

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

In the Matter of **MM Docket No. 90-570**  
Policies and Rules  
Concerning Children's  
Television Programming

Revision of Programming **MM Docket No. 83-670**  
and Commercialization  
Policies, Ascertainment  
Requirements, and Program  
Log Requirements for  
Commercial Television Stations

**REPORT AND ORDER**

Adopted: April 9, 1991; Released: April 12, 1991

By the Commission:

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**I. INTRODUCTION**

1. On November 8, 1990, the Commission adopted a *Notice of Proposed Rule Making*,<sup>1</sup> initiating the process of implementing the Children's Television Act of 1990.<sup>2</sup> The Act (1) requires the Commission to adopt rules limiting the number of minutes that commercial broadcast licensees and cable operators may air during children's programming; (2) requires that the Commission consider in its review of television license renewals, the extent to which the licensee has met the commercial limits, and the extent to which it has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs; and (3) requires the completion, within 180 days of enactment,<sup>3</sup> of a pending proceeding that has sought to define and resolve the treatment of "program length commercials."<sup>4</sup> Based on the record before us, we first prescribe standards for commercial limits in television broadcast and cable programs directed to children 12 years of age and under. Second, we implement the requirement that the Commission review at renewal whether television broadcasters have served the educational and informational needs of children, interpreting the requirement to encompass programming directed to children 16 years of age and under that furthers children's positive development in any way, including serving their cognitive/intellectual or social/emotional needs. Third, we apply essentially the same enforcement standards to violations of the regulations implementing the Act that this Commission has traditionally used to enforce its rules. Fourth, we terminate MM Docket No. 83-670, deciding that a children's program-length commercial is a program, associated with a product, in which commercials for that product are aired. Finally, we adopt an effective date for the children's television rules promulgated here of October 1, 1991, subject to OMB approval. The first television broadcast renewal applications that must demonstrate compliance with these rules are those required to be filed February 1, 1992, for licenses expiring June 1, 1992.<sup>5</sup>

**II. COMMERCIAL LIMITS**

2. The Children's Television Act provides that television broadcast licensees and cable operators shall limit the duration of advertising in children's programming to "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays."<sup>6</sup> The Act is silent, however, on the meaning of key terms such as "children," "commercials," or "program."

### A. "Children's Programming"

3. The *Notice* proposed to define "children's programming" as "programs originally produced and broadcast primarily for an audience of children 12 years old and under."<sup>7</sup> The vast majority and a broad cross-section of the commenters support this proposal.<sup>8</sup> Various parties note that this formulation is well established,<sup>9</sup> thereby providing certainty, and is consistent with legislative intent, industry practice, and the statutory purpose of protecting children who can neither distinguish commercial from program material nor understand the persuasive intent of commercials.<sup>10</sup> We agree. Some parties urge us to either lower or raise the maximum age.<sup>11</sup> The legislative history of the Act, however, reveals that Congress intended that we use a definition of 12 and under for children's programming.<sup>12</sup> Moreover, there is some empirical evidence with respect to children's comprehension of commercial matter that supports an upper age limit as high as 12 years.<sup>13</sup> We believe, contrary to the views of some,<sup>14</sup> that we have construed the definition of "children's programming" as narrowly as is possible while still effectuating statutory objectives. Finally, we decline to adopt a higher maximum age, as USCC suggests,<sup>15</sup> because such an expansion lacks sufficient support in legislative intent or empirical evidence. We thus define children's programming as "programs originally produced and broadcast for an audience of children 12 years old and under." As the legislative history suggests, and many commenters urge,<sup>16</sup> this definition excludes programs originally produced for a general audience that might nevertheless be significantly viewed by children.<sup>17</sup>

### B. "Commercial Matter"

4. The *Notice* proposed to define "commercial matter" in terms of common parlance, *i.e.*, as "air time sold for purposes of selling a product."<sup>18</sup> This definition comports with marketplace realities and is crafted carefully to avoid encompassing noncommercial material. We adopt it, subject to the following clarifications.

5. By requiring that air time be "sold," we mean that the advertiser must give some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material.<sup>19</sup> Without such a qualification, it would be difficult to distinguish mentions of logos or brand names a writer or producer used to advance creative objectives. We also clarify that although our proposed definition only referred to air time sold "for purposes of selling a product," commercial matter also encompasses advertising for services.

6. We also find that the scope of Section 317 of the Communications Act, 47 U.S.C. Section 317, which governs when the sponsor of broadcast material must be identified, is not coterminous with the scope of commercial matter. In particular, we hold that material is not necessarily "commercial matter" for purposes of the Children's Television Act simply because Section 317 requires a sponsorship identification. As the court in *NABB v. FCC* explained, the sponsorship identification requirements apply to more than purely commercial announcements.<sup>20</sup> For example, nonprofit organizations purchasing air time for a public service message must identify themselves as sponsors under Section 317, even though such a message is not commercial material.<sup>21</sup>

7. We accordingly find that the bare sponsorship identification announcement required under Section 317 and our implementing rules,<sup>22</sup> where such material is not

otherwise commercial in nature, will not be deemed commercial matter under our definition here. Thus, public service messages sponsored by nonprofit organizations that promote not-for-profit activities will not be considered commercial matter for purposes of applying the commercial limits.<sup>23</sup> Similarly, air time sold for purposes of presenting educational and informational material, including "spot" announcements, with the only sponsorship mention a "sponsored by," is not commercial matter.<sup>24</sup> The addition of product mentions or advertising to such an identification announcement, however, would constitute commercial matter. Moreover, where a station or cable operator promotes one of its upcoming programs and mentions that program's sponsor, even though not required to do so under Section 317, the mention of the sponsor will constitute commercial matter for purposes of determining whether the commercial limits have been exceeded. In such a case, the mention of the sponsor is not required under the rules and is thus clearly intended to promote the sponsor. Thus, if such a station or cable operator's promo (1) mentions that the upcoming program is "brought to you by" a sponsor, or (2) promotes a product or service related to the program or program sponsor, or (3) mentions a prize furnished by the program sponsor, the mention of the sponsor or the sponsor's product or services, not being required under our sponsorship identification rules, will be considered commercial matter.<sup>25</sup> Promotions of upcoming programs which do not contain such sponsor-related mentions will not be deemed commercial matter.

### C. "Program"

8. The *Notice* proposed to define "program" as an identifiable unit of program material that is not a commercial or promotional announcement.<sup>26</sup> This definition is well established,<sup>27</sup> consistent with the legislative history, and will provide certainty in implementation.<sup>28</sup> We therefore adopt it. We will also use this definition in assessing a licensee's children's programming record. We clarify that under this definition, a 30- or 60- second noncommercial spot can qualify as educational and informational programming, depending on content.<sup>29</sup>

9. The *Notice* also proposed to "count" commercial minutes by program segment and not by clock hour.<sup>30</sup> Almost all parties commenting on this proposal disagree with it and would make administration of the commercial limits more cumbersome.<sup>31</sup> Upon reflection, we are persuaded that the clock-hour approach would harmonize with existing industry practice and thus make licensee and cable operator administration of the commercial limits easier, while still effectively implementing the statutory limits and shielding children from overcommercialization.<sup>32</sup> We therefore adopt it. Although the Act only applies the commercial limits "per hour," we agree with ACT that where a half-hour "island" of children's programming airs in the midst of adult viewing, the limits should apply on a proportionate basis.<sup>33</sup> As many children's programs are of half-hour duration, this interpretation appears appropriate. We do not believe that application of the limits in this context to programs of shorter duration is necessary, however, as such programs constitute a relatively small proportion of children's programming.<sup>34</sup> We clarify that the limits apply to commercial breaks before and after a children's program, as well as to commercials during a program.<sup>35</sup> As a significant portion of the commercial matter in children's program-

ming occurs at these points, to exclude them would vitiate the statute significantly. Finally, we decline to require counting by both clock hour and program segment.<sup>36</sup> We believe that this would needlessly complicate record-keeping and compliance monitoring.

#### D. Application to Cable

10. The commercial limits contained in the statute apply to both television broadcast stations and cable operators. Most commenters support proposals in the *Notice* to exempt cable operators from liability for commercial limit violations on broadcast stations they passively carry and on access channels, while holding cable operators liable for compliance with the Act on locally originated channels.<sup>37</sup> The Copyright Act of 1976 bars cable operators from altering the content, including advertising, of retransmitted broadcast programs, and the Children's Television Act makes broadcasters liable for commercial limit violations so that it is unnecessary to make cable operators additionally liable.<sup>38</sup> The Cable Act prohibits cable operators' exercise of editorial control, with limited exceptions, over access channels. On the other hand, under the Cable Act, cable operators maintain editorial control over the content of locally originated channels.<sup>39</sup> We thus hold that cable operators are not responsible for compliance with the commercial limits on the broadcast stations they passively carry or on their access channels. We will, however, apply the commercial limits to cable operators' locally originated channels.

11. Many commenters, including ACT, NCTA and NAB, disagree with the suggestion in the *Notice* that neither the Act nor the legislative history evidence an intent to hold cable operators responsible for commercial limit violations on cable network programs.<sup>40</sup> Upon further consideration, we agree with arguments that the legislative history does in fact suggest that cable operators should be held accountable for cable network violations.<sup>41</sup> Cable networks produce most of the children's programming on cable. If Congress intended for commercial limits to apply to cable, as it clearly did, it could not have intended for the bulk of that programming to be exempt from the proscriptions of the Act. Moreover, although the statute lacks any express provision on this point, it is implicit in the legislation that cable operators are to be held accountable for violations of the commercial limits on cable networks.<sup>42</sup> As NCTA states, without such cable operator liability, there would be an unintended void in the Act's coverage.<sup>43</sup> Finally, the record is devoid of any opposition on the part of the operators themselves to their liability for the cable network programming they carry. We therefore hold that cable operators are liable for violations of the commercial limits on cable network children's programs they carry.

