

**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
To: The Commission		

COMMENTS OF LITTON ENTERTAINMENT

LITTON ENTERTAINMENT

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SUMMARY

The Children’s Television Act (“CTA”) has worked well for nearly 30 years. Adopted and implemented on a completely bipartisan basis, broadcasters and the FCC have met the goals set forth in the CTA to provide the youth of this country with substantial educational and information (“E/I”) content. While the media landscape may have changed since 1990, over-the-air (“OTA”) broadcasting remains the dominant platform for consuming media.

Litton has created nearly 3,340 original half-hour E/I programs since the inception of the CTA, and now provides three hours each to ABC, CBS, NBC, CW, and Telemundo stations. Litton used the roadmap created by Congress and the FCC to use advertising and sponsorship dollars to underwrite the production costs of high quality E/I programs. Litton provides its programming to stations free of charge – offered in exchange for Litton being able to sell the advertising slots with the programming. All of the financial risk of producing the programming falls on Litton. Litton’s programming has garnered 50 Emmy nominations and 15 Emmy awards, 46 Parents’ Choice Awards, 108 Telly Awards, and a variety of other accolades. And Litton’s programming *is being watched* – 1.5 *billion* views in the last year.

Litton also provides the E/I programming to a number of diginets so understands the multicast world. Litton programming on multicast streams averages less than 5 percent of programming on a station’s main channel, and advertising revenues on multicast streams drops by 98 percent. Allowing stations to satisfy their E/I obligations by moving programming to a multicast stream will destroy the economics of producing E/I programming, resulting in producers relying of reruns and stale programming to provide to stations. New E/I programming would likely disappear, and any newly produced programming would be of greatly inferior

quality. Video description and closed captioning of E/I programming would also diminish or disappear, leaving children with disabilities less access to educational content.

Similarly, eliminating the three-hour processing guideline to something less would negatively impact the production market for E/I programming, as producers would have fewer programs to amortize their production costs over – the economies of scale that a three-hour block of programming allows would disappear.

Litton supports this review and encourages the FCC to find ways to eliminate unnecessary paperwork burdens and provide some measure of additional scheduling flexibility to stations who need to preempt programming. Litton even supports expanding the hours in which core E/I programming can air. As the FCC undertakes this review, however, it must always ask, “does this rule change help or hurt children”? The FCC should reject any change that would ultimately lessen the quantity, quality, or ability of children and their parents to access high quality educational programming.

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Litton Entertainment (“Litton”), pursuant to Sections 1.415 and 1.419 of the Commission’s rules (47 C.F.R. §§ 1.415 & 1.419), submits these Comments in the above-referenced proceedings in response to the Commission’s Notice of Proposed Rulemaking, released July 13, 2018.¹ In support of these Comments, Litton submits:

I. INTRODUCTION

The Children’s Television Act of 1990 (“CTA”)² has served parents and young viewers well for 28 years. Passed with broad bipartisan support, implemented by a unanimous Republican-led FCC in 1991,³ updated by a unanimous Democratic-led FCC in 1996,⁴ and

¹ *Children’s Television Programming Rules, Notice of Proposed Rulemaking*, FCC 18-93, released July 13, 2018 (hereinafter “*Children’s Television NPRM*” or “*NPRM*”). The *Children’s Programming NPRM* appeared in the Federal Register on July 25, 2018, and comments are due 60 days after publication. These Comments therefore are timely filed.

² Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§ 303a, 303b, 394.

³ *Policies and Rules Concerning Children’s Television Programming, Report and Order*, 6 FCC Rcd 2111 (1991) (*1991 Report and Order*), recon. granted in part, 6 FCC Rcd 5093 (1991) (*1991 Reconsideration Order*).

⁴ *Policies and Rules Concerning Children’s Television Programming, Report and Order*, 11 FCC Rcd 10660 (1996) (*1996 Report and Order*).

brought into the digital television age by a unanimous Republican-led FCC in 2004⁵ and 2006,⁶ the CTA has provided broadcasters with clear rules defining their public interest obligations to children. While there have been numerous fines issued for violations the commercial limits portions of the CTA,⁷ no broadcast licensee has lost its license for violating the CTA. While the media landscape has changed significantly in the past 28 years, the fact is that over-the-air (OTA) broadcast remains the dominant media for delivering both entertainment and educational programming. A robust and highly competitive market for producing educational (“E/I”) programming has developed over the past three decades – and flourished in particular over the past decade even as the Big Three networks have arranged with Litton to provide their local affiliates with children’s E/I content – within the ecosystem established by Congress and the FCC.

Litton supports a comprehensive review of the children’s television rules and supports a number of proposals aimed at lessening burdens on television stations and providing them more programming flexibility. In doing so, however, Litton must ask a question that should drive the entire analysis under this *NPRM*: “What’s in this for children?” It *is* the “Children’s Television Act” after all. The Commission needs to analyze each of its proposals under the lens of whether changes to the rules increase and enhance broadcasters’ service to children, or whether such changes decrease the amount and quality of programming that is available to children. If the

⁵ *Children’s Television Obligations of Digital Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 (2004) (*2004 Report and Order*).

⁶ *Children’s Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065 (2006) (*2006 Reconsideration Order*).

⁷ See 47 C.F.R. § 73.670. It should be noted that other than asking whether the record keeping requirement that stations are adhering to the commercial limitations (which are statutory), the *NPRM* does not seek comment on whether the Commission should change the commercial limits themselves. *Children’s Television NPRM*, ¶ 14.

latter, then such a rule change is not warranted given both the plain language and the legislative history of the CTA.

For example, Litton opposes allowing stations to shunt E/I programming off to unwatched and largely unavailable multicast streams, or reducing the number of weekly hours (three) that stations are required to dedicate to children (less than two (2) percent of a station's programming schedule for a station that operates 24/7). Allowing stations to bury children's E/I programming on multicast streams, or reducing the number of hours dedicated to child-targeted E/I programming will quickly destroy the marketplace for new, original E/I programming, and children will be left with nothing but antiquated reruns that have sat collecting dust on producers' shelves.

II. DISCUSSION

A. Litton Entertainment and the Children's Television Act

Litton Entertainment pre-dates the CTA. Litton was formed in 1987 by Dave Morgan, looking to provide original syndicated television programming to television stations.⁸ Litton teamed with zoologist Jack Hanna to produce three one-hour specials, reminiscent of "Mutual of Omaha's Wild Kingdom with Marlin Perkins."⁹ With the passage of the CTA, Litton began producing "Zoo Life With Jack Hanna" as a weekly half-hour series that quickly became the number one Nielsen rated weekly show in America.¹⁰ In the early days of the CTA, Litton was up against large Hollywood studios that produced shows like "Beakman's World," produced by Columbia Pictures/Sony and "Bill Nye, the Science Guy," produced by Disney.¹¹

⁸ See Exhibit 1, Declaration of Dave Morgan, ¶ 3 (hereinafter "Morgan Dec.").

⁹ *Id.* at ¶ 4.

