

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
)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

Rick Kaplan
Jerianne Timmerman
Emmy Parsons

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I. INTRODUCTION AND SUMMARY

The record in this proceeding¹ is replete with examples illustrating the unintended consequences and arbitrary effects of the FCC’s existing children’s TV programming rules. As the National Association of Broadcasters (NAB)² and other commenters have shown, the current rules require TV stations to air educational and informational (E/I) programming in a rigid way that fails to engage young viewers and that unnecessarily restricts the ability of broadcasters to schedule other highly valued local and live programming. The record also shows that the video marketplace has been transformed since the FCC adopted its children’s TV rules, including the three-hour “guideline,” in 1996. Accordingly, the Commission should modernize its rules to better reflect changes in technology and how children and their families are engaging with video content in the 21st century.

Those commenters opposing modernization of the outdated children’s TV rules fail to demonstrate that young viewers today – who clearly prefer accessing video content online,

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 (*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.

on-demand and in short segments – rely in any meaningful way on commercial TV stations’ mandated E/I programming. Given the lack of evidence that young viewers actually watch these programs and the explosion in non-broadcast sources of educational and informational material for children, there is no justification for retaining the existing FCC framework. What we are left with, then, is the notion that, because broadcasters can be regulated, they should be regulated. This view – which undergirds much of the opposition to the Commission’s proposals – is undoubtedly arbitrary and capricious.

Glaring factual and legal errors are another hallmark of the advocacy of those opposing reform of the children’s TV rules. For example, contrary to the erroneous arguments of some commenters, the Commission has the discretion under the Children’s Television Act of 1990 (CTA) to update its children’s TV rules. The CTA does not even mention, let alone mandate, any specific children’s programming requirements that the Commission must impose on TV stations. Instead, the statute merely directs the FCC to “consider,” during the license renewal process, “the extent to which” TV licensees’ programming served the educational and informational needs of children in their communities.³ The Commission has consistently, and correctly, recognized that the CTA does not mandate the imposition of quantitative programming standards or guidelines on broadcasters. And under the Administrative Procedure Act (APA), the FCC has the affirmative obligation to update its children’s TV rules in light of the vast changes in the media marketplace and the viewing habits of children and teens.

As no commenter could dispute, video program offerings available to young viewers have exploded since Congress passed the CTA in 1990. Today, very few children and teens rely on commercial broadcast TV E/I programming, or on broadcast TV more generally.

³ Section 103(a) of the CTA, 47 U.S.C. § 303b(a).

Instead, they are watching short-form, on-demand programming from their connected TVs, computers, smartphones and tablets, across a range of platforms, including websites and apps. According to Nielsen, only 0.5 percent of TV households (or about 582,000 households) across the nation lack both pay TV and internet access and include children ages 2-17. In contrast, the Common Sense Census reports that 75 percent of 0- to 8-year-olds live in a home with an internet-connected TV, and according to Sesame Workshop, 98 percent of homes with children have at least one mobile device. For young digital natives, “mobile is the new prime time.”⁴

Unsurprisingly, as NAB and other commenters have documented, nearly the entire audience of children ages 2-17 for Saturday morning broadcast network programming has evaporated.⁵ Additional data from NBC and CBS show that, out of the small audiences for E/I programming on their owned-and-operated and affiliated stations, *95 percent of that audience is older than 18, and around two-thirds is over the age of 55.* And even among the five percent of the audience between the ages of 2 and 17, only about 18,300 *total* children are watching any given E/I program *via broadcast antenna.* That is, on the average NBC or CBS station – counting some of the biggest markets in the country – *fewer than 90 children* are accessing each E/I program over-the-air (OTA). In short: children do not rely on commercial stations’ E/I content, even in OTA homes.

Given these trends, the Commission is required by law to modernize its rules. As NAB proposed in its initial comments, broadcasters should no longer be mandated to provide an additional three hours of E/I programming per each multicast stream they air. Stations

⁴ Jeff Hasen, *How digital natives are making mobile the new prime time*, possiblemobile.com (May 30, 2018).

⁵ Comments of NAB, MB Docket Nos. 18-202, 17-105, at 7-10 (Sept. 24, 2018) (NAB Comments).

should be able to satisfy their obligations under the CTA by airing 156 hours of core programming annually on any program stream, which could include non-regularly-scheduled programs of varying lengths. These reforms, among others, will ensure that children in the small number of TV households lacking both internet access and pay TV service still have access to educational content through free OTA television, while at the same time giving broadcasters increased flexibility to serve the needs and interests of both young viewers and their local communities. The Commission also should encourage broadcasters to think creatively about non-traditional ways to reach children and teens in the program formats and on the platforms they prefer.

II. CLAIMS THAT THE FCC LACKS AUTHORITY TO AMEND ITS CHILDREN’S TV RULES ARE SPECIOUS

The Center for Digital Democracy, the Campaign for a Commercial-Free Childhood and the Benton Foundation contend that the “FCC lacks statutory authority to amend its children’s television rules as proposed,” claiming that adopting “most” of the FCC’s proposals would be inconsistent with the Communications Act of 1934 (Act or 1934 Act), the CTA and even the Telecommunications Act of 1996 (1996 Act).⁶ In arguing that the FCC does not have authority to change its children’s TV rules as proposed, the Advocacy Groups are essentially contending that almost every jot and tittle of the existing rules – such as refusing to count as core any non-weekly scheduled children’s program; counting a 30-minute program but not a 15–minute one; counting a program shown at 7:00 a.m. but not at 6:30 a.m.; requiring stations to report quarterly, rather than biannually or annually, on their

⁶ Comments of Center for Digital Democracy, Campaign for a Commercial-Free Childhood and the Benton Foundation, MB Docket Nos. 18-202, 17-105, at Heading I. and 5 (Advocacy Group Comments). These commenters never made entirely clear which of the many proposals in the Notice the FCC supposedly cannot adopt.

children’s programming – are statutorily mandated.⁷ The Groups’ arguments are contrary to so many fundamental principles of statutory interpretation and basic precepts of administrative law, not to mention Supreme Court precedent and common sense, that NAB finds it difficult to decide where to start in refuting them.

Let’s begin with the obvious: statutory silence does not constitute a statutory mandate. All three statutes cited by the Advocacy Groups are silent as to any specific programming requirements the FCC must impose on TV stations to show they have fulfilled their obligations to serve children. In fact, two of the statutes do not even directly address TV stations’ obligations to serve the E/I needs of children. Simply put, the 1934 Act, the 1996 Act and the CTA did not require the FCC to adopt its current rules, and they do not prohibit the FCC from now amending those rules as the Notice proposes.

A. The General Public Interest Standard Does Not Require the Retention of the Existing Children’s TV Rules.

The public interest standard established in the 1934 Act requires all broadcast stations to serve “the public interest, convenience, and necessity,” but it is silent as to any particular obligations of licensees to serve the specific educational and informational needs of children.⁸ The Advocacy Groups’ statements that broadcast TV stations must serve the public interest under the Act are thus truisms,⁹ not persuasive arguments about the FCC’s authority and discretion relating to the obligations of TV stations to serve children. Repeating

⁷ See Advocacy Group Comments at 15-16 (opposing changes to the program scheduling rules and objecting to changing the quarterly Children’s Television Report to an annual filing with less information).

⁸ See, e.g., 47 U.S.C. § 309(a) (requiring FCC to determine if the grant of applications for broadcast station licenses, or for modification or renewal of those licenses, would serve the “public interest, convenience, and necessity”); § 310(d) (no station license shall be transferred or assigned except upon an application to the FCC and upon finding by the FCC that the “public interest, convenience, and necessity will be served”).

⁹ See Advocacy Group Comments at 5-7.

the general public interest standard as a mantra in no way establishes that the 1934 Act somehow required the Commission to adopt children's TV rules with certain specified provisions, let alone the existing rules in particular, and it does not support the Advocacy Groups' claim that the FCC now lacks authority under the Act to amend those rules as proposed. The public interest standard's silence on the subject of children's programming is not a directive binding on the Commission to maintain all or most of its existing rules, particularly given that Congress subsequently directly addressed children's TV in the CTA.¹⁰

The weakness of the Advocacy Groups' position is shown by their reliance on a 1974 FCC report and policy statement on children's TV.¹¹ While the report stated that broadcasters have a duty to serve children, including through educational programming, and the FCC expected stations to make a "meaningful effort in this area," the Commission did not adopt rules or even a "guideline" specifying the number of hours of children's programming to be aired or the required characteristics of that programming (e.g., program length, regular weekly scheduling or time of day to be aired).¹² If anything, this policy statement – which declined to "prescribe by rule the number of hours per week" of children's programming, expressly citing the First Amendment and the wish to "avoid detailed governmental supervision of programming whenever possible" – supports the FCC's current efforts to reform its overly-prescriptive and detailed rules.¹³

¹⁰ "It is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

¹¹ See Advocacy Group Comments at 5.

