Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Children's Television Obligations Of Digital Television Broadcasters	)	MM Docket No. 00-167
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OPPOSITION TO MOTION FOR EXTENTION OF EFFECTIVE DATE OR, IN THE ALTERNATIVE, ADMINISTRATIVE STAY

Of Counsel:

Adam Lusthaus
John Kosmidis
Law Students
Georgetown University Law Center

Angela J. Campbell, Esq.
Jennifer L. Prime, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

Counsel for the Children's Media Policy Coalition

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SUMMARY

The Children's Media Policy Coalition strongly oppose the request by Viacom, Disney and NBC ("Companies') to stay or delay the effective date of four rules governing children's television that were adopted by the Commission in September 2004 and are slated to take effect in January 2006. These rules are designed to comply with Congressional intent that children have access to a reasonable amount of educational programming specifically designed for them and that the amount of commercial material in programs intended for children be limited.

Any further delay in the implementation of these rules would harm children and be contrary to the public interest. First, implementation of the revised guideline for children's educational programming, which permits broadcasters who chose to multicast to serve children's educational needs by providing a commensurate amount of children's educational programming on either their main program stream or on multicast channel(s), is particularly important now that that the vast majority of stations are broadcasting in digital and many have begun multicasting. Second, delay of the rule that children's educational programs pre-empted more than 10% of the time (averaged over six-months) are not regularly-scheduled and hence do not count toward the processing guideline, would harm children by making it more difficult for children to find and watch educational programs. Third, children will be harmed both by overexposure to commercial matter and the reduction in programming if the redefinition of "commercial matter" to include program promotions is stayed or delayed. Fourth, children will also be harmed by overexposure to commercial matter if the FCC stays or delays its website display rule, which counts against commercial time limits on-screen displays of addresses for websites of a primarily commercial nature. Similarly, delay of the rule prohibiting on-screen displays of addresses for websites that contain host-selling would allow the Companies to take unfair advantage of children by using their programs to urge children to visit websites full of host-selling. Finally,

the public interest would be harmed by delay because the Companies would continue to develop and expand business models that do not serve children's needs.

The Companies have not met the test necessary for issuance of a stay. Specifically, they have failed to demonstrate that their legal challenges to the rules are likely to succeed. The Commission provided adequate notice and possesses adequate statutory authority for each of the rules. The Companies' claim that the rules somehow violate the First Amendment ignores the fundamental point that the airwaves belong to the public and these companies are licensed to use that spectrum only so long as they serve the public interest. Under a long line of Supreme Court cases, requiring broadcasters to serve children by providing educational programming does not violate broadcasters' First Amendment rights because the public's First Amendment rights to have access to such programming is paramount. Nor do the FCC's reasonable limit on the amount of commercial matter and prohibition on unfair advertising practices on broadcast and cable television present any constitutional difficulties under the applicable standards.

The Companies have also failed to show the rules would cause them irreparable harm. Economic harm alone does not constitute irreparable injury. The basis for the Companies' claim of economic harm is that they can make more money if they do not have to provide educational children's programming or limit the number of commercials on children's programs. But the Congressional mandate to provide children's educational programming and limit commercials, as well as the FCC guidelines implementing that mandate, exist precisely because unregulated market forces do not result in a sufficient amount of educational programming for children and do not effectively limit the amount of commercials to which children are exposed. But even assuming *arguendo* that the cost of complying with new regulations could be considered irreparable harm, the Companies claims of harm are highly speculative and often based on

erroneous or exaggerated assumptions. When the harm to children from staying the rules is balanced against the insubstantial claims of the Companies, it is clear that a stay would not serve the public interest.

Finally, having failed to meet the test for a stay, the Companies do not fare any better under the "good cause" standard of the FCC rules. Companies have not shown any unique or unusual factual circumstances preventing compliance with the rules. They process ample resources and will already have more than a year to come into compliance. Requiring compliance with the rules by January 2006 will promote the public interest, while any further delay would undermine important public interest objectives.

SUMMARY 2

I. FURTHER DELAY OF THE COMMISSION'S RULES WILL HARM CHILDREN AND IS CONTRARY TO THE PUBLIC INTEREST 7

II. THE COMPANIES HAVE NOT MET THE TEST NECESSARY FOR ISSUANCE OF A STAY 13

A. The Companies Have Failed to Show a Likelihood of Success on the Merits 13

1. The Companies have failed to show a likelihood of success on the merits regarding the website display provisions 14

2. The Companies have failed to show a likelihood of success on the merits regarding the decision to count program promotions as commercial mater 16

3. The Companies have failed to show a likelihood of success on the merits regarding limits on preemptions of children's educational programming 19

4. The Companies have failed to show a likelihood of success on the merits regarding extension of programming guidelines to multicasting 21

B. The Companies Have Failed To Show That the Rules Would Cause Them Irreparable Harm 22

C. Balancing the Harms Shows That a Stay Would Not Be in the Public Interest 25

III. THE COMPANIES HAVE NOT SHOWN GOOD CAUSE FOR FURTHER EXTENSION OF THE EFFECTIVE DATE OF THE RULES 25

CONCLUSION 28

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Children Now, American Psychological Association, American Academy of Pediatrics, Action Coalition for Media Education, American Academy of Child and Adolescent Psychiatry, Benton Foundation, National Institute on the Media and the Family, National PTA, and Office of Communication of the United Church of Christ, Inc. ("Children's Media Policy Coalition" or "Coalition") oppose the Motion for Extension of Effective Date or, in the alternative, Administrative Stay filed by Viacom Inc., The Walt Disney Company, NBC Universal, Inc., and NBC Telemundo License Co ("Companies") on September 26, 2005. [1] The four FCC rules being challenged -- limits on the number of times that a children's educational programming can be pre-empted and still count as regularly scheduled, counting program promotions toward the commercial limits, counting displays of addresses for commercial websites toward the commercial limits, and a commensurate expansion of the existing processing guideline for children's educational programming to include multicast channels -- are either moderate, reasonable clarifications of existing rules in response to the documented problems (such as excessive preemptions of children's educational programs and excessive numbers of program