#### E. Record-keeping and Reporting

12. Most parties agree that certification of compliance with the commercial limits should be required of broadcast licensees at renewal time.<sup>44</sup> We therefore will require that licensees so certify their compliance with our rules and if they cannot so certify, explain all instances in which they have exceeded the commercial limits in children's programs.<sup>45</sup> In light of the statutory directive that the Commission "shall review" television renewal applications for compliance with the limits, we believe that we lack the discretion to rely completely on public monitoring, as INTV suggests.<sup>46</sup> In the absence of such a directive

with respect to cable, and in light of the record-keeping requirements we adopt below, however, we believe that reliance on public monitoring is appropriate. It will be relatively easy for members of the public to understand how the commercial limits apply and to perceive violations. Given the certification requirement we are imposing, and the probable efficacy of public monitoring, we decline at this time to institute a regular program of random compliance audits of broadcast stations, as some request.<sup>47</sup>

13. Commenters are divided on whether record-keeping should be required to facilitate review of broadcasters' and cablecasters' compliance with the commercial limits.<sup>48</sup> Given the ease with which programs may be taped, we agree with arguments that public monitoring is likely to have a significant impact in deterring and detecting violations.<sup>49</sup> However, we believe that some record-keeping requirements must be imposed in order to ensure that licensee and cable operator assertions of compliance, as well as allegations of violations, can be verified.<sup>50</sup> As NAB states, broadcasters "undoubtedly will maintain such records for their own commercial purposes and in order to certify their compliance with the rules."<sup>51</sup> We thus do not believe that such a requirement should be overly burdensome, as some suggest.<sup>52</sup> We therefore require television licensees and cable operators to maintain records sufficient to verify compliance with the Act's commercial limits. In the case of broadcast licensees, these records should be sufficient to permit substantiation of the broadcaster's certification of compliance at renewal time. In the case of cable operators, not subject under the Act to renewal review, these records must be retained for a period sufficient to cover the applicable statute of limitations.<sup>53</sup> These records must be made available to the public. Broadcasters and those cable operators subject to a public file requirement must make these records part of their public inspection file.<sup>54</sup>

### III. PROGRAMMING RENEWAL REVIEW REQUIREMENTS

14. The Children's Television Act requires that, in reviewing television license renewal applications, we consider whether the licensee has served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."<sup>55</sup> We may "in addition" consider (1) "any special nonbroadcast efforts . . . which enhance the educational and informational value of such programming" and (2) any "special effort" to produce or support programming broadcast by another station in the licensee's market that is "specifically designed to serve the educational and informational needs of children."<sup>56</sup> In light of the legislative intent,<sup>57</sup> we will implement this programming provision by reviewing a licensee's renewal application to determine whether, over the course of its license term, it has served the educational and informational needs of children in its overall programming, including programming specifically designed to serve such needs.<sup>58</sup>

#### A. Age Range of "Children"

15. The Act does not define "children" for purposes of the educational and informational programming renewal review requirement. The *Notice* sought comment on whether we should adopt the same definition of "child-

dren" that we proposed for the commercial limits, *i.e.*, 12 years of age and under, or whether we should use a broader age range.<sup>59</sup> After reviewing the variety of positions taken in the record, we find that the different policies underlying the Act's programming provision necessitate a broader conception of "children" than we used for commercial limits. While it is primarily younger children who need protection from commercial matter that they do not fully comprehend, older as well as younger children have unique needs and can benefit from programming directed to them.<sup>60</sup> Teenagers are undergoing a transition to adulthood. They are still very influenced by adult role models and peers, including those portrayed on television. They are generally inexperienced and yet face many crucial decisions concerning sex, drugs, and their own identities.<sup>61</sup> To fully comply with the Act's directive that licensees demonstrate responsiveness to the needs of the child audience, we believe that we must interpret the programming renewal review requirement to apply to programs originally produced and broadcast for an audience of children 16 years of age and under.

16. Contrary to the views of some parties,<sup>62</sup> the legislative history and the Act itself support this outcome. For example, the Committee Reports cite several teenage programs as model programming examples.<sup>63</sup> Title II of the Act establishes the National Endowment for Children's Educational Television. That section defines "educational television programming for children" as material "directed to an audience of children who are 16 years of age or younger."<sup>64</sup> It is true the definition of children used in Title II of the Act is not determinative of the definition used for the Title I programming requirement. Nevertheless, it makes sense to interpret the Act so that educational programs entitled to funding under its endowment provisions can qualify as educational and informational programming under the programming renewal review requirements.<sup>65</sup>

17. As we discuss below, we are not requiring that licensees target programming to all ages of children in the under 16 range in order to meet the renewal review requirement. Thus, this expanded age definition should provide the licensee increased flexibility in satisfying the programming renewal review requirement, and dispel fears over increased government control.<sup>66</sup> Finally, although some parties would prefer a definition extending to age 17 and under,<sup>67</sup> this proposal would broaden the age range beyond what is necessary to harmonize the programming provisions with the endowment section of the statute.<sup>68</sup>

18. The *Notice* asked whether the Act requires broadcasters to target particular segments of the child audience.<sup>69</sup> The legislative history, we find, permits but does not require such targeting to satisfy our renewal review. Imposing such a requirement would contravene the legislative intent to afford broadcasters maximum flexibility in determining the "mix" of programming they will present to meet children's special needs.<sup>70</sup> Requiring each broadcaster to serve all age groups in order to pass our renewal review would probably result in less expensive and lower quality programming,<sup>71</sup> possibly engendering what INTV describes as "sameness and mediocrity."<sup>72</sup> We thus decline to adopt suggestions that broadcasters program to all ages or to each subset of children within the under 16 range.<sup>73</sup> Stations may select the age groups they can most effectively serve.

## B. Standard

### 1. Programming

19. Although we stated the desire to avoid any *de facto* system of "precensorship" and to leave it to licensees to interpret the meaning of educational and informational programming, the *Notice* asked those commenters desiring a delineation of the Act's programming renewal review requirement to address what definition of "educational and informational" programming we might use.<sup>74</sup> The *Notice* specifically referred to a description, used by Senator Inouye, as programming which furthers a child's intellectual, emotional and social development.<sup>75</sup> After further reflection, we believe that a general definition of "educational and informational" programming for children would provide needed guidance to the industry as well as to Commission staff administering the statute, and would give licensees sufficient flexibility to exercise their discretion in serving children's needs. We also encourage licensees to use the assessment criteria proposed in the *Notice* in determining how to meet the educational and informational needs of children in their communities.

20. Many parties believe that this Commission should not establish any definition of "educational and informational programming," leaving licensees unfettered discretion to delineate the scope of this requirement.<sup>76</sup> Others, by contrast, would limit licensee discretion by adopting a specific definition limiting "educational and informational programming" to non-fiction,<sup>77</sup> or by establishing independent, expert bodies to define and apply the programming requirement.<sup>78</sup> We do not adopt any of these extremes. Upon reflection, we agree with NABB's suggestion that the Commission cannot properly apply or enforce the Act, and licensees cannot properly implement it, without some delineation of the boundaries of the programming requirement.<sup>79</sup> On the other hand, we agree with CTW and others that limitation of qualifying programming to nonfiction is needlessly constricting, disqualifying even acclaimed programs such as *Sesame Street*.<sup>80</sup> We do not believe that a child can learn only from nonfiction material. Such a narrow view would contravene the open-minded perspective taken in the legislative history, a perspective consistent with allowing sufficient breadth of discretion for licensee creativity and sensitivity to community needs to develop.<sup>81</sup> For the same reasons we do not adopt the modification of the Commission's formerly used definition of "instructional programming" alternatively proposed in the *Notice*.

21. We believe that a definition based on Senator Inouye's view, described above, or based on McGannon's formulation -- content that serves children's cognitive/intellectual or social/emotional needs -- is closer to the spirit of the Act and to our desire to stimulate, and not dictate, programming responsive to children's needs.<sup>82</sup> Thus, programming that furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs, can contribute to satisfying the licensee's obligation to serve the educational and informational needs of children.

22. The *Notice* proposed to require each licensee to assess the needs of children given (1) the circumstances within the community, (2) other programming on the station, (3) programming aired on other broadcast stations within the community, and (4) other programs for children available in the broadcaster's community of license.

Licenses would then air programs intended to meet "the educational and informational needs of children" responding to this assessment.<sup>83</sup> In order to avoid unnecessary burdens, we are not requiring use of the proposed assessment criteria. We do, however, adopt them as permissive guidelines for exercise of licensee discretion in applying this definition. These factors can serve to make licensees' decisionmaking process more objective and may make it easier for licensees to justify programming decisions that are questioned. We therefore encourage their use. We are concerned with licensee responsiveness to children's needs, not with the precise methodology they use to assess those needs.<sup>84</sup> We thus do not adopt proposals for structured assessment procedures.<sup>85</sup> Licensees will retain reasonable discretion to determine the manner in which they assess the educational and informational needs of children in their communities, provided that they are able to demonstrate the methodology they have used.

23. The assessment factors help licensees decide the type of programming to air. Television broadcasters have no *per se* obligation to monitor other stations or to change their plans based on what another station airs. The assessment factors, however, do not affect the Congressional intent that licensees air some educational and informational programming "specifically designed" for children 16 years of age and under in order to satisfy our renewal review.<sup>86</sup>

24. The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station. We thus decline to establish any minimum programming requirement for licensees for renewal review independent of that established in the Act.

25. At the request of numerous parties, we clarify that short segment programming, including vignettes and PSAs, may qualify as specifically designed educational and informational programming for children. Such material is well suited to children's short attention spans and can often be locally produced with acceptable production quality.<sup>87</sup> It thus may be a particularly appropriate way for a local broadcaster to respond to specific children's concerns. Whether or not short segment programming fully satisfies the requirement to air programming "specifically designed" to meet children's needs depends on the entire context of the licensee's programming and nonbroadcast efforts directed at children. We also clarify that qualifying programming need not be locally produced and need not be live action, as opposed to animation. We can see no reason in the statute's purpose or legislative history for these restrictions. As the legislative history also indicates, general audience programming can contribute, as part of the licensee's overall programming, to serving children's needs pursuant to the Act. It does not by definition, however, satisfy the additional requirement that licensees air some programming "specifically designed" to serve the educational and informational needs of children.<sup>88</sup>

26. The legislative history provides a wealth of examples of children's programming that is educational and informational. These include "Fat Albert and the Cosby Kids" (dealing with issues important to kids, with interruptions by host reinforcing purpose of show), "CBS Schoolbreak Specials" (original contemporary drama educating children about the conflicts and dilemmas they confront), "Winnie the Pooh and Friends" (show based on books designed to encourage reading), "ABC Afterschool Specials" (everyday problems of youth), "Saved by the Bell" (topical problems and conflicts faced by teens), "Life Goes On" (problems of a retarded child, emphasizing pro-social values), "The Smurfs" (prosocial behavior), "Great Intergalactic Scientific Game Show" (basic scientific concepts), and "Action News for Kids" (weekly news program for and by kids).<sup>89</sup> Where determinations of whether a program qualifies as "educational and informational" are in doubt, we will expect licensees to substantiate their determinations. We will rely on the guidance given in the legislative history, including the specific examples cited above, in ruling on the sufficiency of such demonstrations.