¹² *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 5-6 (1974).

¹³ *Id.* at 6.

While citing a 44-year-old policy statement, the Advocacy Groups notably fail to acknowledge Supreme Court precedent making clear that the FCC has broad discretion under the 1934 Act to interpret the public interest standard. The “Act does not define the term ‘public interest, convenience, and necessity,’” and the Court’s “opinions have repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”¹⁴ Because the “weighing of policies under the ‘public interest’ standard is a task that Congress has delegated to the Commission in the first instance,”¹⁵ the Advocacy Groups should expect a reviewing court to reject claims that the FCC lacks the authority or discretion under that standard to revise its children’s TV rules as proposed.¹⁶

Citing Section 336 of the 1996 Act does not bolster the Advocacy Groups’ arguments.¹⁷ That provision has nothing to do with children’s TV but established the statutory framework for the transition to digital TV. In fact, that section – entitled “Broadcast Spectrum Flexibility” – particularly focuses on digital TV stations’ potential provision of *non-broadcast* ancillary and supplementary services.¹⁸ And for the same reasons described above, the inclusion of the general public interest standard in the first sentence of Section

¹⁴ *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593, 596 (1981) (citing several earlier Supreme Court cases).

¹⁵ *Id.* at 596 (citation omitted).

¹⁶ See also, e.g., *FCC v. Pottsville Broadcasting Co.* 309 U.S. 134, 138 (1940) (describing the public interest standard “as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy”).

¹⁷ See Advocacy Group Comments at 6-7.

¹⁸ See 47 U.S.C. §§ 336(a)(2), (b)(1), (b)(2), (b)(3), (d) & (e) (all addressing ancillary and supplementary services).

336(d)¹⁹ does not cast doubt on the FCC’s authority and discretion to amend its existing children’s TV rules.²⁰

B. The FCC Has the Discretion Under the CTA’s General Terms to Update its Children’s TV Rules and the Obligation to Do So Under the Administrative Procedure Act.

While the Advocacy Groups quote the CTA,²¹ they seem unaware how its general terms actually demonstrate the breadth of the FCC’s discretion in determining how to implement that statute. The CTA only obligates the FCC to “consider the extent to which the licensee has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs,” when reviewing TV stations’ license renewal applications.²² Notably, the CTA does not mention – let alone mandate – any particular children’s TV programming requirements. The statute is silent as to any required minimum amounts of E/I programming to be aired over the course of a week, month, year or license term; any requirements as to the placement and scheduling of E/I programs (e.g., day of week, time of day, regularly

¹⁹ “Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.” 47 U.S.C. § 336(d).

²⁰ NAB also questions the extent to which Section 336(d) pertains to multicasting. See Advocacy Group Comments at 6-7 (arguing that the section “made clear” that TV licensees “were expected to serve the public interest through their programming on any multicast program streams made available to the public for free”). This section does not refer to multicasting. After repeating the general public interest standard in the first sentence, Section 336(d) specifically addresses, in two additional sentences, how the FCC should review the renewal applications of TV licensees that provide ancillary and supplementary services, which are distinct from and unrelated to free OTA multicast channels and services. Thus, contrary to the Advocacy Groups’ claim, Section 336 has not “made clear” anything about stations that multicast, let alone anything about the offering of children’s TV programs on multicast streams.

²¹ Advocacy Group Comments at 6.

²² Section 103(a) of the CTA, 47 U.S.C. § 303b(a).

scheduled every week or month); any requirements dictating how preempted programs must be rescheduled; any requirements as to the minimum or maximum length of E/I programs; or any other specific programming requirements. As the FCC previously observed, the CTA even “is silent on how the term ‘children’ should be defined when the Commission is considering whether broadcasters have provided programming” designed to serve their needs.²³

Through its general terms and lack of specificity, the CTA gave the Commission considerable discretion in its implementation and did not in any way dictate the adoption of the existing regulations. Even when approving the current rules, the FCC acknowledged “the CTA does not require quantitative standards or guidelines”²⁴ or the extension of that quantitative standard to all multicast streams.²⁵ Nor does the CTA’s silence prevent the FCC from now modifying those rules as proposed, particularly given the CTA’s legislative history making clear that Congress did “not intend that the FCC interpret” the statute “as requiring or mandating a quantification standard governing the amount” of E/I programming a station must air to qualify for renewal of its license.²⁶ In light of this legislative history and, more

²³ *Policies and Rules Concerning Children’s Television Programming*, Notice of Proposed Rulemaking, 5 FCC Rcd 7199, 7200 (1990).

²⁴ *Policies and Rules Concerning Children’s TV Programming, Revision of Programming Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660, 10722 (1996) (1996 Order).

²⁵ See *Children’s Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, 22953 (2004) (finding only that extending the three-hour “guideline” to multicast streams was consistent with the CTA’s objective) (2004 Order).

²⁶ H.R. Rep. No. 101-385, at 17 (1989) (also stating that a “broad range of programming will meet the standard of service” expected of TV licensees). The Senate Report contained almost identical language. See S. Rep. No. 101-227, at 23 (1989). Similar statements were made on both the House and Senate floors. For example, Senator Daniel Inouye commented that the “committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement” of E/I

importantly, the CTA's silence with respect to any specific children's TV requirements to be imposed on broadcasters, a reviewing court will defer to an FCC decision implementing the proposals made here.²⁷ Perhaps unsurprisingly, the Advocacy Groups do not even try to explain how the CTA restricts the FCC's discretion to such an extent that "most" of its current proposals would be inconsistent with the statute.²⁸

While the terms of the CTA permit the Commission to reform its children's TV rules, the APA imposes an affirmative duty on the FCC to update its rules to reflect the realities of the modern media marketplace and the altered video consumption habits of children and teens. As NAB discussed in its initial comments, the courts have made clear that changes in factual circumstances obligate the Commission to reconsider settled policies.²⁹ The Commission also must ensure under the 1934 Act that its previously adopted children's TV rules still serve the public interest and local communities as a whole, given changed circumstances.³⁰ In short, there is no statutory impediment, and in fact there is a statutory

programming. 136 Cong. Rec. S10122 (July 19, 1990). Congressman Ed Markey stated that the children's TV "legislation does not require the FCC to set quantitative guidelines for educational programming." 136 Cong. Rec. H8537 (Oct. 1, 1990).

²⁷ See *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) (stating that if a "statute is silent or ambiguous with respect to [a] specific issue," then a court defers to the agency's reasonable construction of the statute); *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (stating that "[i]f the agency's reading fills a gap or defines a term in a reasonable way . . . we give that reading controlling weight").

²⁸ These commenters note that Congress imposed children's programming requirements only on broadcasters and not on cable systems, but that obvious observation does not somehow rewrite the CTA to reduce the FCC's discretion under its terms. See Advocacy Group Comments at 6.

²⁹ See NAB Comments at 12-13, citing *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) and *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995).

³⁰ See NAB Comments at 13, citing *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) and *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 881-82 (D.C. Cir. 1999). Although even the Advocacy Groups admit that "the landscape of children's programming

duty, for the Commission to modernize its rules and provide broadcasters the flexibility needed to offer programming that serves the needs and interests of their communities, including children.

III. THE FCC MUST REJECT FACTUALLY INACCURATE AND LEGALLY INCORRECT CLAIMS THAT THE EXISTING CHILDREN'S TV REGULATORY REGIME SHOULD REMAIN INTACT BECAUSE BROADCASTERS HAVE "FREE" LICENSES

The Advocacy Groups also make several irrelevant and egregiously inaccurate claims about the broadcast industry and supposed government-facilitated windfalls. For instance, they and other commenters assert that broadcasters receive "free" licenses to use the public airwaves.³¹ This assertion is factually incorrect. As a 2014 study showed, 92 percent of all existing full-power television licensees *paid market rates* to the collective tune of approximately \$50 billion for their spectrum licenses on the secondary market.³² Since 2014, even more television licensees have acquired their licenses in the marketplace, paying full market price. For about two decades, moreover, initial TV licenses have been awarded via FCC auctions, in which broadcasters paid market price to the government.³³ And regardless of whether their licenses were "free," TV licensees invest millions in their

has changed" since the 1990s, they ignore relevant case law and insist that the children's TV rules nonetheless must remain the same. Advocacy Group Comments at 17.

