

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Children's Television Obligations)	MM Docket No. 00-167
Of Digital Television Broadcasters)	
)	
)	

**TURNER BROADCASTING SYSTEM, INC.'S
PETITION FOR RECONSIDERATION**

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Dated: February 2, 2005

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SUMMARY

Turner Broadcasting System, Inc. (“Turner”) respectfully requests that the Commission reconsider: (1) its expansion of the definition of “commercial matter,” particularly as it applies to networks whose schedule is primarily comprised of children’s television programming, and (2) its new website regulations, including those relating to the display of website addresses during children’s television programming on non-interactive television platforms and the absolute prohibition on host-selling.

With respect to the definition of commercial matter, the Commission should restore its previous definition. First, the Commission’s decision to expand the definition to encompass the promotion of programming airing on the same broadcast station or network is inconsistent with Congressional intent as demonstrated by reviewing the legislative history of the Children’s Television Act. Second, the Commission’s decision fails to meet the requirements of administrative law in that the underlying record in this proceeding was completely devoid of any evidence that would justify a reversal of its original definition. Third, the Commission’s treatment of promotions raises serious First Amendment concerns by favoring one form of speech over another. Finally, classifying all self-promotional material as commercial matter is contrary to the goals of the CTA because it will reduce the revenues necessary for Turner’s Cartoon Network and other networks that primarily feature children’s programming to continue to develop new and innovative programming.

The Commission should also reconsider its website regulations. Because the Commission sought comment only on the use of interactive web links, the Commission did not compile a record relating to the passive display of website addresses on non-

interactive television platforms. Not surprisingly, the Commission's four-prong standard regulating the display of website addresses raises numerous practical and interpretive questions. Now that the Commission has deferred the effective date of the website regulations, Turner hopes to work with all interested parties to develop more workable standards that reflect the Commission's limited jurisdiction in this area.

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To: The Commission

PETITION FOR RECONSIDERATION

Turner Broadcasting System, Inc. (“Turner”), by its attorneys and pursuant to the provisions of Section 1.429 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider two components of its *Final Report and Order* in the above-captioned proceeding (the “*KidVid Order*”).¹ Turner respectfully requests that the Commission reconsider: (1) its expansion of the definition of “commercial matter,” particularly as it applies to networks whose schedule is primarily comprised of children’s television programming, and (2) its new website regulations, including those relating to the display of website addresses during children’s television programming on non-interactive television platforms and the absolute prohibition on host-selling.

INTRODUCTION

Turner fully supports Congress’ and the Commission’s long-standing goals of protecting children from inappropriate and excessive commercial matter and adopting

¹ *In the Matter of Children’s Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rule Making*, FCC 04-221, MM Docket No. 00-167 (rel. Nov. 23, 2004); 70 Fed. Reg. 25 (Jan. 3, 2005).

appropriate educational and informational programming requirements for digital television. Compliance with the existing obligations for commercial matter during children's programming has always been, and continues to be, an important priority at Turner. Turner believes that its compliance efforts in this area and its promotional campaigns for its networks and programming serve these goals.

Since the Commission initiated the above-captioned proceeding in 2000, its principal focus in this area has been to clarify what obligations digital broadcasters have in serving children.² As a part of this process, the Commission has considered such diverse issues as the identification of core programming and the future impact of digital interactivity on children. Turner applauds the Commission for its efforts to update children's television obligations for the digital age. At the time the *KidVid Order* was adopted, however, the underlying record before the Commission was four years old. The Commission therefore did not have up-to-date information regarding network practices for children's programming and related websites. In particular, having neither solicited comments nor proposed specific draft regulations on the display of website addresses on non-interactive television platforms, the Commission did not have an opportunity to understand and grapple with the myriad practical and interpretative questions involved in crafting website standards. Turner appreciates the Commission's decision to postpone

² See *In the Matter of Children's Television Obligations Of Digital Television Broadcasters, Notice Of Proposed Rule Making*, FCC 00-344, MM Docket No. 00-167 (rel. Oct. 5, 2000) ("NPRM") ("We issue this *Notice of Proposed Rule Making* ("*Notice*") to seek comment on a range of issues related to the obligations of digital television ("DTV") broadcasters to serve children."). See also *KidVid Order* at ¶ 13 (how should existing obligations apply to digital broadcasting); *Id.* at ¶ 14 ("The purpose of this proceeding is to clarify how these requirements apply in light of the new capabilities made possible by digital technology.").

the effective date of these regulations, and believes that the additional time will permit the Commission to work with all interested parties to formulate more workable standards.