¹⁰ *Id.* at ¶ 5.

¹¹ *Id.* Both "Bill Nye, the Science Guy"—which originally ran for 5 seasons in the 1990s for a total of 100 episodes (see <https://www.imdb.com/title/tt0173528/>)—and "Beakman's World"—which originally ran

Litton studied hard what Congress and the FCC said about how to fund production of quality E/I programming.¹² Using sponsorship to help underwrite production costs,¹³ Litton has been able to offer its quality children's programming to stations free of charge – neither networks nor individual stations pay for the programming, but rather receive it in exchange for allowing Litton to sell limited, designated advertising within the programs.¹⁴

When Litton began to produce E/I programming, it looked at the market and determined that the largest demographic underserved with educational programming was teens (13-16 year

for four seasons in the 1990s for a total of 81 episodes (*see* <https://www.imdb.com/title/tt0106367/fullcredits>) continue to air today as core children's programming on the MeTV network. *See* <https://www.metv.com/schedule/>. Of course, when a show's library consists of 100 episodes (or fewer), stations (for example, affiliates of MeTV) that air multiple episodes of the show each weekend will exhaust the library quickly and re-air the library multiple times. For example, according to quarterly Children's Television Programming Reports available in the FCC's Online Public Inspection File system, MeTV affiliates have aired two episodes of "Bill Nye the Science Guy" and "Beakman's World" every weekend from October 2016 to the present. In those two years, the entire library of both shows has aired at least twice. In contrast, as noted above, Litton generates new episodes of programs and entirely new programs on a regular basis, keeping content fresh and viewers engaged.

¹² Congress made clear in the CTA that producers needed advertising dollars to support the production of quality children's educational programming. *See, e.g.,* H.R. 1677, Section 101 ("Congress finds that . . . (3) the financial support of advertisers assists in the provision of programming to children"). The FCC refused to adopt calls to limit stations' ability to underwrite children's programming through sponsorships. *1991 Report and Order*, ¶ 7 (concluding that sponsorships do not constitute commercial matter for purposes of the commercial limits unless the sponsors or products are promoted beyond the requirements for sponsorship ID under Section 317 of the Communications Act); *id.* at footnote 24 ("Indeed, we wish to encourage the sponsorship of educational and informational material"). *See also* *1991 Reconsideration Order*, ¶ 31 (rejecting renewed calls to limit sponsorship and marketing efforts of children's programming: "We further agree with MPAA that such a rule would deter producers from employing marketing efforts necessary for a viable program and would stifle creativity by restricting the sources they could draw upon for stories and characters" (footnote omitted)); *id.* at ¶ 32 ("Indeed, the measures proposed by ACT/NABB would be so intrusive to the commercial and creative processes critical to the production of high quality children's programming that the ultimate goals of the Act could be frustrated").

¹³ Morgan Dec., ¶ 8.

¹⁴ *Id.* Indeed, in many instances, stations actually receive a share of the advertising dollars derived from airing the programming. *Id.*

olds).¹⁵ The success of “Zoo Life With Jack Hanna”¹⁶ emboldened Litton to produce additional content for teens. Beginning in 2011, Litton began producing a three-hour block (six half-hours) for ABC affiliates under the brand of “Litton’s Weekend Adventure.”¹⁷ Litton’s opportunity to provide this programming to ABC affiliate coincided with the ABC Network’s decision to stop providing children’s E/I content to its affiliates, content which consisted principally of off-Disney cable channel programming. Within six months, ratings for those time slots increased by 73%.¹⁸ Litton works with award winning teachers, top child psychologists & pediatricians, broadcasters, and other experts to develop and review its programming to make sure that it meets their highest standards and the definition of core E/I programming.¹⁹ Over the past 30 years, Litton has gained valuable insight into what is impactful television and what does not work in delivering a positive educational message to children, and specifically to teens.²⁰

As of these Comments, Litton provides three hours of original E/I content each to ABC, CBS, NBC, CW, and Telemundo, and E/I programs to a number of multistream diginets such as Antenna TV and Cozi.²¹ All of Litton’s currently produced original programming is shot in high definition, is closed-captioned, and contains video description.²² Since 1990, Litton has

¹⁵ *Id.* at ¶ 6.

¹⁶ Attached as Exhibit 3 is a letter from Jack Hanna to Chairman Pai, previously entered into the record in this proceeding, talking about how important the CTA has been to Jack’s ability to reach young people with educational programming about nature and conservation.

¹⁷ Morgan Dec., ¶ 10.

¹⁸ *Id.* at ¶ 11.

¹⁹ *Id.* at ¶ 7.

²⁰ *Id.*

²¹ *Id.* at ¶¶ 11-14.

²² *Id.* at ¶ 26.

produced approximately 3,340 original half-hours of E/I programming.²³ Litton has received 50 Emmy nominations and won 15 Emmy awards (going head to head with all types of children's programming, not just E/I content). Litton has won 46 Parents' Choice Awards, 108 Telly Awards, and a variety of other accolades for its programming.²⁴

More important, and contrary to what some say,²⁵ people *are* watching Litton's programming. Last year, in total, Litton's programming alone was viewed 1.5 *billion* times.²⁶ Litton Network partners air 15 hours per week (ABC/CBS/NBC/CW/Telemundo) of E/I programming reaching an average of approximately 900,000 unique teens in the average month, nearly equaling the reach of PBS' 6-12 hours per day, seven days a week, nearly equaling the total reach of PBS' six to 12 hours of E/I programming per day.²⁷ Litton's mission to reach at-risk teens is working:

- 50 percent of CBS viewers with children 12-17 earn a HHI of \$40K or less. They are 19 percent more likely to earn a HHI of \$40k or less.
- 56 percent of CW viewers with children 12-17 earn a HHI of \$40K or less. They are 3 percent more likely to earn a HHI of \$40k or less.
- 46 percent of NBC viewers with children 12-17 earn a HHI of \$40K or less. They are 8 percent more likely to earn a HHI of \$40k or less.
- 48 percent of ABC viewers with children 12-17 earn a HHI of \$40K or less. They are 13 percent more likely to earn a HHI of \$40k or less.²⁸

²³ *Id.* at ¶ 15.

²⁴ *Id.*

²⁵ *See Children's Television NPRM*, ¶ 16; *see also Comments of NAB* in Docket 17-105, pp. 24-25, filed July 5, 2017.

²⁶ Morgan Dec., ¶ 16.

²⁷ *Id.*

²⁸ *Id.* at ¶ 17.