³¹ Advocacy Group Comments at 2, 7. The National Hispanic Media Coalition (NHMC) also asserts that broadcasters got "free" licenses and use the airwaves "for free." Comments of the National Hispanic Media Coalition, MB Docket No. 18-202, at 3, 13 (Sept. 24, 2018) (NHMC Comments).

³² See Jeffrey A. Eisenach, *The Equities and Economics of Property Interests in TV Spectrum Licenses*, Navigant Economics (Jan. 2014) (Eisenach Study) available at <https://blog.nab.org/2014/01/22/spectrum-sophistry/>.

³³ The Advocacy Groups fail to mention that other entities, like the direct broadcast satellite licensees, which are unencumbered by similar regulatory oversight of their content selections, and cellular telephone licensees, received their initial licenses without paying the government for them. See Eisenach Study at 2, 14-15.

infrastructure, equipment, programming and personnel, without which a bare license authorizing service would be meaningless.³⁴

The Advocacy Groups further claim that the 1996 Act provided an additional allocation of free spectrum to TV stations.³⁵ The implication that the digital transition somehow represented a spectrum windfall is wholly inaccurate. Broadcasters were granted authority to operate using additional channels only for the duration of the transition to facilitate the move to digital operations. Once the transition was complete, broadcasters did not retain access to those additional channels. In fact, the broadcast industry ended the DTV transition with a substantially smaller spectrum footprint, as former TV channels 52-69 were reallocated for other uses.³⁶ Broadcasters, moreover, had to spend millions of dollars per station to convert to digital broadcasting.³⁷ The 1996 Act did not provide a spectrum giveaway, as DTV stations today air far more programming with far less spectrum than in the analog past. It is alarming how little the Advocacy Groups understand about the law, prior Commission decisions and the broadcast TV industry.

Notably, even if the Advocacy Groups' arguments were not factually inaccurate, the conclusions they draw are legally unsupportable. The fact that TV stations use spectrum –

³⁴ The TV industry also pays millions of dollars every year in regulatory fees to the government. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order, MD Docket No. 18-175, at Appendix B (2018) (Fiscal Year 2017 regulatory fees estimated to total more than \$25 million; Fiscal Year 2018 regulatory fees estimated to total more than \$22 million).

³⁵ Advocacy Group Comments at 6.

³⁶ See *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-69)*, Memorandum Opinion and Order, 17 FCC Rcd 11613, ¶ 1 (2002).

³⁷ During the DTV transition, stations reported spending \$3-\$4 million each on digital transmitters and towers, and additional amounts on replacing production equipment and other infrastructure. See Comments of NAB, MB Docket Nos. 06-121, *et al.*, at 91 & nn. 212-213 (Oct. 23, 2006).

whether they paid market rate for their licenses or not – in no way warrants the continued imposition of increasingly arbitrary children’s TV rules that fail to reflect the modern media marketplace and the preferences of young viewers. Repeating the word “free” cannot justify retention of the existing children’s TV regulatory regime without change.³⁸

IV. THE RECORD SHOWS THAT CHILDREN’S VIEWING HABITS HAVE CHANGED DRAMATICALLY AND THAT FEWER AND FEWER YOUNG VIEWERS RELY ON LINEAR BROADCAST TV FOR E/I CONTENT

Most commenters at least acknowledge that few children today watch commercial broadcast E/I programming or even broadcast TV more generally. Even the Advocacy Groups agree that “[c]hildren’s content has suffered from falling viewership.”³⁹ NAB’s initial comments explained in detail that linear broadcast TV no longer commands children’s attention as in the past, and that nearly the entire audience of children ages 2-17 for Saturday morning network programming has evaporated.⁴⁰ Other broadcast commenters confirmed this trend.⁴¹ The commenters, however, contending that broadcast TV remains a

³⁸ In another misleading usage of the word “free,” Litton Entertainment asserts that it provides stations E/I programming “free of charge” and that it bears all the financial risk. Comments of Litton Entertainment, MB Docket Nos. 18-202, 17-105, at 4 (Sept. 24, 2018) (Litton Comments). Stations, however, provide Litton with three hours or more of valuable airtime each week within which Litton can sell all the advertising time and reap all the economic benefit. To imply that stations are not sacrificing anything of value is inaccurate.

³⁹ Advocacy Group Comments at 13.

⁴⁰ See NAB Comments at 6-12 (showing, *inter alia*, that from the 1987-88 season to the 2007-08 season, viewership by children ages 2-17 of the four major English-language networks declined about 90 percent on Saturday mornings from 8:00 a.m. to 12:00 p.m.; since 2007-08, the trend has only continued). NAB has demonstrated in greater detail in other FCC proceedings that linear TV viewing, particularly of broadcast TV, no longer dominates the video marketplace. See, e.g., Comments of NAB, MB Docket No. 17-318, at 14-19, 27-29 & Attachments A-C (Mar. 19, 2018).

⁴¹ See, e.g., Comments of National Religious Broadcasters, MB Docket Nos. 18-202, 17-105, at 2 (Sept. 24, 2018) (NRB comments); Comments of Network Commenters, MB Docket Nos. 18-202, 17-105, at 2-3 (Sept. 24, 2018) (Network Comments); Comments of Gray Television, Inc., MB Docket Nos. 18-202, 17-105, at 5 (Sept. 24, 2018) (Gray Television Comments).

key source of programming for children fail to present data about the actual viewing habits and preferences of young viewers. Instead, they focus on adult viewers,⁴² or on irrelevant generalities about the cost of subscription services, without regard for the number of truly broadcast-only households that include children.⁴³

Litton Entertainment, the primary producer of E/I programming for broadcast TV networks, is the only commenter making a serious attempt to argue that large audiences remain for commercial broadcast E/I content. But Litton fails to provide many key details about its data that purportedly show substantial audiences for its E/I programs, making it very difficult to judge the data's reliability and relevance. There are several clear reasons, however, to be wary of the accuracy and significance of Litton's data, which, among other problems, are inconsistent with extensive data provided by NAB members about the very low viewership of Litton's E/I programming on their own stations.

Litton claims that upwards of 80 million children ages 2-17 are watching its content on an annual basis across ABC, NBC, CBS and other broadcast networks, but fails to provide

⁴² For example, in just three sentences, the Advocacy Groups erroneously claim (1) that broadcast "station revenues often skyrocket" during political years, but quote as support an article that states "the three major *cable news networks* are set to make nearly \$2 billion in ad revenues, and the three main *business networks* are set to add another \$458 million in ad revenue," none of which are broadcast networks; (2) that broadcast TV is expected to take in \$35 billion in electoral spending during the midterm elections (which appears to be off by a factor of at least ten), and cite a Nielsen report that has nothing to do with political advertising but instead is about the time U.S. *adults* spend with TV (which is irrelevant, given that this proceeding concerns children and "TV" does not mean exclusively "broadcast TV"); and (3) that "viewers today still spend more time watching broadcast television than other sources of programming," but cite a study that reports on the time *pay TV viewers ages 18+* (not children) spend watching *linear TV* (again erroneously equating "pay TV" and "linear TV" with "broadcast TV"). See Advocacy Group Comments at 8, nn. 12-14 (emphases added).

⁴³ See *id.* at 17-22; NHMC Comments at 9-11.

any information as to how viewership was measured or the source of the numbers.⁴⁴ NAB's best guess is that the 80 million figure was calculated by summing some measure of total viewership across each episode of all Litton programs aired over an entire year. If that is in fact how Litton calculated the figures, the method flies in the face of industry standards used to calculate network programming viewership because it artificially inflates viewer numbers. The industry standard calculates network viewership based on the average number of people watching at any given minute throughout the duration of a program. For instance, during the week of October 1, 2018, *The Big Bang Theory* – the highest rated prime time series on CBS – had 12.3 million viewers,⁴⁵ meaning that at any given minute during the show, 12.3 million people were watching. If CBS calculated viewership of *The Big Bang Theory* by multiplying 12.3 million viewers across the 24 episodes in an entire season, the show could claim 295.2 million annual viewers – roughly 90 percent of the total U.S. population. That changes the equation just a bit.⁴⁶

Litton further asserts that “[w]hether watched in real-time or time shifted for later viewing, broadcast television viewing of E/I programming far outstrips any other platform.”⁴⁷ But Litton does not clearly explain what it means here or the source for this claim. In any event, NAB reiterates that out of the 4 hours and 30 minutes that children ages 2-16 spent

⁴⁴ See Morgan Declaration at ¶ 24; Litton Comments at 8. For instance, Litton does not indicate its source for this data, the time period measured (either as to the dates or whether this was for live or live + time-shifted viewing), or whether this includes only linear viewing on broadcast and MVPDs or adds internet-based retransmissions.

