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

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Re: Modernization of Media Regulation, MB Docket No. 17-105, Reply to Comments
Proposing Changes to the FCC's Children's Television Rules

Dear Ms. Dortch,

The Campaign for Commercial Free Childhood and the Center for Digital Democracy, represented by the Institute for Public Representation, strongly oppose efforts by industry commenters to repeal or modify the Commission's rules regarding children's television. For over forty years, the FCC has recognized that television stations have public interest obligations to limit advertising on children's programs and to provide programs designed to educate children. The proposals by industry commenters to relax the advertising limits and children's program requirements would harm children by exposing them to excessive and unfair marketing and depriving them of quality programming.

The FCC should reject proposals to relax the advertising limits

The FCC's ad limits and other rules that require a clear separation between content and commercial matter, prohibit host selling, and prohibit program length commercials, rule remain necessary to protect children from excessive, unfair or deceptive marketing. Some industry commenters complain that other providers of children's programs such as YouTube are not subject to the FCC's rules. *E.g.*, CBS, Disney, Fox and Univision ("Networks") at 5-6. This is unfortunate, because there is a robust body of research demonstrating that children experience

difficulty indentifying and defending against television advertising, even when there is clear separation, and that branded and other types of programming that blurs the distinctions makes it even harder for children.

The FCC has known since the early 1970s that children are more vulnerable to advertising than adults because they children have difficulty distinguishing commercials from program content on television and understanding that the purpose of commercials is to promote the sale of a product. The FCC's adoption of the *1974 Children's Policy Statement*, which first limited the amount and prohibited certain types of advertising practices in children's programming, was based on a significant body of research. 50 FCC2d 1, 14-15. These early studies, along with more recent studies, clearly establish that most children experience difficulty discriminating between programs and commercials until about 4-5 years of age.¹ Moreover, research has shown that age is positively correlated with an understanding of advertising's intent and that this ability typically emerges in its earliest form at about 7-8 years of age.² Children have even greater difficulty when the advertising is interwoven with content, as often is the case with sponsored videos, unboxing videos, and influencer marketing targeted to children on YouTube.³ Thus, the fact that YouTube and other internet and mobile providers ignore child development research and longstanding children's media principles is no reason for the FCC to weaken important safeguards for the many children who watch programs on cable or broadcast television.

Repeal of the advertising limits for children's programs would also violate the Children's Television Act (CTA) of 1990, codified at 47 USC §303a. There, Congress directed the FCC to "prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming," and to "limit the duration of advertising in children's television programming to not more than 10.5 minutes per hours on weekends and not more than 12 minutes per hour on weekdays." These limits apply to both commercial broadcast television stations and to children's programming on cable.

But even if the Commission had the authority to repeal the ad limits and leave the regulation children's advertising to the FTC and self-regulatory bodies, as suggested by Networks at 6 and NCTA at 21, it should not do so. The FTC lacks APA rulemaking authority to adopt and enforce rules limiting the amount of advertising on children's programs. Although in theory the FTC could bring enforcement actions under Section 5 against children's advertising practices that are deceptive or unfair, unfortunately, we are not aware of any such actions in the

¹ See, e.g., Dale Kunkel, *Children and Advertising: Content, Comprehension, and Consequences*, in *Handbook of Children and the Media* 395, 403 (Dorothy & Jerome Singer eds., 2012); Dale Kunkel et al., *Psychological Issues in the Increasing Commercialization of Childhood*, Washington, DC: American Psychological Association (2004).

² Dale Kunkel, *Mis-measurement of Children's Understanding of the Persuasive of Advertising*, *Journal of Children and Media*, 4, 109-117 (2010); Dale Kunkel & Jessica Castonguay, *Children and Advertising: Content, Comprehension, and Consequences*, in *Handbook of Children and the Media* 395, 403 (Dorothy & Jerome Singer eds., 2012).

³ See Angela J. Campbell, *Rethinking Children's Advertising Policies for the Digital Age*, 29 *Loyola Consumer L. Rev.* 1, 32-36 (2017)(summarizing research, available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2969&context=facpub>).

past thirty years. After Congress passed a law in 1980 that prohibited the “FTC from adopting any rule in the children’s advertising rulemaking proceeding, or in any substantially similar proceeding, based on an unfairness theory,”⁴ the FTC has been unwilling to use its authority to stop deceptive or unfair practices in advertising to children.⁵ The Children’s Advertising Review Unit (CARU) of the Advertising Self-Regulatory Council has voluntary guidelines for advertising to children, but they are neither actively enforced nor enforceable.⁶

Thus, the FCC children’s advertising rules remain necessary to protect children from unfair and deceptive marketing. The Commission should reject the Networks proposal at 8, to allow branded content on children’s program. Adoption of the industry’s proposal to allow branding would create a loophole that would undermine ad limits and expose children to marketing techniques that are particularly unfair to children.

