

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Children's Television Obligations) MM Docket No. 00-167
Of Digital Television Broadcasters)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 14, 2000

Released: October 5, 2000

Comment Date: December 18, 2000

Reply Comment Date: January 17, 2001

By the Commission: Commissioners Furchtgott-Roth and Tristani concurring in part, dissenting in part, and issuing separate statements; Commissioner Powell issuing a statement.

I. INTRODUCTION

1. We issue this *Notice of Proposed Rule Making* ("Notice") to seek comment on a range of issues related to the obligation of digital television ("DTV") broadcasters to serve children. We focus in this proceeding primarily on two areas: the obligation of television broadcast licensees to provide educational and informational programming for children and the requirement that television broadcast licensees limit the amount of advertising in children's programs. Although we seek comment largely on challenges unique to the digital area, we also explore several issues that children's advocates have raised about children's educational and informational programming more generally.¹

II. BACKGROUND

2. American children spend a considerable amount of time watching television. Recent data show that children in this country spend, on average, almost three hours a day watching television.² In view of the significant role that television plays in the lives of children, this medium has great potential to contribute to children's development. As Congress has stated, "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and

¹ In the following sections of this *Notice*, we seek comment on issues that arise in both the analog and digital broadcasting contexts: the section entitled "Definition of Commercial Matter," section D entitled "Promotions," and section E entitled "Other Steps to Improve Educational Programming.

² See, e.g., Henry J. Kaiser Family Foundation, *Kids and Media at the New Millennium* at 20 (Nov. 1999). In contrast, children spend per day, on average, twenty-one minutes using the computer, twenty minutes playing video games, and eight minutes on the internet.

rely upon it for so much of the information they receive.”³

3. For over 30 years, the Commission has recognized that, as part of their obligation as trustees of the public’s airwaves, broadcasters must provide programming that serves the special needs of children. The Commission’s efforts to promote programming for children began in 1960 with the statement that children were one of the several groups whose programming needs television licensees must meet to fulfill their community public interest responsibilities.⁴ In 1974, the Commission instituted a wide ranging inquiry into children’s programming and advertising practices, which led to publication of the *Children’s Television Report and Policy Statement* (“1974 Policy Statement”).⁵ The Commission concluded that broadcasters have “a special obligation” to serve children and stated its expectation that licensees would increase the number of programs aimed at children in specific age groups. The Commission also concluded that children are more “trusting and vulnerable to commercial ‘pitches’ than adults” and that children “cannot distinguish conceptually between programming and advertising.”⁶ The Commission stated its expectation that the industry would eliminate “host selling”⁷ and product “tie-ins,” use separation between programs and commercials during children’s programming, and honor the industry’s voluntary advertising guidelines for children’s programs.⁸

4. Later in the 1970s, the Commission undertook further study of the availability of educational programming for children.⁹ Finding that the industry had failed to respond to its earlier call for improvements, the Commission considered formal regulation.¹⁰ In 1984, however, the Commission decided not to establish quantitative program requirements for broadcasters, relying instead on market forces to ensure a sufficient supply of educational programming for children.¹¹ Following this decision,

³ S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989) (“Senate Report”).

⁴ *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 44 FCC 2303 (1960).

⁵ *Children’s Television Report and Policy Statement*, 50 FCC 2d 1 (1974), *aff’d.*, *Action for Children’s Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (“1974 Policy Statement”).

⁶ *1974 Policy Statement*, 50 FCC 2d at 11.

⁷ “Host-selling” is the use of program characters or show hosts to sell products in commercials during or adjacent to the shows in which the character or host appears.

⁸ *Id.* at 12-13. Under the voluntary advertising guidelines, broadcasters were to air no more than 12 minutes per hour of advertising on weekday children’s programs and 9.5 minutes per hour on weekend programming.

⁹ FCC, *Television Programming for Children, A Report of the Children’s Task Force* (1979).

¹⁰ *Notice of Proposed Rulemaking, Children’s Television Programming and Advertising Practices*, Docket No. 19142, 75 FCC 2d 138 (1979). The 1979 *Notice* proposed to require that all commercial television stations provide five hours per week of educational programming for preschool children (ages two to five) and two and one-half hours per week of educational programming for school age children (ages six to twelve). *Id.* at 148.

¹¹ *Report and Order, Children’s Television Programming and Advertising Practices*, MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff’d.*, *Action for Children’s Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

the amount of children's educational programming aired by commercial television stations decreased markedly.¹² Also in 1984, the Commission repealed the commercial guidelines for children's programming,¹³ leading to an increase in the amount of commercial matter broadcast during children's programming.¹⁴

5. In 1990, Congress enacted the Children's Television Act of 1990 ("CTA").¹⁵ The CTA imposes two principal requirements. First, commercial television broadcast licensees and cable operators must limit the amount of commercial matter that may be aired during children's programs to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. Second, the CTA requires that, in its review of television broadcast renewal applications, the Commission must consider whether commercial television licensees have complied with the commercialization limits, and whether all television broadcast licensees have served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." In enacting the CTA, Congress found that, while television can benefit society by helping to educate and inform children, there are significant market disincentives for commercial broadcasters to air children's educational and informational programming.¹⁶ The objective of Congress in enacting the CTA was to increase the amount of educational and informational programming on television.¹⁷

6. The Commission first promulgated rules implementing the CTA in 1991. The Commission determined that the statutory children's programming commercial limits would apply to programs originally produced and broadcast for an audience of children 12 years old and under. Commercial matter was defined as "air time sold for purposes of selling a product." In other words, the advertiser must give some valuable consideration either directly or indirectly to the broadcaster as an inducement for airing the material.¹⁸ The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would

¹² Ellen Wartella, Katherine Heintz, Amy Aidman, and Sharon Mazzarella, *Television and Beyond: Children's Video Media in One Community*, *Communication Research* (1990); Dennis Kerkman, Dale Kunkel, Alethea Huston, John Wright, and Marites Pinon, *Children's Television Programming and the "Free Market" Solution*, *Journalism Quarterly* (1990).

¹³ *Report and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logs for Commercial Television Stations*, 98 FCC 2d 1076 (1984).

¹⁴ See Senate Report at 9.

¹⁵ Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, 394. The Senate Report on the CTA cited the Commission's 1984 decisions as precipitating factors in the enactment of the CTA. See Senate Report at 4-5.

¹⁶ Senate Report at 5-9.

¹⁷ Senate Report at 1.

¹⁸ *Report and Order, In the Matter of Policies and Rules Concerning Children's Television Programming*, MM Docket Nos. 90-570 & 83-670, 6 FCC Rcd 2111, 2112 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991).

cause the entire program to be counted as commercial time (a “program-length commercial”).¹⁹ Television licensees are required to certify their compliance with the commercial limits as part of their license renewal application, and must maintain records sufficient to permit substantiation of the certification.²⁰

7. In August 1996, the Commission adopted its current educational programming rules enforcing the CTA.²¹ The Commission’s rules include several measures to improve public access to information about the availability of programming “specifically designed” to serve children’s educational and informational needs (otherwise known as “core” programming). These measures include a requirement that licensees identify core programming at the time it is aired and in information provided to publishers of television programming guides.²² Licensees are required to designate a children’s liaison at the station responsible for collecting comments on the station’s compliance with the CTA.²³ Licensees must also prepare and place in their public inspection files a quarterly Children’s Television Programming Report identifying their core programming and other efforts to comply with their educational programming obligations.²⁴

8. In addition, our rules establish a definition of “core” programming. “Core”

¹⁹ In the CTA, Congress reaffirmed the Commission’s policies regarding separation of programming and commercial material, host-selling, tie-ins, and “other practices which unfairly take advantage of the inability of children to distinguish between programming and commercial content.” S. Rep. No. 227, 101st Cong., 1st Sess. 22 (1989).

