



June 13, 2019

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of *Ex Parte* Communication, MB Docket Nos. 18-202, 17-105

Dear Ms. Dortch:

On Tuesday, June 11 and Wednesday, June 12, the undersigned of the National Association of Broadcasters (NAB) spoke with Joel Miller, chief of staff and media legal advisor for Commissioner Michael O’Rielly, to reiterate NAB’s support for the Commission’s efforts to modernize its children’s television programming rules. NAB has argued throughout this proceeding¹ that the video programming marketplace, and families’ and children’s viewing habits, have changed dramatically since Congress passed the 1990 Children’s Television Act (CTA). The Commission should now align its rules with current marketplace realities. Doing so will allow broadcasters to better serve their communities as a whole, while ensuring that all children have access to educational and informational (E/I) content free, over the air (OTA).

Specifically, NAB continues to believe that if the FCC maintains quantitative requirements or “guidelines,” broadcasters should be allowed to satisfy their children’s television programming obligations by airing 156 hours of core E/I programming on an annual basis on any full-time programming stream. As NAB has argued, this requirement should apply per licensee rather than per programming stream.² Broadcasters should no longer be required to adhere to the inflexible regime requiring three hours of E/I programming per week on each full-time channel, including all multicast channels.

As a preliminary matter, the Commission has the authority to make such a change. Nothing in the CTA requires broadcasters to air E/I programming across all programming streams. In fact, the statute speaks only, and repeatedly, in terms of generally assessing the service of a

¹ See Comments of the National Association of Broadcasters, MB Docket Nos. 18-202, 17-105 (Sept. 24, 2018) (NAB Comments); Reply Comments of the National Association of Broadcasters, MB Docket Nos. 18-202, 17-105 (Oct. 23, 2018) (NAB Reply Comments).

² See NAB Comments at 27-31.

licensee, rather than in terms of TV channels, program streams or hours requirements.³ Further, as NAB discussed in its initial comments, there is a tremendous wealth of children's E/I programming available OTA today that did not exist when Congress passed the CTA in October 1990.⁴ As of March 31, 2019, there were 270 more full-power commercial broadcast TV stations and 25 more non-commercial educational (NCE) TV stations than there were in 1990, as well as 387 Class A TV stations (a service that did not even exist in 1990).⁵ These 682 additional stations all currently provide E/I programming, and they would be required to do so under NAB's proposal.⁶ Even looking only at the time period since the FCC last examined its rules, the E/I content available OTA has continued to expand. Ion Television launched Qubo, its 24/7 broadcast network for children, in 2007, and PBS launched its revamped PBS Kids 24/7 network, along with digital streaming and a companion app for devices, in 2016.⁷ Children in all TV households today have access to many sources of E/I content for free OTA, and that will not change under NAB's proposal.

What's more, as NAB previously documented in detail, children's video consumption habits have altered almost beyond recognition. For example, while children still demand video content, they no longer rely on broadcast programming, whether on a licensee's main channel or multicast channel, the same way they previously did.⁸ In just the last 10 years – which was after the FCC expanded its programming requirements to include multicast streams – Saturday morning viewership by children ages 2-11 of the four major English-

³ See NAB Comments at 19-20, 31; 47 U.S.C. §§ 303b(a) & (b) (“the Commission shall, in its review of any applications for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the *licensee* . . . has served the educational and informational needs of children through the *licensee's* overall programming”; “In addition to consideration of the *licensee's* programming . . .”) (emphasis added). See also NAB Reply Comments at 5-11 (detailing the FCC's considerable discretion under the CTA and refuting other commenters' erroneous claims that the FCC lacks statutory authority to amend its children's TV rules as proposed in its rulemaking notice).

⁴ See NAB Comments at 27-29.

⁵ FCC News Release, *Broadcast Station Totals as of March 31, 2019* (Apr. 2, 2019) and FCC News Release, *Broadcast Station Totals as of Oct. 31, 1990* (Nov. 2, 1990).

⁶ As NAB also noted, nearly 90 percent of the 378 NCE TV stations operating today are members of PBS and must, by the terms of their membership, air at least seven hours of educational children's programming each weekday.

⁷ See NAB Comments at 29; see also www.ionmedia.com/business/qubo; John Koblin, *PBS Is Creating a Channel Exclusively for Children*, The New York Times (Feb. 22, 2016).

