

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman

October 1, 2007

EXECUTIVE SUMMARY

The National Association of Broadcasters (“NAB”) hereby submits its reply to certain comments filed in response to the Commission’s *Public Notice* regarding the status of children’s television programming. The record in this proceeding does not provide any basis for additional or revised regulations, as basic principles of administrative and constitutional law require. Rather, the record highlights the abundant programming choices available to children. As NAB and others demonstrated in the opening comments, broadcasters today are meeting the educational and informational needs of young viewers through a diverse array of high quality children’s programming and thus fulfilling the goals of the Children’s Television Act of 1990. Further, the myriad children’s programming options offered by commercial broadcasters are supplemented by the child-focused offerings of noncommercial stations, cable and satellite channels and video on-demand, DVDs, and the Internet.

The proposals set forth by the Children’s Media Policy Coalition (“CMPC”) in its opening comments would impose on broadcasters burdensome obligations that are unsupported by the record and of questionable legality. Adoption of CMPC’s proposals would require the Commission, among other things, to make subjective judgments about the value of particular educational content, micromanage program scheduling, ignore its traditional definition of “common ownership,” and would compel broadcasters to place certain content on their websites. CMPC fails, however, to provide a legal basis for its proposals or demonstrate with objective evidence that the Commission’s current rules are inadequate. Moreover, well-established First Amendment principles and administrative precedent bar the Commission from engaging in the type of content-based review that CMPC invites. In light of the record confirming that broadcasters continue to provide high quality children’s programming, and guided by relevant First Amendment and administrative law principles, the Commission should adhere to its long-

standing practice of relying on the good faith judgment of broadcasters in serving the educational and informational needs of children.

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	i
I. THE RECORD CONFIRMS THAT BROADCASTERS ARE PROVIDING HIGH QUALITY, DIVERSE EDUCATIONAL AND INFORMATIONAL CHILDREN’S PROGRAMMING PURSUANT TO THE CURRENT REGULATORY REGIME.	2
II. THE FIRST AMENDMENT AND COMMISSION PRECEDENT BAR THE COMMISSION FROM ENGAGING IN THE TYPE OF CONTENT-BASED DECISIONMAKING THAT CMPC ADVOCATES.	6
A. The Proposals Advocated by CMPC Amount to Content-Based Regulation that Cannot Survive Heightened First Amendment Scrutiny.	6
B. There Is No Basis to Depart from Commission Precedent by Adopting Content-Based Regulations Limiting Broadcasters’ Discretion Regarding the Manner in Which They Serve Children’s Needs.	9
III. THE COMMISSION SHOULD REJECT CMPC’S OTHER SPECIFIC PROPOSALS.	11
A. The Commission Should Not Dictate Specific Times During Which Broadcasters Must Air Core Programming.....	11
B. The Commission’s Restriction on Commonly Owned Same-Market Stations Counting Identical Programming as Core Does Not and Should Not Apply to Non-Attributable Ownership Interests.....	14
IV. CONCLUSION.....	16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

)
)
) MM Docket No. 00-167
)
)

Children’s Television Obligations of Digital
Television Broadcasters

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ hereby submits this reply to certain comments filed in response to the Commission’s *Public Notice* regarding the status of children’s television programming.² In its opening comments, the Children’s Media Policy Coalition (“CMPC”) urges the Commission to impose burdensome and constitutionally suspect new children’s programming obligations on broadcasters. As discussed below, the record in this proceeding does not provide any basis for additional or revised regulations. Rather, the record confirms NAB’s initial showing that broadcasters today are providing a diverse array of high quality children’s programming and fulfilling the goals of the Children’s Television Act of 1990 (“CTA”). In light of the evidence that broadcasters are doing much to serve the unique needs and interests of children, and given the dubious legality of the intrusive new rules that CMPC

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free local radio and television stations, as well as broadcast networks, before Congress, the FCC and other federal agencies, and the Courts.