²⁰ Broadcasters who cannot certify compliance must explain in their renewal applications all instances during their license terms in which they have exceeded the commercial limits. The Commission has admonished or fined licensees for commercial overages. The level of sanctions has been based on the number of overages, the length of the overages, and the period of time over which the overages have occurred.

²¹ See *Report and Order, Policies and Rules Concerning Children’s Television Programming*, MM Docket No. 93-48, 11 FCC Rcd 10660 (1996) (“Children’s Programming Report and Order”). The Commission first adopted rules implementing the CTA’s educational programming mandate in 1991. These rules included a very flexible definition of educational programming, did not establish quantitative guidelines regarding the amount of educational programming licensees were required to provide, and did not include measures designed to inform the public about educational programming. Within a few years after these initial rules took effect, questions began to be raised regarding the effectiveness of the new rules, and in particular about the content of the programs stations claimed were educational.

²² 47 C.F.R. § 73.673.

²³ 47 C.F.R. § 73.3526(a)(11)(iii).

²⁴ For an experimental period of three years after the effective date of the 1996 rules, the Reports were required to be filed with the Commission on an annual basis, and can be accessed by the public through the FCC’s children’s television webpage. The Commission has adopted a *Report and Order and Further Notice of Proposed Rulemaking* today that extends indefinitely the requirement that Children’s Television Programming Reports be filed with the Commission, requires that they be filed quarterly rather than annually, makes certain changes to the form, and seeks comment on whether to require that broadcasters post the reports on their own websites. See *Report and Order and Further Notice of Proposed Rule Making, In the Matter of Extension of the Filing Requirement for Children’s Television Programming Reports (FCC Form 398)*, MM Docket No. 00-44, FCC 00-343 (rel. Oct. 5, 2000).

programming is defined as regularly scheduled, weekly programming of at least 30 minutes, aired between 7:00 a.m. and 10:00 p.m., that has serving the educational and informational needs of children ages 16 and under as a significant purpose.²⁵ The program must be identified as core programming when it is aired and in information provided to program guide publishers.²⁶

9. Finally, to provide certainty to broadcasters about how to comply with the CTA and to facilitate fair and efficient processing of the CTA portion of broadcasters' renewal applications, the Commission also adopted a processing guideline. Under this guideline, a broadcaster can receive staff-level approval of the CTA portion of its renewal application by airing at least three hours per week of programming that meets the definition of "core" educational programming.²⁷ Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming.²⁸ Licensees not meeting these criteria will have their license renewal applications referred to the Commission.²⁹

10. We seek comment today on how these existing children's television obligations, developed with analog technology in mind, should be adapted to apply to digital television broadcasting. Digital television is a new technology for transmitting and receiving broadcast television signals that delivers better pictures and sound, uses the broadcast spectrum more efficiently, and offers a range of possible applications. DTV broadcasters will have the technical capability and regulatory flexibility to: air high definition TV (HDTV); "multicast," that is, to send as many as 4 - 6 digital "standard-definition television" (SDTV) signals; or provide "ancillary or supplementary services," including video and data services that are potentially revenue-producing, such as subscription television, computer software distribution, data transmissions, teletext, interactive services, and "time-shifted" video programming. Broadcasters could choose to shift back and forth among these different DTV modes -- HDTV, SDTV, and new video/information services -- during a single programming day. To facilitate the transition from analog to digital television, Congress directed the Commission to grant a second channel for each full-service television licensee in the country to be used for digital broadcasting during the period of conversion to an all-digital broadcast service.³⁰

11. In December 1999, we released a *Notice of Inquiry* ("NOI") to commence collecting

²⁵ 47 C.F.R. § 73.671(c).

²⁶ *Id.*

²⁷ 47 C.F.R. § 73.671, Note 2.

²⁸ *Id.* In this regard, specials, public service announcements (PSAs), short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three-hour processing guideline. *Id.*

²⁹ *Id.* At a Commission-level review, licensees can demonstrate compliance with the CTA by relying, in part, for example, on sponsorship of core programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program or on special nonbroadcast efforts which enhance the value of children's educational and informational programming. *Id.*

³⁰ 47 U.S.C. § 336(a).

views on how the public interest obligations of television broadcasters should change in the digital era.³¹ As we observed in the *NOI*, both Congress and the Commission have recognized that digital television broadcasters have an obligation to serve the public interest. Congress stated in section 336 of the Communications Act that “[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.”³² In implementing section 336, the Commission required that broadcasters air a “free digital video programming service the resolution of which is comparable to or better than that of today’s service, and aired during the same time period that their analog channel is broadcasting.”³³ The Commission also reaffirmed that “digital broadcasters remain public trustees with a responsibility to serve the public interest,”³⁴ and stated that “existing public interest requirements continue to apply to all broadcast licensees.”³⁵

12. We recognize that the CTA is written broadly to apply to television broadcast licensees and that there is nothing in the CTA itself, nor the legislative history, to suggest that the statutory requirement, or the regulations promulgated thereunder, should be limited to analog broadcasters. Indeed, the objectives of the CTA – e.g., to increase the amount of educational and information broadcast television programming available to children and to protect children from overcommercialization of programming – would apply equally to the digital broadcasting context. Given this, and in light of explicit congressional intent expressed in section 336 to continue to require digital broadcasters to serve the public interest, we conclude that digital broadcasters are subject to all of the CTA’s commercial limits and educational and informational programming requirements. Digital broadcasters must also continue to comply with our policies regarding program-commercial separation,³⁶ host selling, and program-length commercials. The purpose of this proceeding is to determine how these requirements should be interpreted and adapted with respect to digital broadcasting in light of the new capabilities made possible by that technology.

13. We request comment herein on a variety of issues related to application of our existing children’s programming rules to digital broadcasting. We also invite comment on a number of specific

³¹ *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, 14 FCC Rcd 21633 (1999).

³² 47 U.S.C. § 336(d). That section also provides: “In the Commission’s review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest.”

³³ *Fifth Report and Order, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket No. 87-268, 12 FCC Rcd 12809, 12820 (1997) (“*Fifth Report and Order*”); 47 C.F.R. § 624(b).

³⁴ *Fifth Report and Order*, 12 FCC Rcd at 12810, 21811.

³⁵ *Fifth Report and Order*, 12 FCC Rcd at 12830.

³⁶ Children’s programs are required to contain bumpers separating the program from adjacent commercial material. Bumpers must be at least 5 seconds long, and include messages such as “and now a word from our sponsor.”

proposals offered by commenters responding to the *NOI*,³⁷ and on some of the views expressed by the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee").³⁸ As we indicated in the *NOI*, the Advisory Committee, representing a broad cross-section of interests from industry, academia, and public interest organizations, submitted a report in 1998 containing recommendations on the public interest obligations digital television broadcasters should assume. Although the Advisory Committee focused on many issues beyond the scope of this proceeding, we will discuss below some of the recommendations of the committee and of individual participants that relate to children's television.

