Exhibit B

MM Docket No. 00-167
MOTION FOR ADMINISTRATIVE STAY
PENDING APPEAL OF VIACOM INC

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

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

DECLARATION OF HERB SCANNELL, NICKELODEON

I. QUALIFICATIONS, TRAINING, AND EXPERIENCE

1. I make this Declaration in support of Petitioners' Motion for Extension of Effective Date or, in the Alternative, Motion for Administrative Stay. This declaration is based upon my personal knowledge and experience, as well as the knowledge and experience of Nickelodeon personnel who work under my supervision.

2. I am over the age of eighteen and am fully competent to make this Declaration.

3. I am President, Nickelodeon Networks, and Vice Chairman of MTV Networks. I have been employed by Nickelodeon for 17 years. I oversee all creative and business operations at Nickelodeon, and have been involved in virtually all aspects of programming, marketing, and branding for Nickelodeon.

4. Prior to my appointment as President in February 1996, I served as Executive Vice President for the Nickelodeon Network. In that position, I oversaw the management and strategic direction of the Nickelodeon and Nick at Nite cable television networks. Additionally, I engineered the development of the network's popular animated programming block and Nick Jr., the network's weekday pre-school programming block.

5. Between 1989 and 1990, I served as Vice President of Programming for Nickelodeon and led the network's expansion into new programming genres. For example, I oversaw the development and launch of Nick News, Nickelodeon's news magazine show.

6. I joined Nickelodeon in March 1988 as Director of Programming. In this role, I oversaw program scheduling and was responsible for the development of a number of program specials.

7. I am familiar with Nickelodeon's programming, marketing, and branding strategies, as well as its "pro-social" initiatives. My position requires me to be aware of the programming, marketing, and branding strategies of competitors to Nickelodeon, including the Cartoon Network, Disney Channel and ABC Family Channel, on cable; the children's programming on network television, including "Fox Kids," "Kids' WB," and a Saturday morning block on ABC; and the Public Broadcasting Service (PBS). I thus am familiar with many of the practices common in the television industry generally, and the children's television community in particular.

8. In the preparation of this Affidavit, I have reviewed and am familiar with the FCC's rules on children's television adopted on November 2, 2004. I am aware that these rules are scheduled to take effect on January 1, 2006 and that Nickelodeon will be expected to comply with the rules in its business operations, including programming, marketing, sales and website operation and promotion.

II. SUMMARY OF TESTIMONY

9. In my preliminary assessment of the steps that Nickelodeon would have to take to comply with the rules, I have identified several significant and burdensome changes that Nickelodeon would have to make to its existing programming, promotion, website, and general operations,

many of which would visit irreparable injury on Nickelodeon, not simply by requiring the irremediable loss of significant amounts of money, but by undermining Nickelodeon's viewer loyalty, goodwill, and competitive position. These rules will deprive Nickelodeon of substantial advertising and other vital revenues. Moreover, the required changes will affect the basic economics of Nickelodeon's business and dictate major changes in program and website content, to the detriment of Nickelodeon's editorial vision and its ability to produce quality, innovative children's programming.

10. Under the rule regarding program promotion, Nickelodeon will either have to dramatically change its strategy and practices for program promotion and tune-in or sacrifice third-party advertising revenues which are a critical basis of support for the financing of the programming. Nickelodeon might also be forced to alter the content of its programming. All of these options threaten to limit the company's creative flexibility, harm its goodwill with its loyal viewers, and put Nickelodeon at a competitive disadvantage relative to its unregulated or less regulated competitors, such as other content providers who sell programming to cable providers and multichannel video programming distributors.

11. Under the rules regarding websites and host-selling, Nickelodeon will have to jettison or revamp its entire online strategy. The website rule will require Nickelodeon to choose between changing the nature, content, and structure of its website, or ceasing to promote the website on its television shows and risk alienating -- and potentially losing -- users who cannot find the URL or location of the desired content. Either option stifles Nickelodeon's creative expression and ability to communicate effectively with viewers and customers. This will erode viewer and customer loyalty, create customer confusion, and damage corporate goodwill.

12. These changes will severely disrupt the company's operations and business model, and

could have material negative effects on the company's overall brand value, its competitive position, and -- most fundamentally -- its ability to provide quality entertainment based on its own creative editorial choices and in response to the desires of parents and children.

