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

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

MOTION FOR EXTENSION OF EFFECTIVE DATE OR, IN THE ALTERNATIVE, ADMINISTRATIVE STAY

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I. SUMMARY

By this motion, Viacom Inc., The Walt Disney Company, NBC Universal, Inc., and NBC Telemundo License Co. (the "Companies") respectfully request that the Federal Communications Commission ("Commission" or "FCC") extend the effective date of the new rules governing children's television or, in the alternative, stay such effective date, until 90 days after the Commission issues a final decision on the pending petitions for reconsideration of those rules. The Companies seek this limited procedural relief based on the significant problems of practical implementation and legal questions raised in the petitions for reconsideration. A brief delay in the effective date of the new rules, now set to take effect on January 1, 2006, would permit the FCC to fully consider the petitions for reconsideration. As described below, similar relief has been granted by the Commission in similar situations, but is especially warranted here, where many of the consequences of the rule were not fully contemplated or considered by the FCC. Thus, regardless of whether the Commission agrees with the Companies on the merits, the procedural relief sought here is clearly warranted.

As to the merits, the rules raise serious statutory questions and grave constitutional concerns. The rules violate the Administrative Procedure Act ("APA"), the Children's Television Act ("CTA"), and the First Amendment. In the interest of fairness, efficiency, and the orderly administration of the rulemaking process, these issues should be addressed on reconsideration *before* the Companies and other regulated entities are compelled to comply with these new rules.

"Good cause" exists to defer the effective date of the rules until the Commission concludes the reconsideration process. It would disserve the public interest and impose significant disruption on the Companies to require them to make the dramatic changes to their business practices necessary to ensure compliance with the new rules as adopted, only to have to reconfigure those practices if and when the rules are modified on reconsideration. Given the serious questions of law raised by the reconsideration petitions, there is a strong possibility that the rules will be materially altered to avoid the statutory and constitutional issues that otherwise would be presented. Merely preserving the *status quo* by deferring the effective date will not undermine the Commission's goals because the existing rules governing children's television will remain in force.

In the alternative, the Commission could provide the same limited procedural relief by entering an administrative stay pending a final decision on reconsideration. Such a stay is amply justified here. The legal issues presented are certainly "substantial." In addition, the Companies will suffer irreparable harm, including the loss of First Amendment rights, unrecoverable economic losses, and competitive injury, if forced to comply with the new rules. This harm should not be imposed on the Companies unnecessarily.

For these reasons, the Commission should, in the interest of orderly and proper administrative process, tie the effective date of the new rules to the conclusion of its reconsideration proceeding. Under either procedural approach – an extension of the effective date or a stay thereof – such action is more than warranted.

II. BACKGROUND

Under the CTA, enacted in 1990,[1] Congress imposed "commercial matter" limits for children's television programming on commercial television broadcasters and cable operators.[2]

1 47 U.S.C. §§ 303a, 303b & 394.

2 *Id.* § 303a(b) (limiting "commercial matter" to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays). Although this statutory obligation applies to cable systems operators, *see id.* § 303a(d) (defining "commercial television broadcast licensee" to "includ[e] a cable operator, as defined in section 602 of the Communications Act"), not cable programming

Congress also required the Commission to consider whether broadcasters have complied with these limits, as well as the broadcasters' overall commitment to children's programming, when reviewing license renewal applications.[3] The Commission thereafter issued implementing rules that, among other things: (1) defined "commercial matter" as "air time sold for purposes of selling a product"; (2) applied the "commercial matter" limits to programming targeted at children 12 years old and under; and (3) classified any program associated with a particular product as a "program-length commercial."[4]

In 1996, the Commission adopted additional children's programming rules. These measures included a definition of "core programming"[5] and a requirement that broadcasters identify "core programming" at the time it is aired and provide similar information to publishers of television programming guides.[6] The Commission also created a "processing guideline" for commercial broadcast license renewals. The FCC determined that, with respect to such applications, a licensee will receive the benefit of staff-level approval of the CTA portion of the application as long as the broadcaster airs at least 3 hours per week of "core programming" or, alternatively, if it demonstrates a level of commitment to children's programming equivalent to

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networks, such as Nickelodeon, as a practical matter cable networks are expected to comply with the regulations as well. All references herein to cable operators are meant to cover cable networks too, but without conceding jurisdiction.

3 *Id.* § 303b.

4 *Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, 2111-12 (¶¶ 1, 3) (1991), *recons. granted in part*, 6 FCC Rcd 5093 (1991).

5 47 C.F.R. § 73.671(c) (defining "core programming" as regularly scheduled, weekly programming of at least 30 minutes, aired between 7:00 a.m. and 10:00 p.m., that serves the educational and informational needs of children ages 16 and under).

6 *See id.* § 73.673.

the 3-hour standard.[7] If a licensees does not meet this requirement, its renewal application will be referred to the full Commission for further review.[8]

In December 1999, the Commission released a Notice of Inquiry seeking views on a range of issues relating to the question of whether the advent of digital broadcasting should alter the existing public interest obligations of television broadcasters.[9] Thereafter, on October 5, 2000, the Commission issued a Notice of Proposed Rulemaking ("*NPRM*") seeking comment on "how these existing children's television obligations, developed with analog technology in mind, should be adapted to apply to digital television broadcasting."[10] In this precise context, the Commission sought comment on five issues: (1) educational and informational programming;[11] (2) preemption;[12] (3) commercial limits;[13] (4) promotions;[14] and (5) other steps to improve educational programming.[15]

After extensive comment, primarily directed at the application of these children's programming issues to digital television ("DTV"), the Commission issued its Report and Order

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7 *See id.* § 73.671, Note 2.

8 *See id.*

9 *See generally In re Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999).

10 *See Children's Television Obligations of Digital Television Broadcasters*, Notice of Proposed Rulemaking, 15 FCC Rcd 22946, 22947 (¶ 10) (2000) ("*NPRM*").

11 *Id*. at 22952-56 (¶¶ 14-24).

12 *Id*. at 22956-57 (¶¶ 25-28).

13 *Id*. at 22957-60 (¶¶ 29-34).

14 *Id*. at 22960-61 (¶¶ 35-37).