III. ISSUES AND REQUEST FOR COMMENT

A. Educational and Informational Programming

14. *Background.* One of the questions we posed in the *NOI* is how public interest obligations generally, including the obligation to provide children's educational and informational programming, apply to a DTV broadcaster that chooses to multicast. We also asked how we should take into account the fact that DTV broadcasters have the flexibility to vary the amount and quality of broadcast programming they offer throughout the day.³⁹ For example, a broadcaster could air 4 SDTV channels from 8 a.m. to 3 p.m., switch to two higher definition channels from 3 p.m. to 8 p.m., and finish with one HDTV channel for prime-time and late-night programming.⁴⁰ Different broadcasters are likely to provide a different overall combination of broadcast hours and quality. We also note that DTV broadcasters may choose to devote a portion of their spectrum to either non-video services, such as datacasting, or to subscription broadcast services available only to viewers who pay a fee, consistent with the requirement that they provide at least one free, over-the-air video program service to viewers.

15. *Discussion.* Our current three-hour children's core educational programming processing guideline applies to DTV broadcasters.⁴¹ We invite comment, however, on how the guideline should be applied in light of the myriad of possible ways that broadcasters may choose to use their DTV spectrum. Should the processing guideline apply to only one digital broadcasting program stream, to more than one program stream, or to all program streams the broadcaster chooses to provide?⁴² Should the guideline

³⁷ A list of the parties that filed comments in response to the *NOI* is attached as Appendix A. Only a few of these commenters addressed children's television issues specifically.

³⁸ See Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998).

³⁹ See *NOI* at ¶ 11.

⁴⁰ Children Now Comments at 13.

⁴¹ See 47 U.S.C. § 336(d) ("Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity."). See also *Fifth Report and Order*, 12 FCC Rcd at 12830 ("As we authorize digital service, . . . broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees.").

⁴² In its comments responding to the *NOI*, the Benton Foundation advocated applying the children's educational programming obligations to every "channel" a digital broadcaster provides. Benton Foundation Comments at 12. The Association of Local Television Stations (ALTV) would apply the children's advertising (continued....)

apply only to free broadcast services, or also to services offered for a fee? In this regard, we note that the CTA requires that television broadcast licensees serve the educational and informational needs of children “through the licensee’s *overall* programming, including programming specifically designed to serve such needs.”⁴³ How should we interpret this phrase in terms of digital broadcasters’ requirement to provide educational programming?

16. We also ask how the existing three-hour guideline would be best applied in the digital context. Commenters responding to questions posed in the *NOI* offer a number of suggestions as to how the processing guideline could be adapted to apply in a multicast environment. We welcome comment on these specific proposals, outlined below, as well as other suggestions for ways our guideline should be interpreted and adapted with respect to digital broadcasting. We also seek comment on when any new requirements that relate to digital broadcasting should become effective.

17. Proportional Hours. One approach, suggested by Children Now and People for Better TV,⁴⁴ is that each digital television broadcaster be required to provide an amount of weekly core programming that is proportional to the three hour per week quantitative guideline. Specifically, these commenters propose that DTV broadcasters be required to devote three percent of their programmable broadcast hours per week to core educational programming. This three percent figure is derived by dividing the current 3 hour guideline by 105, or the total number of hours/week available for core programming during the 7 a.m. to 10 p.m. broadcast window (15 hours/day times 7 days/week equals 105 hours/week). Under this approach, to derive their quantitative core programming obligation, broadcasters would calculate their total digital broadcast hours per week, multiply that total by 3 percent, and round up to the closest five-tenths as half-hour segments are the smallest unit for programming under the definition of core programming. Broadcasters would be required to report this calculation in their quarterly Children’s Television Programming Reports, which would determine the broadcaster’s core programming obligation for the following quarter.⁴⁵

18. In light of the range of possible technical qualities available with DTV technology, from SDTV to HDTV with different datacasting and interactive capabilities included, we also invite comment on whether we should require broadcasters to provide core educational programming in a certain technical format. One approach would be to require broadcasters to use for core programming a technical format that is consistent with the overall quality of the broadcaster’s other programming. Our concern in this regard is to ensure that broadcasters not segregate core programming consistently to the

(Continued from previous page) ——————
restrictions to each “free broadcast channel,” but not the educational programming obligations. ALTV argues that a digital station’s compliance with its public interest obligations, including its educational programming requirements, should be based on an evaluation of its overall programming performance across all of the “free, broadcast digital services” it provides. This approach would give digital broadcasters the flexibility to create specialized services, such as a service devoted only to children’s programming. ALTV also would not apply any content-related broadcasting requirements to pay services or other ancillary or supplementary services. ALTV Comments at 13-15.

⁴³ 47 U.S.C. § 303b (emphasis added).

⁴⁴ Children Now is a member of the People for Better TV steering committee. The Children Now comments were filed separately and included also as an attachment to the comments of People for Better TV.

⁴⁵ Children Now Comments at 34-35.

lowest possible audio/visual quality offered by the broadcaster.⁴⁶

19. The Children Now proportional hours proposal raises a number of questions. If we were to impose a 3 percent core programming obligation, what kind of programming should be included for purposes of calculating the overall number of hours of core programming a DTV broadcaster would be required to provide? Should the percent requirement apply only to free video programming (*e.g.*, 3 percent of all free video programming must be core), or should the percent also apply to datacasting (*e.g.*, 3 percent of all free video programming and datacasting must be core)? Should subscription programming be included in the calculation? Should the 3 percent figure apply to a DTV broadcasters' total amount of programming, or to each programming stream? In addition, how should we address how core programming should be distributed on the broadcaster's channels? Should we require broadcasters to air their core programming on their "primary" channel, or allow them the flexibility to decide how that programming should be distributed over their various program streams? We invite comment on the proportional hours proposal and on these related issues.

20. Pay or Play. Children Now also suggests that, as a corollary to their proportional hours proposal, the Commission could adopt a "Pay or Play" model to allow digital broadcasters maximum flexibility in meeting their core programming obligation.⁴⁷ Under this approach, once the core programming obligation is quantified, broadcasters would have the choice of meeting these obligations either through their own programming or by paying other networks or channels to air these hours for them, or a combination of both. Children Now points out that this model could promote partnerships among commercial broadcasters or among commercial and non-commercial broadcasters in a given market, and could provide much needed support to public broadcasters who have a strong commitment to core programming. Children Now also notes, however, that, under such a model, children's programming could be limited to public broadcasting or to less popular commercial stations, resulting in less exposure to such programming for children. Another concern is that commercial broadcasters may not pay public broadcasters or less successful commercial broadcasters enough to fund high quality children's programming which could, in the end, result in an overall reduction in the quality of core programs. We note that the Commission's rules currently allow broadcasters, under certain conditions,⁴⁸ to meet their CTA obligation by sponsoring core programs aired on another station in the same market. We invite comment on the "Pay or Play" approach and the advantages and disadvantages of adopting

⁴⁶ Children Now offers a proposal to address this issue. Children Now would require that core programming be offered with the same proportion of technological advances that the broadcaster chooses to use in its overall programming. Under this proposal, in their quarterly reports broadcasters would be required to calculate the "digital viewer experience quality" or "DVEQ" of their non-core programming (*e.g.*, the number of hours broadcast in HDTV with streaming datacast, the number of hours broadcast in SDTV as part of a four-channel multicast with no multiplexing, etc.). Once the overall DVEQ distribution is computed, broadcasters would be required to offer in their core programming at least proportionally the same technical capabilities as offered in their overall programming. Children Now Comments at 35-36.

⁴⁷ Children Now Comments at 36-39.

⁴⁸ See 47 C.F.R. § 73.671 Note 2. With respect to program sponsorship, that section provides: "Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have full opportunity to demonstrate compliance with the CTA (*e.g.*, by relying in part on sponsorship of core educational/informational programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming).

such a model for educational programming.