## 2. Nonbroadcast efforts

27. Section 103(b) of the Act permits the Commission, in evaluating compliance with the broadcaster's obligation to demonstrate at renewal time that it served the educational and informational needs of children, to consider "in addition" to its programming (1) "any special nonbroadcast efforts . . . which enhance the educational and informational value" of programming meeting such needs and (2) any "special effort" to produce or support programming broadcast by another station in the licensee's market that is specifically designed to meet such needs.<sup>90</sup> We now elaborate on certain aspects of these requirements.

28. For nonbroadcast efforts to contribute to satisfying the Act's nonprogramming renewal review requirement, they must enhance the "educational and informational value" to children of television programming broadcast either by the licensee or by another station in the community. Thus, however praiseworthy, community outreach efforts unrelated to television programming will not qualify. Similarly, we do not believe that support for children's radio programming, as some urge,<sup>91</sup> although a very laudable objective, qualifies under Section 103(b)(2) as support for another licensee's programming. For support for radio programming to be credited, it must also enhance a related television program under Section 103(b)(1). The "Children's Television Act," as its title indicates, is an attempt to improve television programming for children. For efforts to be credited toward satisfying the Act's programming renewal review requirements, they must somehow enhance or support educational and informational television programming for children.

29. If a station produces or buys children's programs broadcast on another station, so as to qualify under Section 103(b)(2) of the Act, we hold that both stations may rely on such programming in their renewal applications. The extent of support, measured in both time and money, given to another station's programming will determine the weight afforded it. We do not agree with the Public Broadcasting Commenters, however, that such support must consist of the underwriting of an entire program or series to receive some credit.<sup>92</sup> The licensee's obligation to have aired "specifically designed" educational and infor-

mational programming will be satisfied to a degree commensurate with the extent of its nonbroadcast efforts or support for other stations' programming. Nonprogramming efforts, however, will not entirely eliminate the obligation to air some "specifically designed" educational and informational programming.<sup>93</sup> Finally, the provision we have made to give licensees discretion in fulfilling their responsibility under the Act encompasses consideration of financial and technical factors and market size in evaluating compliance, as some suggest.<sup>94</sup>

### C. Noncommercial educational stations

30. The *Notice* asked for comment on whether the Act's programming renewal review requirements apply to commercial and noncommercial stations alike, observing that the Act and its legislative history were unclear on this point.<sup>95</sup> Upon further reflection, we find that application of the Act's programming provisions to noncommercial stations is not required by the statute, its legislative history or the public interest. While Section 103(a), requiring review of renewal applications for compliance with the programming requirements, is explicitly directed to "any application for renewal of a television broadcast license," Section 102(b), imposing commercial limits, explicitly applies to "commercial television broadcast licensee[s]."<sup>96</sup> The comparison suggests that the programming provisions apply to a broader category of broadcast stations, including both commercial and noncommercial licensees. When read in context, however, Section 103(a) can only apply to commercial licensees. That section requires review for compliance with two requirements: (1) the commercial limits and (2) the educational and informational programming requirement. As the commercial limits do not by definition apply to noncommercial stations, and there is no suggestion that we should apply only part of the two-part test to certain renewals, the implication is that the Act does not apply to noncommercial stations. Moreover, on the whole, the legislative history portrays public broadcasting as a model for educational and informational programming which commercial broadcasters should emulate.<sup>97</sup> This portrayal supports our interpretation of the Act as intended to address the performance of commercial television with regard to the special needs of their child audience.<sup>98</sup> The additional costs of regulation are largely unnecessary for noncommercial stations, and would outweigh any potential benefits from application of the children's programming rules to noncommercial stations. We will not impose such requirements on noncommercial/educational stations.

### D. Record-keeping and Reporting

#### 1. Records

31. We find, with the majority of commenting parties, and consistent with legislative intent, that television broadcasters should (1) maintain children's programming records, (2) make these records part of their public inspection file,<sup>99</sup> and (3) retain discretion with regard to the form in which these records are kept.<sup>100</sup> We impose only the requirements necessary for meaningful review. These records should contain a summary of the licensee's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children. The summary should reflect the most significant programming related to such needs that the licensee has aired.<sup>101</sup> Licensees may

make their children's programming records (specifically identified as such) part of their issues/programs list or keep them as a separate list and may update them on either a quarterly or annual basis. However, at a minimum, as the legislative history suggests, such records should indicate the time, date, duration and a brief description of the program or non-broadcast effort the licensee has made.<sup>102</sup>

32. Licensees may make general statements regarding the scheduling of short-segment programming such as PSAs and regularly scheduled programs. Licensees need not provide exact times for each and every airing in these cases. Licensees also need not give the exact time of a short-segment program that airs within a longer program. Because we have not adopted a targeting requirement, we do not adopt ACT's suggestion that licensees have a *per se* obligation to record the age groups of children a program serves.<sup>103</sup> As a general matter, licensees need not state the origin of a program.

#### 2. Reporting

33. In light of the apparent intent of Congress, the *Notice* proposed that broadcasters be required to submit their records of children's programming with their license renewal applications. Nevertheless, given the administrative complexity involved in processing each broadcaster's children's programming records, the *Notice* asked whether we might permit certification of compliance with the Act's programming requirement.<sup>104</sup>

34. The parties are divided on this issue. It is true that the language of the statute does not impose an explicit requirement to submit children's programming records at renewal time.<sup>105</sup> In order for the Commission to review a licensee's renewal application in accordance with the manner intended by Congress, however, we must receive sufficient information to determine the extent to which the licensee has responded to the educational and informational needs of children. Moreover, the legislative history strongly suggests that we should review the licensee's children's programming records in evaluating renewal applications.<sup>106</sup> Despite the contrary claims of many broadcasters,<sup>107</sup> a certification of compliance will not provide the Commission with enough information to perform the type of review apparently intended by the Congress.<sup>108</sup>

35. We accordingly will require submission at renewal time of the summary of the licensee's programming response and other efforts directed to the educational and informational needs of children that the licensee is required to maintain in its public file. We will not, however, require submission of supporting records that the licensee may wish to maintain, although those records could later be submitted by the licensee if questions regarding licensee compliance arise. We believe that this resolution will enable a meaningful review of compliance, while minimizing the burden on licensees.

36. We believe that submission of the summary is a more appropriate means of assessing compliance than use of a composite week submission, as some suggest.<sup>109</sup> We do not now use a composite week to evaluate compliance with existing programming obligations. Such a requirement, moreover, would imply that children's programming must be regularly scheduled to satisfy our renewal review, a condition we have not imposed.<sup>110</sup> We also do not adopt proposed processing guidelines based on percentages of children's programming, as these would con-

flict with Congress' rejection of quantitative standards.<sup>111</sup> In light of the submission we are requiring, we do not find it necessary at this time to institute a regular program of random audits, as some parties suggest, although audits are always a possible enforcement mechanism.<sup>112</sup> The statute does not require (or specifically authorize) us to pass upon a licensee's on-going efforts prior to renewal or a licensee's promise of future compliance, and so we decline to require information about proposed programs as TRAC suggests.<sup>113</sup> Finally, the language and purpose of the statute do not warrant extending the filing requirements to applications for transfer and assignment, as TRAC requests, and we decline to do so.<sup>114</sup>

#### IV. PENALTIES

37. The *Notice* proposed to impose forfeitures on both cable and broadcast operators that exceed the commercial limits in more than a *de minimis* fashion. For continuing or otherwise egregious violations, the *Notice* proposed that television broadcast licensees would lose their renewal expectancy and their license renewal applications would be set for hearing. The *Notice* also sought comment on whether the policy with respect to remedies for failure to meet the educational and informational needs of children should be analogous to those used for commercial limits.<sup>115</sup>

38. There was virtually no controversy in the record over whether the same enforcement standards should apply for commercial limits as for the Act's programming requirements.<sup>116</sup> Most parties also agree with the proposal in the *Notice* to tailor penalties to the magnitude of the violation.<sup>117</sup> The parties disagree, however, on the stringency with which violations should be punished. Broadcast interests generally argue that based on the newness of the rules, and on the breadth of discretion Congress intended licensees to be afforded under them, some element of subjective intent should be present before penalties are assessed.<sup>118</sup> Others believe that in order to ensure compliance, penalties must be substantial.<sup>119</sup>

39. Subject to the exception for *de minimis* violations suggested in the legislative history,<sup>120</sup> we will apply the same enforcement standards that we use in enforcing our other rules to violations of the Act and its implementing rules. This approach will enable us to retain consistent criteria in enforcing all our rules. We accordingly will assess forfeitures for violations of rules implementing the Act if violations are "willful or repeated" within the meaning of 47 U.S.C. Section 503.<sup>121</sup> Given that the Act's programming requirement is to be measured over the course of the license term, however, forfeitures for violation of that requirement would be appropriately considered only at renewal. Similarly, we agree with numerous parties that, consistent with our existing enforcement scheme, violations of the Act should be considered along with a licensee's overall performance in determining whether it is entitled to a renewal.<sup>122</sup> In tailoring penalties to suit the magnitude of the violation, the Commission may impose reporting requirements, forfeitures, short-term renewals, or other sanctions and may take violations into account in determining the weight of a renewal expectancy in a comparative renewal proceeding. We do not believe that the Act empowers us to waive compliance on a long-term, blanket basis either where an "average" number of commercial minutes is within the limits,<sup>123</sup> or for financial hardship or other "unique" circumstances.<sup>124</sup>

Finally, we clarify, at the request of numerous parties, that we will include in the category of *de minimis* violations an isolated and inadvertent violation of the commercial limits.<sup>125</sup>

#### V. PROGRAM-LENGTH CHILDREN'S COMMERCIALS

##### A. Definition

40. We find that the definition of program-length children's commercial proposed in the *Notice* -- a program associated with a product in which commercials for that product are aired -- strikes the best balance between the important interests involved.<sup>126</sup> This definition protects children from the confusion and deception the intermixture of related program and commercial material may inflict upon them, and still preserves the creative freedom and practical revenue sources that make children's programming possible.<sup>127</sup> For the reasons given below, we adopt this definition.