⁸ See NAB Comments at 5-12. For example, out of the 4 hours and 30 minutes children ages 2-16 spent watching video content in 2017, only 34 minutes was spent watching live broadcast TV; only 600,000 children ages 2-17 watched broadcast TV on a given day in the 2017-18 television season, down from 4 million in the 1991-92 season; 95 percent of teens ages 13-17 report having a smart phone or having access to one.

language networks has declined by 71 percent.⁹ During the 2017-18 season, E/I programming on CBS and NBC owned and affiliated stations each averaged 18,300 viewers between the ages of 2-17, and fewer than 90 children ages 2-17 on average watched any given E/I program via broadcast antenna.¹⁰ While children continue to enjoy video content, they are increasingly accessing programs from a variety of sources and via a range of devices, many of them on-demand, and decreasing their reliance on, or interest in, broadcast E/I content.¹¹

The Commission must weigh the relative costs to broadcasters of providing this programming across all full-time streams against the relative benefits of airing and reporting on that programming for a rapidly shrinking young audience that predominantly accesses video content via nonbroadcast options.¹² Indeed, in its own strategic plan, the Commission committed to ensuring that regulations “solve real problems at a reasonable cost.”¹³ As NAB and others have repeatedly stated, broadcasters remain committed to serving the needs of children in their communities.¹⁴ Based on the dynamics of today’s marketplace, however,

⁹ See NAB Comments at 10 (citing 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).

¹⁰ See NAB Reply Comments at 18.

¹¹ Notably, Apple did not introduce the iPhone until 2007, while today, 98 percent of homes with children have at least one mobile device and those “devices are now just as common as televisions in family homes.” Comments of Sesame Workshop, MB Docket Nos. 18-202 & 17-105, at 5-6 (Sept. 24, 2018). A recent study found that devices (e.g., smartphones, computers, iPads, tablets or video-capable eReaders) that can be used for watching video are ubiquitous, with 98 percent of all households having at least one and with an average of about six per household. Leichtman Research Group, *Research Notes 3Q 2018*. See also NAB Reply Comments at 19-21, 32-36 (describing young viewers preferences for online, on-demand video programming and the availability of vast amounts of that programming via multiple devices).

¹² See NAB Comments at 30 (citing *Thompson v. Clark*, 741 F.3d 401, 405 (D.C. Cir. 1984) (If a rulemaking record shows that the rule constitutes an “unreasonable” assessment of costs and benefits as to be arbitrary and capricious under the Administrative Procedure Act, “the rule cannot stand”); see also *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).

¹³ NAB Comments at 30 (citing FCC, *Strategic Plan 2018-2022*, at 13, Performance Goals 4.1.2 & 4.2.1 (Feb. 12, 2018)).

¹⁴ See e.g., NAB Comments at 42; Letter of Joshua N. Pila, General Counsel – Local Media Group, Meredith Corp., to Marlene Dortch, Secretary, FCC, MB Docket Nos. 18-202, 17-105, at 1 (Sept. 24, 2018); Comments of the Network Commenters, MB Docket Nos. 18-202, 17-

the benefit to children of providing three hours of E/I programming on all full-time program streams does not outweigh the costs and burdens.¹⁵ The Commission should eliminate the requirement that broadcasters air E/I programming on all streams and adopt a 156-hour annual requirement per licensee. Doing so is a reasonable approach to ensuring that E/I content remains available free OTA and that local broadcasters, especially smaller ones, are not unduly burdened.¹⁶

As NAB also previously highlighted, consumers are increasingly demanding more local and national news, public interest programming and live sports coverage, which forces broadcasters to preempt more E/I programming.¹⁷ NAB continues to believe that the Commission should allow broadcasters to air E/I content on any free OTA stream and to count short-form (of any length) and non-regularly scheduled programs as core programming. Doing so would greatly reduce the need for broadcasters to preempt programming. If, however, the Commission declines to provide this relief, it should expand its “breaking news” exemption¹⁸ to include other public interest programming, and no longer require stations to reschedule core programming that is preempted due to live, locally produced, non-regularly scheduled programming. Such “programming that is locally produced” by the broadcaster should “serve[] the community where the [broadcast station] is located.”¹⁹ This approach is in line with the way the Commission described locally produced programming in its Closed Captioning and Video Description Order. As the FCC

105, at 9-10 (Sept. 24, 2018); Comments of Cadillac Telecasting Co., MB Docket Nos. 18-202, 17-105, at 10 (Sept. 24, 2018).