In this Petition, Turner asks the Commission to reconsider two aspects of the *KidVid Order*. First, the Commission should reinstate the original definition of commercial matter that excluded self-promotional material from counting towards the network's commercial time limits applicable to children's television. Second, the Commission should replace its website rules – particularly those prohibiting the display of website addresses on non-interactive platforms and all forms of “host-selling” – with standards developed through a cooperative process in which interested parties can discuss the appropriateness and practical applications of such measures. To this end, Turner hopes to work constructively with the Commission and other interested parties to develop a set of appropriate regulations that furthers the goals of the Children's Television Act (“CTA”).³

I. TURNER PROGRAMMING FOR CHILDREN

Turner provides children's programming through a number of outlets.⁴ In this Petition for Reconsideration, Turner's comments will primarily focus on the Cartoon Network, a 24-hour, ad supported cable television network whose daytime and evening programming is dedicated to animated television shows produced to entertain, educate, and inform children.⁵ Cartoon Network, offering the best in animated entertainment,

³ Pub. L. No. 101-437, 104 Stat. 996-1000, 47 U.S.C. §§ 303a, 303b, 394.

⁴ The KidVid regulations are relevant to the Cartoon Network because they apply to its principal distribution outlets, cable operators. 47 U.S.C. § 303a(d).

⁵ Turner also operates Boomerang, a 24-hour television network that showcases classic cartoons and is not currently ad-supported. Boomerang features classic Hanna-Barbera characters, including Yogi Bear, Huckleberry Hound, Quick Draw McGraw and Top Cat, with a stylized sensibility tailored to their notable standing in televisions' pop culture. In

devotes over 120 hours of its weekly lineup to children's programming. Cartoon Network showcases original programming such as "Codename: Kids Next Door," "The Powerpuff Girls," "Foster's Home for Imaginary Friends," and "Dexter's Laboratory," as well as drawing from the world's largest cartoon library and from programming obtained from third party licensors. Cartoon Network also features "Adult Swim," a late night block of animated programs for adults. Cartoon Network is currently seen in approximately 86 million U.S. homes and 145 countries around the world, and continues to be one of ad-supported cable's highest-rated networks.

In addition to television programming, Cartoon Network's main website, www.cartoonnetwork.com, offers an engaging, easy-to-navigate resource for visitors to access additional program content, games, and promotional contest opportunities. In its promotional, interstitial, and other packaging elements on the television network and the website, Turner seeks to create a Cartoon Network neighborhood to give viewers the sense that they are visiting a unique animated environment where the characters live. In promoting the network and operating the website, Cartoon Network follows industry self-regulatory guidelines issued by the Children's Advertising Review Unit ("CARU"), including those applicable to interactive electronic media.⁶

addition, Turner also is the licensee of a broadcast station, WTBS, Atlanta, Georgia, that likewise distributes programming for children. As a broadcast licensee, WTBS offers 6.5 hours of core children's education and informational programming on a weekly basis. As a free market superstation, TBS -- with core programming intact -- is distributed to approximately 88.5 million homes (as of December 31, 2004).

⁶ As part of the Council of Better Business Bureaus, CARU was established by the National Advertising Review Council to promote responsible children's advertising. CARU's basic activities are the review and evaluation of child-directed advertising in all media, and online privacy practices as they impact children. When an advertising practice is found to be misleading or inconsistent with the CARU guidelines, there is a process in place to seek changes through the voluntary cooperation of advertisers and

Later this year, Cartoon Network will introduce a weekday morning block of original and acquired programming designed for preschool children. The preschool block is being developed in consultation with educational experts to place primary emphasis on developing, nurturing, and valuing kids' sense of humor, which is widely recognized as an essential character trait of a happy, well-adjusted child. With the introduction of this preschool block, Turner hopes to fill the void that exists for programming that emphasizes the importance of letting kids be kids, while at the same time showcasing humor to facilitate learning and boost self-esteem.