41. ACT maintains, much as it did in MM Docket No. 83-670,<sup>128</sup> that the Commission should establish a rebuttable presumption that if there is less than a two-year time span between the introduction of a television program and a related product or vice versa, this is *prima facie* evidence that the show is a program-length commercial.<sup>129</sup> We do not find that this is a viable definition. We agree with numerous commenters that it would jeopardize highly acclaimed children's shows such as Sesame Street and Disney programs that have products associated with them.<sup>130</sup> As CTW, the producer of Sesame Street, states, a program's relationship to products is not necessarily indicative of commercial intent. According to CTW, ACT's proposal would inhibit the simultaneous introduction of any new CTW program series and associated products, such as books, magazines, games and computer software whose purpose is to extend the educational benefits of the series.<sup>131</sup> We fear that such a definition would stifle creativity by restricting the sources that writers could draw upon for characters, would limit revenues from merchandising which are an important source of production funding, and would ignore the educational role toys or other related products can play in child development.<sup>132</sup>

42. McGannon would make a *prima facie* finding that a program is primarily a product promotion where related products appear in paid commercial advertising aired on any children's programs broadcast by the same licensee.<sup>133</sup> We believe that if the intent of such a standard is to prevent children from being confused by related program and commercial matter, that standard sweeps far too broadly. It would encompass acclaimed children's programs that, presumably, McGannon would not want to define as program-length commercials.<sup>134</sup> The proposal would also jeopardize the additional revenue streams generated by product merchandising needed by many children's programs.<sup>135</sup>

43. McGannon also believes that the ultimate criteria for determining whether a program is a commercial is whether, given all the circumstances surrounding the creation, production and distribution of a program, including producer's intent, one of the program's primary purposes is to promote products.<sup>136</sup> It specifically disputes the suggestion in the *Notice* that determinations of producer's intent would be difficult if not impossible, and observes that the Commission made such a determination

in the 1969 *Hot Wheels* decision.<sup>137</sup> McGannon is correct that the Commission can use "intent" as a criterion, for example, in determining whether a program is directed to children of a certain age. Determination of whether the creator of a program intended to sell products through a related program is a more difficult endeavor, however. As CTW and Disney suggest, related product marketing is now an integral part of the way children's programs are funded.<sup>138</sup> We would be hard pressed to distinguish among the many children's programs with related product marketing on the basis of whether a producer had commercial or noncommercial intentions in creating the program.<sup>139</sup> The industry practice of related product marketing was not addressed in 1969 in the *Hot Wheels* decision. Since that time we have narrowed the scope of that holding.<sup>140</sup> We believe that the limited precedential value which we have attributed to that decision, in light of prevailing industry practices, remains correct. Moreover, even if McGannon's proposal were administratively feasible, we find that the more precise test proposed in the *Notice* is superior. We are concerned that use of a more vague, facts-and-circumstances test would tend to chill production of children's programming, thereby thwarting the fundamental objectives of the Act.<sup>141</sup>

44. The definition of children's program-length commercial that we are now adopting -- a program associated with a product, in which commercials for that product are aired -- is clear, easy to understand and apply, and narrowly tailored. It directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter. Removal of related commercial matter should help alleviate this confusion. Our definition also would cover programs in which a product or service is advertised within the body of the program and not separated from program content as children's commercials are required to be.<sup>142</sup> Contrary to ACT's view,<sup>143</sup> we find that our definition clarifies the manner in which our traditional definition of program-length commercial applies to children's programs.<sup>144</sup> We have previously so held.<sup>145</sup> Given the First Amendment context of this issue, our approach is a restrained one.<sup>146</sup> Should abuses occur, however, we will not hesitate to revisit this issue. We also note that our definition harmonizes with, and codifies to some degree, existing policies with respect to host-selling and adequate separation of commercial from program material in children's programs.<sup>147</sup>

45. In addition, a program will be considered a program-length commercial if a product associated with the program appears in commercial spots not separated from the start or close of the program by at least 60 seconds of unrelated material. It is reasonably likely that a young viewer will tune in immediately before or stay tuned immediately after a program, and that in such circumstances an adjacent spot would have the same effect as if the spot were included in the program itself.<sup>148</sup> We do not find record evidence justifying extending this rule beyond 60 seconds, or further expanding our host-selling policy, as ACT requests.<sup>149</sup> In light of the short attention spans of children, particularly younger children most likely to confuse program and commercial material, we believe that a 60-second separation is adequate.

46. Most parties commenting on the issue agree with the tentative conclusion in the *Notice* that any children's program found to be a program-length commercial would count toward the statutory commercial limits.<sup>150</sup> We agree. This is a logical application of the definition. Although a program-length commercial of a duration under the commercial limits would not by definition violate the limits, it could violate our policy against host-selling or our policy requiring separation of commercial and program material. Because we agree with INTV and NIMA that, in practice, programs of such brief duration are unlikely to be aired,<sup>151</sup> we believe it unnecessary to formulate additional penalties for short-segment program-length commercials.

#### B. Other Issues

47. Although it had originally requested that the Commission require that sponsorship identification announcements be interspersed throughout "program-length children's commercials" as defined by ACT,<sup>152</sup> ACT now takes the position that such announcements are ineffective.<sup>153</sup> Given the lack of evidence that sponsorship identification announcements can effectively apprise children of the commercial nature of a program in which commercial matter may be interwoven, we will not adopt such a requirement. In addition, in response to an ACT petition concerning interactive toys,<sup>154</sup> the *Notice* sought comment on the impression that interactive toys were not in fact in use. The record substantiates this impression.<sup>155</sup> Further consideration of this issue is thus not warranted at this time.

#### VI. EFFECTIVE DATE

48. Most broadcast and advertising interests favor a notice period extending to October 1991 or later, before the children's television rules become effective.<sup>156</sup> They argue that this time is necessary to produce educational and informational programming,<sup>157</sup> to re-edit existing programs to comply with the commercial limits<sup>158</sup> and to renegotiate or allow expiration of existing contracts.<sup>159</sup> Some suggest that a Fall, 1991 implementation date is appropriate because Fall is the major period for program adjustment each year.<sup>160</sup> Although the legislative history is not entirely clear on this point,<sup>161</sup> we believe that Congress intended to allow licensees a brief period to adjust to the new rules.<sup>162</sup> We thus adopt an effective date for our rules and policies regarding commercial limits, educational and informational programming renewal review and program-length commercials, of October 1, 1991, subject to OMB approval. This should allow parties a sufficient notice period to permit orderly compliance, while permitting prompt implementation of the Act's provisions.

49. Several parties also urge that the Commission not review broadcast renewal applications for compliance with the children's television rules for a year or more after the rules are effective.<sup>163</sup> We do not believe that such an extensive period of time is necessary for meaningful compliance review. We will begin evaluating compliance with the rules, effective as stated above on October 1, 1991, in renewal applications filed as of February 1, 1992, corresponding with licenses expiring as of June 1, 1992. The period from October 1, 1991 through February 1, 1992, is sufficient for us to begin the compliance review mandated under the Act.

50. Some parties urge us to grant a blanket temporary waiver of the commercial time limits for children's programming acquired on a barter basis prior to completion of this proceeding. <sup>164</sup> INTV argues that in many of these contracts, the station and the program supplier each have the right to sell a portion of the advertising time in the program. INTV believes that application of the commercial limits to such programs will curtail the advertising time available to the station and reduce expected revenues from barter programs. The record, however, does not reflect (1) the number of barter contracts that divide advertising availabilities between the station and program supplier in the manner INTV describes, (2) whether the division of such availabilities between the supplier and the station can be or has been renegotiated as a result of the imposition of commercial limits, (3) the amount of advertising time and associated revenues that stations would lose in the absence of the requested waiver, (4) the number of years that such barter contracts have yet to run, and (5) how the proposed relief would harmonize with the objectives of the statute. We are unwilling at this time and in the absence of such evidence to carve out the temporary exception requested.

#### ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. Sections 154 and 303, as amended, and the Children's Television Act of 1990, 47 U.S.C. Sections 303a and 303b, Parts 73 and 76 of the Commission Rules, 47 C.F.R. Parts 73 and 76, and FCC Form 303-S, ARE AMENDED as set forth below, effective **October 1, 1991**.

52. IT IS FURTHER ORDERED that MM Docket No. 83-670 IS TERMINATED and the ACT Petitions dated January 17, 1986, February 9, 1987, August 26, 1987, and October 5, 1987 ARE GRANTED TO THE EXTENT INDICATED HEREIN AND OTHERWISE DENIED.

53. Further information on this proceeding may be obtained by contacting Gina Harrison, Mass Media Bureau at (202) 632-7792.

#### FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

#### APPENDIX A

#### FORMAL COMMENTS

Action for Children's Television; American Academy of Child and Adolescent Psychiatry; American Public Health Association; Association for Childhood Education International; Center for Science in the Public Interest; Consumer Federation of America; Consumers Union of U.S., Inc.; National Association for the Education of Young Children; National Association of Elementary School Princi-

pals, National Association of Secondary School Principals; National Consumers League; National PTA, and Office of Communication of the United Church of Christ (ACT)

American Academy of Pediatrics (AAP)

American Advertising Federation (AAF)

American Psychological Association (APA)

Association of America's Public Television Stations; Corporation for Public Broadcasting; and the Public Broadcasting Service (Public Broadcasting Commenters)

Association of Independent Television Stations, Inc. (INTV)

Association of National Advertisers, Inc. (ANA)

Cannell Communications, L.P.; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; Evening Post Publishing Company; First Media Corporation; Guy Gannett Publishing Co.; H&C Communications, Inc.; Midcontinent Television of South Dakota, Inc.; Multimedia, Inc.; Northwest Television, Inc.; River City Television Partners, L.P., Wabash Valley Broadcasting Corporation (Joint Broadcast Parties)

Capital Cities/ABC, Inc. (Capital Cities)

CBS, Inc. (CBS)

Children's Television Workshop (CTW)

Cohn and Marks on Behalf of Clear Channel Television, Inc.; Delmarva Broadcast Service General Partnership; Golden Orange Broadcasting Co., Inc.; Harriscope of Los Angeles, Inc.; Media General Broadcast Group, Inc.; Monitor Television, Inc.; Northeast Kansas Broadcast Service, Inc.; and Sarkes Tarzian, Inc. (Clear Channel)

Corridor Broadcasting Corp. (Corridor)

Curators of the University of Missouri (U of M)

Donald McGannon Communication Research Center (McGannon)

Fisher Broadcasting Inc. (Fisher)

Great American Communications Company (Great American)

HSN Communications, Inc. (HSN)

International Reading Association (IRA)

ITG Channel, Inc. (ITG)

Kelly Broadcasting Company (Kelly)

Mars, Inc. (Mars)

Motion Picture Association of America, Inc. (MPAA)

National Association for Better Broadcasting; National Educational Association of the U.S.; American Association of School Administrators; and National Association for Television and Children (NABB)

