In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VIACOM, INC., Petitioner	)	
v.	)	**No. 05-1387**
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents	)	

OPPOSITION OF FCC AND UNITED STATES TO MOTION FOR STAY PENDING JUDICIAL REVIEW

In an order issued on November 23, 2004, the Federal Communications Commission amended its rules implementing the Children's Television Act of 1990 ("CTA"), Pub. L. No. 101-437, 104 Stat. 996. *Children's Television Obligations Of Digital Television Broadcasters,* 19 FCC Rcd 22943 (2004) ("*Order*"). On October 3, 2005, Viacom filed with this Court a petition for review of the *Order*. On October 17, 2005, Viacom filed a motion for stay of the *Order* pending judicial review. The rules challenged by Viacom are scheduled to take effect on January 1, 2006. For the reasons discussed below, Viacom has failed to satisfy the stringent requirements for stay of an agency order pending judicial review. Accordingly, the Court should deny Viacom's motion.

BACKGROUND

A. The Children's Television Act Of 1990

When it enacted the CTA in 1990, Congress made several specific findings justifying the need for further regulation of children's television. Among other things, Congress found that "special safeguards are appropriate to protect children from overcommercialization on television." CTA, § 101(4) (codified at 47 U.S.C. § 303a note). Consistent with this finding, the CTA directs the FCC to adopt rules that require commercial television broadcast licensees and cable operators to limit the duration of advertising in children's television programs. 47 U.S.C. § 303a. The statute imposes specific limits on such advertising: "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays." *Id.* § 303a(b).[1] In addition, the CTA requires the FCC, when reviewing any application for renewal of a television broadcast license, to consider the extent to which the licensee has complied with the children's television advertising limits. *Id*. § 303b(a)(1).

Congress also found that, "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children." CTA, § 101(2) (codified at 47 U.S.C. § 303a note). To give effect to this finding, the CTA requires the FCC, when reviewing any application for renewal of a television broadcast license, to consider the extent to which the licensee "has served the educational and informational needs of children through [its] overall programming." 47 U.S.C. § 303b(a)(2). As part of the license renewal process, the FCC may also consider "any special nonbroadcast efforts by the licensee" to enhance the educational and informational value of children's programming, as well as "any special efforts by the licensee to produce or support" educational and informational children's programming "broadcast by another station in the licensee's marketplace." *Id.* § 303b(b)(1)-(2).[2]

The FCC first adopted rules to implement the CTA in 1991.[3] Five years later, the FCC amended those rules in an effort to "strengthen [its] enforcement" of the CTA. *Policies and Rules Concerning Children's Television Programming,* 11 FCC Rcd 10660 (¶ 1) (1996) ("*1996 Order*"). Among other things, it adopted a clearer definition of programming that is "specifically designed" to educate and inform children in accordance with the CTA. *Id.* ¶¶ 4, 73-114. The FCC defined this programming,

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[1] Congress authorized the FCC to modify those limitations after January 1, 1993, if the record in a subsequent rulemaking justified a change. 47 U.S.C. § 303a(c). To date, the Commission has not altered the time limits on advertising prescribed by the CTA.

[2] Unlike the restrictions on advertising in children's programming, the CTA provisions concerning review of license renewal applications do not apply to cable operators, which are not licensed by the FCC.

[3] *Policies and Rules Concerning Children's Television Programming,* 6 FCC Rcd 2111 (1991), *on recon.*, 6 FCC Rcd 5093 (1991).

which it dubbed "core" programming, as regularly scheduled weekly programming of at least 30 minutes in length, aired between 7:00 a.m. and 10:00 p.m., which has as a significant purpose "serving the educational and informational needs of children ages 16 and under." 47 C.F.R. § 73.670(c)(1)-(4).

In the *1996 Order*, the FCC also promulgated a processing guideline under which "broadcasters will receive staff-level approval of the CTA portion of their [license] renewal applications if they air three hours per week of core programming or if … they air a package of programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming." *1996 Order* ¶ 5; *see also id.* ¶¶ 115-134. If any broadcasters did not satisfy this guideline, their renewal applications would be referred to the full FCC for consideration. The FCC emphasized that such broadcasters would have "a full opportunity to demonstrate compliance with the CTA, including through efforts other than 'core' programming and through nonbroadcast efforts." *Id.* ¶ 5; *see also id.* ¶¶ 135-139.