Equally as important, Litton has discovered that parents also watch its programming with their teens (“co-viewing”). This co-viewing phenomenon gives parents a chance to open a dialog with their teens, strengthening family relationships and children’s futures.²⁹ Moreover, many of these co-viewers are educators:

- Women 18-49 viewers are 73 percent more likely to work in pre-school through high school education.
- Women 25-54 viewers are 51 percent more likely to work in pre-school through high school education.
- Adult 18-49 viewers are 69 percent more likely to work in pre-school through high school education.
- Adult 25-54 viewers are 28 percent more likely to work in pre-school through high school education.³⁰

Litton regularly receives letters and e-mails from parents and educators about the importance of Litton’s programming.³¹ Litton also provides its programming at no charge to the American Forces Network Broadcast Center (“AFN-BC”) which is viewed by service members and their families in more than 170 territories and is included as part of the curriculum in Department of Defense Educational Administration (“DoDEA”) classrooms.³²

In short, no one understands the requirements of the CTA or the market for E/I programming better than Litton.

²⁹ *Id.* at ¶ 6.

³⁰ *Id.* at ¶ 18.

³¹ *Id.* at ¶ 15.

³² *Id.* at ¶ 20. *See* Exhibit 2 hereto, letter from AFN to Chairman Pai supporting the efforts of Litton to provide quality E/I programming.

B. The Flawed Premises of the Children’s Television NPRM

While Litton agrees that a comprehensive review of the children’s television rules is in order, Litton disagrees with many of the underlying assumptions contained in the *NPRM* and believes that as the record is developed in this proceeding, some of these underlying assumptions will be disproven.

1. The Fallacy That a Changing Media Market Makes the CTA Rules Irrelevant

Yes, the media marketplace has changed significantly since 1990.³³ Nevertheless, OTA broadcasting remains a dominant part of the television landscape.³⁴ If this were not the case, then “must see” programming such as live sports would have already migrated to other platforms. The same is true with educational programming for children. As Litton’s numbers above demonstrate, there are millions of viewers of E/I programming on OTA television. Whether watched in real-time or time shifted for later viewing, broadcast television viewing of E/I programming far outstrips any other platform.³⁵ Equally important, parents understand the meaning of the “E/I” symbol and know that this programming is designed specifically to meet the educational needs of children.³⁶ Especially for parents of teens, finding suitable content on the uncurated Internet is far more problematic, where a teen is only a click away from violence

³³ *Children’s Television NPRM*, ¶¶ 1, 16-18.

³⁴ See, e.g., “Traditional Television Still Dominant,” March 22, 2017, at <http://informitv.com/2017/03/22/traditional-television-still-dominant/> (“Households with both traditional television as well as online television and video services still watch nearly five and a half hours of live television for every hour of online viewing”).

³⁵ To the extent that some argue that children viewership of E/I programming on commercial television is down substantially since 1990, see e.g., *Comments of NAB* in Docket 17-105, pp. 24-25, filed July 5, 2017, this is only true if you look at young viewers 2-7. The reason for this is obvious, both Litton and Steve Rotfeld Productions, which provides three hours of E/I programming to FOX affiliates, produce 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.

³⁶ For this reason, Litton opposes eliminating the requirement that stations air an “E/I” “bug” on educational children’s programming for commercial stations. See *NPRM*, ¶¶ 25-27.

or pornography. Broadcast television's provision of E/I content remains as relevant, if not more so, for teens and their parents in 2018 as it was in 1990.

2. The Fallacy That Allowing Broadcasters More “Flexibility” Will Return Us to the Glory Years of “Schoolhouse Rock” and “ABC Afterschool Specials”

At the same time the *NPRM* points out that consumer consumption habits of media have changed drastically in the past 28 years, there is a strangely nostalgic notion that if the three-hour “rule” were relaxed, short-form and non-regularly-schedule programming such as “Schoolhouse Rock” and “ABC Afterschool Specials” would somehow magically return to the airwaves.³⁷ That simply will not happen. First, “Schoolhouse Rock” appeared during the Saturday morning animated entertainment block aired by ABC between 1973-1985 / 1993-1999.³⁸ In other words, the programming ecosystem that gave the opportunity for children's E/I interstitial programming to flourish was *long-form children's programming (non-E/I) itself*. Without blocks of children's entertainment programming consisting of 30-minute-long shows, interstitial E/I programming likely would not have aired because there would have been no appropriate home for it. There is absolutely no evidence in the record of this proceeding that even if all E/I programming were relegated to multicast channels, stations would go back to large animation blocks of programming; indeed, none of the Big Four networks currently provide any children's programming other than core E/I programming to their affiliates. So exactly what programming would “Schoolhouse Rock” be broadcast in? Local news? Infomercials?³⁹ The fact is that very few commercial television stations currently offer any programming, or will offer any

³⁷ *Children's Television NPRM*, ¶ 20 (suggesting that the full-length programming mandate killed popular programming such as “Schoolhouse Rock”); ¶ 24 (suggesting that the regularly scheduled mandate killed specials such as “ABC Afterschool Specials”).

³⁸ *Id.* at ¶ 20, n. 91.

³⁹ Morgan Dec., ¶ 28.

programming, where interstitials like “Schoolhouse Rock” or “In the News” would be relevant or even appropriate; as a result, doing away with the 30-minute criterion in the “core programming” definition would render children’s E/I interstitial short-form programming without a natural home.

Moreover, without stations airing full-length children’s E/I programs—which, as noted above, served as the fertile soil in which interstitial E/I material grew and blossomed three decades ago—it is entirely unclear how children would find a station’s short-form, interstitial E/I programming. Consequently, the parties who allege that weekend episodes of children’s E/I programming have experienced a precipitous decline in viewership—an argument that Litton has rebutted—cannot logically reconcile their position about viewership with their exhortation that the Commission eliminate the full-length E/I programming requirement; not only would no on-air environment exist for such interstitial material but also children and parents will be challenged to identify when such material will air. To the extent that parents and children cannot find short-form E/I programming or can only find it amidst age-inappropriate material, how can it be argued that viewership would be better?

Second, “ABC Afterschool Specials” aired largely on weekday afternoons in the 1980s when programming there was largely unwatched. With the rise of a whole generation of popular (and economically lucrative) adult-oriented syndicated fare such as “Oprah,” “Judge Judy,” “Doctor Phil,” and “Ellen,” it is almost inconceivable that stations would preempt such programming in favor of one-off children’s specials.⁴⁰

Therefore, as the FCC addresses the state of the television market for children’s programming, it must acknowledge that the video programming marketplace has evolved in a

⁴⁰ *Id.*

way that makes it highly unlikely that stations will reformat their programming schedules or sacrifice revenues in order to accommodate short-form E/I interstitial or long-form occasional E/I program material targeting children.

3. The Fallacy That Left to their own Devices, All Broadcasters Will Do the Right Thing and Continue to Air Quality Educational Programming

In its review of the development of the children's television rules, the *NPRM* gives short shrift to the underlying problem that occurred between 1991 and 1996 – without firm rules governing the amount of hours broadcasters are required to air, some broadcasters cut corners, cut quality, and cut the quantity of E/I programming.⁴¹ In addition to finding that stations were airing barely two hours of E/I programming per week,⁴² the *1996 Report and Order* found that there were many stations that aired no E/I programming whatsoever, or very little,⁴³ and many programs for which stations claimed E/I credit were of highly questionable educational value.⁴⁴ As the *1996 Report and Order* concluded, there is every economic incentive for some broadcasters to air programming that appeals to a larger audience and therefore is more

⁴¹ Compare *Children's Television NPRM*, ¶¶ 6-9 with *1996 Report and Order*, ¶¶ 35-42.

