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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 30, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Ms. Salas:

Enclosed please find a proposal for the Commission in the form of a Notice of Proposed Rule Making. In addition to the original document, we have included sixteen copies of the NPRM for the Commission's review.

Please feel free to forward any questions or comments regarding this enclosure to either one of us.

Thank you for your assistance in this matter.

Best regards,

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FEB 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

The Reinstatement of	)	MM Docket No.
Ascertainment Requirements	)	
for Educational/Instructional	)	
Commercial Television	)	
Programming for Children	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: Released:

By the Commission:

SECTION I

INTRODUCTION

1. In this proposal we advocate a stronger regulatory stance on children's programming through the use of ascertainment requirements. Following the enactment of the Children's Television Act of 1990 (CTA), the educational

and instructional needs of the community have not been adequately addressed by broadcasters.

2. The passage of the CTA in 1990 served as the culmination of efforts to add education to the focus of children's programming. Indeed, the CTA was simply an additional piece of legislation that had its roots planted over two decades earlier. After several years of comments from children's advocates, the FCC created a formal policy designed to give parameters to broadcasters. "The Commission's *1974 Policy Statement* asked broadcasters to make a meaningful effort to provide programs for children, of which a reasonable part should be educational programming, to increase the number of programs aimed at children in specific age groups, and to improve scheduling practices so that children's programming would be aired both weekends and weekdays" (*FCC 96-335*).

3. On May 24, 1983, upon the threats of removal of the renewal process and public involvement, Peggy Charren, President of Action for Children's Television ACT), spoke to the Committee on Energy and Commerce. The title of discussion was *Broadcast Regulation: Quantifying the Public Interest Standard.* In her speech, Charren defended the public's sole right and means of intervention:

> *It may be that some of the most important services that the public currently receives from commercial broadcasters exist only because of the threat posed by the renewal process.*

4. Charren also called upon the members of the committee to include requirements for educational and informational programming:

> *The children's programming standard should include a requirement for educational and informational programming, just as the adult standard includes a requirement for news and public affairs programming. An examination of children's television during the past decade demonstrates that most broadcasters will not serve children at all without a perceived legal obligation to do so. ...Let me conclude by urging you not to be deceived into thinking that a great many programming outlets automatically guarantee a diversity of service. There are, for example, a vast number of radio stations in this country, yet radio programming is far from sufficiently diverse to serve the public interest* (Charren 99-100).

5. Following the deregulatory downslide of the 1980s, the Federal Communications Commission (FCC) supported revised requirements for children's programming in the 1990s. The Children's Television Act of 1990 created a framework for improving the state of children's television advertising and content.

6. Beginning with the 1997-98 season, programmers were put in a position of placating the FCC by following guidelines for educational/instructional programming. According to mandates molded from the CTA, a minimum of three hours of programming per week must be earmarked for children's shows. "One pretty safe bet about the new federal mandate that broadcasters carry three hours of educational programs per week: it will cause repercussions its framers never anticipated. Some foresee deep change in the commercial structure of children's TV, while others expect token adjustments to business as usual" (Schmuckler 30).

7. The FCC has mandated that broadcasters air a quota of educational programs per week, a requirement that is causing ripples throughout the industry. "Indeed, there is still much speculation in Hollywood about what will constitute an educational program. For the record, the rule states that the three hours of core programming must air between 7 a.m. and 10 p.m. and must serve the 'educational and informational needs' of children. And that's about all the guidance it gives" (Stanley 4).

8. "The FCC-- which ultimately will determine which shows are educational when it reviews stations' compliance with the rule-- left the educational definition vague, mainly for constitutional reasons. It says stations must air three hours per week of programs 'specifically designed' to meet the 'educational and informational' needs of children up to age 16. This includes programs that address their 'cognitive/intellectual' or 'social/emotional' development" (Farhi A1).

9. "But what broadcasters consider an 'educational' program clearly spans a wide gamut; the networks claim as educational everything from *Science Court* to NBC's *NBA Inside Stuff*, a show produced by the NBA about the off-court lives of its players" (Farhi A1).

10. Although many broadcasters have taken the FCC guidelines seriously, and have created programming to fulfill the educational/instructional

requirement, some broadcasters have showcased "educational" programming that has some critics questioning the validity of its educational content. In addition to airing educational programming some critics say that "the networks are merely relabeling as educational some popular programs that were never before known for their instructional content" (O'Connell 16).

