August 10, 2005

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB204
Washington, DC 20554

Re: Ex Parte Presentations in MM Docket Nos. 00-167 and 05-28

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, an original and one copy of this letter are being filed as notice that a meeting was held on August 8, 2005 between Susan Fox, Vice President, The Walt Disney Company, and the following representatives of the Media Bureau: Donna Gregg, Roy Stewart, William Johnson, Deborah Klein, Barbara Kreisman, and Kim Matthews.

The proceedings at issue are not restricted and therefore presentations are permitted, but must be disclosed. During the presentation, Ms. Fox reiterated the points made in Disney's filings in the dockets, including that there is no need for any changes to the current retransmission consent and network exclusivity regulations and that the Commission should reconsider aspects of the rules it recently issued under the Childrens Television Act. Ms. Fox distributed the attached documents.

Sincerely,

Susan L. Fox

Cc: Donna Gregg
Roy Stewart
William Johnson
Deborah Klein
Barbara Kreisman
Kim Matthews

Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: Secretary, Federal Communications Commission

PETITION FOR RECONSIDERATION

THE WALT DISNEY COMPANY

Susan L. Fox, Esq.
Vice President, Government Relations
THE WALT DISNEY COMPANY
1150 17th St., N.W., Suite 400
Washington, DC 20036
(202) 222-4700

Tom W. Davidson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Suite 400
Washington, DC 20036
(202) 887-4011

EXECUTIVE SUMMARY

The Walt Disney Company ("Disney") is a recognized world leader in children's entertainment. Disney's proven commitment to providing high-quality, popular, educational programming is shared across all of its media interests, including its broadcast television network, ABC, its owned broadcast television stations, its cable and satellite networks such as Disney Channel, and its innovative Internet and wireless content. Disney wholeheartedly supports the Federal Communications Commission ("Commission") and Congress's goal of serving children's educational and informational needs through programming and does not challenge the Commission's worthy intentions or commendable efforts in this regard. However, Disney is concerned that some of the Commission's new rules could entangle the Commission in a myriad of content-related issues while others reach so deeply into programming decisions that they could fundamentally alter the way children's programming is delivered. It is with these concerns, and its unique perspective, in mind, that Disney urges the Commission to reconsider five of its rules, for the reasons set forth below:

Definition of Commercial Matter. Re-defining "commercial matter" to include program promotions contravenes legislative intent and creates an unprecedented, unworkable distinction between educational/informational ("E/I") promotions and all other promotions that would deplete Commission resources. Through committee reports, Congress unambiguously directed the Commission to exclude certain program promotions from its commercial matter definition. The Commission's deviation from Congress's directive would extend an arguably content-based distinction to hundreds of cable networks that previously have not had to determine whether their programming is E/I, and would involve already over-burdened Commission staff in judging programmer's fundamental scheduling, programming, promotional and content decisions.

10% Preemption Limit. Setting a fixed, numerical limit on the number of times a broadcaster may preempt a regularly scheduled core children's program is an unnecessary action that could significantly impact broadcasters and the viewing public. The Commission has not provided sufficient justification for this departure from long-established Commission precedent and the Children's Television Act itself. Moreover, this action, which was based on a mistaken belief that a 10% limit would not affect broadcasters, could end the tradition of Saturday morning children's programming or force significant amounts of popular sports programming from free broadcast service to pay services.

Website Reference Rules and Internet Host-Selling Rules. The Commission's vague new rules addressing website references in programming and Internet host-selling are problematic for several reasons. As an initial matter, the website reference rules were adopted without adherence to the notice requirements in the Administrative Procedures Act and the Internet Host Selling Rule regulates a medium over which the Commission has no jurisdiction. In practice, these rules would entangle the Commission in a myriad of content-based issues and determinations. Reconsideration of these problematic rules is especially appropriate given ongoing industry-led efforts to address the Commission's concerns in these areas.

Three Hour Rule Extension. The Commission's extension of its rule requiring a minimum of three hours of core children's programming to a station's additional free multicast programming streams could unnecessarily deter the development of new, innovative services. A phase-in of this new requirement based on the revenue or length of time in service of a programming stream would promote the Commission's goals without discouraging innovation because programmers would be able to more fully develop their services prior to triggering children's television obligations

As further set forth herein, Disney submits that reconsideration of these five rules will enable the Commission to promote children's interests without overburdening the development of new, creative services or triggering other problematic effects.

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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	)	

To: Secretary, Federal Communications Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the rules of the Federal Communications Commission ("FCC" or "Commission"), The Walt Disney Company ("Disney"),[1] by its attorneys, hereby files the instant petition for reconsideration ("Petition") in the above-captioned proceeding, in which the Commission adopted several new rules concerning children's television obligations of digital and analog television broadcasters ("Order").[2] In this Petition, Disney highlights some of the effects these rule changes will have on broadcasters, cable networks and the Commission itself. For instance, some of these rule changes will entangle the Commission in fundamental, day-to-day programming and scheduling decisions. Others may push the Commission into direct Commission regulation of broadcast, cable and, for the first time, Internet, content. The Commission's new rules will have these effects in large part because they are based on incorrect factual assumptions, are vague and imprecise, or are not based on sufficient data because public

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[1] This petition is submitted on behalf of The Walt Disney Company, the ABC Cable Networks Group and International Family Entertainment, Inc. (which control the cable networks known as Disney Channel, Toon Disney and ABC Family), the ABC Television Network and the ABC – owned television stations (those ABC affiliates ultimately owned by The Walt Disney Company). For ease of reference, these entities are collectively referred to herein as "Disney."