² *Commission Seeks Comment on the Status of Children’s Television Programming*, Public Notice, 22 FCC Rcd 7267 (2007) (“*Public Notice*”); see also *Extension of Time to File Comments on the Status of Children’s Television Programming*, Public Notice, 22 FCC Rcd 10,119 (2007).

proposes, the Commission should continue to afford broadcasters discretion in the provision of educational and informational children's programming.

I. THE RECORD CONFIRMS THAT BROADCASTERS ARE PROVIDING HIGH QUALITY, DIVERSE EDUCATIONAL AND INFORMATIONAL CHILDREN'S PROGRAMMING PURSUANT TO THE CURRENT REGULATORY REGIME.

For the Commission to justify increased regulation of children's television programming, the record must demonstrate that the current rules are inadequate and that increased regulation would remedy these inadequacies.³ Simply stated, as a matter of fundamental constitutional and administrative law, the Commission cannot increase broadcasters' children's programming obligations without evidence of an actual problem. Overall, the record in this proceeding does not support CMPC's claim that broadcasters are failing to meet the educational and informational needs of children.

To the contrary, as NAB and others demonstrated in their opening comments, today's broadcasters are fulfilling the goals of the CTA by offering a wide array of high quality, diverse programming that satisfies the Commission's "core" programming criteria.⁴ Even CMPC

³ See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."); *ALLTEL Corporation v. FCC*, 838 F.2d 551, 560 (D.C. Cir. 1988) (finding that the FCC's "facially plausible" claim that a local exchange carrier rule prevented certain abuses ultimately failed to justify the rule because there was "no showing that such abuse" did in fact exist and "no showing that the rule target[ed] companies engaged in such abuse"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (a "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist").

⁴ See, e.g., Comments of NAB ("NAB Comments") at 4-6 (Sept. 4, 2007) (describing examples of core programming offered by major network affiliates and local independent stations); Comments of The Walt Disney Co. and ABC, Inc. ("ABC Comments") at 1-2 (June 1, 2007) (reaffirming ABC's commitment to serving the educational and informational needs of children and expressing confidence that the core programming reported by its stations meets the Commission's requirements); Comments of Trinity Christian Center of Santa Ana, Inc. ("Trinity Comments") at 9-10, Table 1 (June 1, 2007) (highlighting core children's programs aired by Trinity Broadcasting Network).

recognizes this fact, stating that, “[t]o the extent that one of the major purposes of the CTA was to increase the amount of educational programming offered to children, we believe that that goal is generally being met.”⁵ The opening comments also elucidated the vast amounts of additional programming aired by commercial broadcasters—such as cultural, news, weather, and other educational specials—that does not meet the FCC’s definition of “core” but nonetheless satisfies children’s educational and informational needs.⁶ NAB and others also showed that parents have abundant additional choices, beyond the services provided by commercial broadcast stations, for educational and informational programming specifically designed for children, including the child-focused offerings of noncommercial broadcast stations, specialized cable and satellite channels and on-demand offerings, DVDs, and the Internet.⁷

Despite the ample choices available to young viewers today, CMPC urges the Commission to increase its regulation of children’s programming. CMPC fails to demonstrate with objective evidence, however, that the current rules are inadequate, and thus, as a matter of law, provides no basis for adoption of its proposals.⁸ To the contrary, CMPC’s arguments are based upon the results of two very limited surveys conducted in response to the Commission’s

⁵ Comments of Children’s Media Policy Coalition (“CMPC Comments”) at 4 (Sept. 4, 2007).

⁶ *See, e.g.*, NAB Comments at 6-8; Trinity Comments at 9-10.

⁷ *See, e.g.*, NAB Comments at 8-13; Joint Comments of the Association of Public Television Stations and the Public Broadcasting Service (“APTS/PBS Comments”) at 2-4 (May 31, 2007) (noting that most PBS stations offer much more than three hours *per day* of core educational and informational children’s programs). Commercial and noncommercial broadcasters alike are leveraging the Internet to complement their broadcast offerings and enhance the educational experiences of children. *See* NAB Comments at 11-12; APTS/PBS Comments at 6-7.

