

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

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

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Fox Entertainment Group, Inc., NBC Universal, Inc., and Viacom (collectively, the "Networks"), by their attorneys, hereby reply to the Opposition to Petitions for Reconsideration filed by the Children's Media Policy Coalition ("CMPC") on March 23, 2005 in connection with the Commission's *Report and Order and Further Notice of Proposed Rulemaking ("Report & Order")*.¹

I. AVERAGING OF PREEMPTIONS OVER A 12-MONTH PERIOD DOES NOT ELIMINATE THE HARM THAT AN INFLEXIBLE PREEMPTION LIMIT WOULD INFLICT ON CHILDREN, SPORTS FANS AND VIEWERS OF NEWS AND PUBLIC AFFAIRS PROGRAMMING

In their petition for reconsideration, the Networks demonstrated that enforcement of the new inflexible 10 percent preemption rule would force broadcasters to move core educational and informational programming to time periods when fewer children are in the audience. To avoid this perhaps unintended result of the new rule, the Networks urged the Commission to return to its staff the authority to determine preemption levels or, in the alternative, amend the new rule to conform to the staff's letter rulings issued to the networks in 1997 and 1998. Under the letter rulings, the staff would permit a station

¹ See *In re Children's Television Obligations of Digital Television Broadcasters*, Report & Order, 19 FCC Rcd 22943 (2004) ("*Report & Order*").

to count preempted programs toward the core requirement if, among other things, they were rescheduled to a second home or, in isolated circumstances, at any time during core hours within two weeks before or after the preemption.² The data before the Commission demonstrated that programs rescheduled to a second home had ratings that were equal to or better than ratings for the original time period.³

While CMPC appears to recognize in its opposition the need for relief from the new rule, its proposed "modest modification" will not protect broadcasters from the harsh effects of a fixed 10 percent preemption limit.⁴ Thus, CMPC supports a proposal to allow preemptions to be calculated on an annual, rather than 6-month, basis in order "to better accommodate major sporting events such as the Olympics and World Cup."⁵ CMPC asserts that "[t]his will provide broadcasters with up to 6 preemptions per year . . . ,"⁶ and "having preemptions concentrated around such a highly visible event with *few or no* preemptions the rest of the year will likely make it easier for parents and children to locate core programming"⁷ However, even if the Commission were to

² See Networks' Petition for Reconsideration, at 6 (filed Feb. 2, 2005). The letter rulings also exempted certain major sporting events like Wimbledon. See *Mr. Rick Cotton, Ms. Diane Zipursky, National Broadcasting Company, Inc.*, Letter, 12 FCC Rcd 9932 (July 11, 1997). The two-week rule (or similar time period) is particularly necessary in cases of multi-day international competitions.

³ See Networks' Petition for Reconsideration, at 7.

⁴ See CMPC, Opposition to Petitions for Reconsideration, at 8 (filed March 23, 2005) ("The coalition agrees that a modest modification is appropriate.").

⁵ *Id.*

⁶ *Id.* at 8-9 (citation omitted). CMPC apparently assumes that the Commission will round up from 5.2 (10 percent of 52 weekly episodes) to 6 preemptions per year.

⁷ *Id.* at n.33 (emphasis added).

permit 6 preemptions per year, the proposal does not solve the scheduling problems associated with sports on network television.

As CMPC recognizes, six preemptions per year would only accord relief from the rule for one or two major sporting events, with the result that any other preemptions over the course of an entire year could well cause a program to lose its core status. Since networks often broadcast more than one major sporting event each year, these events would consume the allowable preemption limit, leaving no room for other regular Saturday sports events such as college football. CMPC does not explain why broadcasters should be permitted only to preempt for "major sporting events," much less indicate which events are worthy of the "major" appellation. College and professional football and basketball rivalries, for example, may be just as "major" to the teams' fans as the Olympics or the World Cup.

In short, an arbitrary limit simply does not meet the needs of children and sports fans. As the Networks made clear in their petition for reconsideration and in their opposition to CMPC's petition for reconsideration in this proceeding, the overwhelming evidence confirms that any arbitrary limit on preemptions will harm children, sports fans and viewers of news and public affairs programming. Without relief from the new rule, the Networks will be forced to preempt news or popular sports events or move children's programming to less desirable time slots. Accordingly, the Commission should reject an arbitrary preemption limit and return to its staff the authority to determine acceptable preemption levels or amend the new rule to conform to its prior flexible network letter rulings.

II. MOVING CHILDREN'S PROGRAMS FROM SATURDAY MORNINGS AS CMPC SUGGESTS WILL LIMIT ACCESS BY THE CHILD AUDIENCE TO CORE PROGRAMMING

Claiming that "any problem with flexibility lies with the broadcasters, not the FCC's rule," CMPC seems to question the Networks' judgment that their best chance to reach the child audience with core programming is on Saturday mornings.⁸ CMPC asserts that "more children watch TV during the week than on Saturday morning and broadcasters should do more to offer children E/I programming on weekdays."⁹ This statement is misleading. There is no question that the child audience is large during prime time – in fact, as the 4Kids petition makes clear, many of the highest rated programs for children ages 6-14 are during prime time.¹⁰ It is equally clear, however, that it is not reasonable to expect a broadcaster to schedule core children's programming during this coveted time period with its far larger adult audience.