[2] *See* In the Matter of Children's Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 00-167, FCC 04-221 (rel. Nov. 23, 2004) ("Order").

comment was not sought on the actual rule adopted. Despite these infirmities, Disney believes that many of the new rules may be modified in a way that will promote the interests of children without simultaneously overburdening the Commission and the companies it regulates. It is with this primary goal in mind that Disney urges the Commission to change its rules in the manner explained below.

I. THE DISNEY PERSPECTIVE

Disney is a worldwide entertainment company whose business focus includes its media networks. These media networks include owned television and radio broadcast stations, the ABC Television Network, the ABC Radio Networks, and cable and satellite networks, such as ESPN and Disney Channel. Disney creates and produces much of the programming that appears on its stations and networks. Disney also develops, publishes and distributes content for online and wireless services. Given these varied businesses, Disney sees the Commission's new rules from many angles, including through the eyes of a broadcast station, broadcast television network, general cable network, children-focused cable network, programming creator, and Internet content innovator. These multiple roles give Disney an unusually broad and in-depth perspective on how the Commission's new rules will work in practice, and how these rules could be modified to prevent any unintended, yet problematic, effects on all industry players.

Disney's perspective in this proceeding also is guided by its proven commitment to, and established record of, providing high-quality, popular educational programming to children. The Disney name is known throughout the world as a leader in children's programming. In this country, Disney serves children through several platforms, including its 24-hour kid-driven cable and satellite networks, Disney Channel and Toon Disney, and through ABC Family, a cable and satellite network with its own daily kids' programming block. Disney also airs a Saturday

morning children's programming block on the ABC Television Network, the majority of which qualifies under FCC regulations as educational and/or informational ("E/I").

Disney's selection of programming for these kid-focused platforms is guided by several positive, inclusive, pro-social and skill-enhancing imperatives. For example, Disney Channel's programming block for its youngest viewers (ages 2-5), known as "Playhouse Disney," features learning-based programming that invites co-viewing with caregivers. Among other features, Playhouse Disney programming is highlighted by episodes in which characters learn to value the differences they encounter—in shape, size, color, gender and ability.[3] Disney Channel provides this popular,[4] award-winning[5] programming to children without direct advertiser support; instead, Disney Channel relies on its continued policy of limited, select sponsorships for some of its programming.[6] Other Disney platforms, such as the ABC Television Network, rely on more traditional advertisements to support their children's programming costs.

II. DISNEY POSITION

Disney is proud of the special role its programming plays in the lives of children and plans to continue this role in the future. Thus, Disney wholeheartedly supports the Commission and Congress's goal of serving the educational and informational needs of children through

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[3] All Playhouse Disney programming is guided by a "Whole Child Curriculum," a philosophy that promotes child development on multiple levels, including: (i) Social Skills; (ii) Early Academics; (iii) Thinking Skills; (iv) Life Skills; (v) Self-Expression; and (vi) Motor Skills.

[4] For 2004, Disney Channel primetime was #1 in its targeted demographic of kids 6-11 for the second consecutive year; #1 with tweens 9-14 for the third consecutive year; and #3 in both households and total viewers against all basic cable networks, according to Nielsen.

[5] In January 2005, Disney Channel stars were honored with an unprecedented five nominations for the 36th NAACP Image Awards. The NAACP Image Awards honor individuals and projects that support positive images for people of color in arts and entertainment.

[6] Disney Channel adheres to very strict guidelines when offering sponsorship opportunities; specifically, the sponsorship messages must be pro-social and must not employ inducements to buy, use calls to action or provide pricing information.

programming and does not challenge the Commission's worthy intentions or commendable efforts in this regard. Rather, Disney submits that the Commission could improve its rules in a manner that will promote children's interests without overburdening the development of new, creative services or triggering other problematic effects. Disney's specific suggestions for improvement are addressed individually below.

A. THE COMMISSION SHOULD RECONSIDER ITS NEW DEFINITION OF COMMERCIAL MATTER

1. Rule Change

The Commission's rules, adopted to implement the Children's Television Act of 1990 ("CTA"), limit the number of minutes of "commercial matter" that may air during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission's long-standing definition of commercial matter generally includes paid advertisements. This commercial definition specifically excludes "promotions of upcoming programs that do not mention sponsors, public service messages promoting not-for-profit activities, and air-time sold for purposes of presenting educational and informational material."[7] These promotions ("Program Promotions") typically mention other programming scheduled to appear later on the same channel.

Instead of simply extending this established definition from the analog to digital realm, the Commission reversed course and defined commercial matter to include Program Promotions unless those promotions were for E/I programming.[8] The Commission further specified that this revised definition would apply to analog, digital and cable services. The Commission's stated

[7] *See* Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111, 2112 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991).

[8] Order at ¶ 57 (redefining commercial matter to include "promotions of television programs or video programming services other than children's educational and informational programming).

reason for re-defining commercial matter to include Program Promotions was to protect children from over-commercialization "consistent with the overall intent of Congress in the CTA."[9] The Commission also found support for its rule change on the theory that stations receive "significant consideration" for airing Program Promotions through the "increased audiences for the promoted program which presumably leads to increased advertising rates for the station."[10] The Commission exempted Program Promotions of E/I programming, however, to increase parent awareness of, and the audience for, this "desirable" programming.

