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The wheels of the bureaucracy go round 'n' round

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As we reported in last month's issue, the FCC approved several modifications to the children's television rules recommended by "a group of cable and broadcast industry representatives and children's television advocates." Since last month's issue, the text of the FCC's Order was released, allowing us to review the final results of more than two years of arguments, debates and compromises.

As expected, the FCC adopted essentially all of the "Joint Proposal" put forward by the group, which included the big four networks but *not* the NAB or any affiliates. Presumably the networks and the public interest groups will now withdraw the various court challenges to the new rules and will not file any further appeals. Virtually all objections and suggestions from outside the group were quickly and firmly brushed off. Thus, the new kidvid rules – which will probably go into effect around the start of 2007 – are as follows:

DTV Core Programming Requirements. The FCC has long required that television stations air at least three hours per week of "core" children's educational programming to qualify for staff-level review of the children's programming portion of their license renewal applications. The FCC's new rules, which were formulated in the FCC's 2004 Children's Television Order, extended the core programming requirements to the main programming stream of digital television broadcasters.

In addition, for DTV broadcasters that offer multicast program streams, the FCC increased the core programming requirement in proportion to the amount of additional free video programming broadcast. The new rules require an additional 30 minutes of core programming for each 1 to 28 hours of video programming provided per week, up to 3 hours per week of core programming for each 24-hour free multicast program stream. Despite objections that this new requirement will inhibit the offering of new specialized services, such as 24 hour weather channels, the FCC retained these new requirements.

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The only change recommended in the Joint Proposal and adopted by the FCC was to clarify that at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams. The quarterly children's program report (FCC Form 398) will not collect information about which specific programs are allowable repeats, but will require a certification that the station has complied with the repeat restriction.

The FCC added that licensees will be required to retain records sufficient to document that certification, including records of actual program episodes aired, and to make such documentation available to the public upon request. (At this point it does *not* appear that this documentation must be included in the station's public file, although it clearly must be made available to the public on request.)

Preemptions. In its 2004 Order, the FCC imposed a 10 percent cap on preemptions of core children's programming. Based on the Joint Proposal's recommendations, however, the FCC eliminated this new cap and returned to a case-by-case approach. Under this approach, the networks may seek informal approval of their preemption plans by submitting them to the Media Bureau by August 1st of each year. The FCC presumed that non-network affiliated stations "do not need broad preemption relief." In general, preempted programs must be re-scheduled to a "second home" timeslot and on-air notifications of the schedule change must be made during the previously scheduled episode.

Website Displays. One of the most widely-discussed elements of the new kidvid rules was the new restriction on the display of website addresses during children's programming. Display of a website address would only be permitted during children's programming if it met a four part test: (1) the website offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) it is not primarily intended for commercial purposes, including either 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 televised website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, it contains no links labeled "store" and no links to another page with commercial material).

In keeping with the Joint Proposal, the FCC affirmed its new rule but clarified it to provide that (1) the requirements of the rule apply only when Internet addresses are displayed during program material or during promotional material not counted as commercial time, and (2) if an Internet address is displayed during a promotion that does

not meet the four-prong test, in addition to counting against the commercial time limits, the promotion will be clearly separated from programming material.

The FCC also provided a few exemptions from the website rule. PSAs that display websites not under the control of the station are exempted from the website rule if they are aired on behalf of either (a) independent non-profit or government organizations or (b) media companies in partnership with non-profits or government entities, . In addition, station identifications and emergency announcements are not subject to the website display rule as long as the display is consistent with the purpose of the announcement.

Host Selling. The 2004 Order completely prohibited the display of website addresses in a children's program when the site uses characters from that program to sell products or services. After considering the Joint Proposal and other comments, the FCC agreed that this absolute prohibition should be replaced with a rule prohibiting the display of a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program (or a character appearing in the program): (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products. This new rule would not apply to third-party sites linked from the companies' web pages, on-air third-party advertisements with website references to third-party websites, or pages that are primarily devoted to multiple characters from multiple programs.

Under the current rules, licensees certify compliance with children's advertising commercial limits on their license renewal and maintain in their public inspections files records sufficient to substantiate that certification. The FCC reiterated that licensees are now required also to certify that they have complied with the requirements concerning the display of website addresses in children's programming and maintain in their public inspections files records sufficient to substantiate that certification.

Definition of Commercial Matter. In the 2004 Order, the FCC redefined "commercial matter" subject to the children's program restrictions to include all program promotions other than promotions for educational and informational programming. Per the Joint Proposal, however, that redefinition has been redefined to *ex*clude promotions for *any* children's programming on the same channel or educational/informational programming on any other channel.

As noted above, these new rules should become effective around the start of 2007. In the meantime, please call your friendly neighborhood communications counsel if you have any questions about compliance with the children's programming rules.