[1] The Coalition timely files this Opposition pursuant to 47 CFR § 1.45(d). Replies to this Opposition should not be filed and will not be considered by the Commission. *Id.*

promotions) or extensions of these existing rules to address new capabilities (multicasting and interactivity) associated with digital television.[2] While the Coalition urges the FCC to act promptly on the petitions for reconsideration and to provide clarification where needed, it would disserve the interests of children and be contrary to the public interest to delay the effective date of the rules until after it acts on reconsideration.

I. FURTHER DELAY OF THE COMMISSION'S RULES WILL HARM CHILDREN AND IS CONTRARY TO THE PUBLIC INTEREST

Children will be harmed if the Commission further extends or stays the rules. Children have already been waiting for six years for the FCC to adopt public interest obligations for digital television. The Commission began this rulemaking proceeding in 1999,[3] issued a Notice of Proposed Rulemaking in 2000,[4] sought further comment in 2003,[5] and finally adopted an

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[2] The Companies have not specifically challenged the Commission's determination that its commercial limits and policies apply to all digital video programming directed to children ages 12 and under whether that programming is aired on a free or pay digital stream. *Children's Television Obligations of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 22943, 22960 (2004) ("*2004 Children's Television Order*"). The Commission started enforcing this rule on February 3, 2005. Children's Television Obligations of Digital Television Broadcasters, Order on Reconsideration, 20 FCC Rcd 2055 (2005). Nor have they requested an extension or stay of the Commission's rule that broadcasters identify programming specifically designed to educate and inform children by displaying the symbol E/I, throughout the program. *2004 Children's Television Order*, 19 FCC Rcd at 22959 (codified at 47 CFR § 73.671(c)(5)), which took effect on September 12, 2005. Children's Television Obligation of Digital Television Broadcasters, 70 FR 48294 (Aug. 17, 2005). Thus, even should the Commission see fit to grant the Companies some relief, these rules should continue in effect.

[3] *Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry*, 14 FCC Rcd 21,633 (1999).

[4] *Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking*, 15 FCC Rcd 22946 (2000) ("*NPRM*").

[5] *Second Periodic Review of the Commission's Rules and Policies Affecting the conversion to Digital Television, Notice of Proposed Rulemaking*, 18 FCC Rcd. 1279 (2003) ("*Second Periodic Review*").

Order in September 2004 that was released in November 2004.[6] In that Order, the Commission established different effective dates for different rules. For example, it established February 1, 2005, as the effective date for the application of the rules regarding the display of Internet addresses. However, it made the revised definition of commercial matter effective January 1, 2006, to "give programmers time to produce sufficient children's programming and other material to include within the children's programming that would not be considered commercial matter."[7] Likewise, the Commission made the 10% pre-emption limit as applied to analog broadcasters effective January 1, 2006, "to give licensees time to develop programming or to renegotiate or allow expiration of existing program contracts as necessary."[8]

Subsequently, on January 31, 2005, the Commission *sua sponte* issued an Order on Reconsideration that extended the compliance date for the display of website addresses from February 1, 2005 to January 1, 2006.[9] The Commission states that it took this action in response to concerns expressed by some broadcasters, cable operators, and programmers that it would be difficult to comply by the effective date:

> Specifically, these parties state that they were unprepared for the decision to regulate website displays virtually immediately, and that each company must structure a plan of compliance and then reconstruct its website or websites accordingly. These parties have requested that the effective date of these new rules be deferred to January 1, 2006, consistent with the effective date of many of the other requirements in the *Order*. [10]

Thus, the FCC has already been quite generous in giving the Companies time to comply with its new rules.

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[6] *2004 Children's Television Order*, 19 FCC Rcd 22943.
[7] *Id.* at 22967.
[8] *Id*.
[9] *Children's Television Obligations of Digital Television Broadcasters, Order on Reconsideration*, 20 FCC Rcd 2055 (2005).
[10] *Id.*

Furthermore, digital television is already a reality. As noted in the Franks' Declaration, 189 CBS owned and affiliated stations serving 99% of the population are already broadcasting in digital.[11] Indeed, the FCC's rules require that, unless granted a waiver, all commercial television stations must construct and operate a DTV station by May 1, 2003.[12] Many stations are already engaged in multicasting[13] and sales of digital sets have risen substantially.[14] Congress is currently considering legislation that will further accelerate the digital conversion by establishing a hard date, perhaps as early as January 1, 2009, for return of the analog spectrum.[15]

In the CTA, Congress made it plain that in order for a broadcast licensee to meet the public interest standard necessary for renewal, it must demonstrate that it has provided programming that is specifically designed to serve the educational and informational needs of children. Congress requires stations to provide children's educational programming because "children are lagging behind those in other countries in fundamental skills, including reading, writing, mathematics, science, and geography" and television can teach them these skills.[16] In the 1996 Telecommunications Act, Congress made it clear that digital broadcasters are also required to serve the public interest.[17] Also, in 1996, the Commission adopted the 3-hour

