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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96-84

In the Matter of)	
)	
Implementation of Section 505 of)	CS Docket No. 96-40
the Telecommunications Act of 1996)	
)	
Scrambling of Sexually Explicit Adult Video)	
Service Programming)	

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: March 4, 1996 Released: March 5, 1996

Comment Date: April 26, 1996

Reply Date: May 24, 1996

By the Commission:

I. INTRODUCTION

1. On February 8, 1996, the Telecommunications Act of 1996 ("1996 Act") was enacted.¹ Section 505 of the 1996 Act² amends the Communications Act³ by adding a new Section 641, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." Section 641(a) requires that multichannel video programming distributors ("MVPDs")⁴ fully scramble or fully block sexually explicit adult programming or other indecent programming on any channel of its service primarily dedicated to sexually-oriented programming so that a

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² *Id.*, Section 505.

³ 47 U.S.C. § 151, *et seq.*

⁴ Section 602(12) of the Communications Act defines a multichannel video programming distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

subscriber does not receive such programming.⁵ Section 641(b) provides that, until the MVPD fully scrambles such programming, it may not provide such programming during the hours of the day when a significant number of children are likely to view such programming. Section 641(b) further requires that the Commission determine those hours.⁶ Section 641(c) also provides a definition of "scramble:" "to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."⁷ These provisions take effect 30 days after the date of enactment of the 1996 Act, i.e., March 9, 1996.⁸

2. We herein adopt a rule incorporating Section 641(a). We also establish an interim rule implementing Section 641(b), providing that the programming described in subsection (a) may not be provided between the hours of 6 a.m. and 10 p.m. if not fully scrambled or fully blocked. We request comment on whether the interim rule should be adopted as a final rule. Finally, we request comment on other issues regarding

⁵ Section 641(a) requires that

[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

Section 641(a), Communications Act.

⁶ Section 641 provides that

[u]ntil a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

Section 641(b), Communications Act.

⁷ Section 641(c), Communications Act.

⁸ Section 505(b), 1996 Act ("The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.").

implementation and enforcement of these rules.⁹

II. ORDER

3. We herein establish a rule incorporating the self-effectuating language of Section 641(a). We are adding this rule without providing prior public notice and comment because the rule simply incorporates a provision of the 1996 Act. The Commission's action involves no discretion. Accordingly, notice and comment would serve no purpose and is thus unnecessary, and this action falls within the "good cause" exception of the Administrative Procedure Act ("APA").¹⁰

4. We establish an interim rule implementing Section 641(b) regarding the hours during which MVPDs may not provide sexually explicit adult programming or other indecent programming on any channel primarily dedicated to sexually-oriented programming if it is not fully scrambled or fully blocked. We find that good cause exists to establish an interim rule without notice and comment because Section 641 takes effect 30 days after enactment of the 1996 Act, making it impracticable to engage in notice and comment procedures.

⁹ This provision is to be distinguished from other provisions in the Communications Act, existing prior to the 1996 Act, regarding scrambling of programming on cable systems at the cable subscriber's request. Section 624 of the Communications Act requires that, upon the request of a cable subscriber in order to restrict the viewing of programming which is obscene or indecent, a cable operator must provide a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber. *See* Section 624(d)(2), 47 U.S.C. § 544(d)(2). The Communications Act also requires that a cable operator, when providing a premium channel without charge to nonsubscribers, must, among other things, block the channel carrying the premium channel upon the request of the subscriber. *See* Section 624(d)(3)(A), 47 U.S.C. § 544(d)(3)(A). The United States District Court for the District of Columbia invalidated this latter provision. *Daniels Cablevision v. United States*, 835 F. Supp 1, 9-10 (D.D.C. 1993), *appeal pending, sub nom Time Warner Entertainment Co. v. FCC*, No. 93-5349 (D.C. Cir.).

The 1996 Act also adds a new Section 640 to the Communications Act, which requires that, "upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." *See* Section 640(a). "Scramble" is defined the same as in Section 641(c). *See* Section 640(b). We do not address implementation of Section 640 here.