B. The FCC's New Rules For Implementing The CTA

Broadcasters are now in the process of converting from analog to digital television ("DTV") technology. With the advent of DTV, broadcasters will be able to make "more efficient use of scarce electromagnetic spectrum," and television viewers will gain access to a wider array of channels and programs. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 293-94 (D.C. Cir. 2003).

In anticipation of the DTV transition, the FCC proposed to revise certain aspects of its children's television rules. *Children's Television Obligations Of Digital Television Broadcasters*, 15 FCC Rcd 22946 (2000) ("*NPRM*"). A number of broadcasters and other interested parties filed comments in response to the *NPRM*. After reviewing those comments, the FCC in late 2004 amended its children's television rules in several respects. The rules challenged by Viacom fall into four categories: (1) multicasting; (2) preemption; (3) websites; and (4) promotions. The challenged rules are now scheduled to take effect on January 1, 2006.

The Multicasting Rule. The FCC originally developed its processing guideline for license renewals – three hours of core children's programming per week – "with the one channel per broadcaster analog model in mind." *Order* ¶ 18. Digital technology, however, enables broadcasters to air different programs on multiple channels at the same time. Because DTV offers this "multicasting ability," the FCC determined that "a new method of quantifying the … core programming guideline" for digital broadcasters "is both necessary and appropriate." *Ibid.* The agency revised its guideline so that "digital broadcasters that choose to provide additional channels or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide." *Id.* ¶ 19.

Under the revised guideline, for each increment of additional free programming from 1 to 28 hours, a digital broadcaster's core programming benchmark increases by ½ hour per week. Thus, for example, digital broadcasters "providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream." *Order* ¶ 19.

The FCC reasoned that a roughly proportional increase in the core programming guideline for broadcasters who engage in multicasting "is consistent with the objective of the CTA 'to increase the amount of educational and informational broadcast television available to children.'" *Order* ¶ 26 (quoting S. Rep. No. 227, 101st Cong., 1st Sess. 1 (1989) ("Senate Report")). The FCC rejected the arguments of broadcasters that new rules were unnecessary to ensure an adequate supply of children's programming on digital channels. Noting the past failure of broadcasters to provide sufficient children's educational programming "in the absence of specific requirements," the FCC observed that Congress, in enacting the

CTA, "made clear that the FCC could not rely solely on market forces to increase the educational and informational programming available to children on commercial television." *Id.* ¶ 27.

The Preemption Rule. To qualify as "core" programming for purposes of the FCC's processing guideline, a children's program must be "regularly scheduled" – *i.e.,* it must typically air at the same time each week. *Order* ¶ 36. The FCC recognized that children's programming was occasionally "preempted for programs such as breaking news or live sports events." *Ibid.* In the past, the agency staff, with guidance from the FCC, has determined "what constitutes regularly scheduled programming and what level of preemption is allowable." *Ibid.*

In the *Order*, the FCC limited the number of preemptions under its processing guideline "to no more than 10 percent of core programs in each calendar quarter." *Order* ¶ 41. It explained that any program that was preempted beyond the 10 percent limit would not "count as core under the processing guideline, even if the program is rescheduled." *Ibid.* The FCC, however, exempted from this preemption limit "preemptions for breaking news." *Ibid.*

The FCC concluded that its new preemption limit would "help parents and children to locate core programming and to anticipate when it will be aired." *Order* ¶ 42. At the same time, the agency found no reason to believe that the preemption limit would unduly burden broadcasters. On the basis of its past experience, the FCC stated that "most stations currently do not preempt more than 10 percent of core programs in each calendar quarter." *Ibid.* In addition, it observed that the processing guideline was "averaged over a six-month period, which will provide broadcasters with some scheduling flexibility." *Ibid.*[4] The FCC noted that, in any event, "a station that fails to meet the processing guideline because of

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[4] Therefore, for instance, if preemptions for sporting events cause a broadcaster to air only two hours of core programming per week in a particular quarter, it can still satisfy the core programming guideline by airing four hours of core programming per week in the next quarter.

excessive preemptions may still receive staff-level approval of its renewal application" if it shows that it has aired a package of programming "that demonstrates a commitment to educating and informing children at least equivalent to" the core programming guideline. *Ibid.*

The Website Rules. The FCC amended its rules to apply the CTA's commercial time limits to the display of certain Internet website addresses during children's programming. Under the new rules, the commercial time limits apply to the display of website addresses unless (1) the website in question "offers a substantial amount of *bona fide* program-related or other noncommercial content;" (2) it "is not primarily intended for commercial purposes," including e-commerce or advertising; (3) its "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." *Order* ¶ 50. The FCC concluded that this restriction on the display of website addresses was necessary to fulfill its "mandate under the CTA to protect children, who are particularly vulnerable to commercial messages." *Ibid.* (citing Senate Report at 9).