21. Menu Approach. The Center for Media Education, filing jointly with nine other individuals and public interest organizations⁴⁹ (collectively referred to herein as “CME *et al.*”), urges the Commission to adopt children’s guidelines that impose additional obligations on broadcasters, but provide them with flexibility in meeting these obligations. CME *et al.* argues that the current amount of three hours-per-week of core programming is insufficient in light of the added capacity multicasting offers. Specifically, CME *et al.* proposes that digital broadcasters have the option of satisfying their children’s programming obligation by providing, at their option, some combination of the following: (1) additional “core” educational and informational programming; (2) broadband or datacasting services to local schools, libraries, or community centers that serve children; or (3) support for the production of children’s educational programming by local public stations or other noncommercial program producers, such as the National Endowment for Children’s Programming. CME *et al.* points out that public television stations could use additional funding to create new children’s educational programs that take advantage of DTV’s enhanced capabilities. CME *et al.* would not require that DTV broadcasters air core programs on each of their program streams, but instead would permit the creation of specialized channels where core programming could be more easily located by children and parents.⁵⁰

22. We invite comment on the CME *et al.* proposal and, more generally, on the concept of offering broadcasters a choice of ways they can meet their obligation under the CTA. If we were to adopt a menu approach, are there other types of obligations, apart from those suggested by CME *et al.*, that we should allow broadcasters to choose from? One option would be to allow broadcasters to undertake additional outreach efforts to make parents and others aware of the availability of core programs and how to identify and locate them. If we were to include this as an option in a menu approach, what kind of outreach efforts should we require?

23. Daily Core Programming Obligation. The Advisory Committee Report describes another approach regarding the obligation of digital broadcasters to air children’s programming that would require digital broadcasters to air no less than 1 hour of children’s educational programming each day on the broadcaster’s main channel.⁵¹ We invite comment generally on this proposal.

24. Other Digital Improvements. Finally, we ask commenters to address whether the advanced capabilities of digital broadcasting can be used in other ways to help implement the CTA. One approach would be to require broadcasters to use datacasting to make available during a core program information explaining why the program is considered to qualify as “core.”⁵² Another option would be

⁴⁹ The other individuals and groups joining in the CME comments are: Peggy Charren, the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, Junkbusters, the National Alliance for Non-Violent Programming, the National Education Association, the National PTA, Privacy Times, and Public Advocacy for Kids.

⁵⁰ CME *et al.* Comments at 5-6.

⁵¹ Advisory Committee Report at § IV. This approach was most recently articulated by Lois Jean White, president of the National PTA and member of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. She argued that such a requirement is reasonable in view of the “tantamount importance” of broadcasters’ obligations to serve children and in light of the expanded broadcast capacity made possible by digital technology.

⁵² Children Now Comments at 44.

to require broadcasters to provide additional content ratings information on core programs from independent sources, such as public interest groups that rate educational children's programming. Such information could be provided through a direct link to the internet where the content ratings information could be accessed.⁵³ We seek comment on these proposals, as well as other suggestions for how digital capacity could be used to help improve our existing children's programming requirements.

B. Preemption

25. *Background.* Related to the issue of how the children's educational and informational programming obligation will apply in the digital age is the issue of how we will treat preemptions of core programs by DTV broadcasters. To qualify as "core programming" for purposes of the three-hour-per-week processing guideline, the Commission requires that a children's program be "regularly scheduled," that is, a core children's program must "be scheduled to air at least once a week" and "must air on a regular basis."⁵⁴ In adopting its current educational programming rules, the Commission stated that television series typically air in the same time slot for 13 consecutive weeks, although some episodes may be preempted for programs such as breaking news or live sports events. The Commission noted that 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. The Commission stated that it would leave to the staff to determine, with guidance from the full Commission as necessary, what constitutes regularly scheduled programming and what level of preemption is allowable.

26. Since the adoption of the *Children's Programming Report and Order*, the ABC, CBS, and NBC networks have requested flexibility to reschedule episodes of core programs that are preempted by live network sports events without adversely affecting the program's status as "regularly scheduled." Separate requests have been made in connection with each of the 1997-98, 1998-99, and 1999-2000 television seasons. For two of these seasons, the Mass Media Bureau has allowed the networks limited flexibility in preempting core children's programming.⁵⁵ Specifically, within certain limitations, the Bureau advised that preempted core programs could count toward a station's core programming obligation if the program were rescheduled. The Bureau also indicated that it would revisit this limited flexibility regarding preempted core programming based on the level of preempted programs, the rescheduling and broadcast of the preempted programs, the impact of promotions and other steps taken by the stations to make children's educational programming a success.

27. The Commission requires licensees, in their quarterly Children's Television Programming Reports, to identify for each core program the number of times the program was preempted and rescheduled. In another *Report and Order* adopted today, the Commission revised its quarterly Children's Television Programming Report to make the preemption information in that report clearer and to collect information on the reason for each preemption as well as the licensee's efforts to promote the

⁵³ Children Now Comments at 44.

⁵⁴ *Children's Television Programming Report and Order*, 11 FCC Rcd at 10711.

⁵⁵ See, e.g., letters dated July 11, 1997 from Roy J. Stewart, Chief, Mass Media Bureau to: Martin D. Franks, Senior Vice President, Washington, CBS, Inc.; Alan Braverman, Senior Vice President & General Counsel, ABC, Inc.; Rick Cotton and Diane Zipursky, NBC, Inc.

rescheduled program.⁵⁶ The purpose of these changes is to collect more complete data regarding the level of preemption of core programs and station practices in rescheduling these programs. This data will in turn allow the FCC and others to better monitor the impact of preemptions on the availability of core programs.

28. *Discussion.* As noted above, the Commission required that programming must be “regularly scheduled” to qualify under the three-hour guideline. This requirement was based on the fact that programming that is aired on a regular basis is more easily anticipated and located by viewers, and therefore more likely to be seen by its intended audience. Although acknowledging that preemption might occur, the Commission expected that preemption of core programming would be rare. The Mass Media Bureau staff has recently reviewed a random sample of the Children’s Television Programming Reports, and determined that the average preemption rate by stations affiliated with the largest networks during the past two years is nearly 10%, and has been as high as 25% during a quarter when a network had a large number of sports programming commitments. Given this level of preemption, we believe we should 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. DTV broadcasters will have the option of airing multiple streams of programming simultaneously, thus increasing their flexibility to either avoid preempting core programs or to reschedule such programs to a regular “second home.” Given this capability, are there ways in which the Commission could revise its preemption policies to simplify or eliminate the need for networks to seek approval of their planned preemption and rescheduling practices for each television season, and to streamline licensees’ recordkeeping and reporting requirements? One approach would be to fashion a rule that would provide clear guidance to digital broadcasters on the meaning of the requirement that a “core” program be “regularly scheduled.” Such a rule could cover the number of times a core program could be preempted and still count toward the three-hour-per-week processing guideline, and/or the efforts that must be made to reschedule and promote preempted programs in order for these programs to contribute toward the core programming guideline. If we were to adopt such a rule, should we continue to exempt from the requirement that core programs be rescheduled core programs preempted for breaking news? We request comment generally on all of these issues, and on how we could refine and clarify our definition of “regularly scheduled” to address the issue of preempted core programs in the digital age. We also ask commenters to address specifically the kind of rescheduling practices and promotion of rescheduled programs that we could require from digital broadcasters consistent with our goal of ensuring that viewers can anticipate and locate the rescheduled program. For example, should a station be allowed to shift a preempted core program to another digital program stream? If so, should we require that the substitute program stream be of the same technical quality as the stream on which the program is regularly scheduled? Should we permit a preempted program to be shifted from a free to a pay program stream?

