

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

In the Matter of)
)
Sponsorship Identification Rules) MB Docket No. 08-90
and Embedded Advertising)

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman
Erin L. Dozier
Scott A. Goodwin

NAB Law Clerk
Ike Ofobike

November 21, 2008

Table of Contents

I. INTRODUCTION AND SUMMARY	1
II. REGULATIONS DESIGNED TO CURB OR SIGNIFICANTLY REDUCE SPONSORED CONTENT IN BROADCASTING LIKELY VIOLATE THE FIRST AMENDMENT	4
A. PRODUCT PLACEMENT THAT DOES NOT INCLUDE A “CALL TO ACTION” MAY NOT BE COMMERCIAL SPEECH	5
B. EVEN IF PRODUCT PLACEMENT CONSTITUTES COMMERCIAL SPEECH, ENHANCED SPONSOR IDENTIFICATION RULES STILL FAIL UNDER <i>CENTRAL HUDSON</i>	6
I. COMMENTERS IN FAVOR OF ENHANCED SPONSOR ID RULES HAVE FAILED TO PROVE THAT PRODUCT PLACEMENT OR PRODUCT INTEGRATION IS INHERENTLY MISLEADING OR DECEPTIVE	7
II. COMMENTERS IN FAVOR OF ENHANCED SPONSOR IDENTIFICATION HAVE FAILED TO SHOW THAT PRODUCT PLACEMENT OR INTEGRATION CAUSES AN ACTUAL HARM IN NEED OF GOVERNMENTAL REMEDY	9
III. SPECIFIC PROPOSALS TO INCREASE REGULATION SHOULD BE DENIED.....	13
A. THE IMPORTANT GOAL OF PROTECTING CHILDREN FROM EXCESSIVE ADVERTISING IS BEING MET UNDER EXISTING RULES.....	14
B. NO COMMENTER HAS SHOWN THAT THE PUBLIC IS CONFUSED BY CURRENT SPONSORSHIP IDENTIFICATION DISCLOSURES	16
IV. CONCLUSION.....	21

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

In the Matter of)
)
Sponsorship Identification Rules) MB Docket No. 08-90
and Embedded Advertising)

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction and Summary

The National Association of Broadcasters (“NAB”)¹ submits these reply comments on the Commission’s *Notice of Inquiry and Notice of Proposed Rulemaking* in this proceeding.² The combined *NOI/NPRM* asks generally whether the Commission’s long-standing rules regulating identification of sponsors in television and radio programming remain fit to inform consumers in today’s media market. In our initial comments, we answered that question with a simple yes – the current rules provide the proper balance of informing broadcasting viewers and listeners about sponsored content and maintaining the editorial freedom of radio and television broadcasters. Further, the current rules allow broadcasters and programmers enough flexibility to supplement traditional spot commercials with in-program sponsorships that do not

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

² *Notice of Inquiry and Notice of Proposed Rulemaking* in MB Docket No. 08-90 (rel. June 26, 2008) (“*NOI/NPRM*”).

disrupt the quality or integrity of popular broadcast programming. Comments of the National Media Providers, representing networks, programmers and advertisers, the Trinity Christian Center of Santa Ana, the Motion Picture Association of America, and Progress & Freedom Foundation fellows, among others, echoed our arguments that product placement and product integration do not harm consumers and new rules are unnecessary and likely unconstitutional.

Other commenters propose restrictions and/or enhanced disclosure of sponsored content in television and radio programming. These commenters, including Commercial Alert and the Center for Media and Democracy (“CMD”), advocate more burdensome sponsor identification rules, including rules that would require broadcasters to air pop-up alerts every time a brand appears as a prop in the background or is casually mentioned in dialogue. NAB opposes such suggestions and observes that, if their proposals were adopted, broadcast programming would be far more cluttered, and a far more aggravating experience for the average consumer, than that which appears today.

As we noted in our initial comments and repeat below, no group on record that advocates for enhanced regulation of sponsored speech in broadcasting has identified a significant consumer harm that would justify the government’s further restriction of commercial speech. We also note that much of the way that the *NOI/NPRM* defines “embedded advertising” may not be commercial speech at all. This is an argument presented strongly by the National Media Providers, and one we feel is a threshold question for the Commission to consider before moving onto the questions presented in the *NOI/NPRM*.

To justify further restriction of commercial speech, and to satisfy the requirements of the Administrative Procedure Act ("APA") and the Constitution as established by the Supreme Court in the *Central Hudson* case, the Commission must be able to show conclusively that embedded advertising, in whatever form it appears, causes some actual harm to the public.³ As noted below, neither the fact that product placement may be increasing in broadcasting nor the assertion that most viewers and listeners are unaware of product placements are enough to warrant an increase in regulation.

Several commenters again called for the Commission to restrict product advertising in the name of protecting children. In this proceeding, for example, the Campaign for a Commercial-Free Childhood ("CCFC") asked the Commission to apply children's television restrictions to all television programming and restrict product placement even in prime time hours when children may be in the audience. Such a restriction would not pass judicial muster.

In sum, we note that despite many detailed requests from commenters on *how* broadcasters should alert consumers to embedded advertisements, no commenter provides a compelling evidentiary or legal foundation for *why* broadcasters should be forced to air such alerts. The countervailing restrictions of the First Amendment and the APA are clear. Without substantially more evidence than that which is provided in the record so far, the Commission should not press forward with new sponsor identification rules.

³ *Central Hudson and Electric Company v. Public Service Commission*, 447 U.S. 557, 565-566 (1980).

II. Regulations Designed to Curb or Significantly Reduce Sponsored Content in Broadcasting Likely Violate The First Amendment

A full review of the comments filed in this proceeding shows that the majority of advocates calling for more burdensome regulation of sponsored content in broadcasting are intent not just on revising the current sponsorship identification rules, but on ending “advertainment” in broadcasting which, they assert, is seriously harming Americans.⁴ Although expressed in exaggerated terms, these comments are based on two principle arguments: (1) product placement is increasing in American broadcasting, and (2) advertisers and broadcasters are using more subtle methods to reach past viewers and listeners’ conscious minds to plant commercial messages that opponents believe will directly and adversely affect purchasing habits. These commenters allude to the “scope, prevalence and sophistication of embedded advertising strategies” that they view as the road “to non-stop persuasion” that has “serious risks for consumers and society.”⁵ Their unsupported depiction of the viewing public as automatons unable to think independently or resist the impulse to buy Coke, Sony or Nike products if those products happen to appear in their favorite shows cannot provide a valid basis for government regulation of speech. As we outline below, no commenter in this proceeding can identify exactly what that “serious risk” to consumers may be. They identify no physical, mental or emotional harm that is actually caused by product placement or product integration in television or radio programming. The evidence is scant because the underlying assumption is wrong – embedded advertising does not harm consumers.

⁴ See, e.g., Comments of N.E. Mardsen (filed Sept. 22, 2008).

⁵ *Id.* at 18.

New rules that require broadcasters to substantially increase advertising notifications before, after, and worst of all, during programming, *will* do harm, however. New rules would harm broadcasters' ability to utilize a much-needed revenue stream at a time when traditional revenue streams are shrinking. New rules would also do harm to the First Amendment principles that protect media from unnecessary and intrusive government intervention. The new rules would require broadcasters to air content they would not otherwise air, and restrict content that they want to air – or, indeed, need to air to support expensive quality programming. In those ways, enhanced sponsorship identification rules operate as content-based restrictions on speech. Some commenters want to brush aside these First Amendment concerns, but the Commission should not. Instead, the Commission should consider the long-term ramifications of any new sponsorship identification rules, especially the negative effect they would have on the health of the broadcast industry and its ability to provide news, information and entertainment programming in challenging economic times. In sum, NAB believes that new sponsorship identification rules are unnecessary, unfair and unconstitutional.