III. NICKELODEON'S CURRENT BUSINESS PRACTICES ARE DESIGNED AND HAVE ENABLED IT TO MAINTAIN ITS POSITION AS THE LEADING PROVIDER OF SAFE, ENTERTAINING, AND DIVERSE PROGRAMMING FOR CHILDREN ACROSS MULTIPLE MEDIA

13. Nickelodeon, first launched in 1979, is a global entertainment brand with businesses that include television programming, production, consumer products, online content, recreation activities, live stage shows, theme parks and hotels, publishing and feature films. In response to market demand for children's entertainment, Nickelodeon employs these various media channels to develop, deliver, promote, and enhance its programming content. Nickelodeon's philosophy is to put children first and to help connect them to their world. This philosophy extends across all channels, platforms, and ventures, and is reflected in its in-depth public service campaigns, its promotions, and programming, all of which seek to entertain and inspire children while instilling core network values of nonviolence, diversity, and gender neutrality.

14. The highest-rated basic cable network in the United States since 1995, Nickelodeon is the industry's leading producer of original programming for kids. Nickelodeon's cable channels provide quality safe-haven programming for children ages two to seventeen. For example, Nickelodeon is currently the most prolific distributor of pre-school programming, offering over 112 hours a week of original preschool programming across Nick Jr., Noggin, as well as the "Nick on CBS" Saturday-morning lineup.

15. On its flagship television network, Nickelodeon offers an innovative and diverse blend of original and acquired programming, including comedy, adventure, variety, news and game shows created just for kids. Nickelodeon programming also includes a line-up of original

animation, shown on both the Nickelodeon and Nicktoons channels, much of which is produced at the network's animation studio in Burbank, California. Nickelodeon offers additional digital channels: Noggin, a commercial-free, educational digital network for preschoolers; The N, a nighttime block for teens; and Nicktoons TV, home of kid TV's most popular animated hits. Since September 2000, Nickelodeon has programmed CBS's Saturday morning children's schedule, including their E/I programming, with Nick and Nick Jr. series.

16. Nickelodeon Online is the leading portfolio of kids' and parents' destinations, featuring Nick.com, Nickjr.com, teachers.nick.com, and noggin.com, where children (as well as parents, grandparents, and teachers) can go for more information about their favorite shows and characters as well as to participate in games and activities, and purchase related merchandise.

17. Nickelodeon Consumer Products has forged relationships with more than 500 licensees worldwide to merchandise Nickelodeon-branded and property-based products. Other successful ventures include Nick Books, Nickelodeon Magazines, Nick Records, Nickelodeon Live Tours and Recreation. Nickelodeon also produces feature films. Launched in 1996 with Paramount Pictures, Nickelodeon Movies produces quality family entertainment for movie-going audiences.

18. As a core value of our business, Nickelodeon invests heavily in pro-social initiatives and activities that help kids beyond the TV signal. For over 10 years, the Peabody award-winning "The Big Help" introduced kids to volunteerism where 33 million kids participated to pledge over 383 million volunteer hours in their local communities. In 2003, in response to growing concern over childhood obesity, Nickelodeon launched "Let's Just Play," a grassroots initiative encouraging active play in local communities as well as providing over $1.5 million in grant money for kids to secure PE and recreational programs for their schools and community based organizations. Nick News with award winning journalist Linda Ellerbee helps kids contextualize

issues of timely importance such as Hurricane Katrina, AIDS in Africa, and terrorism. Nickelodeon has also used its website in furtherance of the public interest, enabling children to send cards to firefighters, and providing information on their activities after the September 11, 2001 terrorist attacks in New York City, Washington, D.C. and Pennsylvania. Nickelodeon PSA campaigns, such as "Talking to Kids About Tough Issues" and "Ask Listen and Learn," encourage kids and parents to talk to one another about difficult issues for preteens such as bullying, body image, substance abuse, and under age drinking. In its ongoing commitment to provide real tools for kids, communities and families Nickelodeon devotes 10% of its programming to pro-social messaging. Nickelodeon's pro-social efforts are reinforced online, including free educational materials available on Nickelodeons Cable in the Classroom website www.teachers.nick.com.

19. Nickelodeon has received numerous awards for its endeavors. The company has won Golden Marbles Promotion/Advertising awards for promotions and advertisements that communicate to children ages six to thirteen in a manner that informs, educates and entertains. Nickelodeon has been nominated for and won many awards for its depiction of diversity, including Imagen Awards honoring the positive portrayal of Latinos and Latin culture, NAACP awards recognizing significant contributions to the portrayal of African Americans on television, and NAMIC Vision Awards honoring content that reflects our multicultural world. Nickelodeon has also won awards recognizing the overall quality of its programming, including a 2004 Peabody Award for "Dora the Explorer" and several Emmys. For example, in 2005, Nickelodeon won an Emmy for its special, "Never Again? From the Holocaust to the Sudan." Nick News has received more than 20 Emmy nominations. In addition, the Parents' Choice Foundation, the nation's oldest not-for-profit evaluator of children's books, videos, toys, audios,

computer software, television and magazines, has bestowed numerous awards on Nickelodeon's programming and products. Finally, Nickelodeon's website, Nick.com, won the 2003 International Academy of Digital Arts and Sciences' Webby Award honoring achievement in technology and creativity for TV-related websites.

