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

In re:	)	
	)	
THE WALT DISNEY COMPANY,	)	**No. 05-1393**
	)	
Petitioner	)	

OPPOSITION OF FCC AND UNITED STATES TO PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, A WRIT OF INJUNCTION

In an order issued on November 23, 2004, the Federal Communications Commission amended its rules for 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*"). A number of parties, including Walt Disney Co. ("Disney"), petitioned for FCC reconsideration of the *Order*. Those reconsideration petitions are now pending before the Commission.

On October 11, 2005, Disney filed with this Court a petition for a writ of mandamus or, in the alternative, a writ of injunction. Disney asks the Court to direct the FCC "to render a final decision, by November 15, 2005," on the pending reconsideration petitions. Pet. at 1. Alternatively, Disney requests that the Court stay certain FCC rules until the agency acts on the reconsideration petitions. The rules in question are scheduled to take effect on January 1, 2006.

Disney does not satisfy the stringent requirements for either form of extraordinary relief it seeks. First, there is no basis for this Court to intervene in the Commission's decision-making process by directing it to act on Disney's reconsideration petition three weeks from now, as Disney has asked. That petition, along with fifteen other reconsideration petitions in this proceeding, presents complex questions and has been pending for less than seven months, far short of the kind of "unjustifiable" delay this Court has held might warrant mandamus relief. Second, there is no basis for enjoining implementation of any of the revised children's television rules.

In attempting to demonstrate a likelihood of success on the merits, Disney fails to give appropriate weight to the government's well-established interest in promoting and protecting the well-being of children. The narrowly tailored rules at issue here vindicate that interest both by ensuring that broadcasters meet their obligation to provide sufficient educational and informational programming for children and by safeguarding children from overcommercialization. Moreover, Disney's attempt to show irreparable harm impermissibly bootstraps defective constitutional arguments and for good measure tacks on a claim of economic harm that even Disney admits is vague and speculative. As a result, Disney's petition should be denied in its entirety.

BACKGROUND

A. The Children's Television Act Of 1990

As part of its mission to ensure that television broadcasters serve the public interest, 47 U.S.C. § 307(a), the FCC has long recognized the unique needs of children. *See, e.g., Children's Television Report and Policy Statement*, 50 F.C.C.2d 1 (1974) ("*1974 Policy Statement*"), *aff'd, Action for Children's Television v. FCC,* 564 F.2d 458 (D.C. Cir. 1977). To address those needs, the Commission historically has sought to promote two primary objectives: (1) encouraging broadcasters to develop educational and informational programming that is suitable for children of different age groups; and (2) limiting the amount of televised advertising to which children are exposed. *See Order* ¶ 5.

On the theory that market forces would ensure a sufficient supply of educational programming for children, the Commission in 1984 decided not to establish quantitative children's programming requirements for broadcasters.[1] Unfortunately, however, in the wake of that deci-

[1] *Children's Television Programming and Advertising Practices,* 96 F.C.C.2d 634 (1984), *aff'd, Action for Children's Television v. FCC,* 756 F.2d 899 (D.C. Cir. 1985).

sion, "the amount of children's educational programming aired by commercial television stations decreased markedly." *Order* ¶ 6. Moreover, in the same year, the Commission repealed its commercial guidelines for children's programming,[2] and the elimination of those guidelines sparked "an increase in the amount of commercial matter broadcast during children's programming." *Order* ¶ 6 (citing S. Rep. No. 227, 101st Cong., 1st Sess. 9 (1989) ("Senate Report")).

In response to these developments, Congress enacted the Children's Television Act of 1990. It 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).[3] 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

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[2] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logs for Commercial Television Stations,* 98 F.C.C.2d 1076 (1984).

[3] 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.

children." CTA, § 101(2) (codified at 47 U.S.C. § 303a note). To give effect to this finding, the CTA requires the Commission, 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 Commission 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).[4]

The FCC first adopted rules to implement the CTA in 1991.[5] Five years later, the Commission 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 Commission defined this programming, 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 Commission also promulgated a processing guideline under which

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[4] 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.