A. Product Placement That Does Not Include a “Call to Action” May Not Be Commercial Speech

As we noted in our initial comments, the burden to prove the necessity of heightened sponsorship identification rules falls on those advocating for new rules. One commenter has noted that product placement may not qualify as commercial speech and, as such, restrictions on its use would be subject to strict scrutiny analysis by a reviewing court.⁶ As the National Media Providers point out, most product placements

⁶ See Comments of National Media Providers at 45-46 (filed Sept. 22, 2008).

do not include a “call to action” and may be more accurately compared to underwriting sponsorship that Congress and the Commission currently allow on noncommercial television and radio. *Id.* There is a fundamental difference between traditional advertising that, in effect, invites the consumer into a transaction, and the placement of a brand or other trademarked logo. Most sponsored content within programming falls into the latter category.

Noncommercial broadcasting underwriting announcements cannot, under Commission rules, include “qualitative or comparative language.” However, such announcement may include “company slogans which contain general product-line descriptions” if such descriptions are not clearly promotional.⁷ Likewise, most product placements on television and radio do not include “qualitative or comparative” language. Instead, the vast majority of product placements in broadcasting are simple props or logos placed in the background. These placements are designed more to enhance brand recognition than promote the specific characteristics of a particular product. If simple product placement does not constitute commercial speech, then the Commission would face an even higher hurdle in justifying any increased regulation.

B. Even if Product Placement Constitutes Commercial Speech, Enhanced Sponsor Identification Rules Still Fail under *Central Hudson*

Even assuming that product placement does qualify as commercial speech, advocates must still clear the significant hurdles required under the test laid out in *Central Hudson*, 447 U.S. at 565-66. Under *Central Hudson*, if commercial speech concerns a lawful activity and is not misleading, the government may not regulate that

⁷ See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 FCC Rcd. 827 (1992).

speech unless (1) the asserted interest is substantial, (2) the regulation directly advances that interest, and (3) the regulation is no more extensive than necessary to serve that interest. Proposals to regulate embedded advertising cannot clear any one of these hurdles, let alone all three.

i. Commenters in Favor of Enhanced Sponsor ID Rules Have Failed to Prove that Product Placement or Product Integration Is Inherently Misleading or Deceptive

Several commenters tried to identify a substantial governmental interest in enhanced sponsor identification rules; but as we note below, they have failed on all accounts. Commercial Alert, for example, echoes the inflammatory rhetoric of its petition by characterizing product placement as “hidden advertisements” that are “inherently deceptive and misleading.”⁸ They claim simply that the “very form” of product placement in television and radio programs makes it misleading and therefore undeserving of First Amendment protections. *Id.* They make this claim despite a contrary decision by the Federal Trade Commission (“FTC”), the expert agency charged with determining whether advertisements are deceptive and/or misleading.⁹ In rejecting a similar request from Commercial Alert, the FTC noted that, with product placement, “few objective claims appear to be made about the product’s performance or attributes” and that “in most instances the product appears on-screen ... or is mentioned, but the product’s

⁸ Commercial Alert Comments at 20 (filed Sept. 22, 2008).

⁹ As noted in our initial comments, Section 5 of the Federal Trade Commission Act (“FTC Act”) provides the Federal Trade Commission (“FTC”) with authority to eliminate advertisements deemed unfair or deceptive. 15 U.S.C. § 45. The FTC has noted that “given the fact-specific nature of the deception analysis under Section 5, a one-size-fits-all rule or guide would not be the most effective approach to addressing any potential for deception in some forms of product placement.” See Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gray Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005).

performance is not discussed.”¹⁰ In other words, without an objective claim about a product, there is nothing that can be deceitful or misleading about product placement or integration. For there to be some element of persuasion, claims about a product must be made. The FTC outright rejects the notion that product placement in a program, without more, is inherently deceptive or misleading. The FCC has no basis for second guessing the FTC in this regard.

Despite the strong rejection of their claims by the FTC, Commercial Alert nonetheless maintains that the FTC’s decision was “mistakenly reasoned” and that “there is no common sense rationale” for its position on product placement.¹¹ Commercial Alert says that the FTC fails to account for “the reality of present-day hidden advertisements,” ignoring the fact that the FTC’s Bureau of Consumer Protection is dedicated to the enforcement of claims about deceptive and harmful advertisements. Commercial Alert rests its argument largely on the very limited instances where an objective claim is made about a product during a program.¹² Although Commercial Alert concedes that “straight product placements very likely remain predominant,” it nonetheless maintains that these limited objective claims are, in its view, so inherently harmful that concurrent announcements are necessary for *all* product placements.

Importantly, research cited by Commercial Alert clearly contradicts its own claims. There is no reason to believe that product placements with objective claims are

¹⁰ See Letter from Mary K. Engle, Associate Director for Advertising Practices, Federal Trade Commission, to Gray Ruskin, Executive Director, Commercial Alert, 6 (Feb. 10, 2005).

¹¹ Commercial Alert Comments at 20-22.

¹² *Id.* at 21 (citing, for example, an episode of *Two and Half Men* where one of the characters reads the product description of a popular brand of Webcam).

more harmful than the vast majority of instances where a product appears simply as a prop in a television show. Studies show, for example, that when a “brand’s modality of presentation is not congruent with its level of plot connection, viewers tend to think about the reason for the brand’s presence in the show and raise their cognitive defenses.”¹³ In other words, during instances where an objective claim is made about a product during a program, viewers see that brand as an obstacle to the plot and react negatively toward the brand. These studies support the FTC’s determination that product placement or product integration is not inherently misleading or deceptive. Therefore, there is no justification for requiring concurrent announcements of sponsored content, even those relatively few placements that include an objective claim, which would radically alter the nature of the broadcast experience for consumers.¹⁴

ii. Commenters in Favor of Enhanced Sponsor Identification Have Failed to Show That Product Placement or Integration Causes an Actual Harm in Need of Governmental Remedy

Commercial Alert concedes that the Commission, like the FTC, could find that product placement is entitled to the First Amendment protection afforded to commercial speech, but asserts that more burdensome regulation of sponsored content would pass the *Central Hudson* test. But Commercial Alert and several other groups cannot

¹³ Cristel Antonia Russell, *Investigating the Effectiveness of Product Placement in Television Shows: The Role of Modality and Plot Connection Congruence on Brand Memory and Attitude*, *Journal of Consumer Research*, Vol. 29, 306-318, 314 (December 2002) (citing Friestad and Wright, *The Persuasion Knowledge Model: How People Cope with Persuasion Attempts*, *The Journal of Consumer Research*, Vol. 21, 1-31 (June 1994)).

¹⁴ NAB also notes that Commercial Alert’s proposed regulation of all product placements based in large part on the (unproven) harms presented by those few placements with objective claims would violate *Central Hudson* by being more extensive than necessary.

demonstrate that there is a substantial government interest that justifies a restriction of product placement.