The FCC also prohibited "the display of website addresses in children's programs when the site uses characters from the program to sell products or services" – a practice known as "host-selling." *Order* ¶ 51. The FCC determined that this ban was justified by "the unique vulnerability of young children to host-selling." *Ibid.* This new rule was consistent with the agency's longstanding policy against host-selling on children's television programs. *See Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, 14-17 (1974).

The Promotions Rule. The CTA does not specifically define the "commercial matter" that is subject to time limits during children's programming. When the FCC first defined the term "commercial matter" for this purpose, it exempted promotions of other television programs from the CTA's commercial time limits. While the exemption was in effect, "a significant amount of time" was devoted to promotional announcements during children's programming, "often reducing the amount of time devoted to actual program material to an amount far less than the limitation on the duration of commercial matter alone might suggest." *Order* ¶ 55.

To address this situation, the FCC revised its definition of "commercial matter" to include "promotions of television programs or video programming services other than children's educational and informational programming." *Order* ¶ 57. The FCC's primary purpose in making this revision was "to reduce the number of commercial interruptions in children's programming," thereby increasing the educational and informational content of the programs. *Ibid.* The FCC also found that "[r]educing the number of program promotions" would "help protect children from overcommercialization of programming consistent with the overall intent of Congress in the CTA." *Id.* ¶ 58. At the same time, by exempting promotions for children's educational and informational programming from the CTA's commercial time limits, the FCC hoped to "encourage broadcasters to promote this programming, thereby increasing parents' awareness of the programming and possibly the program's audience, and thus extending the educational benefit of the programming." *Ibid.*

ARGUMENT

Viacom seeks a stay of the *Order* pending judicial review. To obtain such extraordinary relief, Viacom must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). To succeed in invoking "the court's extraordinary injunctive powers," a party must, at the very least, demonstrate "either a high probability of success and some injury, or *vice versa*." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). Viacom's motion falls short of justifying its stay request under this stringent standard. Moreover, because Viacom seeks a stay of several rules, it must separately satisfy the prerequisites for a stay with respect to *each* of those rules. Far from meeting this heavy burden, Viacom has not even made the necessary showings to justify a stay of *any* of the challenged rules.

A. Viacom Has Not Demonstrated A Likelihood Of Success On The Merits.

Viacom challenges four different categories of rules: multicasting, preemptions, websites, and promotions. None of its challenges has merit.

The Multicasting Rule. There is no basis for Viacom's claim (Mot. at 15) that the multicasting rule violates the First Amendment. That rule advances "the government's substantial, and indeed compelling, interest in the protection and education of America's children." *Order* ¶ 35. It is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media. *See, e.g., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 388 (1969); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-41 (1994). Under this more lenient scrutiny, it is also well established that the government may regulate broadcast speech in order to advance its compelling interest in promoting and protecting the well-being of children. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982); *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978); *Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied,* 516 U.S. 1043 (1996). The multicasting rule substantially advances that interest by furthering "the objective of the CTA 'to increase the amount of educational and informational broadcast television available to children.'" *Order* ¶ 26 (quoting Senate Report at 1).

Moreover, consistent with the First Amendment, the rule "is narrowly tailored" to achieve its objective. *Order* ¶ 35. It increases the core programming guideline "only for broadcasters who choose to use their digital capacity to air more free video programming." *Ibid.* Under the rule, the core programming guideline increases in a manner "roughly proportional to the additional amount of free video programming [multicasters] choose to provide." *Id.* ¶ 19. That guideline, by "giving broadcasters clear but nonmandatory guidance on how to guarantee compliance" with the CTA, provides "a constitutional means of giving effect to the CTA's programming requirement." *Id.* ¶ 35.