20. Nickelodeon competes with several kinds of content providers in its television and web enterprises. Programming blocks for children exhibited on broadcast television networks, including "Fox Kids," "Kids' WB," a Saturday morning block on ABC, as well as cable television program services specifically providing children-oriented programming, including the Cartoon Network, Disney Channel, ABC Family Channel, and PBS's "KIDS Sprout" (a preschool digital channel and video-on-demand service), all compete with Nickelodeon for distribution and advertising revenue. In addition, Nickelodeon competes internationally with other television program services and blocks targeted at children for distribution over-the-air or by cable, DTH and other systems, and for program license fees and advertising revenue.

Nickelodeon's Television Programming

21. Nickelodeon competes with for profit and not-for-profit providers of children's television programming and content. In order to win viewers and maintain its brand quality and value, Nickelodeon must constantly create quality, distinctive, and entertaining children's programming, and effectively deliver that programming to its audience. To garner new viewers and cultivate viewer loyalty, the company invests heavily in the creative process, and relies on its own market research, such as focus groups, to discern and respond to viewers' tastes.

22. The company's research and the success of its programming shows that children want a diverse array of programming. Nickelodeon strives to offer an appropriate mix of educational, informational, and entertainment programming that is responsive to the desires of its audience.

Nickelodeon must be able to respond flexibly and efficiently to the preferences of its viewers, or it will fail in its mission and lose out to competitors who can better satisfy the needs and preferences of the marketplace.

23. New content is costly and time-consuming to produce. Live action programming typically requires approximately nine months to produce (5-6 weeks pre-production, 17 weeks of production, and 20 weeks post-production), with budgets of approximately $575,000 per episode. On average, animated programs require approximately eighteen months for thirteen episodes, and budgets range from $500,000 to $550,000 per episode. That substantial investment of time and resources yields the quality and diversity of children's programming for which Nickelodeon repeatedly has been commended.

24. Once programming has been developed and is delivered to viewers, Nickelodeon relies on its program promotions to attract new viewers and to cultivate viewer loyalty. Program promotions help viewers find desired programs by telling them when and where they can tune in to view their favorite shows. Promotion often occurs during a program to encourage viewers to watch upcoming episodes of the same show, or other shows that Nickelodeon thinks they might enjoy. Constantly ensuring that the target audience is made aware of, and knows how to access, the programming produced and aired by Nickelodeon is vital to building and maintaining viewer loyalty. Off-channel advertising, particularly to children, to achieve those same ends is a less effective, risky, and more costly substitute for program promotion. Pre-schoolers cannot read print ads, and the company must use a broader array of media, so there is no guarantee that the advertising will find its viewers.

25. Nickelodeon relies on the sale of third-party advertising time on its channels to fund its operations, including program development and production. The commercial time purchased by

third parties provides the funds necessary to continue creating the high quality, relevant, and diversified programming that is the hallmark of Nickelodeon's highly successful brand.

The Nickelodeon Websites

26. Nickelodeon uses its websites to offer additional content, entertainment, and merchandise related to its programming through a separate medium. In particular, Nickelodeon offers interactive content, such as games and enhanced programming related to its programs that television as a medium cannot provide. This medium strengthens the loyalty of viewers to the Nickelodeon brand and its programming. It also responds to viewers' (and parents') desire for additional educational and entertainment content, games, and merchandise related to the shows children enjoy on television.

27. Children today are uniquely interested in exploring their interests in multimedia entertainment and programming across multiple platforms. Nickelodeon utilizes its websites to supplement its programming in response to children's expectations that they can experience entertainment and learning in different ways based on different media. Children tell Nickelodeon that they want to learn more and experience more from their favorite shows and characters. The websites help the company meet that need with respect to existing programming and introduce new content. Before Dora the Explorer was introduced as a television show, the character was on the company's websites, and children accessing the Internet could play with her in English or in Spanish. Jimmy Neutron, a popular Nickelodeon character, appeared on the websites before he became a movie; if a viewer saw a vignette of Jimmy Neutron on Nickelodeon's television broadcast, it told them, nine months before the movie was released, to go online to play a character-related game. In the summer of 2005, Nickelodeon launched exclusive premieres of both "Catscratch" and "Diego" on Nick.com, prior to the series' kickoff

on television. Thus, Nickelodeon's online and television enterprises provide incalculable value to the company in terms of creativity and viewer loyalty.