Instead, if forced to move children's programs from Saturday morning, broadcasters would likely schedule them on weekday afternoons. As current Nielsen data demonstrates, however, the Saturday morning audience so far this television season for children ages 6 to 14 *is nearly twice as large as the weekday afternoon audience for this demographic group.*¹¹ Thus, for the period September 20, 2004 to March 27, 2005, the

⁸ *Id.* at 12.

⁹ *Id.* at 13 (citation omitted).

¹⁰ Of the top 20 programs for this audience, 10 started after 8 p.m., 3 were afternoon NFL playoff games, 6 had varied (and unknown) start times, and only one program started at 6 p.m. (cable channel Nickelodeon's weekday broadcast of Hey Arnold). *See* 4Kids, Petition for Reconsideration, Ex. C (filed Feb. 2 , 2005).

¹¹ *See* Attached Declaration of Alan Wurtzel, at 1. Weekday afternoons generally are the only viable alternative given the Networks' desire to air children's programming so as not to conflict with the traditional school day.

average rating for children ages 6 to 14 was 19.5 on Saturday mornings 8 a.m. to 12 noon (when most broadcasters present a block of children's programming¹²) versus an average rating of 11.1 for children ages 6 to 14 on weekday afternoons from 2 p.m. to 5 p.m. (when broadcasters have in the past sought to reach the child audience). Quite clearly, broadcasters have a much greater chance of reaching children on Saturday mornings than on weekday afternoons. Presenting children's programs on weekday afternoons, moreover, is not a viable option for many broadcasters who now schedule news beginning at 4 p.m.

Broadcasters present children's programs on Saturday mornings for good reason: it is their best chance to reach a large child audience. An inflexible preemption rule would force stations to move children's programming from Saturday mornings to weekday afternoons – a result which is precisely the opposite of the Commission's goal to make children's programming more accessible. In short, the Commission should return

¹² See 4Kids, Petition for Reconsideration, Ex. A.

to a flexible approach to preemptions, which will enable stations to accommodate the child audience as well as sports fans and viewers of news and public affairs programming.

Respectfully submitted,

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April 4, 2005

DECLARATION OF ALAN WURTZEL

I, Alan Wurtzel, under penalty of perjury, hereby declare as follows:

1. I am President of Research and Development of NBC Universal, Inc. ("NBCU"), and am responsible for analysis of Nielsen media research at NBCU.
2. I have been asked to provide data on the size of the audience (on all broadcast and cable television program channels) for children ages 6 to 14 and ages 2 to 17 on Saturday mornings between the hours of 8:00 a.m. and 12:00 p.m. and on weekday afternoons between the hours of 2:00 p.m. and 5:00 p.m. Below is a tabular display of my analysis for the period September 20, 2004 to March 27, 2005.

VIEWING BY CHILDREN

For Monday, September 20, 2004 through Sunday, March 27, 2005

	HUT¹	Persons 06-14 (PUT)²	Persons 02-17 (PUT)³
Sat 8a –12n	32.7	19.5	18.7
Mon - Fri 2p – 5p	33.0	11.1	12.9

Source: Nielsen Media Research (9/20/04-3/27/05).

¹HUT means the percentage of all television households that are watching television during the indicated time period. ² Persons 06-14 (PUT) means the percentage of all children ages 6 to 14 who are watching television during the indicated time period. ³ Persons 02-17 (PUT) means the percentage of all children ages 2 to 17 who are watching television during the indicated time period.

3. This table indicates that, during the period from Monday, September 20, 2004 through Sunday, March 27, 2005:
 - a) on average, 32.7 percent of all television households were watching television on Saturday mornings between the hours of 8:00 a.m. and 12:00 p.m.;
 - b) on average, 33.0 percent of all television households were watching television weekdays between the hours of 2:00 p.m. and 5:00 p.m.;
 - c) on average, 19.5 percent of children ages 6 to 14 in television homes were tuned to television on Saturday mornings from 8:00 a.m. to 12:00 p.m. versus 11.1 percent of that same demographic group during weekday afternoons from 2:00 p.m. to 5:00 p.m.; and

DECLARATION OF ALAN WURTZEL (CONT.)

- d) on average, 18.7 percent of children ages 2 to 17 in television homes were tuned to television on Saturday mornings from 8:00 a.m. to 12:00 p.m. versus 12.9 percent of that same demographic group during weekday afternoons from 2:00 p.m. to 5:00 p.m.
- 4. I have personal knowledge of the facts contained therein and declare that such facts are true and correct.

/s/ Alan Wurtzel
Alan Wurtzel

Dated: April 1, 2005

CERTIFICATE OF SERVICE

I, Malcolm Tuesley, hereby certify that on this 4th day of April, 2005, I caused a copy of the foregoing "Reply to Opposition to Petition for Reconsideration" to be served by U.S. Mail on the following party:

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