Commercial Alert claims simply that “[v]iewers are harmed every time they are deceived by hidden advertisements” but does not identify the exact nature of the harm. Commercial Alert Comments at 23. As we noted in our initial comments, even if Commercial Alert could prove that consumers are confused as to whether product placements are advertisements, which they cannot, they certainly cannot show that those consumers actually suffer any tangible harm. It is not enough to say, without evidence, that consumers are deceived and therefore injured, or to suggest that product placement of safe and legal products *might* harm consumers if those products are abused.¹⁵ The logical extension of Commercial Alert’s reasoning would eviscerate advertisement of almost any product on any medium. It is an argument that the Supreme Court has routinely rejected.¹⁶ As the Court has said, the government cannot

¹⁵ Commercial Alert notes, for example, that junk food, alcohol and pharmaceuticals, and by extension the advertising thereof, could harm consumers who abuse those products. It also notes that those industries engage in self-regulation to alleviate the effects of advertising, especially on more vulnerable portions of the population. It is true that advertisements in some product categories, such as tobacco, have been regulated in very limited cases. It does not follow logically, however, as Commercial Alert claims, that government regulation of a single product with known health risks, or limited self-regulation in the advertising of a few products such as alcohol, justifies far more burdensome governmental regulation of product placement advertisements in *every* product category. As we noted in our initial comments, many of the most prominent brands featured as product placements are physical fitness brands. See NAB Initial Comments at 8-9. “Abuse” of these products by American consumers would actually be beneficial.

¹⁶ See, e.g., *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985) (holding that state could not restrict newspaper advertisements by attorney soliciting clients with truthful, non-deceptive information); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (court reiterated its rejection of idea that the government had an interest in preventing dissemination of truthful commercial information to prevent members of public from making bad decisions with the information).

justify restriction of legal commercial speech “by mere speculation or conjecture.” *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). Rather, the government “seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Id.* In this case, the “harm” recited by Commercial Alert is nominal at best and certainly does not rise to the level constituting a substantial governmental interest.

Other commenters have suggested that the Commission should impose new regulations on product placement because these legal advertisements are “insidious” and indicative of an “Orwellian Future.”¹⁷ Beyond their ominous sounding adjectives, however, none of these commenters provides evidence of actual consumer harm. The Screen Actors Guild (SAG), for example, lists two interests that it argues are substantial enough to necessitate government intrusion into advertisements in television and radio programming: (1) integrity of television programming; and (2) adherence to the statutory mandates of Section 317 of the Telecommunications Act.¹⁸ Neither of these assertions provide any basis for regulation.

First, as noted above,¹⁹ the FTC has already determined that product placements and/or integrations are not inherently deceptive or misleading. It is difficult to see how sponsored content in programming that the FTC has cleared as harmless could diminish the integrity of television in the eyes of viewers and listeners. In any event, the apparent subjectivity of any regulation aimed at the quality of television and radio

¹⁷ See Comments of the Screen Actors Guild at 4 (filed Sept. 22, 2008) (“SAG Initial Comments”); See also Comments of N.E. Mardsen at 20 (filed Sept. 22, 2008).

¹⁸ See Reply Comments of the Screen Actors Guild at 8 (filed Oct. 22, 2008) (“SAG Reply Comments”).

¹⁹ *Supra*, pp. 7-8.

programming,²⁰ as a standard to justify further restriction of commercial speech would be treading onto very thin constitutional ice. The Supreme Court has already stated that the government may not legitimately make such cultural or artistic judgments.²¹ As noted by Progress & Freedom Foundation fellows in their comments, the “harm” to broadcasting of product placement is “fiction driven” by “a paternalistic view” that the government knows better what audiences should want to see and hear than they do for themselves.²²

SAG’s second governmental interest – “compliance with the statutory mandates of Section 317” – is circular logic at its worst.²³ SAG suggests, in effect, that the government can demonstrate harm to the public sufficient to establish a constitutionally substantial interest by merely referring to the statute. However, SAG’s opinion that the current FCC rules do not satisfy the statutory mandate fails to demonstrate any real harm that would justify greater restrictions on commercial speech. SAG’s argument represents a gross mischaracterization of the *Central Hudson* test. The FCC must not rely on it to impose new regulation.

Finally, some commenters have noted the general increase in product placement over the last several years as evidence that current regulations are not sufficient.²⁴ In

²⁰ SAG Reply Comments at 3 (product placements “add up to a serious degradation of telecommunications content”).

²¹ See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) (“The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority.”).

²² See Comments of W. Kenneth Ferree and Adam Thierer at 5 (filed Sept. 22, 2008).

²³ SAG Reply Comments at 8.

²⁴ See Comments of N.E. Mardsen at 16-17; Commercial Alert Comments at 2-4.

our initial comments we noted that the instances of product placement tend to ebb and flow and that the total number of product placements in television actually *decreased* during the first half of 2008.²⁵ We also noted that current sponsorship identification rules are scalable and designed to fit any amount of embedded advertising in programming. Further, we argued that there is a natural limit to the amount of advertising in programming. Programming overloaded with commercial messages will turn off consumers that have today more choices for video and audio entertainment than at any point in American history. Pointing simply to reports that product placements in television and radio have increased in the last decade are not alone grounds to increase government regulation. There is nothing to suggest that the current rules are unable to accommodate changes to the advertising market.

Without more evidence of an actual harm to consumers, commenters advocating for enhanced sponsorship identification rules have not met their burden to prove that the government has a substantial interest in restricting commercial speech in broadcasting, let alone demonstrate that their proposed regulations directly advance that interest without burdening more speech than necessary. For that reason alone, the Commission should refrain from imposing new and more burdensome rules on broadcasters.

III. Specific Proposals to Increase Regulation Should Be Denied

As discussed above, commenters supporting expanded regulation of embedded advertising have not demonstrated that any public interest harms have, will, or even can result from the advertising. They do not demonstrate that existing sponsorship

²⁵ NAB Initial Comments at 6 (citing B & C Staff, *TV Placements Dip in 1H '08*, Broadcasting and Cable, Sept. 15, 2008, available at: <http://www.broadcastingcable.com/article/CA6596226.html?q=placement&>)

identification disclosures fail to accomplish the intended goals of Congress and the Commission that the public knows by whom it is being persuaded. Their calls for heightened regulation are thus solutions in search of a problem. The courts have made clear that it is arbitrary and capricious for an agency to impose rules without showing that “a problem exists within its regulatory domain.”²⁶ Adoption of these proposals would thus fail to meet applicable Administrative Procedure Act or, as discussed above, First Amendment standards. These requests for additional regulation should accordingly be denied.

A. The Important Goal of Protecting Children from Excessive Advertising Is Being Met Under Existing Rules

The CCFC supports a blanket ban on all embedded advertising in prime time during hours when children may be watching (i.e., prior to 10 PM).²⁷ CCFC concedes that even in passing and implementing the Children’s Television Act of 1990²⁸ neither Congress nor the Commission restricted advertising during programming “originally produced for a general or adult audience which may nevertheless be significantly viewed by children.”²⁹ This is not surprising since a restriction on speech aimed at protecting children who may be in the audience when non-children’s programming airs

²⁶ *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (FCC failed to justify rule governing local exchange carriers because it made no showing that the claimed abuses did in fact exist). *Accord Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (at outset, court “must consider whether the Commission has made out a case for undertaking rulemaking at all since a ‘regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.’”) (citation omitted).

²⁷ CCFC Comments at 18-19.

²⁸ Children’s Television Act of 1990, PL 101–437, 104 Stat. 996–1000, codified at 47 U.S.C. §§303a, 303b, 394.

²⁹ CCFC Comments at 19 (citing H.R. REP. NO. 101-385, at 6. (1989), *as reprinted in* 1990 U.S.C.C.A.N. 1605).

would be not pass constitutional muster. The Supreme Court has repeatedly held that the possibility that children may access material that is not suitable for them cannot justify “reduc[ing] the adult population . . . to . . . only what is fit for children.”³⁰ The blanket ban that CCFC proposes would do exactly that. If the Commission were to prohibit embedded advertising during all prime-time programming before 10 PM, it would completely eliminate adult access to embedded ads—and the programming these ads help support—during that time. Such a ban would never withstand judicial scrutiny and is entirely inconsistent with how Congress and the Commission have regulated advertising during children’s programming. Moreover, CFCC presents no justification or explanation for departing from these well-established standards. CFCC’s request for such a ban should therefore be denied.