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[11] Motion for Extension of Effective Date or, in the Alternative, Administrative Stay, MM, Dkt No. 00-167, filed September 26, 2005 (Decl. of Martin D. Franks, CBS at ¶ 35) ("Companies' Motion").
[12] 47 CFR § 73.624(d).
[13] July 2005 Survey of Television Station's Multicasting Plans, NAB Research and Planning, *at* http://www.nab.org/newsroom/pressrel/Releases/083105_DTVNewsConference.htm (last visited October 3, 2005) (demonstrating that 225 commercial television stations were multicasting).
[14] Press Release, Consumer Electronic Association, DTV Sales Poised For 2005 Explosion, *at* www.ce.org/print/Press/CEA_Pubs/917.asp? (last visited October 3, 2005).
[15] Save Lives Act, S.1268 109th Cong. (2005).
[16] Children's Television Act of 1990, Pub. L. No. 101-437 § 202, 104 Stat. 996, 997 (1990).
[17] 47 U.S.C. § 336(d).

processing guideline because if found that market forces did not ensure sufficient educational programming for children.[18]

As demonstrated in comments, merely providing three hours per week of children's educational programming does not currently meet the diverse educational needs of children of different ages, backgrounds and interest.[19] If the multicast processing guideline is delayed, children will be harmed because without the guideline, stations are unlikely to provide any additional children's educational programming. Indeed, the Declarations make clear the extent of the broadcast networks' strong resistance to voluntarily airing children's educational programming.[20] Delaying implementation of the multicasting guideline at the very time that many stations are starting to multicast would discourage them from "taking advantage of improvements in technology and compression to devote even more time and ingenuity to family or children's programming" and the creation of family or kids' channels on the multicast streams as anticipated by Chairman Martin.[21]

A delay in the rule limiting preemption to 10% will harm children because they will have difficulty locating educational programming if broadcasters preempt programming excessively. In 1996, the Commission required that E/I programs be regularly scheduled so that children and parents could easily locate them and they could develop an audience.[22] As the Commission has recognized in the NPRM, programs aired on a regular basis are more easily anticipated and

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[18] *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10660 (1996) ("*1996 Order*").
[19] Comments of Children's Media Policy Coalition, MM Dkt. No 00-167, filed April 21, 2003.
[20] *See, e.g.*, Companies' Motion (Decl. of Martin D. Franks, CBS at ¶ 38) (claiming that putting children's programming on specialized cooking or news channels would reduce advertising revenues).
[21] *2004 Children's Television Order*, 19 FCC Rcd at 22995 (Statement of Commissioner Kevin J. Martin).
[22] *1996 Order*, 11 FCC Rcd at 10709.

located by viewers.[23] Since 1996, preemption has been a consistent problem.[24] Indeed, Franks admits that CBS stations have pre-empted more than 10% of their children's programming in the past and plans to do so in the upcoming fall season. [25] Thus, if the rule is delayed, children's educational programming will continue to be preempted at high rates. If the 10% pre-emption limit were to cause broadcasters to shift programming to times other than Saturday mornings, children would benefit from having access to such programming available at these times when at present, no children's educational programming airs.

If the FCC extends or delays its rules revising the definition of commercial matter to include program promotions, children will be harmed by overexposure to commercial matter and the reduction in program time Market forces do not assure that children will not be exposed to excessive commercial material.[26] Congress found that "special safeguards are appropriate to protect children from overcommercialization on television."[27] The limits set by Congress -- 10.5 minutes per hour on weekend and 12 minutes per weekday -- provide ample time for the Companies to both air paid advertising and promote programming.

When the FCC first implemented these limits, it did not count promotions for programs on the same channel, although it did count promotions for programs on commonly owned

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[23] *NPRM*, 15 FCC Rcd at 22956.

[24] Comments of the Center for Media Education Comments MM Dkt. No 00-167, filed Dec. 18, 2000 ("CME Comments") (citing FCC Mass Media Bureau, The Effect of Preemption on Children's Educational and Informational Programming 1997-1998 Television Season, DA 98-2306 (1998) ("1997-1998 Bureau Preemption Report.))"

[25] Companies' Motion (Decl. of Martin D. Franks, CBS at ¶¶ 20-33); *see also* Companies' Motion (Decl. of Walter Liss, ABC at ¶¶ 24-5) (admitting that some stations were pre-empting shows up to 30% of the time).

[26] *NPRM*, 15 FCC Rcd at 22948 (explaining that, in 1984, when the Commission repealed its commercial guidelines for kids the amount of commercial matter broadcaster during children's programming increased) *See also Action for Children's Television v. FCC*, 821 F.2d 741, 744 (D.C. Cir. 1987).

[27] Children's Television Act of 1990, Pub. L. No. 101-437 § 101, 104 Stat. 996 (1990).

channels. Since that time, the amount of time devoted to program promotions has vastly increased.[28] Indeed, Nickelodeon concedes that it averages 3-4 minutes of promotions each hour in addition to 9-10 minutes of commercials.[29] Thus, if the rules are delayed, children will continue to be subject to excessive advertising.

Children will also be harmed by overexposure to commercial matter if the FCC stays or delays its website display rules. Although Disney and Viacom present their websites as providing a "safe and child-friendly havens,"[30] some contain substantial amounts of advertising on their home pages,[31] have shopping links on their home pages, and use program characters to promote products.[32] While it is true that children like SpongeBob, Dora, and other characters that appear on the Companies' websites,[33] the very problem with host-selling, as the Commission stated in its 1974 Policy Statement, is that it takes advantage of the trust children place in program characters.[34] Delay of the rules, will allow the Companies and other advertisers to take unfair advantage of children by using their programs to urge children to visit websites full of commercial matter and host-selling.

