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June 1, 2011

Ms. Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: *Petition for Declaratory Ruling Regarding Zevo-3*, MB Docket No. 10-190

Dear Ms. Dortch:

Campaign for a Commercial-Free Childhood (“CCFC”), by its attorney, the Institute for Public Representation, respectfully renews its request that the Commission require MTV Networks (“MTVN”) and Skechers USA, Inc. (“Skechers”) to submit copies of all contracts and other agreements, whether written or oral, concerning the terms under which *Zevo-3* is being shown on Nicktoons, as well as sufficient information to substantiate MTVN’s claim that it pays Skechers a “standard industry license fee.”<sup>1</sup>

MTVN and Skechers provided some information about their business arrangements in response to an inquiry from the FCC General Counsel in a letter dated February 23, 2011.<sup>2</sup> However, the “additional details” actually raise more questions than they answer.

The February 23 letter explains that under an agreement executed in January 2010, MTVN agrees to license a minimum number of *Zevo-3* episodes from Skechers and pay Skechers a “program license fee, consistent with industry standards, for each episode of the series that Skechers delivers in a first season of the program, for an initial license period of three

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<sup>1</sup> CCFC first requested this information by letter on February 7, 2011. See Letter from Guilherme Roschke and Khaliah Barnes, Institute for Public Representation, to Marlene H. Dortch, Office of the Secretary, FCC, MB Docket Nos. 10-190 and 08-90, 1-2 (Feb. 7, 2011). CCFC acknowledges that such proprietary information should be kept confidential, and is willing to have the appropriate representatives of CCFC sign a protective order to be able to review the confidential information.

<sup>2</sup> See Written *Ex Parte* Communication from Antoinette Cook Bush and Jared Sher, Counsel to MTV Networks, and Michael Kellogg and Aaron Panner, Counsel to Skechers USA, Inc., to Austin Schlick, General Counsel, FCC, MB Docket No. 10-190, (Feb. 23, 2011) (“February 23 Letter”).

years.”<sup>3</sup> The agreement also establishes the license fees that MTVN must pay if it chooses to re-run the first season of *Zevo-3* and/or order additional seasons.<sup>4</sup>

Contingent on MTVN’s carriage of *Zevo-3*, the January 2010 agreement requires Skechers to purchase a specified level of advertising on MTVN’s networks at “negotiated market rates.”<sup>5</sup> If Skechers purchases additional advertising, MTVN will increase the license-fee for *Zevo-3*.<sup>6</sup> In addition, MTVN and Skechers agree to share the revenues from certain *Zevo-3* merchandise.<sup>7</sup>

The February 23 letter makes six arguments as to why, in their view, this arrangement does not violate any FCC rules or policies. All lack merit.

First, the letter contends that because MTVN is paying a license fee it has given “more than nominal consideration” for the right to telecast *Zevo-3*.<sup>8</sup> Further it claims that under FCC precedent, a programmer “‘will not be deemed to have received consideration as an inducement to air a program,’ even when the business relationship between the producer of content and programmer results in the programmer receiving something of value from the producer.”<sup>9</sup> This claim misstates both the relevant law and facts.

The concept of nominal consideration originates from the National Associations for Better Broadcasting’s (NABB) complaint against KCOP-TV for broadcasting *He-Man and the Masters of the Universe*. NABB argued that because *He-Man* “contains virtual, nonstop depictions of the ‘He-Man’ logo as well as the entire line of ‘He-Man’ toys, and that the program is provided to KCOP-TV at such a low barter price (2 spots per episode),” the station essentially received the programming for no consideration and therefore, §317 of Communications Act required KCOP-TV to identify Mattel as a sponsor.<sup>10</sup> The Commission denied the complaint and NABB appealed.

The D.C. Circuit rejected as inconsistent with Congressional intent the FCC’s position that sponsorship identification was not required “so long as the program, though directed toward a children’s audience, is entertaining and something less than wholly commercial.”<sup>11</sup> It directed the Commission to “to devise a workable and legally supportable standard by which it may be ascertained whether [barter] arrangements are so balanced in benefits to program producers and broadcasters, respectively, as to involve exchanges immunized from the requirement of sponsorship identification.”<sup>12</sup>

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at n.1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 3 (quoting *In re Policies and Rules Concerning Children’s Television Programming*, Report and Order, 6 FCC Rcd 5093, 5095, ¶ 8 (1991) (“Recon Order”) ).