The Children’s Media Policy Coalition (“CMPC”) devotes several pages of its comments to arguments about the use of interactive links to commercial websites in children’s programming, an issue pending in the Commission’s proceeding on *Children’s Television Obligations of Digital Television Broadcasters*.³¹ NAB and others already have devoted extensive attention to this issue in their comments and reply comments in that proceeding.³² However, should the Commission take the unwarranted step of addressing these issues as part of the instant proceeding, NAB hereby incorporates by reference its earlier comments and replies from MM Docket No. 00-

³⁰ See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, (1989) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983), in turn quoting *Butler v. Michigan*, 352 U.S. at 383 (1957)) (internal quotes and editing omitted).

³¹ CMPC Comments at 9-12.

³² See NAB Comments in MM Docket No. 00-167 (filed April 1, 2005); NAB Reply Comments in MM Docket No. 00-167 (filed May 2, 2005).

167.³³ As NAB explained previously, interactive digital television “is a nascent and developing service” that “commercial broadcasters have only begun to explore” as a means to supplement and enhance the entertainment, educational, and informational content of children’s television programming.³⁴ By CMPC’s own admission, this remains accurate today. CMPC explicitly acknowledges that it “is not aware of any interactive commercial links directly targeting children in children’s programs” and can only point to a single recently announced venture into interactive advertising initiatives in *any* broadcaster programming.³⁵ This only serves to further demonstrate that it would be premature to engage in any regulation of interactive digital broadcasting at this time.³⁶ Again, commenters are offering purported solutions for non-existent problems.

B. No Commenter Has Shown that the Public Is Confused by Current Sponsorship Identification Disclosures

Other commenters propose disclosure obligations that are not necessary or appropriate for the Commission to adopt because they duplicate obligations already in place, would unduly interfere with First Amendment rights of broadcasters and others, and/or would not serve the public interest because they will disrupt the experience of broadcast viewers and listeners. CMD, Commercial Alert, N.E. Marsden (Marsden),

³³ *Id.* For ease of reference, NAB’s comments and replies are attached hereto at Appendices A and B, respectively.

³⁴ NAB Comments in MM Docket No. 00-167 (filed April 1, 2005) at 3.

³⁵ CMPC Comments at 10-11 (describing the announcement of a venture involving NBC Universal and Dish Network).

³⁶ NAB Comments in MM Docket No. 00-167 (filed April 1, 2005) at 2 (“Digital interactive television holds the potential to exponentially increase the amount of educational and informational programming available to children. The public interest will be best served by allowing efforts like these to develop without premature government intrusion... This is particularly true, where, as here, there is no evidence, and no logical basis on which to assume that broadcasters will, in some manner, misuse digital interactivity.”).

and the Writers Guild of America West (“WGAW”) urge the FCC to impose a simultaneous disclosure requirement for embedded ads appearing in broadcast television.³⁷ Others propose sponsorship identification disclosures that would appear either before or after programming containing sponsored content (or both). SAG, for example, urges the FCC not to adopt a simultaneous disclosure requirement because it will disrupt the viewing experience and detract from actors’ performances,³⁸ but supports a mandatory disclosure containing specific language before and after a program containing integrated content, with an audio component.³⁹ In addition to these television-specific proposals, commenters advance some proposals for new or

³⁷ Specifically, WGAW asserts that the disclosure should appear as a crawl, for at least five seconds, at a reasonable speed, using reasonable color contrast and no logos, and should include both brand and parent company information. WGAW Comments at 2-3. CMD proposes that “disclosures for television news include an aural announcement and a text disclosure that remains on-screen for the entire duration” of an embedded advertisement, with text large enough that “viewers of average-sized televisions can easily read them,” and in a color, size, and font that visually distinguishes the disclosure from other content.” CMD Comments at 6-7. Commercial Alert advocates simultaneous disclosure coupled with announcements at the beginning and end of a program where embedded advertising appears. Commercial Alert Comments at 1. Marsden proposes that the Commission require a concurrent disclosure consisting of “a small ‘button’ in the lower, left portion of the screen which states ‘Advertisement’.” Marsden Comments at 4.

³⁸ SAG Comments at 9.

³⁹ SAG Comments at 8. SAG asserts that disclosure should appear in readable text on the full screen for a significant amount of time, and should specify the following: the program has embedded content; inclusion of product is a paid advertisement; specific product was included in exchange for remuneration; inclusion of product is not an endorsement by actors, producers, or writers; and identify the brand and parent company associated with product. *Id.* Similarly, iTVX proposes that broadcasters identify placements before and after shows and direct viewers to a website where they can view “paid-for announcements.” iTVX Comments at 1. Not surprisingly, the website iTVX recommends for this purpose is its own website. *Id.* Marsden supports disclosure “on a full screen at the beginning of the program stating the sources of any paid embedded advertisements.” Marsden Comments at 4.

expanded radio disclosures.⁴⁰ CMD asserts that, in addition to its proposed disclosures specific to either radio or television, all newscasts should be required to identify embedded ads in their closing credits, and all licensees should have to maintain lists of entities that paid for embedded ads in their public files and on their websites for at least one year.⁴¹

Although the proposals are quite detailed, the requisite evidentiary and legal foundation for such proposals is scant. Commenters seeking additional regulation have failed to demonstrate that any harms are resulting from embedded advertising or that the public is in fact being deceived or misled given existing disclosures. Commenter iTVX, for example, does not even attempt to identify a problem that its proposal would cure.⁴² Those who do cite examples of product placement and/or integration they consider problematic fail to make a case for more regulation. CMD cites the example of a morning news show that is partially sponsored by McDonalds and features anchors drinking McDonald's coffee, but as CMD itself explains, the station provides disclosure in the form of "an on-air announcement and on-screen graphics" so the example fails to

⁴⁰ Commercial Alert proposes that, because simultaneous disclosure seems infeasible for radio, disclosure should be required to be made within 30 seconds of an embedded advertisement. Commercial Alert Comments at 19-20. CMD proposes mandating aural disclosures immediately prior to and following any embedded advertising in radio newscasts. CMD Comments at 7.

⁴¹ CMD Comments at 7. CMD also makes some confusing statements about the application of its proposals to video news releases ("VNRs"). CMD suggests that VNRs are simply a form of embedded advertising. *Id.* at 4. VNRs, however, are generally provided free-of-charge, and newscasters use their editorial discretion in choosing whether to use any of the material – just as they do with written press releases. Section 317 of the Act carefully delimits the bounds under which the sponsorship rules apply to VNRs – specifically, where there is an exchange of consideration. Where there is no *quid pro quo* involved, use of VNR material does not trigger Section 317 sponsorship identification requirements.

⁴² iTVX Comments at 1.

show how or why any viewers would be confused.⁴³ CMD goes on to cite two studies purportedly identifying examples of broadcaster failure to provide the appropriate sponsorship identification for various product placements in news programming.⁴⁴ Without access to all of the programming studied, neither NAB nor the Commission can analyze the accuracy or quality of analysis in these studies. However, even if the reports are accurate, they do not make a case for new regulation. If some stations are in fact failing to make the requisite disclosures as alleged by CMD, the cure is enforcement of existing rules, not revised or additional rules. Similarly, if as some commenters contend, any broadcaster has failed to meet the requirement to use disclosures that appear long enough to be heard or read by the average viewer/listener,⁴⁵ if on-air personalities are accepting access to vehicles in exchange for favorable on-air mentions without disclosure,⁴⁶ or if other violations of the statutes or rules are occurring, these problems are a matter of enforcement of existing Act provisions and rules, not a justification for any new rules, especially constitutionally

⁴³ CMD Comments at 1-2.

