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

In the Matter of	)	
	)	
Children's Television Programming Rules	)	MB Docket No. 18-202
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

In this proceeding, the Commission proposes to update its analog-era children's television programming rules to provide broadcasters more flexibility in serving the needs of young viewers in a digital world.[1] The National Association of Broadcasters (NAB)[2] fully supports the FCC's objectives. We emphasize that TV broadcasters are not seeking to eliminate their obligations to offer children's educational and informational (E/I) programming. Broadcasters instead seek rules that reflect the 21st century video marketplace, give stations greater flexibility to provide E/I programming better tailored to how children and their families consume video content today, and serve the broader public interest. The FCC's current rules require TV stations to air E/I programming in a rigid way that fails to engage young viewers in an on-demand media marketplace and that needlessly restricts broadcasters' ability to air other highly valued local and live programming. Thus, the existing rules must be modernized to keep pace with the current video landscape.

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[1] *Children's Television Programming Rules, Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, MB Docket Nos. 18-202, 17-105, FCC 18-93, at ¶ 1 (*rel*. July 13, 2018) (Notice).

[2] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

The Commission has the duty under the Communications Act of 1934 to ensure that its children's TV rules serve local communities, and the discretion under the Children's Television Act of 1990 (CTA) to modernize those outdated rules. The CTA's general terms require that, when reviewing broadcast TV license renewal applications, the FCC consider the extent to which each licensee "served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."[3]

To receive routine approval of the children's TV programming portion of their license renewal applications, the FCC's current rules generally require that TV stations air, per each full-time programming stream, an average of three hours per week of strictly defined "core" E/I programming.[4] Broadcasters can also satisfy their obligations by: (1) airing "somewhat less" than three hours of core programming, if their overall package of programming demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours of core programming; or (2) offering some of their own programming and also sponsoring core programming on other stations in the market and/or engaging in special nonbroadcast efforts that enhance the value of their E/I programming.[5] Broadcasters additionally must document their compliance with these rules each quarter by

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[3] 47 U.S.C. § 303b(a).

[4] "Core" programming is "specifically designed" to educate and inform children. Among other requirements, it must be regularly scheduled on a weekly basis; air between the hours of 7:00 a.m. and 10:00 p.m.; and be at least 30 minutes in length. *See* 47 C.F.R. § 73.671; *Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660, 10662 (1996) (1996 Order) (defining core programming and adopting the three-hour "guideline"); *Children's Television Obligations Of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, 22950-51 (2004) (2004 Order) (extending the 1996 requirements to each full-time multicast programming stream aired by a station).

[5] 47 C.F.R. § 73.671; *see also* 47 U.S.C. § 303b(b).

completing and filing with the FCC the Children's Television Programming Report (Form 398).

The existing rules – including the three hour "guideline" – are not statutorily mandated. The CTA merely directs the FCC to consider during license renewal the extent that a TV licensee's programming served the E/I needs of children. Indeed, in its initial rules implementing the CTA in 1991, the FCC did not adopt any quantitative children's programming requirements, stating that the CTA "imposes no quantitative standards and the legislative history suggests that Congress meant no minimum amount of criterion to be imposed."[6]

As NAB previously detailed,[7] and as the Notice describes,[8] the video marketplace reflected in the FCC's rules no longer exists. Since passage of the CTA in 1990, an explosion of outlets and services has transformed the marketplace. Consumers have embraced online video options and a variety of devices for accessing them. As a result, fewer and fewer households lack multiple video options. Indeed, according to Nielsen, *only 0.5 percent* of TV households (or about 582,000 households) have neither internet nor multichannel video services *and* include children ages 2-17. Children and teens, moreover, have migrated to subscription video on demand and social media platforms, and the time they spend watching traditional TV has plummeted.

The existing children's TV rules are now the proverbial square peg in a round video marketplace. Beyond not fitting the current competitive video market, these rigid rules are

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[6] *Policies and Rules Concerning Children's Television Programming, et al.*, Report and Order, 6 FCC Rcd 2111, 2115 (1991) (1991 Order).

[7] *See, e.g.*, Comments of NAB, MB Docket No. 17-105, at 24-26 (July 5, 2017) (NAB Media Modernization Comments).

[8] Notice at ¶¶ 6, 16-17.

costly and counterproductive. One Central time zone Fox affiliate reports, for example, that over the course of a year, it must preempt 7:00 a.m. Saturday and Sunday local newscasts about two dozen times to air rescheduled E/I programs that had been preempted by live sports programming. Multiple stations report they have declined to cover local events, such as community forums and parades, to avoid problems with rescheduling core children's programs in a packed programming line-up that lacks empty time slots. One station even felt compelled to decline to air a six-week Saturday morning community forum on the opioid crisis, given conflicts with scheduled E/I programs. And on several occasions, an Oklahoma TV station stopped its extended weather coverage to air children's programming due to restrictions on the scheduling and placement of E/I programs. Broadcasters additionally state they would offer on their main channels additional local newscasts, or additional programs from small production houses aimed at minority audiences, if they were not restricted from using multicast streams to air E/I programs. In short, the existing children's TV regulatory regime leads to less than optimal use of limited air time to the detriment of stations and their local audiences. The FCC's failure to now modernize its children's TV rules would be arbitrary and capricious.

Given well-documented problems with the outdated children's TV rules, NAB urges the FCC to adopt a much more flexible approach. This will ensure that children receive E/I programming on free, over-the-air (OTA) TV stations, in addition to myriad other sources. It will also afford broadcasters much-needed flexibility to provide this programming to children and parents uninterested in making weekly appointments for one-size-fits-all E/I programs. Notably, increased flexibility in scheduling and placement of E/I programs on stations' various multicast channels will largely prevent disruptive preemptions of both core programming and other popular and local programming on stations' main channels, including news, live sports and special events, thereby benefitting all viewers.

Specifically, NAB proposes a safe harbor approach that would allow TV broadcasters airing a total of 156 hours of core E/I programming annually, with at least 25 hours in each quarter, to qualify for Media Bureau approval of the children's TV portion of their license renewal applications. The FCC should revise its definition of "core" programming to include short-form programs less than 30 minutes in length and those not regularly scheduled, including long-form specials, and should permit stations to air this programming on any free OTA stream between 5:00 a.m. and 10:00 p.m. Consistent with the Notice, the 156-hour standard would apply per licensee and not be multiplied for every multicast stream a licensee may air. NAB also supports Commission efforts to make other options for satisfying children's TV requirements, such as a licensee sponsoring E/I programming on another station in the same market, practical and viable.

Finally, we urge the FCC to reform and streamline its unduly burdensome children's TV reporting requirements. Viewers are not served by TV stations collectively filing tens of thousands of pages every quarter detailing every E/I program when research indicates that members of the public do not use this information in any routine or meaningful manner.

II. CHILDREN'S TV RULES MORE CLOSELY REFLECTING CONSUMERS' VIEWING PREFERENCES AND THE MODERN VIDEO PROGRAMMING MARKETPLACE WOULD BETTER SERVE THE PUBLIC

Viewers generally, and children specifically, no longer access and experience video programming as they did in the analog past. The current children's TV rules, however, are still mired in the bygone era of appointment viewing of a limited number of linear broadcast TV channels, requiring stations to provide children's programming out of sync with the demonstrated viewing habits of today's young viewers. Instead of mandating one-size-fits-all

E/I content, the FCC should revise its children's TV rules to encourage experimentation and the creation of programming better tailored to younger viewers: shorter programs not tied to rigid viewing schedules.

A. The Video Marketplace Has Been Transformed Since Passage of the CTA, Revolutionizing the Time, Place and Manner of Video Consumption, Especially for Younger Viewers.

1. Linear broadcast TV no longer dominates the video marketplace.

When Congress passed the CTA in 1990, "appointment viewing" – that is, viewing program series (mainly broadcast) aired every week at the same time for set periods of time on the same channel via a TV set –was virtually the only way to access quality video programming. Things undoubtedly have changed. An explosion of outlets and services has transformed the video marketplace. Today, OTA broadcasters, cable and satellite TV operators, "virtual" pay-TV services (*e.g.*, Sling TV or DirecTV Now), subscription video on demand (SVOD) services (*e.g.*, Netflix) and social media platforms all compete for audiences' time and attention.

The numbers tell the story. According to Kagan, multichannel video programming distribution (MVPD) penetration was under 58 percent in 1990. Kagan now estimates that over 75 percent of all U.S. households subscribe to a traditional or virtual MVPD service. The average cable system in the early 1990s offered only about 36 channels,[9] compared to the hundreds offered by cable, satellite and telco multichannel video services today.

Broadband subscribership now substantially exceeds total MVPD subscribership and continues to increase.[10] Consumers have embraced online video options. Sixty-nine percent

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[9] S. Rep. No. 102-92, at 3 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1135. Unlike today, cable networks at that time produced very limited original content.

[10] According to the Leichtman Research Group (LRG), 84 percent of U.S. households as of late 2017 had internet service at home, and 91 percent of all households accessed the

of U.S. households subscribe to Netflix, Amazon Prime and/or Hulu, with more than 80 percent of U.S. households having access to at least one on-demand TV service.[11] And 74 percent of U.S. TV households have at least one internet-connected TV device (*e.g.*, smart TVs, stand-alone streaming devices like Roku or Apple TV, or video game systems).[12]

Due to this proliferation of competing video platforms and services, fewer and fewer households lack multiple video options. Indeed, according to Nielsen, *only 0.5 percent* of TV households (or about 582,000 households) have neither internet nor multichannel video service *and* include children ages 2-17.[13] Clearly, the vast majority of children and their parents do not depend on broadcast TV alone for video content, including children's educational programming.

