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January 6, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

RE: MB Docket No. 10-190
Notice of *Ex Parte* Communication

Dear Ms. Dortch:

On January 5, 2011, the undersigned together with Keith Murphy, Vice President, Government Relations, Viacom Inc., and Andra Shapiro, Executive Vice President, Co-General Counsel, MTV Networks, met with the following Commission staff to discuss matters related to the above-referenced proceeding: Mary Beth Murphy, David Konczal, Kim Matthews, Holly Saurer, Susan Aaron and Jordan Usdan. The Viacom and MTV Networks representatives reiterated the arguments made in MTV Networks' comments and reply comments submitted as part of this proceeding, and also responded to arguments raised in reply comments and an *ex parte* letter submitted by the Campaign for a Commercial Free Childhood ("CCFC").¹

¹ See *In re Petition for Declaratory Ruling Regarding Zevo-3*, MB Docket No. 10-190, Reply Comments of Campaign for a Commercial-Free Childhood (dated Nov. 8, 2010) (the "Reply"); Letter from Guilherme Roschke and Matthew Rich to Marlene H. Dortch, MB Docket No. 10-190 (dated Dec. 7, 2010) (the "Letter").

This proceeding arises from the Petition for Declaratory Ruling (“*Petition*”) filed by CCFC with respect to the children’s television program *Zevo-3*, which currently is telecast on the Nicktoons network.² The Commission has now received substantial comments and reply comments from numerous interested parties confirming that the program does not violate either the spirit or the letter of the Children’s Television Act (“CTA”) or the Commission’s children’s television rules and policies.³ Indeed, the record reflects that acceding to CCFC’s request in the *Petition* would contravene both decades of clear Commission precedent and Congress’ intent in passing the CTA. Restricting the telecast of *Zevo-3* on the basis that its characters previously were used to promote Skechers products also would be inimical to the First Amendment. No commenter offered any substantive legal analysis contradicting the legal conclusions set forth in filings submitted by MTV Networks (and Skechers USA, Inc., the Association of National Advertisers, and the National Cable and Telecommunications Association).

In its Reply and Letter, CCFC for the first time incongruously alleged that MTV Networks and Skechers failed to support their defense of *Zevo-3* because, CCFC says, they did not specifically refute the contention that Skechers paid MTV Networks to telecast the program.⁴ First and foremost, each of Skechers and MTV Networks *did* state unequivocally that the telecast of *Zevo-3* on Nicktoons is fully compliant with not only the CTA but also the Commission’s rules and policies.⁵ These broad statements – that the program complies with law – necessarily included the notion that the program complies with any and all of the individual, subordinate components of the law. That MTV Networks and Skechers did not anticipate and respond in advance to a specific argument that CCFC *never made* in the *Petition* is utterly irrelevant.

The FCC should not countenance CCFC’s effort to manipulate public opinion and the Commission’s processes by withholding critical arguments until the

² See *In re Petition for Declaratory Ruling that the Broadcast of Skechers’ Zevo-3 Violates the Public Interest*, submitted by the Campaign for a Commercial-Free Childhood (filed Sept. 14, 2010).

³ 47 U.S.C. § 303a; 47 C.F.R. § 76.225.

⁴ See Reply, at 4; Letter at 2.

⁵ See Comments of MTV Networks, MB Docket No. 10-190 (filed Oct. 22, 2010), at 8 (“MTV Networks Comments”); Comments of Skechers USA, Inc., MB Docket No. 10-190 (filed Oct. 22, 2010), at 6-10 (“Skechers Comments”).

close of the comment cycle, and then springing them on the parties in an effort to create a “gotcha” moment.⁶ Equally troubling, the Reply suggests that in the purported absence of a response, the Commission simply should “infer”⁷ that CCFC’s allegations are true, in a manner antithetical to Commission policies.⁸ Just because it has realized that the charges levied in its initial *Petition* cannot be squared with law, however, does not mean that CCFC now should be permitted to invent facts that plainly do not exist.

Notwithstanding that MTV Networks and Skechers already have confirmed that *Zevo-3* complies with law, the Viacom and MTV Networks representatives at the meeting clarified for the record the financial arrangement between Skechers and MTV Networks. The representatives explained that MTV Networks currently pays Skechers a standard industry license fee for each episode of *Zevo-3* that Skechers produces and delivers to Nicktoons. For understandable, competitive reasons, MTV Networks has a substantial and legitimate interest in assiduously protecting the confidentiality of its sensitive and proprietary commercial contracts,⁹ and hopes that the representations made at the meeting – especially when

⁶ See, e.g., *Commission Seeks Comment on Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, Public Notice, MB Docket No. 10-56 (“To allow the Commission to consider fully all substantive issues . . . in as timely and efficient a manner as possible, petitioners and commenters should raise all issues in their initial filings. New issues may not be raised in responses or replies. . . . Absent such a showing of good cause, any issues not timely raised may be disregarded by the Commission.”) (citing 47 C.F.R. § 1.45(c)); see also 47 C.F.R. § 76.7(c)(2) (reply comments in response to *Petition for Declaratory Ruling* “shall not contain new matters”).

⁷ Reply, at 4.

⁸ See, e.g., *Columbia Broadcasting System*, 56 F.C.C. 2d 313, 314 (1975) (silence or failure to respond to a petition “is [not] deemed to be an admission of the allegations”); *In re Citadel Broadcasting Co.*, 22 FCC Rcd 7083, 7093, n.57 (2007) (Commission refusing to “presume . . . as a matter of law” certain allegations simply because a party did not “deny . . . or challenge any of the” evidence in a filing with the FCC). See also 47 C.F.R. § 76.7(c)(2) (“[f]ailure to reply will not be deemed an admission of any allegations contained in the responsive pleading”); 47 C.F.R. § 73.3584(b) (“failure to file an opposition or a reply will not necessarily be construed as an admission of fact or argument contained in a pleading”).