11. A lack of public accessibility and involvement in children's programming hurts the community watching local programming. More than a decade after ascertainment requirements have been removed, the choice of programming for the average viewer has increased by large sums. According to the FCC upon rulemaking comments, they predicted this increase in competition, justifying a relaxation of regulation:

> *Moreover, future market forces, resulting from increased competition, will continue to require licensees to be aware of the needs of their communities (FCC 1099).*

12. More than a decade later, the needs of the community are not being met. Under deregulation, media companies are negotiating buy-outs and mergers at astounding rates. The prospect of a future filled with diverse media competitors is limited. Today, successful programs are being replicated into formula television fare. Due to excess competition, a program cannot explore diversity or take a programming risk for fear of failure. Sure-fire hits do not equal quality diverse programming.

13. Continued deregulation threatens the very creation of the 1934 Communications Act. In a TRAC statement to the FCC regarding ascertainment requirements in 1984, a commitment to the public involvement should stay in affect. TRAC contended that the removal of regulations-- like ascertainment requirements-- moves Commission policymaking away from the public interest and public trusteeship theories, and toward a finding that licensees hold a vested property right in the license. PMC reiterated that the license is a public resource, and that affirmative public interest obligations and licensee accountability to the viewing public are required by the Act. (FCC Rpt.1129) This "public resource" of a station's license is the very reason ascertainment requirements regarding children's television need appropriate attention.

14. Cable television is lauded as a new source of innovative programming, offering the viewing public the diversity that it demands. A major flaw in this

argument is that cable saturation reaches 67% of the public, leaving 33% of viewers with local broadcast stations as its primary source of programming. Though broadcast outlets-- including cable-- have increased, the diversity presumed to have come with this increase is a mirage. Although there are more networks, the diversity of viewpoints has not increased. In radio there are comparatively few commercial stations presenting any significant information on matters of political, social, economic, environmental, educational, and health importance to the public. Cable still mainly contributes opportunities to view reruns of syndicated, formerly network entertainment programming (Hilliard 61-62).

15. With the enactment of the CTA, the FCC felt strongly that its assessment guidelines were unnecessary. "In view of the additional guidance provided by our definition of core programming, we believe that the assessment guidelines are superfluous and should therefore be eliminated" (*FCC 96-335*).

16. The FCC's now-defunct assessment guidelines were designed to "identify factors that we encouraged licensees to consider in assessing the needs of children under our broad definition of 'educational and instructional programming'" (*FCC 96-335*).

17. As of September 1, 1997, broadcasters were required to offer a minimum of three hours of educational/instructional programming per week. Less than a year later, supporters of the CTA are criticizing broadcasters for their lean plate of children's educational programming, and broadcaster's are complaining about the added cost of producing children's FCC-friendly fare.

18. "One way to encourage licensees to provide such programming is to encourage and enable the public, especially parents, to interact with broadcasters. Easy public access to information permits the Commission to rely more on marketplace forces to achieve the goals of the CTA and facilitates enforcement of the statute by allowing parents, educators, and others to actively monitor a station's performance" (*FCC 96-335*).

19. The adoption of ascertainment requirements would enhance the respective roles of parents, community leaders, advocacy groups, broadcasters and the FCC in the scope of children's programming..

SECTION II

BACKGROUND

Children's Programming

20. Beginning with the expanding distribution of TV sets, children and television have had a relationship that has been dictated by programming trends, profit margins, and public opinion. In the 1950s, "the creation of an audience for television programs (and hence a market for television sets) was at the top of the agenda. In short, at a time when programming was in short supply, families had to be motivated to buy television sets." Although the motive was to increase sales, "high-quality children's programming was seen as essential in wooing the public to buy sets" (Signorielli 2).

21. In 1951, the networks' weekly broadcast schedules included 27 hours of children's programs such as *Howdy Dowdy* and *Kuala, Fan, and Olli*" (Signorielli 2). With television sets in more and more homes, programmers could concentrate on developing shows that could prove successful through advertising revenue and ratings. For advertisers, Saturday morning proved to be a profitable playground to showcase products to a young audience. "In the early sixties, the National Association of Broadcasters (NAB) code permitted up to 16 minutes per hour for commercials during Saturday morning. By comparison, this code only allowed 9 1/2 minutes of commercials during prime time" (Signorielli 5).