15 *Id*. at 22961 (¶ 38).

on November 23, 2004.[16] The Commission took dramatic and unexpected action entirely outside the DTV context that had been the subject of the *NPRM*. Among other things, the Commission: (1) expanded the definition of "commercial matter" to include "program promotions" unless the promotions are for educational and informational ("E/I") programming ("promotion rule");[17] (2) ruled that programming that is preempted more than 10% per quarter (unless for breaking news) will not count toward the 3-hour "core programming" obligation ("preemption rule");[18] (3) counted toward the "commercial matter" limitation any display of website addresses during programming targeted to children ages 12 and under, unless the website meets the Commission's newly minted "four-part test" ("website reference rule");[19] (4) banned "the display of website addresses in children's programs when the website uses characters from the program to sell products or services ("website host-selling rule");[20] and (5) adopted a license renewal "benchmark" for multicast broadcasting, mandating extra amounts of core E/I programming in "rough[] proportion[] to the additional amount of free video programming [broadcasters] choose to provide" ("multicasting rule").[21] In addition, despite the fact that the *NPRM* was largely limited to DTV, the Commission directed that the new rules be applied to *both* analog and digital television.

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16 *See Children's Television Obligations of Digital Television*, Report and Order, 19 FCC Rcd 22943 (2004) ("*Order*").

17 *Id.* at 22963-64 (¶¶ 55-59).

18 *Id.* at 22958 (¶¶ 40-42).

19 *Id.* at 22961-62 (¶¶ 50-51).

20 *Id.*

21 *Id.* at 22950 (¶ 19).

The *Order* was published in the Federal Register on January 3, 2005. The Commission received sixteen reconsideration petitions,[22] raising numerous legal issues ranging from constitutional questions arising under the First Amendment, to notice and comment problems under the APA, to statutory jurisdiction questions. The Commission, on January 31, 2005, stayed the effective date for the website rules until January 1, 2006.[23] The reconsideration petitions remain pending before the Commission. All of the rules at issue are now due to take effect on January 1, 2006.

III. MOTION FOR EXTENSION OF THE EFFECTIVE DATE

Pursuant to Section 1.3 of the Commission's rules,[24] the parties respectfully request that the Commission extend the effective date of the children's television rules until 90 days after a Commission decision on reconsideration becomes final.[25] This extension is necessary to allow

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22 Specifically, on February 2, 2005, the following parties filed for reconsideration: Discovery Communications, Inc.; 4Kids Entertainment, Inc.; Turner Broadcasting Systems, Inc.; American Advertising Federation, American Association of Advertising Agencies, and Association of National Advertisers, Inc.; Fox Entertainment Group, Inc.; National Cable & Telecommunications Association; Cox Broadcasting, Inc. *et al*.; The Walt Disney Company; National Association of Broadcasters; NBC Telemundo License Co.; Fox Entertainment Group, Inc., NBC Universal, Inc., and Viacom Inc.; Nickelodeon; The WB Television Network; Children's Media Policy Coalition; Univision Communications, Inc.; and Maranatha Broadcasting Co., Inc.

23 *See Children's Television Obligations of Digital Television Broadcasters*, Order on Reconsideration, 20 FCC Rcd 2055 (2005) ("*2005 Order*"). The remaining rules were originally slated to go into effect on January 1, 2006. *See Order,* 19 FCC Rcd at 22970 (¶ 86).

24 *See* 47 C.F.R. §1.3. ("The provisions of this chapter may be . . . waived for good cause shown . . . subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission . . . on petition if good cause therefore is shown.").

25 Under the Commission's rules, a decision on reconsideration would become final upon publication in the Federal Register. *See* 47 C.F.R. § 1.103(b) (providing that "Commission action shall be deemed final, for purposes of seeking reconsideration at the Commission or judicial review, on the date of public notice as defined in Sec. 1.4(b) of these rules"); *id.* § 1.4(b)(1) (defining "public notice" for "all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register").

for the orderly and proper disposition of the petitions for reconsideration, many of which demonstrate that the new rules are seriously flawed as a matter of law and would also be extremely burdensome. As discussed below, an extension of the current effective date of January 1, 2006 would give the Commission time to resolve the complex legal issues addressed in the pending petitions without requiring broadcasters and cable operators to adopt burdensome new practices in order to comply with rules that, because of their statutory and constitutional infirmities, may well be altered on reconsideration. Thus, a stay of the effective date would allow the parties to continue to pursue their arguments on reconsideration without compelling them to make the dramatic changes to their business practices necessitated by the new rules on January 1, only to change them once more if the rules are subsequently modified or withdrawn on reconsideration.

Section 1.3 grants the Commission the authority to extend the effective date of certain rules for "good cause shown."[26] An extension is appropriate "where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question."[27] In evaluating a Section 1.3 extension request, the Commission often "take[s] into account considerations of hardship, equity, or more effective implementation of overall policy."[28] As

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26 47 C.F.R. § 1.3.

27 *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd 7709, 7714 (¶ 9) (2005) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1165 (D.C. Cir. 1990)).

28 *WAIT Radio*, 418 F.2d at 1159.

explained below, the requested extension of the effective date for the children's television rules meets both elements of the "good cause" test.

First, "strict compliance" with the children's television rules before the reconsideration petitions are resolved is "inconsistent with the public interest."[29] Indeed, the Commission *routinely* finds that the public interest warrants a temporary extension of newly adopted rules to enable the Commission to address pending petitions for reconsideration.[30] This is so because the

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[29] *See Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd at 7714 (¶ 9).

[30] *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, CG Docket No. 02-278, FCC 05-132 (¶ 9) (June 27, 2005) ("In light of the on-going developments in Congress and pending resolution of the petitions for reconsideration and clarification of the Commission's facsimile advertising rules, we believe the public interest would best be served by delaying the effective date of the written consent requirement and the 18-month and three-month limitations on the duration of the established business relationship as applied to the sending of facsimile advertisements until January 9, 2006. *This delay will provide the Commission requisite time to address the petitions for reconsideration filed on these issues*.") (footnote omitted) (emphasis added)); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 20125, 20127 (¶ 7) (2004) ("In light of recent action by the U.S. House of Representatives to amend the TCPA [Telephone Consumer Protection Act] and similar proposed legislation in the U.S. Senate, we believe the public interest would best be served by delaying the effective date of the written consent requirement for six months to allow Congress to act. Should Congress not act in this regard, *a further extension will provide the Commission requisite time to address the petitions for reconsideration filed on these issues*.") (emphasis added); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 18 FCC Rcd 19890, 19891 (¶ 4) (2003) ("Given that the Commission's adoption of the modified established business relationship definition in the Report and Order was limited to its application to telephone solicitations, we believe that good cause exists to stay application of the time limitations imposed on the established business relationship in the context of facsimile advertisements until the Commission conducts a review on reconsideration."); *Mass Media Bureau Extends Filing Deadline for Class A License Applications*, *Public Notice*, DA 00-2743 (rel. Dec. 5, 2000) ("The Commission has received several petitions for reconsideration of the Report and Order. In order to give eligible LPTV licensees adequate time to prepare and file their Class A applications consistent with any clarifications or rule changes that may be adopted on reconsideration, we have decided to extend the filing deadline until the issues raised by the petitioners have been resolved. By this Public Notice, the deadline for the filing of Class A applications by eligible LPTV stations is extended to 90 days after release of the Order on Reconsideration."); *Amendment of the Comm'n's Rules Regarding Installment Payment Financing for Personal Commission's Servs. (PCS) Licensees*, Order, 13 FCC Rcd 686, 686-87 (¶ 2) (1998) (extending election date contained in new rule because "[m]oving the election date will serve the public interest by permitting licensees to submit their election after final disposition of arguments raised on reconsideration"); *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Servs. (PCS) Licensees*, Order, 13 FCC Rcd 6956, 6956 (¶ 2) (1998) (granting

public interest is clearly not served, but rather disserved, by pressing ahead to implement rules under further administrative review, creating potential disruption and upheaval in the rulemaking process. This precedent is especially persuasive where, as here:

- the new rules at issue are complex and would require significant changes in business operations;
- many of the new rules require clarification to avoid confusion and narrowing to avoid far-reaching and unreasonable results;
- many of the new rules were not raised or suggested in the *NPRM* but were instead first articulated in the *Order*, meaning that the Companies' first reasonable opportunity to address them was in the pending petitions for reconsideration; and
- the rules suffer from clear legal flaws that should be addressed on reconsideration.

In addition, "considerations of hardship, equity, or more effective implementation of overall policy" all support the approval of this extension request.[31] As detailed in the accompanying declarations, the new rules will have a greatly disruptive effect on the operations of broadcasters and cable operators.[32]

Consider, for example, the new website rules. As a general matter, Disney and Viacom currently provide websites for children that offer a safe and child-friendly haven, with various

further request in same proceeding because reconsideration petitions had not been resolved); *Letter to Eric E. Breisach*, 10 FCC Rcd 12773, 12773 (1995) (extending deadline for cable operators to claim initial inflation adjustments in part because "the extension of our deadline will create greater certainty during this period of reconsideration of our rules in this area").

[31] *WAIT Radio*, 418 F.2d at 1159.

[32] *See* Declaration of Martin D. Franks, Executive Vice President, CBS Television ("Franks Decl.") (Exhibit A); Declaration of Herb Scannell, President, Nickelodeon Networks, and Vice Chairman, MTV Networks Group ("Scannell Decl.") (Exhibit B); Declaration of Walter Liss, President of the Owned Television Stations of ABC, Inc. ("Liss Decl.") (Exhibit C); Declaration of Rich Ross, President, Disney Channel Worldwide ("Ross Decl.") (Exhibit D); and Declaration of Kristen Gray, Assistant General Counsel, 4Kids Entertainment, Inc. ("Gray Decl.") (Exhibit E).

materials and games that are informative, entertaining, and often educational and instructional.[33] The development and promotion of these child-friendly websites should be encouraged. The new rules would do the opposite.

More specifically, the website reference rule, for example, would count toward programmers' "commercial matter" limitation any display of website addresses during children's programming unless the website meets the Commission's vague "four-part test." Because of the test's lack of clarity, broadcasters and cable operators face the daunting prospect of being found in violation of the commercial limits unless they undertake far-reaching, burdensome, and expensive changes to their websites, forgo on-air promotion of the sites, or, alternatively, reduce other commercial time that currently provides the advertising revenues that support the creation and distribution of quality children's programming. The new website host-selling rule is similarly vague and puts broadcasters and cable operators at risk unless they undertake sweeping and immediate changes to their websites. Depending on the Commission's construction of the rule, the Companies might be required to eliminate any reference, anywhere on their websites, to a product or service related to an on-air character, such as SpongeBob Square Pants or Mickey Mouse.[34]

Consider also the new rule that would for the first time count same-channel programming promotions against the commercial time limits, even if the promotions feature other child or family-friendly programming, unless the programming qualifies as E/I. The rule will require broadcasters and cable operators to immediately eliminate material on their channels that helps direct children and parents to other wholesome and entertaining children's programming, with

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33 *See* Scannell Decl. ¶¶ 16, 26-32; Ross Decl. ¶¶ 27-33.

34 *See* Scannell Decl. ¶ 60; Ross Decl. ¶ 38.

the likely effect that this programming and the channel itself will suffer losses of viewers and revenues.[35] It is of vital importance to broadcasters and cable operators that they be able to attract and retain audiences for their child-friendly programming, both E/I and non-E/I. A reduction of on-air promotional opportunities will inevitably harm these efforts and consequently reduce revenues available to support the creation and distribution of child-friendly programming, including E/I programs.

The promotion rule will also cause significant disruption by virtue of its exemption for E/I program promotions. In particular, cable operators until now have had no need to classify their children's programs as E/I or non-E/I. To comply, cable operators would need to review their massive programming library – a significant burden for cable networks such as the Disney Channel and Nickelodeon that run children's programming 24 hours a day, 7 days a week – to attempt to determine what is E/I and what is not. Next, cable operators will need to assess a wide range of material – including not only straightforward show promotions, but also separators, menus, channel IDs, and material that includes show characters or elements – to determine whether it qualifies as a promotion under the terms of the rule and whether it corresponds to an E/I show. Programmers will then need to re-code, re-file, and reschedule their programming and promotional material and overhaul their computer systems in order to monitor, again for the first time, when E/I material runs and when non-E/I material runs.[36] These processes are onerous and will require the creation and maintenance of entirely new computer systems in order to ensure compliance, and may even necessitate manual monitoring, at great

35 *See* Scannell Decl. ¶¶ 24, 34, 38; Ross Decl. ¶¶ 9, 11-12.

36 *See* Ross Decl. ¶¶ 16-24.

expense and effort, until new computer systems can be implemented and integrated with existing systems.[37]

Cable operators also will be forced to re-edit a vast array of existing promotional material or to create entirely new promotional material. Specifically, this process would entail re-editing vast amounts of existing shows to fill the gap in time created by the expanded promotions rule or creating brand new short-form programming to fill the gaps; absent these steps, certain programming inventory would be rendered unusable.[38] If the rule is eventually modified (or overturned) after it goes into effect, many of these changes would be reversed or otherwise altered to allow cable operators to return to the *status quo* that has served them, and the viewing public, so well for so many years.[39]

The FCC's preemption rule also will cause significant disruption warranting an extension of the new rules' effective date. Under that rule, programming that is preempted more than 10% per quarter (unless for breaking news) will not count toward the 3-hour E/I "core programming" obligation. Application of this rule will make it impossible for many stations, especially West Coast stations, to continue to provide their longstanding Saturday morning blocks of E/I children's programming and, at the same time, serve the legitimate interests of their viewers in live sports programming. This is because some sporting events of particular local interest occur in different time zones and, if carried live, will necessarily preempt some Saturday morning programs. For example, preemptions on the West Coast would be caused by the broadcast of

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[37] Ross Decl. ¶¶ 16-24; *See* Scannell Decl. ¶ 52.

