

Modernization of Media Regulation) MB Docket No. 17-105
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Gray owns and/or operates more than 100 full-power, Class A and low power television stations across 57 markets. Gray stations are consistently ranked first or second in their market and are distinguished by their commitment to local news programming. Gray fully supports the Commission's initiative to "advance the public interest by reducing unnecessary regulations and undue regulatory burdens that can stand in the way of competition and innovation in media markets."² Specifically, Gray requests that the Commission re-examine its children's television mandates and return to its previous policy that provided broadcasters with the flexibility to serve their local audiences with programming that was responsive to their needs and interests.

1 Gray Television, Inc. (“Gray”) hereby submits its comments in response to the Commission’s Public Notice initiating a review of its rules applicable to media entities. *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, FCC 17-58, MB Docket No. 17-105 (May 18, 2017) (“PN” or “Public Notice”).

2 PN, at 1.

Paw Patrol, and *Dora the Explorer*. HBO recently signed a five-year deal for first-run episodes of *Sesame Street* to air on its linear and digital platforms. Over-the-top providers Netflix, Amazon, and Hulu provide a treasure trove of original and previously-aired children's programming at consumer's fingertips.

Simply put, parents have a wealth of choices for quality programming aimed at meeting the educational and informational needs of children, making the three-hour per week/per broadcast stream children's television processing guideline unnecessary in today's media marketplace. Not only does the mandate have no statutory basis, its arcane requirements restrict the ability of stations to air local news and other public interest programming in furtherance of their public service mission. With that in mind, Gray requests that the Commission re-examine its children's television mandates. Specifically, Gray proposes that the Commission: (1) allow broadcasters to opt-out of the three-hour processing guideline (and accompanying Children's Educational Television Report) if a station instead provides at least three hours of local public interest programming on the weekend; and (2) eliminate the quarterly Children's Educational Television Report and replace it with quarterly certifications and more fulsome descriptions as part of station renewals.

Background.

The plain language of the Children's Television Act of 1990 (the "Act") purposely gave broadcasters flexibility to meet the programming needs of their local communities. Specifically, the Act requires that as part of the Commission's review of a television license renewal, it consider compliance with children's television commercial limits and "the extent to which the

licensee met . . . educational and informational needs of children through *the licensee's overall programming*, including programming specifically designed to serve such needs.”³

Consistent with the statutory language, and one year after the Act became law, the Commission held that “[t]he Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed.”⁴ Instead, the Commission adopted the following *permissive guidelines* that a station may consider in evaluating whether it had aired programming geared toward children’s needs “(1) the circumstances within the community, (2) other programming on the station, (3) programming aired on other broadcast stations within the community, and (4) other programs for children available in the broadcaster’s community of license.”⁵ Five years later, and well after the Act’s passage, the Commission diverged from the statutory language and Congressional intent, adopting a three-hour per week processing guideline for renewal applications and burdensome requirements for quarterly Children’s Educational Television Reports.⁶

The Time is Ripe to Revamp Children’s Television Regulations

The quantity and quality of children’s programming available in 2017 from free, over-the-air signals and on a multitude of other platforms shows the Commission’s reason for the regulations – “to increase the amount of educational and informational broadcast television programming available to children” – to be outdated and unnecessary.⁷ This year, PBS launched

³ 47 U.S.C. § 303b(a) (emphasis added).

⁴ *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 2111, ¶ 24 (1991) (“1991 Order”).

⁵ *Id.*, ¶ 22.

⁶ *Policies and Rules Concerning Children’s Television Programming*, 11 FCC Rcd 10660 (1996) (“1996 Order”).

⁷ *Id.*, ¶ 2.

its PBS Kids multicast subchannel to more than 100 licensees with anticipated free, over-the-air coverage of 90% U.S. TV households.⁸ The network runs children's programming 24/7 in addition to the seven hours minimum of children's programming that PBS requires its member stations to run on their primary channels. Children can watch popular educational shows like *Bob the Builder*, *Caillou*, *Nature Cat* and *Thomas and Friends* for free either over-the-air, via the PBS Kids Video app, or on the PBS Kids website. Likewise, in many markets where ION Television owns stations, the Qubo multicast stream is available free over-the-air 24/7. Cable networks like Disney Junior, Nick Jr., Nickelodeon and Sprout air a bevy of linear programming at all times of the day as well as on-demand on many cable systems. A quick scan of the Commonsensemedia.org website shows literally hundreds of four-star rated educational and informational shows available for all ages and stages of development on Netflix, Amazon, and Hulu. The market for children's programming is thriving, and the need for government intervention is absent.

Gray values its public service mission and competes to be the preeminent provider of local news, sports, weather and emergency information in each of its markets. Through its proposal to update and modernize the children's television rules, it seeks to better serve its viewers. As outlined above, the Commission should give broadcasters the ability to opt out of the three-hour processing guideline and accompanying obligation to file a quarterly Children's Educational Television Report if a station instead provides a total of at least three hours of local public interest programming across its program streams on the weekends. For instance, if a Gray station with a primary stream and two multicast streams provides a total of at least three hours of

⁸ Dru Sefton, *Launch of PBS Kids Streaming Channel Reshapes Multicast Lineups*, Current.org (Jan. 15, 2017), available at <https://current.org/2017/01/launch-of-pbs-kids-streaming-channel-reshapes-multicast-lineups/#>.

local news Saturday and Sunday on its primary stream, it would meet the three-hour requirement. Stations electing this option then would demonstrate how they served the educational and informational needs of children in their renewal applications under the standards laid out in the 1991 Order.