22. This onslaught of advertising powered revenues, but also fueled children's advocates to lash out at advertisers for their aggressive tactics. The most vocal of these opponents was a grass-roots group called Action for Children's Television (ACT).Saturday morning fare during the 1970s continued to offer an abundance of cartoons and commercials, but "during this decade a number of pressure groups gained momentum and support for their suggested reforms" (Signorielli 6). ACT, in particular, found some success with their campaigns for improved advertising standards in the kids' arena.

23. "Specifically, ACT persuaded the networks to appoint supervisors for children's programming; eliminated commercials for drugs and vitamins from children's programs; and instituted a ban on host selling" (Signorielli 6). Despite ACT's influence in monitoring and modifying the advertising content in children's television, the 1980s would prove to be a transitional decade in the debate over how television advertising and programming affects children.

24. In the 1980s, government regulations relaxed the content standards of children's programming, providing a gateway for toy-based programs that blurred the line between program and product. "Palmer [1987] writes that, during the eighties, Saturday morning programming was characterized by heated ratings competition, thriving 'drop-ins' or 'pop-ups,' and presold properties [any established or name product whose rights could be purchased and programmed]. Today, presold properties are an especially important component in children's television" (Signorielli 6).

25. Presold-- or toy-based-- programming fanned the flames of the debate over the quality of children's television. Many critics of presold programs likened these shows to thirty-minute commercials for action figures, vehicles, lunchboxes, bedsheets, beach towels, and any other product that could have a character's likeness splashed across its packaging. Despite opposition, toy-based programming continued under the protection of loose federal regulations.

26. The deregulation of the 1980s spawned the Children's Television Act of 1990, a measure that sought increased FCC intervention, regulation, and attention for children's programming.

Ascertainment Requirements and the 1960 Programming Policy Statement

27. The 1960 Programming Policy Statement provided the public with the means to ensure that local broadcasters act in the interests of a particular community. Failing to do so meant strict enforcement by the FCC when applications for new stations, renewals, and modifications were revised to require licensees to indicate:

- measures taken to actually determine the tastes, needs, and desires of the community; and
- ways in which the licensee proposed to meet those needs and desires.

This policy gave birth to the FCC's ascertainment requirements (Smith 254).

28. In the 1960s and 1970s, the emphasis was to regulate and protect the right of the public and community. The 1960 Policy Statement, which reinforced the notion that the airwaves belong to the public, noted that the licensee is, in effect, a "trustee," in the sense that his license to operate his station imposes upon him a non-delegable duty to serve the public interest in the community he had chosen to represent as a broadcaster. The commission identified several elements of programming necessary to meeting the public interest, one of which was children's programs (Smith 253).

29. The role of the Commission was to regulate the rules imposed on the licensee. The Commission did not have a proactive role in programming choice or content. The licensee must find his own path with the guidance of those whom his signal is to serve. Requirements included documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: first, a canvass of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community (Ginsburg 175).

30. In an effort to clarify the broadcasters role with regards to ascertainment requirements, the Commission issued a *Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2d 650, 36 F.R. 4092* [21 R.R.2d 1507] on February 23, 1973. Under the

guidelines, the applicants must determine the demographics and composition of the city of license, indicating its economic, social, racial, ethnic and other significant characteristics (Ginsburg 176). Under this Proposed Rulemaking, the guidelines listed would be tailored to children and children's programming. The applicant must also conduct two surveys-- one of community leaders and other members of the general public. These surveys must be conducted to ascertain community "problems, needs and interests" as distinguished from program preferences (Ginsburg 176).

***National Black Media Coalition v. FCC* (1982-1983)**

31. Arguing that small community stations already know their audience and that ascertainment interviews and surveys were too costly, the Commission relaxed the rules. All stations in communities with fewer than 10,000 people were exempted from all inquiry into the matter of formally assessing community problems and needs. Approximately 1900 small market radio stations and 14 commercial television stations were thus exempted from the reporting, but not the substantive obligations of ascertainment. *35 R.R.2d 1555, 41 Fed. Reg. 1371* (1975) (Ginsburg 174) Thus began the slow removal of ascertainment requirements, as they were known in the early 1970s.

