

**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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

To: The Commission

**REPLY OF THE WB TELEVISION NETWORK  
TO OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The WB Television Network (“The WB”), by its attorneys and pursuant to Section 1.429(g) of the Commission’s Rules, hereby replies to the Opposition to Petitions for Reconsideration filed March 23, 2005 (“Opposition”) by The Children’s Media Policy Coalition (“Coalition”). In particular, we address the Coalition’s arguments in support of the Commission’s recent decisions to deem certain program and network promotions to be commercial matter, and to regulate the display of Internet website addresses during children’s television programming.<sup>1</sup> The Coalition fails to rebut The WB’s showing in its Petition for Reconsideration (“Petition”) that no factual or legal basis exists for the adoption of these rules and that they are likely to diminish, rather than expand, quality children’s television programming.

---

<sup>1</sup> Children’s Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 22943 (2004) (“*Report and Order*”).

## I. INTRODUCTION

The WB has made an extensive commitment to providing high-quality children's entertainment since the network's creation in 1995. Kids' WB!, which offers 14 hours weekly of highly rated and entertaining children's television programming, is the number one broadcast television network for children. In its Petition for Reconsideration, The WB asked the Commission to reconsider those aspects of the *Report and Order* that adopt an expanded definition of commercial matter and regulate the display of website addresses, as both will adversely affect the future of children's television on the broadcast medium.

### II. **THE COALITION HAS NOT DEMONSTRATED THAT NON-E/I PROMOTIONAL ANNOUNCEMENTS SHOULD BE DEEMED COMMERCIALS.**

#### A. **The Commission Lacks Authority To Redefine Commercial Matter To Include Promotions For Non-E/I Programs.**

In its Petition for Reconsideration, The WB (along with many other petitioners) pointed out that Congress, in enacting the Children's Television Act, directed the FCC to define commercial matter consistent with an historic definition utilized by the Commission that *excluded* standard program promotions. The Coalition proves petitioners' case, not its own, when it cites a federal court for the proposition that "[t]o freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place."<sup>2</sup> Congress could hardly have given a clearer indication of such a desire than it did in this instance: the House and Senate Reports state that each Committee generating the

---

<sup>2</sup> Opposition at 15, citing *AFL-CIO v. Brock*, 835 F.2d 912, 916 (D.C. Cir. 1987).

legislation “intends that the definition of ‘commercial matter,’ ... will be consistent with the definition used by the [Commission] in its former FCC Form 303.”<sup>3</sup> Each report describes at length exactly which types of announcements were defined as commercials in the FCC form and which were not. It is highly disingenuous for the Coalition to claim that “Congress gave no such indication” of an intent to freeze a specific FCC interpretation.<sup>4</sup>

As the Coalition correctly points out, Form 303 did categorize promotional announcements where consideration is received as commercial matter. The Coalition, like the Commission, concludes that when a station airs promos for its own programs, it “is clearly receiving consideration in the form of increased audiences.”<sup>5</sup> The logic of this conclusion is untenable. If the potential for increased audiences were to represent consideration within the meaning of the Form 303 commercial matter definition, then all promotions would be commercial matter — a result clearly at odds with the form’s deeming most promotional announcements not to be commercials.

**B. There Is No Basis For A Determination That Program Promotions Are Excessive And Therefore Should Be Reclassified As Advertising.**

The Coalition believes that, as a result of promotions and other announcements, less time is devoted to children’s program material than the commercial limits alone suggest.<sup>6</sup> If

---

<sup>3</sup> H.R. Rep. No. 101-385, at 15 (1989); S. Rep. No. 101-227, at 21 (1989).

<sup>4</sup> Opposition at 15.

<sup>5</sup> *Id.* at 14, citing *Report and Order* at para. 58.

<sup>6</sup> Opposition at 17.

interruptions in children’s programming are reduced, the Coalition reasons that the amount of time devoted to actual program material should increase.<sup>7</sup> The Coalition’s logic is again flawed.