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[28] For example, children's exposure to promotional material and PSA's has increased by approximately 200% since 1974. TV advertising to Chidlren 1977 v. 2004, Pauline M. Ippolito Bureau of Economics, FTC July 14, 2005. *See also* Opposition to Petitions for Reconsideration of the Children's Media Policy Petition, MM Dkt. No 00-167, March 23, 2005 at 18 ("CMPC Reconsideration Opposition").

[29] Companies' Motion (Decl. of Herb Scannell, Nickelodeon at ¶ 34).

[30] Companies' Motion at 9.

[31] *See, e.g., Id*. (Decl. of Herb Scannell, Nickelodeon at ¶¶ 54-63) (explaining that Nickelodeon receives revenue from direct sales and third parties who advertise on its website).

[32] CMPC Reconsideration Opposition at 24, fn.104 (showing an example of a host selling advertisement that was displayed on www.nickelodeon.com featuring SpongeBob SquarePants promoting Virgin Mobile products).

[33] *See, e.g.* Companies' Motion (Decl. of Herb Scannell, Nickelodeon at 29).

[34] *Children's Television Report and Policy Statement*, 50 FCC 2d 1, ¶¶ 26-27 (1974) aff'd., Action for Children's Television v. FCC, 564 F.2d 458, ¶ 52 (D.C. Cir. 1977) ("*1974 Policy Statement*").

Finally, if the Commission delays implementing these rules, the Companies will continue to develop and expand business models that do not serve children's needs. This would give them even more reasons to argue that they cannot comply with the new rules without undue disruption to their business.[35] In sum, delaying or staying the rules would cause substantial and immediate harm to children.

II. THE COMPANIES HAVE NOT MET THE TEST NECESSARY FOR ISSUANCE OF A STAY

To determine if a stay should be granted the Commission looks to: 1) the likelihood of success on the merits; 2) the likelihood of irreparable injury; 3) harm to other parties; and 4) the public interest.[36] The Companies have failed to demonstrate that a stay is warranted under these factors.

A. The Companies Have Failed to Show a Likelihood of Success on the Merits

The Companies' legal challenges to the new rules are without merit. The claim that the rules somehow violate the First Amendment ignores the fundamental point that the airwaves belong to the public and these companies are licensed to use that spectrum only so long as they serve the public interest. Under a long line of Supreme Court cases, requiring broadcasters to serve children by providing educational programming does not violate the broadcaster's First Amendment rights because the public's first amendment rights to have access to such programming on the public airwaves is paramount. Similarly, the FCC's reasonable limit on the

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[35] *Cf.* Companies' Motion (Declaration of Martin D. Franks, CBS Inc. at ¶¶ 12-33) (stating the preemption rule would force them to change their scheduled sports, news, or general audience programming, all of which lead to higher profits than children's E/I programming); Companies' Motion (Declaration of Herb Scannell, Nickelodeon, Inc. at ¶¶ 42-53) (stating that the promotion rule would force Nickelodeon to choose between profitable advertising or program promotions to build audience loyalty).

[36] *WMTA v. Holiday Tours, Inc.*, 559 F.2d 84, 843 (D.C. Cir. 1977).

amount of commercial matter and prohibitions on unfair advertising practices on television do not present any constitutional difficulties.

1. The Companies have failed to show a likelihood of success on the merits regarding the website display provisions

The Commission's website display rules are based on adequate notice and are well within the FCC's jurisdiction. The regulations are aimed at limiting the commercial exposure of children to commercial advertising by controlling what they see on the television. They do not regulate the Internet, nor do they impinge on the Companies' First Amendment rights.

The Companies claim that the Commission failed to give notice because it only sought comment on a proposal to prohibit direct, interactive links to websites and the Commission actually addressed "a completely different issue."[37] However, direct interactive links and the display of website addresses are not completely different issues. To interactively link to a website, the television set will first need to display the web address. And the NPRM specifically seeks comments on "How should the appearance of a commercial link be counted in calculating the number of commercial minutes for purposes of our commercial limits?"[38]

The only difference between the display of a web address and an interactive link is that with the former, a child needs to input the website address into a computer,[39] while in the later, she will only need to click on the web address. Just because interactive ads would provide a faster means of connection does not eliminate the concerns raised by the commercial content of the underlying website. The term "direct link" used in the NPRM is broad enough to refer to

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[37] Companies' Motion at 19.
[38] *NPRM*, 15 FCC Rcd at 22958.
[39] Children today are often using their computers at the same time they watch television, making the distinction even finer. Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds*, at 53-55 (2005).

both ways of accessing a website. In fact, Warner Brothers noted the connection between passive displays and interactive links in its Reply Comments.[40] Even if the term "direct link" is interpreted to refer only to interactive links, the display rules are a logical outgrowth of the proposals in the NPRM. In fact, the four part test is adapted from the proposal of Sesame Workshop regarding interactive links.[41]

The Commission also has jurisdiction under the CTA to impose the website display rules. It adopted the website display rule out of concern that "the display of such addresses for websites established solely for commercial purposes in children's programs in inconsistent with our mandate under the CTA to protect children, who are particularly vulnerable to commercial messages and incapable of distinguishing advertising from programming material."[42]

The Companies' jurisdictional challenge rests entirely on the idea that websites rather than television that is being regulated.[43] However, the Order is very clear – it is only "the display of Internet website addresses during [children's] program material" and not the websites themselves that come within the CTA limitation.[44] The FCC rules neither prohibit broadcasters and cable networks from putting any content on their websites, nor mandate the inclusion of any content. All the FCC rules do is determine when website addresses appearing *on television* constitute commercial matter subject to the advertising limits. Similarly, because the website reference rule does not regulate the Internet, the FCC should reject the Companies' argument

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[40] Reply Comments of the WB Television Network, MM Dkt. 00-167, filed Jan. 17, 2001 at 6, fn. 6.