C. Commercial Limits

29. *Background.* Another issue posed by the transition from analog to digital broadcasting is how the Commission’s children’s programming advertising limits and policies will apply to DTV broadcasters. By converging internet capabilities with broadcasting, digital television permits a new level of interactivity between broadcasters, advertisers, and viewers. This capability offers great potential for enhancing the educational value of children’s programs by, for example, permitting children

⁵⁶ *Report and Order and Further Notice of Proposed Rule Making, Extension of the Filing Requirement for Children’s Television Programming Reports (FCC Form 398)*, MM Docket No. 00-44, FCC No. 00-343 (adopted September 14, 2000).

to click on icons that appear on the screen during the program which take them to websites with more in-depth information about the topics covered in the program. However, the interactive capabilities of DTV also allow for the direct sale of goods and services over the television. This capability presents marketers with new opportunities to reach children, which raises concerns in light of the difficulty young children have in distinguishing commercials from programming and the particular vulnerability of children to advertising.

30. *Discussion. Application of Existing Commercial Limits Rules and Policies to DTV.* We seek comment both on how the limits on the amount of commercial matter in children's programming should apply in this digital environment and how we should interpret with respect to DTV broadcasters the policies set forth in the *1974 Policy Statement* on children's programming. One question that arises is whether children's advertising limits and policies should apply only to free over-the-air channels, or to all digital channels both free and pay? We raised this issue in our *NOI*, where we asked whether a licensee's public interest obligations apply to its ancillary and supplementary services, and asked commenters to address the relevance of section 336 in this regard.⁵⁷

31. CME *et al.* expresses the view that the existing advertising restrictions, including the separations, host-selling, and program-length commercial policies, should apply to all digital programs directed to children ages 12 and under, regardless of the program stream on which they are offered. Thus, CME *et al.* argues that these policies should apply when children are watching video programs, regardless of whether the channel is free or pay.⁵⁸ We request comment on this view.

32. In addition, CME *et al.* proposes that the Commission prohibit all direct links to commercial websites during children's programming. We invite comment on this proposal. Should the Commission prohibit the use of digital television interactivity capability in children's programs to sell products? Is such a prohibition appropriate in light of the unique ability of children to be influenced by commercial matter and their difficulty distinguishing commercials from other programming? If commercial links are freely available in programs not subject to our commercial limits (*e.g.*, programs directed at adults and children over the age of 12), would prohibiting them or restricting them in programming directed to children ages 12 and under make this programming less desirable and thus less likely to be selected by children? Should we make a distinction between websites that carry only commercial products, and websites that also offer educational information related to the program? If we permit certain kinds of direct commercial links during children's programs, should such links be permitted to appear during the program itself, or be limited to appearing during commercials adequately separated from program material as required by our separations policy? In addition, if we were to allow the use of direct commercial links, should we limit the duration of time they appear on the screen? How should the appearance of a commercial link be counted in calculating the number of commercial minutes for purposes of our commercial limits? Finally, if we allow certain kinds of direct commercial links,

⁵⁷ Section 336(a)(2) states that the Commission "shall adopt regulations that allow the holders of [DTV] licenses to offer such ancillary and supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." Section 336(e) requires the Commission to collect fees from DTV broadcasters that offer ancillary and supplementary services, which fees must "recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provision of section 309(j) of this Act and the Commission's regulations thereunder."

⁵⁸ CME *et al.* Comments at 13.

should we prohibit links to websites that sell products associated with the program in which the links appear under our program-length commercial policy, or links to websites where a the program host is used to sell products? We invite commenters to address all of these issues, as well as any other issues related to the use of direct website links during children's programming.

33. Definition of Commercial Matter. We also invite commenters to address a broader question related to our restriction on the duration of advertising during children's programming. This is an issue that arises with respect to both analog and digital broadcasting. Under our current policy, the limitation of 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays applies to "commercial matter." "Commercial matter" is defined to exclude certain types of program interruptions from counting toward the commercial limits, including promotions of upcoming programs that do not contain sponsor-related mentions, public service messages promoting not-for-profit activities, and air-time sold for purposes of presenting educational and informational material.⁵⁹ We have observed that there is a significant amount of time devoted to these types of announcements in children's programming. As a result, the amount of time devoted to actual program material is often far less than the limitation on the duration of commercial matter alone might suggest. For example, in an hour-long weekend program, only 10.5 minutes may be devoted to commercial matter, leaving 49.5 minutes for actual program material. In fact, however, many programs contain far less than this amount of actual program time as a result of numerous other interruptions that do not count toward the commercial limit restriction.

34. We invite comment on whether the Commission should revise its definition of "commercial matter" to include some or all of these types of program interruptions that do not currently contribute toward the commercial limits. We note that some of the types of program interruptions currently excluded from the commercial limits may contain information valuable to children, such as promotion of upcoming educational programs or certain types of public service messages. Should we require that the time devoted to these announcements nonetheless count toward the commercial limits to maximize the amount of time devoted to program material and reduce the time taken by interruptions? This might prove especially beneficial for educational and informational programs, where it would increase the amount of time available for delivering educational messages. The issue of the total time taken by program interruptions in children's programs arises in both the analog and digital world. If we were to revise our definition, is there any reason to apply the new definition only to digital broadcasting? Finally, we ask commenters to address whether our ability to revise this definition is restricted by the CTA and its legislative history. The CTA itself does not define the phrases "commercial matter" or "advertising." Both the House and Senate Reports state that "[t]he Committee intends that the definition of 'commercial matter'... be consistent with the definition used by the Commission in its Former FCC Form 303."⁶⁰ We seek comment on whether we must apply the definition of "commercial matter" in the

⁵⁹ *Report and Order, Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd at 2112.

⁶⁰ See H.R. Rep. No 385, 101st Cong., 1st Sess. 15-16 (1989) (House Report); S. Rep. No. 227, 101st Cong., 1st Sess. 21 (1989) (Senate Report). See FCC Form 303-C, Renewal Application Audit Form for Commercial TV Broadcast Stations (Sept. 1981) (former FCC Form 303). The Committee noted that the Commission defined commercial matter to include "commercial continuity (advertising message of a program sponsor) and commercial announcements (any other advertising message for which a charge is made, or other consideration is received)." The Committee also noted that the following were specifically included in the definition of commercial matter: "bonus spots," "trade-out spots," promotional announcements by a commercial TV broadcast station for a commonly owned and operated station in the same market, and promotional announcements about a future program (under certain circumstances). The Committee noted that, among others, the following were not (continued....)

way defined on former FCC Form 303 for purposes of administering the CTA.