2. Bases for Reconsideration

The Commission should reconsider its re-definition of commercial matter to include Program Promotions because the new definition: (i) contravenes legislative intent; and (ii) creates an unprecedented, unworkable distinction between E/I Program Promotions and all other Program Promotions that would deplete Commission resources.

a. The New Definition is Contrary to Legislative Intent

The Commission's revised definition of commercial matter is contrary to the unambiguous intent of Congress when it enacted the CTA. In both the CTA House and Senate Committee Reports ("Committee Reports"), Congress specified that the definition of "commercial matter" should track the definition used by the Commission in its FCC Form 303.[11] The Committee Reports directly quoted the form definition's listing of some material as commercial matter and other matter as non-commercial. Specifically included in the form's commercial matter definition were traditional advertisements as well as bonus spots, trade-out spots and only two distinct kinds of Program Promotions:

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[9] Order at ¶ 58.

[10] Order at ¶ 58.

[11] H.R. REP. NO. 101-385, at 15 (1989); S. REP. NO. at 21 (1989).

> "[(i)] promotional announcements by a commercial television broadcast station for or on behalf of another commonly owned or controlled broadcast station serving the same community [and [(ii)] promotional announcements of a future program where consideration was received for such an announcement or where such announcement identified the sponsor of the future program beyond mention of the sponsor's name as an integral part of the title of the program"[12]

Specifically excluded from the definition of commercial matter, however, were all Program Promotions other than those described in (i) and (ii) above, i.e., all same-channel promotions that do not promote a sponsor and for which no consideration is received.[13] Thus, a plain reading of the Committee Reports reveals Congress's unambiguous intent to exclude Program Promotions from commercial matter. The Commission's revision of the commercial matter definition to include rather than exclude Program Promotions contradicts this express legislative intent.[14]

The Commission's attempts to reconcile the conflict between its decision and the Committee Reports' directive are insufficient. In the Order, the Commission reasoned that its new definition was consistent with legislative intent because a station receives "indirect consideration" for Program Promotions and for other promotions which Congress included in its definition of commercial matter. Thus, according to the Commission, it may extend the commercial matter definition to Program Promotions because "in either case, the station is

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[12] H.R. REP. NO. 101-385, at 15 (1989); S. REP. NO. at 21 (1989).

[13] *Id.* ("The FCC's former Form 303-C defined the following as not commercial announcements: *promotional announcements (except as defined above)*, station identification announcements...") (emphasis added).

[14] The Commission's divergence from legislative intent is especially problematic because that intent appears in committee reports. It is well-settled that in interpreting legislative history, "Committee reports are recognized as the 'most persuasive indicia of congressional intent when enacting a statute.'" *See* In the matter of Direct Access to the INTELSAT System, Report and Order, 14 FCC Rcd 15703, 15774 (1999) (*citing* Mills v. United States, 713 F.2d 1249 (7th Cir. 1983). In this case, the Commission has before it Committee Reports from both chambers of Congress with identical statements that Program Promotions are not commercial matter.

[14] Order at ¶ 59.

receiving indirect consideration for the program promotion."[15] However, in creating this new "indirect consideration" distinction, the Commission has grouped into one category what Congress specifically separated into two categories that would be treated differently. This cannot be what Congress intended. Instead, the simplest interpretation—the same one that is consistent with the FCC's long-standing precedent—is the right one. Congress excluded same-channel promotions from the definition of commercial matter and, absent further legislation from Congress, the Commission should continue to do so, too. Accordingly, the Commission's decision to expand "commercial matter" to include same-channel promotions should be reversed.

b. The New Commercial Matter Definition Creates an Unprecedented, Unworkable Distinction between E/I Promotions and Other Promotions, Which Will Deplete Commission Resources

Even if the Commission does not find that its definition of commercial matter impermissibly contravenes legislative intent, it still should reconsider its decision given the adverse practical effects and implementation problems that it did not consider in the Order. Many of these potential problems will occur because promotions of E/I programming were excluded from "commercial matter," while all other such promotions were deemed commercial matter. In its Order, the Commission implied that the new rule would be a minor change in the way time is "counted" as commercial. However, the new definition will create an unprecedented, unworkable distinction between E/I promotions and other promotions, which will deplete Commission resources, as discussed below.

<u>The New E/I Distinction is an Unnecessary and Unprecedented Extension</u>. The Commission's new E/I-based commercial matter distinction is unprecedented in at least two ways. First, the Commission never before has applied its E/I distinction to cable programming.

[15] Order at ¶ 59.

The Commission's E/I distinction currently is relevant only to broadcasters because they are the only Commission regulatees who must include three hours of E/I programming per week in their programming stream. Cable networks are not subject to such a minimum E/I threshold. Thus, the Commission's new commercial matter definition would extend an arguably content-based distinction to hundreds of cable networks that previously have not had to judge whether their programming is E/I, not because they have any obligations to provide such programming, but so that they can determine which of their children's programs they can promote in non-commercial time. Given that the Commission failed to consider this potential consequence or provide any justification for it, the Commission should reconsider its new definition of commercial matter.