2. Traditional TV is losing young viewers to OTT video providers.

Given the expansion of the video marketplace, the share of time children spend watching broadcast and cable TV has, unsurprisingly, shrunk. The amount of time these young viewers spend watching SVOD services and videos on social media platforms, in

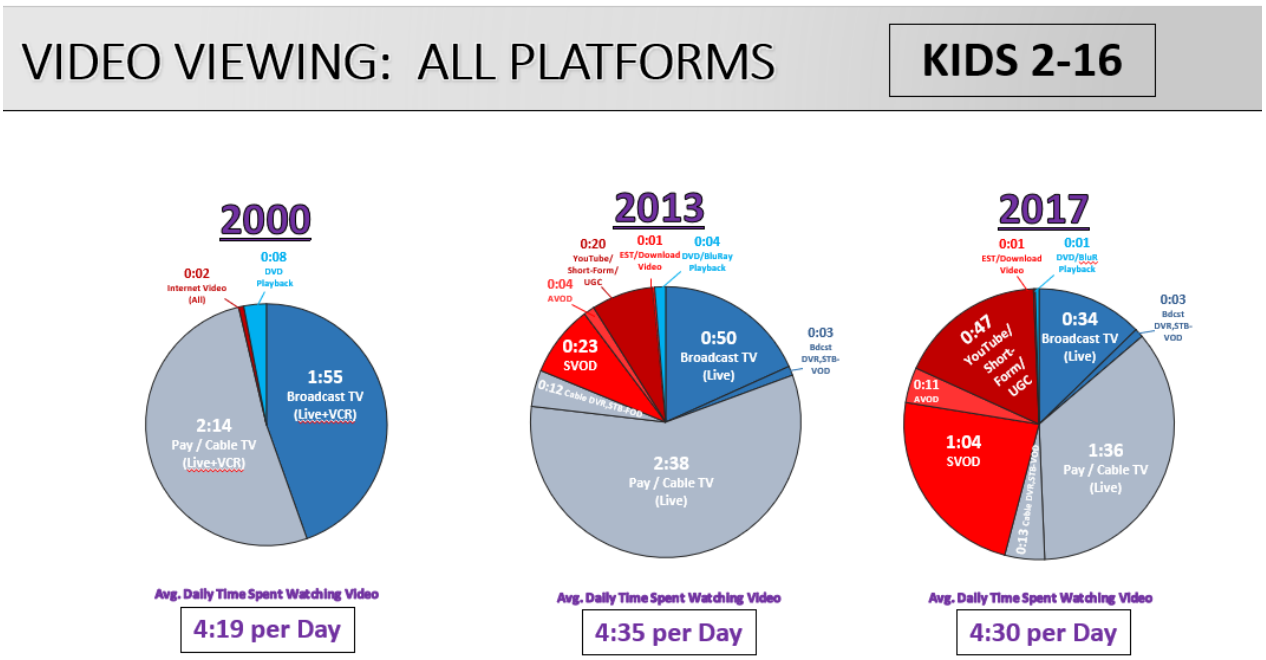
internet either at home and/or on a smartphone. LRG, Press Release, *84% of U.S. Households Get an Internet Service at Home* (Dec. 13, 2017). These numbers continue to grow. According to LRG, the largest cable and telephone providers in the U.S. acquired about 800,000 net additional broadband internet subscribers in the first quarter of 2018 and an additional 455,000 subscribers in the second quarter of this year, after adding 2.1 million subscribers in 2017. LRG, Press Releases, *455,000 Added Broadband in 2Q 2018* (Aug. 14, 2018); *800,000 Added Broadband in 1Q* 2018 (May 18, 2018); *2.1 Million Added Broadband From Top Providers in 2017* (Mar. 13, 2018).

[11] LRG, Press Release, *69% of U.S. Households Have an SVOD Service* (Aug. 27, 2018); *Live TV Cedes Status As Default First Source of TV Content*, marketingcharts.com (July 23, 2018) (citing study by Hub Entertainment Research).

[12] LRG, Press Release, *74% of U.S. TV Households Have at Least One Connected TV Device* (June 8, 2018).

[13] Nielsen estimates there are a total of about 962,000 children ages 2-17 in these 582,000 households. Based on Nielsen's National Panel between the dates 04/26/18-05/23/18.

contrast, continues to rapidly increase. In the year 2000, children ages 2-16 spent 4 hours and 19 minutes per day watching video content, almost entirely with broadcast and pay TV.[14] In 2017, broadcasters and pay TV made up less than half of the 4 hours and 30 minutes per day this age group spent watching video content.[15] And the mere 34 minutes that these young viewers spent per day with linear broadcast TV is notably less than the amount of time they spent with pay TV, SVOD or YouTube/short-form video:



Across the four major English-language broadcast network owned-and-operated and affiliated stations specifically, total viewership of persons ages 2-17 on any given day dropped from 4.0 million in the 1991-1992 television season to 600,000 in the 2017-2018

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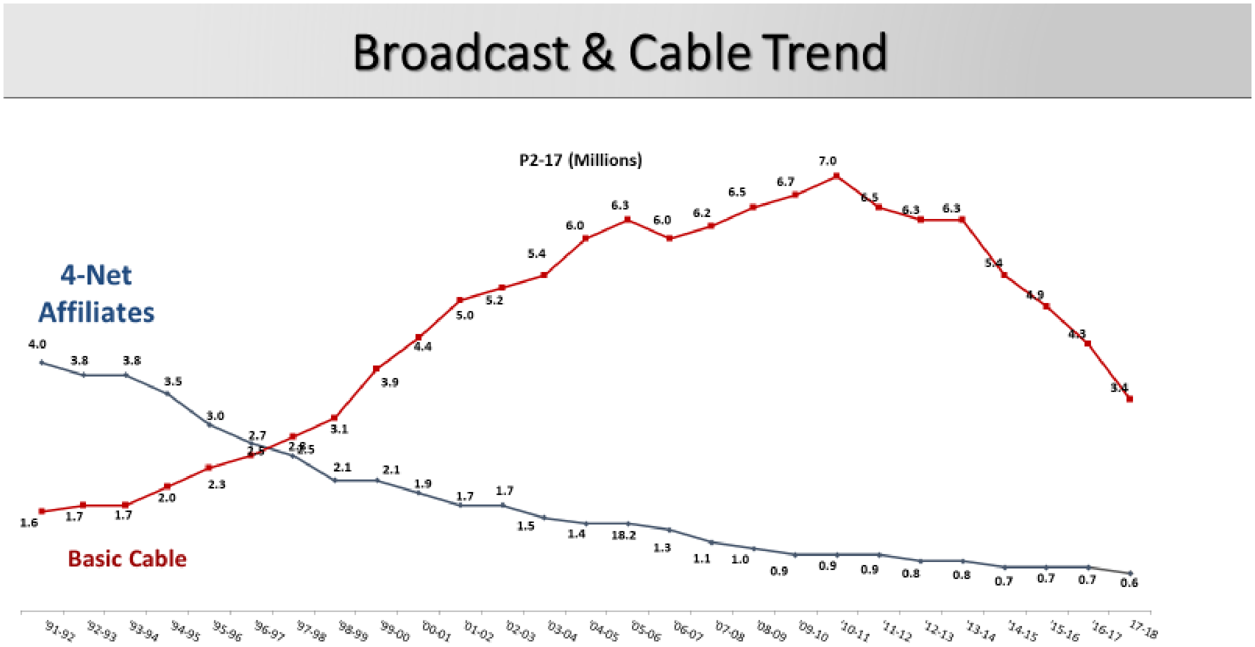
[14] Nielsen NPower & Cross Platform reporting: K2-16 Average Time Spent Viewing per Day English/Spanish Bdcst/Cable/Indy 2015-2017 based on January-December total audience data. Adjustments made to platforms not wholly measured by Nielsen and factors applied to account for un-measured Live & Time-Shifted viewing buckets. Simultaneous viewing of multiple platforms is included.

[15] *Id.*

season.[16] Basic cable viewing declined as well, peaking at 7.0 million per day in the 2011-2012 season and falling to 3.4 million per day for 2017-2018[17]:



The decrease in broadcast television viewership of network programming on these four networks on Saturday mornings for persons ages 2-17 is particularly startling – nearly the entire audience has evaporated since the late 1980s[18]:

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[16] *See* NTI: Sept-May seasons thru 17/18. L7 data stream 2006 forward.

[17] *Id.*

[18] NTI Live; 9/25/17-7/29/18 vs. comparable dates historically. Network program data straight sum. Saturday morning represents 8:00 a.m. to 12:00 p.m. Total Day represents Monday through Sunday 6:00 a.m. to 6:00 a.m. Fox statistics not available for Saturday morning in 2017-2018; *see also See* J.C. Lupis, *The State of Traditional TV: Updated with Q2 2017 Data*, MarketingCharts (Dec. 13, 2017) *available at* https://www.marketingcharts.com/featured-24817 (time spent viewing traditional TV, including cable and satellite, declined 45.5 percent from 2012-2017 among teens ages 12-17 and 43.6 percent among those ages 18-24).