Cartoon Network also recognizes the importance of community-oriented initiatives designed to benefit, educate, and inform children. For example, Cartoon Network recently developed a "Get Animated" campaign designed to promote healthy lifestyles for children that will launch later this month. Cartoon Network intends to work closely with the Boys and Girls Clubs of America ("BGCA") to educate children about the importance of good nutrition and physical activity and to spread the word about the "Get Animated" campaign. In coordination with educational experts, Cartoon Network created and distributed its free "Animate Your World" software program and educational curriculum materials to teachers and BGCA clubs nationwide. The "Animate Your World" software uses animation technology and serves as a valuable resource for teachers and community leaders to teach positive character traits such as respect and responsibility to one's community. In addition, Cartoon Network continues its work with UNICEF to advance the welfare of children globally as demonstrated in the annual

website operators. CARU encourages advertisers to work to better promote the dissemination of educational messages to children in ways consistent with the CTA. *See* "Self-Regulatory Guidelines for Children's Advertising," Children's Advertising Review Unit, Council of Better Business Bureaus, Inc. (7th Ed. 2003).

“Trick-or-Treat for UNICEF” fundraising campaign and a special public service announcement campaign to support tsunami relief fundraising efforts. Cartoon Network also serves as UNICEF’s ambassador to cable affiliates around the country, providing on-air support for UNICEF’s national campaign.

II. THE COMMISSION SHOULD RESTORE ITS PREVIOUS DEFINITION OF COMMERCIAL MATTER

The *KidVid Order* expands the definition of commercial matter to encompass the promotion of programming airing on the same broadcast station or network, except where the promotion is for “educational or informational” programming. This change now makes it impossible for a station or network to promote its own programming without it counting towards its commercial time limits, unless the promotion is for educational and informational programming. The Commission’s primary justification that such promotions are “commercial” -- because the station “receives significant consideration for airing the advertisements” in so far as larger audiences lead to higher advertising rates -- applies equally to the promotions for educational and informational programming exempted by the Commission.⁷ In fact, if the standard to judge whether material is “commercial” is its effect on viewership and consequent advertising rates, then the programs themselves fit that definition.

Moreover, the *KidVid Order* fails to consider the significant impact of this new definition on networks whose program days and evenings are devoted exclusively to children’s programming and for whom the ability to promote their own programming is essential. While the Commission’s apparent concern over the amount of commercial matter aired during children’s programming is admirable, its action here fails to serve its

⁷ *Report and Order* ¶¶ 33-37.

statutory mandate, the requirements of administrative and constitutional law, and would result in significant harm to Cartoon Network and other networks that primarily feature children’s programming. It will have the inevitable and foreseeable effect of reducing resources for new programming and community-oriented initiatives. For these reasons, the Commission should reinstitute its original definition of commercial matter.

A. Prior history and FCC treatment

The CTA does not define the term “commercial matter.” However, both the underlying House and Senate reports state that “[t]he Committee intends that the definition of ‘commercial matter’ . . . be consistent with the definition used by the Commission in its Former FCC Form 303.”⁸ The reports note that the Commission defined commercial matter to include “commercial continuity (advertising message of a program sponsor) and commercial announcements (any other advertising message for which a charge is made, or other consideration is received).”⁹ According to the reports, the definition of commercial matter should specifically exclude promotional announcements, station identification announcements for which no charge was made, and public service announcements.¹⁰

When the Commission initially implemented the CTA, it followed Congress’ intent and excluded certain types of program interruptions from the definition of

⁸ H.R. Rep. No. 385, 101st Cong., 1st Sess. 15-16 (1989); S. Rep. No. 227, 101st Cong., 1st Sess. 21 (1989); FCC Form 303-C, Renewal Application Audit Form for Commercial TV Broadcast Stations (Sept. 1981).

⁹ S. Rep. 101-227 at 21.

¹⁰ *Id.*

commercial matter.¹¹ The Commission’s definition of commercial matter specifically excluded promotions of upcoming programs without sponsor mentions, public service messages promoting not-for-profit activities, and airtime sold for purposes of presenting educational and informational material.¹² The definition established by the Commission in the *1991 Order* was faithful to Congress’ intent, and the Commission was confident that it had reached a definition of commercial matter that “comports with marketplace realities and is crafted carefully to avoid encompassing noncommercial material.”¹³ Nothing in the record in the instant proceeding demonstrates that these “marketplace realities” have changed in such a way as to necessitate a new definition of commercial matter. In fact, the Commission’s attempt to redefine commercial matter in the *KidVid Order* subverts Congress’ intent¹⁴ and the Commission’s own conclusions regarding the appropriateness of the original definition.