Second, the Commission's new definition is unprecedented because it would entangle the Commission in micromanagement of content-based decisions that it typically tries to avoid.[16] Specifically, in order to determine whether a promotion is commercial matter, cable operators and the Commission would have to determine whether the program a cable operator is promoting qualifies as E/I programming, perhaps even on a per-episode basis, because some episodes of a series may qualify as E/I while others may not. For networks such as the Disney Channel, Toon Disney or other all-children's cable channels, this would mean determining the E/I bona fides of as many as 24 hours of programming per day. Moreover, the Commission would have to be prepared to second-guess all such determinations in the event of any audits or challenges to cable networks' compliance with commercial limits, potentially determining for the first time whether thousands of hours of cable network programming qualify as E/I. For good reason, the FCC

[16] *See, e.g.*, 2002 Biennial Regulatory Review, 18 FCC Rcd 13620, ¶ 16 (2003) ("First Amendment interests are implicated by any regulation of media outlets, including broadcast media. We endeavor to be sensitive to those interests and to minimize the impact of our rules on the right of speakers to disseminate a message.").

previously has tried to limit entangling itself in constitutionally infirm content questions such as what is educational. The Commission should continue to avoid the role of content micromanager and should reconsider its new commercial matter definition on this basis.

The New E/I Distinction is Unworkable. The new distinction also will be unworkable for broadcasters and cable networks alike because the Commission did not fully consider how deeply its new definition would intrude upon fundamental scheduling, programming, promotional and content decisions. A quick review of how the commercial matter definitional change could affect Disney's own internal practices triggered a long list of problematic new issues, none of which is addressed in the Order. These issues include, but are not limited to:

- What are the parameters for qualifying a program, movie or series as E/I? Do all episodes of a series need to qualify as E/I for the series to be deemed E/I? If a series consists of E/I and non-E/I episodes, would a promotion for the series as a whole constitute non-commercial matter?

- How are interstitials with talent to be treated? Disney's cable networks create special programming aired during breaks in regular programming that include characters, clips and music from various programs. It would be illogical if these interstitials would turn into commercial matter merely because they include some talent from non E/I programs.

- It would be illogical if simple voice-overs at the end of a non-E/I show saying "tune into the next episode of ..." were considered non-commercial while the same voice-overs at the end of a non-E/I show would be considered commercial. Similarly, how would the Commission treat promotions that include characters from various shows, some E/I and some not?

- It would be very intrusive if traditional FCC-required bumpers between commercial and program content using characters from that show or other shows were considered commercial matter because characters in the bumpers are associated with non-E/I shows.

- Would PSAs with characters from non-E/I shows be considered commercial matter?

- Implementation of the FCC's rules would be extremely difficult if promotions of non-E/I programs were subject to other Commission rules and policies such as host-selling and program length commercials.

Disney's list of questions includes far more than just these few examples; however, even these few examples demonstrate that the Commission's inclusion of non-E/I promotions in the definition of commercial matter is an unanticipated quagmire. In order to avoid such intrusions, the Commission should reconsider its commercial matter definition.

The New E/I Distinction Would Deplete Already Strained FCC Resources. A significant consequence of this new E/I distinction being unprecedented and unworkable is that it would deplete already strained FCC resources. For example, application of the E/I rules to cable networks for the first time could require the Commission to review thousands of hours of cable network programming to determine whether such programming, and promotions of such programming, qualify as E/I. As discussed above, the Commission's new E/I distinction also raises a very long list of new issues.[17] The Commission staff thus would be forced to dedicate significant time and other resources to addressing these factually complex issues in formal proceedings or through informal staff advice. These laborious, subjective responsibilities would take staff away from other important tasks. For this and other bases discussed herein, the Commission should not define commercial matter to include Program Promotions.

B. THE COMMISSION SHOULD RETURN TO A MORE FLEXIBLE AND APPROPRIATE APPROACH TO PREEMPTIONS OF E/I PROGRAMMING

1. Rule Change

In its Order, the Commission for the first time established an express numerical limit on how frequently broadcasters may preempt a program and still have that program qualify as core.

[17] For example, the new E/I distinction, like several other rules adopted in the Order, appears to apply to some pay services like traditional linear cable channels but not necessarily to video on demand ("VOD") services. The Commission should provide some clarification that this is the case. However, because VOD is non-linear and interactive, Disney will address its VOD-related concerns in comments filed in response to the Commission's *Further Notice of Proposed Rulemaking*, which directly addresses interactivity issues. Order at ¶ 71.

The Commission's new rule established a 10% per calendar quarter limit on such preemptions ("10% Rule"), to be averaged over six months, and exempted preemptions for breaking news from the 10% calculation.[18] The new rule, which will apply to preemptions of programs on a broadcaster's analog or digital stream, replaces the current general obligation to air children's programming at a "regularly scheduled" time.[19]

2. Bases for Reconsideration

The Commission should rescind the 10% Rule because: (i) it was based on an erroneous factual finding; (ii) is a departure from long-established Commission precedent and the CTA without sufficient justification; and (iii) would end the tradition of providing children's programming on Saturday mornings or force significant amounts of popular sports programming from free broadcast service to pay services. Each of these bases is discussed below.

a. The 10% Rule Was Based on an Erroneous Factual Finding

The Commission based the 10% Rule on its factual finding that "most stations currently do not preempt more than 10 percent of core programs in each calendar quarter," citing a 2001 Media Bureau study ("MB Study"), and thus concluded that the 10% Rule would not have a significant impact on broadcasters.[20] The Commission's one-sentence summary of the MB Study is factually incorrect. As a result, the Commission grossly underestimated the potential

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[18] Order at ¶ 42.

[19] Published letters from the Media Bureau to television networks also suggest that in the event of a sports preemption, broadcasters should reschedule a program into another core time period (such as on another Saturday morning or a different regular "second home"), provide notice of the preemption to program guides, and announce the program's new time on air. Accordingly, when ABC preempts E/I programming for sports, it reschedules the preempted episode, notifies program guides of the rescheduled date and advises affiliates to run on-air announcements of the rescheduled date and time both during the previous regularly scheduled episode of the show in question and at the time of the preemption.