D. Promotions

35. *Background.* Another issue we raised in the *NOI* relates to the airing, in programs viewed by children, of promotions for other upcoming programs that may be unsuitable for children to watch because either the promotions themselves or the programs they refer to contain sexual or violent content or inappropriate language. This is another issue that arises with respect to both analog and digital broadcasting. The Commission staff has received many informal complaints from members of the public and children's advocates about inappropriate promotions in programs viewed by children. We asked in the *NOI* whether the ratings of programs promoted by broadcasters should be consistent with the ratings of the program during which the promotions run. We note that the broadcast, cable, and motion picture industries have voluntarily agreed to rate video programming that contains sexual, violent, or other indecent material and to broadcast signals containing these ratings so that these programs can be screened by "V-Chip" technology available in television sets. The ratings identify the age group for which a particular program is appropriate and when the program contains violence, sexual content, or suggestive or coarse language.⁶¹

36. *Discussion.* We again invite commenters to address this issue. Are there steps the FCC can take to ensure that programs designed for children or families do not contain promotions for broadcast, cable or theater movies or other age-inappropriate product promotions that are unsuitable for children to watch? One option would be to require that promotions themselves be rated and encoded so they can be screened by V-Chip technology. Yet another option would be to require that promotions be rated and that programs with a significant child audience contain only promotions consistent with the rating of the program in which they appear. We invite comment on these and other approaches that might be used to address this issue.

37. We recognize that the current ratings system was adopted by the broadcast, cable, and motion picture industries voluntarily, and was found acceptable by the Commission.⁶² Would it be preferable to urge the industry itself to make a voluntarily commitment to take steps to protect against the airing of inappropriate promotions in children's programs? As we noted above, the issue of inappropriate promotions in children's programming arises with respect to both analog and digital

(Continued from previous page) _____
included as commercial matter: promotional announcements (except as otherwise defined to constitute commercial matter), station identification announcements for which no charge was made, and public service announcements.

⁶¹ For programs designed solely for children, the ratings categories are: TV-Y (suitable for all children), TV-Y7 (directed to children 7 and above). For programs designed for the entire audience, the ratings categories are: TV-G (general audience), TV-PG (parental guidance suggested – program contains material parents may find unsuitable for younger children), TV-14 (parents strongly cautioned - program may contain material unsuitable for children under 14), TV-MA (mature audience only – program is designed to be viewed by adults and therefore may be unsuitable for children under 17).

⁶² Section 151 of the Telecommunications Act of 1996 authorized the Commission to prescribe a ratings system for video programming if distributors of such programming did not establish a voluntary rating system within one year acceptable to the Commission. Telecommunications Act of 1996, Pub. L. No. 104-104, 111 Stat. 56 (1996). The current ratings system was adopted voluntarily by the broadcast, cable, and motion picture industries in 1997. The Commission requires that television set manufacturers include in certain new sets "V-Chip" technology that will screen programming bases on these ratings.

programming. If we were to take steps to address this issue, should these steps be limited to digital broadcasting or should they apply to analog broadcasting as well? Does DTV technology offer any additional capability that could be used to address this issue in digital broadcasting?

E. Other Steps to Improve Educational Programming

38. We seek further information on children's television viewing habits, and in particular empirical evidence concerning the extent to which they watch designated educational and informational programming. We note that the Annenberg Public Policy Center has annually evaluated the educational and informational programming provided by networks and certain individual stations. We seek further information including the audience share of such programs and, in particular, the audience share of educational and informational programming contrasted with that of other programming for children. We additionally seek information on stations' and networks' efforts to promote educational and informational programming to children and parents. Are stations promoting this programming? How and where? Is the programming being promoted during network prime time programming? During children's programming? Is the promotion effective? Studies of the effectiveness of the three-hour-per-week processing guideline show that parents continue to be unaware of the availability of educational programming and continue to fail to identify core programs.⁶³ We invite commenters to address what steps the FCC might take to increase public awareness of the availability of core programming and how to locate it. Should the FCC require that broadcasters promote core programs? If so, what kind of requirement should we impose? Should we require promotion during prime time or other specific day parts? Should we require stations to air PSAs about the value of educational programming and the meaning of the E/I icon? Are there other steps we could take apart from establishing a rule for promotions and PSAs? Should the FCC itself undertake promotional efforts to highlight and publicize core educational programming? Apart from the issue of public awareness, are there other steps the FCC could take to improve the quality of educational programming? We invite comment on all of these questions and welcome other suggestions for ways to improve both the quality and public awareness of educational and informational children's programming.

IV. CONCLUSION

39. We institute this proceeding to examine how our existing children's educational programming rules and our preemption policies should be adapted to apply to digital broadcasters. Our goal is to ensure that, as we transition from analog to digital television, children and parents continue to have access, as Congress intended, to an ample supply of educational and informational programming specifically designed for children. We also seek comment on how the current limitations on advertising in children's programming should be applied to DTV broadcasters in light of the new capabilities offered by digital technology. Our objective in this effort is to ensure that children continue to be protected from overcommercialization on television. Finally, we raise a number of issues related to the definition of "commercial matter" for purposes of the commercial limits for children's programs, promotions of programs for more mature audiences aired during children's programs, and other steps the Commission could take to help improve the availability of educational and informational programming. These latter issues arise in both the analog and digital worlds. We seek comment on all of the issues we have raised herein, and welcome other ideas commenters may have to achieve our objectives.

⁶³

*See, e.g., Kelly L. Schmidt, *The Three-Hour Rule: Is it Living Up to Expectations?*, The Annenberg Public Policy Center of the University of Pennsylvania (1999).*

V. ADMINISTRATIVE MATTERS

40. *Comments and Reply Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 18, 2000 and reply comments on or before January 17, 2001. Comments may be filed using the Commission's Electronic Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

41. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form, <your e-mail address." A sample form and directions will be sent in reply.

42. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554.

43. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W.; 2-C221, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. the diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number (MM Docket No. 00-167), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 Twelfth Street, S.W.; CY-B402, Washington, D.C. 20554.

44. *Ex Parte Rules.* This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

45. *Initial Regulatory Flexibility Analysis.* With respect to this *Notice*, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix B. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an IRFA of the possible economic impact on small entities of the proposals contained in this *Notice*. Written public comments are requested on the IRFA. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the *Notice*, and should have a distinct heading designating them as responses to the IRFA.

46. *Initial Paperwork Reduction Act Analysis.* This *Notice* may contain either proposed or modified information collections. As part of our continuing effort to reduce paperwork burdens, we

invite the general public to take this opportunity to comment on the information collections contained in this *Notice*, as required by the Paperwork Reduction Act of 1996. Public and agency comments are due at the same time as other comments on the *Notice*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected; and (c) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W., Room C-1804, Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to edward.springer@omb.eop.gov.

47. *Additional Information.* For additional information on this proceeding, please contact Kim Matthews, Policy and Rules Division, Mass Media Bureau, (202) 418-2130.

VI. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that this *Notice of Proposed Rule Making* is issued pursuant to the authority contained in Sections 4(i), 303, 307, and 336(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307, and 336(d), and in the Children's Television Act of 1990.

49. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

The following parties filed comments in response to the FCC's *Notice of Inquiry*:

1. Alliance for Better Campaigns, et al
2. American Federation for the Blind (Alan Dinsmore)
3. American Federation of Labor and Congress of Industrial Organizations
4. Anderson, Thomas V.
5. Association of America's Public Television Stations
6. Association of Local Television Station, Inc.
7. BELO
8. Baker, Fred
9. Bass, Nichole D.
10. Benton Foundation
11. Berman, Michael L.
12. Bernal, Victoria
13. Berry, Kenneth H. Jr.
14. Brunetz, Neil
15. Burdette, Dale E.
16. CBS Corporations
17. Canna, William
18. Capital Broadcasting Company, Inc.
19. Carmack, Tausha
20. Castelow, Shandry
21. Center for Information, Technology Society
22. Center for Media Education, et al
23. Children Now
24. Citizens for Community Values
25. Coffin, Jennifer Niles
26. Community Technology Policy Council
27. Council of Chief State School Officers
28. Cox, Amanda Renea
29. Cox, Stephen Jr.
30. Crnkovic, Sarah
31. Dennis, Vance W.
32. Dixon, John T.
33. Dykstra, Thomas A.
34. Easley, Brian Robert
35. Eaton, Rachel M.
36. Family Friendly Libraries
37. Family Research Council
38. Fletcher, Amy
39. Flory, Heather L.
40. Gallagher, Mary Taylor
41. Griffin, Grae M.