B. The change in the definition of “commercial matter” fails to comport with the requirements of administrative and constitutional law

The record before the Commission does not support its decision to change the definition of commercial matter. The rationale articulated in the *KidVid Order* supporting this change largely reiterates the arguments made in comments submitted by the Center for Media Education (“CME”).¹⁵ CME asserts that because the CTA’s

¹¹ *Report and Order, Policies and Rulings Concerning Children’s Television Programming*, 6 FCC Rcd. 2111, 2112 (1991) (“*1991 Order*”).

¹² *Id.*

¹³ *Id.*

¹⁴ Congress could not have been any more explicit in expressing its intent that the definition of commercial matter mirror that in former FCC Form 303. *See* S. Rpt. 101-227 at 21 (“[t]he Committee intends that the definition of commercial matter will be consistent with the definition used by the FCC in its former FCC Form 303.”).

¹⁵ Comments of CME, et al., at 42-44 (Dec. 18, 2000).

legislative history indicates that promotional announcements by a broadcast station for a sister station's program should count as commercial, including a station or network's self-promotions as commercial "would be more consistent with the definition in Former Form 303-C."¹⁶

CME's assertion misconstrues and ignores long-standing Commission practice, as the Commission appropriately recognized in 1991. By repeating CME's error, the *KidVid Order* commits legal error. For example, in 1976 the Commission squarely confronted the questions of whether announcements promoting sister stations and whether self-promotions announcements were commercial in connection with determining the applicable logging requirements for commercial matter. In contrast to CME's argument, the Commission determined that cross-promotions were commercials, but that self-promotions were not.¹⁷ Those logging requirements, which have since been superceded, were cited in the *1991 Order*.¹⁸

Without evidence in the record to support this revision of the definition of commercial matter, it must be rejected as arbitrary and capricious as a matter of administrative law.¹⁹ No evidence exists in the record to suggest that a network's promotion of its programs results in any sort of harm or abuse. There is no record

¹⁶ Comments of CME at 43.

¹⁷ *In the Matter of Amendment of Note 3 of Sections 73.112, 73.282, and 73.870 of the Commission's Rules Concerning the Logging of Promotional Announcements*, 59 FCC 2d 594 (rel. May 25, 1976).

¹⁸ *1991 Order* at n.18.

¹⁹ *See People of the State of California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (because FCC's conclusion that market and technological changes after earlier rulings had reduced danger of cross-subsidization by regional telephone companies of enhanced services and basic services was not supported by the record, it was arbitrary and capricious); *NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (agency regulations are arbitrary and capricious if they are not supported by the record).

evidence regarding non-core children’s programming or non-broadcast children’s programming. The *NPRM* suggests that programming often contains a significant amount of time devoted to promotions, thereby reducing the amount of actual program material.²⁰ However, without evidence in the record to support such an assertion, changing course to now include a network’s promotion of itself or its programs as commercial matter is unsustainable as a matter of administrative law.²¹ Moreover, to the extent promotions for educational and informational programs and PSAs are still considered “non-commercial,” the rule change adopted by the Commission will not necessarily lead to an increase in program material.

Furthermore, the expansion of the definition of commercial matter to include self-promotional material that is not educational and informational raises serious First Amendment concerns because it favors a certain form of speech as a result of restricting another form of disfavored speech.²² Simply put, the Commission has no record before it

²⁰ *NPRM* at ¶ 33.

²¹ In order to justify the alteration of a policy, the Commission must provide a reasoned explanation for such a change and consider all relevant factors. *See Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must supply a reasoned explanation for its change in policy). The Commission has failed to provide a reasoned explanation for the change to the definition of commercial matter, and therefore, the change cannot be defended. *See, e.g., Sangre De Cristo Comm. Inc. v. FCC*, 139 F.3d 953, 264-65 (D.C. Cir. 1998) (finding that the FCC failed to adequately explain its decision); *Action for Children’s Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (holding that the FCC failed to provide a reasoned basis for its decision to make a policy change given the absence of facts or analysis to justify the change); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746-47 (D.C. Cir. 1986) (same); *Office of Comm. of the United Church of Christ v. FCC*, 707 F.2d 1413, 1426 (D.C. Cir. 1983) (same).