28. In addition, Nickelodeon's websites offer free content. This includes lesson plans for teachers, along with printable and interactive games and activities for parents to utilize with their children. There is also general-interest content beneficial to children and parents. Kids can get their horoscope, the weather, and they can customize what they get out of the web. They and their parents can explore voluminous noncommercial, educational, and informational content on such topics as health, fitness, current events, and parenting. One example is the "Nicktrition" portion of the site, which was created "to inform and educate kids and their parents about healthy lifestyle choices – like eating right and exercising,"[1] a key focus of the nationwide childhood obesity debate. Nickelodeon has made its website a way for children and parents to connect to the world at large and to the world of Nickelodeon.

29. Children enjoy using the Nickelodeon websites for many purposes. Nickelodeon's websites empower kids to express themselves, control their experience, and create a community of their own. User email demonstrates that they appreciate being able to customize their own web pages, utilize the message boards, play games, and find out more about their favorite programs. Users are able to create and customize their own pages on the site. One user wrote, "I'm lovin' the MY NICK pages! Mine is decorated all SpongeBob and it looks so cute! I like that I can personalize it how I want. Thanks!" The free games provide entertainment. For example, another wrote, "I want to say that I love being a member of the Nick.com idea! There are great games to play when you are totally bored. I just want to say thanks."

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[1] http://www.nickjr.com/home/nicktrition/index.jhtml (last visited on September 9, 2005).

30. It is obvious from user email that parents and other adults use the site to find information about programming available on television, download activities, access parenting resources, and to purchase merchandise related to popular shows. In fact, 40% of visitors to the Nick.com website were adults ages eighteen to forty-nine; the median age of users of Nickelodeon's websites for 2005 is 19 years old. Parents make use of free craft ideas; one mother wrote, "I downloaded your pumpkin carving patters of Dora and Blues Clues. I carved them onto my pumpkins yesterday and they turned out FABULOUS! I am very impressed as is my 4 year old daughter who absolutely loves Dora and Blue." Others utilize the free parenting help and resources. One parent wrote, "Your movie guide is so helpful. I wish you would include more movies on it. ... As a parent of four kids, I don't have time to preview the movies before I let them go see them. I have relied heavily on your guide and have never yet been disappointed with your advice." Parents, grandparents, and teachers also value the site for its access to programming-related merchandise, and as a source for additional program content. For example, a satisfied grandparent wrote, "Please can you let us know when we might find the Backyardigans merchandise. My 14 month old grandchild loves your show. If we're not watching it on tv, we're on the computer watching the skits on nick jr."

31. By providing another way to connect with the characters and shows they enjoy, as well as offering enriching resources and activities, the websites reinforce the viewer loyalty that sustains ratings, which in turn draws advertisers and produces revenue used for new production.

32. Nickelodeon devotes substantial resources to the development and maintenance of its detailed, interactive, program-related websites. The company strives to keep the websites as user-friendly and easy to navigate as possible, in order to keep users happy with the site. Flexibility and efficiency enables the company to respond rapidly to customer and user

preferences. This flexibility is vital to maintaining customer loyalty and thus safeguarding the company's competitive position.

Nickelodeon's Operations Under The Current Regulatory Regime

33. When the FCC first implemented the commercial limits imposed by the Children's Television Act of 1990 ("CTA"), the Commission defined "commercial matter" as "air time sold for purposes of selling a product."[2] The Commission expressly excluded program promotions from the definition of commercial matter.

34. Therefore, broadcaster or cablecaster receipt of third-party consideration was a required component of the FCC's definition of commercial matter, while program promotions that did not include sponsor-related mentions were not deemed to be advertising. Consistent with this regulatory regime, in a typical 30-minute program Nickelodeon airs 23:30 minutes of content, 1:30 to 2:00 minutes of promotions for Nickelodeon's programming, and 4:30 to 5:00 minutes of third party advertising. This balance of content, program promotion, and third-party advertising reflects their importance to Nickelodeon's mission. They are each vital components of the network's ability to create, distribute, and maintain quality children's programming -- and, in turn, corporate value and goodwill. Without promotion for its programs, the audiences would tune in at lower levels and some would drop the channel in favor of another. If ratings dip, third parties would not purchase, or pay as much for commercial time, revenue from which is critical to the development of the content that must be promoted. And, if content quality suffers, so could the entire Nickelodeon brand and corporate mission, as it loses the ability to define and distinguish itself from its competitors. Thus, the three types of material are intertwined and

[2] *In the Matter of Policies and Rules Concerning Children's Television Programming, Report and Order*, 6 FCC Rcd 2111, 2112 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991).

critical to Nickelodeon's success.

35. Until now, per Congress's design, Nickelodeon has operated its websites free from FCC regulation or oversight. They are a vital part of Nickelodeon's programming, marketing and sales operations, and provide an important channel for communicating with Nickelodeon's audience.