National Association of Broadcasters (NAB)

National Broadcasting Company, Inc. (NBC)

National Cable Television Association, Inc. (NCTA)

National Infomercial Marketing Association (NIMA)

Oklahoma City Broadcasting Company, Debtor-in-Possession (Oklahoma City)

Radio-Television News Directors Association; The Media Institute; The Reporters Committee for Freedom of the Press; Society of Professional Journalists (RTNDA)

Station Representatives Association (SRA)

Telecommunications Research and Action Center and Maryland and Virginia Chapters of the Washington Area Citizens' Coalition Interested in Viewers Constitutional Rights (TRAC)

Toy Manufacturers of America, Inc. (Toy Manufacturers)

Trustees of the University of Pennsylvania (U of P)

Turner Broadcasting System, Inc. (TBS)

USA Network (USA Network)

Walt Disney Company (Disney)

Westinghouse Broadcasting Company, Inc. (Group W)

#### INFORMAL COMMENTS

American Family Association, Inc. (AFA)

Kellogg Company (Kellogg)

Meredith Corporation (Meredith)

National Education Association (NEA)

New York State Education Department (New York)

#### REPLY COMMENTS

Alaska Broadcasters Association; Illinois Broadcasters Association; Indiana Broadcasters Association; Minnesota Broadcasters Association; Nebraska Broadcasters Association; New Hampshire Association of Broadcasters; New York State Broadcasters Association; Pennsylvania Association of Broadcasters; Wisconsin Broadcasters Association (State Broadcasters)

Capital Cities

CTW

Claster Television, Inc. (Claster)

Cohn and Marks

INTV

Jamie T. Deming

Mc Gannon

MPAA

NABB

NAB

National Broadcast Association for Community Affairs (NBACA)

NBC

NCTA

National Coalition on Television Violence (NCTV)

National Public Radio (NPR)

New York State Broadcasters Association (NYSBA)

Pennsylvania Association of Broadcasters (PAB)

Pickleberry Pie, Inc. (Pickleberry)

SRA

Tribune Broadcasting Company (Tribune)

United States Catholic Conference (USCC)

Disney

#### INFORMAL REPLY COMMENTS

Association of Advertising Agencies (AAAA)

AFA

Capital Community Broadcasting, Inc. (CCBI)

USA Network

#### APPENDIX B

1. FCC Form 303-S is amended by adding question 9, to read as follows:

FCC Form 303-S Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station

\* \* \* \* \*

9. The following sections apply only to commercial television broadcast applicants:

(a) Attach as Exhibit No. \_\_\_\_\_ a summary of the applicant's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and reflecting the most significant programming related to such needs which the licensee has aired, as described in 47 CFR Section 73.3526(a)(8)(ii).

(b) For the period of time covered 

|  |     |    |
|--|-----|----|
|  | Yes | No |
|--|-----|----|

 by this report, has the applicant complied with the limits on commercial matter as set forth in 47 CFR Section 73.660 (no more than 12 minutes of commercial matter per hour or 6 minutes per half hour on weekdays, and no more than 10.5 minutes of commercial matter per hour or 5.25 minutes per half hour during children's programming on weekends)?

(c) If no, submit as Exhibit No. a list of each one hour or 1/2 hour segment of programming designed for children twelve years old and under broadcast during the license period which contained commercial matter in excess of:

(i) 12 minutes per hour or 6 minutes per half-hour on weekdays (Monday through Friday), or

(ii) 10.5 minutes per hour or 5.25 minutes per half hour on weekends (Saturday and Sunday).

For each programming segment so listed, indicate the length of the segment (i.e. one hour or 1/2 hour), the amount of commercial matter contained therein, and an explanation of why the limits were exceeded.

## APPENDIX C

Parts 73 and 76 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 73 continues to read as follows:

**Authority: 47 U.S.C. 154, 303**

2. Section 73.3526 is amended by adding new subparagraphs (a)(8)(ii) and (a)(8)(iii), by redesignating existing paragraph (a)(8) as (a)(8)(i), and by revising the fourth sentence, and adding a new sentence, in paragraph (e). Amended Section 73.3526 will read as follows:

**Section 73.3526 Local public inspection file of commercial stations.**

(a) \* \* \*

(8) \* \* \*

(ii) For commercial TV broadcast stations, records sufficient to permit substantiation of the station's certification, in its license renewal application, of compliance with the commercial limits on children's programming established in 47 U.S.C. Section 303a and 47 C.F.R. Section 73.660.

(iii) For commercial TV broadcast stations, on either an annual or quarterly basis, records demonstrating the extent to which the licensee responded to the educational and informational needs of children in their overall programming, including programming specifically designed to serve such needs. These records may also reflect any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children and any special efforts by the licensee to produce or support programming broadcast by another television station in the licensee's marketplace, which is specifically designed to serve the educational and informational needs of children. These records shall include a summary of the licensee's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and shall reflect the most significant programming related to such needs which the licensee has aired. Licensees may make their children's programming records part of their issues/programs list or keep them as a separate list. Such records should indicate, at a minimum, the time, date, duration and a brief description of the program or nonbroadcast effort the licensee has made to serve the educational and informational needs of children.

\* \* \* \* \*

(e) *Period of Retention.* \* \* \* The "significant treatment of community issues" list and the records demonstrating the station's response to the educational and informational needs of children specified in paragraph (a)(8) of this section shall be retained by commercial broadcast television licensees for the term of license, 5 years. Commercial AM and FM radio licensees shall retain the "significant treatment of community issues list" specified in paragraph (a)(9) of this section for the term of license, 7 years. \* \* \*

\* \* \* \* \*

3. Section 73.660 is added to read as follows:

**Section 73.660 Commercial limits in children's programs**

No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service.

Note 2: For purposes of this section, *children's programming* refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

4. Section 73.661 is added to read as follows:

**Section 73.661 Educational and informational programming for children.**

(a) Each commercial television broadcast station licensee has an obligation to serve, over the term of its license, the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.

(b) Any special nonbroadcast efforts which enhance the value of children's educational and informational television programming, and any special effort to produce or support educational and informational television programming by another station in the licensee's marketplace, may also contribute to meeting the licensee's obligation to serve, over the term of its license, the educational and informational needs of children.

Note: For purposes of this section, *educational and informational television programming* is any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs.

5. The authority citation for Part 76 continues to read as follows:

**Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, and 309**

6. Section 76.225 is added to read as follows:

**Section 76.225 Commercial limits in children's programs**

(a) No cable operator shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

(b) This rule shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. Section 531(e) and Section 532(c)(2).

(c) Cable operators must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C. Section 503(b)(6)(B).

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service.

Note 2: For purposes of this section, *children's programming* refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

7. Section 76.305 is amended by revising paragraphs (a) and (c). Amended Section 76.305 will read as follows:

(a) *Records to be maintained.* The operator of every cable television system having 1000 or more subscribers shall maintain for public inspection a file containing a copy of all records which are required to be kept by Section 76.205(d) (origination cablecasts by candidates for public office); Section 76.221(f) (sponsorship identification); Section 76.79 (EEO records available for public inspection); and 76.225 (c) (commercial records for children's programming).

\* \* \* \* \*

(c) The records specified in paragraph (a) of this section shall be retained for the period specified in Sections 76.205(d), 76.221(f), 76.9 and 76.225 (c).

## APPENDIX D

### FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

#### I. Need and Purpose of this Action:

54. The actions taken in this decision are intended to satisfy the mandate of the Children's Television Act of 1990. This *Report and Order* prescribes standards for commercial limits on children's programs, completes MM Docket No. 83-670, and implements the educational and informational programming renewal review requirements, all as mandated by the Act.

#### II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

55. No comments were submitted relative to the Initial Regulatory Flexibility Analysis.

#### III. Significant Alternatives Considered and Rejected:

56. The Commission reviewed several definitions of "children" for purposes of monitoring compliance with the commercial limits and the educational and informational programming requirement, but felt that the age ranges selected, 12 and 16 years respectively, offered the strongest protection, within the terms of the Act, to both the interests of children and that of licensees.

57. The Commission had several record-keeping and reporting options available to assist the Agency in monitoring compliance with the provisions of the Act. For example, it could have adopted new restrictive record-keeping burdens on both broadcast licensees and cable operators, or taken a more flexible approach and allowed licensees to choose their record-keeping system. The Commission will require that broadcast licensees at the time of renewal, certify their compliance with the commercial limits and maintain records sufficient to substantiate this certification. Cable operators must maintain records sufficient to verify their compliance with the Act. As the legislative history indicates, broadcast licensees will, however, be required to maintain records demonstrating how they responded to the educational and informational needs of children in their programming. The records must include a summary of licensees' programming re-

sponse, nonbroadcast efforts and support for other stations' programming, directed to the educational and informational needs of children. This summary must be forwarded to the Commission at renewal time. If a station's compliance with the programming requirement is in doubt, the Commission may also review supporting records. The adopted record-keeping and reporting requirements allow the Commission sufficient information to confirm compliance with the Act's mandate, while limiting the administrative burden on broadcast licensees, cable operators, and the Agency.

58. The Commission in this decision, elects to define, for purposes of implementing the programming renewal review mandated in the Act, "educational and informational" programming as any programming which furthers the positive development of the child in any respect, including, but not limited to, anything which furthers a child's cognitive/intellectual and social/emotional needs. Some of the commenters had asked for a more narrow definition limited, for example, to nonfiction programming. The Commission rejected such a restricted definition because it would disqualify valuable educational or informational matter presented, for example, in a fictional setting or featuring a popular fictional character. In dismissing such a narrow definition, and a second proposal to rely on a third-party review to define and apply the programming requirement, the Commission noted that the legislative history of the Act indicates Congressional intent to afford licensees broad discretion in providing programming responsive to the educational and informational needs of children.

59. Finally, several of the commenters suggest a definition of program-length commercials based on when the program appeared in relationship to when the related products were marketed, based on intent of the producer, or based on whether related product advertisements appeared on television. The Commission adopted a definition of "programs associated with a product, in which commercials for that product are aired." This definition encompasses commercials for a related product within the body of a program and not separated from program matter as children's commercials are required to be. The Commission found that this definition would not jeopardize highly acclaimed shows and would not create implementation difficulties, as would the other alternatives.

60. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)).