⁸ Likewise, NAB respectfully submits that the claims of Ms. Margaret Draper, who expresses personal opinions regarding the “objectionable” behavior modeled on cartoon shows, negative impact of rap music on television programming, and “jumbled nature” of new video design, cannot possibly form the legal or evidentiary bases for revision of the Commission’s rules. *See* Comments of Margaret Draper at 1-2 (Apr. 18, 2007).

Public Notice. In one survey, CMPC studied the amount of and preemption rates for core programming aired by 30 major network affiliates in six top-ten DMAs during the first quarter of 2007.⁹ Another survey by CMPC member Children Now examined 23 episodes of programs claimed as “core” by major networks in the Los Angeles, California DMA to determine whether the programming met the Commission’s standards.¹⁰

CMPC readily admits that its review of children’s programming was not “an exhaustive examination of E/I compliance,”¹¹ and that, indeed, is quite an understatement. In the *Program Hours and Preemptions Survey*, CMPC confined its analysis to certain network affiliates (ABC, CBS, CW, Fox, and NBC) in only six of the nation’s largest markets. This limited sample not only excluded approximately 79% of U.S. television households, but also failed to consider any programming or scheduling differences unique to mid-size and small market broadcasters.¹² Similarly, the *Program Content Survey* was limited to programming aired in the Los Angeles DMA, which CMPC baldly asserts is “largely representative of (and in most cases identical to) the programming provided by major networks in most markets across the country.”¹³ CMPC provides no rationale, however, for extrapolating the results of either under-inclusive, informal

⁹ CMPC Comments, Appendix I (“*Program Hours and Preemptions Survey*”).

¹⁰ CMPC Comments, Appendix II (“*Program Content Survey*”).

¹¹ See CMPC Comments at 3-4.

¹² Markets analyzed in the *Program Hours and Preemptions Survey* included Atlanta, Chicago, Dallas-Ft. Worth, Los Angeles, New York, and Washington, D.C., which, according to Nielsen estimates, only account for approximately 21% of U.S. television households. See Nielsen Media Research, Nielsen Media Research Local Market Universe Estimates (2006-2007), available at <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=6573d3b8b0c3d010VgnVCM100000ac0a260aRCRD>.

¹³ CMPC Comments at 4.

survey to the universe of commercial television broadcasters.

Notably, CMPC also fails to explain the “methodology” behind its evaluation of children’s programming content. In the *Program Content Survey*, after reviewing only one to two episodes of various children’s programs, CMPC member Children Now formed biased and subjective conclusions regarding the educational or informational nature of the programming and the accuracy of claims made on stations’ FCC Forms 398. The survey categorized programs as “social/emotional” or “cognitive/intellectual” and judged whether programs had “poor” or “good” educational content, but did not explain the standards which governed these arbitrary categorizations and certainly gave no legal or empirical bases for them.¹⁴ Overall, CMPC’s surveys are riddled with flaws, not the least of which is, as discussed further below, the ultimate subjectivity of the content review itself. As such, they cannot possibly form the basis for a decision to impose new restrictions on broadcasters.¹⁵

¹⁴ See *Program Content Survey* at 1.

¹⁵ Nor can Children Now’s recently released study on duopoly ownership and children’s programming be used to justify increased regulation in this area. See Children Now, *Big Media, Little Kids 2: Examining the Influence of Duopolies on Children’s Television Programming*, Sept. 2007, available at <http://publications.childrennow.org/assets/pdf/cmp/big-media-little2-07.pdf>. This latest study is apparently aimed at the FCC’s pending ownership proceeding, particularly the formation of television duopolies, which, the study asserts, had led to declining quantities of children’s television programming on broadcast stations. See *id.* at 1. Importantly for the present children’s inquiry, this new study does not assert that broadcast stations – whether part of duopolies or not – are failing to comply with any Commission regulations on children’s programming. Children Now also downplays the significance of cable and satellite programming asserting that those services are not universally available. See *id.* at 3. In doing so, Children Now altogether ignores the role of free, over-the-air noncommercial stations, on which children’s programming is often the “centerpiece” of program line-ups. See APTS/PBS Comments at 2-4; see also NAB Comments at 9-10. Finally, like the flawed qualitative survey on which CMPC relies in its comments in this proceeding, Children Now’s focus on a small number of duopolies and children’s programming misses the mark.