⁴² *1996 Report and Order*, ¶ 121 (“airing two hours per week of such programming six years after passage of the CTA clearly is not compatible with the long-term performance improvement Congress intended when it passed the CTA, and a processing guideline of three hours is clearly a reasonable means of implementing the statute at this time”).

⁴³ *Id.* at ¶ 41 (“four stations (8.3 percent) in the Kunkel study did not claim to air any such programming, in addition, eleven stations (23 percent) reported airing one hour or less of such programming per week, sixteen stations (33 percent) reported airing 1.5 hours or less of such programming per week, and twenty-five stations (52 percent) reported airing two hours or less of such programming per week”).

⁴⁴ *Id.* at ¶ 41, n. 100 (stations claimed the following shows as E/I: “America's Funniest Home Videos,” “Biker Mice from Mars,” “Bugs and 100 Friends,” “Mighty Morphin Power Rangers,” “Woody Woodpecker,” “X-Men,” and “Yogi Bear”). See also *2004 Report and Order*, Statement of Commissioner Copps (“All of these steps are important to guarantee that we do not return to a time when G.I. Joe, Mighty Morphin Power Rangers, America's Funniest Home Videos, the Jetsons, and the Flintstones were held up as examples of programs that met the educational and informational needs of children”).

profitable.⁴⁵ Yet the *Children’s Television NPRM* fails to discuss *why* a three-hour rule was necessary, and simply assumes that quality children’s programming will continue to be aired, even if the rules are relaxed. History and experience demonstrates otherwise. Before the Commission even considers relaxing the three-hour processing guidelines, it must explain why a departure from the 1996 Commission’s analysis is supported by record evidence that broadcasters will continue to meet their public interest obligation by airing E/I programming that meets what Congress established in 1990.

4. The Fallacy That the Programming Aired on Other Platforms Would Qualify As E/I Were it to Air on Broadcast Television

The *Children’s Television NPRM* concludes that there are large amounts of “children’s programming” available on cable and other platforms.⁴⁶ However, what the *NPRM* can’t say is whether such other programming is truly educational, directed at children, and would meet the definition of E/I programming (programming specifically designed for a target children’s audience and has education as a significant purpose).⁴⁷ That is because none of these other platforms (including cable) are required to meet these standards – not only are they free to provide purely entertainment programming 24/7 but they also can label whatever they want as “educational.” In contrast, over the past 28 years, Litton has developed a team of award winning

⁴⁵ *Id.* at ¶¶ 29-34.

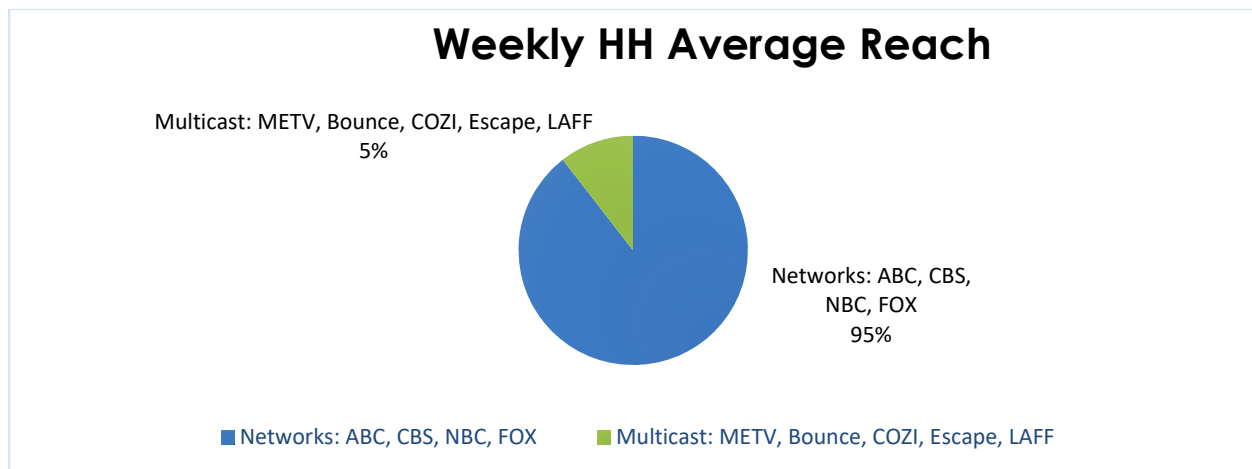
⁴⁶ *Children’s Television NPRM*, ¶ 16. See also Modernization of Media Regulation Initiative, Comments of the National Association of Broadcasters (filed July 5, 2017), p.26 n.56 (“For example, myriad full-time children’s cable channels are flourishing (e.g., Nickelodeon, Nick Jr., Teen Nick, Disney Channel, Disney Junior, Disney XD, etc.), as are other channels (e.g., Discovery, Discovery Family, National Geographic, National Geographic Wild, Animal Planet, History Channel, Smithsonian Channel, etc.) that provide educational and informational programming attractive to viewers of all ages.”).

⁴⁷ *1996 Report and Order*, ¶ 75. Indeed, the first parenthetical in the NAB’s July 5, 2017, comments, see *supra* note 46, appears to identify cable networks that are largely vehicles for children’s entertainment programming, and the second parenthetical refers to cable networks that air general audience—not child-targeted—programming. General audience E/I programming is irrelevant for purposes of evaluating how much child-targeted E/I content exists in the current video programming ecosystem.

teachers, top child psychologists & pediatricians, broadcasters, and other experts to develop and review its programming to make sure that it meets these expert's highest standards and the definition of core E/I programming.⁴⁸ Before the FCC considers reducing the three-hour processing guideline, it must demonstrate that *quality* educational programming is actually available on these other platforms.

C. Allowing Stations to Move E/I Programming onto Their Multicast Streams Would Destroy the Market for New Quality Children's Educational Programming