32. The National Black Media Coalition (NBMC), sought a review of the FCC's exemption of small radio and television license renewal applicants from the requirement of conducting formal surveys to ascertain the problems, needs and interests of their community of license. (*NBMC v. FCC*)

33. During the Commission's three-year experimental small market exemption, designed to determine whether the ascertained formalities were in fact unnecessary, unduly burdensome, and not in the public interest, no scientific data was presented. The Commission concluded that a rigorous, scientific analysis of the experiment results "would have been quite costly,...with no assurance that the data compiled would have provided unambiguous evidence with regard to the outcome of the experiment" (*NBMC v. FCC*).

34. The NBMC was left to wonder whether a truly scientific analysis with proper methods would have garnered different results. The NBMC contends that the Commission's exemption of small market licensees from its

ascertainment documentation and reporting requirements was arbitrary, capricious and without any basis in the record. The Court of Appeals disagreed, and indicated that the FCC did more than what was required at the time.

35. The Court's statement offered the following rationale:
The Commission noted that with "unlimited funds and resources" it might have used a "more scientific method". Even had such an intent initially existed, however, the Commission's decision to forego a rigorous statistical evaluation would not invalidate a decision based on valid alternative grounds. The Commission need not have conducted this experiment prior to taking the action it did. Even without the experiment, the Commission complied fully with the rulemaking requirements of notice and comment. (*NBMC v. FCC*)

Although the evidence offered in support of that hypothesis is not as "scientific" as might be desired, we cannot say that the Commission erred in its resulting conclusions. (*NBMC v. FCC*)

36. The Courts ruling reaffirmed the right of the Commission to change regulation without the participation of citizens or community organizations. The Small Market ascertainment case came on the heels of the Commission's order deleting formal ascertainment procedures for all radio broadcasters and was upheld by the Court of Appeals in *Office of Communication of the United Church of Christ v. FCC*, No. 81-1032. Shortly after Small Market and Radio ascertainment were deleted, so too were all commercial ascertainment requirements.

SECTION III

PROS AND CONS

Children's Programming

37. Peggy Charren, founder of Action for Children's Television, has been a tireless crusader for quality children's programming since the late 1960s. In

her decades as an advocate, she has not neglected the common sense approach to broadcasting, particularly in the scope of children's television:

> *We have to remember that broadcasters are public trustees and they like it that way. They like being carried free by cable. They like getting all kinds of freebies. And we're going to make them serve children. Broadcasters signed on to the idea that in return for a license they have to serve the public. That's very different from print; it's different from what newspapers have to do. The* New York Times *doesn't have to show the government that it's serving the public, but broadcasters do* (Jessell 21).

38. Despite her commitment to the issue, Charren is reluctant to endorse the creation of mandatory guidelines for broadcasters to follow. However, she does expect broadcasters to use common sense when programming for children:

> *If the broadcaster can't figure out what educational television is, he should go into the shoe business. ... But I would hope that broadcasters aren't going to air a superhero cartoon and have the hero eat an orange in the last 30 seconds and call that nutrition education, or put on programs where the kids don't attack each other and say that teaches interpersonal relationships* (Jessell 22).

39. When asked about government intervention in educational programming in an interview with *Broadcasting & Cable* magazine, Charren stressed:

> *It shouldn't get to that point. Any broadcaster who allows it to get to a point where the community is so aggravated that it's going to come up before a hearing at the commission should have his head examined* (Jessell 23).
>
> *The program that doesn't meet the educational needs of children doesn't have to go off the air. It just can't be counted in the core programming* (Jessell 23).

40. Lucie Sulhany, the president of UPN, offers her frustration over the vague guidelines :

> *I don't know what Washington wants. I don't know what's educational. My fear is when you call it educational, or you try to*

make it fall under some kind of definition, you go overboard and kids don't watch it (Rice 12).

41. "ABC's *Science Court*, a program that discusses scientific phenomena, ranks 35th among regular network children's series. Ratings are so low for the syndicated *All New Captain Kangaroo* that its distributor is considering canceling it. *Popular Mechanics for Kids* has performed better that that, but its viewer totals are still about 30 percent lower than those for *Beast Wars*. Conversely, some of the most-watched children's programs on commercial television this fall stressed entertainment, not education" (Farhi A1).

