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Communications Broadcast Advisory

FCC Issues Order Clarifying Television Broadcasters' Children's Television Programming Obligations

On September 29, 2006, the FCC released the *Second Order on Reconsideration and Second Report and Order* (hereafter "*Second Order*") regarding the children's television rules and policies it had established in 2004 but for which it had suspended implementation pending reconsideration. In the *Second Order*, the FCC rejected many of the petitions for reconsideration but adopted several changes to the 2004 rules that were requested by a coalition of broadcasters, programmers, and public interest groups in a "Joint Proposal" submitted earlier this year. The revised rules, which are discussed below, will take effect 60 days after publication in the Federal Register.

The Multicasting Rule

Under the rules adopted in 2004, a digital television licensee is required to air extra amounts of educational and informational ("E/I") programming roughly in proportion to the additional amount of free video programming that the broadcaster provides on its multicast video programming streams. Thus, for each full-time stream of additional free video programming (24 hours per day, 7 days a week), a licensee must air an additional three hours per week of core children's programming.

Additionally, the 2004 rules stated that at least 50 percent of the core programming could not be repeated during the same week to qualify as core. To avoid confusion, the FCC adopted the clarification proposed in the Joint Proposal that at least 50% of the core programming counted toward meeting the additional programming requirements may not consist of program episodes that have already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams. Additionally, licensees must certify on Form 398 that they have complied with this rule, retain records sufficient to document the accuracy of the certifications, including records of actual program episodes aired, and make such documents available to the public upon request.

The Preemption Rule

The preemption rule adopted in 2004 provides that no program will be counted toward the fulfillment of a broadcaster's three hour requirement to provide core children's television programming if the program is preempted more than 10 percent of the time in any calendar quarter.

In the *Second Order*, the FCC repealed the percentage cap on preemptions, as requested in the Joint Proposal. The FCC, however, emphasized that networks must seek informal Commission approval of their preemption plans each year and those programs must be aired in a substitute time slot (otherwise known as a "second home") with an on-air notification of the schedule change occurring at the time of preemption during the previously scheduled episode or be considered preempted. Networks seeking such preemption flexibility must file requests with the Media Bureau by August 1 of each year (or for 2006 no later than 30 days after approval of this information collection by the Office of Management and Budget) stating the number of preemptions expected, when the program will be rescheduled, whether the rescheduled time is the program's second home, and the network's plan to notify viewers of the schedule change.

The Website Rule

Under the Commission's website reference rule adopted in 2004, the display of a website address during children's television programming would be prohibited, unless the website satisfies a four-part test: (1) the website offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) the website is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes.

In the *Second Order*, the Commission adopted the changes requested in the Joint Proposal with respect to this rule and clarified that the website reference restriction applies only when Internet addresses are displayed in program material or promotional material not counted as commercial time and that if an Internet address for a website that fails the four-part test is displayed during a promotion, in addition to counting against the commercial time limits, the promotion is required to be clearly separated from programming material. Significantly, the Commission cautioned that broadcasters may not rely on certifications by program providers that web addresses meet the four-part test. Licensees are required to certify that they have complied with the website address requirements and maintain records in their public inspection file to support the certifications.

The Commission also concluded in the *Second Order* that public service announcements aired on behalf of independent non-profit or government organizations, or media companies in partnership with non-profits or government entities, as well as station identifications and emergency announcements, are not subject to the rules governing the display of website addresses.

The Host-Selling Rule

Pursuant to this rule adopted in 2004, no website address may be displayed in children's television programs where the website uses characters from the program to sell products or services. As requested in the Joint Proposal, the Commission in the *Second Order* revised the rule, prohibiting only the display of a website address during or adjacent to a program if, on the web pages that are primarily devoted to free non-commercial content regarding that specific program or a character appearing in that program, (1) products

are sold that feature a character appearing in that program or (2) a character appearing in that program is used to actively sell products. The rule does not apply to: (1) third-party sites linked from the companies' web pages; (2) on-air third-party advertisements with website references to third-party websites; or (3) pages that are primarily devoted to multiple characters from multiple programs.

With respect to the enforcement of the host-selling rule, licensees must certify compliance on their license renewal forms and maintain in their public inspection file records sufficient to substantiate the certifications.

Definition of "Commercial Matter"

The definition of "commercial matter" adopted in 2004 included "promotions of television programs or video programming services other than children's educational informational programming." In the *Second Order*, the Commission granted broadcasters and cable operators additional flexibility, as requested in the Joint Proposal, and revised the definition "of commercial matter" to exclude promotions for children's or other age-appropriate programming appearing **on the same channel** or promotions for E/I programming on any channel.

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