²² *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (striking down restrictions on commercial speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557 (1980) (same). *See also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (striking down FCC’s must-carry rules).

to sustain its First Amendment burden here and, as such, the Commission should reconsider the appropriateness of such content-based restrictions.

C. Classifying all self-promotional material as commercial matter is harmful to Cartoon Network and other networks that primarily feature children’s programming

All television networks or stations use some form of self-promotion to attract viewers to future broadcasts of a particular show, or to promote the network’s identity. Such promotion is essential to distinguish a network from its competitors and to attract viewers and advertisers. The Commission’s own logic in permitting a broadcaster to promote its educational and informational programming without counting the time as commercial matter recognizes the benefits of providing information to viewers about other programming on the same network.²³

The Commission’s decision justifying the change in definition focuses primarily on the length and types of interruptions in broadcasters’ core children’s programming. There is no discussion of the potential impact on networks, like Cartoon Network and others, whose schedule is primarily comprised of children’s programming. Moreover, there is no evidence in the record suggesting that networks devoted to children’s programming air more material promoting their own shows and their network than networks without children’s programming.

Cartoon Network promotes its network and programming on-air in various ways, including the use of bumpers, interstitials, and other elements that wrap around program

²³ CME, the proponent of the approach the Commission adopted, misses the point and the need for a network or station to inform viewers, including children, of its offerings. Instead, it complained of the “inconsistent results” that when “station runs an advertisement for a movie being shown in a movie theater, it clearly counts toward commercial limits. But the same station can run an advertisement for an up-coming movie on its station and the commercial does not count.” Comments of CME at 43.

episodes. Often, these materials have a distinct sense of humor and are entertaining while also serving the added function of providing additional minutes of television material at the end of an episode.²⁴ Furthermore, promotion of upcoming programs appearing on the network serve the important function of alerting child viewers and parents about a show's schedule.²⁵

The original definition of commercial matter provided networks with a necessary level of bright-line clarity that has been lost with the Commission's new definition. The *KidVid Order* is far from clear regarding what types of material will be counted as commercial under the new rules. For example:

- If a program announces that viewers can catch the same show at the same time one week in the future, does this qualify as commercial matter against the commercial limits, if only scheduling information is provided?
- If a network uses characters from the just-aired program to announce the airing of that same show one week later, does the use of a character from the program to announce scheduling information qualify as commercial matter and, therefore, also host selling?
- Often, programs scroll a message at the bottom of the screen at the end of an episode that informs the viewer when that particular show will air again. Will the scrolling information be deemed commercial matter under the new definition? If so, since the scroll only fills one-third of the screen, would the elapsed time be discounted accordingly?

²⁴ Due to traditional animated television program formats and duration that allow approximately fifteen minutes of breaks per hour, television networks often must fill odd time segments with a combination of station identifications, interstitials, and promotional material. Reclassifying these types of on-air promotional materials as commercial matter may result in "dead air" when a network has existing programming scheduled and reaches its limit of allowable commercial time.

²⁵ In fact, making it easier for parents to identify when children's programming is aired was one of the goals of this proceeding. *KidVid Order* at ¶ 17 ("we want to address . . . the continued lack of awareness on the part of parents and others of the availability of core programming."). Punishing networks for airing self-promotional material runs counter to the Commission's goal of helping parents become aware of when children's programming is aired.

- Cartoon Network currently uses a visual message that indicates on the screen “Now Program A, Next Program B.” How much, if any, of that message would be commercial under the revised definition?

The new definition of commercial matter will have a significant negative financial impact on Cartoon Network and consequently on the programming it offers. Under the new definition, Cartoon Network, now forced to count promotion of its programming as commercial matter, will reach its commercial limits more quickly. As a result of the new standard, Cartoon Network will either be forced to sell less advertising time and/or reduce self-promotion (leading to lower ratings and ultimately less advertising revenue). Less advertising revenue necessarily means that Cartoon Network would have fewer resources available for the development of new and innovative children’s programming, like its new preschool block. Similarly, a reduction in revenue would make it more difficult to create and support valuable community-oriented initiatives such as the “Get Animated” healthy lifestyles campaign, sponsorship of UNICEF and the Boys and Girls Clubs of America, and Turner’s unique “Animate Your World” program, which have been designed to educate and benefit children.