¹⁰ *See* 5 U.S.C. § 553(b)(B) (notice requirements inapplicable "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

5. This interim rule is based on a closely analogous, existing Commission rule. The Commission's current rule regarding broadcast indecency prohibits the licensee of a radio or television broadcast station from broadcasting between 6 a.m. and 10 p.m. any material which is indecent.¹¹ This rule is based on an extensive administrative record and judicial review of the regulation of indecent programming. The United States Court of Appeals for the District of Columbia Circuit upheld a 10 p.m. to 6 a.m. safe harbor in *Action for Children's Television v. FCC*, and the United States Supreme Court denied certiorari.¹² We are aware of no relevant differences here that would justify a different interim rule. Accordingly, based upon that closely related proceeding, we adopt an interim rule requiring that, until an MVPD complies with the scrambling/blocking requirement in new Section 641(a), the MVPD may not provide sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming between the hours of 6 a.m. and 10 p.m.

6. We define "indecent" programming here on an interim basis the same as in other video programming contexts: any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other MVPD medium.¹³ We believe it is clear that the term "sexually explicit adult programming" in Section 641(a) is merely a subset of the term "programming that is indecent." To the extent that this language could be viewed as ambiguous, we interpret it to include only indecent programming. As to the applicability of Section 641(a) only to channels "primarily dedicated to sexually-oriented programming," we believe the statute is clear regarding what channels Section 641(a) applies to, but unless and until we adopt a definition of that term we will rely on the good faith judgment of MVPDs regarding its definition. We note that Section 641 only requires that MVPDs fully scramble or otherwise fully block the video and audio portion of channels primarily dedicated to sexually-oriented programming "[i]n providing sexually explicit adult programming or other programming that is indecent." Thus, we interpret the provision as not requiring the scrambling of programming that is not indecent even if provided on a channel primarily dedicated to sexually-oriented programming.

7. To the extent that compliance with Section 641 conflicts with any Commission rules requiring cable operators to give advance written notice to subscribers or local

¹¹ 47 C.F.R. § 73.3999.

¹² 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 64 USLW 3465 (Jan. 8, 1996).

¹³ *See Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987); 47 C.F.R. §§ 76.701(g) ("indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.").

franchising authorities of certain changes in their service, those rules are waived.¹⁴ To the extent that compliance with Section 641 conflicts with any state or local notice requirements, those requirements are preempted by Section 641 itself, which requires that MVPDs make the programming changes within 30 days of the Section's enactment. Cable operators should, however, give notice as soon as is reasonably practicable. We understand that in some instances such notice may not be given until after the change has been made.

III. NOTICE OF PROPOSED RULEMAKING

A. Hours

8. We propose to adopt a final rule establishing the hours between 6 a.m. and 10 p.m. as the hours when sexually explicit adult programming or other programming that is indecent on any channel primarily dedicated to sexually-oriented programming is prohibited if not fully scrambled for nonsubscribers. We tentatively conclude there are no relevant differences between broadcast and nonbroadcast delivery of programming that justify adoption of a different rule. While at one time there may have been differences in the demographics regarding those who receive cable and those who watch broadcast television over the air, MVPDs, in some form, are available to a majority of homes. For example, cable service is subscribed to by 65% of homes passed.¹⁵ The number of homes having access to and subscribing to other MVPDs also continues to increase.¹⁶ Commenters on this issue are asked to provide specific data in support of any assertions regarding the hours when children are likely to be viewing this programming.

B. Definitions

9. We note that the definition of indecent programming in the video programming context is well established. The Commission defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."¹⁷ The Commission has also defined indecency with respect to the use of channel

¹⁴ See 47 C.F.R. §§ 76.309(c)(3)(i)(B), 76.964.

¹⁵ Assessment of the Status of Competition in the Market for Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, FCC 95-491, at ¶ 14, summarized at 61 Fed. Reg. 1932 (Jan. 24, 1996) ("Competition Report"). Cable service passes 96% of homes in the United States. Competition Report at ¶ 15.

¹⁶ For example, direct broadcast satellite ("DBS") services are available in the 48 contiguous states and Alaska. Competition Report at ¶ 49 and at Appendix G, Table 1.