BROADCAST EROSION

Saturday Morning		
Broadcast	K2-11	
Season	Rtg	Sh
1987/88	23.1	76
1997/98	8.0	38
2007/08	2.3	11
2017/18	0.4	4

Saturday Morning		
Broadcast	P12-17	
Season	Rtg	Sh
1987/88	18.1	73
1997/98	6.9	39
2007/08	1.9	11
2017/18	0.3	4

Total Day		
Broadcast	K2-11	
Season	Rtg	Sh
1987/88	9.3	66
1997/98	5.2	41
2007/08	2.4	17
2017/18	1.2	14

Total Day		
Broadcast	P12-17	
Season	Rtg	Sh
1987/88	10.1	72
1997/98	5.6	44
2007/08	2.7	20
2017/18	1.2	16

Even in just the last 10 years, after the FCC expanded its children's TV obligations to all full-time multicast channels, Saturday morning viewership of the four networks by children ages 2-11 has declined by about 71 percent.[19] Given this precipitous decline, it is nearly impossible to justify broadcast-only children's programming mandates in the modern video marketplace, particularly in their current restrictive form.

3. Young viewers today want video on-demand, in shorter segments.

The fact is that today's viewers – and especially young ones – expect to be able to access programming when and where they want via a range of devices.[20] One writer bluntly

[19] Nielsen (NTI); 09/24/2007-07/27/2008 vs. 09/25/2017-07/29/2018, Saturday 8:00 a.m. to 12:00 p.m. (the percentage decline is the same for both Live and Live+SameDay).

[20] *See* NAB Media Modernization Comments at 25-26 & nn. 52-53 (citing reports and studies documenting the move from traditional TV viewing toward streaming content, accessing video on social media, and time-shifting and binge viewing).

stated that “[p]reteens do not see television as being a primary source of entertainment.”[21] He advised TV companies to produce “shorter, more targeted and less structured content,” suitable for viewing on various devices.[22] This view reflects the slew of technology choices young people have today.

In 2018, consumers are expected to spend around eight hours per day consuming media – up 12 percent from 2011.[23] But the large increase here is due to a huge surge in the time people spend with mobile internet. In 2011, the average person spent around 20 minutes per day on mobile. In 2018, they are expected to spend nearly 2 hours with mobile.[24] Ninety-five percent of teens ages 13-17 own a smart phone or have access to one, and 45 percent of teens “say they are online on a near-constant basis.”[25] And they are accessing social media platforms in huge numbers: 85 percent of teens use YouTube, 72 percent use Instagram, 69 percent use Snapchat, and 51 percent use Facebook.[26]

A separate study looking specifically at teen video consumption habits found that young persons today prefer digital video content over TV content “because it better suits

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[21] Mark Mulligan, *A Glimpse Into the Future of Video Consumption*, Midia Research (July 10, 2015) *available at* http://www.midiaresearch.com/blog/a-glimpse-into-the-future-of-video-consumption-2/.

[22] *Id*.

[23] *See Time Spent With Traditional Media Drops As Mobile Internet Use Blossoms*, MarketingCharts (June 4, 2018) *available at* https://www.marketingcharts.com/industries/media-and-entertainment-83605.

[24] *Id*.

[25] Monica Anderson and Jingjing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center (May 31, 2018) *available at* http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

[26] *Id*.

their lifestyles and has more relatable content."[27] This study found that 93 percent of teens ages 13-15 use social platforms to access video, including 82 percent through YouTube, 72 percent through Netflix, and 64 percent through cable or satellite TV.[28] The trend line is clear. Young audiences no longer depend on broadcast television. They have choices, and they are exercising them.

B. The FCC Has a Clear Duty to Revise its Children's TV Rules to Reflect the Current Video Environment.

As demonstrated in detail above, the existing broadcast-only children's TV rules do not reflect the realities of the modern media marketplace or remotely match the video consumption habits of children and teens. Broadcasters today are forced to invest in children's content that satisfies outdated regulatory mandates but not the viewers the rules were intended to benefit. This leaves broadcasters with fewer resources to invest in content responsive to their local communities, including to those same young viewers. This seems the very definition of arbitrary and capricious, as well as contrary to the public interest.

Under these circumstances, the Commission not only has discretion under the broad terms of the CTA, but also a clear duty under the Administrative Procedure Act (APA) and the Communications Act, to reform its rules. The courts have made clear that changes in factual circumstances obligate the Commission to reconsider settled policies.[29] The Commission

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[27] Acumen Report, *Youth Video Diet*, DEFY Media, at 8 (2017) *available at* http://defymedia.com/wp-content/uploads/2017/11/Acumen_DL_booklet_16_12_04.pdf. (Acumen Report).

[28] *Id*.

[29] *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (finding that FCC had to address a broadcast license applicant's allegation that changes since the FCC first adopted a licensing criterion made continuing use of that criterion arbitrary and capricious, as "changes in factual and legal circumstances may impose upon [an] agency an obligation to reconsider a settled policy"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir.

must also ensure that previously adopted rules still serve the public interest, given changed circumstances.[30] As the D.C. Circuit has stated, the "Commission is statutorily bound to determine" whether the "vital link between [its] regulations and the public interest" exists.[31]

III. THE FCC SHOULD REPLACE ITS OUTDATED FRAMEWORK WITH A FLEXIBLE SAFE HARBOR APPROACH

The FCC should replace its anachronistic children's TV regime with a new safe harbor approach that provides broadcasters flexibility in today's competitive video marketplace and allows greater responsiveness to viewer preferences. NAB proposes that broadcasters qualify for Media Bureau approval of the children's TV portion of their license renewal applications if they air a total of 156 hours of core E/I programming annually, with at least 25 hours each quarter. The FCC should count as "core" educational programming aired on any free OTA program stream between 5:00 a.m. and 10:00 p.m., including short-form programs and those not regularly scheduled, such as long-form specials. Consistent with the Notice, this 156-hour standard should apply per licensee and should not be multiplied for every multicast stream a licensee may air.[32]

1995) (stating that "where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach").

[30] *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (finding under the Communications Act that the FCC was statutorily required to determine whether certain previously adopted rules still served the public interest, given a change in relevant circumstances).

[31] *Id*. at 980. *See also Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 881-82 (D.C. Cir. 1999) (stating that the "FCC is bound to regulate in the public interest" and rejecting the FCC's explanation of "why the public would benefit" from two rules challenged by broadcasters).

[32] NAB's proposal of this safe harbor approach does not waive any arguments about the constitutionality of content-based children's programming rules. Neither the CTA nor the FCC's implementing rules have ever been challenged in court, and NAB hereby preserves its rights with regard to a First Amendment challenge to the CTA and the FCC's final rules in this proceeding. "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992), and even in the broadcast context, the Supreme Court has stated that "the FCC's oversight responsibilities do not grant it the power to ordain

A. NAB's Approach Provides Both Flexibility and Certainty.

Airing 156 hours per year of core programming is equivalent to the current requirement of airing three hours per week on a full-time program stream. An annual standard, however, gives stations greater flexibility in scheduling E/I programs around other programming with strong local interest, including news, live sports, coverage of local events and specials.[33] Requiring stations to air at least 25 hours per quarter ensures that children will have access to free, OTA E/I programming throughout the year,[34] while providing sufficient flexibility so that broadcasters can, if they wish, concentrate their E/I programming during periods when children have additional time to watch video programming. Local stations might, for example, offer special E/I programs or blocks of programming during spring break or the summer when schools are closed.

This annual standard will provide clarity to stations about their children's TV obligations and certainty about the processing of their license renewal applications. It will also be straightforward for FCC staff to apply and will conserve FCC resources. More importantly, the added flexibility should encourage broadcasters to experiment with more creative planning for their E/I programming, to the benefit of young viewers.

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any particular type of programming that must be offered" by stations. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994). Moreover, given marketplace changes since 1990 and the vast array of child-oriented video content now available via a range of platforms, highly prescriptive and burdensome children's TV rules applicable only to broadcast stations are increasingly vulnerable to an as-applied First Amendment challenge. *See* Notice at ¶ 42 (asking how marketplace developments since enactment of the CTA may affect First Amendment considerations applicable to the FCC's prescription of broadcast TV programming requirements).

[33] *See* Notice at ¶ 38.

[34] *See* Notice at ¶ 39.

B. Consistent with NAB's Safe Harbor Proposal, the FCC Should Redefine "Core" E/I Programming.

NAB supports the FCC's tentative conclusions to eliminate the requirements that only regularly scheduled weekly programs at least 30 minutes in length count as core E/I programming.[35] As NAB, other commenters and the FCC all recognize, these requirements strongly discourage the production of quality short-form programs and specials.[36] Gone are the days when viewers routinely sat down in front of their TV sets at the same exact time every week to catch their favorite shows. In an on-demand world, broadcasters should have the flexibility to provide E/I programs other than weekly series of uniform length episodes.

This flexibility should improve service to young viewers. Children have a demonstrated interest in diversity of programming and formats,[37] and they would be more engaged by E/I programming of different lengths and greater variety.[38] Numerous sources also conclude that children's attention spans for learning are short.[39] A large-scale study of

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[35] *See* Notice at ¶¶ 20-21, 24.

[36] *See* NAB Media Modernization Comments at 31 n. 71 (discussing *Schoolhouse Rock* and *In the News* – both short-form interstitials geared toward educating children that existed before 1996); Notice at ¶¶ 20, 24 (observing that ABC and CBS aired popular and acclaimed afternoon specials until the FCC changed its E/I rules in 1996).