[41] *2004 Children's Television Order* 19 FCC Rcd at 22961. For the same reasons, the Companies' claim that there was inadequate notice about the rule prohibiting displays of websites containing host selling, Companies' Motion at 19-20, is similarly unavailing. The *NPRM* sought direct comment on the combination of direct commercial links and host-selling on the websites displayed. *NPRM* at 15 FCC Rcd at 22958.

[42] *2004 Children's Television Order*, 19 FCC Rcd at 22961.

[43] Companies' Motion at 20, citing 47 U.S.C. § 303a.

[44] *2004 Children's Television Order*, 19 FCC Rcd at 22961.

that the website display rules are unconstitutional under the strict scrutiny test applied to the Internet.[45]

The Commission should also reject the Companies other "constitutional" claims.[46] The website rule has little or no impact on the Companies' ability to inform adult audiences. Nothing in the rule prevents the Companies from providing information to both adults and children on websites; it merely prevents overly commercial website addresses from being displayed on programs intended for children aged 12 and under unless they are counted in the commercial limitations. Websites that do not meet the 4-part test can be displayed during other programs. Moreover, the four part test is not unconstitutionally vague. Terms such as "substantial amount," "*bona fide*" and "noncommercial" are routinely used in a variety of statues and regulations.[47]

2. The Companies have failed to show a likelihood of success on the merits regarding the decision to count program promotions as commercial mater

The Commission's revision of the definition of "commercial matter" to include program promotions is well within its statutory authority and does not raise any First Amendment concerns. The FCC revised its definition of "commercial matter" to maximize the amount of program content and reduce the interruptions in children's program, as well as further protect children from over-commercialization.[48] Additionally, the Commission exempted E/I program promotions to bolster awareness of E/I programming.[49]

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[45] Companies' Motion at 21.
[46] *Id*. at 21-22.
[47] *See, e.g.*, 47 U.S.C. § 315 (bona fide news exemption for equal use of broadcasting station for public office candidates); 47 C.F.R. § 73.503 (noncommercial educational FM broadcast stations); 47 C.F.R. § 73.621 (noncommercial educational TV stations); 47 C.F.R. § 1.1212(h) (ex parte presentations and "substantial amount" or correspondence involved).
[48] *2004 Children's Television Order*, at 22963.
[49] *Id*. at 22963.

The FCC possesses clear authority to modify this definition.[50] Although the CTA itself does not define commercial matter, §303a(c) explicitly authorizes the FCC to "review and evaluate the advertising duration limitations" and "after notice and public comment and a demonstration of the need for modification of such limitations, *modify such limitations in accordance with the public interest*."[51] The FCC can modify the limitations directly by changing the numerical limits, for example by reducing the weekday limit from 12 minutes to 10 minutes, or by changing the definition of commercial matter to be more inclusive. In this particular instance, the Commission has chosen to modify the advertising limits by altering the definition of commercial matter.

The Companies base their claims primarily on nonbinding language in the Senate Report stating that "[t]he Committee intends that the definition of 'commercial matter' . . . will be consistent with the definition used by the FCC in its former FCC Form 303."[52] However, the FCC found that its revised definition is consistent with the definition used in former FCC Form 303.[53] Form 303 specifically categorized "promotional announcements of a future program where consideration [is] received" as commercial matter.[54] When a station airs promotions for its own programs, it is clearly receiving consideration in the form of increased audiences, which translates into increased ad revenue during the promoted programs.[55] Furthermore, the Companies, in effect, concede that they receive consideration for airing promotions of their own programming when they argue that changing the definition will adversely affect their revenues.

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[50] *See* Companies' Motion at 22.
[51] 47 U.S.C. § 303a(c) (emphasis added).
[52] *See* S. Rep. No. 101-227, at 21 (1989) ("*Senate Report*").
[53] 2004 Children's Television Order at 22963-4.
[54] Senate Report at 21.
[55] *See 2004 Children's Television Order*, at 22963-22964.

Moreover, the revised definition remedies an anomaly in the former definition. Under the former definition, a promotion for a program shown on a commonly owned station in the same market already counted as a commercial advertisement. Thus, for example, in Washington, D.C., where Fox owns both the WTTG and WDCA, a promotion for a children's program on WTTG would count as commercial matter if shown on WDCA but not on WTTG. The new definition of commercial matter recognizes such promotions have the same effect on children, regardless of the station which shows it.

Even if the FCC's revised definition were inconsistent with the former Form 303, the FCC still has authority to change the old definition. Although Congress clearly intended the FCC to use the Form 303 definition as a starting point, nothing in the CTA or its legislative history expresses Congress' intent to prohibit the FCC from changing the definition in the future if circumstances have changed such that a change would serve the public interest. As the courts have found, "[t]o freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place."[56]

The Commission's new definition of "commercial matter" is not only authorized by statute, but is also constitutional. Limiting promotions easily satisfies the test for commercial speech set forth in *Central Hudson*.[57] The rule serves two substantial governmental interests -- protecting children from over commercialization and increasing the amount of E/I programming available to children. The FCC reasonably found that the large number of program promotions reduced the amount of educational programming reaching children.[58] Moreover, the Commission's revised definition is narrowly tailored to advance these important governmental

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[56] *AFL-CIO v. Brock*, 835 F.2d 912, 916 (C.A.D.C.,1987).
[57] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).
[58] *See* CMPC Reconsideration Opposition at 18 (filed Feb. 2, 2005).

interests because it allows ample time for ads and promotions during children's programming as well as permitting such commercial material at other times when children are watching television.