- 42. Guthrie, Carol
- 43. Herman, Emily L.
- 44. Hood, William D.
- 45. Huffman, Cheri
- 46. Human Relations Foundation of Chicago
- 47. Jones, Valorri
- 48. Kern, Montague
- 49. Kol, Alexandra
- 50. Kranz, Ralph
- 51. Kurtz, Robert R.
- 52. Lally, Nicole C.
- 53. Lambert, Regina M.
- 54. Lewis, South
- 55. Martin, Justin R.
- 56. Mason, Valerie Latosha
- 57. McCormack, Mauann
- 58. McElroy, Robert Lee IV
- 59. McMurray, Jama
- 60. Media Institute
- 61. Michigan Consumer Federation
- 62. Mitchell, Darren
- 63. Molde, Brian
- 64. Morality in Media, Inc.
- 65. Named State Broadcasters Associations
- 66. National Association of Broadcasters (NAB)
- 67. National Law Center for Children and Families
- 68. National Minority T.V., Inc.
- 69. Neff, Amy E.
- 70. Osborn, Dationa
- 71. Ozment, Kenneth R.
- 72. Paul, Amy
- 73. Paxson Communications Corporation
- 74. People for Better TV
- 75. Peterson, Nicholas J.
- 76. Pinkston, Neal
- 77. Pipkin, Glenda H.
- 78. Poley, Dr. Janet
- 79. Pope, Jackson R.
- 80. Progress & Freedom Foundation
- 81. Radio-Television News Directors Association
- 82. Randolph, Jason S.
- 83. Rose, Ben M.
- 84. Schmidtke, Jill R.
- 85. Scrugham, Richard T. Jr.
- 86. Snyder, Brent
- 87. Sowers, Natalya L.

- 88. Sukhia, Nathan D.
- 89. Suttles, Jennifer C.
- 90. Telecommunications for the Deaf, Inc.
- 91. United Church of Christ, et al
- 92. United States Catholic Conference
- 93. Vance, Robert L.
- 94. Verotsky, Stephen E.
- 95. WGBH (Media Access)
- 96. Waddey, Alex
- 97. Wallace, Chad E.
- 98. Williams, Raymond Kyle
- 99. Williamson, Theresa
- 100. Wilson, Gary
- 101. Wimberly, Chris
- 102. York, April M.

APPENDIX B**Initial Regulatory Flexibility Act Analysis**

As required by the Regulatory Flexibility Act, 5 U.S.C. § 603 ("RFA"),⁶⁴ the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the proposals contained in this *Notice*. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the *Notice*, but they must have a separate and distinct heading, designating the comments as responses to the IRFA. The Commission shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the RFA, 5 U.S.C. § 603(a).

a. Need for and Objectives of the Proposed Rules. Our goal in commencing this proceeding is to seek comment on how the existing children's educational television programming obligations and limitations on advertising in children's programs should be interpreted and adapted to apply to digital television broadcasting in light of the new capabilities made possible by that technology. In seeking comment on what steps the FCC might take to address the issue of the airing of promotions inappropriate for children in programs viewed by children, our goal is to protect children from programming with inappropriate sexual or violent content or suggestive or coarse language. We also invite comment on a number of specific proposals offered by commenters responding to the *NOI* in MM Docket No. 99-360.

We invite comment on how the children's core educational programming processing guideline should be applied to DTV broadcasters that choose to multicast. For example, we ask whether the guideline should apply to only one digital broadcasting program stream, to more than one program stream, or to all program streams the broadcaster chooses to provide. We also ask whether the guideline should apply only to free broadcast services or also to pay services, and whether a three-hour guideline is sufficient in light of the additional program capacity made available by digital technology. We also seek comment on whether the Commission's policies regarding preemption of core programs should be revised in view of the greater programming capacity available to DTV broadcasters.

With respect to the children's programming advertising limits and policies, we ask whether these rules and policies should apply to both free and pay program streams. We also seek comment on how these rules and policies should be interpreted in light of the interactive capabilities made possible by digital technology. For example, we ask whether we should permit the use of direct commercial website links in children's programs and, if so, whether we should limit the duration of time they appear on the screen. We also ask how such links should be treated under our program-length commercial and host-selling policies.

We also invite comment on a broader question related to the advertising limits that arises with respect to both analog and digital broadcasting. Specifically, we ask whether the Commission should revise its definition of "commercial matter" to include types of program interruptions that do not currently contribute toward the commercial limits, such as certain program promotions.

⁶⁴

See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.* has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

In addition, we invite comment on how to address the issue of the airing in programs viewed by children of promotions for other upcoming programs that may be unsuitable for children to watch because either the promotions themselves or the programs they refer to contain sexual or violent content. This is an issue that arises with respect to both analog and digital broadcasting.

Finally, we invite commenters to address what steps the FCC might take to increase public awareness of the availability of core programming and how to locate it. We also ask whether there are other steps the FCC could take, apart from the issue of public awareness, to improve the quality of educational programming by, for example, seeking legislation to establish a mechanism to fund the production of high-quality educational and informational programming.

b. Legal Basis. Authority for the actions proposed in the *Notice* may be found in Sections 4(i) and 303, 307, and 336(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307, and 336(d), and in the Children's Television Act of 1990.

c. Recording, Recordkeeping, and Other Compliance Requirements. The *Notice* invites comment on how the existing children's educational television programming requirements and children's commercial limits should apply to digital broadcasters. The *Notice* also invites comment on whether the Commission should revise its definition of "commercial matter" to include types of program interruptions in children programs that do not currently contribute toward the commercial limits. We also ask what steps the FCC might take to address the issue of the airing in programs viewed by children of promotions for other upcoming programs that may be unsuitable for children to watch because either the promotions themselves or the programs they refer to contain sexual or violent content or suggestive or coarse language.

d. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules. The rules under consideration in this proceeding do not overlap, duplicate, or conflict with any other rules.

f. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

Small TV Broadcast Stations. The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5 million or less in annual receipts.⁶⁵

The children's educational and informational programming requirements apply to commercial and noncommercial television stations. There are approximately 1,243 existing commercial television stations

⁶⁵

13 C.F.R. § 121.201 (SIC Code 4833).

and 373 existing noncommercial television stations of all sizes that may be affected by the proposals contained in this *Notice* related to our educational and informational programming requirements. The children's commercial limits apply to commercial television broadcasters and cable operators. Thus, in addition to the above, there are approximately 10,500 cable systems of all sizes that could be affected by the proposals in the *Notice* related to the children's commercial limits.

g. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. 5 U.S.C. § 603(c).

This *Notice* invites comment generally on a number of issues related to application of the existing children's television programming requirements to digital broadcasters, and asks commenters to address various proposals advanced by commenters responding to the NOI in this proceeding. We seek comment on whether there is any significant impact on small entities that might result from any of these proposals. Any significant alternatives presented in the comments will be considered.