42. Despite complaints that educational programs traditionally lose money and falter in the ratings, Donna Mitroff, Fox's vice president of educational policies and program practices, doesn't rely on tried-and-true excuses for abandoning educational programs:

I'm not worried [about low ratings]. *There's enough talent out there to make shows that are both educational and enticing to kids. We haven't been doing this long enough for the jury to be in yet* (Farhi A1).

43. During pre-production for *Mr. Men*, an animated series for young children, Shelley Hirsh, president of Summit Media enlisted "two psychologists to help 'draw up the curriculum'" for the new show. "One psychologist is from Canada; the other one works for the New York City school system" (Schlosser 44). Hirsh registered his frustration with the lax guidelines as a producer attempting to follow the FCC's standards:

> *The FCC is cute. They mandate what they want, but they don't tell you exactly what they want. It is very loose. ...What do they mean by the term educational? I'm not quite sure what they want. If what the government mandates is somebody standing in front of a classroom with a pointer, it will lead to the demise of over-the-air children's television* (Schlosser 45).

44. "Advocates for better children's television maintain that the educational requirement has been a qualified success. The regulation, they say, has brought more educational or quasi-educational shows to commercial television stations, including such earnest offerings as ABC's *Science Court* and the syndicated *Popular Mechanics for Kids*, based on the exploratory magazine" (Farhi A1).

45. One criticism shadowing the guidelines is the amount of education can be adequately translated over the airwaves. Dean Valentine, the chief executive officer of UPN comments:

> *I am deeply skeptical about the educational part of children's television, that you can actually educate in this way. But the government says you can, so we, as a result, tried to be incredibly sensitive in putting together shows that had the right balance of the educational component and were also entertaining* (Rice 10).

46. Ed Chiodo, co-executive producer of the preschool series *The Crayon Box*, echoes Valentine's questioning of the medium as a viable instructor:

> *The terms they use and the guidelines they set are really open for interpretation in terms of morality versus curriculum. Whether some of these shows like NBC's* Saved by the Bell *are truly educational, I'm just not sure. Personally, I'm not sure if TV is the best place to be teaching kids, anyway. I'm not a big fan of the FCC mandating times and things like that. I think that it's the parent's responsibility. I grew up on* Looney Tunes. *That certainly wasn't educational* (Schlosser 46).

47. Peggy Charren, a charter member of the children's programming crusade, takes the Peacock network to task for its interpretation of educational programming:

> *NBC has the laziest approach to educational shows on the major networks, and I think it's sad. If they think they can put on five teenage sitcoms and one NBA program and [say] it will educate kids, they should have their head examined* (Rice 11).

48. "Robin Schwartz, NBC's director of prime time series and Saturday morning programs, said the network already has an 'incredibly rigorous' process in place that insures educational programming for teenagers-- its target market-- with Saturday morning shows like *Saved by the Bell: The New Class* and *California Dreams*. Before the start of each season, Schwartz said, network executives, writes and producers hold brainstorming session with teen psychologists and educational consultants to discuss potential subjects, like Bell story lines about self-esteem and teen smoking" (Rice 12).

49. Defenders of the teen genre, a "typical formula of school-based sitcoms, with an ethnically diverse mix of jocks and nerds who mix it up in

the classroom and at the mall" (Levin 36), claim that "increasingly savvy and cynical teenagers, tempted by MTV, Top 40 radio and the Internet, may find it tougher to stomach those FCC-friendly shows, which makes appealing to all but the youngest segments problematic" (Levin 36).

50. In a study conducted by the Center for Media Education, researchers monitored the success of the Children's Television Act and collected comments from a variety of media professionals, including syndicator Howard France, who criticized the FCC's educational guidelines:

> *The FCC is telling you you have to put boring TV on. The primary focus has got to be educational, not entertaining. You know kids, they don't want to go to school all week. If they don't want to watch it, who's gonna make 'em? The government can't pass a law to make people watch shows* (Aufderheide 9).

51. FCC response to criticism that the educational guidelines are too vague to be effective indicates that the Commission is not planning to revisit its guidelines. According to FCC spokesperson Barbara Kreisman:

> *There is nothing vague about it. A significant part of the program has to be informational and educational. It has to have an informational effect and objective. We allow the licensees to bring in anyone they want to say their show is educational. They can bring in someone if they need help to do just that. But if the licensee brings in an expert that tells me that the* Mighty Morphin Power Rangers *is educational and informational-- forget about it. Three hours a week doesn't seem to me to be an unreasonably terrible burden. Licensees hold a public trust and there is a general obligation to serve the needs and interests of a community. What the Children's TV Act did was particularize that obligation-- you must serve the children in your audience* (Schlosser 46).