[20] Order at ¶ 42 (citing Mass Media Bureau, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines, 1997-1999* (2001) ("MB Study")).

impact of the 10% Rule. Actual data from the MB Study demonstrates that hundreds of stations would exceed the 10% limit in multiple quarters. The MB Study acknowledges this fact, noting that "[f]or ABC, CBS and NBC network affiliates, many core program series were preempted more often in particular quarters of the year."[21] For example, the MB Study notes that all network affiliates located in the Pacific time-zone had an annual average preemption rate of 16% and other affiliated stations would have exceeded 10% during particular quarters.[22] ABC's internal data demonstrates that these numbers continue to approximate current preemption rates.[23] Thus, it is clear that the 10% Rule would have a large impact on hundreds of stations across the country. Accordingly, the Commission should reconsider the 10% Rule.

b. The 10% Rule is an Unjustified Departure from Commission Precedent and the CTA

The 10% Rule also should be revisited because the Commission did not fully justify its departure from previous rulings approving current preemption levels. Specifically, the Commission and the Media Bureau consistently have concluded that current preemption levels are acceptable and do not reduce the educational and informational value of core programming. For example, in its response to several network requests, the Media Bureau determined that the networks' preemption practices were "consistent with the Commission's goals of maintaining scheduling continuity and predictability" and "advised the networks that their proposals for promoting and rescheduling preempted core programs would not run afoul of the children's

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[21] MB Study at 2.

[22] Specifically, the MB Study reports that in the third quarter of particular years, ABC affiliates had a preemption rate of 17.1% (versus a quarterly low of 2%), CBS affiliates had a preemption rate of 12.4% and NBC affiliates had a preemption rate of 24.9%. MB Study at 14.

[23] For example, ABC exceeded a 10% sports preemption level several times during the past eight quarters in at least one time zone. ABC anticipates that these preemption rates will increase in 2006 due to World Cup soccer.

television rules."[24] In a 1998 report, the Media Bureau similarly concluded that preemption levels were acceptable and that "the network-owned stations' overall children's educational and informational programming effort had not been unduly affected by the limited preemption flexibility granted them."[25] Although the Commission noted these previous decisions in the Order, it did not provide a legal basis for changing its existing policy. Moreover, the Commission cited no evidence suggesting that current preemption levels will increase or that existing preemption levels suddenly will have some new detrimental impact.[26] Absent such evidence or reasoning, the new 10% Rule is an unjustified reversal of the Commission's prior decisions and, as such, should be modified.

The Commission's extension of the 10% Rule is particularly troublesome because it extends a rule that was not even addressed by Congress in the CTA. The CTA only instructs the Commission to ensure that a licensee's "overall programming" serves the educational and informational needs of children. Based on this general expression of concern, the Commission already dictates exactly how much and what kind of children's programming broadcasters must air, even though neither the CTA nor the legislative history contained a specific directive. For the Commission now to rely upon Congress's general instruction to tell broadcasters that they cannot accommodate program conflicts through good faith rescheduling is unreasonable.

In sum, the Commission's new 10% Rule will further increase the Commission's involvement in broadcasters' programming decisions without justification. Preemptions are an

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[24] MB Study at 5 (citing letters from Roy J. Stewart to various networks' legal counsel).

[25] MB Study at 5-6 (citing "The Effect of Preemption on Children's Educational and Informational Programming, 1997-1998 Television Season," November 1998, DA 98-2306).

[26] The Commission cited no evidence that the current policy is problematic or is being abused.

unavoidable reality for all television programming.[27] The Commission previously has praised broadcasters' preemption practices and has cited no harm from this practice. The only actual evidence in the record shows that broadcasters continue to make a good faith effort to keep their children's programming in regularly scheduled time periods, usually preempt this programming only for valued sports programming, and properly reschedule it. Absent evidence of some harm from this practice, there is no need for further invasive regulation like the 10% Rule.

c. The 10% Rule Will Have Devastating Effects on Broadcasters Programming Decisions

The Commission also should reconsider the 10% Rule because it failed to consider certain devastating effects that the 10% Rule would have on existing sports programming contracts or that the 10% Rule could end Saturday morning children's programming. Instead, the Commission incorrectly assumed that networks like ABC could make slight adjustments to comply with the 10% Rule; this simply is not the case. There is no reasonable way ABC can continue to comply with its current sports contracts and with the 10% Rule and still air its E/I children's programming on Saturday mornings.

A few examples demonstrate how significant a problem this is. ABC currently carries live college football games on Saturdays, generally from late August through early December. As the Commission has acknowledged, some core programs included in the "Big 3" networks' traditional Saturday morning children's programming at times must be preempted for popular sports programming such as college football.[28] For example, a game with a noon EST kickoff will air live in the Pacific time-zone at 9AM, thus conflicting with at least an hour of scheduled

[27] For instance, ABC often does not air even its most popular prime-time shows, such as Desperate Housewives or Boston Legal, during their regular time slot in the event of a conflict with sports programming or special events.

[28] *See, e.g.*, MB Study at 4, 12, 14, 21, and 36. Sports programming inherently must air live or else lose its value to viewers.

children's E/I programming. Some ABC affiliates, and some regions of the ABC network, also carry additional sporting events such as local conference football games, all of which occur on fall Saturdays. In addition, the ABC network has agreed to carry World Cup soccer on Saturdays throughout summer 2006 and other Saturday events such as the British Open golf tournament.