Viacom asserts that the record contained no evidence that the current level of core programming "is inadequate to meet the needs of children." Mot. at 15. To the contrary, there is record evidence that the current core programming guideline does not produce sufficient educational and informational programming for children. *See* Comments of Children's Media Policy Coalition, April 21, 2003, at 4-7. In any event, it was reasonable for the FCC to modify the guideline in response to the dramatic expansion of channels and program options made possible by DTV. In 1996, the FCC determined that a core programming benchmark of three hours per week was "a reasonable, achievable guideline" that would not unduly burden broadcasters. *1996 Order* ¶ 122. But now that digital broadcasters have the capability to significantly increase their overall hours of programming, the FCC reasonably found that a higher core programming guideline would be achievable without imposing unreasonable demands on broadcasters. *See Order* ¶¶ 26, 28-29. Even if a new digital channel broadcasts 24 hours a day, 7 days a week, for example, the broadcaster can satisfy the new guideline with just three additional hours of core programming – less than two percent of the channel's 168 hours of weekly programming. Contrary to Viacom's assertion (Mot. at 15), the agency's slight modification of its guideline for multicasters is both consistent with the First Amendment and sufficiently reasonable to satisfy the APA.[5]

Viacom also argues that the multicasting rule violates the APA because it "is inconsistent with" a subsequently released FCC order declining to require cable operators to carry more than one programming stream of a DTV multicaster. Mot. at 15 (citing *Carriage of Digital Television Signals*, 20 FCC

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[5] In a similar context, this Court upheld the constitutionality of a statute that reserved at least 4 percent (and as much as 7 percent) of the channels on direct broadcast satellite ("DBS") systems for noncommercial educational and informational programming. *Time Warner Entertainment Co. v. FCC,* 93 F.3d 957, 973-77 (1996), *reh. denied*, 105 F.3d 723 (D.C. Cir. 1997). If the First Amendment permits the *mandatory* reservation of DBS channels for noncommercial programming, then it surely allows the FCC's reasonable modification of its *nonmandatory* core programming guideline for DTV multicasters.

Rcd 4516 (2005)). There is no inconsistency.[6] In that subsequent action, the FCC was construing separate statutory provisions establishing cable operators' obligations to carry broadcast DTV signals, which involves the burden that will be placed on third parties to accommodate the government's grant of additional spectrum to broadcasters. *See id.* at 4517; 47 U.S.C. 614(b)(3)(A), 615(g)(1). Here, the FCC was implementing the entirely separate and unrelated provisions of the CTA and determining broadcasters' obligation to children with respect to their use of additional spectrum. These different contexts render the Commission's decisions in these two different proceedings both reasonable and consistent.[7]

The Preemption Rule. There is no merit to Viacom's argument (Mot. at 13) that the new preemption rule violates the First Amendment. That rule easily passes muster under the more lenient scrutiny applicable to regulation of broadcast speech. *See Turner Broadcasting System*, 512 U.S. at 637-41; *Red Lion*, 395 U.S. at 388.

The preemption rule substantially advances an important governmental interest by helping "parents and children to locate core programming and to anticipate when it will be aired." *Order* ¶ 42. The FCC found "a continued lack of awareness on the part of parents regarding the availability of children's programming." *Id.* ¶ 58. It reasonably determined that a limit on preemptions would make core programming easier for parents and children to find, thereby increasing the audience for educational and informational programming. *See 1996 Order* ¶ 105 ("Programming that is aired on a regular basis is more easily anticipated and located by viewers, and can build loyalty that will improve its chance for

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[6] Even if the latter order created an inconsistency, *that* order – not the *Order* on review – would be vulnerable to an APA challenge. *See Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990). The FCC "need not explain alleged inconsistencies in the resolution of subsequent cases." *CHM Broadcasting Ltd. Partnership v. FCC*, 24 F.3d 1453, 1459 (D.C.Cir. 1994).

[7] Although Viacom suggests that the *NPRM* did not provide adequate notice (Mot. at 3-4), it could not claim that the FCC failed to provide adequate notice of the multicasting rule. *See NPRM* ¶¶ 14-24.

commercial success.").[8] Moreover, because the preemption rule passes constitutional muster, it also satisfies the APA's less demanding standard of review. Consequently, Viacom cannot show that the rule is "arbitrary and capricious." *See* Mot. at 14-15.[9]