II. THE FIRST AMENDMENT AND COMMISSION PRECEDENT BAR THE COMMISSION FROM ENGAGING IN THE TYPE OF CONTENT-BASED DECISIONMAKING THAT CMPC ADVOCATES.

A. The Proposals Advocated by CMPC Amount to Content-Based Regulation that Cannot Survive Heightened First Amendment Scrutiny.

Content-based regulations—even in the broadcast context—are subject to heightened review and must be “narrowly tailored to further a substantial governmental interest” in order to be valid.¹⁶ The “principal inquiry” to be applied in deciding whether a particular regulation is content-based, and thus subject to heightened scrutiny “is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”¹⁷ “The government’s purpose is the controlling consideration.”¹⁸ Often times, “[t]he purpose, or justification, of a regulation,” and its content-based character, will “be evident on its face.”¹⁹ The fact that a regulation, such as one limiting broadcasters’ ability to claim certain educational and informational programming as “core,” fails to ban speech outright does not warrant application of a lower standard of review.²⁰

In its opening comments, CMPC urges the Commission to increase regulation of children’s programming content and make content-based distinctions based upon programs’ particular educational or informational lessons. Based on the *Program Content Survey*, CMPC

¹⁶ See *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

¹⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁸ *Ward*, 491 U.S. at 791.

¹⁹ *Turner Broad. Sys, Inc.*, 512 U.S. at 642 (citing *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

²⁰ See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826 (2000) (“When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.”).

concludes that the vast majority of today's educational and informational programming imparts only social/emotional messages and fails to fulfill the CTA's goal of teaching children vocabulary, math, and other academic skills.²¹ CMPC also asserts that broadcasters claim as core some programming that has little or no educational value.²² Consequently, CMPC urges the Commission to adopt a stronger definition of core programming and to require, in particular, that broadcasters air some programming designed to meet children's cognitive/intellectual, not merely social/emotional, needs.²³

In the *Program Content Survey* upon which CMPC relies, if lessons were viewed as "difficult to determine" or "not integral to the plot," a program was judged to have "poor" educational content, whereas a program with a "clear" lesson that was "easy for a viewer in the program's target age range to understand" and "an important part of the story or character development" was deemed to have "good" educational content.²⁴ In their unabashedly subjective review, the survey's authors criticized programs believed to contain generic or weak educational messages,²⁵ programs that failed to capitalize on all available opportunities to impart

²¹ See CMPC Comments at 10-12. Content was considered social/emotional if "the story or lesson in the show dealt with interpersonal relationships or personal values" and cognitive/intellectual if "the material dealt with traditional educational lessons, such as science, literary skills, history or art." *Program Content Survey* at 1.

²² See CMPC Comments at 3, 14-17. In addition to the *Program Content Survey*, CMPC cites as support for this conclusion program monitoring by one of its members and Annenberg Public Policy Center studies that it concedes are "out of date." See *id.*

²³ See CMPC Comments at 18-19.

²⁴ See *Program Content Survey* at 1.

²⁵ See, e.g., *Program Content Survey* at 7 (reviewing "Hannah Montana:" "Although this episode contains a weak educational message about working hard and not giving up on something one wants to achieve, the main character only wanted to succeed on her test so she could go on tour."); *id.* at 27 (reviewing "Jane and the Dragon:" "The message in this episode

educational lessons,²⁶ older programs,²⁷ and programs with incidental appeal to a broader audience.²⁸ Expounding on the findings of the *Program Content Survey*, CMPC made its own judgments about the value of surveyed episodes and urged the Commission to require broadcasters to air some programming meeting children’s cognitive/intellectual needs—needs which CMPC apparently deems paramount.²⁹ The subjective, content-based nature of the judgments upon which CMPC’s proposals are based is indisputable.