⁴⁴ CMD Comments at 3-4. CMD states that an evaluation of 294 newscasts on television broadcast stations found that 90% contained embedded advertisements and that the “links between advertisers and television news are rarely disclosed.” CMD Comments at 3 (citing James Upshaw, Gennadiy Chernov and David Koranda, “Telling More Than News: Commercial Influence in Local Television Stations,” *Electronic News*, Volume 1, Issue 2, May 2007, pp. 67-87). CMD states that another second study involving multiple stations found that the sponsorship of paid-for programming involving health care was not disclosed. *Id.* at 4 (citing Trudy Lieberman, “The Epidemic: That Gee-Whiz Medical Segment on Your Local TV News? It Was Produced and Written by the Very Hospital It’s Touting,” *Columbia Journalism Review*, March / April 2007).

⁴⁵ See Commercial Alert Comments at 10; WGAW Comments at 3, 10-13 (asserting that disclosures are “barely readable by the viewer”); SAG Comments at 6. Although Commercial Alert contends that it is “widely acknowledged” that the requirement to make disclosures that can be heard or read by the average person “is not met in practice,” it offers no evidence to support this statement. *Id.*

⁴⁶ See Commercial Alert Comments at 10, 19.

suspect ones. Bald assertions that the disclosures currently being made are too short, too small, too easy to bypass, or too confusing for the public does not justify changes to longstanding Commission rules and policies.⁴⁷

With respect to on-air mentions by radio hosts, commenters' requests largely echo existing requirements. CMD, for example, asserts that "[l]isteners must be made aware when radio reporters or hosts are given products or services in exchange for on-air mentions."⁴⁸ This is an accurate statement of current law, not an aspirational statement or justification for additional regulation: on-air mentions are subject to the sponsorship identification requirements, and any mention that does not meet the obviousness exception must be identified. CMD goes on to argue that no on-air mention can ever fall within the obviousness exception. NAB does not agree that on-air mentions always require identification and can never meet the obviousness exception. Indeed, CMD does not even attempt to explain why on-air mentions can never fall within the scope of this exemption. NAB renews its suggestion from its initial comments that the Commission *not* assume that consideration has or has not taken place in connection with on-air mentions, but should rely upon case-by-case analysis whenever there has been an allegation or investigation into a broadcast licensee's conduct with respect to an on-air mentions.

⁴⁷ See *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 42 (1983); *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) (if the Commission rejects a "time-tested procedure" and replaces it with a new one, then it must be able to show that this "new procedure is superior" because, "if not, why the change?").

⁴⁸ CMD Comments at 8.

IV. Conclusion

In sum, NAB encourages the Commission to take a balanced approach to this proceeding, and weigh carefully the effects of any rule changes on the future health of the over-the-air and free broadcast industry. As we noted in our initial comments and repeated here, NAB knows of no evidence that shows embedded advertising in any form causes harm to the public interest. We again urge the Commission to continue to enforce existing rules and resist calls to adopt unduly burdensome restrictions that may run afoul of First Amendment protections and impede broadcasters' continued ability to support high quality, free over-the-air programming.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman
Erin L. Dozier
Scott A. Goodwin

NAB Law Clerk
Ike Ofobike

November 21, 2008

Appendix A

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

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

To: The Commission

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the *Further Notice* asking how the Commission should tailor its rules to balance innovation and parental control in an interactive television environment.² In its recent decision on children’s television obligations, the Commission agreed that prohibiting interactive links at this stage of the digital transition is “premature and unnecessary,” and could “hamper the ability of broadcasters to experiment with potential uses of interactive capability in children’s programming.” *R&O/FN* at ¶ 53. Nonetheless, the Commission sought comment on “how to tailor our rules to allow innovation in interactivity in children’s television programming, while at the same time ensuring that parents can control what information their children can access.” *R&O/FN* at ¶ 71. The Commission also tentatively concluded that it should “prohibit

¹ NAB is a nonprofit incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry.

² In the Matter of Children’s Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 00-167 (rel. Nov. 23, 2004) (“*R&O/FN*”).

interactivity during children’s programming that connects viewers to commercial matter unless parents ‘opt in’ to such services,” and sought comment on whether to change how it defines commercial matter “given that interactive elements can cause a commercial to last much longer than a 30-second or 15-second spot.” *R&O/FN* at ¶ 72.

NAB urges the Commission to exercise restraint, and submits that from a technological standpoint, it is far too early to develop interactive television rules. The Commission was absolutely correct when it concluded that premature rules will unnecessarily limit the potential of this service by stifling innovation to the detriment of children’s educational and informational programming. As discussed in greater detail below, NAB submits that the Commission should continue to exercise restraint rather than prematurely develop rules without evidence of any need to regulate and quite possibly in excess of its statutory and constitutional authority.

II. It Is Premature To Formulate Rules For Nascent And Developing Interactive Children’s Television Services.

Digital interactivity is a nascent and developing service. As the Commission itself has recognized in other contexts, it should not engage in unnecessary regulation of such services.³ This is particularly true, where, as here, there is no evidence, and no logical basis on which to assume that broadcasters will, in some manner, misuse digital interactivity. The agency must refrain from regulation.

³ See, e.g., *Notice of Proposed Rulemaking* in CC Docket No. 02-33, 17 FCC Rcd 3019, 3022-23 (2002) (in which the FCC recognized that “a minimal regulatory environment” will promote “investment and innovation in a competitive market.”); see also *TRAC v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (court upheld FCC’s determination not to apply certain broadcast public interest requirements to new teletext services offered by television broadcasters on grounds that the “burdens of applying” such obligations “might well impede the development of the new technology”).

As the record reflects, since 2000 commercial broadcasters have only begun to explore ways in which their websites can “supplement and enhance the entertainment, educational, and informational content of children’s television programming.”⁴ In doing so, they are, to some extent, following the lead of public television that has charted the path toward developing interactive television for toddler and pre-school children to enhance educational learning.⁵ As companies such as Sesame Workshop demonstrate, in a digital interactive environment, children could be linked to websites that have scores of educational and informational destinations. Digital interactive television holds the potential to exponentially increase the amount of educational and informational programming available to children. The public interest will be best served by allowing efforts like these to develop without premature government intrusion.⁶

Accordingly, the Commission should not prematurely adopt restrictions on interactive television, such as an “opt-in” provision, which may inadvertently create a disincentive for the development of interactive educational and informational children’s programming. Digital interactivity must be allowed flexibility to promote its development.

NAB strongly urges the Commission not to adopt its tentative conclusion to prohibit interactive website links. In lieu of a sweeping and premature prohibition, the Commission

⁴ See *In the Matter of Children’s Television Obligations of Digital Television Broadcasters*, Comments of Viacom, MM Docket No. 00-167, Dec. 18, 2000 at 31. Further, advertisers are not engaging in any inappropriate interactive marketing because, with the exception of a few experimental programs, the technology has not been deployed. See, e.g., <http://heavy.etv.go.com/etvHome/business/press.shtml> (where ABC was awarded an Emmy for its interactive applications during *Celebrity Mole: Yucatan* (last visited Apr. 1, 2005)).

⁵ See http://www.ictv.com/whats_new/2004/press_2004may3games.html (last visited Apr. 1, 2005).