[37] "'[YouTube] is sort of like rapid-fire channel surfing,' says Michael Rich, a professor of pediatrics at Harvard Medial School and the director of the Center on Media and Child Health. 'In many ways YouTube Kids is better suited to the attention span of a young child—just by virtue of its length—than something like a half-hour or hour broadcast program can be.' Instead of being treated to a 28-minute episode of Mr. Roger's Neighborhood, a toddler or preschooler might be offered 28 minutes of phone time to play with the Daniel Tiger's Neighborhood app." Adrienne LaFrance, *The Algorithm That Makes Preschoolers Obsessed with YouTube*, The Atlantic (July 25, 2017) *available at* https://www.theatlantic.com/technology/archive/2017/07/what-youtube-reveals-about-the-toddler-mind/534765/.

[38] *See supra* Section II.A.3.

[39] *See, e.g.*, *Behavior Management Important Facts*, The Student Coalition for Action in Literacy Education *available at* http://www.unc.edu/depts/scale/Member/trainings/BehaviorManagement-ImportantFacts.pdf (suggesting an appropriate formula for determining a child's attention

more than 6.9 million video-watching sessions across four Massive Open Online Courses found that short-form video content (about six minutes in length) is more effective for engagement even among older students.[40]

Given that Congress passed the CTA to promote child learning through television programming,[41] the FCC should remove its mandate that every core E/I program be a weekly scheduled show at least 30 minutes long. The current record lacks evidence that children learn best in 30-minute or longer increments, but instead suggests that children have shorter attention spans and remain more engaged with short-form video content.[42] To further the original goals of the CTA, the FCC should give broadcasters the flexibility to offer long-form and short-form programs by allowing both types of programs to count toward stations' obligations.[43]

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span for learning is "chronological age + 1," so, for example, an 8-year-old child would have a 9-minute attention span for learning (8+1=9)); *see also*, David Vawter, *Mining the Middle School Mind*, National Association of Elementary School Principals, at 2 (March 2009) *available at* https://www.naesp.org/sites/default/files/resources/2/Middle_Matters/2009/MM2009v17n4a2.pdf ("The attention span of the average middle school student is 10-12 minutes, and there is little evidence that their brains can be trained to develop a longer span.").

[40] *See* Philip J. Guo, *et al.*, *How Video Production Affects Student Engagement: An Empirical Study of MOOC Videos*, at 3 (2014) *available at* http://up.csail.mit.edu/other-pubs/las2014-pguo-engagement.pdf (showing that "[v]ideo length was by far the most significant indicator of engagement," with the median engagement time being "at most 6 minutes, regardless of total video length").

[41] Congressional findings to the CTA state, *inter alia*, that "television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them." 47 U.S.C. § 303a note.

[42] In initially implementing the CTA in 1991, the FCC recognized that short-form programming, including PSAs and vignettes, can serve the needs of children. *See* 1991 Order at 2115.

[43] The FCC adopted the 30-minute requirement in part because it believed that long-form regularly scheduled programming was easier for viewers to find than short-form, occasional programming. *See* 1996 Order at 10713. Today, parents and children are more familiar with

NAB would expect broadcasters to take advantage of increased flexibility to produce more creative and varied educational content for young audiences. As one NAB member reported, it has a regular short-form series that features high school students talking about their experiences and lives. Because the programs are 7-10 minutes, the station cannot rely on these on-air segments to satisfy any of their E/I program obligations. Other stations report airing child-oriented specials featuring local children, which, regardless of their content, cannot be eligible for FCC E/I credit. Given that young viewers today want video programming that suits their lifestyles and "has more relatable content,"[44] FCC rules should not affirmatively discourage TV stations from offering precisely that type of content.

Broadcasters also have successfully experimented with informational programming geared to young viewers on platforms where they are not hampered by FCC restrictions as to length, format and scheduling. NBC News, for instance, partnered with Snapchat to offer a twice-daily, app-based news program for Generation X viewers called "Stay Tuned."[45] With a full-time crew of 30 producers, writers, editors and graphic designers, "Stay Tuned" is reportedly reaching 35 million unique viewers each month, and in less than one year, has more than one billion total views and more than 600 total short-form episodes, each less than 10 minutes in length.[46]

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searching program guides, including electronic ones, so the weekly scheduled, 30-minute minimum requirement cannot be justified on that basis.

[44] Acumen Report at 8.

[45] ABC's Owned Stations Group also recently launched a new digital-first brand called "Localish" targeted at young, mobile audiences. Localish's first series, *More in Common*, has already received more than nine million video views and 95,000 followers. *See* Jon Lafayette, *ABC Stations Launch 'Localish' for Mobile Millennials*, B&C (Sept. 20, 2018) *available at* https://www.broadcastingcable.com/news/abc-stations-launching-localish-a-brand-for-mobile-millennials.

[46] *See* Sarah Perez, *NBC's Snapchat news show gains 29+ million viewers in its first month*, Tech Crunch (Aug. 18, 2017) *available at* https://techcrunch.com/2017/08/18/nbcs-

Innovation by broadcasters should be fostered both on-air and online, but the current regulatory regime discourages broadcasters' production of creative content for young viewers, regardless of platform. Any TV station today wanting to create online content or apps, or different types of on-air educational content directed to young audiences, would need to expend additional significant resources beyond those spent to provide the mandated three hours of regularly-scheduled, 30-minute minimum programming per week on each program stream.

Finally, the FCC should expand the time frame for airing core programming and permit stations to begin airing E/I programming at 5:00 a.m., instead of 7:00 a.m.[47] A review of Nielsen data shows that, between the hours of 5:00 a.m. and 7:00 a.m. nationwide, an estimated 32.45 to 44.09 million children ages 2-15 (averaging about 57.9 to 78.7 percent of this age group), are watching television, whether broadcast, cable, satellite or telco.[48] Sixty-five percent of teens surveyed report watching video content before school or work.[49] Despite millions of young viewers watching video content before 7:00 a.m., commercial TV stations are unlikely to provide content for them because stations are not permitted to count

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snapchat-news-show-gains-29-million-viewers-in-its-first-month/; *see also* Sahil Patel, *NBC News got 4 million subscribers in 5 months to its Snapchat show*, Digiday (Jan. 4, 2018) *available at* https://digiday.com/media/nbc-news-daily-snapchat-show-now-4-million-subscribers/. Seventy-five percent of the audience is younger than 25. By comparison, for the four weeks from July 23, 2018 to August 13, 2018, the total audience for "NBC Nightly News with Lester Holt" was just over 29.3 million, with only 6.3 million total viewers between the ages of 25-54. *See* A.J. Katz, Evening News Ratings, Weeks of July 23, July 30, August 6 and August 13, TVNewser (2018) *available at* https://www.adweek.com/tvnewser/category/evening-news.

[47] *See* Notice at ¶ 22.

[48] *See* Nielsen NPower, Live (No-Time-shifting), Reach % (data from January 1, 2017 through June 30, 2018, examining average audience reach of persons ages 2-15 Monday through Sunday from 5:00 a.m. to 7:00 a.m.).

[49] *See* Acumen Report at 7.

programming aired before 7:00 a.m. toward their FCC obligations. The FCC's rules should permit broadcasters to air core E/I programming earlier in the day to better serve these children.[50]

C. Under NAB's Safe Harbor Approach, and as the FCC Proposes, Broadcasters Should Be Allowed to Air Their E/I Programming on Any Free OTA stream.

When the FCC expanded its three-hour standard to multicast channels in 2004, it committed to reevaluating the rules in three years to "consider whether the determinations made herein should be changed in light of technological developments," and specifically "whether broadcasters should be given more flexibility to determine the program stream on which core programming is placed."[51] Despite that commitment, until now the FCC has failed to reevaluate its rules. We agree with the Notice that broadcasters should no longer be required to air their core programming on their main program stream or on a stream with comparable MVPD carriage.[52] Rather, broadcasters should have the flexibility to air core programming on any free OTA stream.

As an initial matter, the FCC has statutory authority to adopt its proposal. The CTA speaks only and repeatedly to Commission assessment of a TV "licensee's" programming and other efforts to serve children.[53] The CTA does not speak in terms of TV channels or

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[50] With regard to the additional requirement that all core programming display the E/I symbol, the FCC tentatively concluded that the symbol is now sufficiently familiar to parents there is little benefit to requiring non-commercial educational stations to display it throughout every E/I program. *See* Notice at ¶ 25. This logic also would support eliminating the requirement for commercial stations to display the symbol. *See* Notice at ¶ 27.

[51] 2004 Order at 22966.

[52] *See* Notice at ¶ 49.

[53] 47 U.S.C. § 303b(a) (providing that FCC shall review extent to which "the licensee" has served the needs of children through the "licensee's overall programming"). *See also id*. at § 303b(b) (stating that, in addition to consideration of "the licensee's programming," the FCC may consider special nonbroadcast efforts "by the licensee" and any special efforts "by the

program streams. The FCC therefore has discretion under the CTA's broad terms to revise its rules as to on which channels a licensee may air its children's programming.

The vast majority of children today have access to a plethora of educational content offered by a wide variety of broadcast, cable, satellite and over-the-top outlets and accessible via a collection of devices.[54] The FCC's primary focus in this proceeding therefore should be on the approximately 582,000 TV households with children ages 2-17 that have neither MVPD nor internet service. By definition, these households have access to TV stations' OTA main and multicast streams, and their access to these streams is not enhanced by MVPD carriage. Thus, there is no sound reason for restricting stations from placing some or all core programming on multicast streams, and there is no solid rationale for basing broadcast-only children's TV rules on whether a multicast stream has MVPD carriage – particularly given that the FCC does not require MVPDs to carry any broadcast multicast channels.