As NAB demonstrated in its opening comments, the First Amendment bars the Commission from engaging in the type of content-based decisionmaking that CMPC’s proposals invite.³⁰ Thus, while CMPC is entitled to its own opinion regarding the relative “strength” of particular educational lessons, the Commission is not at liberty to “impose upon [broadcasters] its private notions of what the public ought to hear.”³¹ NAB agrees that the government’s interest in ensuring that the needs of child viewers are met may well qualify as a “substantial”

seemed to be that it’s bad to tell lies, but it was very weak, especially since the viewer never sees the characters learn from their mistakes.”).

²⁶ See, e.g., *Program Content Survey* at 3 (reviewing “The Emperor’s New School:” “Kuzco never has to face a personal conflict or find a resolution, nor are there any real repercussions for Kuzco’s anti-social behavior (other than his eventual loneliness).”).

²⁷ See, e.g., *Program Content Survey* at 16, 20 (reviewing “Wild America” and “National Geographic’s Really Wild Animals”).

²⁸ The survey suggested that “Wild America” is not specifically intended for children simply because the episode reviewed included commercials for companies like American Express and a PSA for foster parents. See *Program Content Survey* at 16. It is hardly unreasonable, however, for broadcasters (and advertisers) to expect some parents to view core programs with their children.

²⁹ See CMPC Comments at 10-12, 15-16.

³⁰ See NAB Comments at 13-15.

³¹ *Turner Broad. Sys., Inc.*, 512 U.S. at 650 (internal citations omitted).

one. Any rule limiting broadcasters' wide discretion in the manner urged by CMPC, however, could not reasonably be found narrowly tailored to advance the government's interest in protecting and educating children.³²

B. There Is No Basis to Depart from Commission Precedent by Adopting Content-Based Regulations Limiting Broadcasters' Discretion Regarding the Manner in Which They Serve Children's Needs.

Undeniably, CMPC's assertions regarding the alleged failures of broadcasters to meet the needs of children were based entirely on its own subjective judgments regarding the content and quality of children's programming. Incorporating such subjective considerations into a revised core programming definition would not only conflict with the First Amendment, but would also violate the Commission's bedrock principle that "judgments of the quality of a licensee's programming, educational or otherwise, are best made by the audience, not by the federal government."³³ To that end, the Commission has recognized the need for a core programming definition that is "as objective as possible" so that licensees and Commission staff can more easily understand the rules and the Commission can avoid making "sensitive decisions regarding program content."³⁴

NAB recognizes the value of programming teaching basic academic skills,³⁵ but

³² Cf. *id.* at 651 (finding that "broadcast licensees must retain abundant discretion over programming choices"); *Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broad. Stations*, Report and Order, 11 FCC Rcd 10,660, 10,663 (¶ 7) (1996) ("1996 Children's Television Report & Order") (defending its regulations as being "appropriately tailored to provide flexibility for broadcasters").

³³ See *Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broadcast Stations*, Notice of Proposed Rulemaking, 10 FCC Rcd 6308, 6310 (¶ 4) (1995) ("1995 Children's Television NPRM").

³⁴ *1996 Children's Television Report & Order*, 11 FCC Rcd at 10,698 (¶ 80).

³⁵ Many broadcasters do, in fact, choose to air programs designed to meet children's cognitive/intellectual needs. Examples include: "It's Academic," an award-winning high school

maintains that nothing in the CTA or the Commission's rules prohibits broadcasters from fulfilling their obligations to children through programming that imparts social/emotional messages. Notably, in the *1996 Children's Television Report & Order*, the Commission considered and rejected the argument put forth by some commenters that programs "specifically designed" to further educational and informational needs must advance children's cognitive/intellectual development.³⁶ Recognizing that educational programs must still be entertaining and attractive to children, the FCC found that:

[The CTA] does not draw a distinction between educational and informational programming that furthers children's cognitive and intellectual development and educational and informational programming that furthers children's social and emotional development. We decline to draw that distinction ourselves and accordingly conclude that both fall within the scope of our definition. We underscore that we are not interested in influencing—or even knowing—the viewpoint of any core programming.³⁷