⁹ The Commission long has recognized that disclosure of sensitive, confidential business information could put parties at a competitive disadvantage in the marketplace. See *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24852 (1998).

coupled with the facts already in the record – will put to rest once and for all any lingering question that may have been raised by the Reply or the Letter.¹⁰

Other than the meritless accusations addressed above, neither the CCFC Reply nor the Letter does any more than repeat the unsupported allegations already raised in the *Petition* and thoroughly refuted in the record. In particular, CCFC asserts that *Zevo-3* should somehow be considered distinct from scores of other children’s television programs (which CCFC concedes *are* lawful) that feature characters who also have appeared as products in a commercial setting.¹¹ CCFC simply notes that in other cases those programs often feature characters who have been used to encourage children to buy toys, whereas *Zevo-3* features characters who have been used in other contexts to encourage children to buy sneakers.¹² CCFC still has never offered an explanation for this supposed distinction, nor could it, given that it is hard to fathom how a child is capable of being influenced in any different manner by seeing a television show featuring a product spokesperson than by seeing a show featuring an actual product.¹³ CCFC does not even attempt, in the Reply or

¹⁰ In addition, as is apparent from watching various MTV Networks channels, Skechers also purchases advertising time on Viacom-owned networks (but not during episodes of *Zevo-3*). This is of no consequence, however. Skechers purchased ad time on Viacom networks long before *Zevo-3* ever was telecast, and of course it continues to place advertisements on various other, non-Viacom channels. The fact that Nickelodeon and Skechers have a multi-faceted business relationship does not automatically mean that Skechers pays to get *Zevo-3* telecast. Regardless, FCC precedent makes clear that “if a [programmer] gives more than nominal consideration in return for the right to air a program,” as MTV Networks does here in the form of a license fee, “the [programmer] will not be deemed to have received consideration as an inducement to air the program,” even when the business relationship between the producer of content and programmer results in the programmer receiving something of value from the producer. *See In re Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 5093, 5095 (1991). Moreover, the Viacom and MTV Networks representatives confirmed at the meeting that their programming executives exercised their editorial discretion in good faith in determining that *Zevo-3*’s characters would be effective children’s entertainment for their audience. *See, e.g., In re Complaint of Action for Children’s Television against Television Stations KTTV, Los Angeles, California, et al.*, Memorandum Opinion and Order, 58 R.R.2d 61, ¶ 18 (1985).

¹¹ *See* Reply, at 11-12.

¹² *See id.*

¹³ CCFC’s observation that some of the character names in *Zevo-3* are integrated in marketing and branding for Skechers shoes only reinforces the absurdity of CCFC’s attempt to draw a distinction here. CCFC never explains why anyone should view differently a character named Z-Strap (which also describes a style of shoe) from characters named Barbie or Mickey Mouse (which are also a variety of toys). Indeed, Barbie’s and Mickey Mouse’s very names, images and

the Letter, to address the FCC's decision in the *KTTV* case, which more than 25 years ago made clear that the inclusion in children's programming of characters "the existence of which" in a commercial setting "predated the production of the programming" does *not* implicate the agency's rules and policies.¹⁴

Finally, CCFC tries summarily to dismiss the very serious questions that MTV Networks and several other parties have raised with respect to the First Amendment.¹⁵ The Reply suggests that an FCC order condemning *Zevo-3* would not implicate constitutional issues because "neither the CTA nor the FCC rules and policies regarding children's advertising have been found to violate the First Amendment."¹⁶ Of course, the Reply neglects to mention that neither the statute nor the Commission's policies has been challenged on First Amendment grounds, so CCFC's argument is hardly persuasive. In any event, even assuming the facial validity of the law, that certainly would not preclude a finding that the application of that law against *Zevo-3* would conflict fundamentally with Nicktoons' First Amendment rights. And the FCC itself has made clear that, "consistent with legislative intent," it would "interpret the [Children's Television Act] with sensitivity to the constitutional rights of the broadcasters and cable operators it affects by affording them significant discretion"¹⁷ The Commission appropriately has sought to avoid actions that would "chill production of children's programming, thereby thwarting the fundamental objectives" of the statute.¹⁸

brands are identical in children's programs featuring those character as in commercials used to market Barbie and Mickey Mouse toys. The bottom line is that, contrary to the claims in the Reply, a Commission ruling against *Zevo-3* would *put at risk* countless other popular and acclaimed children's programs.

¹⁴ *KTTV*, 58 R.R.2d at ¶¶ 17-18.

¹⁵ See MTV Networks Comments, at 22-23; Skechers Comments, at 10-13; Comments of Association of National Advertisers, Inc., The American Advertising Federation, and The American Association of Advertising Agencies, MB Docket No. 10-190 (filed Oct. 22 2010), at 11-12.

¹⁶ Reply, at 16.

¹⁷ *In re Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 FCC Rcd 2111, n. 5 (1991).

¹⁸ *Id.* at 2118.

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In sum, given that the only substantive legal analysis submitted in the record of this proceeding confirms unequivocally that *Zevo-3* complies with the law, MTV Networks urges the Commission to dismiss the *Petition*.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Jared S. Sher
Counsel to Viacom and MTV Networks

cc: Mary Beth Murphy
David Konczal
Kim Matthews
Holly Saurer
Susan Aaron
Jordan Usdan