Nor should the Commission eliminate the “website display rule” which was intended to prevent host-selling to children. As the Commission explained:

The display of the address of a website that sells a product is the equivalent of a commercial encouraging children to go to the store and buy the product. Thus, including the display during program material converts that program material into commercial matter just as a host telling children to race to their local toy store would.⁷

NCTA contends at 21 that this rule was intended to prohibit advertisers from targeting and interacting with children, and that it is no longer needed because that “direct connectivity did not exist then, and remains exceedingly rare – if it exists at all – today.” This claim ignores the development of new techniques for targeting ads to television viewers. Within the industry, these practices are often referred to as “programmatic marketing,” which means “the automated bidding on advertising inventory in real time, for the opportunity to show an ad to a specific customer, in a specific context.”⁸ Many major media companies offer this capability. For example, NBCUniversal announced in March 2016 that it was “expanding its programmatic media product by launching NBCUx for linear TV , , [so that] advertisers can use data and automation to build media plans that include premium linear TV inventory across NBCUniversal’s entire portfolio of cable and broadcast entertainment networks.”

⁴ J. Howard Beales III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present* at 7 (2004), <https://www.ftc.gov/public-statements/2004/03/advertising-kids-and-ftc-regulatory-retrospective-advises-present>.

⁵ Some of the signatories have asked the FTC to investigate unfair or deceptive advertisements to children and teen, but unfortunately to date, none have in an enforcement action. *See, e.g.*, Complaint, Request for Investigation and Request for Policy Guidance concerning Child-Directed Influencer Advertising, filed by CCFC, CDD and Public Citizen, Oct. 21, 2016.

⁶ *See* Angela J. Campbell, *Rethinking Children’s Advertising Policies for the Digital Age*, 29 *Loyola Consumer L. Rev.* 1, 33-35 (2017), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2969&context=facpub>.

⁷ Children’s Television Obligation of Digital Television Broadcasters, 21 FCC Rcd 11065,11077 (2006).

⁸ What is Programmatic Marketing? <http://www.smartinsights.com/internet-advertising/internet-advertising-targeting/what-is-programmatic-marketing>.

NBCUniversal’s press release explained that “[w]ith this expansion, select advertisers, and their agency partners, will be able to reach their target consumers by developing media plans via a private exchange by using a combination of their own data, third party data sources and NBCUniversal’s television inventory.”⁹ And just recently, the TV station unit of 21st Century Fox announced that it would allow advertisers to buy advertising inventory from its stations with programmatic technology. Brian Steinberg, *Fox TV Stations Will Offer Programmatic Buys*, *Variety*, July 26, 2017. The *Variety* article notes that programmatic buying “is gaining more traction as Madison Avenue attempts to place advertising on TV in much the same way it does in digital arenas, with precision and in a way that can reach an audience more narrowly defined around a set of behaviors or characteristics.” *Id.*¹⁰ Thus, repealing the website display rule could enable advertisers to increasingly target and interact with child television viewers.

Finally, The Commission should not eliminate the requirement that cable operators maintain online public inspection files as urged by Verizon at 6-8. Similarly, they should not proceed with the request of American Cable Association (ACA) at 16-17 to permit cable operators to provide documentation only in the event of a complaint. . If the FCC allowed cable operators to file only a bare certification of compliance without supporting documentation, neither the public nor the FCC would have a way to ensure the accuracy of the certification. Unlike broadcasters, cable operators are not licensed by the FCC and thus do not routinely file information with the FCC. However, it was a routine audit of a cable operator’s compliance documentation that led to the FCC discovery that a large number of children’s programs on Nickelodeon exceeded the ad limits or violated the rule against program length commercials. *Viacom International Inc.*, 19 FCC Rcd 20802 (2004)(this case was settled with a consent decree). Thus, the Commission should continue to require that companies put documentation that they have complied with the children’s advertising rules in their online public files.

The Commission should not eliminate the processing guidelines or Quarterly Program Reports

The Children’s Television Act of 1990 (CTA) requires the FCC to consider a television station’s program service for children as part of the license renewal process that occurs every eight years. Specifically, 47 USC §303b requires the FCC to consider whether the station “has

⁹ Press Release, NBCUniversal Unveils Industry’s First National Programmatic TV Offering at Scale (Feb. 24, 2016), <http://www.nbcuniversal.com/press-release/nbcuniversal-unveils-industry%E2%80%99s-first-national-programmatic-tv-offering-scale>. See also Kelly Llyakasa, *NBCUniversal Will Make \$1 Billion in Audience Guarantees This Upfront Season*, *ad exchanger* (Mar. 2, 2017), <https://adexchanger.com/digital-tv/nbcuniversal-will-make-1-billion-audience-guarantees-upfront-season/>.

¹⁰ See also, Kevin Gallagher, *Disney bundles assets for advertisers*, *Business Insider*, May 16, 2017, <http://www.businessinsider.com/disney-bundles-assets-for-advertisers-2017-5> (summarizing a report that explores the drivers of programmatic TV adoption and the value advertisers and TV companies can derive from hyper-targeted audiences); John LaFayette, *Adobe Creates Advertising Cloud for Programmatic TV Buying*, *Broadcast & Cable*, June 19, 2017, <http://www.broadcastingcable.com/news/currency/adobe-creates-advertising-cloud-programmatic-tv-buying/166600>.

served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."