As reflected in the underlying legislative history, when Congress adopted the Children’s Television Act, it understood that the average hour of children’s television would be comprised of a variety of different types of content, including program material, commercial matter, promotions, public service announcements, station identification announcements, and certain sponsorship identification announcements.<sup>8</sup> The Coalition fails to demonstrate an *increase* in “clutter” since the passage of the Children’s Television Act justifying the adoption of new commercialization restrictions. The Coalition provides no evidence that non-program material has become more prevalent on children’s television since 1991, or that program segments have become shorter during that same timeframe.<sup>9</sup>

The Coalition cites, as “dramatic evidence” that excessive promotions during children’s programming are short-changing child viewers, the fact that “more than 25% [26.4%] of WB’s children’s programming consists of non-E/I promotions and commercials.”<sup>10</sup> The figure is commensurate with the limits enacted by Congress, which permit 20% of each weekday children’s programming hour and 17.5% of each weekend hour to consist of commercials alone. Furthermore, there is no evidence in the record suggesting that children’s television has historically been comprised of a greater proportion of program material than it now is.

---

<sup>7</sup> *Id.* at 18-19.

<sup>8</sup> *See supra* note 3.

<sup>9</sup> The increase in *prime time* “clutter” cited by the Coalition has no relevance to the presence or absence of “clutter” during children’s TV. Opposition at 17 & n.74.

<sup>10</sup> *Id.* at 18 & n.78.

In sum, the record in this proceeding is devoid of any evidence that, in the fourteen years since the enactment of the Children’s Television Act and the imposition of the children’s commercial limits, program segment lengths have declined. Thus, there is no basis for attempting to increase them by altering the definition of commercial matter.

**C. Children’s Broadcast Television Will Experience Reduced Revenues, Reduced Audiences, Or Both If Non-E/I Promos Are Deemed Commercials.**

In its Petition, The WB described a delicate ecosystem whereby its ability to promote Kids’ WB! programming during that block creates the audience levels which, in turn, generate the advertising needed to pay for its high-quality children’s programming. The Petition also described the cycle of attrition likely to result if broadcasters are unable to promote without losing ad revenue, thereby materially disrupting this ecosystem.<sup>11</sup> As similarly observed by 4Kids Entertainment, “[I]f Broadcasters do not promote their non-E/I Programming, kids will continue to abandon Broadcasters. . . . If Broadcasters elect to use some of their limited commercial inventory to promote non-E/I Programming or attempt to promote non-E/I Programming by advertising in other media, the reduced advertising revenues or significant cost increases resulting from these media buys will further compromise the viability of the financial model that has sustained the broadcast of children’s television programs by Broadcasters.”<sup>12</sup>

The Coalition’s suggested “solutions” to this problem are not helpful. Although the Coalition notes that E/I programming can be freely promoted, The WB does not offer such

---

<sup>11</sup> Petition at 2.

<sup>12</sup> 4Kids Entertainment, Inc. Petition for Reconsideration at 5.

programming. We also do not believe that a 30-year-old FCC finding<sup>13</sup> that reducing children's TV ad inventory will result in higher prices for the remaining inventory is meaningful today, considering that this finding predated the advent of new media outlets dedicated to children, including cable channels and the Internet. Congress was prescient when it said:

Further constraints on commercial time might reduce the revenue available to support the acquisition and production of new children's programming. Accordingly, the Committee determined that it would not be productive to impose lower limitations on the commercial time while simultaneously increasing broadcasters' obligations to provide programming for children. *These specific limits reflect an "estimate of the amount of advertising time needed to make children's programming economically viable."*<sup>14</sup>

The cited estimate remains correct. Accordingly, the Commission should not effectively reduce the commercial limits by requiring that program promos be included within them.

### **III. THE COALITION'S ATTEMPTED JUSTIFICATIONS OF THE WEBSITE DISPLAY RULE ARE WITHOUT MERIT.**

In its Petition, The WB observed that the *NPRM* in this proceeding only sought comment on whether the Commission should regulate direct, interactive links from the television screen to Internet websites.<sup>15</sup> The resulting *Report and Order*, however, promulgated rules on a completely different matter: the display of non-linking website addresses during children's television programming.<sup>16</sup> This, we argued, is a violation of the Administrative Procedure Act.<sup>17</sup>

---

<sup>13</sup> See Opposition at 19.