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

"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 Commission for consideration. The Commission 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.[6] 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 Broad-*

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[6] Broadcasters are currently broadcasting on both digital and analog spectrum. Under current law, broadcasters may continue to use their analog spectrum allotments (in addition to their digital allotments) until 85% of people in a market have the capability to receive a digital signal. *See* 47 U.S.C. § 309(j)(14). Given the uncertainty concerning when this condition will be met, Congress is considering legislation to establish a definite deadline for the DTV transition. On October 20, 2005, the Senate Commerce Committee voted to report out a bill that changes the date for completion of the digital transition to April 7, 2009. *See Communications Daily*, Oct. 21, 2005, at 1; Oct. 17, 2005, at 1; Mohammed, Senate Bill Sets Spring 2009 Demise for Analog Television, Washington Post, Oct. 15, 2005, at D2. Thus, the timetable for completion of the DTV transition is currently uncertain, and the new rules at issue here are likely to apply to analog as well as digital television stations for several more years.

casters, 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 Commission in late 2004 amended its children's television rules in several respects. The rules challenged by Disney 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.[7]

The Multicasting Rule. The Commission 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 Commission 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

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[7] Originally, the website rules were scheduled to take effect on February 1, 2005. *See Order* ¶ 86. However, after a number of broadcasters and cable operators expressed concern that they would have difficulty complying with the new website rules by February 2005, the Commission deferred the effective date of those rules until January 1, 2006. *See Children's Television Obligations of Digital Television Broadcasters*, 20 FCC Rcd 2055 (2005).

week of core programming in addition to the 3 hours per week on the main program stream." *Order* ¶ 19. To comply with the new guideline, digital broadcasters are given the discretion to "air all of their additional core programming … on one free digital video channel or distribute it across multiple free digital video channels," as long as the channels on which core programming airs have "comparable carriage on multichannel video programming distributors" as the channel whose programming triggers an increase in the core programming guideline. *Id.* ¶ 24.

The Commission 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 Senate Report at 1). The Commission 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 Commission further 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 Commission also found that the new guideline is consistent with the First Amendment because it "imposes reasonable parameters on a broadcaster's use of the public airwaves and is narrowly tailored to advance the government's substantial, and indeed compelling, interest in the protection and education of America's children." *Id.* ¶ 35.

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 Commission 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 Commission, has determined "what constitutes regularly scheduled programming and what level of preemption is allowable." *Ibid.*

In the *Order*, the Commission 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 Commission, however, exempted from this preemption limit "preemptions for breaking news." *Ibid.*

The Commission 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 Commission 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.*[8] The Commission noted that, in any event, "a station that fails to meet the processing guideline because of 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.*

[8] 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.

The Website Rules. The Commission 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 Commission concluded that this restriction on the display of website addresses was necessary to fulfill the agency's "mandate under the CTA to protect children, who are particularly vulnerable to commercial messages." *Ibid.* (citing Senate Report at 9).

In addition, the Commission 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 Commission 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 1974 Policy Statement*, 50 F.C.C.2d at 14-17.

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 Commission 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 Commission'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 Commission 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 Commission 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.*

C. Subsequent Developments

Following release of the *Order*, a number of parties filed sixteen petitions for agency reconsideration of the new rules. In addition to Disney's petition for reconsideration, Viacom, Inc. and the Office of Communications of the United Church of Christ, Inc. joined in separate petitions for reconsideration filed by other parties. In late September and early October, however, United Church of Christ and Viacom withdrew their participation in those reconsideration petitions and filed separate petitions for judicial review. United Church of Christ filed a petition for review of the *Order* in the Sixth Circuit on September 26, 2005. *Office of Communication of the United Church of Christ, Inc. v. FCC*, No. 05-4189 (6th Cir., filed Sept. 26, 2005). Seven days later, Viacom filed a petition for review of the *Order* in this Court. *Viacom, Inc. v. FCC*, No. 05-1387 (D.C. Cir., filed Oct. 3, 2005).[9] Disney recognizes that these are related cases. *See* Pet. at v (Statement of Related Cases).

The Commission filed the record on review in the *United Church of Christ* case in the Sixth Circuit on October 11, 2005. That filing was based on the provision of 28 U.S.C. § 2112(a)(1) stating that the agency "shall file the record in the court in which proceedings with respect to the order were first instituted."[10] Also on October 11, 2005, the Commission moved to transfer Viacom's petition for review from this Court to the Sixth Circuit based on the provision of 28 U.S.C. § 2112(a)(5) requiring that "[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed." On October 12, 2005, the Commission similarly moved to transfer Disney's mandamus petition to the Sixth Circuit on the grounds that it would be a more efficient use of this Court's resources and would avoid unnecessary and undesirable fragmentation of review of multiple challenges to the same FCC action.