[38] *See* Ross Decl. ¶¶ 25-26.

[39] *See* Ross Decl. ¶¶ 10, 40.

football games or other sporting events that begin in the early afternoon on the East Coast.[40] Historically, many stations operating in good faith to meet their children's programming obligation – particularly West Coast stations – have preempted children's programs more frequently than the new rule would permit.[41] By rescheduling the preempted programs to other time slots with notice of that rescheduling, these longstanding preemption practices, fully approved by the Commission, have allowed stations to serve the needs of children and of viewers interested in live sports programming.[42]

The new preemption rule, however, will make it impossible for the stations to serve both sets of needs. Stations will either substantially curtail live sports programming of great local interest, particularly on the West Coast, or they will move children's programming either into slots currently filled by news or public affairs programs or into afternoon slots already filled with popular programming and for which there is historically a smaller child audience.[43] However stations choose to comply, they will disserve a substantial portion of their audience.

Last, the multicasting rule will cause significant disruption to broadcasters by creating obstacles to the transition to digital television, long a public interest goal of the Commission, and by interfering with ongoing efforts to create and distribute specialized programming.[44]

All of this significant disruption becomes even more troubling when viewed in light of the new rules' potentially limited duration, and the time and resources required to undo the steps

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40 *See* Franks Decl. ¶¶ 16, 19, 22; Liss Decl. ¶¶ 10-15.

41 *See* Franks Decl. ¶¶ 19; Liss Decl. ¶¶ 23-25.

42 *See* Franks Decl. ¶¶ 17-19; Liss Decl. ¶¶ 6-7.

43 *See* Franks Decl. ¶¶ 22-27, 29-31; Liss Decl. ¶¶ 8-22.

44 *See* Franks Decl. ¶¶ 34 -42.

taken to comply, if the rules are ultimately changed or eliminated. The tremendous time, effort, and expense of the changes made to come into compliance with the new rules would be wasted. Moreover, implementing and then undoing changes to programming, promotions, websites, and other operations will create consumer confusion and frustration not once but twice. Foisting several rounds of content and format changes on viewers would interfere with established viewer expectations and irreparably harm these company-viewer relationships.[45]

Broadcasters and cable operators should not be forced to make these far-reaching and costly changes to their operations – in many cases radically changing or entirely discontinuing successful business practices, such as existing program schedules and marketing strategies – while there remains a strong possibility that the rules will be altered on reconsideration. The public interest would be better served by allowing the Commission to complete its review and disposition of the reconsideration petitions in an orderly fashion while preserving the *status quo*.[46] Accordingly, compelling compliance with these burdensome rules, while modification of the rules on reconsideration is being actively reviewed at the Commission, would be both inefficient and unfair.

The second prong of the "good cause" test likewise is easily satisfied here because "the relief requested would not undermine the policy objective of the rule in question."[47] In its *Order*, the Commission explained that the goals of the proceeding were to "provide television broadcasters with guidance regarding their obligation to serve children as we transition from an

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45 *See, e.g.*, Scannell Decl. ¶ 40; Ross Decl. ¶ 40; Gray Decl. ¶ 5.

46 Indeed, when the Commission deferred the effective date of the website rules from February 2005 to January 2006, it implicitly found that preparing for compliance with those rules would be burdensome and time-consuming. *See infra* note 49. That conclusion remains true today, and applies with equal force to the other rules under consideration as well.

47 *See supra* note 26.

analog to a digital television environment, and to improve our children's programming rules and policies."[48] Denying the instant request and requiring broadcasters and cable operators to comply with the adopted rules – which have an uncertain future, and which, at a minimum, require extensive clarification – would have the opposite effect and *undermine* the FCC's goals of providing "guidance" to broadcasters and cable operators by introducing uncertainty and confusion into the transition from analog to digital television. These Companies would, at a minimum, have to dramatically change, and in some cases dismantle, certain practices to comply with the *Order*, only to change them yet again if the rules are modified on reconsideration.

Further, when the Commission extended the effective date of the website rules,[49] it raised no concern about any potentially negative effect of delaying the effective date. Rather, the Commission recognized that, on balance, it was more important to ensure that broadcasters and cable operators had sufficient time to prepare for the far-reaching changes required by the new rules.[50] In addition, preserving the *status quo* will not undermine the Commission's goals because the existing rules governing children's television will remain in force and thus ensure that there is no harm to children's television viewers.

In sum, if changes are made to the rules on reconsideration, as would be prudent in light of the substantial legal questions presented,[51] such action will require major efforts by the Companies to shift between compliance with the rules adopted in the *Order* and compliance with

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48 *Order*, 19 FCC Rcd at 22944 (¶ 1).

49 *2005 Order*, 20 FCC Rcd at 2055 (¶ 3) (delaying the implementation date of the website rules in order to "give broadcasters and cable operators more time to review and make any necessary changes to their programs or websites to comply with these new requirements").

50 *Id*.

51 *See infra* Section IV.A.

any amended rules. In such circumstances, the Commission often has extended compliance dates, noting that pending proceedings could affect the ability of parties to comply with the new rules on their effective dates.[52] Rather than require the Companies to expend significant, potentially unrecoverable resources and to incur other harms to comply with one set of rules while the Commission considers the many substantial petitions to change those rules, the parties respectfully request that the Commission temporarily stay the effective date of the rules until 90 days after a final resolution of the pending reconsideration petitions.

IV. MOTION FOR ADMINISTRATIVE STAY

As demonstrated above, ample grounds exist for the extension of the effective date of the children's television rules, and such action would be entirely consistent with Commission precedent. In the alternative, however, the Commission could afford the parties the same relief by granting an administrative stay of the rules until 90 days after the decision on reconsideration becomes final.

The Commission looks to the same factors as federal courts in determining whether to grant a stay: (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury;

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[52] *See, e.g., Implementation of Section 304 of the Telecomms. Act of 1996*, Order and Further Notice of Rulemaking, 18 FCC Rcd 7924, 7925-26 (¶ 4) (2004) ("In light of the ongoing notice and comment cycle relating to the FNPRM, the evolving nature of technical specifications relating to navigation devices, and the imminent business ordering and manufacturing cycles facing MVPDs and consumer electronics manufacturers in anticipation of the pending 2005 prohibition, we hereby extend the deadline concerning the prohibition on integrated devices until July 1, 2006."); *DTV Buildout, Requests for Extension of the Digital Television Construction Deadline,* Order, 18 FCC Rcd 22705, 22711 (¶ 27) (2003) (granting requests for extension of time to construct DTV facilities because "[t]he pendency of Commission proceedings is the type of matter outside of the control of a station that warrants allowing additional time for the construction of DTV facilities"); *see also Puerto Rico Tel. Co., Petition for Waiver of Section 61.41 or Section 54.303(a) of the Commission's Rules*, Order, 16 FCC Rcd 12343, 12346 (¶ 7) (2001) (granting waiver of deadline contained in FCC rules because the need for a carrier to comply with the deadline could be impacted by a proposal pending before the Commission); *Puerto Rico Tel. Co., Petition for Waiver of Section 61.41 or Section 54.303(a) of the Commission' s Rules*, Order, 15 FCC Rcd 9680, 9682-83 (¶ 5) (2000) (same).