If the 10% Rule becomes reality, ABC is left with a Hobson's Choice: to breach its current sports contracts as detailed above (or attempt to renegotiate them to move such programming to pay services) or move its traditional children's programming schedule to a less desirable day and time with fewer kids in the audience. None of these alternatives is in the public interest. College football games have aired on free, over-the-air broadcast television since the 1940s and have become a valued Saturday tradition across the country. Imposing an arbitrary 10% limit on preemptions of children's programming could force the migration of this high-value, popular over-the-air broadcast programming to pay services.

The other alternative—moving ABC's children's programming out of the Saturday morning slot—also could harm the public interest. ABC, like NBC and CBS, has aired its core children's programming on Saturday morning for decades. Generations of American children grew up watching these programs on Saturday morning; parents and children alike know that Saturday morning is the time that these programs air. However, the 10% Rule would change this longstanding tradition because for ABC or any other broadcast network to continue carrying college football, it will have to move some or all of its children's programming out of the traditional Saturday morning slot. The Commission did not consider this public interest harm in adopting the new 10% Rule, and thus should reconsider its decision.

C. THE COMMISSION SHOULD RECONSIDER ITS NEW WEBSITE RULES IN FAVOR OF A MORE TARGETED AND REASONABLE APPROACH

1. New Rule

In the Order, the Commission established, for the first time, rules prohibiting certain references to Internet websites in children's programming. Specifically, the Commission determined that website addresses cannot be displayed in programming targeted towards children ages 12 and under unless the website satisfies four specific criteria (the "Four-Part Test"): (1) it offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) it is not primarily intended for commercial purposes, including e-commerce or advertising; (3) its home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes, *e.g.*, no links labeled "store" and no links to another page with commercial matter.[29] If a website satisfies the Four Part Test, broadcasters may display the website's address throughout the program. The Commission further noted that these websites are not prevented from selling or advertising merchandise related to programming on the commercial portions of the website.[30] The rules governing the display of website addresses, together with the Four-Part Test, are hereinafter referred to as the "Website Reference Rules."

2. Bases for Reconsideration

Disney urges the Commission to reconsider its Website Reference Rules because they: (i) were adopted without adherence to the Administrative Procedures Act ("APA"); (ii) entangle the

[29] Order at ¶ 50.

[30] Order at ¶ 51.

Commission in a myriad of content-based issues and determinations; and (iii) are unnecessary in light of ongoing industry efforts.

a. The Website Reference Rules Were Adopted Without Adherence to the APA

As an initial matter, the Commission must reconsider its decision to adopt the Website Reference Rules because the Commission failed to provide proper notice of the proposed rules, in apparent violation of the APA.[31] The APA requires that the Commission provide interested parties with notice of a proposed rule prior to adopting it.[32] In the instant proceeding, the Commission failed to give proper notice of its intention to limit references to website addresses in children's programming. Specifically, the Commission's NPRM discussed and sought comment only on a proposal to prohibit direct, interactive links to websites.[33] Nowhere in the NPRM did the Commission mention the much different issue of whether the mere display of website addresses was appropriate.[34] In addition, because the underlying policy justification against direct links does not apply to mere website references, participants did not have notice that the rules would address mere displays of website addresses.[35]

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[31] 5 U.S.C. § 553(b) (2000) ("General notice of proposed rule making shall be published in the Federal Register. . .The notice shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.").

[32] Proper public notice and comment are critical to effective agency rulemaking not only to meet legal due process requirements but also to ensure that all potential issues are addressed, including problems that only industry participants could anticipate, such as those raised herein.

[33] *See* Children's Television Obligations of Digital Television Broadcasters, *Notice of Proposed Rulemaking*, MM Docket No. 00-167, FCC 00-344, ¶ 32 (rel. Oct. 5, 2000) ("NPRM").

[34] Further evidence of this lack of notice is that no commenter even addressed this issue, as discussed below.

[35] Although the Commission has stated its concern that children could have difficulty distinguishing between programming and commercial content if they could link seamlessly from a television show to a website, any such concern does not apply to non-interactive references to websites because a child viewing these references must affirmatively go to a computer to access

The Commission's new Website Reference Rules also should be reconsidered because they are not supported by the record in the proceeding, as required by the APA. In fact, not a single commenter addressed the mere display of website addresses.[36] This is not surprising given that the FCC did not seek public comment on, or provide advance notice of, the Website Reference Rules. The Commission's rules also are unsupportable because they are not a "logical outgrowth" of the proposed rule, as required by the APA.[37] Simply put, the NPRM proposed rules concerning interactive links, but the Order adopted rules concerning website references.

b. The Website Reference Rules Could Entangle the Commission in a Myriad of Content-Related Issues and Determinations

Upon reconsideration, the Commission should refrain from reaffirming the Website Reference Rules because these rules could entangle the Commission in a myriad of content-related issues and determinations. Although the Commission has jurisdiction and authority to regulate broadcasters, the Commission never has established similar authority or jurisdiction over Internet websites or the content thereof. Yet, the current Website Reference Rules are drafted in such a vague and broad manner that they could lead to a host of unanticipated content-related issues. Ultimately, the FCC will be forced to rule on many of these thorny content-

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the website. It is highly unlikely that the child would have difficulty differentiating the programming on his or her television from the website on his or her computer monitor.