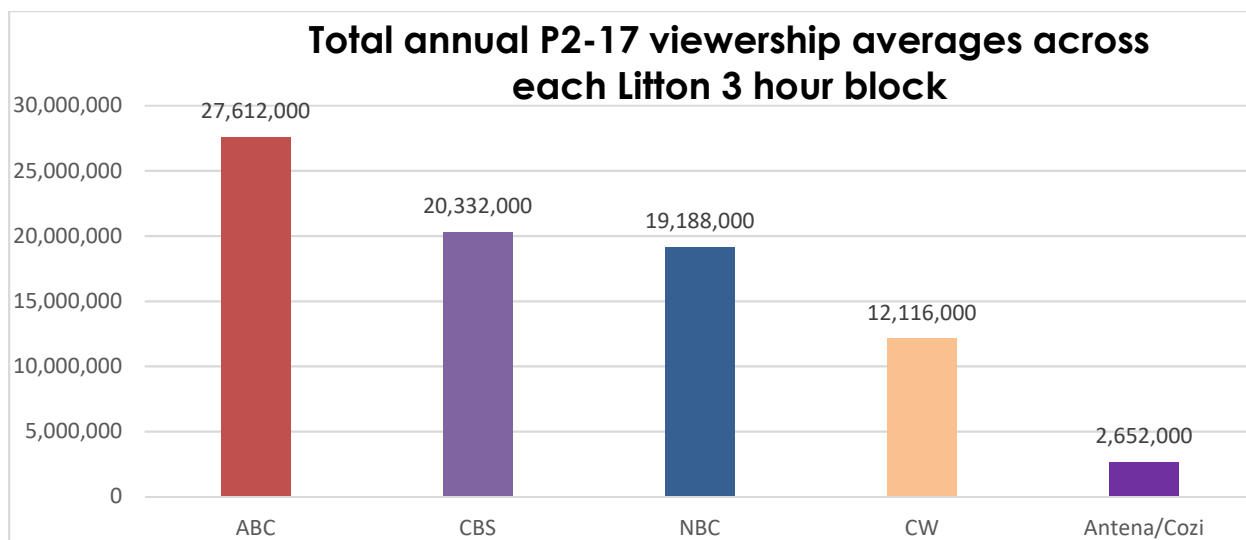
One of the proposals in the *NPRM* that Litton cannot support is permitting stations to relocate E/I programming from station's main channel onto one of its multicast channels.⁴⁹ Such a move would likely destroy the market for new quality E/I programming. Litton supplies programming to two diginets (Antenna TV and Cozi) that air on stations' multicast streams. Viewership of that programming is 95 percent less than Litton's E/I programming carried on station's main channels.⁵⁰



⁴⁸ Morgan Dec., ¶ 7. Litton regularly receives letters and e-mails from parents and teachers talking about the positive impact of Litton's programming on their children and students. *Id.* at ¶ 19.

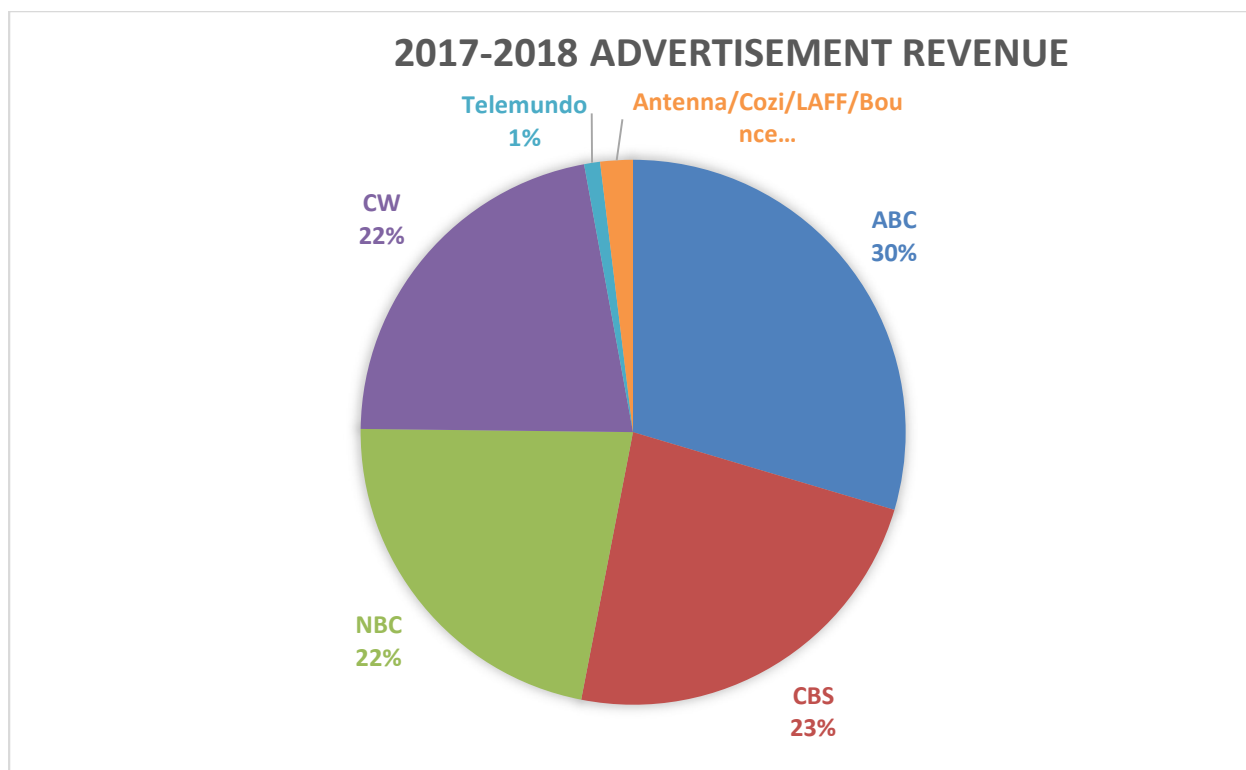
⁴⁹ *Children's Television NPRM*, ¶¶ 49-56.

⁵⁰ Morgan Dec., ¶ 23.



Without viewers, both sponsorship and advertising revenues would dry up. Litton anticipates that it would lose 98% of its advertising revenues from a program that is moved to a multicast stream.⁵¹ Other producers would suffer the same fate. Again, this observation is based on Litton's experience in providing E/I programming to multicast streams – this is not some theoretical construct.

⁵¹ *Id.* at ¶ 24.



The reason for this is obvious: Multicast streams are not carried by most MVPDs. DBS providers do not carry multicast streams. The lack of DBS carriage alone represents an instant loss of 40 million television households.⁵² In addition, cable systems that carry stations under the must-carry regime are not required to carry multicast streams.⁵³ The bulk of Americans television households view children’s E/I programming over the facilities of MVPDs or DBS providers. Assuring access of such multicast E/I programming would require changes to FCC rules to require multicast carriage by MVPDs, and/or the requirement that all MVPDs provide

⁵² According to Nielsen, there are approximately 120 million Television Households (“TVHH”). <https://www.nielsen.com/us/en/insights/news/2017/nielsen-estimates-119-6-million-us-tv-homes-2017-2018-tv-season.html>. Of those, DBS providers (DISH and DirecTV) serve 33.2 percent, or just under 40 million. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 (MB 2017) (18th Report).

⁵³ See *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission’s Rules*, 70 F.R. 14412, ¶ 2 (2005).

devices allowing viewers to switch between the MVPD video source and an over-the-air signal (the so-called “A/B Switch”).⁵⁴

Finally, and importantly, E/I programming aired on a multicast channel will not be broadcast in full high definition. Almost all broadcasters dedicate the majority of their data stream to their main channel, and broadcast multicast streams in standard definition.⁵⁵ So ultimately, children will be watching “educational” programming in the same resolution as stations carrying reruns of “Perry Mason” and “The Beverly Hillbillies.”