¹⁷ *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987).

capacity on cable systems for leased access and public, educational and governmental access -- indecent programming is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.¹⁸ We propose to use the same definition for purposes of this statutory provision.¹⁹ Because we read the term "sexually explicit adult programming" to be a subset of indecent programming, we do not believe that further definition is necessary. As noted above, we believe the statute is clear regarding the channels to which Section 641(a) applies, however, to the extent parties disagree, they may comment on the appropriate definition of "channel . . . primarily dedicated to sexually-oriented programming."

10. Finally, we seek comment on any other issues relevant to proper implementation of Section 641. In particular, with respect to the requirement to "fully scramble or otherwise fully block" sexually explicit adult programming or other programming that is indecent, are there differences in technology between MVPDs that would require different rules?

IV. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

11. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis ("IRFA") of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *NPRM*, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall cause a copy of the *NPRM*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

12. The Commission issues this *NPRM* pursuant to Section 505, Pub. L. No. 104-104, and seeks public comment on the implementation of that statutory provision.

Objectives. Our goal in this proceeding is to gather information to implement Congress' directive that multichannel video programming distributors fully scramble or fully block sexually explicit adult programming or other programming that is indecent on any channel primarily dedicated to sexually-oriented programming so that nonsubscribers do not receive it. We also must gather information so we can determine the hours when significant numbers of children are likely to view such programming if not fully scrambled or fully blocked.

¹⁸ See 47 C.F.R. §§ 76.701(g), 76.702.

¹⁹ See *supra* ¶ 6.

Legal Basis. Authority for this proposed rulemaking is contained in Sections 4(i) and 641 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and in Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104 (1996).

Description, Potential Impact and Number of Small Entities Affected. The rules proposed could affect certain small entities including multichannel video programming distributors who choose to provide sexually explicit adult programming or other programming that is indecent on a channel primarily dedicated to sexually-oriented programming without fully scrambling or fully blocking such programming during hours when it is prohibited from doing so by the Commission.

Reporting, Recordkeeping and Other Compliance Requirements. None.

Federal Rules which Overlap, Duplicate or Conflict with these Rules. None.

Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives. None.

V. PROCEDURAL PROVISIONS

13. *Ex parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

14. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. Comments are due on April 26, 1996, and reply comments are due on May 24, 1996. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

VI. ORDERING CLAUSES

15. IT IS ORDERED that, pursuant to Sections 4(i) and 641 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 505 of the Telecommunications Act of 1996, that the Commission's rules ARE AMENDED as set forth in Appendix A. These rules are effective upon publication in the Federal Register. We find good cause for making these rules effective upon publication in the Federal Register because

Section 641 becomes effective 30 days after enactment of the Telecommunications Act of 1996.²⁰

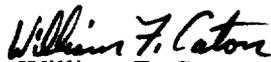
16. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 641 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Section 505 of the Telecommunications Act of 1996, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this *Notice of Proposed Rulemaking*, and that COMMENT IS SOUGHT regarding such proposals, discussions, and statement of issues.

17. IT IS FURTHER ORDERED that 47 C.F.R. § 76.309(c)(3)(i)(B) IS WAIVED to the extent indicated herein.

18. IT IS FURTHER ORDERED that 47 C.F.R. § 76.964 IS WAIVED to the extent indicated herein.

19. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

²⁰ See 5 U.S.C. § 553(d)(3); see also *Wells v. Schweiker*, 536 F. Supp 1314, 1327-28 (E.D. La. 1982).

APPENDIX

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation of Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. A new Section 76.227 is added to Subpart G to read as follows:

§ 76.227 Blocking of Indecent Sexually-oriented Programming Channels.

(a) In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Until a multichannel video programming distributor complies with the requirement set forth in paragraph (a) of this section, the multichannel video programming distributor shall not provide the programming referred to in that subsection between the hours of 6 a.m. and 10 p.m.

(c) Scramble means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

(d) Sexually explicit adult programming or other programming that is indecent means any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other multichannel video programming distribution medium.