To implement this statutory requirement, the FCC adopted the processing guideline and reporting requirements in 1996. It found that its prior rules, which provided great flexibility to television stations, failed

to adequately counterbalance the marketplace disincentives as Congress intended when it enacted the CTA. Indeed, some broadcasters are carrying very little regularly scheduled standard length programming specifically designed to educate and inform children. Second, some broadcasters are claiming to have satisfied their statutory obligations with shows that, by any reasonable benchmark, cannot be said to be "specifically designed" to educate and inform children within the meaning of the CTA.

Children's Television Report & Order, 11 FCC Rcd 10660, 10661 (1996). The FCC thus created Form 398, Children's Educational Television Report to address these deficiencies. The Commission also adopted a processing guideline for the media bureau staff to use in reviewing license renewal applications.

Some comments complain that filling out the Form 398 reports is burdensome and serves no useful purpose. Gray Television, for example, asks the FCC to eliminate the reports in their entirety and replace them with quarterly certifications of compliance. NAB at 5 urges the FCC to replace the quarterly children's program reports and several other filing requirements with a "combined annual compliance report." NAB also proposes at 13 that instead of requiring "the submission of granular details about specific programs," the Commission should allow media companies to simply certify that they met the FCC's requirements.¹¹

We strongly object to these proposals. The claims that preparing the Form 398 is burdensome is laughable, given that most stations air one the bare minimum amount of core programming needed to meet the guideline. Moreover, most of these programs are reported as targeting ages 13-16, so that the advertising limits do not apply. See David Robb, *Preteen Saturday Morning Kids Shows Abandoned by Broadcast Networks*, Deadline Hollywood, June 20, 2016. As this article explains:

To qualify for this exemption [from the ad limits], and to run over 50% more ads than would be allowed on younger kids' shows, all the stations have to do is tell the FCC that their target audience is children aged 13-16. And that's what every ABC, CBS, Fox and CW station in the country has done. Quarterly reports they file with the FCC show that the target audience for every single one of

¹¹ Alternatively, NAB urges the FCC to weaken the guidelines by relaxing the definition of core programming to include programming that is not full length, relaxing the definition of core programming to include programming that is not full length and is aired at times other than between 7 am and 10 pm and by allowing more children's programs to be preempted. We oppose these proposals as well.

their kids' shows is now the 13-16 demographic. And NBC will be following suit later this year.

Relaxing the reporting requirements would leave the Commission unable to conduct the review of a station's service to children required by the CTA. Nor would members of the public have the information they need to challenge the license renewal of a station that was providing adequate service to children.¹²

We also oppose proposals to "revisit" the need for the processing guideline or to give broadcasters greater flexibility in meeting their public interest obligations to children. *See, e.g.,* Networks at 9, NAB at 36. The current guidelines already afford a great deal of flexibility. The experience before adoption of the 1996 rules has shown that when stations have more flexibility, they simply do not meet the program needs of children.

Likewise, we oppose proposals to reexamine the Commission's application of the guideline to digital multicast channels. *E.g.* NAB at 35. Although the CTA did not address multicast channels (which did not exist at that time), Section 336(a)(5) of the 1996 Telecommunications Act directed the FCC to conduct a proceeding to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity" once television stations transitioned to digital. Under this authority, the FCC adopted rules setting forth the public interest requirements of digital television stations in 2004. It found: "Given that the CTA is written broadly to apply to television broadcast licensees, and in light of explicit congressional intent expressed in Section 336 of the Communications Act, as amended, to continue to require digital broadcasters to serve the public interest, we concluded in the *Notice* that digital broadcasters are subject to all of the CTA's commercial time limit and educational and informational programming requirements." 19 FCC Rcd 22943, 22948

NAB at 37 also asks the FCC to repeal the requirement that at least 3 hours of core programming be shown on a station's primary channel. We oppose this request since many children do not have access to the multicast channels because the FCC only requires cable systems to carry a television station's primary channel.

We also oppose Gray's suggestion at 4 that the FCC permit stations to opt-out of the meeting the children's program guideline, if a station instead provides at least three hours of local public interest programming on the weekend. Children's E/I programming and local public interest programming are both necessary to meeting the statutory obligations of stations to serve their communities. Stations should not be able to get out of their obligations to children by providing local programming for adults.

¹² For example, the FCC relied on the information in Form 398 when it found that Univision television stations fell short in serving children's educational program needs because they inappropriately claimed certain Telenovelas as core children's programs. As a result, Univision agreed to pay a fine of \$24 million and to take steps to comply with the children's television requirements in the future. *Shareholders of Univision Communications Inc.*, 22 FCC Rcd 5842, 5844 (2007). Similarly, the challenges brought to license renewals of certain stations in Washington, D.C. and Cleveland, were based on the information in the Program Reports. *Letter from Barbara A. Kriesman, Chief, Video Division, to Angela Campbell, et al.*, 30 FCC Rcd 1978 (MB 2015).

In conclusion, we urge the Commission to reject proposals that would weaken its children's advertising policies or lead to a reduction in educational programming for children.

Respectfully submitted,

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