⁴⁵ See Nielsen, Primetime Broadcast Programs, Live+SameDay, for the week of October 1, 2018.

⁴⁶ Litton also claims that their programs were viewed 1.5 billion times in 2017. See Morgan Declaration at ¶ 16; Litton Comments at 6. If anyone is to rely on this number for any purpose, it needs to be properly sourced and explained, rather than merely claimed.

⁴⁷ Litton Comments at 8.

viewing video content in 2017, only 37 minutes (or 13.7 percent of the time) was spent watching broadcast TV, either live or time-shifted through DVR or video-on-demand.⁴⁸ Other surveys of the video consumption habits of teens specifically – Litton’s stated target audience – found that only 14 percent of teen video consumption is with “live TV” and 71 percent is streaming.⁴⁹

These are not the only reasons to question the reliability and meaningfulness of Litton’s statistics. Litton additionally states that its programs reach around “900,000 unique teens in the average month.”⁵⁰ Taking this number at face value and multiplied over the course of a year, that only equals 10.8 million teens. It is unclear then how, without counting the same child over and over again, 27.6 million children ages 2-17 could be watching Litton’s ABC programming; 20.3 million watching Litton’s CBS programming; 19.2 million watching Litton’s NBC programming; 12.1 million watching Litton’s CW programming and 2.7 million watching Litton’s Antenna/Cozi programming, as Litton claims. This large difference cannot be explained by many pre-teens viewing Litton’s programs. As Litton separately argued, Litton produces “programming aimed at the teen demographic. It is natural that younger viewers and parents have migrated to non-commercial (PBS), and other platforms to find age-appropriate programming.”⁵¹

In fact, Nielsen data demonstrate a massive overall decline among children and teens ages 2-17 watching network programming on the four major English-language

⁴⁸ See NAB Comments at 8, citing Nielsen data.

⁴⁹ Haley Velasco, *Who is Gen Z? How teens are consuming content*, thedrum.com (Dec. 27, 2017).

⁵⁰ See Morgan Declaration at ¶ 16; Litton Comments at 6.

⁵¹ Litton Comments at 8, n.35.

broadcast networks on Saturday mornings – when Litton’s programming blocks air.⁵² As NAB previously showed, total viewership on Saturday mornings of these networks by children ages 2-11 declined by about 71 percent from just 2007-2008 to 2017-2018.⁵³ And over the last year on Saturday mornings, only 0.58 percent of children ages 2-11 watched the four major networks combined.⁵⁴ Clearly, child viewership of broadcast network programming has declined very significantly across the full age range from 2 to 17.

What’s more, additional data from NAB members show that very limited numbers of viewers watch Litton’s programming specifically, and of those watching, the vast majority of viewers are 18 or older. In the 2017-2018 television season, for example, CBS and NBC aired a combined 13 Litton-produced programs. Across the hundreds of CBS and NBC owned-and-operated and affiliated stations, these programs averaged a modest 1.23 million viewers each, counting both over-the-air and MVPD viewing.⁵⁵ Among these viewers, however, only about 57,000 were between the ages of 2 and 17.⁵⁶ And looking more closely at children ages 12 to 17, which most closely aligns to Litton’s targeted audience of children ages 13 to 16, only about 19,900 children watched each program on average.⁵⁷ To be clear, only about five percent of the audience for these Litton programs airing on CBS and NBC owned and affiliated stations was 17 or younger; less than two percent of the audience was in Litton’s targeted age group of 13-16; and 95 percent of the audience was over the age of

⁵² See NAB Comments at 8-10; see also Network Comments at 2 (in terms of total day viewing, broadcast network viewership by children ages 2-17 has decreased 88 percent since the 1987-88 season).

⁵³ See NAB Comments at 10.

⁵⁴ Nielsen, Oct. 17-Sept. 18, Live viewing, Network averages, 9:00 a.m.-12:00 p.m.

⁵⁵ Nielsen NPM, Live+SD, Per2+ (09/30/2017-09/22/2018).

⁵⁶ *Id.*, TC211+TT1217.

⁵⁷ *Id.*, TT12-17.

18. In fact, around two-thirds of the audience for Litton's programs on these two networks last season was over the age of 55.⁵⁸

When focusing on viewership of Litton's programs among those children accessing them only via broadcast antenna, the numbers are even smaller. On a national basis in the 2017-18 season, Litton's programs on CBS and NBC owned and affiliated stations each averaged 18,300 viewers between the ages of 2-17, including 6,200 children ages 12-17.⁵⁹ Across each of these stations, fewer than 90 children ages 2-17 on average watched any given Litton program via broadcast antenna, and fewer than 30 children ages 12-17 watched via antenna.⁶⁰ In short, children no longer rely on commercial stations' E/I content, even in OTA homes.⁶¹

No one disputes that Litton invests significant resources and effort into producing quality educational programming for young viewers. The above data, however, demonstrate that very few children and teens are interested in watching broadcast TV for that particular programming.⁶² At the same time, children clearly have a tremendous appetite for video content. As discussed in more detail below, stations should be encouraged to experiment with how best to attract children to educational and informational content, including on the

⁵⁸ NNTV, Live+SD (09/25/2017-09/23/2018).

⁵⁹ NPower, Live+SD, 09/30/2017-09/22/2018.

⁶⁰ *Id.*

⁶¹ A letter from The Henry Ford specifically addressed one Litton program, *Innovation Nation*. See Letter from Patricia E. Mooradian, President and CEO, The Henry Ford, to Chairman Pai, MB Docket Nos. 18-202, 17-105 (Sept. 24, 2018). According to Nielsen data from the 2017-18 season, while the show averaged 1.57 million Live + Same Day viewers, only 68,000 viewers were ages 2-17, and only 22,000 of these children accessed the show via broadcast antenna. See Nielsen NPM, Live+SD, 09/30/2017-09/22/2018.

⁶² See NAB Comments at 7-12 (discussing traditional television's loss of young viewers to OTT video providers that provide programming on demand, in short segments and via a range of devices).

platforms and devices young viewers prefer, rather than be required to air traditional programs fitting the parameters of existing FCC rules but failing to interest the intended beneficiaries of those rules.

V. COMMENTERS OPPOSING REFORM OF THE FCC'S REGULATIONS PERTAINING TO MULTICAST CHANNELS FAIL TO JUSTIFY RETENTION OF THOSE RULES

Commenters opposing changes to the children's TV programming rules express concern about households that lack pay TV and internet access.⁶³ But when opposing the FCC's proposed changes to its multicast regulations specifically, these same commenters suddenly change their tune and focus on the ability of children in households *with* pay TV subscriptions to access E/I programming on broadcasters' multicast streams.⁶⁴ The Commission's concern here should remain on those children in households without access to pay TV and internet services and that may be more likely to access E/I content via antenna on commercial and noncommercial broadcast stations.

A. Only 0.5 Percent of TV Households Without Pay TV And Internet Access Have Children Ages 2-17.

The focus in this proceeding should be on the 582,000 TV households that, according to Nielsen, lack both pay TV and internet access and include children ages 2-17.⁶⁵ These households are the least likely to have access to non-broadcast sources of children's programming *and* the most likely to want access to that programming. And as NAB showed in its initial comments, these limited numbers of households have access to greater numbers of commercial, non-commercial and Class A TV stations all carrying E/I

⁶³ See, e.g., Advocacy Group Comments at 17-23; Comments of Common Sense Kids Action, MB Docket Nos. 18-202, 17-105, at 2 (Sept. 24, 2018) (Common Sense Comments).

⁶⁴ See, e.g., Advocacy Group Comments at 13-14; Common Sense Comments at 5-6.

⁶⁵ See NAB Comments at 7.

programming than existed in the 1990s.⁶⁶ Ninety percent of all noncommercial educational TV stations are PBS members, and thus are required to air at least 35 hours per week of children’s educational content on their primary video channel, and the new 24/7 PBS KIDS broadcast and online streaming channel “has been a game-changer for families across the country.”⁶⁷ Dozens of ION stations also provide a 24/7 commercial multicast channel for children.⁶⁸

Despite the increased number of broadcast TV stations offering children’s content, the trend line is clear. Households – especially those with children – are increasingly adding devices capable of receiving video content from non-broadcast platforms.⁶⁹ The record is replete with evidence demonstrating this technological shift.

Sesame Workshop, for example, reports that today 98 percent of homes with children have mobile devices, such as tablets or smartphones, a 52 percent increase from only six years ago. “In fact, mobile devices are now just as common as televisions in family

⁶⁶ See NAB Comments at 28 (counting 680 more commercial, noncommercial and Class A TV stations in 2018 than there were in 1990).