(3) harm to other parties; and (4) the public interest.[53] "To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced."[54]

Accordingly, even if the Commission does not agree with the Companies that its rules are legally flawed, a stay nonetheless is fully justified here. The significant hardship that the rules will impose on the Companies, by itself, warrants an administrative stay. Moreover, at a minimum, the legal issues raised by the parties are "substantial,"[55] as explained below. Thus, the *Order* should be stayed pending completion of the reconsideration proceeding, in which the Commission may rectify some or all of these flaws.

A. THE COMPANIES HAVE MADE A PERSUASIVE SHOWING THAT THE COMMISSION SHOULD SIGNIFICANTLY MODIFY THE RULES ON RECONSIDERATION

The Companies possess a likelihood of success on the merits of their claims that the rules are invalid. Simply put, and as set forth below, the new children's television rules are not legally sustainable in their current form. Accordingly, the Commission should modify or vacate those rules on reconsideration and issue a stay of the rules pending the completion of the reconsideration process.

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53 *See WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 13191, 13192-93 (¶ 4) (2000).

54 *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

55 *See Holiday Tours*, 559 F.2d at 843 (explaining that only a "substantial case on the merits" is required where the other three factors strongly favor a stay).

1. The Website Rules Violate the APA, Exceed the FCC's Jurisdiction, and Contravene the First Amendment.

The Commission's new website rules are legally problematic, and therefore ripe for reconsideration, because they take the Commission far afield from the subjects raised in the *NPRM* (interactive television) and its traditional venue of regulation (television programming). The rules also raise grave constitutional concerns.

First, the Commission did not provide the notice required by the APA in promulgating the website rules. As the D.C. Circuit has explained, the APA's notice requirement serves twin objectives: "(1) to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies; and (2) to assure that the agency will have before it the facts and information relevant to a particular administrative problem."[56] The processes employed by the Commission in adopting these rules deprived affected parties of the opportunity for notice and comment to which they are entitled and, at the same time, deprived the Commission itself of the record evidence it needs to make an informed decision.

Specifically, in the *NPRM*, the Commission invited comments on: (1) a proposal that the Commission prohibit all "direct links to commercial websites during children's programming;"[57] (2) distinctions between websites that carry only commercial products and those that offer educational products; and (3) issues related to the placement and timing of same with respect to program material.[58] However, in the *Order*, the Commission took no action with respect to

56 *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (internal citations and quotations omitted).

57 *Order*, 19 FCC Rcd at 22960 (¶ 48).

58 *Id.* at 22963 (¶ 55-56).

"direct, interactive, links to commercial Internet sites in children's programming,"[59] As the Commission explained, "[t]here is little if any use of direct Internet connectivity today in television programming of the type that was contemplated when the Notice in this proceeding was issued. Accordingly, we find that it would be premature and unduly speculative to attempt to regulate such direct connectivity at this time."[60] Instead, the Commission addressed a completely different issue – the mere display of Internet addresses that appear, without interactive capability, during children's programming.

This final regulation limiting the display of Internet addresses that cannot be accessed without the use of a computer – as opposed to "direct, interactive, links to commercial Internet sites" – is neither the proposed rule nor a "logical outgrowth" of the proposed rule.[61] Instead, it is an entirely new rule that is far removed from the rationale underlying the *NPRM's* request for comment on issues related to the interactivity permitted by digital television,[62] and a proposed prohibition on "all direct links to commercial websites during children' s programming."[63]

With respect to the website host-selling rule, the Commission sought comment on the view that existing advertising restrictions, including host-selling policies, should apply to digital programs.[64] The Commission also sought comment on whether, even if certain direct commercial links were allowed, it should nevertheless "prohibit links to websites that sell

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59 *Id.* at 22962 (¶ 53).

60 *Id.*

61 *See* Pet. for Recons. of Nickelodeon, at 18-20 (filed Feb. 2, 2005) ("Nickelodeon Recons.").

62 *NPRM*, 15 FCC Rcd at 22957-58 (¶ 29).

63 *Id.* at 22958 (¶ 32).

64 *Id.* at 22958 (¶ 31).

products associated with the program in which the links appear under our program-length commercial policy, or links to websites where a [] program host is used to sell products[.]"[65] Again, the Commission took no action with respect to direct links, but instead addressed the relationship between host-selling and the appearance of Internet addresses that cannot be accessed directly. The final rule limiting the display of Internet addresses in children's programs when the site uses characters from the program to sell products or services is neither the proposed rule nor a "logical outgrowth" of the proposed rule.[66] Like the website reference rule, it is an entirely new rule that is far removed from the rationale of the *NPRM*.

The website rules also exceed the Commission's jurisdiction under the CTA, which does not grant the Commission authority over the Internet. The grant of regulatory jurisdiction conferred by the CTA is limited to programming that appears on television.[67] Indeed, in passing the CTA, Congress made specific findings concerning the harm that certain commercial content on children's *television* programming could work on children.[68] The content of a website simply is not "television programming" for purposes of the CTA. Accordingly, the CTA did not grant the Commission authority to superintend the content on Internet websites. Yet that is precisely the result of the new website rules.[69]

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65 *Id.* at 22959 (¶ 32).

66 *See* Nickelodeon Recons. at 18-20.

67 The CTA provided the FCC with the mandate 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." 47 U.S.C. § 303a(a) (emphasis added).

68 *See id.* § 303a note ("special safeguards are appropriate to protect children from overcommercialization *on television*") (emphasis added).

69 *See 2005 Order*, 20 FCC Rcd at 2055 (¶3) (delaying the implementation date of the rules in order to "give broadcasters and cable operators more time to review and make any necessary changes to their programs *or websites to comply with these new requirements*") (emphasis added).