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[9] Pursuant to 28 U.S.C. § 2344, petitions for review of FCC orders must be filed within sixty days of entry of a final order. That time period is tolled for a party upon its timely filing of a petition for agency reconsideration. *Los Angeles SMSA Ltd. Partnership v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995). United Church of Christ's and Viacom's withdrawal of their petitions for reconsideration prior to a Commission order resolving the petitions restarted the time period for seeking judicial review. *Id.*

[10] Section 2112(a)(1) contains special provisions for lottery selection where petitions for review of the same agency order are filed in more than one circuit. For those provisions to become applicable, however, the petitions must be filed "within ten days after issuance of the order" for which review is sought. Neither Viacom's petition for review nor the petition in the Sixth Circuit was filed within ten days after issuance of the FCC's *Order*.

ARGUMENT

Claiming that the FCC has unreasonably delayed action on pending reconsideration petitions, Disney asks the Court for a writ of mandamus directing the Commission to issue a reconsideration order by November 15, 2005. Pet. at 11-17. Alternatively, Disney seeks a writ of injunction staying certain FCC rules that are scheduled to take effect on January 1, 2006. Pet. at 18-30. As we explain below, neither a writ of mandamus nor a stay is justified in this case.

I. A WRIT OF MANDAMUS IS NOT WARRANTED HERE.

"A writ of mandamus is 'an extraordinary remedy, to be reserved for extraordinary situations.'" *In re Brooks,* 383 F.3d 1036, 1041 (D.C. Cir. 2004) (quoting *Cobell v. Norton,* 334 F.3d 1128, 1137 (D.C. Cir. 2003)). This is not one of those situations. When a party raises claims of unreasonable agency delay, mandamus is "warranted only when agency delay is egregious." *In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988). Disney has failed to show that the delay in this case "is so egregious as to warrant mandamus." *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*").

The Administrative Procedure Act empowers reviewing courts to "compel agency action" that is "unreasonably delayed." 5 U.S.C. § 706(1). While there is no *per se* rule for determining what constitutes unreasonable agency delay, this Court has recognized that "the time agencies take to make decisions must be governed by a 'rule of reason.'" *TRAC,* 750 F.2d at 90. The application of the rule of reason to a claim of unreasonable delay "is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). Applying this rule of reason, the Court has held that a delay even of several years is not necessarily so egregious to warrant mandamus.[11]

Given the Court's recognition that in a complex case an agency may reasonably take years to act, it is clear that the FCC has not unreasonably delayed action here. The sixteen pending petitions for reconsideration of the *Order* were filed on February 2, 2005; and the pleading cycle with respect to those petitions was not completed until early April 2005. Thus, less than seven months have passed since the reconsideration petitions became ripe for FCC resolution. This relatively short interval does not remotely approach the sort of egregious agency delay that would justify the extraordinary remedy of mandamus.

Disney claims that "it would require only a modest effort for the FCC to act" on the pending reconsideration petitions. Pet. at 15. To the contrary, those sixteen petitions raise complex issues concerning multiple rule changes. Recognizing the complexity of these issues, Viacom unsuccessfully sought leave to file a 40-page motion to stay the rules – double the prescribed page limit for stay motions. *See* Motion for Leave, *Viacom v. FCC,* D.C. Cir. No. 05-1387 (filed Oct. 12, 2005). In view of the number and variety of complicated issues presented by the reconsideration petitions, it is surely reasonable for the Commission to take more than a few months to produce an order that resolves all of these difficult issues.[12]

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[11] *See, e.g., Monroe Communications,* 840 F.2d at 945-47 (a delay of several years did not warrant mandamus); *TRAC*, 750 F.2d at 81 (delays of two and five years did not warrant mandamus); *Oil, Chemical and Atomic Workers Intern. Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (dismisssing mandamus petition for agency failure to complete rulemaking upon showing by agency, after five year-delay, that it would complete rulemaking within two years).

[12] There is also nothing unreasonable about FCC rules taking effect while reconsideration petitions remain pending. Agencies are not required to stay the effect of duly adopted rules simply because reconsideration petitions have been filed. Indeed, both the Communications Act and the FCC's rules provide that the filing of a reconsideration petition shall not excuse compliance with any rule or "operate in any manner to stay" the effect of such rules. 47 C.F.R. § 1.429; *see also* 47 U.S.C. § 405(a). It is common for new or modified Commission rules to take effect in such circumstances.

This Court has long recognized that "an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). Courts generally will not infringe on an agency's "broad discretion to set its agenda" unless the agency engages in "excessive" or "unjustifiable" delay. *Ibid.* There is no evidence of any such egregious delay in this case.[13] Consequently, the Court should deny Disney's petition for a writ of mandamus.