⁶⁷ Comments of America’s Public Television Stations (APTS), the Corporation for Public Broadcasting (CPB), and the Public Broadcasting Service (PBS), MB Docket Nos. 18-202, 17-105, at 2, 4 (Sept. 24, 2018) (PTV Comments) (crediting the PBD KIDS channel as substantially increasing children’s time spent viewing PBS among low-income families and broadcast-only homes). According to PTV, 75 percent of all children ages 2-8 watch their local public TV station, and African-American, Hispanic and low-income households make up a larger percentage of the PBS KIDS audience as compared to their representation in the U.S. population. *Id.* at 4.

⁶⁸ See Notice at ¶ 17. Although the Advocacy Groups said they were “not aware of any” commercial stations that “devote[d] a significant portion of a multicast stream to children’s educational programming,” Advocacy Group Comments at 14, the Notice pointed out that carriage of the Qubo network “allows Ion to provide over 500 percent more children’s programming” than FCC rules require. *Id.*

⁶⁹ See NAB Comments at 6-7, 10-12.

homes.”⁷⁰ According to the Common Sense Census, 75 percent of 0- to 8-year-olds live in a home with an internet-connected TV, up from 30 percent in 2013.⁷¹ Use of these connected devices by children ages 5-7 jumped 122 percent from 2016 to 2018,⁷² and according to Nielsen, homes that have connected devices “skew younger . . . and are much more likely to have children.”⁷³ As the Census further documents, parents are increasingly downloading apps for their children: 71 percent in 2017, up from 40 percent in 2011.⁷⁴ This percentage increases as children grow older, from 24 percent of parents with children under the age of two, to 88 percent of parents with children ages five to eight.⁷⁵ There are, moreover, “no other demographic differences in the likelihood of a parent downloading apps for a child, such as by gender, race/ethnicity, income or parent education.”⁷⁶ Given these trends, it is highly likely that the small number of TV households with children that lack both pay TV and internet access will continue to shrink.⁷⁷

⁷⁰ Comments of Sesame Workshop, MB Docket Nos. 18-202 & 17-105, at 5-6 (Sept. 24, 2018) (Sesame Workshop Comments).

⁷¹ See *The Common Sense Census: Media Use by Kids Age Zero to Eight 2017*, at 18, Table 6 (2017) (Common Sense Census).

⁷² Comments of NCTA – The Internet & Television Association, MB Docket Nos. 18-202, 17-105, at 3 (Sept. 24, 2018) (NCTA Comments).

⁷³ *The Nielsen Total Audience Report, Q2 2017*, at 4. Nielsen also estimates that enabled devices reach 87 percent of total children ages 2-11 each month, and 84 percent of children ages 12-17 each month. These numbers are similar across Black, Hispanic and Asian Americans. *Id.* at 5.

⁷⁴ See Common Sense Census at 26, Table 18.

⁷⁵ *Id.*

⁷⁶ *Id.* at 26.

⁷⁷ Data presented by some commenters showing the comparative lack of pay TV and internet access by rural and minority households fail to show the complete picture. In particular, these commenters fail to address how many of the minority and/or rural households they cite as lacking access to the internet and/or pay TV services include children. See, e.g., NHMC Comments at 8-10; Common Sense Comments at 2, 9. Based on Nielsen’s current methodology of defining household internet access, 3.59 million TV

B. Particularly Given the Very Small Audiences for Commercial Broadcast E/I Content, Stations Should Not be Required to Air Additional E/I Content for Multicast Channels.

Opponents of eliminating the rule requiring three hours of additional core programming for every full-time multicast stream aired by broadcasters state the obvious: the FCC's proposal would "reduce the overall amount of E/I programming on the air."⁷⁸ While likely true, that is not a valid basis for retaining the rule, particularly given that few children watch E/I programming on broadcast TV, whether on stations' main channels or on their multicast streams.⁷⁹ Indeed, Litton observed that "viewership of multicast streams is so low, that removing E/I programming from these streams would have little to no impact on the total viewership of E/I programming" and "would not harm children."⁸⁰ And there is no statutory requirement to maintain the current rules, as Congress did not mandate the original three-hour "guideline," let alone its expansion to the second, third and fourth (or more) multicast streams provided by stations.⁸¹

Certain commenters supporting the FCC's current multicast rules also conflate the quantity of programming available to children with the quality and effectiveness of that content.⁸² Given that FCC rules require stations to air E/I programming that garners few

households have neither pay TV nor internet access, and out of that universe, only 582,000 households have neither pay TV nor internet access *and* include children ages 2-17. Nielsen also estimates that under 1.64 million of the 3.59 million TV households without pay TV and internet access are Asian, Black or Hispanic. Due to sample size concerns, NAB was not able to obtain data as to how many of these 1.64 million minority households include children.

⁷⁸ Advocacy Group Comments at 10; see *also* NHMC Comments at 13 (FCC proposals "would likely decrease" the amount of educational programming available).

⁷⁹ See Section IV., *supra*, and NAB Comments at 7-10. Moreover, significant amounts of E/I programming will remain available on broadcast stations. See Section V.A., *supra*.

⁸⁰ Morgan Declaration at ¶ 30d; Litton Comments at 27.

⁸¹ See Section II.B, *supra*; 47 U.S.C. § 303b(a); NAB Comments at 31 & n.83.

⁸² See, e.g., Advocacy Group Comments at 10-11; Common Sense Comments at 4-5.

child viewers, those rules and that programming cannot be said to effectively serve children or the public interest more broadly. Requiring stations to air three more hours of E/I programming for each full-time multicast stream therefore does not further the CTA’s express goal of serving the needs of children, whether or not this requirement results in children having access to more (unwatched) programming over-the-air.⁸³ Every multicasting TV station, including the smallest, should not be obligated to bear these additional programming burdens, given the lack of interest by a shrinking audience that strongly prefers to consume video content via non-broadcast options.⁸⁴

As Nexstar observed, the burden of the multicast requirement is not lessened by flexibility to choose on which multicast stream to air the additional programming because “six hours is six hours no matter how you divide it.”⁸⁵ The experiences of Maranatha Broadcasting, a small, independent broadcaster with two TV stations, WFMZ and WDPN, in the Philadelphia market, illustrate Nexstar’s observation.⁸⁶ After the broadcast TV spectrum incentive auction, WFMZ began sharing a channel with three other stations. Even though WFMZ is not affiliated with a major network, its primary stream airs over 46 hours per week of local news; its secondary stream airs full-time local weather coverage. MBC sought guidance post-auction from FCC staff about satisfying WFMZ’s obligation to provide six hours

⁸³ See Gray Television Comments at 8 (“Requiring *all* programming streams to carry three hours of children’s programming is excessive and does not comport with viewers’ expectations.”).

⁸⁴ See NAB Comments at 29-31 (observing, *inter alia*, that the APA and Regulatory Flexibility Act (RFA) require the FCC to “minimize” the economic impact of regulations on small entities and that any FCC rule’s impact on small businesses must be “reasonable and reasonably explained”).

⁸⁵ Comments of Nexstar Broadcasting, MB Docket Nos. 18-202, 17-105, at 5 (Sept. 24, 2018) (Nexstar Comments).

⁸⁶ See Comments of Maranatha Broadcasting Company, Inc., MB Docket Nos. 18-202, 17-105 (Sept. 24, 2018) (MBC Comments).

a week of E/I programming. Specifically, MBC inquired about airing WFMZ's local weather stream's three hours of E/I programs on its co-owned sister station WDPN, observing it make little sense to disrupt the news programming on WFMZ's main stream with additional E/I programs or to place children's programs in the middle of 24-hour local weather coverage. But in the absence of any FCC assurances that this alternative would be approved, MBC made the difficult decision to degrade WFMZ's two program streams to air a third stream, which would rebroadcast another subchannel and on which the requisite hours of E/I programming could be aired. Despite these efforts, MBC reports that almost no children watch its E/I programming.⁸⁷ Given their unintended consequences and arbitrary effects, the Commission should eliminate the existing multicast E/I requirements.⁸⁸

C. Broadcasters Are Not Responsible for MVPD Carriage of Multicast Signals, and MVPD Carriage of a Broadcast Channel Has No Bearing on Whether a Broadcast Licensee Satisfied its E/I Programming Obligations.