Giving stations greater ability to utilize multicast streams for E/I programming would not in any way disenfranchise the very limited number of households dependent only on OTA TV and would affirmatively promote the public interest. Stations place their multicast streams directly adjacent to their main streams, making this programming easy to find for OTA-only households. Several broadcasters have indicated, moreover, that given the option to air the required E/I programming on a multicast stream, they would air additional news and other programming of local community interest on their primary channels.

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licensee" to support children's programming on another station in "the licensee's marketplace").

[54] *See* Notice at ¶ 55; Section II.A., *supra*.

Nexstar Broadcasting surveyed 95 of its stations' general managers about the FCC's children's TV obligations. Seventy-three percent reported that they would provide additional, or newly-created, morning news programs if they could air E/I programming on their multicast streams; 64 percent said they would air more locally-produced public affairs programming; 49 percent said they would air more local sports and lifestyle programming. Griffin Communications, a small broadcaster based in Oklahoma, similarly stated that if it were not required to air three hours of E/I programming on its stations' main channels, it would air additional hours of local news. Another mid-sized TV group observed that Saturday morning would be an excellent spot to air weekly public affairs programming on its main stream, or a new in-depth regional or local sports program, specifically mentioning that a station located in Georgia could air a Saturday morning show on SEC football before a game later that day. Hubbard Broadcasting's Twin Cities, Minnesota stations reported, moreover, that they have unused runs of syndicated programs from smaller production houses that they would like to air on their main streams, including African American Short Films, Gospel Music Presents, Black Music Honors, American Latino Presents: "State of the Arts," Hispanic College Quiz and Women on the Move. This additional programming would further broadcasters' mandate to serve the public interest without decreasing the availability of E/I programming, consistent with both the CTA and the Communications Act.

The Notice also asks how broadcasters should notify audiences if the Commission permits them to air core programming on any of their OTA streams.[55] Broadcasters have strong incentives to ensure that as many viewers as possible watch their programs; accordingly, they will make it as easy as possible for children and parents to find their E/I programs. Because broadcasters know how to reach their viewers, the Commission should

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[55] *See* Notice at ¶ 56.

give stations flexibility in providing notice of their scheduling of E/I programming, including through use of station websites. Other recent FCC initiatives rely on websites, whether its own or stations' sites, to inform the public.[56] Any FCC notification requirements should reflect the full range of ways stations can reach viewers today.[57]

D. Stations Are Airing Growing Amounts of Other Highly Valued Programming, Increasing Preemptions of Core Programming and Making Reform of FCC Rules That Restrict Placement and Scheduling of E/I Programs Even More Urgent.

When Congress passed the CTA, few stations offered local newscasts on weekend mornings; broadcast networks offered fewer hours of their national morning news shows; and network affiliated stations offered far less live sports coverage. Responding to consumer demand, broadcasters since that time have increased their local and national news, public interest programming and sports coverage.[58] As NAB member stations have

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[56] *See, e.g.*, *Revisions to Public Inspection File Requirements – Broadcaster Correspondence File and Cable Principal Headend Location*, Report and Order, 32 FCC Rcd 1565 (2017); *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Report and Order, 30 FCC Rcd 10468 (2015); *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest* Obligations, Second Report and Order, 27 FCC Rcd 4535 (2012); *Implementation of the Commercial Advertisement Loudness Mitigation (CALM)* Act, Report and Order, 26 FCC Rcd 17222 (2011). In addition, MVPDs provide program schedules for their subscribers, which includes broadcast programming.

[57] The Commission further seeks comment on how to apply children's TV rules to stations that broadcast in ATSC 3.0 and shift their E/I programming to a multicast stream that may not be simulcast in ATSC 1.0. *See* Notice at ¶ 54. At this time, it is unnecessary for the FCC to consider this issue. Broadcasting in ATSC 3.0 will be entirely voluntary, and it remains to be seen how ATSC 3.0 stations will handle their E/I programming obligations (or even what those obligations will be in the future once stations commence ASTC 3.0 broadcasting on a non-experimental basis). To address this question now would be premature. NAB notes that deployment of ATSC will likely benefit young viewers in the future, given their preference for accessing video content streamed and on-the-go, rather than via a traditional TV set.

[58] In 2017, TV stations aired on average 2.2 hours of local news on both Saturdays and Sundays and 5.6 hours on weekdays. Stations in large markets (ranked 1-50) aired even more local news, averaging around 3.5 hours of local news on Saturdays and Sundays and about 6.7 hours on weekdays. Bob Papper, *RTDNA Research: Local News by the Numbers* (June 13, 2018). In contrast, according to an RTDNA/Ball State University Survey in 2004,

explained, these types of live and local programming help broadcasters stay competitive with online and on-demand services. In a video marketplace where binge viewing and time-shifting are common, "DVR-resistant" programming,[59] especially live sports and special events, are more important than ever to broadcast stations.[60]

But this growth in live programming on broadcast TV has significantly limited the windows during which stations can consistently schedule E/I programming on their primary channels. In Nexstar's survey, its general managers reported that the top causes of children's TV preemptions are (1) live network sports broadcasts, (2) live coverage of local or regional news or sporting events, (3) network breaking news coverage, and (4) other locally-produced special programming. Stations are additionally hampered by the Commission's

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stations aired, on average, 1.4 hours of local news on Saturdays, 1.3 hours of local news on Sundays and 3.7 hours on weekdays. Network affiliated stations today also air expanded amounts of national news and public affairs programming on weekends and weekdays. Network news programming, especially morning shows, have significantly expanded their length in recent years, as well as expanding to seven days a week. In 2017, more than 134,000 hours of sports programming were available for viewing in the U.S. up from 31,000 hours in 2002. *Length of sports TV broadcast hours in the United States from 2002 to 2017 (in thousand hours)*, Statistica.com.

[59] Nielsen Insights, *Catch It Live: Sports Viewing Scores a Programming Goal* (Feb. 22, 2016). During the past TV season, NBC's Sunday Night Football topped the TV ratings for a record seventh straight year, with CBS' Thursday Night Football in second place. *See* Barry Wilner, *"Sunday Night Football" sets TV ratings record*, Seattle Times (May 23, 2018) *available at* www.seattletimes.com/sports/sunday-night-football-sets-tv-ratings-record/. *See also* Daniel Holloway, *How "Sunday Night Football" Became TV's Ratings King*, Variety (Sept. 8, 2016) (stating that Sunday Night Football is a "testament to the growing power of live sports" at a time when viewing habits are rapidly evolving and many viewers now wait days or even weeks to watch most shows).

[60] Live programming "is so much of a bigger deal than it has ever been before," and sports programming has a "huge edge on other programming." *"Sunday Night Football" sets TV ratings record*, USA Today (May 23, 2018) *available at* https://www.usatoday.com/story/sports/nfl/2018/05/23/sunday-night-football-sets-tv-ratings-record/35251609/. Eight of the top ten individual programs (based on total viewers) in 2017 were sports programs. The other two top-viewed programs were live specials, the Academy Awards and the Grammy Awards. *Leading single telecast TV programs in the United States in 2017, based on total viewers (in millions)*, Statistica.com.

general policy that they should keep "second home" windows available for rescheduling preempted core programs.[61] As a result, broadcasters not only must find three hours for originally scheduling core programming, but also hold additional time slots available in the (likely) event that at least some of their E/I programming is preempted.

The need for stations to hold time slots on their main streams for rescheduling preempted core programs leads to inefficient use of limited air time that benefits neither the station nor viewers. Several network-affiliated stations in small- to mid-sized markets, for example, explained they are limited in their ability to launch new hyper-local programming. They commented that the early Sunday morning timeslot would be ideal for a local talk-show, political candidate forum or magazine show featuring community events. Given current FCC rules, however, many stations reserve that time as a second-home for airing children's E/I programming preempted on Saturdays. If given more flexibility to air core programming on multicast streams, these stations see potential for more hyper-local Sunday morning programming targeted to the needs of their communities.

Limited programming windows and related preemption problems often create specific, serious dilemmas for local stations. About twenty-five percent of Nexstar's general

[61] The Commission has indicated that a station should generally reschedule a preempted core program in a strictly-defined second home. To be a second home, the rescheduled time slot must be between 7:00 a.m. and 10:00 p.m.; it must be within seven days of the date on which the episode was scheduled to air; it must be consistent (*i.e.*, it must be the same day/time each week that the program is preempted and rescheduled, for example, the second home of a show regularly scheduled at 9:00 a.m. on Saturday is at 7:00 a.m. on Sunday); and it must be publicized on air. This second home policy is not in any rule, but was developed by FCC staff over 20 years ago. *See Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065, 1107 (2006) (referring to the second home policy formerly developed by FCC staff following the 1996 children's TV order). In describing its policy in the Notice, the FCC stated that a station generally must air a rescheduled E/I program in this previously selected second home and provide on-air notification of the scheduled change in order for the rescheduled program to count toward compliance with the three-hour guideline. *Id*. at ¶ 57 & n. 174 (noting certain exceptions to this policy).

managers surveyed reported that they have declined to air local programming because of their E/I obligations. For instance, one station declined to run a six-week Saturday morning community forum on the opioid crisis discussing how and where people in their community could get help. Another Nexstar station is the only one in its market not offering local news on Saturday and Sunday mornings due to children's TV obligations. A third station stopped airing local Sunday religious services to accommodate E/I programming.