Finally, the website rules in their current form are unconstitutional. By counting programming time with website references as commercial time unless the website meets the Commission's four-part test, the website reference rule severely limits the ability of regulated entities to inform their audience, including adults, about their websites. Such a restriction raises profound First Amendment concerns. The rule fares no better on the ground that broadcasters and cable operators may comply by changing the content of their websites: that "option" also runs afoul of the First Amendment, which accords the Internet the highest level of protection.[70]

The prohibition against host-selling on websites that are displayed in programming also contravenes the First Amendment because the prohibition sweeps much more broadly than could be justified on any theory of protecting children from overcommercialization; the prohibition operates 24 hours per day and effectively bans websites from providing useful commercial information to adults as well as children.[71]

The website rules are also unconstitutionally vague. The website reference rule's four-part test provides little guidance to those attempting to comply with its requirements. For example, the first prong requires websites to contain a "substantial amount of *bona fide* program-related or other noncommercial content."[72] Yet the rules provide no definition of the conclusory and subjective terms "substantial amount," "*bona fide*," or "noncommercial." Likewise, the second prong of the test mandates that the website must not be "primarily intended for

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70 *See Reno v. ACLU*, 521 U.S. 844, 868-70 (1997).

71 Exacerbating the constitutional infirmity of the website rules is the lack of record evidence suggesting that children are subject to overcommercialization on the Internet or that these rules will help combat any such harm. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000) ("This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved in this case.").

72 *Order*, 15 FCC Rcd at 22961 (¶ 51) (emphasis added).

commercial purposes" but fails to explain what this means.[73] In some sense *any* website of a commercial entity is "primarily intended for commercial purposes," but if this were the intended meaning of the rule, it would effectively ban the display of *all* website addresses.

The website host-selling rule is equally vague. This rule prohibits "the display of website addresses in children's programs when the site uses characters from the program to sell products or services."[74] However, the rule fails to define or explain what is meant by "the site." This is extremely problematic for the broadcasters and cable operators. The "site" could, for example, range from the children's section of the domain to all websites owned by the Companies. Given the drastic sanctions that might result from a violation, the vague terms that pervade the website rules provide inadequate guidance to a good faith broadcaster or cable operator.

2. <u>The Redefinition of "Commercial Matter" to Include Program Promotions Violates the CTA and the First Amendment.</u>

The Commission's redefinition of "commercial matter" to include program promotions should also be altered on reconsideration because it violates both the CTA and the First Amendment.

The Commission exceeded its statutory authority under the CTA in redefining "commercial matter" to include program promotions. Congress unambiguously expressed its intent that a station's promotions of its own programs *not* be deemed "commercial matter" for purposes of the CTA's time limits. The Senate Report explains that Congress "intend[ed] that the definition" be "consistent" with the definition used by the FCC in its former FCC Form 303. The Senate emphasized that Form 303 – which regulated advertising "for which a charge is made, or other consideration received" – excluded "promotional announcements" from the

[73] *Id.*

[74] *Id.*

definition.[75] Congress also included an extensive list of examples of "commercial matter."[76] Notably absent from this expansive list was any reference to a station's uncompensated promotions of its own programming. Thus, Congress clearly never intended that the FCC have any authority under the CTA to treat a broadcaster's uncompensated promotions of its own programming as "commercial matter."

Even if the Commission's redefinition of "commercial matter" to include program promotions is authorized by the CTA, it nonetheless cannot survive constitutional scrutiny, whether reviewed under the strict scrutiny standard applicable to cable programming or the more forgiving standard applicable to broadcast. Nothing in the record suggests that any harm to children arises from exposure to non-E/I program promotions. The proposed rule thus does not substantially advance an important governmental interest, as the First Amendment requires.

In addition, the exemption of E/I promotions from the revised definition of "commercial matter" evinces a content-based preference for certain speech that is impermissible under any standard of review. A programmer that wishes to schedule non-E/I shows that may appeal to viewers of children's programming is penalized by having to count against its commercial matter limit any promotions for such shows that it runs during that programming; a programmer that wishes to schedule and promote E/I shows suffers no such constraint. Indeed, the FCC's stated justification for this change – that it favors the promotion of E/I programming over non-E/I programming, and specifically intends its rules to result in more of the former – *proves* its

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75 *See* S. Rep. No. 101-227, at 21 (1989).

76 *Id.* ("[B]onus spots; trade-out spots; 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 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 a[n] integral part of the title of the program.").

content-based preference.[77] For these reasons, the promotion rule cannot withstand First Amendment scrutiny.

3. <u>The Preemption Rule Violates the APA and the First Amendment.</u>

The Commission's new preemption rule also suffers from several legal flaws. First, as with the website rules discussed above, the preemption rule suffers from a notice-and-comment defect. The *NPRM*, which focused on DTV, provide no notice that the Commission was in any way considering revising its preemption rule with respect to analog broadcasting.[78] Accordingly, virtually every commenter to address the issue framed the preemption question solely with respect to digital broadcasts.[79] The new preemption rule impacts digital and analog television in fundamentally different ways. Had the Commission given the Companies any notice that it was considering revising its preemption policies with respect to analog broadcast, there would have been considerable comment. The *Order* nonetheless dictates that, for *both* analog and digital broadcasters, the number of preemptions under the processing guidelines is limited to no more than 10% of core programs in a calendar quarter, averaged over a six-month period.[80] This was not reflected in the proposed rule, nor is it a "logical outgrowth" of the proposed rule.

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77 *Order*, 15 FCC at 22964 (¶ 58) (explaining that "exempting program promotions for children's educational and informational programming may encourage broadcasters to promote this programming").

78 *Id.* at 22956-58 (¶¶ 36-42).

79 *See, e.g.,* Comments of NBC, Inc., at 5 (filed Dec. 18, 2000) ("Another issue raised by the Commission in this Notice is how the agency will treat preemptions of core programs *by DTV broadcasters*.") (emphasis added); Joint Comments of Named State Broadcasters Associations, at 13 (filed Dec. 18, 2000) ("The NPRM also seeks comment on how the Commission should treat preemptions of core programming *by digital* broadcasters.") (emphasis added).

80 *Order*, 19 FCC Rcd at 22958 (¶¶ 41-42).

The preemption rule is also constitutionally infirm, even under the standard of review applicable to broadcast programming. The new rule does not directly advance any important governmental interest: nothing in the administrative record suggests that the current level of preemptions causes children any harm, and indeed the record establishes that viewership in some cases *increases* when E/I programming is moved to make way for special programming.[81] Thus, the preemption rule was not necessary to address any defect in the preexisting regime, which allowed preempted and rescheduled E/I programming to be counted towards the Commission's 3-hour processing guideline, as long as the broadcaster made reasonable efforts to inform the audience when the rescheduled program would be aired.