## FOOTNOTES

<sup>1</sup> *Notice of Proposed Rule Making*, MM Docket Nos. 90-570 and 83-670, 5 FCC Rcd 7199 (1990) (*Notice*). In response to the *Notice*, 38 parties filed timely comments and 23 filed timely replies. AFA, Kellogg, Meredith, NEA and New York filed initial comments after the January 30, 1991, deadline. AAAA, USA Network, CCBI and AFA filed reply comments after the February 20, 1991, deadline for replies. AAAA also requested that its reply be accepted as a late-filed pleading or, alternatively, be considered as an informal request. We will treat all these late-filed pleadings as informal comments or reply comments, as appropriate. A list of commenting parties and the abbreviations used for them is contained in Appendix A.

<sup>2</sup> Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b, 394 (Act).

<sup>3</sup> The Act was enacted on October 18, 1990. Thus, the Commission was required to act by April 16, 1991. The rules on commercial limits are also required to be prescribed by this date.

<sup>4</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670. The Notice consolidated MM Docket No. 83-670 and the instant proceeding.

<sup>5</sup> Several parties have also raised questions regarding the constitutionality of the Act. *See, e.g.*, RTNDA Comments at 3-5; AAAA Reply at 3-11 & Attachment A. We are not obliged to question the constitutionality of an Act of Congress which we are charged with enforcing. *See Meredith Corp. v. FCC*, 809 F.2d 863, 873 n. 11 (D.C. Cir. 1987). Moreover, Congress, in enacting the statute, has already provided a vigorous defense of its constitutionality. *See, e.g.*, Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 10-18 (1989) (Senate Report). We believe it is consistent with legislative intent, however, to interpret the Act with sensitivity to the constitutional rights of the broadcasters and cable operators it affects by affording them significant discretion when implementing the Act. *See, e.g.*, Senate Report at 15-16, 17-18.

<sup>6</sup> 47 U.S.C. Section 303a.

<sup>7</sup> Notice, 5 FCC Rcd at 7199, at 7204 n.8.

<sup>8</sup> *See, e.g.*, INTV Comments at 5-8; McGannon Comments at 29-34; NCTA Comments at 3-4.

<sup>9</sup> This age definition was previously used by the Commission in connection with commercial limits on children's programs. *See, e.g., Action for Children's Television*, 53 FCC 2d 161, *modified*, 58 FCC 2d 1169 (1975), *recon. denied*, 63 FCC 2d 26 (1977).

<sup>10</sup> ACT Comments at 7-10 (well established, consistent with industry practice); Capital Cities Comments at 3-4 (providing certainty); CBS Comments at 2-4 (consistent with legislative intent); McGannon Comments at 29 (consistent with goal of protecting children).

<sup>11</sup> Corridor Comments at 7-8 (10 years); NAB Comments at 3-4, AAF Comments at 2-5 (six or at most eight years).

<sup>12</sup> Children's Television Act of 1989, House Committee on Energy and Commerce, H.R. Rep. No. 385, 101st Cong., 1st Sess. 16 (House Report); Senate Report at 22 (referring to definition of 12 years of age and under used in former version of FCC broadcast license renewal form).

<sup>13</sup> Compare AAF Comments at 4-5 with McGannon Reply at 17-19, NABB Reply at 13 and AFA Comments at 4-5. Although research tends to show that the cognitive ability to discern the persuasive intent of commercials develops in children at the age of seven or eight, studies also indicate, at least by inference, that significant numbers of children, slower than the norm, develop this ability at a later age. McGannon Reply at 18-19; APA Comments in MM Docket No. 83-670 at 6 (filed Feb. 18, 1988)(summarizing experiment in which 30% of 7-8 year olds demonstrated ability to understand commercial intent). We also observe that the statute permits us to review the advertising duration limitations after January 1, 1993, and to modify them after notice and comment and a demonstration of need for such change. 47 U.S.C. Section 303a(c). If after some experience with using an age definition of 12 and under to implement the statute, there appears to be additional evidence that a change in the maximum age would be appropriate, we have the authority to consider such modification after January 1, 1993.

<sup>14</sup> *See, e.g.*, ANA Comments at 3-4.

<sup>15</sup> USCC Reply at 3, 8-9.

<sup>16</sup> *See, e.g.*, NAB Comments at 4; ANA Comments at 5; NCTA Comments at 3-4; Disney Comments at 31. *See* House Report at 16; Senate Report at 22. We similarly agree with the Joint Broadcast Parties that the commercial limits should not apply to programs intended for a teenage audience. Joint Broadcast Parties Comments at 3-4.

<sup>17</sup> We also clarify that if a station with an all-advertising format directs commercials for children's products to adult viewers/purchasers, these commercials would not be considered as aired in connection with "programs originally produced and broadcast for an audience of children 12 years of age and under." *See generally* HSN Comments at 3.

<sup>18</sup> As the Notice stated, and many parties agree, this was essentially the definition contained in former FCC Form 303 which was cited in the Act's legislative history. *See Notice*, 5 FCC Rcd at 7199 & n.10. *See, e.g.*, NBC Comments at 5. *See also* Former FCC Form 303, Section III.1.C (Sept. 1981); 47 C.F.R. Section 73.670 nn. 3 & 4 (1976 ed.)(superseded); House Report at 15-16; Senate Report at 21.

<sup>19</sup> We observe that for purposes of determining whether material is "commercial matter," the furnishing of material for airing may or may not qualify as consideration. *See generally Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 906 & n.26 (1982) (*Educational Broadcast Stations*). Some barter arrangements, depending on their terms, may involve consideration furnished as an inducement to air commercial matter. *Cf.* APA Comments at 3. Airing commercials for a local car dealership in exchange for free car rentals would be one hypothetical example. However, not all barter contracts may be so categorized. *Cf. National Association for Better Broadcasting v. Television Station KCOP (TV)*, 4 FCC Rcd 4988 (1989)(*NABB Remand*), *aff'd sub nom.*, *National Association for Better Broadcasting v. FCC*, 902 F.2d 1009 (D.C. Cir. 1990)(*per curiam*) (where station gives more than nominal consideration in exchange for a program, sponsorship identification not required for the program).

<sup>20</sup> *National Association for Better Broadcasting v. FCC*, 830 F.2d 270, 275-77 (D.C. Cir. 1987) (*NABB v. FCC*), *on remand*, *NABB Remand, supra*.

<sup>21</sup> *See* Letter to Long Island Music Broadcasting Corp. from FCC Mass Media Bureau Enforcement Division (Sept. 28, 1990). We thus do not adopt ACT's suggestion that all matter requiring a sponsorship identification be identified as commercial. ACT also requests that we include in the definition of commercial matter all matter placing undue emphasis on products or promotional material, even if not within the scope of Section 317. ACT Comments at 4, 25-28. We believe ACT's proposal is too vague to serve as a viable definition. Accordingly, unless the circumstances show that such material placing undue emphasis on products or promotional material fits our definition of commercial matter, such material will not be deemed commercial. *See generally KISD, Inc.*, 22 FCC 2d 833 (1970) ("plugs" as commercial matter).

<sup>22</sup> 47 C.F.R. Sections 73.1212, 76.221.

<sup>23</sup> INTV Comments at 13 & n.23; *Educational Broadcast Stations, supra*, 90 FCC 2d at 906.

<sup>24</sup> *See generally* Disney Comments at 26-29; Disney Reply at 15-16. *Cf. Educational Broadcast Stations, supra*, 90 FCC 2d at 911 (donor acknowledgement, required under 47 C.F.R. Section 73.1212, as well as donor's logogram, is permitted on noncommercial stations, pursuant to public broadcaster's good faith determination that such acknowledgement identifies, rather than promotes, donor). Indeed, we wish to encourage the

sponsorship of educational and informational material, and believe that short-segment programming of this nature may be particularly effective in reaching a child audience. See discussion *infra* para. 25.

<sup>25</sup> Of course, some consideration must be furnished for the airing of the material. Moreover, even if no separate consideration is received for such mentions, if such "hybrid" promotional/commercial spots are part of a program package for which the broadcaster or cablecaster receives consideration, then consideration was received for the airing of these announcements. This approach is consistent with our previous decisions under which "bonus" spots or ostensibly free spots broadcast in connection with an agreement to run paid spots were treated as commercial matter. Former FCC Form 303, Section III.1.C, cited in Senate Report at 21, House Report at 15-16.

<sup>26</sup> Notice, 5 FCC Rcd at 7199.

<sup>27</sup> See, e.g., Former FCC Form 303, Section IV-B, II.3 (Dec. 1973) (defining "program" as "identifiable unit of program material . . . which is not an announcement").

<sup>28</sup> Capital Cities Comments at 3-4.

<sup>29</sup> See *infra* para. 25.

<sup>30</sup> Notice, 5 FCC Rcd at 7199, at 7205 n.12. Both methods apply the limits to programming on an hourly basis, but they begin "counting" at different points. Counting by the clock hour begins at the start of the hour and finishes at the hour's end, and not at the start of a program segment (which might, for example, begin at the half-hour).

<sup>31</sup> See, e.g., SRA Comments at 2-3; ACT Comments at 29-30; Clear Channel Comments at 41-43.

<sup>32</sup> ACT Comments at 30 & n. 83; NAB Comments at 5.

<sup>33</sup> See generally ACT Comments at 30. Thus, a weekend half-hour children's program would be limited to 5.25 minutes of commercials, and a weekday half-hour program to 6 minutes. See Amendments to FCC Form 303-S, Appendix B, *infra*. We also agree with NIMA that no limits should apply to an adult program aired as an "island" within a block of children's programming. NIMA Comments at 3-4; Clear Channel Comments at 43 n.48.

<sup>34</sup> See generally Clear Channel Comments at 41-43 & n.47.

<sup>35</sup> In the general case, we will measure commercial time associated with a program beginning at the hour or half hour as appropriate, and ending on the hour or half hour, depending on the program's duration. For programs not conforming to the standard hour or half-hour time periods or otherwise not involving clear starting and ending periods, we would follow Clear Channel's suggestion and allocate half of the break at the beginning or end of a program to the immediately preceding program and half to the next program. Clear Channel Comments at 42-44 & n.47.

<sup>36</sup> NABB Reply at 15.

<sup>37</sup> Notice, 5 FCC Rcd at 7199-7200. See, e.g., NCTA Comments at 4-5.

<sup>38</sup> 17 U.S.C. Section 111(c)(3); 47 U.S.C. Section 303a(b); NCTA Comments at 4-9; NABB Comments at 5-8.

<sup>39</sup> 47 U.S.C. Section 531, 532(c)(2).

<sup>40</sup> 5 FCC Rcd at 7200. See, e.g., ACT Comments at 33-34; NCTA Comments at 6-7; NAB Comments at 5.