⁶ See *TRAC*, 801 F.2d at 518 (where the court held that “the Commission’s view that encouragement of new technologies serves the public interest is not only rational, but is explicit in [Section 303(g) of] the Communications Act of 1934”).

should instead focus its attention towards appropriately tailoring any regulation of such links. NAB continues to believe that the use of interactive links to commercially sponsored sites may appropriately be conditioned upon a “clear separation between program content and advertising content or non-program website content generally.”⁷ As the Advertising Associations suggested in their initial comments, it would be simple to insert a bumper “*And Now A Word From Our Sponsor*” to alert parents and children that by clicking on an icon, they are leaving the “core” programming.⁸ And as Sesame Workshop correctly stated in its initial comments,

children capable of activating the link will not be toddlers; rather they will be old enough to *distinguish between commercial matter and other programming*. Studies show that children between the ages of 6-8 can distinguish advertising from program content.⁹

Thus, should the Commission find it necessary to separate program content from interactive links, it is feasible to do so. Further, the Commission may consider an “opt-out” provision, in which parents could block the interactive features of programming, including during programming aimed at children *and* for those programs aimed at general audiences where large numbers of children are likely to be watching.

By these various means, the Commission can strike a reasonable balance between protecting children from overcommercialization and encouraging the development of beneficial interactive content in children’s programs. Indeed, the Commission has recognized that “direct links to websites with program-related material could provide beneficial educational and

⁷ See Reply Comments of NAB at 13 (Jan. 17, 2001), quoting the proposal set forth by Children Now in their initial comments, MM Docket No. 00-167 (Dec. 18, 2000) at 37.

⁸ In the Matter of Children’s Television Obligations of Digital Television Broadcasters, *ANA/AAAA Comments*, MM Docket No. 00-167, Dec. 18, 2000 at 3.

⁹ In the Matter of Children’s Television Obligations of Digital Television Broadcasters, *Sesame Workshop Comments*, MM Docket No. 00-167, Dec. 18, 2000 at 24-25, *citing* H.R. Rep. No. 101-385, at 6 (1989) (emphasis added).

informational content in children’s programs.” *R&O/FN* at ¶ 98.¹⁰ Contrary to its stated goal, the Commission’s tentative conclusion to bar interactive links completely “place[s] unnecessary barriers in the way of technical developments in this area that may take place.” *Id.* The net effect of this premature regulation would be the chilling of innovative programs aimed at enhancing the viewing experience of children.

III. The Commission Lacks Statutory Authority To Regulate Internet Content As “Broadcast Commercials” And Such Regulation Raises Serious Constitutional Concerns.

A. The Children’s Television Act Does Not Confer Authority To Regulate Internet Website Links.

As NAB has previously demonstrated, the Children’s Television Act (“CTA”)¹¹ does not provide the Commission with statutory authority to prohibit the inclusion or exclusion of Internet addresses or Internet access points in television programming.¹² The plain language of the CTA states that “special safeguards are appropriate to protect children from overcommercialization *on television.*” 47 U.S.C. § 303a note (emphasis added). Website links do not fall within the scope of this language: website links cannot be considered commercials “on television.” Indeed, they cannot even properly be considered “commercials” because they do not sell or promote a product or service. They are merely addresses, access points to content posted on a particular website. Website links are “an avenue to other documents located anywhere on the Internet.” *Reno v.*

¹⁰ Moreover, even links to commercial websites can serve useful purposes because, as public broadcasters have found, merchandising is an important source of funding for educational and informational programming.

¹¹ Children’s Television Act of 1990, Pub.L. No. 101-437, 104 Stat. 996-1000, *codified* at 47 U.S.C. §§ 303a, 303b, 394.

¹² In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *NAB Petition For Reconsideration*, MM Docket No. 00-167, Feb. 2, 2005 at 18-19 (“*NAB Petition*”).

ACLU, 521 U.S. 844, 852 (1997).¹³ Thus, the CTA does not provide the FCC with authority to regulate these Internet addresses or access points.¹⁴

Even if the CTA could somehow be interpreted to apply to the display of interactive Internet website addresses, a prohibition on such a display is far beyond the intent of Congress in limiting the amount of commercials in broadcast television programming aimed at audiences 12 and under. In implementing commercial limits in the CTA, Congress stated that those limits were “far less restrictive than complete bans.”¹⁵ The Commission’s tentative conclusion to bar interactive Internet website addresses during children’s programming is therefore overbroad under the CTA. Certainly the mere convergence of two media platforms, digital free-over-the-air television and the Internet, cannot by itself warrant government regulation. This is particularly true given the lack of any evidence to demonstrate a need for such drastic measures. It is not surprising that the *R&O/FN* does not cite even a *single* example of how the display of an interactive Internet address has lead to overcommercialization or the commercial exploitation of children because *the technology has yet to be deployed*.

Altering the definition of “commercial matter” to include time spent on the Internet after linking from either a program or a commercial with interactive links is wholly impractical and thus beyond the Commission’s discretion under the CTA. For example, it would be difficult, if

¹³ See also Reply Comments of WB Television Network, MM Docket No. 00-167, Jan. 17, 2001 at 10.

¹⁴ Nor has the Commission identified any other source of statutory authority. Given this lack of any explicit statutory authority to adopt restrictions on the display and the use of interactive Internet website links, the Commission does not possess the authority to adopt such rules. See *MPAA v. FCC*, 309 F.3d 796, 805-07 (D.C. Cir. 2002) (concluding that FCC’s general powers under the Communications Act did not authorize the adoption of rules implicating program content).

¹⁵ H. Rep. 385, 101 Cong., 1st Sess. 11 (1989) at 1613.

not impossible, for broadcasters to predict, and impossible for them to control, how much time a viewer may spend at an advertiser's website after clicking on an interactive link from a commercial. To count this time under the commercial time limits imposed by the CTA would therefore amount to – and raise the same concerns as – a flat ban against the airing any commercials with interactive elements during children's programming. As noted above, such a flat ban is contrary to the intent of the CTA. Moreover, flat bans on protected speech are particularly suspect under the First Amendment.¹⁶

B. The Commission's Efforts To Regulate Interactive Internet Website Links Raise Serious Constitutional Concerns.

Beyond these questions as to statutory authority, the Commission's efforts to regulate where and how Internet website addresses can be displayed raise serious constitutional questions. The Supreme Court has made clear that Internet speech is afforded the highest degree of constitutional protection, and has struck down congressional attempts to regulate such speech, even when the goal has been to protect children from obscene and indecent material.¹⁷ Nothing in the *R&O/FN* explains why the standards established in *Reno* and *Ashcroft* for reviewing restrictions on Internet speech would not apply to the review of any Commission regulations affecting the display or use of interactive Internet website links. And the Commission has certainly made no showing that its proposal to prohibit interactive website links could possibly survive such searching scrutiny. Even if a reviewing court were to (incorrectly) apply a lesser standard of review to the Commission's new regulations affecting Internet content, including a

¹⁶ See, e.g., *Sable Communications of California v. FCC*, 492 U.S. 115, 127-28 (1989) (finding a "total ban" on indecent commercial telephone communications to be unconstitutional).

¹⁷ See *Reno*, 521 U.S. 844; *Ashcroft v. ACLU*, 124 S.Ct. 2783 (2004) (applying strict scrutiny, court struck down congressional enactments because they were not narrowly tailored and did not utilize the least speech restrictive means of furthering the government's compelling interests).

ban on interactive links, these regulations would not pass constitutional muster under an intermediate level of scrutiny.¹⁸

The fact that the Commission is proposing regulations affecting Internet websites in the guise of regulating content on television does not in any way lessen the constitutional difficulties with these proposed rules. Not only has the Supreme Court made clear that Internet speech is afforded the highest degree of First Amendment protection, it has emphasized that the factors that, at least in the past, could justify greater regulation of the broadcast media do not apply to the Internet.¹⁹ In particular, the Court has found governmental attempts to regulate the Internet unconstitutional because it takes “affirmative steps” for users to access content on the Internet.²⁰ Because it will clearly take further “affirmative steps” to access any Internet content, commercial or other, from any link in television programming, the Commission’s proposal to ban interactive Internet links during all children’s programming would be unlikely to pass constitutional muster.