IV. THE RULES WILL PROHIBIT OR SUBSTANTIALLY CHANGE MANY OF THE PRACTICES AND OFFERINGS THAT NICKELODEON VIEWERS HAVE COME TO EXPECT AND ENJOY, CAUSING NICKELODEON SIGNIFICANT DISRUPTION AND IRREPARABLE HARM

36. Three new children's television rules are relevant here. First, the Commission expanded the definition of commercial matter to include "program promotions" unless the promotions are for E/I programming (the "promotion rule"). Second, the Commission would count toward programmers' "commercial matter" limitation any display of website addresses during programming targeted toward children ages 12 and under unless the website meets the Commission' s " four-part test" (the "website reference rule"). Finally, the Commission would ban "the display of website addresses in children's programs when the website uses characters from the program to sell products or services (the "website host-selling rule").

37. Insofar as Nickelodeon can ascertain the meaning and requirements of these rules, or attempt to ensure compliance by steering clear of the ambiguity inherent in the rules, the proposed changes could substantially change the way Nickelodeon operates, its creative decisions, its freedom of expression, and its ability to compete with other children's video programming providers and indeed other providers of children's products and services.

38. The proposed expansion of the definition of commercial matter to include program promotion could force Nickelodeon to make burdensome choices about sacrificing third-party

advertising revenue, how to communicate with viewers about the very programs those revenues make possible, and what kind of programming to create and promote. The website rules, both the "website reference rule" and the "website host-selling rule," threaten to change the way Nickelodeon interacts with its viewers and users -- both in terms of what the company can say, and when and how it can say it. This interference with the content and method of Nickelodeon's communications with its audience threatens to undermine viewer loyalty, create customer confusion, erode Nickelodeon's competitive position, and harm corporate goodwill.

39. These changes will cause Nickelodeon competitive harms. As explained above, Nickelodeon competes for programming distribution, viewer loyalty, licensing agreements, product sales, and advertising revenues with several types of competitors in a highly dynamic market. Competition is only increasing as more sources of children's entertainment and video programming generally are available over cable, Internet, and other media. If Nickelodeon is unable to offer the mix of entertainment and E/I programming it believes is most responsive to children's tastes and needs, or if it is constrained in promoting that programming or the websites and products related thereto, it could lose its competitive edge. If stripped of its ability to promote and market its program-related merchandise, Nickelodeon may not be able to compete as effectively with companies offering competing products whose advertising and sales channels are unrestricted. The ratings and revenue decline caused by promotion restrictions could further erode the value of the Nickelodeon brand to potential advertisers and business partners, such as licensees. All of this could damage Nickelodeon's position relative to competitors in numerous sectors of its business who will be unconstrained by these rules, such as other providers of video programming, including video on demand services, movie producers, and video game manufacturers, as well as merchandisers that sell children's toys but are not restricted in their

ability to market their products. These competitive harms would be irreparable.

40. In addition to these grave and sweeping harms, the rules impose immediate burdens on Nickelodeon, including the creation of customer frustration and confusion and the expenditure of unrecoverable and unquantifiable costs to achieve compliance, which may ultimately prove futile if the rules are modified or abandoned on reconsideration, or invalidated on judicial review. Indeed, if Nickelodeon attempts to comply with the rules pending their finality and any challenges thereto, it will be practically impossible or prohibitively expensive to undo the steps taken to ensure compliance. This leads to yet another irreparable harm that compliance will visit on Nickelodeon: implementing and then undoing changes to programming, promotions, and websites promises to engender consumer confusion and frustration not once but twice, something Nickelodeon is loathe to do to its loyal customers and viewers. As explained above, viewer loyalty is critical to Nickelodeon's success. Imposing repeated content and format changes on viewers accustomed to easy navigation and clear programming information would interfere with, and irreparably harm, established company-viewer relationships.

41. In sum, these new rules, operating in isolation or together, will cause significant disruption and irreparable harm to Nickelodeon. They will require the unrecoverable expenditure of significant sums of money. They will necessitate content and format changes to television programming and the various websites operated by Nickelodeon. The rules could jeopardize vital advertising revenues or interfere with the company's ability to promote its shows, which will constrain Nickelodeon's creative editorial discretion and negatively impact Nickelodeon's ability to continue producing the innovative and high-quality children's programming that is at the heart of Nickelodeon's business. All of this will erode the intangible yet tremendous value of the Nickelodeon brand and undo decades of effort at building goodwill.

The Impact of the Promotion Rule on Nickelodeon's Businesses

42. The promotion rule will impact Nickelodeon's operations in several specific ways. If construed so as to avoid a significant risk of liability, the promotion rule appears to significantly curtail Nickelodeon's ability to promote its shows, raise advertising revenues, and ultimately exercise its own creative editorial discretion over the substance and content of its programming.