The Commission should further reject the Companies' claim that the distinction between E/I and non-E/I promotions somehow makes the regulation unconstitutional.[59] To the contrary, the exception for promotions for E/I programming aired during children's programming reflects a careful weighing of the costs and benefits of such promotions and, if anything, demonstrates how the FCC has carefully tailored this regulation.[60] Therefore, the revised definition of commercial matter raises no problems under the First Amendment.

3. The Companies have failed to show a likelihood of success on the merits regarding limits on preemptions of children's educational programming

Contrary to the Companies' contentions, the new rules on preemption of children's core programs were based on adequate notice and do not violate any of the broadcaster's First Amendment rights.

Under the APA, it is sufficient that an agency give "a description of the subjects and issues involved."[61] Comments raising possible agency action can also contribute to notice requirements.[62] Also, the final rule need only be a "logical outgrowth" of the proposed rule.[63] Here, the NPRM gave notice of the issues involved in asking how the Commission might modify

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[59] Companies' Motion at 23.
[60] *Cf. Lorillard Tobacco Co*, 533 U.S. 525, 561-66 (2001) (stressing the importance of balancing the benefits and harms in assessing the constitutionality of a regulation); *Marketing Services, Inc. v. F.T.C.* 358 F.3d 1228 (10th Cir. 2004).
[61] 5 U.S.C. § 553(b)(3).
[62] *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (citing *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224, 1243 (D.C. Cir 1988)).
[63] *Spring Corp. v. FCC*, 315 F.3d 369, 375 (D.C. Cir 2003).

its preemption policy.[64] Although the Companies' claim that the NPRM referred only to preemptions on digital television, not analog television,[65] in fact, the NPRM gave notice that it was also seeking comment on certain issues affecting analog broadcasts,[66] and it called for comments on how the FCC could increase awareness of core programs and how to locate them.[67] The 10% preemption rule is a direct, logical result of the NPRM because it is intended to increase the visibility of E/I programming.

Additionally, comments filed by the Center for Media Education et al. provide further evidence of adequate notice. The comments specifically urged that preemption limits should apply to both digital and analog broadcasters in order to increase the ability of core programming to attract and retain an audience.[68] These comments show the foreseeability of the FCC's decision and provided the broadcasters with a chance to respond to the proposal by filing reply comments, ex parte letters, or comments in the *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*.[69]

The Companies' constitutional argument regarding preemptions is premised on the wrong standard of review. Because the pre-emption rule applies only to broadcasters, it is subject to only rational review. Limiting the number of pre-emptions for programs counted toward the 3-

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[64] *NPRM*, 15 FCC Rcd at 22957.
[65] Companies' Motion at 24.
[66] *NPRM*, 15 FCC Rcd at 22946.
[67] *Id*. at 22961.
[68] CME Comments at 16-17. The NAB specifically addressed CME's proposal, showing notice to parties. Reply Comments National Association of Broadcasters MM Dkt No. 00-167 filed January 17, 2001 .
[69] 18 FCC Rcd 1279, 1319-20 (2003). The *Second Periodic Review* sought to update the record in the Children's DTV proceeding.

hour guideline is a reasonable way to serve the interests of viewers (parents and children) by making it easier for them to find and watch educational programming.[70]

In any case, excessive pre-emptions are a real problem. During the first few years after the guidelines took effect, the Mass Media Bureau actively monitored the level of pre-emptions by sending letters to the networks.[71] In its three year review, the Bureau found that while preemption levels were generally consistent with the CTA's goals, the three largest network affiliates' preemption rates were "notable" and "especially significant for stations in the West."[72] The 10% limit addresses the problem of excessive pre-emptions without imposing undue burdens on broadcasters' speech. Broadcasters may either schedule children's programming at times when it is not likely to be pre-empted, or if a program is pre-empted too many times to be considered regularly scheduled, may demonstrate that they have served children's educational needs in other ways.[73]

4. The Companies have failed to show a likelihood of success on the merits regarding extension of programming guidelines to multicasting

The Commission has properly updated the children's programming processing guideline to increase the amount of core programming needed to meet the guideline for those broadcasters

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[70] *1996 Order*, 11 FCC Rcd at 10711.

[71] *See, e.g.*, Letters dated July 11, 1997 from Roy J. Stewart, Chief, Mass Media Bureau to: Martin D. Franks, Senior Vice President, CBS Inc.; Alan Braverman, Senior Vice President & General Counsel, ABC Inc.; Rick Cotton and Diana Zipursky, NBC Inc.

[72] Three Year Review of the Implementation of the Children's Television Rules and Guidelines 1997-1999, Mass Media Bureau at ¶ 49 (Jan. 2001).

[73] Option B of the Processing Guidelines of the *1996 Order* seems to anticipate this very situation. Instead of meeting the three hours of core programming, a broadcaster can show "a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children at least equivalent to airing three hours per week of core programming." 11 FCC Rcd. at 10718. This option is echoed in the *2004 Children's Television Order*, 19 FCC Rcd at 22958.

who choose to multicast.[74] This commensurate increase is a reasonable means of implementing the CTA's directive that the FCC examine the extent to which licensees have served the educational needs of children and the 1996 Act's mandate that digital broadcasters serve the public interest on their digital channels.