<sup>41</sup> See, e.g., ACT Comments at 33-34; TBS Comments at 5. See Senate Report at 10 (referring to advertising on cable network programs). While not unambiguous, the Act's definition of "commercial television broadcast licensee" as including "cable

operators" itself suggests that Congress intended cable operators to be responsible for compliance with the commercial limits on cable network programs.

<sup>42</sup> Cable programmers state that the Act does not confer the authority to hold them directly responsible for advertising limit violations. They state, however, that they intend to comply with these limits and several made similar representations to Congress. See, e.g., USA Network Comments at 1; Cable Hearing, at 12, 14 (testimony of Geraldine B. Laybourne, president and general manager, Nickelodeon), at 15-16 (testimony of John S. Hendricks, chairman and chief executive officer, Cable Educational Network, Inc., the Discovery Channel).

<sup>43</sup> NCTA Comments at 7.

<sup>44</sup> See, e.g., Tribune Reply at 3.

<sup>45</sup> See Appendix B *infra*.

<sup>46</sup> 47 U.S.C. Section 303b(a); INTV Comments at 22.

<sup>47</sup> See, e.g., ACT Comments at 29, 31-32.

<sup>48</sup> Notice, 5 FCC Rcd at 7200. Compare NAB Comments at 7 (record-keeping unnecessary) with ACT Comments at 29, 31, 34 (record-keeping should be required).

<sup>49</sup> See, e.g., NBC Comments at 30.

<sup>50</sup> See, e.g., NABB Reply at 12 n.12.

<sup>51</sup> NAB Comments at 7.

<sup>52</sup> NCTA Reply at 5-8. We observe that cable operators may wish to arrange to have cable networks provide to them commercial records for the children's programming cable networks supply.

<sup>53</sup> 47 U.S.C. Section 503 (b)(6)(B).

<sup>54</sup> 47 C.F.R. Sections 73.3526, 76.305. Cable operators of systems with under 1,000 subscribers are not subject to public file requirements. They must, however, retain commercial records for children's programming and make them available to the public.

<sup>55</sup> 47 U.S.C. Section 303b(a)(2).

<sup>56</sup> 47 U.S.C. Section 303b(b)(2).

<sup>57</sup> See House Report at 17; Senate Report at 16-17, 23.

<sup>58</sup> We expect substantial compliance throughout all of the broadcaster's license term. In situations in which the Act was in effect for less than a broadcaster's full license term, we will examine a licensee's compliance during the period of its term that the rule was in effect.

<sup>59</sup> 5 FCC Rcd at 7200.

<sup>60</sup> See generally AAP Comments at 5 (teenagers just as impressionable and exploitable as younger children).

<sup>61</sup> See generally Meredith Comments at 2-4.

<sup>62</sup> See, e.g., ACT Comments at 10-12; McGannon Reply at 15.

<sup>63</sup> Senate Report at 8.

<sup>64</sup> 47 U.S.C. Section 394 (i)(1).

<sup>65</sup> ACT is correct that prior to passage of the Act, the Commission had traditionally defined children, for purposes of determining whether their special programming needs are met, as 12 and under. ACT Comments at 7-9. With the passage of the Act, and in light of its legislative history, we believe that we need to revise this definition.

<sup>66</sup> See generally INTV Comments at 29-30.

<sup>67</sup> See, e.g., HSN Comments at 11-13.

<sup>68</sup> We believe that a definition of "children" as persons 16 and under is most consistent with Congressional intent in enacting the Children's Television Act. By contrast, we have defined "children" as persons 17 and under when enforcing the statutory prohibition against broadcast indecency (Section 1464 of

Title 18 of the United States Criminal Code) because both the federal and the state legislatures have evinced concern over exposing children 17 and under to sexually explicit materials. See *Report of the Commission, Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. Section 1464*, 5 FCC Rcd 5297, 5301 (1990).

<sup>69</sup> Notice, 5 FCC Rcd at 7200.

<sup>70</sup> Senate Report at 17, 23; House Report at 12, 17. As Kelly observes, a predecessor bill to the Act expressly required programming for pre-school and school-aged children and was amended to permit a more general programming obligation. Kelly Comments at 9 n. 6. See S. 1215, 101st Cong. 1st Sess. Section 3(b)(2) (1989). We thus disagree with ACT that Congress intended to require age-specific programming. ACT Comments at 23-25.

<sup>71</sup> NAB Comments at 9-10.

<sup>72</sup> INTV Reply at 11.

<sup>73</sup> See, e.g., NABB Comments at 16-17; AAP Comments at 5.

<sup>74</sup> 5 FCC Rcd at 7200.

<sup>75</sup> Notice, 5 FCC Rcd at 7206 n.30 (citing 136 Cong. Rec. S10122 (daily ed. July 19, 1990)(remarks of Senator Inouye)).

<sup>76</sup> See, e.g., RTNDA Comments at 11; NAB Comments at 12.

<sup>77</sup> See, e.g., ACT Comments at 2-3, 20-23.

<sup>78</sup> NABB Comments at 19-20.

<sup>79</sup> NABB Reply at 6.

<sup>80</sup> CTW Reply at 2-5.

<sup>81</sup> Senate Report at 17, 23; House Report at 12, 17. We also do not adopt AFA's suggestion that we mandate that general audience programs not be harmful to child viewers or NCTV's proposal for a specific definition of educational and informational programming that would include, *inter alia*, programming stressing non-violence and strong family and social bonding. AFA Comments at 15-19; NCTV Reply at 1. We find these proposals beyond the intent and purpose of the statute.

In addition, we are not persuaded that we should require licensees to air "regularly scheduled" educational and informational programming, as Claster requests. Claster Reply at 2-3. Some licensees may, for example, believe that the needs of children in their community may best be met by children's program specials devoted, perhaps, to particular topical issues. We will not foreclose such a possibility.

<sup>82</sup> See 136 Cong. Rec. S10122 (daily ed. July 19, 1990)(remarks of Senator Inouye); McGannon Reply at 11. See generally NBC Comments at 17-18 (in the event Commission opts to define "educational and informational programming," legislative history, including Senator Inouye's statement, indicates requirement intended to encompass broadly the development of the whole child, including both cognitive and affective needs).

<sup>83</sup> 5 FCC Rcd at 7200.

<sup>84</sup> See generally U of M Comments at 4-5; HSN Comments at 17-18.

<sup>85</sup> NEA Comments at 4.

<sup>86</sup> 47 U.S.C. Section 303b(a); Senate Report at 23; House Report at 17.

<sup>87</sup> To the extent that existing children's programs are formatted with gaps to be filled by commercials which exceed the commercial time limits, such short-segment educational and informational programming might provide a practical way to use this time beneficially.

<sup>88</sup> Senate Report at 23; House Report at 17.

<sup>89</sup> Senate Report at 7-8.

<sup>90</sup> 47 U.S.C. Section 303b(b).

<sup>91</sup> U of P Comments at 2, 8-10; NPR Reply at 5-6; Pickleberry Reply at 1-2, 7-8; CCBI Reply at 1-3; Deming Reply at 1-3.

<sup>92</sup> Public Broadcasting Comments at 16-22.

<sup>93</sup> See *supra* para. 23.

<sup>94</sup> Cohn and Marks Comments at 21-29.

<sup>95</sup> 5 FCC Rcd at 7205 n.19. 47 C.F.R. Section 73.621 provides that, with some exceptions, noncommercial educational stations "will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs, and to furnish a nonprofit and noncommercial television broadcast service."

<sup>96</sup> Compare 47 U.S.C. Section 303a(b) with Section 47 U.S.C. Section 303b(a)(emphases supplied).

<sup>97</sup> For example, the Senate Report cites public broadcasting programs, "Mister Roger's Neighborhood," "Sesame Street," "Electric Company," "3-2-1 CONTACT," "Square One TV," and "Reading Rainbow" as programs that are effective in teaching children specific skills. It then concludes that "[t]oday, public television is the primary source of educational children's programming in the United States, broadcasting over 1,200 hours of children's educational programming for home viewing." The Senate Report adds, "[h]owever, our children watch more than just public television . . . [W]hen viewed as a whole, there is disturbingly little educational or informational programming on commercial television." Senate Report at 6-7. See also 136 Cong. Rec. S10123 (remarks of Sen. Wirth) (July 19, 1990 daily ed.) ("[E]ducational programs have literally disappeared from the airwaves on all but PBS stations"); 136 Cong. Rec. S16342 ("No longer will [educational children's programming] be limited solely to PBS")(remarks of Sen. Wirth)(Oct. 22, 1990 daily ed.). Cf. Senate Report at 22 ("Those who think that H.R. 1677 will foster real improvements in commercial TV programming are sadly mistaken") (dissenting views).

<sup>98</sup> Senate Report at 6-7. We also observe, as the Public Broadcasting Commenters state, that the Corporation for Public Broadcasting, one of the major funding sources for public broadcasting, has a statutorily mandated goal of service to children's needs. See Public Broadcasting Comments at 4-8; 47 U.S.C. Section 396 (a)(6).

<sup>99</sup> Notice, 5 FCC Rcd at 7200. See, e.g., Tribune Reply at 6; AAP Comments at 4.

<sup>100</sup> See, e.g., NAB Comments at 12; AAP Comments at 4.

<sup>101</sup> "Children's programming records" refers to all the records licensees must keep to demonstrate their response to the educational and informational needs of children, even though these records may also document non-programming responses to such needs. Moreover, we note that, although they are not required to do so, licensees may wish also to retain records supporting their children's programming summaries that would help demonstrate the extent of their responses to the educational and informational needs of children if challenged on this issue at renewal.

<sup>102</sup> Senate Report at 23; House Report at 17-18.

<sup>103</sup> ACT Comments at 14-15.

<sup>104</sup> 5 FCC Rcd at 7201.

<sup>105</sup> See, e.g., Clear Channel Comments at 39-41.

<sup>106</sup> House Report at 18; Senate Report at 24 ("Broadcasters . . . must send the children's television lists contained in the public files to the FCC at the time the FCC is considering their licenses of renewal [sic]. The Committee recognizes that this last

requirement distinguishes this material from all other community issue-oriented programming. That is the committee's explicit intent.")

<sup>107</sup> See, e.g., NAB Comments at 12-13; NBC Comments at 32-33.