Nor is the preemption rule narrowly tailored. In particular, the rule is excessively rigid in light of the substantial impact that it will have on broadcasters' ability to deliver speech to an audience that wishes to receive it – a core First Amendment interest. Under the new rule, broadcasters will be forced to choose between refraining from delivering live programming (such as news or live sports) to an audience that wishes to receive it, or moving a considerable amount of E/I programming permanently to another slot where, presumably, it will displace other programming that an audience wishes to see at that time. Forcing programmers to choose between these options, in effect displacing the broadcasters' editorial judgment of what speech should be disseminated when, is irreconcilable with the First Amendment.

4. <u>The Multicasting Rule Violates the First Amendment.</u>

Finally, the multicasting rule runs afoul of the First Amendment because it is not narrowly tailored to achieve an important government interest. The Commission extended the 3-hour "processing guideline" to all additional free multicasting streams. There is no evidence that

81 Pet. for Recons. of Fox Entertainment Group, et al., at 7 (filed Feb. 2, 2005).

the current level of E/I programming offered on primary channels is inadequate to meet the needs of children.[82] The mere fact that broadcast *capacity* expands does not necessarily mean that the *need for E/I programming* also expands proportionately. The FCC has failed to establish that the expansion of the E/I requirement to all multicast streams effectuates the CTA's goal. Nor has the Commission demonstrated that this rule will remedy any actual harm. For these reasons, the multicasting rule, like the other rules adopted in the *Order*, is not legally sustainable.

B. THE COMPANIES WILL SUFFER IRREPARABLE HARM

If the new rules are implemented before the reconsideration petitions are resolved and the above-discussed defects are addressed, the Companies will suffer irreparable harm. First, the deprivation of the Companies' First Amendment rights is the paradigmatic irreparable injury. Second, the unquantifiable economic harm that the new rules will cause – *i.e.*, diminished corporate value, loss of customers, loss of goodwill, and competitive injury – is equally irreparable.

1. Deprivation of First Amendment Rights.

As shown above, the *Order* impairs the Companies' core First Amendment rights. The new rules intrusively regulate programming and other speech by: (1) restricting the display of website addresses during children's programming and subjecting the content of the Companies' websites to governmental regulation; (2) banning all host-selling on websites displayed during children's programming; (3) restricting the Companies' ability to promote their own programming by redefining "commercial matter" to include promotions of non-E/I programming; (4) inflexibly limiting preemption of E/I programming, thus interfering with

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[82] *See FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 397 (1984) (The government must show that its regulation will actually advance its asserted interest, because the "sacrifice [of] First Amendment protections for [a] speculative . . . gain is not warranted.").

broadcasters' ability to deliver programming to audiences that want it; and (5) drastically expanding E/I requirements to cover multicast streams.[83]

This dramatic intrusion on core First Amendment rights is irreparable.[84] It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[85] This irreparable injury stems from the "intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future."[86]

2. <u>Unrecoverable Economic Damages.</u>

Compliance with the rules announced in the *Order* will also inflict irreparable harm upon the Companies in the form of unrecoverable economic damages. These damages result from: (1) money lost to government regulation that cannot be recouped because of sovereign immunity; and (2) diminished corporate value, lost customers and goodwill, and competitive injury, none of which can be calculated.

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83 *See, e.g.,* Franks Decl. ¶¶ 38, 43 (discussing the impact on CBS's editorial discretion); Scannell Decl. ¶¶ 10-11, 37, 58, 61 (discussing the chilling effect of the new rules on Nickelodeon's ability to engage in creative expression and to communicate truthful, nonmisleading commercial speech to its viewers and customers); Liss Decl. ¶ 19 (discussing the impact on ABC stations' ability to televise sporting events live); Ross Decl. ¶¶ 12-15, 34, 36-38 (discussing the impact on ABC Cable Network Group's ability to communicate its offerings to viewers and customers).

84 This established rule applies with equal force to commercial speech. *See, e.g., Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001).

85 *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also, e.g., Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989); *Branch v. FCC*, 824 F.2d 37, 40 (D.C. Cir. 1987).

86 *Newsom*, 888 F.2d at 378 (quoting *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983)).

Federal agencies generally enjoy sovereign immunity from money damages suffered as a result of their regulatory decisions.[87] Accordingly, money lost due to the FCC's new rules will not be recoverable from the government. For this reason, in *Iowa Utilities Board v. FCC*,[88] a case challenging the Commission's pricing and "pick and choose" rules for wireline carriers, the Eighth Circuit held that "the incumbent LECs [Local Exchange Carriers] would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules were eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market."[89] The same is true here. Forcing the Companies to change their programming, promotional practices, advertising, and websites will inflict significant economic damage that can never be recovered from the government if the new rules ultimately are modified or overturned. Hence, these unrecoverable economic injuries constitute irreparable harm.

The Companies will also suffer irreparable injury in the form of unquantifiable economic losses, including: (1) diminished corporate value; (2) loss of customers (including television viewers, website users, advertisers, content providers, and business partners such as licensees), and goodwill; and (3) competitive injury.[90] Although the economic damage the rules will inflict on the Companies will undoubtedly be significant, it is difficult, if it not impossible, to ascertain

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87 *Ranger v. Tenet*, 274 F. Supp. 2d 1, 6 n.2 (D.D.C. 2003) ("Indeed, money damages are generally unavailable in cases involving review of a federal agency's administrative decision.").

88 109 F.3d 418 (8th Cir. 1996).

89 *Iowa Utils. Bd.*, 109 F.3d at 426; *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding sovereign immunity precluded adequate remedy at law); *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (irreparable injury found where the State imposed nighttime ban on use of airport because plaintiff was barred under the Eleventh Amendment).

90 *See, e.g.,* Scannell Decl. ¶¶ 34, 37-41, 45, 48; Franks Decl. ¶¶ 3, 33, 35, 40-41; Liss Decl. ¶¶ 19-22; Ross Decl. ¶¶ 9, 11-15, 34-35, 37-39.

that amount. Beyond the substantial revenue losses that will occur, the overall value of the Companies will likely diminish,[91] because the new rules limit the flexibility and efficiency of the Companies in, among other things, presenting a diversified menu of programming with the greatest appeal to existing and potential new viewers and business partners. Thus, it would be "exceedingly speculative" to attempt to quantify the diminution "in value between" the systems that the Companies "presently operate[] and the effectively smaller, more constrained network that compliance with the [new CTA rules] would entail."[92]

Second, the Companies' loss of customers and goodwill "is difficult, if not impossible, to quantify in terms of dollars."[93] "If customers are likely to stop patronizing a supplier because it can no longer continue to provide goods or services available elsewhere, the impossibility of calculating the value of this loss of goodwill amounts to irreparable injury."[94] For the reasons given above, the new rules are likely to drive away viewers, Internet users, advertisers, licensees, and content providers, such as those holding the rights for live sports events. For example, the preemption rule certainly may impair broadcasters' ability to air highly popular sports programming live during certain time periods on Saturdays, causing a loss of viewership and

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91 *See, e.g.,* Scannell Decl. ¶¶ 12, 48, 50-51 (describing overall harm to Nickelodeon brand value); Franks Decl. ¶¶ 25, 43(same, for CBS brand); Ross Decl. ¶¶ 11-12 (describing overall harm to Disney brands and harm to business model of ABC Cable Networks Group and ABC Kids); Gray Decl. ¶ 12 (describing overall harm to 4Kids brand).