<sup>10</sup> *NABB v. KCOP Television*, 58 Rad.Reg.2d (P&F) 61, 64 ¶9 (1985).

<sup>11</sup> *NABB v. FCC*, 830 F.2d 270, 277 (D.C. Cir. 1987).

<sup>12</sup> *Id.* at 278.

On remand, the Commission acknowledged that “sponsorship identifications may be required for programming supplied to a station free or for a nominal charge.”<sup>13</sup> However, it concluded that KCOP’s acquisition of the program in exchange for advertising time worth more than \$300,000 per year constituted more than nominal consideration.<sup>14</sup>

The Commission followed a similar approach in implementing the advertising limits of the 1990 Children’s Television Act. It concluded that “for purposes of determining whether material is ‘commercial matter,’ the furnishing of material for airing may or may not qualify as consideration. Some barter arrangements, depending on their terms, may involve consideration furnished as an inducement to air commercial matter. However, not all barter contracts may be so categorized.”<sup>15</sup>

The deal ties the licensing of the program from Skechers together with the sale of commercial time to Skechers. The mere fact that MTVN pays a license fee for the program in a larger deal that also includes MTVN receiving advertising and other revenues from Skechers does not resolve the consideration question. Since MTVN receives revenues from another part of the transaction, the transaction could be structured so as to create the appearance of paying a license fee. This apparent license fee could then be refunded to MTVN by increasing the amount Skechers pays for the purchase of commercial time.

Thus, to determine whether *Zevo-3* is commercial matter, the Commission must examine the specifics of the financial agreements between MTVN and Skechers. This careful examination is warranted given the groundbreaking use of commercial spokescharacters in a feature length children’s television program.

In contrast to *NABB v. KCOP-TV*, the parties have not disclosed the amount that MTVN is paying Skechers in licensing fees or the amount Skechers is paying MTVN for advertising. Moreover, there may be additional financial inducements from Skechers for MTVN to carry the show. For example, MTVN receives valuable cross-promotions of Nicktoons and *Zevo-3* every time Skechers sells a pair of children’s shoes with a *Zevo-3* DVD in the box.<sup>16</sup> The Skechers website promotes Nicktoons by informing visitors that *Zevo-3* airs exclusively on Nicktoons inviting visitors to “Play *Zevo-3* Games,” “Watch Videos,” and “Create Your Own *Zevo-3* Comic Book.”<sup>17</sup> As noted by the Senior Vice President of Creative Development for Skechers Entertainment, their plan is to “leverage the marketing and promotional power of the Skechers brand at retail to raise the visibility of *Zevo-3* in a truly impactful way. This promotion will

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<sup>13</sup> *NABB v. KCOP Television*, 4 FCC Rcd 4988, 4989 ¶9 (1989).

<sup>14</sup> *Id.* at 4990, ¶25.

<sup>15</sup> See *In re Policies and Rules Concerning Children’s Television Programming*, Memorandum Opinion and Order, 6 FCC Rcd. 2111, n. 19 (1991) (“CTA Order”).

<sup>16</sup> Skechers launched a promotional campaign for Nicktoons’ *Zevo-3* broadcast by including *Zevo-3* DVD inserts into Skechers children’s shoe boxes. Wendy Goldman Getzler, *Zevo-3 DVD Set to Hit One Million Skechers Shoe Boxes*, KIDSCREEN (June 10, 2010).

<sup>17</sup> See <http://zevo-3.com/>. Screenshots are attached.

generate brand awareness among the exact audience we need to reach. We are confident this will result in enhanced viewership once the series takes to the airwaves.”<sup>18</sup>

MTVN’s share in the proceeds from the *Zevo-3* related merchandising provides an additional inducement to air the program. These revenues could be substantial. Currently, Skechers is working on a licensing campaign that includes *Zevo-3* “apparel, interactive, toys, games and food and beverage.”<sup>19</sup> In furtherance of this effort, Skechers has applied for trademarks for Kewl Breeze for “eyeglasses, sunglasses, optical frames” and “eyewear cases,”<sup>20</sup> for Elastica “tops, shirts, blouses, t-shirts. . . hats, caps,”<sup>21</sup> and even underwear, lingerie, socks, belts, and gloves.<sup>22</sup>