<sup>108</sup> See generally NABB Comments at 29. In certifying compliance with the commercial limits, a licensee is responding to a question of fact -- whether it has limited its commercial time in children's programs to a measurable number of minutes, as prescribed by statute. The Act, however, does not set measurable standards for programming review at renewal time. Rather, it suggests that we should take a more individualized approach to each renewal application, looking at "the extent" to which the broadcaster has met children's educational and informational needs through its "overall programming," including programming specifically designed to serve such needs, and taking into account special nonbroadcast efforts and support for other stations' programming. Certification would not permit us to perform a review of this nature.

<sup>109</sup> ACT Comments at 3, 15-17.

<sup>110</sup> See *supra* note 81.

<sup>111</sup> ACT Comments at 17-20. See House Report at 17; Senate Report at 23.

<sup>112</sup> See, e.g., Joint Broadcast Parties Comments at 24 n.22 (alternative proposal).

<sup>113</sup> TRAC Comments at 6-7.

<sup>114</sup> TRAC Comments at 7.

<sup>115</sup> 5 FCC Rcd at 7200-01.

<sup>116</sup> Three commenters argue for different standards. See NYSBA Reply at 12-14; PAB Reply at 12-14; State Broadcasters Reply at 12-14.

<sup>117</sup> See, e.g., CBS Comments at 5 n. 1; NBC Comments at 33-34; AAP Comments at 4-5.

<sup>118</sup> See, e.g., Westinghouse Comments at 4-5; NAB Comments at 6.

<sup>119</sup> NABB Comments at 10; CTW Comments at 9.

<sup>120</sup> See, e.g., House Report at 16.

<sup>121</sup> See *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515-16 n.22, supplemented, 3 FCC Rcd 3155, 4 FCC Rcd 7299 (1988), appeal dismissed sub nom. *Telesat, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990)(Table)(carrier's actions were "willful" in that it took the action involved and "repeated" in that they were repeated over more than one day). This traditional, statutory standard does not require the level of intent several parties argue should be present before penalties are assessed for Children's Television Act violations. See, e.g., NAB Comments at 6.

<sup>122</sup> See, e.g., Westinghouse Comments at 5. See generally *Office of Communication of United Church*, 779 F. 2d 702, 708-9 (D.C. Cir. 1985) (renewal applicant's "overall" programming efforts must adequately treat issues of public concern).

<sup>123</sup> Corridor Comments at 8. See also NBC Comments at 8. NBC states that under the 10.5 minute weekend commercial limit, half-hour Saturday morning children's programs are likely to be formatted with 5 and 5.5 minutes of commercial matter, with the programs containing the 5 and 5.5 minutes of commercial matter running back to back. It expresses concern that in the event of a scheduling adjustment, two programs with 5.5 commercial minutes and two programs with 5 commercial minutes would be placed back-to-back, exceeding the commercial limits in one hour, but leaving the "average" in that weekend block of time within the limits. Although we do not permit "averaging" on a blanket basis, to the extent that NBC is con-

cerned about an occasional emergency scheduling change, we would take this factor into account in deciding whether to allow for extenuating circumstances.

<sup>124</sup> Clear Channel Comments at 29-34. See *Cablevision VI, Inc.*, 68 RR 2d 575 (1990). Ability to pay is, of course, a relevant consideration in assessing the amount of a forfeiture, as opposed to determining whether a violation exists in the first instance. See 47 U.S.C. Section 503 (b)(2)(D).

<sup>125</sup> See, e.g., INTV Comments at 19-20.

<sup>126</sup> Notice, 5 FCC Rcd at 7201.

<sup>127</sup> In light of the Act's imposition of commercial limits on both television broadcasters and cable operators, we will apply our definition of program-length children's commercials to both television broadcast and cable programs for children.

<sup>128</sup> The Act requires that we complete MM Docket No. 83-670, which raises the program-length children's commercial issue. A predecessor bill would have categorized certain product-related programs as commercial matter, but was deleted in a compromise amendment. See 136 Cong. Rec. S10124 (daily ed. July 19, 1990)(remarks of Senator Wirth). The Act therefore affords us no specific guidance on how to decide the questions relating to program-length children's commercials. See generally Senate Report at 22 ("The Committee has not dealt with [the program-length commercial] controversy except to require the FCC to complete . [Mass Media Docket No.] 83-670 . . . . The Committee does not intend to affect the regulation of the controversy by enactment of this legislation.")

<sup>129</sup> ACT Comments at 45.

<sup>130</sup> See, e.g., HSN Comments at 26 & n. 23; Cohn and Marks Reply at 26-27.

<sup>131</sup> CTW Reply at 11.

<sup>132</sup> Disney Comments at 18-24; MPAA Reply at 4-6.

<sup>133</sup> McGannon Comments at 22-24. Cf. NABB Comments at 33-34, iv (whether related products are advertised on television should be factor in determining whether show is program-length children's commercial).

<sup>134</sup> Cf. Disney Comments at 24 (if, *inter alia*, manufacturers were not permitted to advertise their products during other shows, it could become economically imprudent for Disney to continue producing children's series for first-run syndication).

<sup>135</sup> Disney Comments at 21-24. CTW also asks us to ban all program-length child-directed promotions containing no separate advertising spots. CTW Comments at 20-23. This request, however, begs the basic dilemma: how to distinguish a program from a promotion.

<sup>136</sup> McGannon Comments at 17-18.

<sup>137</sup> *Topper Corp.*, 21 FCC 2d 148 (1969). See also *American Broadcasting Companies, Inc.*, 23 FCC 2d 132 (1970); *American Broadcasting Companies, Inc.*, 23 FCC 2d 134 (1970).

<sup>138</sup> CTW Comments at 4; Disney Comments at 10-12, 15-16.

<sup>139</sup> See generally Capital Cities Reply at 13-14 (commercial motives are not necessarily inconsistent with good programming for children).

<sup>140</sup> *ACT v. KTTV*, 58 RR 2d 61, 67 n. 18 (1985), *rev'd on other grounds*, *NABB v. FCC*, *supra*.

<sup>141</sup> Cf. Disney Comments at 25-26 (test based on producer's intent would be impermissibly vague and would tend to chill the creative process).

<sup>142</sup> See *Weigel Broadcasting Company*, 41 FCC 2d 370 (1973) (eight-minute segment inviting viewers to contact sponsor about entering chinchilla ranching business in half-hour program on

chincilla ranching); MPAA Comments at 4 n.5 (clever marketer cloaking commercial message in, for example, a news report in body of program).

<sup>143</sup> ACT Comments at 45-46.

<sup>144</sup> For our traditional definition, see *Applicability of Commission Policies on Program-Length Commercials*, 44 FCC 2d 985, 986 (1974)(a program segment "so interwoven with, and in essence auxiliary to the sponsor's advertising . . . that the entire program constitutes a single commercial promotion for the sponsor's products or services").

<sup>145</sup> *ACT v. KTTV*, supra, 58 RR 2d at 66 (applying traditional definition by reviewing program for the airing of related commercials).

<sup>146</sup> *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 380 (1984).

<sup>147</sup> Our policy against "host-selling" prohibits the use of program talent to deliver commercials. *Action for Children's Television*, 50 FCC 2d 1, 8, 16-17 (1974). The policy applies to endorsements or selling by animated cartoon characters as well as "live" program hosts. Letter to KCOP Television from FCC Mass Media Bureau, Enforcement Division (May 15, 1989) (*May 15 Letter*). "Host-selling" is a special application of our more general policy with respect to separation of commercial and program material. The separation policy is an attempt to aid children in distinguishing advertising from program material. It requires that broadcasters separate the two types of content by use of special measures such as "bumpers" (e.g., "And now it's time for a commercial break," "And now back to the [title of the program]"). *Action for Children's Television*, 50 FCC 2d at 14-16. Bringing program elements into the commercial breaks within a program, for example, undermines the effectiveness of this policy. *May 15 Letter*. In general, a first-time violation of a Commission policy such as host-selling or separation of program and commercial material will result in a letter of admonishment. Violations of our rules regarding program-length children's commercials may be subject to forfeitures.

<sup>148</sup> See generally MPAA Reply at 7.

<sup>149</sup> ACT Comments at 47-50.

<sup>150</sup> *Notice*, 5 FCC Rcd at 7201. See, e.g., NIMA Comments at 4; AAP Comments at 2.

<sup>151</sup> INTV Comments at 51-52; NIMA Comments at 4.

<sup>152</sup> ACT Petition (filed Jan. 17, 1986); ACT Petition for Declaratory Ruling or Notice of Inquiry at 1, 5-6 (filed Feb. 9, 1987) (*ACT Interactive Toy Petition*).

<sup>153</sup> ACT Comments at 27 n.78. See also AAP Comments at 4; NIMA Comments at 4.

<sup>154</sup> *ACT Interactive Toy Petition*.

<sup>155</sup> See, e.g., Toy Manufacturers Comments at 6-7; AAAA Reply at 17; Tribune Reply at 8-9.

<sup>156</sup> See, e.g., AAAA Reply at 16 (proposing October 1, 1991); INTV Comments at 24-26, 49-50 (proposing January 1, 1992).

<sup>157</sup> NBC Comments at 34; CBS Comments at 15.

<sup>158</sup> CBS Comments at 15-16.

<sup>159</sup> NAB Comments at 14; INTV Comments at 24-26.

<sup>160</sup> See, e.g., CBS Comments at 15.

<sup>161</sup> An April 1989 predecessor version of H.R. 1677, the bill ultimately enacted into law, specifically provided that the commercial limits were to be effective January 1, 1990 (eight months later) and the House Report on the bill, issued that November echoed that same January 1, 1990 effective date (two months later). H.R. 1677, 101st Cong. 1st Sess. (1989). The House Report, issued in November, 1989, contemplates a January, 1990 effective date for the commercial limits. House Report

at 16. On the other hand, the Senate Report states that it expects licensees to be in compliance with the programming standard set forth in the legislation within one year of enactment. Senate Report at 24. In July of 1990, three months before the bill's passage, Senator Inouye, one of the members of the House committee reporting the bill, stated that "[t]he committee expects licensees to be in compliance with the commercial time limits and the programming standard set forth in Title I by September 1991." 136 Cong. Rec. S10122 (daily ed. July 19, 1990).

<sup>162</sup> We do not agree with NABB that Congress intended a Spring 1991 effective date. Allowing for the 180 days to complete this Rule Making afforded by the statute, and the time needed to obtain Office of Management and Budget approval for the filing obligations the statute necessitates, a Spring 1991 effective date would not be possible. 5 C.F.R. Section 1320.14(c).

<sup>163</sup> See, e.g., Joint Broadcast Parties Comments at 26; INTV Comments at 49, 50.

<sup>164</sup> INTV Comments at 26-28; NAB Comments at 14 n.18.