Commenters that oppose allowing broadcasters the discretion to place core programming on multicast streams, rather than on their main channels, argue that the FCC should not permit this flexibility because MVPDs do not carry many multicast channels.⁸⁹ The Commission should disregard these arguments. TV stations are only responsible for broadcasting E/I programming free over-the-air. They are not responsible for MVPD carriage of their signals containing that programming (nor can they be because the FCC does not grant must-carry status to multicast channels). Accordingly, the FCC should not base

⁸⁷ See *id.* at 2, 4.

⁸⁸ MBC is not the only small broadcaster explaining the challenges they face complying with the FCC's rules. See, e.g., Comments of Block Communications, Inc., MB Docket Nos. 18-202, 17-105 (Sept. 24, 2018) (Block Communications Comments); Comments of Cadillac Telecasting Company, MB Docket Nos. 18-202, 17-105 (Sept. 24, 2018) (Cadillac Comments).

⁸⁹ See Advocacy Group Comments at 14; Litton Comments at 15; Common Sense Comments at 5-6.

stations' fulfillment of their obligation to serve children on whether or not MVPDs – broadcasters' marketplace competitors, themselves not required to serve children – choose to carry the programming stream(s) with local stations' E/I programs.

D. Viewers That Rely on OTA-Only TV Will Not Be Harmed if Broadcasters Are Able to Air Their E/I Programming on Multicast Streams.

As NAB's initial comments showed in detail, broadcasters need increased flexibility in airing E/I programs so they can better tailor their programming schedules to the needs and interests of their communities.⁹⁰ Allowing broadcasters to air some or all of their requisite hours of core programming on their multicast streams, rather than their primary channels, will preserve access to this programming for the 582,000 TV households with children that lack both pay TV and internet access. The fact that MVPDs do not carry many multicast streams is irrelevant, as MVPD carriage does nothing to increase accessibility of those streams to the OTA-only households primarily at issue in this proceeding.

Utilizing multicast streams, moreover, is consistent with how many network-affiliated stations currently handle preemptions of primetime programming for breaking news and last-minute Presidential addresses.⁹¹ In these cases, stations move their regularly-scheduled programming to a multicast channel and alert viewers to the changed channel. Over-the-air viewers simply "click up," for example, from channel 4.1 to channel 4.2, and they can continue watching the primetime program.

Although Litton worries about its ability to produce new E/I content if stations are permitted to air this programming on multicast channels, broadcasters will still be required, under NAB's proposal, to air 156 hours of core programming annually (the equivalent of

⁹⁰ NAB Comments at 22-27; see also, e.g., Nexstar Comments at 5, MBC Comments at 2.

⁹¹ See Network Comments at 8.

three hours per week), thereby ensuring continued broadcaster demand for E/I content. Other commenters express unfounded fears about losing access to E/I content. NHMC's comments, for example, include anecdotes about families relying on broadcast E/I programming. However, the programs these families fear losing access to are all PBS programs, including *Mr. Rogers*, *Arthur*, *Wild Kratts*, *Sesame Street* and *The Electric Company*.⁹² PBS member stations are required as a condition of their membership to air at least seven hours of E/I programming per weekday, and APTS, CPB and PBS state that their commitment to serving children will not change regardless of the outcome of this proceeding.⁹³

While NHMC's anecdotes are unrelated to commercial TV programming, they are nonetheless telling. Viewers recognize noncommercial educational stations as a leading source of children's programming, while commercial TV stations, with their extensive network and syndicated programming, local and national news, weather and sports, are not places parents or children intuitively turn for children's programming.⁹⁴ The experiences of local stations over the past 20 years has shown that "[t]he 'require-it-and-they-will-watch' premise of the 1990s children's television regulatory approach" has not worked as intended.⁹⁵ Commercial TV stations' provision of the requisite amounts of strictly-defined

⁹² See NHMC Comments at 7-8.

⁹³ See PTV Comments at 2, 4. In early 2017, PTV also launched its PBS KIDS broadcast and online streaming channel, ensuring that educational programming is freely available to all children and their parents on a platform and at a time convenient for them.

⁹⁴ Maranatha Broadcasting, for example, reported it is "impossible for MBC to sell a single advertiser commercial time in any of its children's programming. This is because advertisers know intuitively coupled with a lack of ratings in these shows, that MBC's extensive news, weather and syndicated programming serves an adult audience. WFMZ-TV is not the place parents or children turn to for children's programming." MBC Comments at 4.

⁹⁵ NRB Comments at 2.

core programming on their main streams and on multicast channels has not attracted young viewers in any meaningful numbers. It is time for a change in regulatory approach.

VI. THE FCC SHOULD ALLOW BROADCASTERS TO COMPETE IN THE FORMATS YOUNG VIEWERS PREFER

In this proceeding, broadcasters are primarily concerned that the FCC's rules no longer reflect the dynamics of the video programming marketplace. As a result, stations now make programming decisions to conform to rigid regulatory mandates, rather than to respond to the needs and interests of young viewers who have shifted to other video options. Reforming the FCC's rules as proposed could begin to address this problem.

A. The Record Is Devoid of Evidence Showing That Children Benefit from Rigid Programming Rules.

Commenters that oppose modifying the definition of core programming to include non-regularly scheduled programs, and programs of varying lengths, assert these changes will decrease the educational value of the programming and make the programming harder for parents to find.⁹⁶ For instance, NHMC repeatedly argues that the FCC's 30-minute minimum requirement "is backed by science."⁹⁷ Rather than citing research, however, NHMC merely refers to the FCC's 1996 decision that short programs should not count as core programming.⁹⁸ Similarly, Common Sense cites research showing that children benefit from "regular, repeated content," but "regular" and "repeated" does not necessarily mean weekly-scheduled or for 30-minute minimums.⁹⁹ And while Litton says it may support

⁹⁶ See, e.g., NHMC Comments at 14-17; Common Sense Comments at 6-7.

⁹⁷ See NHMC Comments at 16-17.

⁹⁸ NHMC Comments at 16 (citing 1996 Order, 11 FCC Rcd at 10713).

⁹⁹ See Common Sense at 6-7. Common Sense makes a somewhat confusing argument that the FCC should not eliminate the requirements that core programming be regularly-scheduled and weekly, citing a study showing that "children who had watched the same episode of *Blue's Clues* every day for a week had a much higher level of comprehension of

modifying this rule, it does not believe that stations will produce short-form programs if given the opportunity.¹⁰⁰ But Litton’s supposition is irrelevant. It provides no evidence that short-form programs – if they were produced and aired – would fail to serve children, and it offers no valid reasons to discourage or prohibit stations from even experimenting with shorter E/I programs.

1. Increased Programming Flexibility Will Allow Broadcasters to Better Serve Their Communities, Including Children

When first adopting rules implementing the CTA in 1991, the Commission concluded that short segment programming “is well suited to children’s short attention spans and can often be locally produced with acceptable production quality,” and “thus may be a particularly appropriate way for a local broadcaster to respond to specific children’s concerns.”¹⁰¹ NAB’s initial comments here identified several articles and studies, including one examining nearly seven million video-watching sessions across four Massive Open Online Courses, finding that students have short attention spans for learning.¹⁰² Based on

the show’s messages than children who had seen the show once.” *Id.* at 6. That may be the case, but under the FCC’s rules, stations are restricted in their ability to count previously aired programs toward their three-hour requirement. In fact, Common Sense illustrates a potential benefit of allowing stations more flexibility. If stations were able to satisfy their E/I obligations on an annualized basis, they could tailor their programming lineups to times when children are more likely to be at home and could air increased amounts of E/I programming, including non-weekly scheduled specials, over shorter time periods (e.g., spring break or summer vacation), which could have a greater educational impact. For instance, according to Nielsen, the 2017 persons-using-television ratings for children ages 2-11 increased by several points on Mondays through Fridays from 9:00 a.m. to 3:00 p.m. during the third quarter, which overlaps with traditional school summer breaks. See Nielsen NPower, Time Period Report, PUT, 3Q 2017 (06/26/16-09/24/17); 4Q17 (09/25/17-12/31/17), 1Q18 (01/01/18-04/01/18), 2Q18 (04/02/18-07/01/18).

¹⁰⁰ See Morgan Declaration at ¶ 28; Litton Comments at 27, 9-11.

¹⁰¹ *Policies and Rules Concerning Children’s Television Programming*, Report and Order, 6 FCC Rcd 2111, 2115 (1991) (1991 Order).