Once again, the Companies' First Amendment claim is premised on the wrong standard.[75] The multicasting guidelines apply to broadcasting which is subject to only rational basis review. But, even were intermediate scrutiny to apply, the multicast guidelines would pass scrutiny. They address a real problem. The record shows that three hours per station per week of E/I programming is not enough to satisfy the diverse programming needs of children of different age groups and backgrounds.[76] Moreover, broadcasters that choose to multicast and do not wish to provide additional core programming remain free to demonstrate that they have served the educational needs of children in their audience by other means.

B. The Companies Have Failed To Show That the Rules Would Cause Them Irreparable Harm

Not only have the Companies failed to demonstrate the likelihood of success on the merits, they have failed to show that implementation of the rules as scheduled would cause them irreparable harm.

The Companies assert that any deprivation of their First Amendment rights is by definition, irreparable harm. However, the Commission has found that "[i]f the First

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[74] *See* Senate Report at 10-11; *1996 Order*, 11 FCC Rcd 10660 at 10728-33.
[75] Companies' Motion at 25.
[76] Comments of the CMPC at 4-5 (filed April 21, 2003), citing Benton Foundation, *The FCC Gives Teeth to the Children's Television Act of 1990*, at http://www.benton.org/Policy/TV/kidstv-sum.html).

Amendment claim is a losing claim…there is no such irreparable injury."[77] Here, as shown above, there is no merit to the Companies' First Amendment claims, and thus their allegations of First Amendment violations do not support a finding of irreparable injury.[78]

The Companies claim that implementation of the rules will cause unrecoverable economic damage should also be rejected. It is well known that "economic loss does not, in and of itself, constitute irreparable harm."[79] Moreover, it is not unusual for regulatory changes to cause companies to incur additional expenses. That is the nature of a regulated industry.[80]

The basis of the Companies' allegation of economic harm is that they can make more money if they do not have to provide educational children's programming or limit the number of commercials on children's programs. But the Children's Television Act's mandate to provide children's educational programming and the FCC guidelines implementing that mandate exist precisely because unregulated market forces do not result in a sufficient amount of educational

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[77] A-R Cable Services - ME, Inc. v. F.C.C., 1995 WL 283861, *2 (D.Me.1995).

[78] The leading case cited by the Companies, *Elrod v. Burns*, does not involve broadcasting, but rather found that patronage dismissals of public employees violated the employees' First Amendment freedoms of belief and association regarding core political speech. While *Branch v. FCC* did involve broadcasting, the discussion of injury from alleged violation of constitutional rights was used to show that the petitioner had standing, not to find irreparable harm for purposes of a stay. Further, in that case, the court found that a content based provision in the Communications Act that requires broadcast stations to afford equal opportunities to opposing candidate if it permits a newscaster who is also a candidate to appear on the air, did not violate the First Amendment.

[79] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985).

[80] *See generally*, *McConnell v. FEC*, 540 U.S. 93, 332-333 (2003). Additionally, given that the Companies have known of these rules for a significant amount of time, and have even already received a one year extension, they have had "ample time to budget for an expenditure of money to avoid any purported 'economic harm' caused by compliance with the Commission's rules." *In the Matters of US West, Inc. Petition for Reconsideration or Waiver v. BellSouth Corporation Motion for Stay of Blocking and Unblocking Requirements for Transmission of Calling Party Number (CPN) from Party Lines*, 13 FCC Rcd 6468, 6476 (1998).

programming for children and do not effectively limit the amount of commercials to which children are exposed.[81]

Even assuming *arguendo* that the cost of complying with new regulations could be considered irreparable harm, the Companies have failed to "demonstrate the alleged harm is both certain and great;…actual and not theoretical."[82] Indeed, they admit that the alleged damage to "corporate value, lost customers and goodwill, and competitive injury" cannot be "calculated"[83] and that "it is difficult, if it [sic] not impossible, to ascertain the amount" of economic damage.[84]

Moreover, many of the Companies' claims of economic harm are based on erroneous or exaggerated assumptions. For example, at times, they claim that the new rules limit preemptions to 10% each quarter,[85] when in fact, the rules allow the Companies to average two consecutive quarters.[86] Similarly, they ignore the fact that even if they exceed the 10% pre-emption limit, they may still meet the FCC's guideline under Category B, in which "[b]roadcasters that air somewhat less than three hours per week of core programming will also receive staff-level approval if they show that they have aired a package of different types of educational and informational programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming."[87]

Additionally, they ignore the possibility that by providing more educational children's programming, they may actually be increasing the goodwill of their viewing audience. Thus, the

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[81] *See, e.g., 1996 Order*, 11 FCC Rcd at 10671.
[82] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).
[83] Companies' Motion at 27.
[84] *Id*. at 28-29.
[85] Companies' Motion at 5, 12, (Decl. of Martin D. Franks at ¶ 20).
[86] 2004 Children's Television Order, 19 FCC Rcd at 22958.
[87] *1996 Order*, 11 FCC Rcd at 10723.

Companies have failed to show any irreparable harm that would result from letting the rules take effect as scheduled.

C. Balancing the Harms Shows That a Stay Would Not Be in the Public Interest

As shown above, further delay of the Commission's rules would cause harm to children, while implementing the rules as scheduled would not cause irreparable harm to the Companies. In balancing these interests, it is clear that granting a stay would not be in the public interest.

III. THE COMPANIES HAVE NOT SHOWN GOOD CAUSE FOR FURTHER EXTENSION OF THE EFFECTIVE DATE OF THE RULES

Having failed to meet the test for a stay, the Companies do not fare any better under the "good cause" standard of the FCC rules.[88] The Companies recognize that to show "good cause," they must meet the same standard for a waiver, that is, they have the burden of demonstrating that compliance would be "inconsistent with the public interest," and that the "relief requested would not undermine the policy objective of the rule in question."[89] The Companies fail to meet this test. Here the application of the rules furthers the public interest in ensuring adequate educational programming for children and in limiting the amount of commercial matter. Moreover, as shown above, further delay of the rules would undermine these policy objectives.

