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

In the Matter of	)	
	)	
Campaign for a Commercial-Free	)	
Childhood Petition for a Declaratory	)	MB Docket No. 10-190
Ruling that a Program to be Aired by	)	
Nicktoons Violates the Children's	)	
Television Act	)	

COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

Robert Corn-Revere
Ronald G. London
DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Ave., N.W., Suite 800
Washington, D.C. 20006-3401
(202) 973-4200

Counsel

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The Association of National Advertisers, Inc. ("ANA"), the American Advertising Federation ("AAF"), and the American Association of Advertising Agencies ("AAAA") hereby respond to the above-captioned Petition for Declaratory Ruling of the Campaign for a Commercial-Free Childhood ("CCFC Petition") and the Commission's Public Notice seeking comment thereon.[1] The Advertising Associations offer these comments in order to preserve the careful balance the Commission has struck regarding the creation of and financial support for children's programming. They oppose the CCFC Petition because it asks the Commission to repudiate the balanced approach it has applied historically to children's programming and to adopt in its place an amorphous standard that would intrude deeply into the creative and editorial choices of programmers.

[1] *Comment Dates Established for Campaign for a Commercial-Free Childhood Petition for a Declaratory Ruling that a Program to be Aired by Nicktoons Violates the Children's Television Act and the FCC's Rules and Policies*, 25 FCC Rcd. 13226 (MB 2010), seeking comment on Petition for Declaratory Ruling Submitted by Campaign for a Commercial-Free Childhood, Sept. 13, 2010. Descriptions of the ANA, AAF, and AAAA (together, the "Advertising Associations") are provided in the Attachment to these Comments.

INTRODUCTION AND SUMMARY

The CCFC Petition asserts that the *Zevo-3* program created by Skechers Entertainment is a "program length commercial" that violates advertising limitations set forth in the Children's Television Act and FCC rules because it reflects the commercial interests of shoe manufacturer Skechers USA. The Petition's central claim is that Skechers originally created the *Zevo-3* TV show characters to deliver marketing messages for Skechers shoes, so any fictional entertainment based on those same characters necessarily is commercial matter and not legitimate programming. At its core, the Petition wants *Zevo-3* banned based not because of the show itself, but based on the circumstances of its creation, and because Skechers may get an "advertising boost" from the mere existence of the show. CCFC Pet. at 12.

The CCFC Petition is based on the false premise that any animated characters with ties to products inherently constitute advertising, and that their presentation in children's television programming automatically violate FCC commercial limits. But a moment's reflection on the history of popular children's characters illustrates the fallacy of this assertion. As discussed in more detail below, characters ranging from Peter Pan to the Smurfs have appeared in books, as toys, and in advertising for over a century. Subjects of children's stories have been adopted as commercial icons, just as characters originating in advertisements have captured the imagination of program creators and their audience. Which incarnation comes first is beside the point, and any attempt to separate popular fiction from the commercial world is both Quixotic and damaging to the creative process. The FCC's actions to regulate children's television over the past several decades reflect this important insight, which is missing entirely from the CCFC Petition.

The FCC has long recognized the need to enforce its children's television policies in a way that does not restrict the ability to draw characters from many different sources. Accordingly, it has enforced the commercial limits of the Children's Television Act, 47 U.S.C.

§ 303a, its implementing rules, 47 C.F.R. §§ 73.670, 76.225, and related FCC policies so as to "preserve the creative freedom and practical revenue sources that make children's programming possible." [2] The Act imposes advertising time limits during children's programs, and FCC policies generally require a separation between such programming and commercial matter by prohibiting practices like host-selling and program-length commercials. *See CTA MO&O*, 6 FCC Rcd. at 5095-99. Yet at the same time, the Commission has long rejected the notion that the statute or rules should restrict children's programs simply because they "have products associated with them." *CTA R&O*, 6 FCC Rcd. at 2117-18. *Accord*, *CTA MO&O*, 6 FCC Rcd. at 5098-99. The CCFC Petition ignores this regulatory history and asks the Commission to adopt a rule that would allow the government to regulate the origins of fictional characters in children's programming. Such an intrusive approach is both unnecessary and unwise.