¹⁰² NAB Comments at 15-16.

this evidence and the FCC's own previous conclusions, the Commission now should eliminate its requirement that every children's program must be 30 minutes or longer to count as core.¹⁰³

Cadillac Telecasting explained, moreover, that changing the status of short-form programming under the FCC's rules may open up a new marketplace for content producers. Today, film producers can use "[s]martphones, animation software, and free and/or open source video-editing technology" to create original content, including "short-duration educational/instructional programming."¹⁰⁴ Nexstar also argued that eliminating the 30-minute requirement would allow broadcasters to "produce or procure higher quality, local facing or focus driven children's programming," instead of settling for the programming widely available from networks and syndicators, thereby increasing the variety of children's programs on the air.¹⁰⁵ But because the current rules do not count short-form or non-regularly scheduled programming toward the requisite three hours, many stations are

¹⁰³ NHMC asserts that Congress intended to require children's programs to be 30-minutes long, but that claim should be rejected, given the CTA's silence on the characteristics of stations' programming intended to serve the needs of children. See Section II.B., *supra*; H.R. Rep. No. 101-385, at 17 (1989) (stating that a "broad range of programming will meet the standard of service" expected of TV licensees under the CTA). NHMC also argues that because broadcasters have not generally deviated from the 30-minute format in their programming, "it is still fair to hold broadcasters to their own industry practices." NHMC Comments at 16. In other words, NHMC claims that because broadcasters *have not violated FCC rules* by deviating from the mandated 30-minute minimum format, stations should continue to be held to this format. The FCC must reject that absurd argument.

¹⁰⁴ Cadillac Comments at 8.

¹⁰⁵ See Nexstar Comments at 6; see *also* Block Communications Comments at 4 (noting that because of the threat of "significant penalties" for violating these rules, "rather than trying to produce local children's programming, or running children's programming at times that might best fit local children's needs, many stations now run syndicated, pre-packaged blocks of children's programming, just to be safe.").

understandably reluctant to produce or acquire and air much, if any, of this new original content.¹⁰⁶

According to Gray Television, providing broadcasters more flexibility in airing children's TV programs will allow local stations to adjust programming schedules as needed "based on the needs of their communities."¹⁰⁷ In the month before an election, for instance, a station may decide to air public forum discussions or candidate debates and interviews on Saturday mornings. During this pre-election period, a station with greater programming flexibility could air E/I specials at different times, rather than weekly-scheduled E/I programs on Saturday mornings. Increased flexibility also would permit WDRB, Block Communications' Louisville, Kentucky station, to serve its community by offering locally produced pre-game shows prior to airing several college basketball games of high local interest.¹⁰⁸ Block estimates such a pre-game program would employ 12 crewmembers and bring in gross profits of \$9,000 per show, which Block could invest "into station personnel, capital purchases, and additional local programming."¹⁰⁹ Because of the FCC's strict scheduling and preemption rules, however, WDRB does not plan to add pre-game shows to its lineup,

¹⁰⁶ NHMC also claims that "broadcasters may still count short segment programming, such as *Schoolhouse Rock*, as educational and informational pursuant to the CTA." NHMC Comments at 16. But short-form programming only counts toward satisfying stations' children's TV obligations under the FCC's "Category B" guideline. Since 1996, virtually no stations have utilized the Category B option, given its vagueness and uncertainty. See Comments of NAB, MB Docket No. 17-105, at 28-29 (July 5, 2017). As Nexstar explained, "the current rules disincentivize one-time KidVid productions or specials created by broadcasters, or even other program providers, regardless of duration, since those programs would only be considered non-core programming and not necessarily cost effective or beneficial from compliance perspective." Nexstar Comments at 7.

¹⁰⁷ See Gray Television Comments at 6.

¹⁰⁸ See Block Communications Comments at 5.

¹⁰⁹ *Id.* at 5-6.

costing its community local programming of interest and costing WDRB significant revenue.¹¹⁰

Even assuming the FCC provides broadcasters more scheduling flexibility, many broadcasters, moreover, may continue to air regularly scheduled children’s programming and programs 30 minutes in length. Elimination of these requirements would simply ensure that other, non-regularly scheduled programming and short-form programs are “appropriately ‘counted’ towards fulfilling a broadcaster’s children’s programming obligations.”¹¹¹

2. Increased Scheduling Flexibility Will Not Significantly Impact Parents’ Ability to Find E/I Programming

The Commission should dismiss the argument that programs must be regularly-scheduled and 30 minutes long for parents to find the programs for their children.¹¹² As explained in detail, very few children are even watching broadcast programs at the time they air.¹¹³ Families today live in an on-demand world, and most are not interested in waiting for Saturday mornings to watch a television show at its scheduled time. As Block Communications noted, “Children, like their parents, are more likely to ‘binge watch’ programs than they are to wait patiently for next week’s episode.”¹¹⁴

¹¹⁰ Block also discussed the influx of revenue WDRB received when it changed its Saturday morning 8:00 a.m.-9:00 a.m. time slot from E/I programming to news programming. WDRB now makes \$11,400 in revenue for that time slot each month. Across three hours each weekend, in just one month the station could generate an additional \$35,000 in revenue – “allowing it to employ up to 14 people just for that three-hour news block.” Block Communications Comments at 5.

¹¹¹ Gray Television Comments at 6.

¹¹² See, e.g., Advocacy Group Comments at 15.

¹¹³ See Section IV., *supra*; NAB Comments at 7-10.

¹¹⁴ See Block Communications Comments at 8.

What’s more, as Meredith explained, “the maturation of the TV Listings industry has put searchable programming grids in the palm of Americans’ hands – whether through the remote or a phone or tablet.”¹¹⁵ Parents eager to find E/I programming can search their TV listings at any time, and in homes with connected devices or OTT apps, they can even search using voice commands.¹¹⁶ The record shows no sound basis for continuing to require all core programming by every TV station to be formatted and scheduled in the same rigid way.

For similar reasons, the Commission also should reject calls to maintain stations’ reporting obligations without change. Common Sense claims that allowing non-regimented E/I programming, “combined with the proposed changes in reporting and publicization requirements” will make the programming harder to find.¹¹⁷ Parents, however, do not rely on stations’ quarterly children’s TV reports to find E/I programming,¹¹⁸ and if the Commission adopts NAB’s proposal for a streamlined annual report, it will still have information sufficient to gauge stations’ compliance with the children’s TV rules.¹¹⁹

B. Young Viewers Demonstrate Clear Preferences for Short-Form, On-Demand Programming, and FCC Rules Should Better Reflect These Preferences

Those opposing any changes to the current children’s TV rules contend it is irrelevant that children today access video content via other platforms, because only broadcasters are

¹¹⁵ See Letter from Joshua N. Pila, General Counsel, Meredith Corporation Local Media Group, to Marlene H. Dortch, FCC, MB Docket Nos. 18-202, 17-105 at ¶ 2 (Sept. 24, 2018) (Meredith Letter).

¹¹⁶ *Id.*

¹¹⁷ Common Sense Comments at 7.

¹¹⁸ See, e.g., Network Comments at 7; Meredith Letter at ¶ 5; Block Communications Comments at 9.

¹¹⁹ See NAB Comments at 36-42.

mandated to offer E/I programming.¹²⁰ They cherry pick a select few shows – out of the myriad number of programs available online – that allegedly illustrate that OTT programming is not “designed with a specific purpose to educate children,”¹²¹ and also argue that not all programming on channels such as the Disney Channel, Nickelodeon, Discovery Channel and History Channel is educational or even appropriate for children.¹²² These commenters’ arguments are wholly unconvincing. Among other things, they ignore the demonstrated preferences of young viewers for video content other than those programs receiving the Commission’s “E/I seal of approval.”

As an initial matter, neither the CTA nor the FCC’s regulations require that all child-oriented programming must be educational and informational or require that E/I programming air only on channels that are suitable for, or oriented toward, children every minute of every day. Indeed, broadcast channels are not child-oriented for most of the viewing day, and they may also include programs that some parents would prefer their children not view. Cable channels and OTT platforms therefore cannot be dismissed merely because they are not solely devoted to educational content suitable for children.

OTT providers, moreover, have incredible libraries of content for children, some of it educational, some of it entertaining. According to the Common Sense Census, the three categories of videos most frequently watched by 0- to 8-year-olds are learning videos (64

¹²⁰ See Advocacy Group Comments at 17 (“kids’ offerings of these companies need not meet any educational standard, and often don’t”); see *also* Common Sense Comments at 9; NHMC Comments at 11.

¹²¹ Advocacy Group Comments at 27.