II. INJUNCTIVE RELIEF IS NOT WARRANTED HERE.

As an alternative to a writ of mandamus, Disney requests a writ of injunction staying the rules to which it objects until 90 days after the FCC acts on its reconsideration petition. To obtain such extraordinary relief, Disney 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 Metropolitan Area Transit Commission 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). Disney's petition falls short of justifying its stay request under this stringent standard. Moreover, because Disney 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, Disney has not even made the necessary showings to justify a stay of *any* of the challenged rules.

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[13] Furthermore, Disney has proposed a plainly unreasonable timetable for agency action. It asks the Court to direct the FCC to issue a reconsideration order by November 15, 2005 – only two weeks after Disney's deadline for filing a reply in support of its mandamus petition.

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

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

The Multicasting Rule. Disney contends that the multicasting rule, which modifies the core programming guideline for multicasters, "runs afoul of the First Amendment because it does not substantially advance an important governmental interest and is not narrowly tailored." Pet. at 26. Disney is wrong on both counts.

Contrary to Disney's assertion, the multicasting 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 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); *see also* CTA, § 101(1) (codified at 47 U.S.C. § 303a note) (Congress has found that "television can assist children to learn important information, skills, values, and behavior").

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.

Disney asserts that the record contained "no evidence" that "the current level" of core programming "is inadequate to meet the needs of children." Pet. at 26. 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 Commission to modify the guideline in response to the dramatic expansion of channels and program options made possible by DTV. In 1996, the Commission 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 Commission 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.

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 Enter-*

tainment Co. v. FCC, 93 F.3d 957, 973-77 (1996), *reh. denied*, 105 F.3d 723 (D.C. Cir. 1997). The Court held that the government did not violate the First Amendment "by requiring DBS providers to reserve a small portion of their channel capacity for [noncommercial] programs as a condition of their being allowed to use a scarce public commodity." *Id.* at 976. 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.[14]

The Preemption Rule. There is no merit to Disney's argument (Pet. at 25-26) 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.

Contrary to Disney's contention, the 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 Commission 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 commercial success.").

Disney asserts that the preemption rule is not "narrowly tailored" because it "rigidly

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[14] Disney does not – and could not – claim that the FCC failed to provide adequate notice of the multicasting rule. *See NPRM* ¶¶ 14-24.

constrains broadcasters' traditional editorial discretion." Pet. at 25. Disney significantly overstates the rule's burdens. Disney's claim that stations will be forced to choose between delivering live sporting events and airing children's programming is incorrect. If a station wishes to air live sports events in any particular quarter at a time when children's programs are normally scheduled, it can remain in compliance with both the core programming guideline and the preemption limit by choosing another regularly scheduled time slot in which to air its children's programming. Alternatively, if a station wishes to preempt an hour of core programming on Saturday morning for sports during football season (the fall quarter), then it just has to run an additional hour of core programming each week in the next quarter to satisfy the guideline.[15] In any event, 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 will continue to have considerable flexibility in deciding how to satisfy their obligations under the CTA.[16]

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[15] Of course, these measures will be unnecessary for stations that preempt less than 10 percent of core programs per quarter. According to the Commission, "most stations currently do not preempt more than 10 percent of core programs in each calendar quarter." *Order* ¶ 42.

[16] In a footnote (Pet. at 26 n.34), Disney argues that the FCC promulgated the preemption rule without satisfying the APA's notice-and-comment requirements. That claim lacks merit. In the *NPRM*, the Commission observed that "the average preemption rate by stations affiliated with the largest networks during the past two years" had 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,
(footnote continued on following page)

The Website Rules. There is no basis for Disney's assertion (Pet. at 20) 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 Commission properly exercised that authority when it limited the televised display of addresses for websites that are used for commercial purposes.

Disney 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 Disney itself acknowledges. *See* Pet. at 20. 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.

Disney's attack on the constitutionality of the website rules is also 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

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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).

protecting children from "overcommercialization." *Order* ¶ 52. In adopting this rule, the Commission rightly rejected Disney's flawed premise that "information about websites cannot be sensibly analogized to product offerings for toys and snacks." Pet. at 21. To the contrary, numerous websites sell products with special appeal to children (*e.g.*, www.etoys.com, www.toysrus.com). Indeed, Disney itself has a website linked to disney.com – by a button marked "Shop" – that sells toys, games, and other merchandise of interest to children: www.disneyshopping.com.[17] Televised references to commercial websites of this sort are essentially no different 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 Commission 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.

