

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

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

MB Docket No. 10-190

REPLY COMMENTS OF SKECHERS USA, INC.

In their opening comments, Skechers, MTV Networks, and the Association of National Advertisers explained at length why *Zevo-3* fully complies with the relevant statutes and regulations regarding advertising to children.

In contrast, most of the commenters that support CCFC encourage the Commission to ban *Zevo-3* but ignore the pertinent legal standards. Free Press (at 4-6) briefly mentions those standards, but simply repeats CCFC’s baseless assertion that *Zevo-3* should be banned because its characters are “inextricably associated” with Skechers shoes. That is not the test for a program-length commercial or host selling. *See* Skechers Comments at 6-10. Indeed, a finding that programming “inextricably associated” with a children’s product is unlawful would have the effect of prohibiting shows featuring popular characters such as Batman, G.I. Joe, Elmo, and the Transformers. Such an expansive and unprecedented holding is directly contrary to longstanding Commission policy and could not be squared with the First Amendment. *See id.* at 11-13.

Professor Dale Kunkel correctly concedes (at 14) that, under current law, a show is not a program-length commercial as long as “no spot[] ads for the program-related products air during breaks in the show.” Professor Kunkel nonetheless criticizes the Commission’s existing rules

and encourages the Commission to “issue a Notice of Proposed Rulemaking to clarify and/or revise its policy on children’s program-length commercials.” Kunkel Comments at 15-16. As Skechers explained (at 10-13), there is no need for the Commission to reconsider its existing rules. But Professor Kunkel is correct that, if the Commission were to reconsider its longstanding policies in this area, it would have to do so through a Notice of Proposed Rulemaking. The Commission’s current rules regarding program-length commercials and host selling were adopted through notice-and-comment rulemaking proceedings.* It is a fundamental principle of administrative law that, “[i]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.” *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (internal quotation marks omitted). To reconsider its existing rules, the Commission would thus have to issue an NPRM and provide an opportunity for public comment. *See* 5 U.S.C. § 553. In any event, as Skechers explained at length (at 5-10), the Commission has *already* considered and rejected arguments in favor of a broader rule that are almost identical to the arguments advanced by CCFC and its supporters in this proceeding; there is accordingly no need to reconsider those issues at this time.

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No commercials for Skechers shoes — even commercials that do not feature the characters from *Zevo-3* — will be aired during that program. *See* Van Cott Decl. ¶ 11. Neither the Skechers brand nor any specific Skechers products will be mentioned by the *Zevo-3* characters during the show. *Id.* And none of the characters will appear in commercial

* Report and Order, *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 2111 (1991); Memorandum Opinion and Order, *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 5093 (1991).

advertisements that are aired during *Zevo-3*. *Id.* Thus, *Zevo-3* does not violate the Commission's rules regarding program-length commercials and host selling. CCFC's petition for a declaratory ruling should accordingly be denied.

Respectfully Submitted,

s/ Michael K. Kellogg

Michael K. Kellogg

Aaron M. Panner

Jeffrey M. Harris

KELLOGG, HUBER, HANSEN, TODD,

EVANS & FIGEL, P.L.L.C.

1615 M Street, NW, Suite 400

Washington, DC 20036

(202) 326-7900

Counsel for Skechers USA, Inc.

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