<sup>14</sup> S. Rep. No. 101-227, at 20-21 (1989) (emphasis added), citing testimony of Bruce Watkins, Senate Commerce Committee Hearings on Commercial Matter on Children's Programming Carried on Cable, October 18, 1989, and S. Hrg. 101-221, at 55 (Testimony of Edward O. Fritts, President, National Association of Broadcasters).

<sup>15</sup> Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rule Making*, 15 FCC Rcd 22946, 22958-59 (2000) ("*NPRM*").

<sup>16</sup> *Report and Order*, 19 FCC Rcd at 22961-62, 22974.

<sup>17</sup> Petition at 14-16.

The Coalition claims that the *NPRM* provided sufficient notice of the Commission’s regulatory intent “because it sought comment on whether the Commission should ‘prohibit all *direct links* to commercial websites during children’s programming.’”<sup>18</sup> We disagree. An interactive link allowing website content to be accessed directly and immediately is fundamentally different than the mere display of a website address during television programming which the viewer may access later on a computer.<sup>19</sup>

The Coalition then implies that since “recent research show[s] that children frequently *visit websites advertised on television* while watching television,”<sup>20</sup> the regulation of website displays is needed. This statement misinterprets the research data in question. In fact, the study asked children ages 8 to 18, “When you watch TV, how often do you go online on your computer to do something *related to what you are watching (such as vote in a poll or check background sports statistics)*?”<sup>21</sup> Thus, the children were never asked whether the addresses of the websites they visited while watching TV had been displayed on television and, in any case, 72% of respondents answered that they “rarely” or “never” view related material on the computer while watching television.<sup>22</sup> The fact that some older children may multi-task while

---

<sup>18</sup> Opposition at 22 n.97 (emphasis added), citing *NPRM* at para. 32 and noting that four years ago The WB opined that the Commission’s reference to “website links” could mean either the passive display of a website address or the appearance of an interactive link. With the benefit of knowledge gained over the past several years – a significant amount of time in the fast-paced technology realm – we believe that the Commission could only have intended the term “website links” to have its plain meaning, that is, interactive links that, when clicked on, take the user directly to a website.

<sup>19</sup> Moreover, in the single paragraph in which the *NPRM* sought comment on this question, it referred three times to “direct commercial links,” three times to “links,” twice to “commercial links,” and once each to “direct links,” “direct website links,” and “interactive capability”; it never even mentioned the display of *non-linking* website addresses on the television screen. *NPRM*, 15 FCC Rcd at 22958.

<sup>20</sup> Opposition at 23 (emphasis added), citing a recent Kaiser Family Foundation study.

<sup>21</sup> Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds at 85* (Mar. 2005) (emphasis added), at [www.kff.org/entmedia/7251.cfm](http://www.kff.org/entmedia/7251.cfm) (last visited Apr. 6, 2005).

<sup>22</sup> *Id.*

watching television does not mean that televised website addresses should be regulated to protect children from alleged over-commercialism.

#### IV. CONCLUSION

For the foregoing reasons, the Coalition's arguments are unpersuasive. The Commission should reconsider its expanded definition of commercial matter and either formulate less restrictive means of regulating the display of website addresses during children's television programming, or refrain from regulating such displays altogether.

Of counsel:

Steven N. Teplitz  
Susan A. Mort  
Time Warner Inc.  
800 Connecticut Avenue, NW  
Washington, DC 20006

John D. Maatta  
Executive Vice President  
and General Counsel  
The WB Television Network  
4000 Warner Boulevard  
Burbank, CA

April 6, 2005

Respectfully submitted,

**THE WB TELEVISION NETWORK**

By: /s/ Barbara K. Gardner  
Barbara K. Gardner  
Jean W. Benz

Leventhal Senter & Lerman PLLC  
2000 K Street, NW  
Suite 600  
Washington, DC 20006  
(202) 429-8970

*Attorneys for The WB Television Network*

**CERTIFICATE OF SERVICE**

I, Evangula Brown, hereby certify that a true and correct copy of the foregoing Reply of The WB Television Network was sent this 6<sup>th</sup> day of April 2005, by first-class mail, postage prepaid, to the following:

Jennifer L. Prime, Esq.  
Angela J. Campbell, Esq.  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Washington, DC 20001  
*Counsel for The Children's Media Policy Coalition*

/s/ Evangula Brown  
Evangula Brown