Similarly, Griffin Communications reported that on several occasions, while airing extended weather coverage, it stopped coverage to air children's programming. In other words, broadcasters find it so challenging to schedule core programming on their main channel (or to find a consistently available second home for preempted E/I programs) that they must decide whether a weather event is severe enough to warrant preempting core programs. Griffin's Tulsa station was also unable to air the annual Susan G. Komen Race for the Cure because of its children's TV obligations, and it had to cut short its coverage of a Saturday morning parade celebrating the opening of a $400 million public park because the station's E/I programming was regularly scheduled to start at 10:00 a.m.[62]

A Fox affiliate in the Central time zone moreover reported that, over the course of a year, it must preempt 7:00 a.m. Saturday and Sunday newscasts on its main channel about two dozen times to "make good" E/I programs that had been preempted by live network sports programming. Not only do these scheduling conflicts take local news coverage away from viewers, but the general manager of this station also explained that local news preemption costs his station advertising dollars that cannot be recouped and that could

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[62] Several other NAB members similarly reported that their stations have declined to air local parades, including one station that did not air a Christmas Day parade, due to the difficulties they would cause for scheduling and rescheduling E/I programming.

have been used to support other programming efforts.[63] The public is not served by FCC rules that force TV stations onto the horns of such dilemmas, and continued retention of these rigid rules in the current marketplace would be arbitrary and capricious.[64]

These growing complications caused by preemptions of core programs make it even more urgent for the FCC to adopt the proposals to allow broadcasters to air E/I programming on any free OTA stream and to count short-form and non-regularly scheduled programs as core. Increasing programming flexibility in this manner would greatly reduce, if not largely eliminate, preemption of E/I programming.[65] The FCC has historically preferred consistency in the scheduling of core programs, and child audiences are likely better served by E/I programming offered on multicast streams than by airing the programming on stations' main streams and experiencing frequent disruptions due to conflicts with other programs. As

[63] The third quarter of the year when Major League Baseball, the National Football League and college football have daytime games on the weekends is particularly challenging for stations located outside the Eastern time zone. As NAB TV station members have explained, while in the Eastern time zone weekend newscasts typically run until 9:00 a.m. and sports does not begin until 12:00 p.m., those 12:00 p.m. sports programs begin at 11:00 a.m. in the Central time zone, 10:00 a.m. in the Mountain time zone, and 9:00 a.m. in the Western time zone. Stations in these time zones routinely have their E/I programming preempted by live sports leading to conflicts between rescheduled core programs and other programming, including local news. Even East Coast stations, however, are not immune from these scheduling problems. Hubbard Broadcasting's Rochester, NY station reported that it preempted E/I programming eight times in the first quarter of 2018, 23 times in the second quarter, and expects 32 preemptions in the third quarter.

[64] *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (stating that the FCC has a "duty to evaluate its policies over time to ascertain whether they work," and that, in the rulemaking context, it is "settled law" that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision has been removed). Because the FCC's second home policy is not embodied "in a binding regulation issued after public notice and comment," the FCC has an "even more pressing" duty to ensure its preemption policy is appropriate and works without undue burden in the current environment. *Id*.

[65] *See* Notice at ¶ 57 (asking whether the FCC should revise its preemption policies or whether the added flexibility afforded to stations by other proposed rule changes, if adopted, would largely eliminate the need for preemptions).

NAB members have explained, most stations have at least one multicast channel that offers less programming of the type likely to lead to preemptions (*e.g.*, live) and could consistently and easily accommodate E/I programming.

If, however, the FCC ultimately does not give broadcasters the proposed flexibility, then a more rational preemption policy would be imperative, as NAB previously explained in detail.[66] Under those circumstances, NAB would continue to support its previous proposal to eliminate the FCC's existing preemption policy, which needlessly restricts broadcasters' ability to schedule programming in a manner that best serves the needs of their communities.

E. Consistent with the Notice, the 156-hour Safe Harbor Standard Should Apply Per Licensee and Not Be Multiplied Per Every Multicast Stream a Licensee Airs.

NAB agrees with the Notice's tentative conclusion that the FCC should eliminate the additional core programming requirements applicable to each multicast stream.[67] The transformation of the video marketplace from broadcast-centric to online-centric and the corresponding proliferation of available E/I programming justifies this reform.

Children today have access to far more educational programming choices than they did when Congress passed the CTA in 1990. The rapid growth of children's educational and informational content on cable channels and online has been well documented.[68] Today, almost unlimited children's content may be accessed 24/7 online and via apps on a range

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[66] *See* NAB Media Modernization Comments at 32-36 (discussing how the second home policy is overly restrictive and burdensome and urging its removal, or at least its substantial reform).

[67] *See* Notice at ¶ 51.

[68] *See* Notice at ¶ 16. NAB's Media Modernization Comments identified numerous full-time children's cable channels, other cable channels providing educational and informational programming attractive to viewers of all ages, and major internet sites where children and parents may obtain educational content both free and via subscription. *Id*. at 26, n.56.

of devices, including smart phones and tablets, whether at home or on-the-go. And many sources are now available to guide parents toward recommended educational and family friendly websites and apps.[69]

While this growth in the availably of children's educational content online and via apps has recently received the most attention, content available via OTA TV stations also has significantly grown since passage of the CTA. As of 2018, there are 260 more commercial broadcast TV stations and 31 more non-commercial educational (NCE) TV stations than there were in 1990,[70] in addition to 389 Class A TV stations, a service that did not even exist then.[71] These additional 680 TV stations all currently provide children's E/I programming and would continue to do so under NAB's proposal. Nearly 90 percent of the 384 NCE TV stations operating today, moreover, are members of PBS and must by the terms of their membership air at least seven hours of educational children's programming each weekday[72] – a contractual obligation unaffected by potential changes in the FCC's mandates for multicast channels. PBS also recently launched an updated multiplatform "PBS Kids," which provides 24/7 OTA broadcast programming plus digital streaming and a

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[69] *See, e.g.*, Saroj Kumar, *10 Top Educational Apps For Kids*, eLearning Industry *available at* https://elearningindustry.com/10-top-educational-apps-for-kids (providing ten outstanding apps that engage children's brains while allowing them to have fun); YouTube Kids *available at* https://www.youtube.com/yt/kids/ (using a mix of filters, user feedback and human reviewers to keep the videos family friendly); *Best TV: Our Recommendations for Families*, Common Sense Media *available at* https://www.commonsensemedia.org/tv-lists (including lists of the best kids' shows on Netflix, Amazon Prime, Hulu, YouTube).

[70] *See* FCC News Release, *Broadcast Station Totals as of June 30, 2018* (July 3, 2018) and FCC News Release, *Broadcast Station Totals as of Dec. 31, 1990* (Jan. 7, 1991).

[71] Section 73.671 of the FCC's rules, Educational and Informational Programming for Children, applies to Class A stations. *See* 47 C.F.R. § 73.6062 (listing all rules applicable to Class A stations).

[72] *See* Notice at ¶ 16.

companion app for devices.[73] PBS's free OTA multicast channel reaches 95 percent of U.S. TV households,[74] and Qubo, Ion Television's 24/7 broadcast networks for kids, airs on ION stations across the country.

Given the expansion in available children-oriented content across a variety of platforms available in homes and on the go, requirements for broadcasters to provide three hours of E/I programming per week on every full-time stream are no longer needed.[75] Even in the very limited number of households that lack access to both MVPD and internet services, children now have access to considerably more free OTA educational programming than when Congress passed the CTA.

The FCC also must consider the burden the current regulatory regime imposes on stations. Even Sesame Street, the gold standard for children's TV programming, reported several years of operational losses, including an $11 million deficit for fiscal year 2014 before signing an agreement with HBO.[76] And the burdens of the existing regulatory framework include the opportunity costs imposed on stations across all their programming streams and the choices that must be made about use of limited air time.[77] As one network

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[73] *See* Notice at ¶ 17; John Koblin, *PBS Is Creating a Channel Exclusively for Children*, New York Times (Feb. 22, 2016) *available at* https://www.nytimes.com/2016/02/23/business/media/pbs-is-creating-a-channel-exclusively-for-children.html?rref=collection%2Ftimestopic%2FPublic%20Broadcasting%20Service&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=4&pgtype=collection&_r=0. PBS Kids now delivers four billion educational videos a year, and PBS Kids mobile apps deliver 160 million streams per month.

[74] *See* Notice at ¶ 17.

[75] *See* Notice at ¶ 52.

[76] *See* Austin Siegemund-Broka, *B Is for Broke: Why 'Sesame Street' Is Moving to HBO* (Aug. 19, 2015) *available at*: https://www.hollywoodreporter.com/news/b-is-broke-why-sesame-816105.

[77] *See supra* Sections III.C. & D.

affiliated station explained, it airs a 30-minute E/I program during the day Monday through Friday. Directly adjacent to this program, the station airs a syndicated show. The syndicated program generates about $1,000 more per day in revenue than does the E/I program. If the station could air another 30-minute syndicated program on its main stream in place of the E/I program, it estimates it could generate an additional $250,000 each year, which could be used to support other community interest programming.

The Commission has an obligation to reform its existing children's TV rules, given that stations' costs to air and report on the specified amounts of rigidly-defined core programs per every multicast stream have notably increased relative to the benefits of airing and reporting on that programming for a shrinking audience that predominantly accesses video content via nonbroadcast options.[78] "Agencies have long treated cost as a centrally relevant factor when deciding whether" and how "to regulate."[79] Indeed, the FCC's own strategic plan commits it to ensuring that both new and existing regulations "solve real problems at a reasonable cost,"[80] citing Executive Orders directing agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."[81] The FCC's

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[78] *See Thompson v. Clark*, 741 F.3d 401, 405 (D.C. Cir. 1984) (if a rulemaking record shows that the rule constitutes such an "unreasonable assessment" of costs and benefits as to be arbitrary and capricious under the APA, "the rule cannot stand"); *see also supra* Section II.A. (documenting the steep decline in viewership of broadcast TV by young viewers).