Disney claims that "the website reference rule severely limits the ability of broadcasters and cable programmers to inform their audiences about their affiliated websites." Pet. at 20. 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.

The website reference rule does *not* restrict the televised display of *all* website addresses

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[17] Children who visit disneyshopping.com can purchase (among other things) a "Princess Bounce Castle" (priced at $299), a "Rocking Goliath" (priced at $149), and a "Mr. Fix 'N' Stitch Tool Bench Set" (priced at $49.95).

on children's programs. It places no limits on references to websites that are not commercial in nature. To determine which websites qualify for this exemption, the Commission has created a four-part test. *Order* ¶ 50. Although Disney argues that this test is "unconstitutionally vague" (Pet. at 20-21), the FCC's website test 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, Disney cannot seriously claim that the boundary between commercial and noncommercial speech is unconstitutionally vague.

Concern about the commercialization of children's television also justified the Commission's decision to "prohibit 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. In support of this rule change, the Commission cited "the unique vulnerability of young children to host-selling." *Ibid.* Disney asserts that the ban on host-selling is too broad because it applies even if a child accesses a website sometime after the program advertising the website has ended. Pet. at 21. Disney appears to assume that the Commission's only concern about host-selling stems from children's inability to distinguish between advertising and program material during television broadcasts. But the Commission long ago identified another problem with host-selling: "[T]he practice allows advertisers to take unfair advantage of the trust which children place in program characters…. [S]ince a special relationship tends to develop between hosts and young children in the audience, commercial messages are likely to be viewed as advice from a friend." *1974 Policy Statement*, 50 F.C.C.2d at 16. The new host-selling rule is reasonably designed to address this legitimate concern.

The host-selling rule also is sufficiently clear to overcome Disney'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 Disney complains that the term "site" is too vague in this context (Pet. at 22), 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.[18]

Finally, Disney contends that the Commission violated the APA by promulgating the website rules without providing notice or an opportunity for comment. Pet. at 22. 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. A website address is generally an integral part of a link. And the *NPRM* asked whether "the appearance of a commercial link" should "be counted in calculating the number of commercial minutes for purposes of [the CTA's] commercial limits." *NPRM* ¶ 32. The concern underlying that inquiry – the commercialization of children's television – applies not just to interactive links, but to all commercial website addresses.

Disney 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

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[18] *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).

more generally to the broadcast of any website addresses. *See* Reply Comments of the WB Television Network, 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. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996). Thus, when it adopted the website rules, the Commission complied with the APA's notice-and-comment requirements.

The Promotions Rule. Disney maintains that the Commission violated the First Amendment by revising its definition of "commercial matter" to include program promotions. Pet. at 22-24. 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.

The promotions rule is reasonably designed to "reduce the number of commercial interruptions in children's programming." *Order* ¶ 57. The Commission 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.

Disney also faults the Commission for excluding promotions for educational and informational programming from the "commercial matter" that is subject to the CTA's time limits. Disney asserts that this exemption amounts to an unconstitutional "content-based preference for certain speech." Pet. at 23. The CTA itself, however, reflects a preference for certain speech:

educational and informational television programs for children. To date, neither Disney 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.

Finally, contrary to Disney's assertion (Pet. at 24-25), the Commission 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 Commission 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).

In attacking the Commission's interpretation of "commercial matter," Disney makes much of a dictionary definition of "commercial" as "supported by advertisers." Pet. at 24 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 224 (1979)). But a more pertinent definition of "commercial" in this context is "an advertisement broadcast during a sponsored radio or television program." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 456 (1993). The term "advertisement" is defined as "the action of advertising," which entails "calling something (as a commodity for sale, a service offered or desired) to the attention of the public." *Id.* at 31. These widely accepted definitions support the Commission's view that the term "commercial matter" includes program promotions because broadcasters seek to maximize their revenue by drawing as many viewers as possible to their programs.