Contrary to Viacom's assertion (Mot. at 13), the preemption rule does not force broadcasters "to choose between refraining from delivering live programming" or "moving a considerable amount" of core children's programming "permanently to another slot." If a station wishes to preempt an hour of core programming on Saturday morning for sports during football season (the fall quarter), then it has the option of airing an additional hour of core programming each week in the next quarter to satisfy the FCC guideline. In any event, if a broadcaster's program schedule will lead to regular preemption of core children's programming, it is not unreasonable for the FCC to expect that the broadcaster will move that programming to another time slot on a permanent basis.[10] Moreover, even if a station "fails to meet the processing guideline because of excessive preemptions," it "may still receive staff-level approval of its renewal application" by showing that it has aired a package of programming "that demonstrates a commitment to educating and informing children at least equivalent to airing the amount of core programming indicated by the processing guideline." *Order* ¶ 42. Thus, even after the preemption rule takes effect, broadcasters

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[8] Although Viacom asserts that viewership of children's educational programming may increase when that programming "is moved to make way for special programming" (Mot. at 13), it cites nothing to substantiate this claim.

[9] Viacom also faults the Commission for exempting "breaking news" from the preemption rule. Mot. at 13 n.20, 14 n.21. That exemption is entirely reasonable. The Commission concluded that the rule should apply only to preemptions caused by scheduled programs (such as live sports telecasts). While broadcasters have time to plan for such preemptions in advance, the same is no true for breaking news, which by definition occurs without little or no advance notice.

[10] Of course, stations that preempt less than 10 percent of core programs per quarter will not need to make any adjustments in their program schedule. According to the Commission, "most stations currently do not preempt more than 10 percent of core programs in each calendar quarter." *Order* ¶ 42.

will continue to have considerable flexibility in deciding how to satisfy their obligations under the CTA.[11]

The Website Rules. Viacom's attack on the constitutionality of the website rules is unavailing. Because these rules regulate commercial speech, they are permissible under the First Amendment if they "directly advance" a "substantial" governmental interest in a manner that "is not more extensive than necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 564-66 (1980). The website rules clearly satisfy these criteria.

By limiting the display of commercial website addresses during children's programming, the website reference rule is narrowly tailored to advance the government's substantial interest in protecting children from "overcommercialization." *Order* ¶ 52. Numerous websites sell products with special appeal to children (*e.g.*, www.etoys.com, www.toysrus.com). Indeed, the Nickelodeon cable channel, a unit of Viacom dedicated largely to programming for children, has a website – www.nick.com – with a button marked "Shop" that sells toys, games, and other merchandise of interest to children: shop.nickjr.com.[12] Televised references to commercial websites of this sort are essentially no different

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[11] There is also no merit to Viacom's argument (Mot. at 14) that the FCC promulgated the preemption rule without satisfying the APA's notice-and-comment requirements. The *NPRM* stated: "[T]he average preemption rate by stations affiliated with the largest networks during the past two years … has been as high as 25% during a quarter when a network had a large number of sports programming commitments." *NPRM* ¶ 28. "Given this level of preemption" by analog broadcasters, the Commission decided to "consider whether we should adopt another approach to preemptions in the digital context to ensure that our preemption policy does not thwart the goals of the CTA." *Ibid.* Because the Commission had cited an increase in preemptions of *analog* broadcasts as the catalyst for revisiting the preemption policy, it should have come as no surprise that the Commission ultimately adopted a preemption limit that applies to both analog and digital broadcasters. Indeed, in response to the *NPRM*, one commenter argued that "the Commission should adopt strong preemption standards for both analog and digital television." Comments of CME, *et al.*, Dec. 18, 2000, at 16-19. The application of the FCC's new preemption rule to analog programming is thus a "logical outgrowth" of the agency's proposal to modify its preemption policy for digital programming. *See Crawford v. FCC*, 417 F.3d 1289, 1295-97 (D.C. Cir. 2005).

[12] Children who visit shop.nickjr.com can purchase (among other things) a "SpongeBob SquarePants: Free Standing Electronic Pinball Machine" (priced at $99.99), a "Dora The Explorer ATV" (priced at $199.99), and a "Backyardigans Plush Pillow Set" (priced at $89.97).

from other forms of advertising. A television commercial encouraging children to go to the Toys "R" Us website, for example, is substantially similar to an ad telling children to go to their local Toys "R" Us store. The FCC thus reasonably concluded that a limit on televised advertising of commercial websites during children's programming was needed "to protect children, who are particularly vulnerable to commercial messages." *Order* ¶ 50.