One of the goals of this proceeding was to provide incentives for broadcasters to find ways to better serve the needs of children.²⁶ Networks like Cartoon Network best serve the interests of children by being innovative and developing new programming. The Commission’s changes to the definition of commercial matter to include the self-promotion of material that does not satisfy the definition of educational and informational will stand as an impediment to any network’s incentive and ability to innovate in the area of children’s programming. To comply with its statutory mandate, the demands of

²⁶ *KidVid Order* at ¶ 1.

administrative and constitutional law, and to prevent harm to networks committed to children's programming such as Cartoon Network, the Commission should reconsider its adoption of a new definition of commercial matter and revert to its preexisting definition.

III. THE COMMISSION SHOULD RECONSIDER ITS WEBSITE REGULATIONS

The *NPRM* sought comment on television interactivity, a topic that has since become the subject of a new *Notice of Proposed Rule Making*.²⁷ In contrast, the website rules adopted in the *KidVid Order* relate to the passive display of website addresses on non-interactive television platforms, a topic which was neither raised in the *NPRM* nor addressed in the record in this proceeding.²⁸ As a result, the Commission's four-prong standard regulating websites that are passively displayed during children's programming raises numerous practical and interpretive questions.

In recognition of the complex business and technical issues involved with websites, the Commission has now deferred the effective date of these regulations.²⁹ Turner hopes to work with other affected parties, interested advocacy groups, and the

²⁷ 50 Fed. Reg. 63 (daily ed. Jan. 3, 2004).

²⁸ In the *KidVid Order*, the Commission adopted a new regulation limiting the display of Internet website addresses during children's program material to situations where: (1) the website offers a substantial amount of *bona fide* program-related or other non-commercial content; (2) the website is not primarily intended for commercial purposes, including e-commerce or advertising; (3) the website's pages clearly distinguish between commercial and non-commercial sections; and (4) the home page, and any pages the home page links to, are not used for commercial purposes (the "double-click rule"). 47 C.F.R. § 76.225(b). The Commission also instituted an absolute ban on the display of a website address in either program or commercial material "when the site uses characters from the program to sell products or services" (the "host-selling prohibition"). *Id.* § 76.225(c). The Commission's jurisdiction to reach such websites is, at best, limited to commercial references to them.

²⁹ *In the Matter of Children's Television Obligations of Digital Television Broadcasters, Order on Reconsideration*, FCC 05-22, MM Docket No. 00-167 (rel. Jan. 31, 2005).

Commission staff to develop more workable standards. Toward that end, Turner wishes to describe its current website practices so that the Commission can better understand some of the concerns in this area. For purposes of reconsideration, however, we believe it is also necessary to outline the problems underlying the current regulations.

A. Cartoon Network’s current website practices

Cartoon Network’s main website is located at www.cartoonnetwork.com. The website brings the Cartoon Network neighborhood concept to the on-line community. As such, Turner is committed to ensuring that the website follows the same standards, practices, policies, and procedures as the network. Cartoon Network and its website both follow the self-regulatory guidelines developed by CARU, and Turner has developed its own standards and practice guidelines for Internet content.

Cartoon Network’s programs and interstitial program material invite viewers to visit the website to find out additional information about the network’s shows and characters, and to broaden their entertainment value by playing free on-line games and activities based upon the shows and characters. The website takes great care to clearly separate commercial material from program material. Advertisements and sponsored content are clearly identified as such and are separated from other program-related information and content. In order to reach the e-commerce area of the website, a visitor must find and click the tab that is marked “Shop.” It is not possible to purchase merchandise while visiting the website unless the visitor intentionally accesses the Shop portion of the site. In addition, the website separates over 100 free on-line games from downloadable *Power Play Games* that are offered for sale in the games area of the site. The Cartoon Network website is an example of how a site can be designed to clearly

separate e-commerce material from program material, while not negatively affecting a visitor's entertainment experience.