MTVN and Skechers claims that there is no problem with this revenue sharing because the FCC “has approved of an arrangement whereby broadcast stations were entitled to share merchandising revenues generated by toys based on characters in a children’s program they agreed to carry,” Letter at 3, citing *Petition for Rule Making to Prohibit Profit-Sharing Arrangements in the Broadcasting of Children’s Programming*, 100 FCC 2d 709, 710, 713 (1985).<sup>23</sup> In the case cited, Action for Children’s Television (ACT) alleged that Telepictures Corporation was marketing *Thunder Cats* by offering stations the opportunity to share the profits resulting from revenues of *Thunder Cats*-related merchandise.<sup>24</sup> ACT argued that such commercially-motivated arrangements would unduly influence licensees to broadcast certain programs and requested that the FCC adopt a rule “prohibiting arrangements where, in return for airing a particular program, television stations share in the profits from the sale of products bearing the name of the program, its characters, or program devices.”<sup>25</sup> The Commission declined, finding that it was irrelevant whether the price of the program was “set forth in terms of a separate provision for product license profit-sharing or whether product licensing revenues are simply reflected in the price of the program or in the barter arrangement.”<sup>26</sup> But, at the same time, it noted that *Thunder Cats* was the only program involving this particular type of contractual agreement and it had “no reason to believe that product-related considerations will come to dominate or disserve children’s programming.”<sup>27</sup> In contrast here, there is good reason

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<sup>18</sup> *Sneak Preview DVDs of New Animated Kids’ Television Series Zevo-3 to Be Distributed in Skechers Shoe Boxes; Footwear Company to Support Skechers Entertainment TV Debut with Giveaways in One Million Kids Shoe Boxes*, BUSINESS WIRE, <http://www.businesswire.com> (June 8, 2010, 5:36 PM GMT).

<sup>19</sup> Gary Rusak, *Skechers Begins Licensing Push*, KIDSCREEN (Mar. 28, 2011), [http://kidscreen.com/2011/03/28/skechers-begins-licensing-push/?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=skechers-begins-licensing-push](http://kidscreen.com/2011/03/28/skechers-begins-licensing-push/?utm_source=newsletter&utm_medium=email&utm_campaign=skechers-begins-licensing-push).

<sup>20</sup> U.S. Trademark Application Serial No. 85,162,345 (filed Oct. 27, 2010).

<sup>21</sup> U.S. Trademark Application Serial No. 77,937,599 (filed Feb. 17, 2010).

<sup>22</sup> U.S. Trademark Application Serial No. 77,937,745 (filed Feb. 17, 2010).

<sup>23</sup> February 23 Letter at 3.

<sup>24</sup> *Petition for Rule Making to Prohibit Profit-Sharing Arrangements in the Broadcasting of Children’s Programming*, 100 FCC 2d 709 ¶ 2 (1985).

<sup>25</sup> *Id.* at ¶1.

<sup>26</sup> *Id.* at ¶10.

<sup>27</sup> *Id.* at ¶8. The Commission recognized that placing too much weight on the subsidiary concerns of tie-ins and profit sharing could reduce the variety of children’s programming and promised to revisit the issue if necessary. *Id.* at ¶13.

to believe that the prospects of sharing revenues did unduly influence MTVN's decision to air Zevo-3.

In short, the facts here differ substantially from those in *NABB* and *Thunder Cats*. The arrangement between MTVN and Skechers goes well beyond a simple barter agreement. Even from the limited description given by the parties so far, it is apparent that Skechers has many opportunities to provide financial inducements to MTVN for airing Zevo-3, including commitments to buy advertising time on other programs, cross-promotions, and shared revenues. Until the FCC determines the details of these arrangements, it simply has no basis to conclude that MTVN paid more than nominal consideration for Zevo-3.