¹²² See Common Sense Comments at 10-11 (arguing that the Disney Channel and Nickelodeon offer “children’s entertainment media,” and that some of the programming on the Discovery Channel and the History Channel are “not suitable for children”).

percent), animal videos (46 percent) and how-to videos (38 percent).¹²³ Entities such as Common Sense Media are trusted sources for evaluating children’s programming, and it highlights dozens of quality children’s programs on many OTT platforms.¹²⁴ As the Common Sense Census illustrates, children and their parents today routinely access educational and informational content through OTT platforms, even though these platforms are not required by the FCC to provide such content. The Commission may therefore appropriately rely on the extensive and growing amounts of child-oriented content – much of it educational or informational – available online and through MVPDs as a basis for reforming its current children’s TV rules.¹²⁵

¹²³ See Common Sense Census at 18. It should also be noted that some programming, even if it is not designated as E/I, has real, valuable impact on children. MTV’s *16 and Pregnant*, which aired for five years and was “not specifically designed as an anti-teen childbearing campaign,” nonetheless had a demonstrable impact on reducing the rate of teen births in America. See Comments of the Institute for the Study of Knowledge Management in Education, Projected, Evolved, and Explorer at Large, MB Docket Nos. 18-202, 17-105, at 5 (Sept. 24, 2018).

¹²⁴ See *Best Kids’ TV Shows on Amazon Prime Instant Video*, Common Sense Media, available at <https://www.commonsensemedia.org/lists/best-kids-tv-shows-on-amazon-prime-instant-video>; *Best for Learning: Our Recommendations for Families*, Common Sense Media, available at <https://www.commonsensemedia.org/best-for-learning-lists> (educational apps, games and websites for kids); *Best Kids’ TV Shows on Netflix in 2018*, Common Sense Media, available at <https://www.commonsensemedia.org/lists/best-kids-tv-shows-on-netflix>; *Best Kids’ Shows on Hulu*, Common Sense Media, available at <https://www.commonsensemedia.org/lists/best-kids-tv-on-hulu>.

¹²⁵ A few commenters opposing changes to the FCC’s rules also cite concerns with commercialization and violations of privacy online, saying they want to “preserve a safe space for children” on the “[r]egulated airwaves.” NHMC Comments at 11-12; see also Advocacy Group Comments at 23. NAB fully appreciates that many families regard broadcast TV as safe for their children. However, the FCC’s children’s TV rules do not produce a safe space that benefits children because young viewers have fled that space. As discussed above and in NAB’s initial comments, young viewers are increasingly abandoning broadcast and even cable TV for OTT options and are not viewing commercial stations’ E/I programs in any substantial numbers. The space created by the FCC’s children’s TV rules may be safe, but it is virtually empty.

Broadcasters also should have the opportunity, and be encouraged, to satisfy their E/I programming obligations by producing creative content in formats of demonstrated interest to children and teens. As the Sesame Workshop noted, “children’s media experiences have evolved dramatically since the passage of the CTA: they are now engaging with programs not only on a television set, but across multiple platforms, anytime and anywhere.”¹²⁶ In fact, according to the Common Sense Census, only 27 percent of all TV viewing for children ages 0 to 8 in 2017 (which includes both broadcast and cable television) was watched live, down from 45 percent just four years ago.¹²⁷ This makes sense, given that 98 percent of homes with children have at least one mobile device.¹²⁸ As NCTA reported, this year online video streaming will displace “traditional broadcast and cable programming as the number one source of traditional television programming for children and families,”¹²⁹ and among teens, online streaming has already displaced traditional broadcast and cable TV.¹³⁰ And while only 1.12 percent of children ages 2-11 watched broadcast networks on Saturday mornings in the last year, during the same time period, 9.51 percent of this age group watched cable programming, 3.62 percent watched

¹²⁶ Sesame Workshop Comments at 4.

¹²⁷ See Common Sense Census at 17, Figure 4.

¹²⁸ See Sesame Workshop Comments at 5.

¹²⁹ NCTA Comments at 2, 4-5.

¹³⁰ A 2017 analysis found that 34 percent of teens’ video consumption was with YouTube, 27 percent with Netflix, another ten percent with Hulu/Amazon Prime/Twitch and only 14 percent with “live TV.” Teens, moreover, last year consumed 70 percent of their video content via smartphones (34 percent), computers (26 percent) or tablets (10 percent). Haley Velasco, *Who is Gen Z? How teens are consuming content*, thedrum.com (Dec. 27, 2017). Further, according to Nielsen, TV households with teens ages 12-17 are 82 percent more likely to use video games, 31 percent more likely to use smart TVs, and 21 percent more likely to use tablets than TV households without children. See Nielsen NPOWER, UE Report, 2/15/2018, Based on Scaled Installed Counts.

content using internet-connected devices, 2.36 percent used video game consoles, 1.53 percent watched DVR programming, and 0.77 percent watched DVDs.¹³¹

Data from PTV further illustrates the clear demand for educational content accessed via different devices. PBS KIDS videos are streamed an average of 253 million times each month and account for 35 percent of the time children spend watching videos online.¹³² Data from one broadcast network show that when its E/I programs were streamed during the Fall 2017 season, 14 percent of the total streams came from desktop computers, 28 percent from mobile apps, and 58 percent from OTT apps.¹³³ These data are not surprising, given NAB's previous discussion about the preferences of young viewers for on-demand video.¹³⁴ Given the reality of today's digital marketplace, NAB reemphasizes the real value in encouraging broadcasters to think creatively about non-traditional efforts to serve children and teens, including through online content and apps. We again urge the FCC to provide guidance as to how such non-broadcast efforts can count toward a station's E/I obligations.¹³⁵

VII. THE FCC SHOULD ALLOW SAME-MARKET BROADCASTERS TO COORDINATE AND AIR CONCENTRATED AMOUNTS OF E/I PROGRAMMING ON SELECT STATIONS IN THE MARKET

As Maranatha Broadcasting Company explained, the target audience for its Philadelphia station WFMZ's local news, weather and syndicated programming is adults.¹³⁶

¹³¹ Nielsen, Oct. 17-Sept. 18, Live viewing, 9:00 a.m.-12:00 p.m.

¹³² See PTV Comments at 4.

¹³³ CBSi Internal. "Mobile apps" include apps downloaded to personal devices including smart phones and tablets. "OTT apps" include apps downloaded to devices including smart TVs, Apple TV and Amazon Fire TV Stick.

¹³⁴ NAB Comments at 10-12, 17.

¹³⁵ NAB Comments at 17-18, 34.

¹³⁶ See MBC Comments at 4.

And while this programming serves WFMZ's community, placing children's TV programming in WFMZ's lineup likely does not serve anyone because children are not looking to WFMZ for E/I programming, and adult viewers are likely aggravated by the interruption of the news and other adult-oriented programming for which they turn to the station.¹³⁷ Far better, MBC suggests, would be to aggregate E/I content on a few stations within the Philadelphia market. Children are "far more likely to be watching a channel where there is a substantial amount of children's programming."¹³⁸ If given the opportunity, MBC would prefer to air WFMZ's required E/I programming on its commonly-owned sister station in the market. Philadelphia children would still have the same amount of core programming available to them, and the programming would air on channels more likely to attract child audiences.

PTV also supports this proposal.¹³⁹ Its experience with the 24/7 PBS KIDS channel indicates that fostering more educational content on child-focused stations or program streams could boost viewership, as "children's time spent viewing PBS has increased 47 percent among low-income families and 32 percent in broadcast-only homes" since the inception of PBS KIDS.¹⁴⁰ The FCC should consider allowing TV stations in the same market to work together to determine the best channels for airing core programming in their market. At the least, the Commission should give a licensee like MBC owning two stations in the

¹³⁷ See MBC Comments at 4. Meredith Corporation recounted a similar experience. Some of its stations carry 24-hour weather radar multicast channels, and they have received viewer complaints when the radar is interrupted by children's programming. See Meredith Letter at ¶ 4.

¹³⁸ MBC Comments at 4.

¹³⁹ See PTV Comments at 10.

¹⁴⁰ PTV Comments at 2.

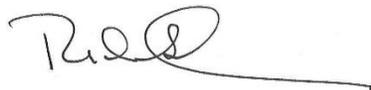
same market the flexibility to meet its children's programming obligations by airing most or all of its two stations' combined E/I programming on one of its stations.¹⁴¹

VIII. CONCLUSION

All children should have access to quality educational and informational video content. The Commission's children's TV rules, however, have failed to keep pace with the transformation of the media marketplace since the 1990s and the changing viewing preferences of children and teens. The evidence shows that the FCC can adopt several common-sense reforms to its rules, which will enhance broadcasters' ability to offer programming that serves the needs and interests of their local communities as a whole, including children.

Respectfully submitted,

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



Rick Kaplan
Jerianne Timmerman
Emmy Parsons

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¹⁴¹ See *also* Meredith Letter at ¶ 6 (urging the FCC to give co-owned, same-market stations the ability to choose which station carries how much of the required children's programming).