I. LONG-STANDING FCC POLICY REQUIRES A BALANCED APPROACH TO CHILDREN'S PROGRAMMING

The FCC has long understood that enforcement of its children's television rules require a delicate balance. First and foremost, it has sought to apply the law in such a way as to avoid intruding on editorial judgments and to find regulatory approaches that do not chill the production of children's programming. *CTA MO&O*, 6 FCC Rcd. at 5099. *Cf. CTA R&O*, 6 FCC Rcd. at 2118. As part of this balanced approach, the Commission recognized that "service to the public depends on [the] ability to maintain adequate revenues with which to finance programming," which among other things directly affects "the amount and quality" of children's programs made available. [3] "Eliminating the economic base and incentive for children's

[2] *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd. 2111, 2118 ("*CTA R&O*"), *on recon.*, 6 FCC Rcd. 5093 (1991) ("*CTA MO&O*")).

[3] *Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward Elimination of Sponsorship and Commercial Content in Children's Programming*, 50 FCC.2d. 1, 9, 11 (1974).

programming would inevitably result in [ ] curtailment … in this area," and it is especially "unrealistic, on the one hand, to expect [programmers] to improve significantly their [ ] service to children and, on the other hand, to withdraw a major source of funding for this task." [4]

The CCFC Petition begins with the premise that "[t]he FCC has several longstanding policies" governing "the intermixture of program and commercial material in children's television programming," [5] but it ignores how the Commission has balanced competing policy interests over the years. The Commission has been able to avoid intruding on editorial judgments by relying on objective standards for separating programs from advertising. For example, the Children's Television Act limits commercial time during children's programs (12 minutes on weekdays and 10.5 minutes on weekends). To implement these limits, the FCC defined such "commercial matter" as "[a]ir time sold for purposes of selling a product (or service)." [6] The rules and policies also require separation devices – *e.g.*, "bumpers" – to distinguish commercial matter from the start or close of a program or its segments (*i.e.*, those between commercial "breaks"). *See CTA R&O*, 6 FCC Rcd. at 2112, 2117-18. They also prohibit "host selling" by a program's talent or characters, as well as program-length commercials, which include not only shows dedicated to a sales message but also placing commercials for a product or character associated with a program in or adjacent to the program. *E.g.*, *Children's Television*, 13 FCC Rcd. at 10266.

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[4] *Id*. at 11. Accordingly, the Commission has also long "encourage[d] … explor[ation] of alternative methods of financing" the production of children's programming as well. *Id*.

[5] CCFC Pet. at 11 (quoting *Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. 10682 (2008)). *See also id*. at 14-15 (citing *CTA R&O*, 6 FCC Rcd. at 2118, and *CTA MO&O*, 6 FCC Rcd. at 5097).

[6] *See CTA R&O*, 6 FCC at 2112. The Commission has explained that material is commercial matter if the entity airing it "received consideration directly or indirectly" for doing so and it was used to sell a product or service, and that this is not restricted to material of any particular length. *Mass Media Bureau Advises Commercial Television Licensees Regarding Children's Television Commercial Limits*, 13 FCC Rcd. 10265, 10266 (MMB 1998).

Contrary to these long-established policies, the CCFC Petition asserts that *Zevo-3* violates FCC policies based mainly on the presumed commercial goals of its producers. Thus, the Petition describes *Zevo-3* and its commercial origins at length, but provides very little legal analysis of how the show assertedly runs afoul of the children's program commercial limits and the host-selling and program-length commercial bans. It fails to acknowledge, for example, that the FCC long ago experimented with – and discarded – an approach similar to what CCFC now proposes. In a case involving the Saturday morning 30-minute *Hot Wheels* cartoon based on toy cars of the same name, the Commission found that the "circumstances surrounding the creation, production, and sale of the program, together with its content and partial sponsorship" of the toymaker, required treating the show as commercial matter. [7] But it later backed off such a hard-line position, finding it to be unworkable.

In this regard, the Commission subsequently denied a complaint alleging that program-length commercials existed where programs were named after or depicted "products such as toys, characters, or sets of toys and characters, the existence of which predated the production of the programming" when "commercials for such products use the same voices, animation, characters, and logos as those depicted during the programming." *ACT v. KTTV*, 58 R.R.2d at 62. The complaint targeted eight different animated programs, including *He-Man and the Masters of the Universe*. The FCC expressly rejected the argument, almost identical to the one now made by CCFC, that the commercial origins of the characters should determine the classification of the shows as "commercial matter" under the rules. It found the programs were

[7] *In re Complaint of Topper Corp.*, 21 FCC.2d 148 (1969), *aff'd* 23 FCC.2d 132, 134 (1970), *reaffirmed sub nom. American Broad. Co.*, 23 FCC.2d 134 (1970). This decision pre-dated the FCC's definition of "commercial matter" under the Children's Television Act, and thus did not result in punishment for airing the show. The decisions therefore did not impede broadcast of the program to its intended child audience. *See Action for Children's Television v. KTTV*, 58 R.R.2d (P&F) 61, 67-68 n.20 (1985) ("*ACT v. KTTV*").

not program-length commercials despite the fact they were created with the active participation of the products' producers. *Id*. at 67-68.