The record in this proceeding provides no basis for the Commission to alter its statutory interpretation or depart from well-established precedent, as CMPC urges, to require broadcasters to air certain amounts of programming specifically designed to meet children's

quiz show endorsed by the National Association of School Boards that tests students' knowledge of academic subjects including history, geography, science, and math, *see* NBC, *It's Academic*, <http://www.nbc4.com/education/10255946/detail.html> (last visited Sept. 26, 2007); *Exploration with Richard Weise*, which takes viewers around the globe to answer questions about natural disasters, *see* FCC Form 398 for KSBW, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/19/report.faces> (query for KSBW 2Q 07); http://www.newsweather.com/tv_show.php (last visited Sept. 26, 2007); "Jack Hanna's Animal Adventures," a nature program taking children around the world to view animals in various habitats, *see* Jack Hanna's Animal Adventures, <http://www.animaladventures.com/> (last visited Sept. 26, 2007); and "B in Tune," a music and arts program supported by the In Tune Foundation Group, which is funded in part by the U.S. Department of Education, *see* B in Tune, <http://www.bintune.net/about.html> (last visited Sept. 26, 2007).

³⁶ *See 1996 Children's Television Report & Order*, 11 FCC Rcd at 10,699-10,701 (¶¶ 82-87).

³⁷ *Id.* at 10,701 (¶ 87). The Commission emphasized that, in adopting the processing guideline, they were not "telling licensees what topics to discuss." *Id.* at 10,730 (¶ 151).

cognitive/intellectual needs.³⁸

The opening comments confirm that broadcasters continue to provide high quality educational and informational programming, and the Commission’s existing rules, including its criteria for defining “core” programming, are adequate and effective.³⁹ In light of this record and relevant First Amendment and administrative law principles, there is no justification for a departure from the Commission’s long-standing practice of reliance on the good faith judgment of broadcasters in serving the educational and informational needs of children.⁴⁰

III. THE COMMISSION SHOULD REJECT CMPC’S OTHER SPECIFIC PROPOSALS.

A. The Commission Should Not Dictate Specific Times During Which Broadcasters Must Air Core Programming.

CMPC also urges the Commission to modify its processing guideline to require broadcasters to schedule some educational and informational programming on weekdays between 7 am and 10 pm.⁴¹ Based on its cursory *Program Hours and Preemptions Survey*, which as noted above analyzed only certain network affiliates in six markets, CMPC concludes that most broadcasters air educational children’s television programming exclusively on weekends and therefore allegedly fail to fulfill the CTA’s goal of making children’s

³⁸ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

³⁹ See, e.g., ABC Comments at 1-2; Trinity Comments at 13. Should the Commission find a problem sufficient to warrant revision of its core programming definition, however, NAB respectfully submits that any new definition must be sufficiently clear to provide broadcasters with notice of the substantive standards by which their conduct will be judged. See NAB Comments at 15, n.47. Clearly, any standard resembling the one utilized in CMPC’s survey (with its subjective determinations of “poor” and “good” educational content) would not suffice.

⁴⁰ See 47 C.F.R. §73.671, Note 1.

⁴¹ See CMPC Comments at 18.

programming broadly available at times when children are watching television.⁴² Elsewhere in its opening comments, however, CMPC acknowledges the FCC's 1995 observation that "while most network affiliates aired the bulk of their children's programming on the weekends, Fox affiliates and most independent stations aired children's programming on weekdays."⁴³ Major network affiliates certainly comprise a sizeable portion of the nation's broadcasters, but CMPC's survey made no attempt to account for other stations that may, as CMPC recognizes, air children's fare on weekdays.

Moreover, CMPC's proposal invites the Commission to impermissibly micromanage program scheduling, a task that should be left to broadcasters' discretion. The current regulatory regime recognizes the well-established principle that the Commission's authority to control the scheduling choices of broadcasters is constitutionally limited. Indeed, as the Commission has recognized:

Section 326 of the Communications Act and the First Amendment to the Constitution prohibit any Commission action which would improperly interfere with the programming decisions of licensees. With certain limited exceptions, such as the broadcast of obscene or indecent programming, *licensees are accorded a great deal of discretion in the scheduling, selection and presentation*