[79] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.") (emphasis in original).

[80] FCC, *Strategic Plan 2018-2022*, at 13, Performance Goals 4.1.2 & 4.2.1 (Feb. 12, 2018) (FCC Strategic Plan).

[81] Executive Order 13563, *Improving Regulation and Regulatory Review*, at § 1(b) (Jan. 18, 2011); *see also* Executive Order 13579, *Regulation and Independent Regulatory Agencies*, at §§ 1(b) & (2) (July 11, 2011) (directing retrospective analyses of existing rules); FCC Strategic Plan at 13.

general obligation to adopt children's TV rules based on reasonable assessments of their costs and benefits is particularly strong with regard to small broadcasters, as the "APA together with the Regulatory Flexibility Act require that a rule's impact on small businesses be reasonable and reasonably explained."[82]

The FCC should no longer mandate that every TV station, including the smallest, air one-size-fits-all E/I programming across all programming streams, regardless of consumer demand. Nothing in the CTA requires a doubling, tripling or quadrupling of quantitative E/I programming requirements due to multicasting a second, third or fourth stream. Indeed, the CTA does not mandate *any* quantitative programming obligation.[83] NAB's proposed 156-hour safe harbor therefore should apply per licensee, and not per each separate programming stream of every licensee.

IV. BEYOND NAB'S PROPOSED SAFE HARBOR, STATIONS SHOULD HAVE ADDITIONAL OPTIONS FOR SATISFYING THEIR CHILDREN'S PROGRAMMING OBLIGATIONS

The CTA specifically authorizes the FCC to consider sponsorship of children's programming on other same-market stations, as well as special nonbroadcast efforts by the licensee, when it evaluates a licensee's service to the educational needs of children.[84] As NAB previously explained,[85] the FCC's current rules have made these additional options

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[82] *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009). The Regulatory Flexibility Act places an affirmative duty on the FCC to "minimize the significant economic impact" of regulations on "small entities." 5 U.S.C. § 604(a)(6).

[83] That statute speaks repeatedly and only in terms of generally assessing the service of a *licensee* and not in terms of TV channels, program streams or hours requirements. *See* 47 U.S.C. §§ 303b(a) & (b). Moreover, when originally extending the three-hour requirement to all multicast streams, the FCC did not find that its action was mandated by the CTA. *See* 2004 Order at 22953.

[84] *See* 47 U.S.C. § 303b(b).

[85] *See* NAB Media Modernization Comments at 30-31.

theoretical, rather than viable, for licensees.[86] NAB is unaware of any stations that have relied on sponsorship of programming or special nonbroadcast efforts to satisfy their E/I obligations. We continue to support additional options for stations to serve the needs and interests of young viewers and urge the Commission to consider how to improve their predictability and viability.

A. NAB Supports Allowing Stations to Satisfy Their Children's Programming Requirements by Relying in Part on Sponsoring E/I Programming on Another Station in the Same Market.

What matters to local audiences is the availability of quality children's programming in their markets. Viewers do not care on which station a particular E/I program airs or whether every station in their market airs the exact same amount of core programming.[87] Consistent with its safe harbor proposal, NAB therefore believes that broadcasters should have the flexibility to decide the specific amount of core programming they air, and how much they sponsor on another same-market station, whether commercial or noncommercial, provided that, in combination, those hours total 156 hours per year. Sponsored programming should be counted on a minute-for-minute basis, with each minute of a sponsored program being treated as equivalent to one minute of programming on the licensee's stream.

NAB agrees with the FCC's proposal that Media Bureau staff, rather than the full Commission, should be able to approve the children's programming portion of the renewal applications of licensees relying in part on sponsoring E/I programming on other stations.[88]

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[86] *See* Notice at ¶ 44 (observing that few, if any, broadcasters have taken advantage of these options).

[87] Most audiences do not even care if this programming is available for free OTA, but only that they can access it by a device on a platform.

[88] *See* Notice at ¶ 48.

Requiring full Commission review of the renewal applications of stations engaging in sponsorships effectively discourages any station from exploring such an option. As the D.C. Circuit has noted, broadcasters, like the "rational" holders of any "government-issued license," want to "avoid the inconvenience and expense of being subjected to further review."[89]

NAB observes that sponsorship agreements could result in more effective service to child audiences. Rather than every station in a market airing small amounts of E/I programming, one station in a market could, through sponsorships, provide large amounts of children's programming that may better attract the attention of young viewers and their parents. No broadcaster, however, will increase the risk to its license renewal by relying on a vague, uncertain option for fulfilling its children's TV obligations. To encourage stations to explore sponsorships, the standards for this option must be clear.[90]

B. NAB Also Supports Permitting Broadcasters to Engage in Special Nonbroadcast Efforts to Enhance the Value of Their Educational Programming.

Beyond sponsorships, the CTA allows the FCC to consider "special nonbroadcast efforts" by broadcasters to "enhance" the value of their E/I programming.[91] While the FCC's rules currently allow for consideration of these efforts, the rules give no guidance as to what activities would constitute "special" efforts and how those efforts would be evaluated. As a result, broadcasters have avoided relying on this option to satisfy their obligations.

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[89] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

[90] *See* Notice at ¶ 46. A separate but related issue is the question of flexibility for broadcasters that co-own stations in the same local market. The FCC should consider giving a licensee owning two stations in the same market the flexibility to meet its children's programming obligations by airing most, or even all, of its two stations' combined E/I programming hours on one of its stations.

[91] 47 U.S.C. § 303b(b)(1).

Given the wide range of potential special nonbroadcast efforts, the FCC should not attempt to create one-size-fits-all rules covering all possible qualifying efforts. The FCC, however, should provide more explicit guidance about the types of efforts it will accept and how it will measure those efforts. In doing so, the FCC should seriously consider giving broadcasters the opportunity to reach young viewers where they are – that is, online and on-the-go. The Commission could create a non-exhaustive menu of presumptively qualifying special efforts to guide broadcasters in this area. For example, broadcasters could be incentivized to create a web series similar to NBC News's popular "Stay Tuned" or ABC's new "Localish" to complement their broadcast programming by counting that as a qualifying special effort, or to create a website similar to PBS Kids that provides interactive games and resources related to a station's E/I programming.[92]

Given the reality of today's digital marketplace, NAB believes there is real value in encouraging broadcasters to think creatively about non-traditional efforts to serve children and teens, including through online content and apps. The FCC's rules today make it unlikely, however, that broadcasters will experiment with E/I programming on online platforms. In this regard, the FCC should revisit its website display rule,[93] which has not kept pace with digital technology. Though well-intentioned, it did not anticipate the ubiquitous presence of banner ads on websites, or the huge role of mobile apps and app stores, where, mixed among free educational apps, there are other apps that must be purchased. Under the current rule, broadcasters cannot direct their audiences to these websites or to

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[92] The FCC also will need to make clear any minimum amount of OTA programming a broadcaster must air in addition to any non-broadcast special efforts and answer practical questions about measuring non-broadcast efforts. For example, if a station creates a web-based news show for teens, would that show count toward the station's requisite children's TV hours on a minute-by-minute basis?

[93] *See* 47 C.F.R. § 73.670(b).

download those apps because the websites and app stores violate the FCC's rule banning stations from directing viewers to a website that contains commercial material. The FCC's rule should balance the interest in protecting children with the benefit of alerting children and parents to online and digital resources that would complement broadcast E/I content. The FCC should update this rule and should encourage, rather than discourage, broadcasters' efforts to engage young viewers through nonbroadcast efforts.

C. The Utility of Retaining the Existing "Category B" Processing Guideline Depends on Other Decisions in This Proceeding.

Current rules permit broadcasters to satisfy their children's TV obligations under the so-called Category B by airing "somewhat less" than three hours of core programming if their overall package of programming demonstrates an equivalent level of commitment to educating children. Under Category B, specials, public service announcements, short-form programs and non-weekly programs that currently do not qualify as core programming count toward meeting the processing guideline.[94] Because the FCC has tentatively concluded to change its definition of core programming to allow broadcasters to count these other types of programs as core, Category B may no longer have continued utility.[95] If, however, the FCC does not ultimately adopt its proposal to redefine core programming to include these other types of valuable programming, then NAB urges the FCC to retain an option for licensees to count these types of educational programs toward satisfying licensees' children's TV obligations.

[94] *See* 47 C.F.R. § 73.671(c).

[95] *See* Notice at ¶ 40.

V. THE FCC SHOULD REFORM ITS CHILDREN'S TV REPORTING AND NOTIFICATION REQUIREMENTS

NAB agrees with the FCC that the children's TV reporting requirements should be streamlined to eliminate unnecessary burdens and redundancies.[96] As NAB previously demonstrated,[97] the excessive detail required by the current quarterly Children's Television Programming Reports (Reports) places significant burdens on TV stations, especially smaller ones. There is, moreover, no evidence that parents routinely use these Reports to guide their children's viewing or for any other purpose. Given evidence showing that the costs of the current reporting requirements outweigh their benefit, the FCC should reform its requirements to reduce the frequency of the Reports and streamline their content.

A. Consistent with its Proposed 156-hour Safe Harbor Approach, NAB Supports the Tentative Conclusion to Require Annual Rather than Quarterly Reporting.