43. As explained above, the current regulatory regime yields a balance of program promotion and third-party advertising that enables Nickelodeon to attract and maintain viewers, which are necessary to attract the third-party advertising revenues vital to continued operation. Thus, program promotion and third-party commercial advertising are vital, symbiotic components of the network's vitality and value.

44. By including program promotions in the definition of commercial matter, the promotion rule could force Nickelodeon to choose between eliminating third-party advertising time, eliminating program promotion, or reducing one or the other on a zero-sum basis. Forcing Nickelodeon to choose between the program and network promotions that are vital to sustaining ratings, and the advertising revenues that are vital to its business, could result in a significant reduction in the quality and quantity of children's programming on Nickelodeon channels.

45. Specifically, if Nickelodeon is unable to promote its own shows, or is forced to curtail such promotion, ratings of the shows that lose promotion will decrease. In turn, if ratings fall, Nickelodeon will lose third-party advertising revenues, as those shows become less desirable as vehicles for advertisers' messages. It is impossible to predict with any certainty the magnitude of a likely drop in ratings or the attendant losses in advertising revenues, but the fact of those losses is predictable and they would be irreparable. The ripple effect of a drop in ratings on future lost revenues is impossible to predict, but would be substantial. Indeed, this

unpredictability puts Nickelodeon in an untenable position with respect to its advertising "up fronts" -- which occur in January -- during which the company negotiates its rates with advertisers. Because Nickelodeon will not be able to predict the impact of the rule on its ratings, it will be obligated to afford its advertisers some protection from possible ratings declines occasioned by the rule's prohibitions; advertisers will anticipate this danger and adjust their network preferences and willingness to pay accordingly, leaving Nickelodeon at a disadvantage in securing third-party advertising dollars and in having to protect those advertisers against the impact of the rules.

46. In addition, the elimination or reduction of program promotions would result in viewer frustration and confusion. Nickelodeon's audience is used to, and enjoys, being informed about the schedule of shows in which they are interested. If they find it difficult to locate their shows in the schedule or have to expend more effort to find out schedule information, they will grow frustrated or be unable to find shows they want to watch, and could lose interest and stop watching. This frustration will harm Nickelodeon's goodwill and constitutes irreparable harm.

47. In order to minimize customer confusion about the schedule, maintain ratings, and minimize the loss of advertising revenues, Nickelodeon would be forced to consider purchasing off-channel advertising for the shows that it is unable to promote on its own network, at considerable additional expense. Further, it is unclear what media Nickelodeon could use and whether this off-channel advertising would be effective in reaching children; of particular concern in devising an off-channel advertising strategy is the fact that many of Nickelodeon's viewers cannot yet read, rendering print media of limited utility. Given the difficulty of reaching much of the target audience, and the varied media that would be needed to compensate for the loss in program promotions, Nickelodeon could have to spend substantial sums annually to make

up for the loss in tune-in promotions.

48. On the other hand, Nickelodeon could maintain its current levels of program promotion by reducing the amount of time it sold for third-party advertising, thus reducing the revenues it earns from third-party commercials. As explained above, these funds are vital to the company's operations. Sacrificing this revenue would irrevocably change Nickelodeon's business model and irreparably injure the brand's value.

49. Another alternative to the cessation or limitation of program promotion would be to change the nature of Nickelodeon's programming so that all or most of its programs are clearly E/I. This would allow the company to avoid the restrictions of the new definition of commercial matter, which does not include promotions of E/I programming, but would impose a different and equally troubling set of burdens on the company (and on the public interest). First, changing the nature of Nickelodeon's programming would cause irreparable harm in several ways. It would eliminate the diversity of offerings that viewers value. Children, like adults, have varied preferences and tastes, and benefit from a variety of offerings, some purely educational and others purely entertainment. The elimination or marginalization of all or many programs not deemed "educational or informational" would harm Nickelodeon irreparably. It would lose viewers, not only to competitors not similarly restricted, but to other media, such as movie and video game providers, that are not regulated in this way and can continue to offer entertainment programming and services.

50. Even more fundamentally, such a shift in programming content would represent a reconstitution of the nature and identity of the company. Under the promotion rule, Nickelodeon could be forced to alter the mix of programming that it offers on its cable channels to ensure practicable compliance. This could seriously interfere with Nickelodeon's editorial discretion.

Transforming the programming in this way would shift the company away from its mission of responsibly fulfilling the desires and needs of children and parents by providing quality entertainment. This represents a threat to the very identity of Nickelodeon, and would irreparably harm its brand image.