⁴² See CMPC Comments at 5-6. CMPC suggests that because most stations air core programming on weekends and children can only watch one show at a time, the amount of programming available to children is limited. As discussed in Section I, *supra*, this argument ignores the myriad non-broadcast children's programming options available to children today. In any event, as the examples in NAB's opening comments illustrate, broadcasters do offer some core children's programs during weekdays, such as *Teen Kids News* and ION Media Network's Friday afternoon Qubo line-up, not to mention the twenty-four-hour digital multicast Qubo channel. See NAB Comments at 5-6; Qubo TV Schedule, <http://www.qubo.com/tvschedule.asp> (last visited Sept. 26, 2007); Qubo 24/7, <http://www.qubo.com/dtvschedule.asp> (last visited Sept. 26, 2007); *Teen Kids News*, <http://www.teenkidsnews.tv/> (last visited Sept. 26, 2007).

⁴³ CMPC Comments at 6 (citing *1995 Children's Television NPRM*, 10 FCC Rcd at 6334-35 (¶ 51)).

of programs and announcements to be aired by their stations.⁴⁴

Accordingly, the Commission traditionally has taken a “hands-off” regulatory approach to children’s program scheduling.⁴⁵

The Commission has in fact done so for decades, notwithstanding previous suggestions that a contrary approach—akin to that suggested by CPMC—would be appropriate. Indeed, when the Commission initiated the proceeding which eventually led to adoption of the current processing guideline, it received comments urging for a daily, rather than weekly, minimum quantitative guideline.⁴⁶ In addition, as CMPC observes, both the Senate Report on the CTA and a 1974 FCC Policy Statement expressed concerns about confining children’s programming to limited time slots.⁴⁷ Without a doubt, then, CMPC’s weekday programming requirement is not a novel proposition. Obviously, the Commission has been aware of these issues since the 1970s but nonetheless has declined to burden broadcasters with onerous scheduling regulations mandating some arbitrary quantity of weekday children’s programming. Nothing in the record

⁴⁴ *Nat’l Broad. Co., Inc.; For Renewal of License of Station WNBC(TV), N.Y., N.Y.*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 9026, 9031 (¶ 18) (1999) (emphasis added).

⁴⁵ *See, e.g., 1996 Children’s Television Report & Order*, 11 FCC Rcd at 10,709 (¶ 101) (in establishing 10 pm as the evening limit for core programming, the FCC emphasized that it *did not* expect the limit “to impose a burden on broadcasters, or impede their program scheduling strategies”); *see also In the Matter of Children’s Television Obligations of Digital Television Broads.*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22,943, 22,951 (¶ 22) (2004) (observing that the Commission averages the three-hour processing benchmark over a six-month period “in order to provide broadcasters with scheduling flexibility”).

⁴⁶ *See 1995 Children’s Television NPRM*, 10 FCC Rcd at 6334-35 (¶ 51).

⁴⁷ *See* CMPC Comments at 5; Petition for Action For Children’s Television (Act), *Children’s Television Report and Policy Statement*, 50 FCC 2d 1, 6-7 (1974); S. Rep. No. 227, 101st Cong., 1st Sess. 1, 8 (1989).

provides a legitimate basis for the Commission to change course now.⁴⁸

B. The Commission’s Restriction on Commonly Owned Same-Market Stations Counting Identical Programming as Core Does Not and Should Not Apply to Non-Attributable Ownership Interests.

CMPC asks the Commission to “clarify” that stations with *any* common ownership interests—not merely attributable ones—cannot count identical educational and informational programming as core under the current rules. In the *2003 Ownership Order*, the Commission stated that “where two or more stations in a market are commonly owned and air the same children’s educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in Section 73.671,”⁴⁹ but clearly intended to refer to *attributable* common ownership interests.

As an initial matter, a contrary interpretation would make no sense, as attributable interests are the only common interests that are generally recognized under the Commission’s rules. By its terms, moreover, the *2003 Ownership Order* confirms that the Commission’s policy on identical core programming applies only to entities with attributable ownership interests in same-market stations. When describing its modified local television ownership rule, the Commission stated that the “rule will *permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations.*”⁵⁰ The Commission later reiterated this using slightly different language, stating that the “outlet cap will *allow common ownership of no more than two television stations in markets with 17 or fewer*

⁴⁸ See, e.g., *State Farm Mutual Auto. Ins.*, 463 U.S. at 42.