¹⁵ As Nexstar Broadcasting explained, “[t]he burden of providing any additional 3.0 average hours of children’s television for every stream disincentivizes broadcasters from expanding their program offerings to all other viewers beyond their primary station. This results in the inefficient use of spectrum and a restriction of programming choices in general, and the burden is not necessarily lessened by a broadcaster’s option to determine how to distribute the children’s television programming across the multicast streams, six hours is six hours no matter how you divide it.” Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 18-202, 17-105, at 8 (Sept. 24, 2018) (Nexstar Comments).

¹⁶ See NAB Comments at 31 (explaining that the Regulatory Flexibility Act places an affirmative duty on the FCC to “minimize the significant economic impact” of regulations on “small entities,” citing 5 U.S.C. § 604(a)(6)).

¹⁷ See NAB Comments at 22-25.

¹⁸ See *Children’s Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943, 22957 (2004) (“We will continue to exempt from the requirement that core programs be rescheduled core programs preempted for breaking news.”).

¹⁹ *Closed Captioning and Video Description of Video Programming*, Order on Reconsideration, 13 FCC Rcd 19973, ¶ 61 (1998).

previously indicated, this type of content includes “local public interest programming (e.g., a parade, a county hearing).”²⁰

A number of the live locally-produced programs that broadcasters struggle to schedule due to the rigid E/I requirements are not regularly scheduled and are of considerable interest to not only their communities at large but also to children and teens. These types of programs include community parades and rallies, local high school sports (especially play-off or championship games), political candidate forums and specials addressing challenges in stations’ communities.²¹ The Commission should not impede the ability of stations to offer these programs by requiring stations to reschedule E/I content preempted for them.

Finally, the Commission should also adopt NAB’s proposals to modernize the FCC’s reporting requirements by reducing the frequency of the filings to an annual report and allowing broadcasters to largely rely on a series of certifications.²² For example, licensees currently must include in their reports the “Age of Target Child Audience” for each program. The Commission uses this information to help determine whether the broadcaster complied with the commercial time limits, yet the commercial time limit applies only to programming for children ages 12 and younger.²³ The Commission should streamline this specific requirement by requiring broadcasters to certify either that the program was targeted at children 12 or younger, or that it was targeted at children ages 13-16.²⁴ This certification should also provide a broadcaster the flexibility to certify that all of its programming was targeted toward one of these two age groups, rather than requiring the broadcaster to individually certify the age group for each program. As Litton Entertainment discussed in its comments, Litton programming is targeted toward children ages 13-16, and Litton currently supplies programming to three of the four major English-language networks, as well as the

²⁰ *Id.* See also *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, ¶ 158 (1997) (also stating that local high school and other nonprofessional sports, live local talk shows and community theatre productions would fall within the category of locally produced and distributed programs of local public interest).

²¹ While NAB does not believe regularly-scheduled programs should be included in this exemption, the Commission should provide flexibility for stations to air occasional, locally-produced multipart series. For instance, as Nexstar explained, one of its stations was unable to air a 6-week series on opioid addiction in the community due to the E/I programming requirements. See Nexstar Comments at 5. Such a program should be exempted from the preemption rule. Stations should be encouraged to air these important shorter, multi-week specials of local interest.

²² See NAB Comments at 40-42.

²³ See 47 CFR § 73.670 n.2 (“For purposes of this section, children’s programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.”).

²⁴ Similar to all other elements of the Commission’s rules that TV broadcasters would be required to certify compliance, if a broadcaster is not able to certify that its programming is targeted to either age group, it would be required to explain the reason.

CW, Telemundo, Antenna TV and Cozi.²⁵ Requiring the hundreds of stations that rely on Litton programming to provide the targeted age group for each program is unnecessary and overly burdensome. Rather, the Commission should provide the flexibility for broadcasters to certify either one time for all programs or to certify each individual program depending on the nature of that licensee's programming. Doing so would provide the Commission the information it needs to determine compliance with the commercial time limits while decreasing compliance burdens.

NAB appreciates the Commission's continued efforts to modernize its children's TV rules. This review is an important step toward ensuring that the FCC's rules reflect the current video programming marketplace and the needs of children and their families today.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

A handwritten signature in dark ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

cc: Joel Miller

²⁵ See Comments of Litton Entertainment, MB Docket Nos. 18-202, 17-105, at 4-5 (Sept. 24, 2018).