B. The Commission's ability to regulate in this area is very limited

In the *KidVid Order*, the FCC asserts that its authority to impose restrictions on children's television programming and associated website content derives from Section 303a of the CTA.³⁰ Section 303a provides that:

(a) Establishment. The Commission shall, within 30 days after the date of enactment of this Act, initiate a rulemaking proceeding to prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming. The Commission shall, within 180 days after the date of enactment of this Act, complete the rulemaking proceeding and prescribe final standards that meet the requirements of subsection (b).

(b) Advertising duration limitations. Except as provided in subsection (c), the standards prescribed under subsection (a) shall include the requirement that each commercial television broadcast licensee shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.

Section 303a does not confer upon the Commission the authority to regulate the content of children's programming or commercial advertising, and it is entirely silent with respect to websites, web addresses, and e-commerce. Given that Congress has demonstrated its ability to regulate the Internet directly when it so desires,³¹ its silence in this instance is indicative that the Commission lacks the authority to regulate the content of Internet websites.³² The fact that the content on these websites is related to the content

³⁰ *KidVid Order* at n.2.; 7 U.S.C. § 303a.

³¹ See generally *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (discussing congressional attempts to regulate Internet content in order to protect children)

³² See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that the Commission's authority is "restricted to that reasonably ancillary to the effective

of children’s television programming available on broadcast stations or cable networks, or that the website addresses may be displayed in programming or promotions, in no way extends the Commission’s ability to regulate the Internet.

C. The website rules violate basic administrative law principles and are vague and ambiguous

The notice and comment rulemaking process is intended to provide “diverse public comment,” “fairness to affected parties,” and the opportunity to develop evidence in the record that “enhances the quality of judicial review.”³³ The end goal of this process is to produce final regulations that are a “logical outgrowth” of the proposed regulations.³⁴ In this instance, the Commission’s Notice in this proceeding and the resulting regulations dealing with the treatment of website addresses on non-interactive television platforms fail to meet these standards.

The Notice did not discuss or seek comment on any issue concerning website addresses in a context other than interactive television. Rather, it asked “[s]hould the Commission prohibit the use of digital television interactivity capability in children’s programs to sell products” and refers only to “direct commercial links.”³⁵ The Notice did

performance of the Commission’s various responsibilities for the regulation of television broadcasting.”). *See also Motion Picture Assoc. of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (holding that the Commission cannot have ancillary authority to regulate in the public interest absent any other provision in the Communications Act delegating authority to regulate). Because nothing in 47 U.S.C. § 303a refers to websites, web addresses, or Internet commerce, the Commission lacked the delegated authority to promulgate the rules restricting the display of Internet website addresses, and therefore, the Commission lacks any ancillary authority to do the same. *Id.*

³³ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

³⁴ *Nat’l Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F.Supp.2d 33, 39 (D.D.C. 2000). “A final rule is considered the ‘logical outgrowth’ of the proposed rule if at least the ‘germ’ of the outcome is found in the original proposal.” *Id.* (citations omitted).

³⁵ *NPRM* at ¶ 32.

not suggest that the Commission was contemplating restrictions on the display of website addresses in a non-interactive context during children’s programming.³⁶ If the Notice had indicated that the Commission was contemplating the adoption of such regulations and invited comment on this topic, Turner and others would have pointed out the problems inherent in crafting website regulations and provided input on existing practices and how to develop practical and reasonable standards that directly serve the interests of children within the limits of the Commission’s jurisdiction.

Despite the lack of notice and comment on the display of website addresses on non-interactive television platforms during children’s programming, the *KidVid Order* adopts regulations it characterizes as “similar to [a proposal] advanced by Sesame Workshop.”³⁷ The comments submitted by Sesame Workshop, however, only address the potential regulation of *direct, interactive website links by digital programmers* and