The Commission acknowledged there may be "commercial goals intended by toy manufacturers who encourage the development and broadcast of programs in which their toys are depicted or who base their toys on existing programs," *id*. at 66, but there is "no useful purpose in restricting unnecessarily … programs merely because products are depicted." *Id*. at 67. In other words, the commercial origins of a program's premise, including the appearance of products or product characters, did not detract from the ability to create stories and characters that are engaging, entertaining, or even educational. Where, as here, program distributors select and/or develop a show in good faith for its entertainment value, it does not constitute commercial matter under FCC children's programming policies. *Id*. at 66-67. The FCC added that "[t]o the extent the 'Hot Wheels' decisions have been interpreted as including a finding that program product licensing and associated off-program advertising is inherently contrary to the public interest or deceptive to the child audience, we believe [they have] been read too broadly." *Id*. at 67 n.18.

The Commission reaffirmed these findings in implementing the Children's Television Act, and thus rejected essentially the same regulatory framework CCFC now proposes. Specifically, the Commission declined to adopt a test of whether a program's primary purpose is to promote products based on the circumstances of its creation, production and distribution, including producer intent, as the ultimate criterion is whether the program itself is a commercial.[8] It agreed that "a program's relationship to products is not necessarily indicative of commercial intent," *id*. at 2117, especially as "related product marketing is … integral [to how] children's programming is funded." *Id*. at 2118.

[8] *See CTA R&O*, 6 FCC Rcd. at 2117-18. *See also id*. at 2118 & n.20; *CTA MO&O*, 6 FCC Rcd. at 5098 (narrowing the *Hot Wheels* precedent).

The Commission purposefully adopted rules that minimized government intrusion into editorial decisions of program producers. It decided the appropriate test is whether a show separates program content from commercials. *Id*. at 2117. It did so in significant part because the less precise, further-reaching alternative presaged by *Hot Wheels* and periodically revived by anti-commercial activists "would be so intrusive to the commercial and creative processes critical to … children's programming that the ultimate goals of the Act could be frustrated." *CTA MO&O*, 6 FCC Rcd. at 5099. The Commission explained that the approach based on commercial interests was imprecise, administratively infeasible, and insensitive to interests in encouraging multiple revenue streams to fund children's programs. *CTA R&O*, 6 FCC Rcd. at 2117-18; *CTA MO&O*, 6 FCC Rcd. at 5098-99.

The CCFC Petition does not attempt to apply – nor does it even mention – the applicable legal framework under these FCC precedents. Although CCFC asserts that "[t]here is no way to separate the programming content from the commercial content of *Zevo-3* because the programming content *is* commercial content," CCFC Pet. at 15, it makes no attempt to support this claim by reference to the Commission's definition of "commercial matter." Indeed, any fair examination of the show's narrative reveals that there is no call-to-action nor any qualitative "pitch" regarding any good or service, which are the true hallmarks of "commercial matter."[9] As a separate matter, it can be fairly expected that Nicktoons will keep ads involving *Zevo-3* characters (and Skechers shoes) from airing during the *Zevo-3* program.

Accordingly, given these facts and established FCC precedent, granting the Petition would require a fundamental shift in the Commission's approach to product-related children's

[9] *See, e.g., Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licenses*, 16 FCC Rcd. 19042, 19050 n.42 (2001); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 FCC Rcd. 827 (1992).

shows. Such a change faces significant practical and policy pitfalls that counsel against the Commission altering course as CCFC seeks.

II. THE CCFC PETITION SHOULD BE DENIED BASED ON PRACTICAL AND POLICY CONSIDERATIONS UNDERLYING EXISTING FCC RULES AND TO AVOID CREATING A FIRST AMENDMENT CONFLICT

The Commission's existing policy governing children's programming recognizes that so long as adequate safeguards prevent direct intermixture of commercial calls to action and program segments, and a good-faith belief exists that a program will entertain, there is "no useful purpose" in restricting how programs are developed, selected, and aired. *ACT v. KTTV*, 58 R.R.2d at 66-67. The CCFC Petition asks that the FCC modify its policies to presume that a program constitutes commercial matter based on the origins of the characters and the asserted commercial motives of program producers. This would be unsound policy for several reasons.