Without viewers, without advertising dollars, and without sponsors, producers could never cover the costs of creating new E/I programming.⁵⁶ Viewers will be confronted with an ever-aging library of reruns.⁵⁷ The MeTV network’s⁵⁸ current use of 1990s children’s programs “Bill Nye the Science Guy” and “Beakman’s World” illustrates the concept.⁵⁹ Further reinforcing the concept is “Saved By the Bell,” which originally aired a total of 86 episodes between 1989 and 1993.⁶⁰ Because the content fits the MeTV network’s profile of classic TV,

⁵⁴Were the FCC to conclude that the access issue could be solved with an A/B Switch, the constitutional underpinnings of the must-carry rules themselves would be ripe for challenge. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 221 (1987) (“Congress’ decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings and lack of consumer acceptance. The reasonableness of its judgment was confirmed by additional evidence on remand that A/B switches can create signal interference and add complexity to video systems, factors discouraging their use”).

⁵⁵ Morgan Dec., ¶ 26.

⁵⁶ Morgan Dec., ¶ 25.

⁵⁷ *Id.*

⁵⁸ MeTV is principally a multicast network, though a handful of stations air it on their primary program stream as their primary affiliation. *See* List of MeTV Affiliates, Wikipedia, *available at* https://en.wikipedia.org/wiki/List_of_Me-TV_affiliates.

⁵⁹ *See supra* note 11. In the case of MeTV, which provides classic television shows from the 1950s to the 1990s, it is logical to air non-HD children’s E/I programs from the 1990s, but a similar programming symmetry does not exist for many other multicast dignets.

⁶⁰ *See* <https://www.imdb.com/title/tt0096694/>.

MeTV provides the program to its affiliates to help satisfy their three-hour core programming “guideline” amount. According to Children’s Television Programming reports of MeTV affiliates available in the FCC’s OPIF system, four episodes of “Saved By the Bell” have been airing each week since at least the first quarter of 2016, meaning that the entire library of this 25-year-old show will have aired more than seven times by the end of 2018. Relegating children’s E/I programming to multicast streams would virtually guarantee that the “Saved By the Bell” repeat-library strategy would become the norm. Moreover, it does not end there. There would be serious secondary effects caused by moving E/I programming to multicast. First, currently all Litton programming is closed-captioned. Even if some producer could find a way to create new E/I programming for multicast streams, they certainly could not afford the costs of closed captioning. The same thing would happen with video description. Children with disabilities would lose access to these vital ancillary services in a multicast world.

Second, even moving as little as one hour per week of E/I programming over to multicast would severely and negatively affect the market for quality children’s E/I programming. As the Declaration of Dave Morgan demonstrates, Litton is able to subsidize the production costs of some of its programming by spreading all of its production costs across the six half-hour programs it produces for each network or group of affiliates.⁶¹ If broadcasters sent one (or more) hours of programming per week to the multicast gulag, two things would happen. First, the multicast hour would cease to be original, new, and up-to-date original programming. It would consist of reruns of stale programming. Second, a producer’s ability to spread the overall production costs would be reduced from six programs to four (or even less if stations were allowed to shift more than one hour per week over to multicast). Overall production budgets

⁶¹ *Id.* at ¶ 27.

would have to decrease, and the quality of children’s E/I programming going forward would suffer.

1. Video-Described Age-Appropriate E/I Programming for Visually Impaired (and Other) Children Would Decline Dramatically

The sweeping changes proposed in the NPRM—especially the proposals to reduce the overall number of hours of children’s E/I programming to be aired on individual television stations and to change the definition of core programming to remove the 30-minute duration criterion—will dramatically negatively affect the availability of these accessibility services to children in age-appropriate programming.

With respect to video description, the Commission’s rules currently require Big Four affiliates in the Top 60 Designated Market Areas (“DMAs”) to air at least 87½ hours of video-described programming per calendar quarter, of which 50 hours must be prime time programming and/or children’s programming.⁶² Because, as noted above, currently all Litton children’s E/I programming is video-described (and closed captioned), Big Four affiliates in Top 60 DMAs that air Litton children’s E/I programs have been able to rely on Litton’s content as part of their video description compliance mandate. In addition, the FCC’s video description rule requires all television stations that are affiliated with any network (including Big Four affiliates outside of the Top 60 DMAs) to “pass through” any video description that is embedded in programming (including children’s programming) to the extent that such station is

⁶² See 47 C.F.R. § 79.3(b)(1). For purposes of the video description rules, the term “children’s programming” refers to any programming that has a target audience of persons 16 years of age and younger, and it is not limited to the children’s E/I programming that is the subject of the instant proceeding. Big Four affiliates may choose any programming of any type that airs between 6 a.m. and 11:59 p.m. local time to meet the requirement for the other 37½ hours of video described programming per calendar quarter. *See id.*

“technically capable” of doing so.⁶³ Thus, to the extent that network-affiliated stations other than Top 60-DMA Big Four affiliates are technically capable of passing through video description and air Litton’s children’s E/I programming, the marketplace for age-appropriate video-described content is enhanced.

To grasp completely the potential implications of the proposed rule revisions on the availability of age-appropriate video-described programming, it is important to understand the special nature of children’s programming that the Commission has always recognized within the context of video description rules. For example, in 2000, when the Commission first implemented a video description rule, the Commission observed that, in addition to the benefits of video description for visually impaired viewers (including children):

[A]t least one and a half million children between the ages of 6 and 14 with learning disabilities may benefit from video description. Because the medium has both audio description and visual appeal, it *has significant potential to capture the attention of learning disabled children and enhance their information processing skills*. Described video programming capitalizes on the different perceptual strengths of learning-disabled children, pairing their more-developed modality with their less-developed modality to *reinforce comprehension of information*.⁶⁴

As the quoted language makes plain, the Commission in 2000 specifically saw E/I value for children—including teenage children—in the use of video description services in age-appropriate programming.

⁶³ See 47 C.F.R. § 79.3(b)(3).

⁶⁴ *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230 (2000), ¶ 10 (emphasis added) (internal footnotes omitted), *vacated in part, reversed in part by Motion Picture Ass’n of Am. V. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

Although the Commission's 2000 promulgation of video description rules was ultimately vacated and reversed by the D.C. Circuit Court of Appeals,⁶⁵ the Commission in 2011⁶⁶ specifically referred directly back to the paragraph of the 2000 video description Report and Order that contained the quote set forth above. In so doing, the Commission observed:

Because older children with vision or other impairments can benefit from video description, the [2011 video description] NPRM proposed to define children's programming in this context as programming directed at children 16 years of age and under. . . . Setting aside questions of authority, we agree with our predecessors regarding the potential value of these rules for children.²²⁰ We therefore adopt the proposal to define children's programming as programming directed at children 16 years of age and under, and, as noted above, to permit video described children's programming to count toward the 50 hour description requirement.⁶⁷

Footnote 220 in the language quoted above cites back to paragraph 10 of the 2000 video description Report and Order, i.e., the language about benefits to children that is quoted further above.