⁴⁹ *2002 Biennial Regulatory Review—Review of the Comm’s Broad. Ownership Rules*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13,620, 13,690 (¶ 183) (2003) (“*2003 Ownership Order*”), *aff’d in part, rev’d in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005); see CMPC Comments at 21.

⁵⁰ *2003 Ownership Order*, 18 FCC Rcd at 13,668 (¶ 134) (emphasis added).

stations.”⁵¹ By equating the two, the Commission clearly considered “commonly owned” stations to be those in which a party has an attributable interest. Adopting CMPC’s proposal, however, would require the Commission to completely ignore its attribution rules, and find that *any* common ownership interest bars broadcasters from claiming identical programming as core. Such a departure from the FCC’s long-standing and well-understood definition of common ownership is entirely unwarranted.

CMPC’s proposal is also wholly impractical. Most fundamentally, if two stations are not controlled by a common owner, how would the stations, much less the FCC, determine which station should receive priority to claim the programming as core? CMPC does not even acknowledge the practical problems that would flow from adoption of its proposal, let alone provide a way for broadcasters or the FCC to resolve them.

Furthermore, CMPC ignores the fact that stations that air the same programs may well do so at different times, as NBC and ION stations currently do, and thus potentially serve different sets of child viewers. For example, NBC stations air *Babar* at 10 am on Saturdays, while ION stations air the program at 3 pm on Fridays.⁵² Children who view the show on Friday afternoons are certainly free to watch other children’s programs on Saturday mornings, and the supposed “overlap” in programming thus does not diminish the diversity of options available to any particular viewer.

Finally, CMPC’s proposal—like so many of its others—demonstrates a very basic misunderstanding of parents’ varied options in today’s video marketplace. If parents believe that duplicative children’s programming offered by particular sets of local stations, to the extent that

⁵¹ *Id.* at 13,691 (¶ 186) (emphasis added).

⁵² *See* <http://www.qubo.com/tvschedule.asp> (last visited Sept. 26, 2007).

this situation exists at all, does not serve their children's needs, then, as discussed in NAB's opening comments, there are abundant choices offered by other local commercial broadcasters, public television stations, cable and satellite channels, and the Internet to which they may turn.⁵³

IV. CONCLUSION

The record in this proceeding confirms that broadcasters are meeting the educational and informational needs of children by providing an abundance of high quality, diverse educational and informational children's programming. In its opening comments, CMPC stands the First Amendment and administrative law on their heads and fails to demonstrate with objective evidence the existence of a problem warranting regulatory intervention. Under the FCC's current children's programming regime, broadcasters have the necessary discretion to make programming and scheduling decisions, and the public participation process and well-functioning marketplace exist as safety nets if individual broadcasters fail to meet the Commission's standards. Accordingly, NAB urges the Commission to continue to adhere to its

⁵³ CMPC also argues that programming should only be counted as core if it is clearly and prominently identified as educational and informational on the station's website. *See* CMPC Comments at 8-9; 18. Not only does the First Amendment counsel against such a requirement, but neither the CTA nor any other provision of the Communications Act confers statutory authority on the FCC to regulate broadcasters' website content. *See Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11,065, 11,077 (¶ 30) (2006) ("[T]he Commission has the authority to enact these restrictions *because they do not regulate Internet content*, but rather the advertising of commercial websites in children's programming, a subject clearly within the scope of the Commission's jurisdiction.") (emphasis added). Further, CMPC gives no objective reasons why the Commission should do so. For example, CMPC fails to explain why identifying programs as educational and informational on a station's website would do more to inform parents than the Children's Television Programming Reports currently available to the public on the FCC's own website. CMPC does not show that station websites are used by parents as a primary source of program content information, or consider how such a requirement would impact smaller independent stations who do not currently have their own websites

long-standing practice of relying on broadcasters' good faith judgments as to whether programming serves the educational and informational needs of children.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman

October 1, 2007