Nor have the Companies shown any unique or unusual factual circumstances preventing compliance or the existence of special unanticipated circumstances warranting a deviation from the general rule.[90] They have had more than a year to implement the new rules and they have

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[88] 47 C.F.R. § 1.3.

[89] Companies' Motion at 7-8, citing Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order, 20 FCC Rcd 7709, 7714 (¶ 9) (2005).

[90] *See 220 MHz Non-Nationwide Licensees (Requests for Waivers of § 90.755(a))* 19 Comm. Reg. 826 (2000) (finding that knowledge of problems with the e-filing process a month before the deadline should have lead to manual filing, thus not excusing a missed deadline); *see also*

ample resources to do it. In 2004, The Walt Disney Company had sales of over $30 billion and approximately 129,000 employees.[91] Viacom had sales of over $22 billion and approximately 38,000 employees.[92] NBC had sales of over $12 billion and approximately 16,000 employees.[93] Thus, their situation is completely different from that of the small wireless carriers who sought to delay the effective date of the enhanced 911 requirements in *Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems.*[94]

The Companies attempt to paint a picture of costly website redesign.[95] However, the rules do not require companies to redesign their websites; companies may choose not to display the addresses for commercial websites during their programming, or (except in the case of host-selling) simply count the display toward their commercial matter limitations.

The Companies' claims of "disruption" because of the 10% limit on preemptions[96] cannot support a finding of good cause. As noted above, the Commission made the 10% pre-emption limit effective January 1, 2006, "to give licensees time to develop programming or to renegotiate or allow expiration of existing program contracts as necessary."[97] Any disruption then is due to the broadcasters' refusal to schedule children's educational programming at times other than Saturday morning. Airing core programming at different times may in fact better

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Federal-State Joint Board on Universal Service (Year 3 Filing Window), 20 Comm. Reg 826 (2000) (finding that waiver of a filing deadline would be justified by the unanticipated failure of a network server).

[91] Hoovers Company Fact Sheet, *at* http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=11603.

[92] Hoovers Company Fact Sheet, *at* http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=12435.

[93] Hoovers Company Fact Sheet, *at* http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=128633; http://www.ge.com/en/company/businesses/ge_nbc_universal.htm.

[94] 20 FCC Rcd 7709 (2005).

[95] Companies' Motion at 10.

[96] *Id*. at 12.

[97] *2004 Children's Television Order*,19 FCC Rcd at 22967.

serve the needs of children. As the Commission found in the *1974 Policy Statement*, "we do not believe that it is a reasonable scheduling practice to relegate all of the programming for this important audience to one or two days." [98]

Finally, although the Companies suggest that the Commission routinely delays the implementation of its rules, [99] that is not the case. The cases in footnote 30 concern only four situations where the Commission temporarily extended deadlines, and each situation presented special reasons for the extensions that are not present here. For example, the Commission delayed implementing the *Telephone Consumer Protection Act* rules because of pending legislation that would affect the rules.[100] In the other cases cited, the extensions involved minor procedural matters.[101]

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[98] *1974 Policy Statement*, 50 FCC 2d 1 (1974), at ¶ 27.
[99] Companies' Motion at 8, fn. 30.
[100] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order,* CG Docket No.02-278, FCC 05-132; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order*, 18 FCC Rcd 19890 (2003).
[101] *Mass Media Bureau Extends Filing Deadline for Class A License Applications, Public Notice*, DA 00-2743 (rel. Dec. 5, 2000) (granting a single extension for the deadline for submissions of applications); A*mendment of the Comm'n's Rules Regarding Installment Payment Financing for Personal Commission's Servs. (PCS) Licensees, Order,* 13 FCC Rcd 686, 686-87 (1998) (granting a very brief extensions of an election of payment option date); Letter *to Eric E. Breisach*, 10 FCC Rcd. 12773 (1995) (granting an extension for claiming inflation adjustments).

CONCLUSION

The Companies have failed to make the showing necessary for a stay nor have they demonstration good cause for extending the effective date. For the foregoing reasons, the Commission should deny the Companies' request.

Respectfully Submitted,

/s/ Jennifer Prime____
Angela J. Campbell, Esq.
Jennifer L. Prime, Esq.

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for Counsel for the Children's Media Policy Coalition

Of Counsel:

Adam Lusthaus
John Kosmidis
Georgetown University Law Center

Law Students

Dated: October 3, 2005

CERTIFICATE OF SERVICE

I, Jennifer L. Prime, certify that the foregoing "Opposition to Motion for Extension of Effective Date Or, In the Alternative, Administrative Stay" was served by first class, postage prepaid mail this 3rd day of October, 2005, to the following:

Seth P. Waxman
Paul R.Q. Wolfson
Eric R. Columbus
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, NW
Washington, DC 20037

Attorneys for The Walt Disney Company

Helgi C. Walker
Margaret A. Ryan
William A. Consovoy
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Attorneys for Viacom

F. William LeBeau
Assistant Secretary and Senior Regulatory Counsel
NBC Universal Inc. and NBC Telemundo License Co.
1299 Pennsylvania Avenue, NW
11th Floor West
Washington, DC 20004

Attorney for NBC Universal Inc. and NBC Telemundo License Co.

/s/ Jennifer Prime___
Jennifer L. Prime