Disney finds support for its preferred reading of the statute in the Senate Report on the CTA. Pet. at 24 & n.33. The most that can be said for the Senate Report is that it states a 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" Disney's position, the reading of the CTA that Disney 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.[19]

B. The Balance Of Equities Calls For Denial Of Disney'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

[19] Disney does not – and could not – claim that the FCC failed to provide adequate notice of the promotions rule. *See NPRM* ¶¶ 33-34.

other three factors" – irreparable injury, harm to others, and the public interest. *Holiday Tours*, 559 F.2d at 844; *see also Cuomo*, 772 F.2d at 974. Where a petitioner has demonstrated such a low probability of success as Disney 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. *Holiday Tours*, 559 F.2d at 844; *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 Disney challenges. Disney 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. "'The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). *See also Buffalo-Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981) (irreparable harm is the "*sine qua non* for the grant of such equitable relief."). Before Disney 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." *Wisconsin Gas*, 758 F.2d at 674. In other words, Disney must provide "proof indicating that the harm [it alleges] *is certain to occur*." *Id.* (emphasis added). Disney has not come close to satisfying this stringent standard.

a. First Amendment. Disney'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, Disney 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* Pet. at 26-27. However, contrary to what Disney 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; in cases involving a claim by movant of interference with protected freedoms or other constitutional 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 Disney's First Amendment challenges to any of these rules. Because the First Amendment claims are unavailing on their merits, Disney's effort to bootstrap those claims into a showing of irreparable injury is equally unsuccessful.

b. Unrecoverable Economic Damages. Disney also contends that the new rules will inflict irreparable injury "in the form of unrecoverable economic damages." Pet. at 27. These damages, allegedly, will come in the form of costs to comply with the rules, advertising revenue that Disney "may lose," and "loss of customers and good will." Pet. at 28. By Disney's own admission, it is "difficult, if it not impossible" and "exceedingly speculative" for Disney "to ascertain the precise amount of economic damages that the new rules could cause." Pet. at 28.

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). Disney has done neither. To the extent that Disney contends that compliance with the new children's television rules pending resolution of the reconsideration petitions will constitute irreparable injury, it has failed to demonstrate that the injury will be either certain or great. The declarations attached to Disney's petition and cited in support of the claimed injury (*e.g.*, Pet. at 27, 28) provide additional detail indicating that Disney may have to make changes in some of its operations to comply with the new rules. These additional details do not, however, 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 $30 billion in annual revenue.[20]

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). In considering requests for stay of agency orders, courts give significant weight to the public interest served by the proper operation of the regulatory scheme.[21]

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

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[20] *See* The Walt Disney Company, 2004 Annual Report, Inside Cover.

[21] *See Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm'n*, 337 F.2d 221, 222-23 (6th Cir.1964) (denying stay in deference "to the expert judgment of the Commission as a coordinate agency of government specially created to further public purposes" of regulating radioactive materials); *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir.1960) (denying stay of SEC order because otherwise "[the court] would, in effect, be substituting [its] judgment as to the public interest for that of the [SEC]").

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, Disney's claim that the Commission has acknowledged that a stay would cause no harm because the agency itself (a) delayed the effective date of the rules in January 2005, and (b) "preserved the *status quo* for almost five years while it considered whether to adopt the new rules" (Pet. at 29) is extraordinary. The Commission's discussion of its decision to make most of the new rules effective January 1, 2006 does not indicate at all that the Commission 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.").

In addition, the Commission deferred the effective date of the new website rules at the express request of broadcasters and cable operators. *See Children's Television Obligations*, 20 FCC Rcd at 2055 ¶ 2. Among those requesting the delay in the rules' effective date was Disney.[22] The Court should reject Disney's remarkable claim that the Commission's decision to postpone the rules' implementation temporarily to accommodate Disney and others somehow now justifies a stay further delaying implementation of the rules. If anything, the delays to this point in implementing these rules, whatever the reason for such delays, undercut rather than support Disney's request for further delay in making the rules effective.

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[22] Letter of Dec. 15, 2004 from Barbara K. Gardner to Marlene H. Dortch, *Notice of Oral Ex Parte Presentation, MM Docket No. 00-167*, listing a representative of Disney among parties meeting with various FCC officials to request delay in effective date of rules.

CONCLUSION

In consideration of the foregoing, the Court should deny Disney's petition for a writ of mandamus and its request for an injunction in the nature of a stay of the effective date of the new children's television rules.

Respectfully submitted,

Peter D. Keisler
Assistant Attorney General

Mark B. Stern
Appellate Litigation Counsel

United States Department of Justice
Washington, D. C. 20530

Samuel L. Feder
Acting General Counsel

Matthew B. Berry
Acting Deputy General Counsel

Jacob M. Lewis
Associate General Counsel

Daniel M. Armstrong
Associate General Counsel

C. Grey Pash, Jr.
James M. Carr
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740
FAX (202) 418-2819

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