The FCC currently requires commercial TV licensees to complete the Reports on a quarterly basis, place the Reports in their online public files and retain them until final action on the licensees' next license renewal applications.[98] NAB urges the Commission to modify its reporting requirements to allow licensees to file a streamlined annual Report, rather than the existing quarterly ones.[99] The Reports should be due by January 31 of the following year. That will provide broadcasters sufficient time to prepare and file the Reports without unduly delaying the posting of the Reports in stations' online public files.

There is no sound basis for retaining the current quarterly Reports, which require the submission of excessively granular and redundant data. The burdens of these quarterly filings are clear. In the first quarter of 2018, the Reports of the 16 TV stations owned by one

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[96] *See* Notice at ¶ 29.

[97] *See* NAB Media Modernization Comments at 11-12.

[98] 47 C.F.R. § 73.3526(e)(11)(iii).

[99] *See* Notice at ¶ 30.

NAB member group totaled 492 PDF pages, with the average being nearly 31 pages per station. Based on the first quarter's numbers, this group's stations will file an estimated 1,968 pages in 2018 detailing their children's TV programs. Over the course of their eight-year license terms, the stations in this mid-sized group will file an estimated 15,744 pages with the FCC just to document their children's TV programming.[100] And these estimates are likely conservative.[101] Hubbard Broadcasting's Twin Cities stations also reported that each quarter, their stations' legal, programming and operations departments spend a combined 30 hours compiling information for the FCC's reports, uploading the reports to their online public files and updating records at the station to reflect that the work was completed.

These burdensome and highly detailed quarterly Reports also appear to have limited practical utility or public benefit. In this regard, NAB recently reviewed the Correspondence Folders in 1,784 full-power TV station license renewal applications submitted during the 2012 cycle.[102] While NAB's review revealed some instances of station non-compliance with the children's TV rules, most of these rule violations came to light because the station itself admitted to the error in its license renewal application, not because members of the public

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[100] The experience of this TV station group is typical. Broadcast counsel estimate that the Reports of a station – whether in a large or small market or owned by a large or small group – with four programming streams (one main and three multicast) typically range from 40-60 pages every quarter. The Report of a station with three programming streams generally range from 30-40 pages every quarter, and stations with two streams usually have Reports about 25-30 pages in length.

[101] According to broadcast counsel, Reports in the third quarter of each year are generally longer than in the other quarters, due to programming changes often made by broadcast networks in that quarter. For instance, in the third quarter of 2017, the Reports of the 16 stations in the TV group discussed above totaled 520 pages.

[102] Correspondence Folders attached to stations' renewal applications include documents categorized as "Informal Filings" and "Imported Letters." These documents, for example, include petitions to deny, letters from the public supporting or opposing the broadcasters' license renewal, FCC actions on alleged rule violations, and stations' responses to such documents.

or the FCC discovered those violations through the quarterly reports.[103] In no case that NAB saw did the FCC question whether these generally self-reported violations constituted a failure of the station to serve the educational and informational needs of children in their communities.[104]

Notably, none of these rule violations appear to have been brought to the FCC's attention by consumers. In fact, NAB found only one consumer complaint even remotely related to children's TV programming in its review of the Correspondence Folders. In this single complaint, a California viewer lamented the fact that a non-commercial broadcaster had cancelled several news shows and failed to air some special public interest programming and had instead "added two hours daily of children's programming, airing 12 hours a day."[105]

In short, the record does not support retaining the current quarterly Reports. They are unnecessarily burdensome, and NAB's recent review of license renewal materials did not indicate public reliance on those Reports. Further, there is no evidence that either the Commission or the public relies on quarterly reporting specifically. Licensees' submission of eight annual Reports over the course of their license terms, rather than 32 quarterly

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[103] On occasion, a station's failure to timely file its quarterly reports was discovered by FCC staff when reviewing the station's online public file.

[104] Broadcasters in these cases generally had failed to comply with the FCC's process-oriented rules (*e.g.*, failing to timely file the quarterly children's TV reports; failing to display the E/I symbol throughout a core program; failing to publicize the existence and location of a station's reports; inadvertently and briefly displaying a website address during the closing credits of an E/I program).

[105] *See* Letter of Paul Streitberger to Marlene H. Dortch (Oct. 29, 2014). Mr. Streitberger also complained about the airing of "entertaining shows glorifying wealth . . . including Downton Abbey, British Antiques Road Show, Masterpiece Mystery, and Classical Music (commissioned by and written for royalty)."

Reports, should be sufficient to ensure that TV stations meet their children's programming obligations.

B. NAB Supports Other Measures to Streamline the Existing Reporting and Notification Requirements.

Simply reducing the frequency with which broadcasters are required to file their children's TV Reports will not meaningfully reduce the reports' burdens. The FCC must take additional steps to streamline the information broadcasters must file. Without these additional steps, compiling the same information that is currently required, but on an annual rather than quarterly basis, may actually be more burdensome for broadcasters.

1. NAB agrees with the tentative conclusion to eliminate the requirement to identify the E/I programs stations plan to air in the future.

The Reports require stations to identify every quarter the programs they actually aired *plus* the programs they expect to air in the next quarter. There is no evidence that parents or children consult the Reports to plan their viewing in the coming months, and no evidence that the FCC uses this information about planned E/I programs to assess compliance with the substantive children's programming requirements. Thus, requiring stations to report in detail on the programming they expect to air in the next quarter provides no public benefit and is contrary to the Paperwork Reduction Act (PRA), as it lacks "practical utility."[106] The FCC should eliminate this duplicative and unnecessary reporting requirement.[107]

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[106] 44 U.S.C. § 3506(c)(3)(A) (requiring agencies to certify that their information collections are "necessary for the proper performance of the functions of the agency, including that the information has practical utility").

[107] *See* Notice at ¶ 31.

2. NAB supports the tentative conclusion to remove the requirement that broadcasters publicize their current Reports.

Requiring broadcasters to publicize the existence and location of their Reports serves little purpose today.[108] This requirement predates the hosting of TV stations' public files, which include the Reports, on the FCC's web site. Because TV stations now must provide a link to their FCC-hosted online public files from the home page of their own web sites, there is no need to retain an additional rule for publicizing children's TV Reports. Members of the public can easily access stations' Reports at any time from any place with an internet connection, and stations' program listings are also easily accessible.

In addition, available evidence does not suggest that community members have complained to the FCC about stations' failures to publicize their Reports or that viewers rely on stations' publicizing efforts. In the instances the FCC cited failure to publicize the existence and location of Reports when assessing fines during the 2012 license renewal process, the stations themselves generally admitted their error. The FCC should eliminate this requirement.[109]

3. NAB urges the FCC to permit broadcasters to primarily rely on certifications of compliance with the children's programming requirements.

Rather than requiring the submission of granular details about the specific programs aired by stations on all their program streams – which NAB has demonstrated is unduly

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[108] *See* Notice at ¶ 35.

[109] The FCC also asked about the requirement that broadcasters provide information identifying programming specifically designed to educate/inform children, including the intended age group, to publishers of program guides. *See* Notice at ¶ 28. Broadcasters provide information about their full programing schedules to program guides, including E/I programming, because stations want as many viewers as possible. However, program guide services have no obligation to include in their guides the specific E/I information that broadcasters must provide, so this rule may not have significant public benefits.

burdensome – the Commission should modify the Reports to instead include a series of certifications. These certifications would be specific to each requirement under the rules. For example, if NAB's 156-hour safe harbor proposal is adopted, the Report would require that licensees certify, *inter alia* (1) that the licensee aired the requisite 156 hours in the past year, (2) that the licensee provided at least 25 hours of E/I programming in each quarter of the past year, (3) that all programming was aired between 5:00 a.m. and 10:00 p.m., and (4) that the programming served the E/I needs of children ages 16 and under as a significant purpose. Broadcasters would be required to disclose and explain any inability to make any of the required certifications.

The Notice inquires how the FCC would verify stations' compliance with the children's programming rules if it adopted streamlined reporting requirements as NAB has proposed.[110] To ensure that the FCC has access when needed to more detailed information about stations' E/I programming, it could extend to commercial stations a requirement similar to that already placed on noncommercial stations that they maintain (but not file) documentation sufficient to show compliance with the rules at renewal time, and throughout their license terms, in response to consumer complaints, FCC inquiries or enforcement actions.

These reporting and recordkeeping requirements will help ensure broadcasters' compliance with the children's TV rules. NAB's review of the 2012 TV license renewal application files shows that broadcasters do in fact admit to error and disclose non-compliance with FCC rules. They would continue to be required to do so under NAB's certifications proposal. Moreover, no evidence from NAB's review of the last cycle of license renewals, or otherwise in the record, indicates that parents specifically, or members of the

[110] *See* Notice at ¶ 33.

public generally, review with any frequency the detailed and voluminous data currently submitted by broadcasters in their Reports. Consistent with the Paperwork Reduction Act and its duty to reduce the burdens on persons providing information to it, "including with respect to small entities,"[111] the Commission should streamline its children's TV Reports as NAB proposes.

VI. CONCLUSION

Broadcasters have always been, and remain, committed to serving the needs of their communities – and specifically to serving children. The FCC's rules no longer reflect the dynamics of today's video marketplace and how children and their families watch video programming. It is well within the FCC's authority to modernize these rules, and, in fact, the Commission is obligated to do so under the APA. The Commission should take this opportunity to provide broadcasters urgently needed flexibility to offer programming that serves the needs and interests of children and their local communities as a whole, consistent with both the CTA and the Communications Act.

[111] 44 U.S.C. § 3506(c)(3)(C).

Respectfully submitted,

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