¹⁸ In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court required the government to do more than simply “posit the existence of the disease sought to be cured” to justify even a *content neutral* regulation of the speech of cable operators. 512 U.S. 662, 664 (1994), quoting *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The government must instead demonstrate that the harms alleged “are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way.” *Turner*, 512 U.S. at 662, 664. In light of the fact that the Commission has failed to demonstrate *any* harm caused by the display or use of interactive Internet website addresses, it clearly cannot show that the regulation (let alone the prohibition) of such interactive links would alleviate that harm or otherwise further its interest in protecting children from overcommercialization. And it would be virtually impossible for the Commission to demonstrate that its proposed ban on interactive website links would not burden “more speech than is necessary” to protect children. *Id.*

¹⁹ *Reno*, 521 U.S. at 868-70 (noting that broadcast medium had “history of extensive Government regulation,” was characterized by “the scarcity of available frequencies at its inception,” and had an “invasive nature,” but that these “factors were not present in cyberspace”).

²⁰ *Id.* at 869 (explaining that, unlike broadcast, Internet communications “do not invade an individual’s home or appear on one’s computer screen unbidden”).

IV. The Commission’s Proposed “Opt-In” Program For Interactive Children’s Television Is Not The Least Restrictive Means To Protect Children From Overcommercialization.

Even assuming the Commission had the statutory authority to regulate the Internet as accessed through interactive television and could show that its proposed regulation would in fact directly and materially alleviate real harms caused by the existence of interactive Internet links in television programming, the Commission would still need to show that these regulations do not burden more speech than necessary to protect children. The Commission’s tentative conclusion is to prohibit “interactivity during children’s programming that connects viewers to commercial matter” unless parents “opt in” to such a service. *R&O/FN* at ¶ 72. This sort of “opt-in” approach is not the least speech restrictive means to protect children from overcommercialization. There is clearly a less restrictive alternative to enable parents to control the material their children may access. Specifically, as with V-chip technology, parents can be given an option to block unwanted content – an “opt-out” approach.²¹ NAB thus urges the Commission consider an “opt-out” plan as a less restrictive alternative more likely to pass constitutional scrutiny. This approach will allow parents to “control what information their children can access”– the Commission’s stated goal²²– rather than censoring content at its source.

²¹ *See also Ashcroft*, 124 S.Ct. at 2793 (in which the Supreme Court noted that content that may be filtered or blocked by parents “give[s] parents [the ability to monitor what their children see] without subjecting protected speech to severe penalties”).

²² *R&O/FN* at ¶ 71.

V. Conclusion.

For the reasons discussed above, NAB again requests that the Commission delay its examination of interactive website links during children's television until the technology has been deployed and the Commission has a better understanding of the actual benefits and harms of this promising new technology.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha MacBride
Jerianne Timmerman
Ann West Bobeck

Jennifer DiMarzio
NAB Law Clerk

April 1, 2005

Appendix B

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

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

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these reply comments in the above-captioned proceeding.² In its recent decision on children’s television obligations, the Commission sought comment on “how to tailor our rules to allow innovation in interactivity in children’s television programming, while at the same time ensuring that parents can control what information their children can access.” *R&O/FN* at ¶ 71. The Commission also tentatively concluded that it should “prohibit interactivity during children’s programming that connects viewers to commercial matter unless parents ‘opt in’ to such services,” and sought comment on whether to change how it defines commercial matter “given that interactive elements can cause a commercial to last much longer than a 30-second or 15-second spot.” *R&O/FN* at ¶ 72. In its

¹ NAB is a nonprofit incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry.

² In the Matter of Children’s Television Obligations of Digital Television Broadcasters, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 00-167 (rel. Nov. 23, 2004) (“*R&O/FN*”).

comments, Children’s Media Policy Coalition (“CMPC”)³ rejects the Commission’s opt-in proposal and instead advocates a complete ban on all digital interactivity that contains any commercial matter during children’s programming. As discussed below, the record in this proceeding demonstrates that there are better and less restrictive means by which the Commission can strike a reasonable and appropriate balance between protecting children from overcommercialization and encouraging the development of beneficial interactive content in children’s programs.

II. V-Chip Technology Could Be Used To Allow Parents To Opt-Out Of Interactive Content.

In our initial comments, NAB offered measures to appropriately tailor interactive links during children’s programming.⁴ NAB has consistently advocated that interactive links to commercially sponsored sites may appropriately be conditioned upon a “clear separation between program content and advertising content or non-program website content generally.”⁵ And, in lieu of an “opt-in” provision, NAB urged the Commission to consider an “opt-out” provision. An “opt-out” provision provides a less restrictive means to allow parents to block the interactive features of programming, both during programming aimed at children and programs aimed at general audiences where large numbers of children are likely to be watching. And, the

³ In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *Comments of The Children’s Media Policy Coalition*, MM Docket No. 00-167, Apr. 1, 2005 (“CMPC Comments”).

⁴ In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *NAB Comments*, MM Docket No. 00-167, Apr. 1, 2005 at 4 (“NAB Comments”).

⁵ See In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *Reply Comments of NAB*, MM Docket No. 00-167, Jan. 17, 2001 at 13, quoting the proposal set forth by Children Now in their initial comments, MM Docket No. 00-167 (Dec. 18, 2000) at 37; NAB Comments at 4.

“opt-out” approach ensures ready access for adults that wish to have easy access to interactive links.

The comments of Tim Collins/Tri-Vision, inventor of the V-chip, demonstrate that this “opt-out” approach is readily achievable.⁶ Specifically, Collings/Tri-Vision states that V-Chip technology can not only be used to help identify E/I programming (which NAB endorses), but that the “V-chip can also be used to help parents control access to interactive program elements by creating additional ratings to describe interactive program elements.” Collings/Tri-Vision Comments at 3. Collings/Tri-Vision also provided a sample interactive ratings system, which would allow parents to choose the levels of commercial and non-commercial content they wish to be linked to. *Id.* at 4-5. Thus, should the Commission find it necessary to separate program content from interactive links, it may be achieved by adapting existing V-Chip technology. Further, as digital television technology develops, including advances in digital programming listings, there will likely be additional means by which parents can block unwanted content at the home. An “opt-out” approach will allow parents to “control what information their children can access”– the Commission’s stated goal⁷– rather than censoring content at its source.

III. The Commission Should Reject CMPC’s Call For A Total Ban On Interactivity Of Any Commercial Content During Children’s Programming.

As NAB demonstrated in its initial comments, the Children’s Television Act (“CTA”)⁸ does not provide the Commission with statutory authority to prohibit the inclusion or exclusion

⁶ In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *Comments of Tim Collings and Tri-Vision International Ltd.*, MM Docket No. 00-167, Apr. 1, 2005 (“Collings/Tri-Vision Comments”).

⁷ *R&O/FN* at ¶ 71.