[36] At most, commenters only discussed the proposal to prohibit children from accessing websites directly from a program. *See e.g.* Comments of Viacom, at pp. 29 - 33. The Commission points to a proposal by Sesame Workshop as justification for the Four-Part Test; however, this proposal was crafted in direct response to the Commission's queries regarding interactive links and cannot serve as the basis for rules prohibiting certain displays of website addresses. *See* Comments of Sesame Workshop, at pp. 23 – 25.

[37] *See e.g.* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547-549 (D.C. Cir. 1983) (holding that an agency has provided adequate notice and comment of final administrative rules, even if the final rules differ from the agency's initial proposed rules, if the final rules are a "logical outgrowth" of the proposed rules such that interested parties could have anticipated that the final rules might be promulgated).

related questions. For example, Disney's quick review of the Website Reference Rules raised several initial questions, the answers to which inevitably involve such content-related issues, such as:

- Would the mere listing of programming schedules or editorial content, such as online games, show clips and character biographies, related to its children's programming be deemed commercial content or "*bona fide* program-related" content?[38]

- Would the phrase "primarily intended for commercial purposes" restrict generally informative and noncommercial websites that are a part of Disney's general corporate enterprise, which clearly is a commercial venture, even though these sites themselves comport with the FCC's valuation of interactivity as a means of "enhanc[ing] the educational value of children's programming"?[39]

- Would Disney need to violate or at a minimum attempt to renegotiate its contracts with advertisers that include obligations to place advertisements on home pages?

As the Commission has acknowledged, advertising support of children's programming (and related websites) is essential to the ongoing ability to fund additional children's programming; similarly, some advertising support of websites is essential and the FCC's rules should take this into account.

c. The Website Reference Rules are Unnecessary Given Voluntary Efforts

Disney further believes that the Commission's Website Reference Rules are unnecessary because ongoing voluntary efforts are sufficient to serve the Commission's purposes. As several commenters noted, the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus has promulgated guidelines to address online marketing practices, including

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[38] Disney believes that this type of content furthers the Commission's policy objective of using interactivity to enhance the educational value of children's programming. *See* Order at ¶ 71. Consequently, such programming should not inadvertently be deemed "commercial" content in violation of the Commission's website rules.

[39] Order at ¶ 71.

marketing to children.[40] The CARU guidelines specifically address areas the Commission attempted to address in the Order, including concerns that children will have difficulty distinguishing between content and commercials if faced with interactive links in their programming. Disney has developed its own guidelines for promotion of website content which incorporate aspects of the CARU guidelines as well as its own internal policies and procedures, and which respect the concerns of the young viewer. In addition, Disney—individually, and as part of a group of programmers—is working to develop further policies regarding the display of and reference to websites in children's programming. Specifically, members of the industry plan to meet in the near future to review current practices and develop a joint proposal, which they likely will present to the Commission in the second quarter of 2005. Given current guidelines being used by Disney and other broadcasters and ongoing industry efforts to further refine such guidelines, the Commission's Website Reference Rules are unnecessary. For these reasons and those outlined above, the Commission should reconsider the Website Reference Rules.

D. THE COMMISSION SHOULD REPEAL THE EXTENSION OF ITS HOST SELLING POLICY TO WEBSITES

1. Rule Change

In its Order, the Commission adopted a rule strictly prohibiting "the display of website addresses in children's programs when the site uses characters from the program to sell products or services."[41] This rule, hereinafter referred to as the "Internet Host Selling Rule," applies equally to website addresses displayed during program-related or commercial content.[42] The

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[40] *See* Self-Regulatory Guidelines for Children's Advertising, *available at* http://www.caru.org/guidelines/index.asp ("CARU Guidelines").

[41] Order at ¶ 51.

[42] *Id.*

Internet Host Selling Rule effectively extends the Commission's traditional policy prohibiting host-selling in programming to the Internet.[43]

2. Bases for Reconsideration

The Commission should reconsider the Internet Host Selling Rule because: (i) the sole concern that motivated the broadcast host-selling rule does not apply to websites; (ii) the rule would entangle the Commission in content-related issues over which it has no jurisdiction; and (iii) the rule is unnecessary in light of ongoing industry efforts. Each of these bases for reconsideration is discussed below.

a. The Internet Host Selling Rule Does Not Promote the Policy that Motivated the Traditional Host Selling Rule

The Internet Host Selling Rule, at least in its present form, does not promote the original policy behind the traditional host selling rule. The Commission developed its traditional host selling rule to address a very specific concern—that children would have difficulty distinguishing between programming and advertising when a character in a particular program was used to market or sell products in commercials running immediately adjacent to that program.[44] This concern is not present in the Internet context.[45] Unlike television commercials, which run seamlessly together with television programming in a linear fashion and are programmed by others, accessing a website involves connection to an entirely different medium

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[43] The Commission's traditional prohibition against host selling is a long-standing Commission policy; however, this policy is not formalized in a rule. Yet, in the Order, the Commission adopted formal rules to prohibit host selling on websites. Thus, the Commission has taken formal measures to regulate a medium over which it has no jurisdiction while using a less stringent approach to alleviate host selling in a medium over which it has express jurisdiction.

[44] *See* Petition for Rulemaking of Action for Children's Television, *Children's Television Report and Policy Statement*, Docket No. 19142, FCC 74-1174 (rel. Oct. 24, 1974).