51. In addition, the expanded definition places on Nickelodeon the burden of attempting to predict which of its programs qualify as E/I. As a cable programmer not subject to the FCC's 3-hour "processing guideline" for E/I content, the company has never undertaken the enormous and imprecise task of analyzing and categorizing all of its programming as E/I or non-E/I. Absent some pre-enforcement evaluation or a safe harbor, it is unclear what shows in Nickelodeon's library and lineup might qualify as E/I. Thus, in order to ensure compliance, Nickelodeon would have to err on the side of caution by counting programs and program promotions as non-E/I when in doubt, and thus further shrink the amount of time it could devote to such material. As a result, Nickelodeon would find its creativity stifled and communication chilled. This would cause additional damage to the flexibility and viewer-responsiveness that enables Nickelodeon to compete for viewers.

52. Even if it were able to fully understand and comply with the promotion rule Nickelodeon faces irreparable harm. The promotion rule will necessitate immediate and unrecoverable expenditures of large sums of money to evaluate, edit, and possibly avoid using programs already archived in the Nickelodeon library, programs that were formatted and produced under the existing rules. Nickelodeon could be forced to create new material rather than "renovate" its archived programs to comply with the new rule. Not only would this be a significant disruption to its operations, the potential inability to make productive use of its otherwise valuable inventory and recover the sunk costs of the investments causes serious and irreparable injury to

the company.

53. In sum, to the extent the company can understand and implement the promotion rule, compliance would irreparably harm the corporation by depriving it of vital advertising revenue, eliminating its ability to effectively communicate with its audience, or necessitating a change in the content of Nickelodeon programming and making some current programming inventory unusable. Any of these harms would put Nickelodeon at a competitive disadvantage, harm customer loyalty, and cause irreparable damage to the corporation.

The Impact of the Website Rules

54. The proposed website rules would visit immediate and irreparable harm on Nickelodeon. The rules would effectively require Nickelodeon to choose between maintaining editorial control over its sites and ceasing promotion of the sites to comply with the website reference rule or, in the alternative, continuing to promote the website but complying with the vague "four-part test" that would diminish the quality and utility and reduce its effectiveness as a unique channel for communication, programming, and sales. The difficulty of complying with this rule, and its unintended consequences, are evinced by the fact that providing links to many websites (e.g., those of libraries, schools, newspapers, groups to promote proper nutrition) would violate the test if there is a sponsor link embedded anywhere in the secondary site to which the link is provided.

55. If Nickelodeon chooses to continue promoting its websites during its programming, the promotion rule would require fundamental changes to the website or the creation of temporary event-driven websites that comply with the website reference rule, which would make it harder for users to locate the features and services they have come to expect and enjoy. For example, one user wrote to Nickelodeon, "I think this website is cool and don't ever change it." As noted previously, children, parents, grandparents, and teachers enjoy the site's many features. Any

change that is not driven by customer preferences will result in customer confusion and frustration, which will harm corporate goodwill, and erode the company's competitive position.

56. Moreover, these changes would be difficult and costly to implement, and may be unrecoverable. The specific requirements of the rules are imprecise and could require the expenditure of significant resources to redesign various websites. In an attempt to comply with the website reference rule, Nickelodeon could undertake the creation of a dual web navigation system with, on the one hand, the principal websites Nick.com and NickJr.com which would no longer be promoted on-air and, on the other hand, multiple and various unrelated special program and event-driven websites and URL's which would be promoted on-air and comply with the rule. The company would have to reallocate website designers, technical producers and other labor to build and maintain the two, different navigation architectures. The dedication of such personnel to the special program websites would come at the expense of work flow on projects on the principal, ad-supported websites resulting in less detailed and dynamic websites. Advertisers would in turn find the Nickelodeon websites a less attractive venue. Hence, the loss of the multiplatform approach would increase hard costs in labor and opportunity costs in the creation of additional content, while at the same time eroding the value of the Nickelodeon websites to both users and advertisers.

57. In addition, such redesign of the website to bury merchandise would lead to consumer confusion and frustration, as it would make it harder for users -- like parents and grandparents -- to find desired products. This will harm the company's goodwill and competitive position.

58. Alternatively, Nickelodeon could choose to maintain its website consistent with its editorial vision, but would have to cease altogether displaying its web addresses during children's programming. This would result in decreased traffic to the website, and once that

traffic departs the site it may be impossible to regain. In addition, this would possibly require the expenditure of substantial sums of money for off-channel advertising of the website. Any decrease in traffic to the website would directly impact Nickelodeon's ability to secure third-party advertising on the website, which would further reduce Nickelodeon's revenue stream, impacting its ability to continue providing non-commercial content, like the movie guides and parenting articles, and would further erode the brand's value. Also, under this scenario, Nickelodeon would be unable to offer our audience the multimedia entertainment experience which they love. Either result constitutes irreparable harm.