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART

Re: Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, MM Docket # 00-167 (adopted September 14, 2000)

As I stated at the NOI phase of this proceeding, we have an obligation to “implement[] Section 336's directives regarding the transition from analog to digital broadcast services. The birth of digital television raises discrete issues regarding application of our existing public interest requirements during the transition period and beyond.”⁶⁶ Today's Notice of Proposed Rulemaking seeks comment on some of the legitimate issues raised by the transition of broadcasting from analog to digital. However, as I did at the Notice of Inquiry stage, I must dissent from those portions of today's decision that go beyond these transition issues to address new and burdensome proposals for additional regulatory obligations.

Today's NPRM is a missed opportunity. It should read: “Here are the old rules that are no longer necessary for digital broadcasting.” Instead, it reads: “Here are new additional burdensome rules that will discourage and delay digital broadcasting.”

The increased burdens posited in the Notice are both ill timed and technologically misdirected. We are in a critical phase of the transition from analog to digital broadcasting. There are already substantial and costly impediments to the transition – and our ability to achieve the targeted 2006 transition date is by no means certain. It is counterintuitive that the Commission would now consider expanding the regulatory burden imposed on this nascent technology. In addition, the ability of digital broadcasters to supply 4 or perhaps 6 over the air signals will greatly enhance the variety of programming available. Thus multicasting is likely to allow for the provision of more niche programming, such as those shows targeted to children. To the extent that any changes are warranted, it seems that multicasting would actually argue in favor of reducing these regulatory obligations, not increasing them.

Today's NPRM suggests some policies that I find particularly intrusive and contrary to this Commission's purportedly deregulatory philosophy. For example, the Notice suggests the Commission may want to monitor and compare the quality of the audio and visual presentation of core versus children's programming.⁶⁷ Or perhaps broadcasters will be required to provide “additional content ratings information on core programs from independent sources, such as public interest groups that rate educational children's programming . . . through a direct link to the internet where the content ratings information could be assessed.”⁶⁸ The Notice also suggests a possible requirement that broadcasters do more to promote children's programming during prime time.⁶⁹ Other proposals, such as prohibiting

⁶⁶ See Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, in *Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry*, 14 FCC Rcd 21633 (1999).

⁶⁷ Order at ¶ 19.

⁶⁸ Order at ¶ 25.

⁶⁹ Order at ¶ 39

direct Internet links to commercial sites during children's programming, may raise serious constitutional and policy concerns.⁷⁰ In the end, I fear that a valuable opportunity to explore the opportunities presented by the digital transition may be lost by an NPRM that seems to move the Commission in the wrong direction.

⁷⁰

Order at ¶ 33.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, MM Docket No. 00-167 (adopted September 14, 2000)

My general policy is not to oppose Notices of Inquiry and Notices of Proposed Rulemaking as long as they seek comments in a neutral fashion and are sufficiently broad in scope. I write separately in this NPRM to express some concerns I have with this Item.

First, let me state the NPRM raises important questions related to the application of the existing children's television rules to digital broadcast services. There are undoubtedly important questions concerning the application of existing obligations to the new digital medium. Yet, we are at the very preliminary stages of the digital transition, and it is far from clear what form new services will take in the digital era.

It seems to me premature to attempt to fix public interest obligations to a service that has yet to blossom. For example, the NPRM seeks comment on whether the Commission should prohibit all direct links to commercial Internet sites, a capability that is not even available today on broadcast television. In my view, the wiser course would have been to initiate an Inquiry at a time when we understand more about the proposed or likely applications of digital television, so our proposal would bear some plausible nexus to the service itself, rather than its potential. At a minimum, I would have preferred that any public interest obligations be considered in the broader DTV proceeding.

Second, I caution against introducing subjective tests that require the Commission to make value judgments about the appropriateness of certain content for children's viewing. The NPRM asks, for example, whether "unsuitable promotions" should be banned during children's programming. I am skeptical that we can, or should, make this subjective determination. But assuming, *arguendo*, we could, I am troubled by the fact that we have not established, as a threshold matter, that a serious problem exists in this area. There is little, if any, empirical data in the record to substantiate the conclusion that unsuitable promotions are being aired during children's programming. I would hope that we gather this type of hard data here, so we can then make fact-based decisions

**SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI
CONCURRING IN PART AND DISSENTING IN PART**

**In the Matter of Children's Television Obligations of Digital Television Broadcasters, MM
Docket No. 00-167**

I am pleased to support this item for the most part, but will be dissenting in part on one narrow issue. As I have said before, the public interest standard should protect and enrich our children. The Notice of Proposed Rulemaking is a first step towards fulfilling our duty to ensure that quality educational and informational programming is available to children in the digital era.

It also asks important questions about whether we are sufficiently protecting our children from age inappropriate materials in product promotions that run during children's programming. These questions follow on the heels of this week's Federal Trade Commission Report which found, among other things, that age inappropriate violent movies are deliberately marketed during television shows watched by children. For example, and I cite from that report: "Seven of the nine PG-13 rated films that were targeted to children 11 and younger were advertised on afternoon and Saturday morning cartoon programs."

The questions also follow the multiple inquiries, complaints and concerns that we routinely receive from the American public concerning age inappropriate product promotions during times when children are likely to be watching. A case in point is a copy of an e-mail Mr. Charles Van Genderen of Helena, MT, sent to the Discovery Channel and forwarded to us, which reads as follows:

I am writing to express my concern over a couple of commercials which my children observed. This morning my two daughters ages 7 & 9 and I were watching a show on sharks, 8-9 a.m. MST on the Discovery channel (actually Discovery kids was listed on the screen). During this show, two commercials came on regarding issues which I feel are inappropriate for children to see. The first was for Bloussant, an alleged breast enhancement pill and the second was for energex, an alleged sexual potency stimulant.

Our society sends so many messages to girls that they have to be perfect and sexually attractive. These commercials do nothing to help. With eating disorders, the pressure to develop, etc. on children all the time, please rearrange your programming so that a young child does not have to be introduced to this type of commercial during what is clearly a children's program.

I am by no means a moral or religious zealot but am concerned that my daughters are introduced to enough negative messages. I would have thought the Discovery

channel to have better sense than that - especially on a Sunday Morning. Do I need a v-chip for this too? Please respond to my complaint with how this will be handled in the future and feel free to contact me if you need further information.

The question in this notice, whether such product promotions should be rated, so a V-Chip can be used, and the answer, I hope, may give Mr. Van Genderen and many other parents better means to protect their children. Despite these continued concerns, the new digital era promises many exciting possibilities that will set an abundance of information and choice before our children. The ability to blend broadcast programs with consumer products through point and click technology will both empower our children and expose them to risks we can only imagine. If we are to improve on our past record, it is imperative that the obligations of broadcasters in the digital era be identified, discussed and openly debated.

Today's adoption of this Notice of Proposed Rulemaking sets us on the right course and explores the public interest obligations of broadcasters to our children.

On one matter, however, I regret that my fellow Commissioners would not join me in asking the following questions: (1) Whether, in light of the additional program capacity made available by digital technology, a three-hour guideline is sufficient, or whether the guideline should be increased to ensure an adequate supply of educational and informational programming for children? and (2) If we were to require broadcasters to provide more than a total of three hours per week of core programming, could broadcasters choose to air this programming on a single program stream or should we require that it be distributed among more than one or all of the broadcaster's program streams? On the failure to ask these questions, I respectfully dissent.

All in all, the opportunity to increase the availability of educational and informational programming and to limit the availability of age inappropriate content during children's programming is squarely before us. Some here would say the last chapter on broadcaster obligations to children was written during the analog era. I believe the story is not finished. There is no higher obligation and no greater task. I urge everyone to examine our obligations and to write the chapter that ensures our children are the winners in the new digital era.