Viacom claims that "the website reference rule drastically constrains the ability of regulated entities to inform their audience." Mot. at 8. The rule does no such thing. It only limits the amount of time that certain types of website addresses may be televised; and even those restrictions apply *only during children's programs,* which typically represent a tiny fraction of a broadcaster's programming. The rule does nothing to prevent broadcasters and cable programmers from publicizing their websites as often as they wish during their many hours of *other* programming, regardless of whatever content those websites might contain.[13]

The website reference rule does *not* restrict the televised display of *all* website addresses on children's programs. It places no limits on references to websites that are not commercial in nature.[14] To determine which websites qualify for this exemption, the FCC has created a four-part test. *Order* ¶ 50. Although Viacom argues that this test is "unconstitutionally vague" (Mot. at 8), the FCC's website test

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[13] Similarly, Viacom has no basis for its claim that the host-selling rule sweeps too broadly. The rule does nothing more than prohibit advertising on children's television programs of websites that employ host-selling. Broadcasters are free to advertise those websites on any of their other programming and to use host-selling on their websites as long as they do not advertise those sites on children's programs. Therefore, there is no basis for Viacom's contention (Mot. at 8 n.13) that the host-selling rule "effectively bans websites from providing useful commercial information to adults as well as children."

[14] Viacom suggests (Mot. at 8) that one reading of the Commission's rule "would ban the display of *all* website addresses" because "*any* website of a commercial entity is presumably intended for commercial purposes." That is not a reasonable reading of the Commission's rule since a website dedicated to providing educational material related to a program, and not including any advertisements or products for sale, could not reasonably be characterized, for purposes of the Commission's rules, as a site primarily intended for commercial purposes.

essentially draws a distinction between "commercial" and "noncommercial" websites. For decades now, the Supreme Court has made a similar distinction, finding that the First Amendment provides less protection to commercial speech than to noncommercial speech. *See, e.g., Central Hudson*, 447 U.S. at 562-63; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Given this well-established precedent, Viacom cannot seriously claim that the boundary between commercial and noncommercial speech is unconstitutionally vague.[15]

There is also no basis for Viacom's assertion (Mot. at 9) that the new website rules exceed the regulatory authority delegated to the FCC by the CTA. The statute expressly authorizes the agency to regulate the amount of advertising on children's television. 47 U.S.C. § 303a. The FCC properly exercised that authority when it limited the televised display of addresses for websites that are used for commercial purposes.

Viacom contends that the FCC lacks jurisdiction to regulate Internet content. But the website rules do not regulate the Internet. Rather, they regulate programming that appears *on television* – a subject that plainly falls within the scope of the FCC's regulatory jurisdiction, as Viacom acknowledges. *See* Mot. at 9. The website rules have no application to websites whose addresses are not displayed during children's television programs, and addresses of commercial websites may even be displayed during children's programs so long as the time of such display is counted against commercial limits.

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[15] The host-selling rule also is sufficiently clear to overcome Viacom's vagueness challenge. That rule bans "the display of website addresses in children's programs when the site uses characters from the program to sell products or services." *Order* ¶ 51. While Viacom complains that the term "site" is too vague in this context (Mot. at 8 n.14), that term has a commonly understood meaning among Internet users. Indeed, Congress has repeatedly used the term "website" in numerous statutes without perceiving the need to define the term. *See, e.g.,* 15 U.S.C. § 6307c(c)(1) (when changing a boxer's rating, an organization that sanctions boxing matches must post a copy of the change "on its Internet website" for at least 30 days); *id.* § 6502(a)(1) (making it "unlawful for an operator of a website … directed to children … to collect personal information from a child in a manner that violates" FTC regulations).

Finally, Viacom contends that the FCC violated the APA by promulgating the website rules without providing notice or an opportunity for comment. Mot. at 9-10. The *NPRM* in this proceeding invited comment on a proposal "that the Commission prohibit all direct links to commercial websites during children's programming." *NPRM* ¶ 32. While the *NPRM* focused on interactive links, the questions the agency asked raised the more general issue of the relationship between children's television programs and commercial websites. The concern underlying that inquiry – the commercialization of children's television – applies not just to interactive links, but to all commercial website addresses displayed in children's programming. Additionally, the display of a website address is generally an integral part of any interactive link.

Viacom maintains that the reference to "direct links" in the *NPRM* encompassed only interactive links. But at least one broadcaster – the WB Television Network – recognized that the allusion to "direct links" could include the display of *any* website address during children's programming. Consequently, the WB addressed its comments not only to interactive links, but more generally to the broadcast of any website addresses. *See* WB Reply Comments, Jan. 17, 2001, at 6 n.6. As those comments confirm, the website rules were a "logical outgrowth" of the *NPRM*'s request for comment on a proposal for FCC regulation of Internet-related advertising during children's television programs. Thus, the FCC complied with the APA's notice-and-comment requirements. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996).