Gray's proposal will provide stations with autonomy to decide how to meet their communities' needs. Indeed, the current requirement often forces stations to forego public interest programming and news on weekends to accommodate children's programming and network-affiliated sports content. The problem is especially acute in the Mountain and Pacific time zones, where sports often have a morning start time, preempting children's programming and forcing the station to remove other programming to "make good" the children's programming at a different time.

Furthermore, allowing stations to opt out of the three-hour guideline will better reflect the intent of Congress. In drafting the Act, Congress carefully avoided inclusion of any quantitative guidelines on how much programming a station must air. That is why in the 1991 Order, the Commission adhered to "this strong legislative direction" and "decline[d] to establish any minimum programming requirement for licensees for renewal review."⁹ Gray's proposal reestablishes this flexibility and follows the Act's language to consider children's programming in the context of a station's "overall programming."¹⁰ In fact, Gray's proposal mirrors a similar proposal made by former FCC Commissioner Susan Ness in 1994, whose "idea was that rather than an inflexible three-hour requirement, the nations' 1,550 television stations be required either to broadcast three hours' worth of regularly scheduled half-hour shows for children weekly, or to

⁹ 1991 Order, ¶ 24.

¹⁰ 47 U.S.C. § 303b(a)

satisfy the FCC that they offer enough other programs or public-service activities to fulfill their legal mandate.”¹¹ If a station chooses the status quo and continues to air three hours of children’s programming, it can. If another station instead chooses to opt-out and air weekend public interest programming or local news, it can. In either case, the stations choose the programming that best serves the needs of its community, not the agency.

Giving broadcasters more flexibility also will eliminate the First Amendment problems inherent in the processing guideline promulgated in the 1996 Order. The processing guidelines – “clear but nonmandatory guidance on how to guarantee compliance”¹² – provide that the Media Bureau will approve the children’s television portion of renewal applications where the station has aired three hours per week of educational and informational programming.¹³ “Renewal applications that do not meet this guideline will be referred to the Commission, where the applicant [has] a full opportunity to demonstrate compliance with the [Act]”¹⁴ In reality, the “nonmandatory guidance” has acted as a *de facto* rule that broadcasters ignore at their peril, which is why few stations have chosen to take the option to go before the full Commission to demonstrate compliance with the Act. When seen properly as a rule mandating that broadcasters air certain government-approved programming, it unconstitutionally burdens commercial speech in violation of the First Amendment.

¹¹ Lawrie Mifflin, *U.S. Mandates Educational TV for Children*, The New York Times (Aug. 9, 1996), available at <http://www.nytimes.com/1996/08/09/us/us-mandates-educational-tv-for-children.html>.

¹² 1996 Order, ¶ 149.

¹³ 1996 Order, ¶ 120.

¹⁴ 1996 Order, ¶ 120.

Reducing the Burdens of Children's Television Reports

For licensees that opt to continue providing three hours of core educational and informational programming, the Commission should replace the unwieldy Children's Educational Television Reports with simple quarterly certifications and a more fulsome explanation of a station's efforts to comply with the Act as part of a station's renewal application. This will reduce unnecessary burdens on broadcast stations without countervailing harm.

Tellingly, when the FCC first promulgated rules under the Act in 1991, it required only "submission at renewal time of the summary of the licensee's programming response and other efforts directed to the educational and informational needs of children," which provides the agency "a more appropriate means of assessing compliance than use of a composite week submission."¹⁵ Since that time, and following the 1996 Order, the children's television reporting requirement has morphed into an elaborate series of superfluous questions. Are viewers really checking a station's online public file two months ahead of time to see what children's programming it plans to air next quarter? If a viewer wants information on a certain program, isn't it more likely that they will Google the show and land on the show's website than navigate to a description of the show in the public file? Does preemption reporting serve any purpose other than compliance with rules for rules' sake? The bottom line is that the cost of the current quarterly reports filed via LMS – which can be up to a full day of work for a business manager at each station – greatly outweighs their negligible utility.

¹⁵ 1991 Order, ¶¶ 35-36.

Quarterly certifications, similar to those allowed to certify compliance with commercial limits, provide a way for the Commission and the public to measure compliance. As with the commercial limits certifications, no specific form is required. Instead, stations would upload a signed statement of compliance with the relevant rule parts. Details on specific programs aired, including programs aired if a station opted-out and provided weekend public interest programming, would be included in a submission with a station's renewal.

The new certification/renewal explanation requirement would reduce burdens on both stations and the Commission and should be proposed and adopted expeditiously.

Conclusion

Gray appreciates the Commission's efforts to spur investment in broadcast television by repealing unnecessary and outdated regulations. Given the plethora of quality children's television in the marketplace, revision of the children's television mandate is long overdue. The Commission should allow stations to opt-out of the three-hour children's television processing guideline if they instead provide at least three hours of public interest programming on weekends. Further, the Commission should replace the burdensome, low-utility Children's Educational Television Reports with a quarterly certification of compliance.

Respectfully submitted,

GRAY TELEVISION, INC.

/s/

Robert J. Folliard, III
Gray Television, Inc.
Vice President and Deputy General Counsel
4370 Peachtree Road, NE
Atlanta, GA 30319
Phone: 202.750.1585

July 5, 2017