A. The Petition's Regulatory Approach Contradicts FCC Policy and is Unworkable

CCFC's proposed reading of the law flies in the face of longstanding FCC policies designed to minimize government regulation of editorial content and to maintain economic support for children's programs. *ACT v. KTTV*, 58 R.R.2d at 67; *CTA R&O*, 6 FCC Rcd. at 2117. There is no principled way the government may play favorites based on timing or the perceived merit of products involved. Thus, the Commission has observed that "[i]f the existence of commercial rewards from associated products were the criteria for imposing restrictions upon children's programming," then no program-related licensing would be possible and "programs such as 'Sesame Street' and … those in the 'Peanuts' series would have to be eliminated." *ACT v. KTTV*, 58 R.R2d at 67. As a consequence, the Commission purposefully has rejected regulatory tests that, "if applied in a content-neutral fashion, could jeopardize acclaimed children's shows and other programs." *CTA MO&O*, 6 FCC Rcd. at 5099.

"[R]elated product marketing" remains "an integral part of the way children's programs are funded." *CTA R&O*, 6 FCC Rcd. at 2118. Accordingly, within the framework of its children's television rules, the Commission has refused to impede purveyors of goods and/or services from developing entertainment divisions, as has Skechers, and programming outlets from joining with them to develop entertaining new fare. This is exactly the kind of "alternative method of financing" children's programs that the FCC has long encouraged.[10] The CCFC Petition provides no rationale for "jeopardiz[ing such] additional revenue streams … needed by many children's programs." *CTA R&O*, 6 FCC Rcd. at 2117.

The approach CCFC proposes would require the Commission to examine the particular content and narrative structure of children's shows, and the evolution and timing of program-related products, to determine how the rules apply to any given program. However, as the FCC has explained, there is "no sensible or administratively practical method of making distinctions among programs based on the subjective intentions of the program producers or on the product licensing/program production sequence." *ACT v. KTTV*, 58 R.R.2d at 67. Too restrictive a framework in this area "would stifle creativity by restricting the sources that writers could draw upon for characters." *CTA R&O*, 6 FCC Rcd. at 2117. *See also CTA MO&O*, 6 FCC Rcd. at 5099 ("a rule [that] would deter producers from employing marketing efforts necessary for a viable program … would stifle creativity by restricting the sources they could draw upon for stories and characters").

Not only is such an approach needlessly intrusive, it is unworkable. One of CCFC's principal concerns is the presumed intent behind the *Zevo-3* program, *see, e.g.*, CCFC Pet. at 4, but as the Commission has explained, "determinations of producer's intent [are] difficult if not

[10] *See supra* note 4. *See also ACT v. KTTV*, 58 R.R.2d at 67 n.20 (children's programming producers "must be receptive to a variety of ways to generate sufficient monies").

impossible."[11] The Commission undoubtedly was correct regarding the senselessness and impracticality of trying to assess the subjective intentions of program producers. Nothing has changed that would enhance the Commission's ability to "distinguish among the many children's programs with related product marketing on the basis of whether a producer had commercial or noncommercial intentions in creating the program." *CTA R&O*, 6 FCC Rcd. at 2118.

There likewise is no practical method of making the product licensing/program sequence a determining factor. *ACT v. KTTV*, 58 R.R.2d at 67. The chicken-and-egg problem of whether inclusion of a character in a children's program predated creation of products associated with it, or whether the character was itself a product or associated with one before becoming an element of a children's show, still offers no meaningful test for commercial matter. In the *CTA MO&O*, the Commission held that proponents of a timing-based approach "ha[d] not demonstrated … [that] there is any necessary correlation between the commercial nature of a program and the timing of associated product marketing." 6 FCC Rcd. at 5099. The CCFC Petition does little more than repeat claims the Commission previously has wisely rejected.