52. "Hollywood types have been known to occasionally have a shrink around, but psychologists are now becoming the hip thing for children's programmers-- or at least those trying to get the coveted FCC-friendly stamp of approval" (Schlosser 44). Commenting on the extra efforts some producers are exerting in the name of the CTA, Karen Jaffe, a children's television activism offers:

Syndicators and programmers that are really going to do well in this business are ones that have gone to the next step and [created a panel of doctors, teachers and psychologists]. *Once you bring in the experts then you can develop some goals and objectives that are truly educational* (Schlosser 46).

53. Jamie Kellner, the WB's chief executive officer, believes it's presumptuous to decide which of the network shows are educational until specific guidelines have been established:

> *I get a kick out of how everybody is saying 'we've got this show, we've got that show.' My take on what is expected goes far beyond what people are talking about. Basically you're going to find that most of the programs on commercial TV are not like* Carmen Sandiego. *There is a limited number of shows on commercial TV and cable that would comply with what the FCC is trying to do. I think what they are talking about is creating a whole new category of programming* (Rice 12).

54. In spite of broadcasters' precarious attempts at balancing educational and entertainment, supporters of the CTA are unimpressed with programming performances thus far. Following a FCC report citing dozens of instances of noncompliance with the CTA, Rep. Ed Markey (D-Massachusetts), a leading supporter of the measure, reacted to the 84 stations found to be in violation of the Act:

> *Crack down on these renegades. They give a black eye to their industry and subject the notion of this critical public interest obligation to ridicule* (Albiniak 16).

55. Amy B. Jordan, senior research investigator for the Annenberg Public Policy Center, issued challenges to both broadcasters and parents in a recent letter to the *Washington Post*:

> *The networks need to learn from the audiences they are obligated to serve whether and how their programs meet the educational and instructional needs of children. Now might be a good time for parents to let broadcasters know what they expect from the trustees of this valuable national resource* (Jordan C6).

56. In a recent study conducted by the National Association of Broadcasters, researchers estimated that radio and television broadcasters

spent an estimated $6.8 billion dollars on public service, including public service announcements and fundraising for charities (McConnell 70).

57. Despite the NAB's claim of keeping the public interest in focus, skeptics dispute broadcasters' commitment to serving the public. Jeff Chester, executive director for the Center for Media Education, says:

> *There is no way the broadcasting industry is going to convince anyone that they are fulfilling their obligation* (McConnell 71).

58. Peggy Charren concurs with Chester, and points out:

> *If there were enough public service, they wouldn't have to do studies to prove there was. These issues have been on the docket of the FCC since 1970. And broadcasters' studies always make it look as if the stations have nothing on their mind besides serving the public:* "The bottom line can go to hell as long as we are serving the community." *You don't have to be a genius to know that this is not how the world works* (McConnell 71).

59. Thomas W. Hazlett, a professor of economics and public policy at the University of California at Davis, questions the authority of the FCC, based on the Commission's past enforcement practices:

> *The FCC has come to the rescue with beefed-up rules about how much educational programming your local TV station will be required to display as part of its license deal. We should not dwell on the somewhat embarrassing fact that the FCC has ostensibly required commercial broadcasters to perform such public service since even before Newton Minow was its able chairman. Nor should we pause to consider that, over 35-plus years, this regulatory mandate has been labeled a 'joke' several hundred time more often than it has been referenced as a 'notable success resulting in the happiness and improved welfare of the little people we call kids'* (Hazlett 66).

Ascertainment Requirements

60. From the creation of the ascertainment requirement in the late 1960's to its removal in the early 1980's, most public interest and community groups supported it as an important means by which the local population could communicate its needs to the broadcaster.

61. Just as there were many that supported the creation of ascertainment requirements, there were those in the broadcast industry who loathed it as a burdensome and unnecessary piece of regulation that cost stations too much money. On both sides, advocates debated until June 24, 1984 when the last of the ascertainment requirements was deleted from commercial television station provisions.