³⁶ This point is confirmed by the record before the Commission, as even the commenting parties that supported restrictions on the display of website addresses during children’s programming addressed only the potential prohibition of direct, interactive links. *See, e.g.*, Comments of CME, et al., at 31 (Dec. 18, 2000) (“the Commission should clarify that direct linking to a commercial website . . . violates these longstanding principles”); *Id.* at 33 (“any direct link to a commercial website or online service from a children’s program would violate the Commission’s longstanding separations policy.”); *Id.* at 37 (“Direct linking from a commercial aired during children’s programming to a commercial website or online service would render the existing commercial limits meaningless”); Reply Comments of CME, et al., at 38 (Jan. 17, 2001) (“A straightforward prohibition of commercial direct links during children’s programs would best protect children from unfair uses of this technology.”); Comments of Children Now, at 37 (Dec. 18, 2000) (proposing regulation of “the use of links to commercially sponsored sites”); *Id.* at 38 (proposing regulation of “interactive sites packaged with and linked to a program”); Comments of Children’s Media Policy Coalition, at 32 (Apr. 21, 2003) (supporting “a prohibition on links from children’s programs to commercial websites”); Comments of Sesame Workshop, at 23 (Dec. 18, 2003) (“Direct Links To ‘Mixed-Use’ Internet Sites Should Be Permitted During Children’s Programming, So Long As The Site Avoids Host Selling.”). *See also* Ex Parte Letter of Children Now (Sept. 1, 2004) (stating that while meeting with Commissioner Copps and staff, they “discussed the coalition’s recommendations on interactive advertising.”).

³⁷ *KidVid Order* at ¶ 50.

conclude that children who are old enough to access the Internet on their own are not susceptible to the harms the Commission sought to avoid with the website rule.³⁸ Although other commenters joined Sesame Workshop in discussing issues relating to direct, interactive website links, no party addressed the display of website addresses where interactivity was not present.³⁹ As such, there is no evidence in the record demonstrating that restrictions on the display of website addresses on non-interactive television platforms protects children from exposure to harmful commercial material. As noted by Sesame Workshop, children under the age of six are unlikely to remember a website address they have seen on television and later access the website on a computer. Given this absence of record support, the Commission’s regulations restricting the display of website addresses “run[] counter to the evidence before the agency.”⁴⁰

The *KidVid Order*’s conclusions regarding “host-selling” on websites similarly lack a factual grounding and are inherently ambiguous. In particular, since there may be a significant time separation from when a website address is displayed on air to when it is accessed by a child, the Commission’s website host-selling rule is overbroad. In the traditional broadcast television setting, host-selling is considered harmful in that it frustrates the Commission’s policy of separating program content from commercial content by injecting program content into the commercial content.⁴¹ Time is a key element in the Commission’s negative view of host-selling. An advertisement may run the risk of causing such confusion only if it occurs during the program, or within sixty

³⁸ See Comments of Sesame Workshop at 23-25.

³⁹ See n. 34 *supra*.

⁴⁰ *AT&T Corp. v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001).

⁴¹ See *1991 Order* at 2118 n.147.

seconds of its beginning or end.⁴² It is notable that in 1991 the Commission declined to set a longer time limit “[i]n light of the short attention spans of children, particularly younger children most likely to confuse program and commercial material.”⁴³ To follow the Commission’s logic, the harm presented by host selling is absent if an advertisement featuring a character from a program is aired more than one minute from the beginning or end of that program. Yet there is no evidence in the record to suggest that children tend to access websites during a program or within sixty seconds before or after its end, as opposed to simply remembering the website address and accessing the website at a later time.

Aside from the administrative law concerns associated with the website regulations, the rules themselves provide little clarity for those subject to them. With regard to the four prong test for a compliant website address, how will the Commission quantify a “substantial amount of *bona fide* program-related or other noncommercial content?” How will the Commission determine whether a website is “primarily intended for commercial purposes, including either e-commerce or advertising?” The application of the television host-selling rules to an Internet website that can potentially have thousands of pages with adjacent but unrelated areas of content also creates more questions than answers. For example, how will the Commission define the term “selling?” Does host-selling in a segregated area of a multi-layered website restrict advertisement of other website areas without host-selling during certain children’s programming? The presence of these types of uncertainties necessitates reconsideration of the Commission’s website rules.

⁴² *1991 Order* at ¶ 45.

⁴³ *Id.*

CONCLUSION

Turner respectfully requests that the Commission reconsider several aspects of the *KidVid Order*. Regarding the definition of commercial matter, the Commission should revert to the original definition that excluded self-promotional material from counting towards a network's commercial time limits. The Commission should also grant reconsideration of the website address display and host-selling rules, replacing them with standards developed through a cooperative process in which interested parties can discuss the appropriateness of such measures.

For the foregoing reasons, the Commission should grant reconsideration.

Respectfully submitted,



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