[45] Presumably, this is why the Commission had to adopt the Internet Host Selling Rule based on a more general concern, i.e., "in connection with...[its] mandate to protect children from over commercialization." Order at ¶ 52.

controlled and operated by the child or the child's parent. A child viewing a website address displayed during a television program cannot access that address until that child affirmatively connects to the Internet. Specifically, to reach a website promoted in a particular program, a child must note the website address, leave the television, move to a computer connected to the Internet, turn on the computer, establish an Internet connection, and enter the website address. This process involves several distinct steps, thus enabling the child to distinguish the website from the programming in which the website address appeared. Further, a child old enough to take these steps without adult assistance will recognize that the website is not an extension of the programming. In sum, because the concerns that led to the broadcast host selling rules are not present in the Internet context, the Commission should repeal its Internet Host Selling Rule.

b. The Vague Internet Host Selling Rule Will Entangle the Commission in Content-Related Issues Over Which it Has No Jurisdiction

The vague Internet Host Selling Rule also is problematic because it involves the Commission in additional content-related issues over which it has no jurisdiction, and goes well beyond the scope of its traditional host selling policy. The Commission's traditional host selling policy applies only to commercial matter aired during or adjacent to broadcasts of children's programs containing a character in the commercial, and not to different programs aired later in the day. For example, it would be a host-selling violation for Snow White to appear in a cereal commercial aired during a Snow White movie, but would not be a violation if that very same commercial aired half an hour, or less, after the Snow White movie. The Internet Host Selling Rule, on the other hand, prohibits references to any website that uses any host selling anywhere on that website, at any time.[46] Thus, this new rule could prohibit Disney from using its

[46] Unlike the Website Reference Rules, which contemplate that a broadcaster might sell or market program-related products on its website so long as these pages (or pages one click from

characters in connection with marketing anywhere on its entire network of websites, even if that marketing is many clicks away from the website address displayed in a particular program and the website referenced in the program otherwise satisfies the Four-Part Test. In this sense, the Commission is regulating content in a medium, the Internet, over which it does not have jurisdiction. The Commission should avoid this type of content regulation and should rescind the Internet Host Selling Rule.

c. The Internet Host Selling Rule is Unnecessary

The Commission also should reconsider the Internet Host Selling Rule because it is unnecessary. As explained above, Disney and other companies comply with existing suggested guidelines and are actively engaged in efforts to further refine these guidelines. In addition, the Commission explicitly stated that it will allow broadcasters to market or sell program-related content on websites whose addresses are displayed during children's programming so long as these areas of the site are at least two clicks away from the displayed website address. This "two-click" requirement adequately addresses the Commission's concerns that children will not be unduly influenced to purchase program-related merchandise. Thus, for the reasons set forth above, the Commission should reconsider its vague and unnecessary Internet Host Selling Rule.

E. THE NEW THREE HOUR RULE IS A DISINCENTIVE TO INNOVATION AND SHOULD, AT A MINIMUM, HAVE A TRANSITION PERIOD

1. New Rule

The Commission's current rules require each broadcast station to air three hours per week of core children's programming on its analog and digital channels ("Three Hour Rule"). In the Order, the Commission extended this rule to additional free multicast programming streams.

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the displayed website address) are not referenced in children's programming, the Internet Host Selling Rule is not limited to a set number of pages.

Specifically, digital broadcasters must air "½ hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream."[47] Compliance with this requirement will be averaged over six-months.[48]

2. Bases for Reconsideration

The Commission should reconsider aspects of the Three Hour Rule extension because it will act as a disincentive to the development of new, innovative services. Broadcasters currently are contemplating new experimental services to be offered through their unused digital spectrum. In considering whether to launch such a service, broadcasters and networks must decide whether they can accept the initial substantial losses required in order to commence and maintain such a service. For example, ABC just completed an experiment with offering ABC News Now ("ANN"), a 24/7 all news service, as a digital multicast service option for ABC Owned Stations and other ABC Television Network affiliated stations, and as a subscription broadband and wireless service. The Commission's extension of the Three Hour Rule to all multicast programming, regardless of its nature or revenues, could significantly deter programmers from developing useful services like ANN or even simpler data services like weather radar, to which it is unclear whether the Three Hour Rule would apply. In this regard, ABC requests that the Commission reconsider or clarify its rule to exempt purely informational data services like weather radar displays.

The Commission could counter the disincentive to experimentation detailed above by extending the Three Hour Rule only to those multicast programming streams that are profitable or at least well-established. Such a regulatory scheme would be consistent with the regulatory structure put in place when the FCC adopted closed captioning rules. In the context of closed-

[47] Order at ¶ 19.

[48] Order at ¶ 22.

captioning obligations, the Commission incorporated exemptions for new networks, for programmers for whom the cost of closed captioning would exceed two percent of their gross revenues, and for channels with low annual revenues.[49] Similarly, the Commission should phase-in the children's programming obligations based on the revenue of, and the number of years in operation of, a station's programming service. This phased-in approach would promote the Commission's goals without discouraging innovation because programmers would be able to more fully develop their branded service prior to triggering children's television obligations.

III. CONCLUSION

For the reasons discussed herein, Disney urges the Commission to reconsider its commercial matter definition, the 10% Rule, the Website Reference Rules, the Internet Host Selling Rule and the Three Hour Rule extension.

Respectfully submitted,

THE WALT DISNEY COMPANY

By: /s/ Susan L. Fox

Susan L. Fox, Esq.
Vice President, Government Relations
THE WALT DISNEY COMPANY
1150 17th St., N.W., Suite 400
Washington, DC 20036
(202) 222-4700

Tom W. Davidson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Suite 400
Washington, DC 20036
(202) 887-4011

Its Attorneys
February 2, 2005

[49] 47 U.S.C. § 79.1(d).