In addition, the same paragraph from the 2000 video Description Report and Order was also cited by the Commission in its 2014 video description report to Congress,⁶⁸ and the Commission in the same report observed that video description in children's programming enhanced the ability of visually impaired adults to discuss children's programming with

⁶⁵ *Motion Picture Ass'n of Am. V. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

⁶⁶ In 2011, the Commission's promulgation of the current video description regime was expressly authorized by the CVAA, Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010).

⁶⁷ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847 (2011), ¶ 53 (internal footnote omitted).

⁶⁸ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011 (2014), ¶ 16 n.46.

children.⁶⁹ The 2014 report to Congress also acknowledged that in 2013 ABC, CBS, and NBC would be providing most of their children’s E/I programming with video description.⁷⁰

Finally, in 2017, when the Commission adopted the Report and Order⁷¹ increasing the number of hours of video described programming for certain entities to 87½ on a quarterly basis, the Commission specifically acknowledged “the benefits of video description to children and individuals on the autism spectrum, because it can help with the development of vocabulary.”⁷²

Thus, the history of the regime governing video description, including statements made by the Commission as recently as last year, demonstrates that the Commission has consistently found video description services to be important in the context of children’s programming and specifically in the context of learning and cognition by underserved and vulnerable viewers.

Why is this video description history important? Because the proposed rule changes would perversely result in less video-described children’s programming and, more to the point, E/I children’s programming. If the proposed rule changes are adopted and the economic model for producing high-quality E/I programming for children is deleteriously affected—and Litton provides persuasive evidence in these comments that it will be—producers of such programming will be forced to determine how to trim costs to continue to provide *any* new children’s E/I

⁶⁹ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011 (2014), ¶ 16 (“Although the record largely does not address the benefits of video description for particular types of programming, one commenter notes that she appreciates video description for children’s programming because she can understand the visual content in programs that her grandchildren watch, which can enhance discussions of those shows with young children.”).

⁷⁰ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report to Congress, 29 FCC Rcd 8011 (2014), ¶ 20 & n.56.

⁷¹ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 32 FCC Rcd 5962 (2017), ¶ 11 (citing *Listening Is Learning, How Does Description Benefit Students Without Visual Impairments?*, http://listeningislearning.org/background_description-no-bvi.html).

⁷² *Id.*

programming. Because the FCC's video description rules require only Big Four network affiliates to air at least 87½ hours of video-described programming each calendar quarter on their Big Four-affiliated program streams, video description is likely the first accessibility service to be economically forced out of the children's E/I video production process. Why? Because a change in the rules to allow stations—including Big Four affiliates—to put all of their children's E/I programming on their multicast streams would mean that stations would no longer rely on video-described children's programming to meet their 87½ hour-per-quarter video description obligation because they would no longer air children's E/I programming on their primary stream. Consequently, the incentive will plummet for children's E/I program producers to commit a portion of a rapidly shrinking production budget to video description services, which will result in a much smaller amount of age-appropriate video-described content in the marketplace for children.

Furthermore, even if children's E/I programming producers such as Litton were able to magically maintain production budgets that included video description, the proposal to allow multicasting stations to air a total of three hours of E/I programming per week would necessarily result in far less age-appropriate video-described programming for children in the marketplace. For example, a Big Four-affiliated station that today airs three hours of Litton's video-described children's E/I programming on its primary channel and six more hours of Litton's video-described children's E/I programming on each of its two multicast channels (for a total of 9 hours of age-appropriate video-described children's E/I programming) would be allowed to reduce its video-described children's E/I programming to one-third that amount for a total of 3 hours per week, which could be broadcast on any program stream the station wishes, including a

program stream that lacks the technical capability of passing through the embedded video description.

Finally, to the extent that the full-length program criterion is eliminated from the definition of core programming and stations begin airing short-form children’s E/I programming, what is the likelihood that such interstitial material will be video described? Litton respectfully submits that the answer is “not likely.” This perverse result may be a function of the law of unintended consequences, albeit one that will severely and negatively affect the amount of age-appropriate video described programming in the marketplace—programming that could not only educate and inform children but also provide cognitive benefits to the vulnerable population of children with learning disabilities.

2. The Availability of Closed Captioned Children’s E/I Programming Would Likely Decline

The Commission’s closed captioning rules function in a manner that is significantly different from the Commission’s video description rules, though they provide equally important accessibility to vulnerable, underserved viewers. With respect to closed captioning, the “default” for years has been for all “new” programming to be closed captioned on broadcast stations⁷³ and for stations to pass-through all closed captioning that is embedded in programming provided to the station.⁷⁴ Of course, there are exceptions to the default rule, including two that have great significance to this proceeding, namely (i) the exemption that applies to program streams with gross revenues of less than \$3,000,000⁷⁵ and (ii) the exemption that applies to interstitial material

⁷³ 47 C.F.R. § 79.1(b)(1).

⁷⁴ 47 C.F.R. § 79.1(c).

⁷⁵ 47 C.F.R. § 79.1(d)(12) (“No video programming provider shall be required to expend any money to caption any channel or stream of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming closed captioned when received pursuant to [paragraph \(c\)](#) of this section. For the purposes

and PSAs that are less than 10 minutes in duration.⁷⁶ While Litton has been unable to locate any definitive data regarding how many multicast streams across the country have reached the \$3,000,000 gross revenues threshold, Litton believes that the number is small and, for non-Big Four-affiliated multicast streams may be very few indeed. If broadcasters push all of their children's E/I programming to their multicast streams, then children's E/I programming providers may no longer feel compelled to—and, given the sure-to-be undermined economic structure of the children's E/I programming production market, may no longer be economically able to—embed closed captioning in children's programs because broadcast stations would not be legally obligated to provide closed captioned children's programming that airs on multicast channels with less than \$3,000,000 in revenues. Consequently, then, the proposal to eliminate a requirement that at least three hours of children's core programming air on each station's primary channel could have as its unintended consequence, a reduction in the amount of closed captioned children's E/I programming available on broadcast stations.

Moreover, the clamor to bring back short-form interstitial children's E/I material may result in a further reduction of closed-captioned children's E/I programming. To the extent television stations use their short-form children's E/I programming as interstitial material (which it would be, almost by definition) or to the extent that stations rely on child-oriented PSAs as E/I programming, they may very well take advantage of the exemption category in Section 79.1(d)(6) and lawfully omit closed captioning from such material. Indeed, such short-form material is likely to be economically fragile as a general principal since it will not be long

of this paragraph, each programming stream on a multicast digital television channel shall be considered separately for purposes of the \$3,000,000 revenue limit.”).

⁷⁶ 47 C.F.R. § 79.1(d)(6) (“Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.”).

enough in duration for commercial insertion, which, in turn, means that the economics of spending resources to closed caption it would be unsustainable.

In short, the proposals to allow stations to exclusively use short-form programming to meet their children's E/I programming obligations and to move all children's E/I program material to multicast channels would undermine the availability of—and accessibility by the visually impaired, deaf and hearing impaired, and other children, to—important services like video description and closed captioning.