The Promotions Rule. Viacom maintains that the FCC violated the First Amendment by revising its definition of "commercial matter" to include program promotions. Mot. at 10-11. To the contrary, like the website rules, the promotions rule is a permissible regulation of commercial speech because it "directly advances" a "substantial" governmental interest and is no "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

Viacom mistakenly asserts that the primary purpose of the promotions rule was to favor promotions for core programming over other program promotions. To the contrary, the rule's primary objective is to "reduce the number of commercial interruptions in children's programming." *Order* ¶ 57. The FCC determined that the "significant amount of time devoted" to promotional announcements during children's programs had substantially reduced "the amount of time devoted to actual program material to an amount far less than the limitation on the duration of commercial matter alone might suggest." *Id.* ¶ 55. By applying the CTA's commercial time limits to promotional announcements, the promotions rule directly advances a substantial governmental interest: increasing the amount of time dedicated to broadcasting educational and informational program material for children. Because the rule is reasonably designed to achieve this goal, it also satisfies the APA, notwithstanding Viacom's claim to the contrary. *See* Mot. at 12-13.

Viacom faults the FCC for excluding promotions for core programming from the "commercial matter" that is subject to the CTA's time limits. Viacom asserts that this exemption amounts to an unconstitutional "content-based preference for certain speech." Mot. at 11. The CTA itself, however, reflects a preference for certain speech: educational and informational television programs for children. To date, neither Viacom nor anyone else has challenged the constitutionality of the CTA's provisions for promoting such programming. The FCC's decision to exempt promotions for such programming from the CTA's commercial time limits is narrowly tailored to advance the statute's substantial interest in "the promotion of educational and informational programming for children." *Order* ¶ 57.

Contrary to Viacom's assertion (Mot. at 11-12), the FCC acted well within its statutory authority when it revised its definition of "commercial matter" to include program promotions. The CTA itself does not define the terms "commercial matter" or "advertising." In the provision prescribing commercial time limits, the statute provides that commercial broadcasters and cable operators "shall limit the duration of *advertising* in children's television programming." 47 U.S.C. § 303a(b) (emphasis added). The term "advertising" is commonly understood to mean "the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 31 (1993). Consistent with the common-sense meaning of that term, the FCC reasonably concluded that the CTA's commercial time limits should apply to advertising of upcoming television programs as well as advertising of other products and services. That reasonable reading of the CTA is entitled to deference. *See National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 125 S. Ct. 2688, 2699-2700 (2005); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Viacom finds support for its preferred reading of the statute in the Senate Report on the CTA. Mot. at 11-12. The most that can be said for the Senate Report is that it states a congressional committee's preference for defining "commercial matter" to exclude promotions of a broadcaster's own programming. Even if the Report "might lend some support to" Viacom's position, the reading of the CTA that Viacom advocates "surely is not compelled by the statutory text," which says nothing to exclude program promotions from the definition of "commercial matter." *See Moseley v. V Secret Catalogue, Inc.,* 537 U.S. 418, 432 (2003). As the Supreme Court has repeatedly held, "the authoritative statement" of congressional intent "is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 125 S. Ct. 2611, 2626 (2005). The statutory text in this case does not preclude the FCC from treating program promotions as "commercial matter" subject to the CTA's commercial time limits.[16]

[16] Although Viacom suggests that the *NPRM* did not provide adequate notice (Mot. at 3-4), it could not claim that the FCC failed to provide adequate notice of the promotions rule. *See NPRM* ¶¶ 33-34.

B. The Balance Of Equities Calls For Denial Of Viacom's Stay Request.

For purposes of evaluating stay motions, the Court has held that the necessary showing on the merits is governed by the "balance of equities as revealed through examination of the other three factors" – irreparable injury, harm to others, and the public interest. *Holiday Tours*, 559 F.2d at 844. Where a petitioner has demonstrated such a low probability of success as Viacom has in its petition, as we have shown above, grant of a stay is appropriate only when the balance of hardships tips decidedly in petitioner's favor. *Id.*; *see also Cuomo*, 772 F.2d at 974. In this case, however, the relevant equities do not favor grant of a stay with respect to any of the rules that Viacom challenges. Viacom has failed to demonstrate irreparable injury in the absence of a stay of any of these rules, and the public interest favors the Commission's determination that all of the rules should become effective on January 1, 2006.