62. Arguments, before the Commission, from broadcasters presented sharp attacks and the elimination of ascertainment requirements. Many commentaries said that ascertainment procedures have become an end in themselves, and contended their formalism and rigidity have had the opposite effect of that intended, actually obscuring the licensee's ability to be responsive to community issues (*FCC 1126*).

63. In a formal hearing on August 4, 1983 to the Subcommittee on Telecommunications, Consumer Protection and Finance Committee on Energy and Commerce, former chairman of the Federal Communications Commission, Charles D. Ferris, eloquently counters the broadcast industries plea for help with a sigh of normalcy:

> *Since at least as far back as the 1960's, it has almost been an annual ritual. Witnesses testify, lobbyists knock at your doors, local broadcasters buttonhole you on visits to your districts, all delivering the same pleas and portents of doom. Yet, oddly enough, the broadcast industry is financially stronger than ever* (Ferris 35).

64. Surprisingly, CBS supported the purpose behind the rule-- licensee responsiveness to issues of concern to the assigned community-- should remain an element in reviewing the public interest value of a station's service. (*FCC 1127*). Despite a measure of support for the rule's intent, CBS and most broadcasters favored ascertainment's immediate elimination because they were unnecessarily burdensome (*FCC 1127*).

65. Several broadcasters argued that ascertainment requirements must be eliminated, yet paradoxically said that, as long as public interest standards are retained, public interest programming would continue. Today, few networks-- with the exception of public broadcast stations-- speak of serving the public interest and offer documented evidence.

66. Other commentaries contended that reliance upon market forces in the past has not proven reliable. Action for Children's Television said that the continuing market failure in the children's television market indicates that reliance upon self-regulation and market forces is not a viable alternative, at least for children's programming (*FCC 1129*). More than ten years later, competition has only given way for fewer and fewer choices as bigger companies take control of smaller competitors, leaving the public with one less voice. Relying upon market forces to act in a responsible, pro-public interest means giving too much influence to broadcasters. TRAC argued to the Commission that only through some positive effort, like ascertainment, can the licensee fulfill its public interest obligations to its community of license. UCC agreed that the television marketplace is generally not sufficiently mature to rely upon market forces. (*FCC 1129*)

67. In separate proceedings, former FCC Chairman Charles D. Ferris, commented on the overwhelming need to have strong public interest policies, even as we enter an "age of video abundance". In 1998, media is poised on the edge of an age of new and innovative technology, but Mr. Ferris' statement continues to show crucial points more than a decade later:

> *Even when the much-heralded age of video abundance arrives, it would still be good pubic policy to require broadcasters to continue to channel their competitive efforts into meeting the public interest. The public has accustomed itself to certain expectations with respect to over the air broadcasting that will provide an inherent marketplace advantage well into the future—even after the arrival of the new era. As long as this advantage exists and broadcasters are given free use of the airwaves, I strongly believe that requiring broadcasters to meet and serve the needs of their communities is a very small price to ask them to pay* (Ferris 39).

68. Many in the broadcast industry site cost as a major obstacle in the implementation of ascertainment requirements. Though this rulemaking will be focused and limited to children, any opposition will include the "cost factor." The cost of ascertainment relative to its benefit was cited as a major reason for the elimination of these procedures. CBS reported that it spent over $10,000 in connection with the preparation by an outside research firm of the general public survey for the renewal of WCAU-TV (*FCC 1128*).

69. The opposing view points to a different conclusion amidst the controversy. They contend that costs only exceed benefits when the benefits are undervalued. UCC said that significant benefits are acquired from the current procedures by the Commission in its statutory oversight function, by the broadcaster in indicating what sorts of procedures and programming will earn a renewal expectancy, and by the public in acquiring the means to measure and assess the broadcaster's service. TRAC asserted that while ascertainment has some costs it should simply be characterized as part of the cost of doing business using a public good (*FCC 1129*).

70. Charles D. Ferris reiterates the "public good" in his comments against costs to broadcasters:

> *Granted, the process imposes significant costs on the handful of licensees subjected to a comparative challenge at renewal time. But remember—broadcasters are businessmen who are able to factor the costs of paperwork and potential litigation into the cost of doing business. As businessmen, they must assume the risks involved in operating broadcasting station and must work hard not to lose their investment. Part of this effort includes being sensitive to community needs and desires, and continually striving to upgrade performance* (Ferris 39-40).