D. Relaxing the Three-hour “Rule” Would Negatively Affect the Ability of Producers to Create New E/I Programming

If the FCC were to conclude that three hours per week is too much, and reduced the amount of programming to something less than that,⁷⁷ the overall quality of children's E/I programming would decrease. There is a reason why in 1996 President Clinton, broadcasters, and child advocacy groups coalesced around three hours as the right fit for each station to broadcast.⁷⁸ There is a real “sweet spot” at three hours that allows producers to exercise economies of scale and spread both individual show production costs and overall overhead across six half-hour programs, and as mentioned above, be able to cross-subsidize the production costs of its most expensive programming, especially the programming that requires deployment of film crews.

⁷⁷ See *Children's Television NPRM*, ¶ 36.

⁷⁸ See <https://www.c-span.org/video/?73980-1/childrens-television> (CSPAN coverage of 1996 White House Conference on Children's Television). See also *1996 Report and Order*, ¶ 22 where the FCC made clear that the CTA's obligations relate to each broadcast station, not to a broadcast market as a whole (“Congress sought to accomplish this objective by placing on each and every licensee an obligation to provide educational and informational programming, including programming specifically designed to educate and inform children, and by requiring the FCC to enforce that obligation”). Compare this interpretation of the CTA with that proposed in the *NPRM* where the Commission would look to the marketplace as a whole for children's E/I programming. *NPRM*, ¶ 42.

E. The Children’s Television Rules can be Updated and Burdens Lessened on Broadcasters without Destroying Quality Educational Programming

Other than opposing the multicast proposal and relaxing the three-hour processing guideline, Litton supports many of the proposals contained in the *NPRM*. Specifically, Litton supports:

- Reducing paperwork burdens:⁷⁹ Removing the quarterly report filing requirement and replace it with an annual report, and eliminate the forward-looking reporting requirement;
- Expanding Core Programming Hours:⁸⁰ Litton supports expanding the current 7:00 a.m. to 10:00 p.m. period for airing E/I programming to provide broadcasters additional flexibility. Litton would support 6:00 a.m. to 11:00 p.m., or even 6:00 a.m. to midnight, even though it is likely that viewership of E/I programming in the expanded hours would drop.⁸¹
- Additional Flexibility Regarding Preemptions, Especially for West Coast Stations:⁸² Litton is well aware of the problems many stations have, especially those on the West Coast, with preemptions for sporting events. The current “fixed second home” has proven to be unworkable for many stations, especially if they are airing “wall-to-wall” event programming such as Wimbledon, The Ryder Cup, or the Olympics every other year. For these mega events, the FCC should provide more flexibility for stations, possibly expanding the airing window

⁷⁹ *Children’s Television NPRM*, ¶ 29. Litton actually provides the substantive content for the Form 398 for all stations to which Litton provides programming.

⁸⁰ *Id.* at ¶ 22.

⁸¹ Morgan Dec. ¶ 30.

⁸² *Children’s Television NPRM*, ¶ 57.

beyond that contemplated above. For all the reasons Litton demonstrated above, however, Litton cannot support allowing stations to move preempted programming to a multicast stream.⁸³

- Remove the Requirement to Air E/I Programming From Multicast Streams.⁸⁴

Even though Litton provides EI programming to a number of diginets that are broadcast on stations' multicast stream, since these streams are nearly bereft of any viewership, removing the requirement to provide three hours on each multicast stream would not harm children since so few actually watch programming on multicast streams.

- Remove the Requirement that All E/I Programming be a Minimum of 30 minutes in Length.⁸⁵ Litton is willing to support this proposal *if* there is ample scientific evidence produced in the record that outweighs the substantial studies done prior to the *1996 Order* demonstrating that short-form programming has as much or more educational impact as 30 minute programming. Having said that, Litton is unsure providing such flexibility will have any ultimate impact. As stated above, the current television market will not support the return of interstitials like “Schoolhouse Rock” and “In the News,” because there will be no relevant programming to place these into. In addition, stations create their schedules on a half-hour basis. It would be far more work (and far more burdensome) for

⁸³ Litton receives “credit” and ratings for preempted programming that is aired any other time during the broadcast week, but would not receive any ratings or credit from its advertisers for programs preempted and aired on a multicast stream. Morgan Dec. ¶ 30.

⁸⁴ *Children’s Television NPRM*, ¶ 51.

⁸⁵ *Children’s Television NPRM*, ¶ 20.

stations to try and acquire a slate of 10, 15, or 20 minute programming to put together a grid that adds up to exactly three hours (in order to fit within the overall programming schedule), than it would for them to continue to acquire six half-hour programming to meet their requirements under the CTA.

F. A Full Evidentiary Record must be Established Before a Number of Other Proposals in the *NPRM* can be Adopted

There are a number of additional proposals for rule changes in the *NPRM* that may be considered, but should not be adopted unless and until a full evidentiary record is established demonstrating that the costs of continuing these rules clearly outweighs the burden such rules impose on stations. These proposals include:

- Eliminating the requirement for an E/I “bug” on programming.⁸⁶ Litton has carried, and will continue proudly to carry the E/I watermark on its programming. From a production standpoint, it is a near-zero cost item (and as to Litton programming certainly does not cost stations anything to continue to use the E/I symbol). Litton believes that parents have come to understand and trust the mark – they know that their children are watching quality educational and information programming if the bug is up on the screen. Unless parties can provide the Commission with contrary evidence as to the efficacy of this requirement, it should be retained.
- Regularly Scheduled Programming.⁸⁷ Litton demonstrated above how removing the regularly scheduled programming requirement would not have the effect of returning nostalgic programming like “ABC Afterschool Specials” to the air.

⁸⁶ *Children’s Television NPRM*, ¶ 27.

⁸⁷ *Children’s Television NPRM*, ¶ 24.

Unless stations will go on the record promising to produce, promote, and air such programming, and in a quantity to be the equivalent of regularly scheduled programming (e.g., seven hour-long specials aired in a quarter to replace a regularly scheduled half-hour program), then the FCC should reject what is nothing more than an attempt to roll back the three hours broadcasters agreed to in 1996.

- Remove the Requirement to Report E/I Shows to Programming Guides.⁸⁸ While Litton generally supports the requirement, if record evidence is presented demonstrating that programming guides are not using this information, then Litton would support deleting this requirement.

III. CONCLUSION

What is in this *NPRM* for children? We must come back to that question. The FCC certainly should consider rule changes that allow stations to better serve children. Rules that reduce the quality or quantity of children's E/I programming should be rejected as antithetical to the bipartisan CTA, and nearly thirty years of bipartisan implementation by FCCs controlled by both parties. Our children deserve nothing less than this approach.

⁸⁸ *Children's Television NPRM*, ¶ 28.

WHEREFORE, Litton Entertainment urges the FCC to adopt the measures proposed herein.

Respectfully submitted,

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