The remaining arguments in the February 23 letter are also without merit. The second argument is that *Zevo-3* should not be considered a commercial because of the "distance that Skechers and MTVN intentionally put into the program between the characters and the products that Skechers sell."<sup>28</sup> They admit that "the characters in *Zevo-3* are based generically on characters that previously appeared in Skechers promotion materials," but claim that "the characters have been significantly fleshed out to adopt them to the multi-dimensional world of a full-length television series."<sup>29</sup>

Just because the characters from the Skechers' spot commercials have been fleshed out does not change the fact that the program is commercial matter. Skechers' product brand names Z Strap ®, Kewl Breeze ®, and Elastika ® are advertised and integrated within the body of *Zevo-3* in violation of the FCC's separations policy. Furthermore, the program is filled with product placements as that term has been defined by the Federal Trade Commission's food marketing studies.<sup>30</sup>

The third argument is that MTVN's programming executives decided that "*Zevo-3* would be an appealing entertainment property appropriate for Nicktoons' audience" without influence from the advertising side of the company.<sup>31</sup> Just because programming might be appealing to children does not mean it is not commercial. Indeed, the D.C. Circuit rejected the FCC position that a broadcast was not sponsored just because the "program, though directed toward a children's audience, is entertaining and something less than wholly commercial."<sup>32</sup> Moreover, Skechers' president Michael Greenberg acknowledges that its commercials are entertaining:

"SKECHERS Kids has become the number one children's footwear resource . . . thanks in part to . . . Elastika®, Kewl Breeze®, [and] Super Z Strap ®. On most weekends and

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<sup>28</sup> February 23 Letter at 3.

<sup>29</sup> *Id.*

<sup>30</sup> The FTC defines product placement as "permitting, promoting, or procuring the integration of any food product, logo, signage, trade name, or package into a television . . . motion picture, video . . . or other form of entertainment programming." Federal Trade Commission, *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities and Self-Regulation*, B-9 (2008).

<sup>31</sup> February 23 Letter at 3-4.

<sup>32</sup> *National Association for Better Broadcasting v. Federal Communications Commission*, *supra* note 11, 830 F.2d 270, 277.

through many weeknights, we are entertaining children on leading network and cable stations with creative, memorable and appealing [commercial] spots.”<sup>33</sup>

Thus, even if some audiences find *Zevo-3* entertaining, that does not mean it is not commercial.

The fourth argument is that the fee MTVN pays for *Zevo-3* is “comparable” to that paid for other programs such as *Fantastic Four*, *Iron Man*, and *Speed Racer* and is 9% higher than the median fee paid for 24 other children and family shows for which it pays per-episode license fee.<sup>34</sup> Without knowing the details of these other transactions it is impossible to assess the accuracy of this claim. But even assuming it to be true, the licensing fee is not the only relevant issue here. Rather, as discussed above, the Commission must examine the financial transaction as a whole to determine whether MTVN is paying more than a nominal amount for the program.

The fifth argument is that “Skechers’ advertising commitment under the agreement is in line with Skechers’ advertising buy across MTVN kids and family networks in previous years,” and has actually decreased since its peak in 2008.<sup>35</sup> Implicitly, this argument recognizes the relationship between the license fee and the amount of advertising purchased by Skechers. But the mere fact, if true, that Skechers may not have increased its ad buy is meaningless without knowing the other part of the transaction. It could be that the lower ad buys are more than made up for by MTVN’s portion of the revenues from the related merchandise. Moreover, even if Skechers’ advertising buy was lower than in the past, it could still be high relative to other advertisers, as television advertising revenues in general have decreased due to the poor economy.

The sixth claim is that “Skechers’ advertising spending on MTVN kids and family networks is also in line with its spending on competing networks.”<sup>36</sup> This is a factual question for which the Commission needs actual financial figures to make a decision regarding CCFC’s petition for declaratory ruling. The parties have supplied none.

In sum, the claims that *Zevo-3* is not “commercial matter” all depend on financial information that is known only to MTVN and Skechers. For the reasons above, we ask the Commission to direct MTVN and Skechers to provide all the information needed for the Commission to reach a fact-based determination as to whether *Zevo-3* is commercial matter for purposes of the children’s advertising limits.

Respectfully submitted,

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<sup>33</sup> “SKECHERS Footwear Announces Licensing Agreement with Adjmi Apparel to Produce Children’s Clothing Line,” *Business Wire*, January 6, 2009.

<sup>34</sup> February 23 Letter at 4.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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Screenshots from <http://zevo-3.com/>