92 *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673-74 (D.C. Cir. 2005).

93 *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003); *see also Ross Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (irreparable injury results where business would "lose incalculable revenues and sustain harm to its goodwill").

94 *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5th Cir. 1981) (citing *Guiness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 473 (2d Cir. 1980)).

advertising revenue, among other things.[95] Similarly, the potential loss of Saturday morning news programs would decrease viewership, harm advertising revenues, and create additional adverse ripple effects, such as the loss of the ability to cross-promote other programming and reputational harm.[96] The lost relationships and damage to the Companies' goodwill are unquantifiable and thus amount to irreparable injury.

Finally, the Companies will suffer the "lost opportunity to compete" – also an irreparable injury.[97] In particular, the preemption limit constrains broadcasters alone among providers of video programming in their ability to air live, non-news programming, such as sports, during time slots normally allocated for E/I children's programming.[98] Additionally, the promotion rule adversely affects the ability of broadcasters and cable operators to promote their own programs, but it does not currently affect competitors such as DBS providers,[99] public television stations and providers of other forms of video content such as DVDs.[100]

C. THE BALANCE OF HARMS WARRANTS AN ADMINISTRATIVE STAY

No appreciable harm to third parties will result from extending the effective date of the new rules, because the requested stay would do nothing more than maintain the *status quo*. In

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95 *See* Franks Decl. ¶ 26-27; Liss Decl. ¶ 19.

96 *See* Franks Decl. ¶ 25.

97 *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 664 (2003); *see also Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (agreeing with the district court that the loss of "investment and competitive position" constitutes irreparable harm); *BasicComputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (concluding that "the loss of fair competition . . . is likely to irreparably harm an employer").

98 *See* Franks Decl. ¶¶ 24, 26-27.

99 Although the Commission stated its intent to extend the new definition of commercial matter to DBS, it has not yet done so. *See Order*, 19 FCC Rcd at 22963 (¶ 57).

100 *See* Scannell Decl. ¶¶ 44-47, 49; Ross Decl. ¶¶ 11-13.

evaluating this factor, the issue is "whether injunctive relief would significantly harm other interested parties."[101] Even if any such harm can be identified, it is necessary to "'balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief.'"[102]

First, there is no evidence that any harm will result from maintaining the *status quo* pending Commission action on the petitions for reconsideration. The rules do not concern any matter of imminent risk to public health and safety. Moreover, by delaying the effective date of certain of the rules in January 2005, the Commission implicitly acknowledged that the dramatic impact of the rules outweighed any concomitant injury associated with maintaining the *status quo*. Indeed, the Commission preserved the *status quo* for almost five years while it considered whether to adopt the new rules. Furthermore, that the Companies' petitions for reconsideration remain pending with only months to go before the new rules take effect only underscores the gravity and complexity of the issues raised by the rules.

Although the record is devoid of evidence that concrete, quantifiable, non-speculative harm will result if the effective date of the new rules is delayed past January 1, 2006 to afford the Commission an adequate opportunity to conduct a plenary review of the Companies' arguments, the Companies have identified with particularity substantial injury to First Amendment interests and other harms that will accrue if the rules are implemented in their current form. These harms are not speculative, but will be visited upon the Companies as soon as the new rules take effect. Moreover, because the scope and breadth of the new rules were not adequately addressed in the

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101 *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

102 *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326 (D.C. Cir. 1987) (quoting *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987)).

NPRM, the Commission did not have a previous opportunity to rule on the merits of the important questions they present, as explained in the pending reconsideration petitions. Accordingly, this third factor weighs strongly in favor of granting the stay pending the outcome of reconsideration.[103]

D. AN ADMINISTRATIVE STAY IS IN THE PUBLIC INTEREST

For substantially the same reasons that the Companies' interest in obtaining short-term relief from the impending effective date outweighs any negligible harm that might be caused by such a relatively brief delay,[104] consideration of the public interest does not militate against granting the stay. To the contrary, it counsels in *favor* of a stay. Again, "[v]indicating First Amendment freedoms is clearly in the public interest."[105] Similarly, assuring the fulfillment of the APA's notice and comment mandate – provisions designed to protect the public's right to participate in rulemakings – is decidedly in the public interest.[106] As explained above, the new rules implicate core First Amendment and administrative due process rights.

Enforcement of these rules would contravene the public interest in other ways as well. As previously noted, the multicasting rule, for example, will impair both the transition to digital television and the development of new multicast channels. The Commission has long considered

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103 *See, e.g., Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) (granting relief where denial of stay would "utterly destroy the status quo" and entry of stay would only "cause relatively slight harm").

104 *See supra* pp. 14-16.

105 *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.").

106 *See Vikonics, Inc. v. United States*, Civ. A. No. 90-2423, 1990 WL 157925, at * 2 (D.D.C. Oct. 4, 1990) (explaining that "the public interest favors government compliance with applicable statutes and regulations").

increasing the availability of high definition programming to be of critical importance in driving the digital transition. To that end, the availability of additional program streams from digital broadcasters is likely to spur the purchase of digital television sets. And by making possible the broadcast of multiple program streams, digital television offers free over-the-air broadcasters new opportunities to provide innovative program services with specialized appeal to the viewing public. For all of these reasons, hindering the growth of multicast services decidedly is not in the public interest.[107]

In addition, this is not a case where Congress's remedial purpose would be frustrated by a stay. Rather, the Companies are currently subject to rules that the Commission originally deemed adequate to vindicate Congress's purpose in passing the CTA. In contrast to a situation in which federal regulatory intervention is the only practical means of achieving a remedial objective, in the instant case the viewing public enjoys the benefit of the original rules limiting children's exposure to commercial material, which have worked for many years. Further, parents have other means, completely independent of federal regulation, of reducing children's exposure to material they deem inappropriate. Accordingly, given the substantial constitutional and economic harms at stake, consideration of the public interest favors granting the stay.

V. CONCLUSION

For the foregoing reasons, the Commission should either extend or stay the effective date of the rules until 90 days after final action on the pending reconsideration petitions.

[107] *See* Franks Decl. ¶ 37-38, 42.

Respectfully submitted,

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