1. Irreparable Injury. A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). Before Viacom can obtain a stay, it must establish that the irreparable injury it would suffer without a stay would be "both certain and great," "actual and not theoretical." *Id.* at 674. In other words, Viacom must provide "proof indicating that the harm [it alleges] *is certain to occur.*" *Id.* (emphasis added). Viacom has not come close to satisfying this stringent standard.

a. First Amendment. Viacom's showing of irreparable injury focuses on the claim that the new rules will deprive the company of its First Amendment rights. In support of this point, Viacom makes the obligatory citation to *Elrod v. Burns*, 427 U.S. 347, 373 (1976), for the proposition that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See* Mot. at 16. However, contrary to what Viacom appears to believe, the mere claim that an agency regulation will deprive a party of First Amendment rights is not a basis for a finding of irreparable injury:

> A litigant must do more than merely *allege* the violation of First Amendment rights … the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant, but depends on an appraisal of the validity, or at least the probable validity, of the legal premise underlying the claim of right in jeopardy of impairment.

Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (internal quotations omitted). As we have shown above, there is no substantial basis for Viacom's First Amendment challenges to any of these rules. Because the First Amendment claims are unavailing on their merits, Viacom's effort to bootstrap those claims into a showing of irreparable injury is equally unsuccessful.

b. Unrecoverable Economic Damages. Viacom also contends that the new rules will inflict irreparable injury in the form of "unrecoverable economic damages." Mot. at 17. These damages, allegedly, will come in the form of costs to comply with the rules, "diminished corporate value," "loss of customers and good will," and "competitive injury." *Id.* By Viacom's own admission, however, these alleged "economic losses" are "difficult, if it not impossible, to quantify in terms of dollars." *Id.* at 18.

A party moving for a stay is "required to demonstrate that the injury claimed is 'both certain and great.'" *Cuomo*, 772 F.2d at 976 (quoting *Wisconsin Gas*, 758 F.2d at 674). Viacom has done neither. The declarations attached to Viacom's motion and cited in support of its claimed injury (*e.g.,* Mot. at 18) provide extended discussion but no relevant additional detail as to the extent of Viacom's claimed injury and do not approach a demonstration of the sort of "certain and great" injury that courts have held to be necessary to justify a stay of agency rules – particularly when advanced by a corporation with more than $22.6 billion in annual revenue. *See* Viacom, Inc., Form 10-K (Dec. 31, 2004) at II-2.

2. Public Interest Considerations. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The FCC has made a public interest determination in this proceeding, based on Congress' specific delegation of authority to it in the CTA, that changes are necessary to existing regulations to fulfill the Act's goals of limiting advertising to children on television and ensuring that television broadcasters provide programming that serves the unique needs of children. Staying the rules will result in less educational and informational television programming for children and greater commercialization of children's television programming. This unnecessary delay in the effective date of new regulations to implement the statutory goals of the CTA would be detrimental to the public interest.

3. Harm To Others. As discussed above, there plainly would be harm to children if the rules are stayed. Moreover, Viacom's claim (Mot. at 19) that the FCC has acknowledged that a stay would cause no harm because the agency itself "devot[ed] five years to the rulemaking process" and "delay[ed] the effective date of the challenged rules in January 2005" is extraordinary. The FCC's discussion of its decision to make most of the new rules effective January 1, 2006, does not indicate at all that the FCC lacked concern about delay in implementing these rules. Rather, it was providing broadcasters transition time given the requirements of the new rules. *See Order* ¶ 70 ("We believe that this transition period is appropriate to give licensees time to develop programming or to renegotiate or allow expiration of existing program contracts as necessary.").[17] If anything, the delays to this point in implementing these rules, whatever the reason for such delays, undercut rather than support Viacom's request for further delay in making the rules effective.

CONCLUSION

In consideration of the foregoing, the Court should deny the motion for stay.

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[17] The Commission deferred the effective date of the new website rules from Feb. 1, 2005 until Jan. 1, 2006 at the express request of broadcasters and cable operators, including Viacom. *See Children's Television Obligations*, 20 FCC Rcd 2055 ¶ 2 (2005). The Court should reject Viacom's remarkable claim that the Commission's decision to postpone the rules' implementation temporarily to accommodate Viacom and others somehow now justifies a stay further delaying implementation of the rules.

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