The CCFC Petition in fact illustrates the difficulty of crafting an intelligible standard in this area that does not enmesh the Commission in unresolvable content-based determinations unrelated to application and enforcement of its rules. It does not offer – nor is there a way to craft – any meaningful rule for distinguishing *Zevo-3* from shows like *He-Man*, *G.I. Joe*, *Shirt Tales*, *Peanuts* specials, *The Smurfs*, or others that may involve pre-existing characters based on products or other trade identities. *See ACT v. KTTV*, 58 R.R.2d at 62, 63-64, 66 & nn.2-7. Indeed, the Shirt Tales creatures were trade characters for Hallmark before appearing in their own

[11] *CTA R&O*, 6 FCC Rcd. at 2117. *See also CTA MO&O*, 6 FCC Rcd. at 5098 ("We do not believe it is administratively practical … to discern whether a producer had a commercial interest in producing a given program through review of the facts and circumstances surrounding its production and airing.").

television show. And the California Raisins attained popularity as characters promoting California fruit growers before they were featured in a Saturday morning cartoon.

With regard to characters of this type, it makes little difference if a child first encounters the Pink Panther selling attic insulation before seeing him outwit an animated Inspector Clouseau. A child's experience with such a character is also based on the accident of birth and timing of programs and product introduction. Does anyone even remember that "G.I. Joe" was a World War II-era live-action movie character decades before the action figure he inspired came to market, and in turn gave rise to a children's show? Will a child hold an Elmo doll before watching Sesame Street on TV? The bottom line is that, regardless whether *Zevo-3* characters first appeared in shoebox-insert comics or ads, they have sufficiently resonated that Skechers and Nicktoons hold a good-faith belief they can anchor a cable program that will entertain children. So long as they do so without incorporating an express sales message, engaging in host-selling, or including commercials for Skechers shoes during the program, there is no violation of the Act or FCC policy.

B. The CCFC's Proposal to Review Program Content Highlights a First Amendment Conflict

As recognized long ago, the FCC's approach in matters such as these involving children's programming "must be a restrained" due to "the First Amendment context of this issue." *CTA R&O*, 6 FCC Rcd. at 2118. Where "measures proposed by [children's advocates] would be so intrusive to the … creative process critical to the production of [ ] children's programming that … [they] are overly broad, contrary to First Amendment principles, and inimical to the fundamental objectives of the Children's Television Act," the Commission has rejected them because of potentially chilling effects.[12] For the same reason, the Commission now should analyze the

[12] *CTA MO&O*, 6 FCC Rcd. at 5099. *Cf. CTA R&O*, 6 FCC Rcd. at 2118 ("use of a more vague, facts-and-circumstances test would tend to chill production of children's programming");

issues raised in the CCFC Petition so as to avoid creating "grave and doubtful constitutional questions." *Jones v. United States*, 526 U.S. 227, 239 (1999).

A more detailed constitutional analysis will be reserved for reply comments. However, it bears noting that CCFC's analysis of the FCC commercial limits raises a number of significant First Amendment problems. The CCFC Petition proposes a standard that would require the FCC to make detailed editorial judgments regarding the content of children's programs. Such content-based requirements necessarily implicate First Amendment analysis. *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002). Because this would result in the direct regulation of programming content, it is unlikely the government could rely on the constitutional standard that governs the regulation of commercial speech. Yet even if this could be framed as a commercial speech issue, CCFC's proposed approach would require that certain types of programs be banned as "program-length commercials" because of the origin of the characters. Such a result cannot be considered narrowly tailored, even under the commercial speech doctrine. Additionally, the Petition raises unresolved questions regarding the limits of FCC jurisdiction to regulate children's programming, both for broadcasters and cable programming networks.

CTA MO&O, 6 FCC Rcd. at 5098 ("attempt[ing] to discern whether a producer had commercial intent … would intrude to a much greater degree into the creative process … and would therefore tend to chill creative production of children's programs").

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

Association of National Advertisers, Inc.
American Advertising Federation
American Association of Advertising Agencies

By /s/ Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Ave., N.W., Suite 800
Washington, D.C. 20006-3401
(202) 973-4200
Counsel

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ATTACHMENT

ADVERTISING ASSOCIATIONS

Association of National Advertisers, Inc. The Association of National Advertisers, Inc. ("ANA") leads the marketing community by providing insights, collaboration and advocacy to its membership, which includes nearly 400 companies with 9,000 brands that collectively spend over $250 billion in marketing communications and advertising annually in the United States. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote and protect advertisers and marketers. For more information, visit www.ana.net.

American Advertising Federation. Headquartered in Washington, D.C., the American Advertising Federation ("AAF"), is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations.

American Association of Advertising Agencies. Founded in 1917, the American Association of Advertising Agencies ("AAAA"), is the national trade association representing the advertising business in the United States. AAAA's nearly 450 members represent virtually all the large multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of total advertising volume placed by agencies nationwide.