59. The website host-selling rule would also substantially change the way Nickelodeon does business, both in terms of its programming content and with respect to its sales and marketing decisions. It puts Nickelodeon in the impossible position of eliminating all reference to its websites during its programming or so fundamentally altering the content of the websites as to completely silence Nickelodeon's communications. In addition, it takes away a vital source of financial support and effectively undermines the utility and viability of Nickelodeon's web operation as a business matter.

60. The Commission's long-standing definition of host-selling, which is itself expansive, includes any commercial appearance of a program character, no matter how brief, during the program in which that character is featured. This means that during a program featuring Sponge Bob Squarepants, Nickelodeon can not run an advertisement for a product based on or tied to, a character on the Sponge Bob Squarepants show. However, Sponge Bob can still represent products and merchandise, and ads featuring that merchandise can run at other times and appear in other media. Under this regime, Nickelodeon can at least separate its host-selling material and effectively segregate it because there is a finite universe -- the related show -- in which the host-

selling is barred. However, under the new rule, by virtue of the almost-limitless space of the Internet and websites, if a SpongeBob product is advertised *anywhere* on a Nickelodeon website, no matter how deeply embedded within the website, or if the product is advertised on a different site to which Nickelodeon merely provides a link, the *entire* Nickelodeon website cannot be referenced during related programming. However, characters such as Dora the Explorer and Ernie & Bert from Noggin host-sell education because children are often more receptive to E/I material and other positive messages if their favorite characters are involved, even if products associated with those characters may be for sale somewhere on the website or on a sponsors' link.

61. This restriction will limit sharply Nickelodeon's creative discretion, revenue streams, and ultimately its online and business strategy. As noted, Nickelodeon would have to choose between eliminating references to its websites entirely, or scrubbing all its sites of any commercial products or merchandise promoted by or related to its characters. Neither is a tenable choice. Children and adults, such as parents, are pleased with the experiences that our websites offer, and the company will lose -- perhaps permanently -- or never gain customers who do not experience it because they are not made aware of it through the distinct channel of website references during television programming. The former would damage the utility of the websites as a marketing, promotional, and branding vehicle for Nickelodeon to build and sustain viewer loyalty. In addition, it would effectively silence both commercial and non-commercial speech that the company wishes to convey to its viewers. On the other hand, eliminating all commercial content from the website infringes on Nickelodeon's right to communicate truthful commercial information and would adversely affect Nickelodeon's ability, as a financial matter, to underwrite the website and other content that its viewers and users enjoy. Nickelodeon relies

on its commercial advertising partnerships and merchandising, which the Commission has recognized are "an important source of production funding,"[3] to support its creative endeavors and to fund production of the sites' valued program-related and public interest noncommercial content. Under either scenario, this overly restrictive rule will irreparably harm Nickelodeon.

62. These rules would put Nickelodeon at a competitive disadvantage in the intensely competitive marketplace for children's video programming and related goods and services. As noted above, Nickelodeon competes with companies selling children's merchandise unrelated to television programming, as well as organizations that offer children's programming but are not bound by the aforementioned rules, such as Sesame Workshop. Sesame Workshop offers toys, games, and other resources for sale on its website.[4] In competing with these entities, Nickelodeon would bear burdens that do not apply to many of its competitors, and thus would be harmed in its market position.

63. Moreover, burying information about products within a website and making these purchases more onerous limits Nickelodeon's ability to communicate by dictating the content and method of Nickelodeon's communication to viewers and users. In imposing these website rules, the government clearly burdens and may effectively silence the communication of truthful, nonmisleading commercial information to willing and eager recipients.

V. CONCLUSION

64. As demonstrated by the examples outlined above, these rules will cause significant disruption to, and impose substantial economic and non-economic losses on, Nickelodeon.

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[3] Policies and Rules Concerning Children's Television Programming, *report and Order*, 6 FCC RCD 2111, 2112 (1991).

[4] *See* http://www.sesameworkshop.org/newshop/ (last visited September 9, 2005).

These losses cannot easily be quantified and are unrecoverable as a matter of law. Not only will Nickelodeon have to spend large sums of money to ensure compliance, the rules threaten to cause a loss of goodwill, customer frustration and confusion, and compelled editorial changes across several distinct media channels. The rules will also chill large amounts of commercial communication. For all these reasons, Nickelodeon seeks relief from the disruption and irreparable harm threatened by these rules.

FURTHER THE DECLARANT SAITH NOT

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Pursuant to Section 1.16 of the Commission's rules, I, Herb Scannell, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED ON SEPTEMBER 23, 2005