⁸ Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified* at 47 U.S.C. §§ 303a, 303b, 394.

of Internet addresses or Internet access points in television programming. The plain language of the CTA states that “special safeguards are appropriate to protect children from overcommercialization *on television.*” 47 U.S.C. § 303a note (emphasis added). Website links do not fall within the scope of this language: website links cannot be considered commercials “on television.” Indeed, they cannot even properly be considered “commercials” because they do not sell or promote a product or service. They are merely addresses, access points to content posted on a particular website. Website links are “an avenue to other documents located anywhere on the Internet.” *Reno v. ACLU*, 521 U.S. 844, 852 (1997).⁹

For this reason, the Commission should reject CMPC’s assertion that the CTA provides the Commission with authority to regulate (let alone ban) these Internet addresses or access points.¹⁰ The statute simply does not go that far. Nor has CMPC or the Commission identified any other sources of statutory authority. Given this lack of any explicit statutory authority to adopt restrictions on the display and the use of interactive Internet website links, the Commission does not possess the authority to adopt such rules. *See MPAA v. FCC*, 309 F.3d 796, 805-07 (D.C. Cir. 2002) (concluding that FCC’s general powers under the Communications Act did not authorize the adoption of rules implicating program content).

Even if the CTA could somehow be interpreted to apply to the display of interactive Internet website addresses, a complete prohibition on such displays is far beyond Congress’ intent in the CTA to limit, but not to ban, the amount of commercials in broadcast television programming aimed at audiences 12 and under. In implementing commercial limits in the CTA,

⁹ *See also* Reply Comments of WB Television Network, MM Docket No. 00-167, Jan. 17, 2001 at 10.

¹⁰ CMPC Comments at 12-13.

Congress specifically noted that those limits were “far less restrictive than complete bans.”¹¹ Clearly, Congress recognized that a free, over-the-air commercial broadcasting service relies on advertising revenue to support programming, including children’s educational and informational and other child-oriented programming. The Commission should accordingly reject CMPC’s call for a complete “prohibition on interactivity, during children’s programming and during commercials aired during or adjacent to children’s programming, that connects the viewer to commercial matter.” CMPC Comments at 2. Even setting aside questions about the FCC’s authority to regulate Internet content (which it does not have), a total ban on interactive websites, based on the type of content a website address linked to, would certainly be overbroad, given Congress’ intent in the CTA to merely limit commercials in television programming.

Beyond these questions as to statutory authority, any Commission effort to regulate where and how Internet website addresses can be displayed raises serious constitutional questions. As detailed in NAB’s initial comments, the Supreme Court has made clear that Internet speech is afforded the highest degree of constitutional protection, and has struck down congressional attempts to regulate such speech, even when the goal has been to protect children from obscene and indecent material.¹² Nothing in either the *R&O/FN* or CMPC’s comments explain why the standards established in *Reno* and *Ashcroft* for reviewing restrictions on Internet speech would not apply to the review of any Commission regulations affecting the display or use of interactive Internet website links and the type of content that may be linked to.

¹¹ H. Rep. 385, 101 Cong., 1st Sess. 11 (1989) at 1613.

¹² See *Reno*, 521 U.S. 844; *Ashcroft v. ACLU*, 124 S.Ct. 2783 (2004) (applying strict scrutiny, court struck down congressional enactments because they were not narrowly tailored and did not utilize the least speech restrictive means of furthering the government’s compelling interests).

Given these statutory and constitutional constraints, CMPC's position of a flat ban, without even the Commission's proposal allowing parents to "opt-in,"¹³ is untenable. NAB submits that it is *parents*, and not the government, who should determine which content is appropriate for their children to access. Thus, the Commission should reject CMPC's call for a total ban on interactive websites that link to *any* commercial matter during children's programming.

IV. CMPC's Speculation On The Harms Of Interactive Television Are Not An Adequate Basis For Government Regulation.

CMPC next attempts to justify a total ban on interactive links to any commercial matter, not based on statutory or constitutional authority, but rather on a variety of imagined harms, ranging from "the strain such advertising places on parent-child relationships" to an increase of child obesity. CMPC Comments at 5 and 6, respectively. CMPC also states that that "children would be exposed to even greater amounts of advertising" and that "[i]t is easy to imagine that advertisers would attempt to *lure* children away from programming..." CMPC Comments at 7 and 8, respectively (emphasis added). CMPC further claims that regulation is "necessary to ensure compliance with the commercial time limits." CMPC Comments at 9. These statements, however, are entirely speculative – interactive television has *yet* even to be deployed. As The Walt Disney Company points out, interactive services are "being designed to at most allow viewers to connect to a finite amount of additional content provided ahead of time by the programmer to the [Multichannel Video Service Provider]."¹⁴ Simply stated, there is no

¹³ CMPC Comments at 19.

¹⁴ In the Matter of Children's Television Obligations Of Digital Television Broadcasters, *Comments of The Walt Disney Company*, MM Docket No. 00-167, Apr. 1, 2005 at 4 ("Disney Comments").

evidence, and no logical basis on which to assume that broadcasters will, in some manner, misuse digital interactivity.¹⁵ Moreover, as the Commission itself has recognized in other contexts, it should not engage in unnecessary regulation of nascent and developing services.¹⁶ Thus, it is not appropriate for this Commission to pre-judge – and prematurely regulate – interactive television.

CMPC would have the Commission assume that all commercial advertising is a problem that can only be “solved” by government regulation. The Commission should decline to follow CMPC’s suggestion. First, it is not clear there is a “problem.” CMPC’s sweeping declaration that “children do not receive any benefit from being exposed to interactive advertising”¹⁷ overlooks the fact that in an interactive environment, advertising links may be partnered with educational and informational on-line resources. The successes of PBS, Sesame Street, National Geographic and the Discovery Channel,¹⁸ for example, shows the symbiotic relationship between educational and commercial resources. As it does with children’s television programming, advertising on websites helps to ensure that children’s programming, including interactive programming, is adequately funded. In any event, CMPC is also wrong to suggest that

¹⁵ CMPC fails to provide any evidence that *any* interactive digital services have been determined to be harmful to children.

¹⁶ *See, e.g., Notice of Proposed Rulemaking* in CC Docket No. 02-33, 17 FCC Rcd 3019, 3022-23 (2002) (in which the FCC recognized that “a minimal regulatory environment” will promote “investment and innovation in a competitive market.”); *TRAC v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (court upheld FCC’s determination not to apply certain broadcast public interest requirements to new teletext services offered by television broadcasters on grounds that the “burdens of applying” such obligations “might well impede the development of the new technology”); *see also* Disney Comments at 9 (discussing the FCC’s decision not to regulate pulver.com’s voiceover internet protocol service).

¹⁷ CMPC Comments at 20.

government must step in now to regulate. It is premature to conclude that interactive television—a technology yet to be deployed – will result in harm sufficient to justify governmental intrusion on this speech.

Thus, NAB again urges the Commission to exercise restraint, and submits that from a technological standpoint, it is far too early to adopt interactive television rules. The Commission was absolutely correct when it concluded that premature rules will unnecessarily limit the potential of this service by stifling innovation to the detriment of children’s educational and informational programming. *R&O/FN* at ¶ 53. Rather than adopting rules in a vacuum today, the Commission should monitor the development of interactive digital technology. If then, the Commission determines, based on real-world experience, that it is necessary to separate television program content from interactive links, there are less restrictive means by which that goal can be achieved. NAB also urges the Commission to work with broadcasters and the consumer electronics industry to monitor and facilitate the further development of V-Chip and other blocking technologies that will allow parents to control the content their children can access.

V. Conclusion.

For the reasons discussed above, NAB again requests that the Commission delay its examination of interactive website links during children’s television until the technology has

¹⁸ See <http://www.pbs.org> (last visited May 2, 2005); <http://www.sesameworkshop.org> (last visited May 2, 2005); <http://www.nationalgeographic.com> (last visited May 2, 2005); <http://www.discovery.com> (last visited May 2, 2005).

been deployed and the Commission has a better understanding of the actual benefits and harms of this promising new technology.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha MacBride
Jerianne Timmerman
Ann West Bobeck

May 2, 2005