71. Ascertainment requirements, though demanding some cost to the station, cannot be weighed directly against the ultimate users of the airwaves, the public. The publics interest in good quality programming and policy out weigh any numerical cost to a broadcast station. These stations pay nothing for the use of their channel from the public. The very least broadcasters can do is give the community a means by which it can communicate with local stations to help make necessary changes which can benefit the consumers while still satisfying the provider. A customer who is satisfied with programming will translate into a profitable consumer for the broadcaster.

SECTION IV

POLITICAL IMPACT

72. Politically, child-friendly regulation rarely has major vocal opposition, provided that it does not impede on the rights of adults and their freedoms. With ascertainment requirements geared towards children, adults would benefit from this added participation and communication from broadcasters. Unlike television ratings and censorship on the Internet, the ascertainment of quality communication in the local broadcaster's community would have few political foes. The only opposition would be from members of the political realm supported heavily by broadcast dollars. Since the media lobby is such a powerful entity, it would not be surprising to see this proposed regulation disputed by the very children's television producers.

73. The time is right for this type of regulation in children's media. The creation of the V-chip has elicited cries of censorship from those with strong First Amendment beliefs. The V-chip provision included in the Telecommunications Act of 1996 gave the government increased authority over indecency on the airwaves, and sent the message to broadcasters that "if they did not take a proactive role in restricting the violent and indecent images and ideas that were reaching the country's children, government was ready to do it for them" (Samoriski 2).

74. The Communications Decency Act, which would have protected children from obscene and indecent material on the Internet, was found unconstitutional by the Supreme Court because it hindered access and freedoms for adults. The ascertainment requirement brings the community together with the local broadcaster to attain better communications involving children and programming. Political opposition to this form of dialog would be inconceivable when compared to the radical approach made by the CDA in 1996. By reinstating the public comments back to the local broadcaster, a clearer definition of "quality children's programming" can be made. If we do not include members of the community, then we must rely on the government to step in and regulate each step of the way. The best sources for information on what children need to see on television are from parents, advocacy groups, educational consultants, child psychologists, and other professionals schooled

in the influence of media on child development. Turning programming content over to the government undermines broadcasting and community partnerships.

75. Following the deregulation of ascertainment requirements in 1984, Commissioner Henry Rivera stated that the marketplace would ensure adequate levels of programming without guidelines. However, when ensuring the needs of children are met on commercial TV, he disagreed and stated that they currently are not being met (*Broadcasting* July 2, 1984).

76. Crucial support of this proposal will come from major children's charities, citizens' groups, community activists, educational advocates and organizations for better broadcasting. A large group of these potential supporters made a joint statement in 1983, when it became apparent that public interest regulations were about to be eliminated:

> *Public interest programming can be safeguarded only by current logging requirements and ascertainment, programming and commercialization regulations, which require a licensee to respond to the needs and interests of its community. The vital role broadcast television plays in our democratic political process cannot be sacrificed for administrative convenience consistent with the statutory requirements of the Communications Act.*

77. The public's need for participation is clear after more than a decade of decisions made solely by broadcasters. The interest of children should be made by, at the very least, both sides. These decisions should not be made solely by the group that has a vested interest in making money from viewers.

LEGAL IMPACT

78. Responding to rumblings that the CTA is unconstitutional, the FCC maintains the legality of its mandates:

> *With regard to the constitutional arguments that have been raised in this proceeding, we conclude, as Congress did when it enacted the CTA, that requiring broadcasters to serve the educational and informational needs of their child audience is clearly within the scope of the long recognized obligation of broadcasters to serve the public interest. We further conclude that the regulations we adopt today*

directly advance the government's substantial, and indeed compelling, interest in educating America's children" (FCC 96-335).

79. Some of broadcasters biggest concerns surrounding ascertainment have centered on public interference with programming decisions. It is not the purpose of interviews and surveys to solicit programming choices. The interviews and surveys serve as a means for the station and community to correspond specific ideas. This two-way communication is a link to new and better ideas which can facilitate an improved outcome for the children of that community. Any final decisions are made solely by the station. The public comments and discussions are simply opinions, designed to communicate local concerns to the station managers. Encouragement of program suggestions may tend to make consultations primarily a discussion of programming and programming preferences, rather than a discussion to ascertain community problems (Ginsburg 184). This does not mean that programming cannot be a source of conversation, but it simply needs to be a balanced emphasis towards community needs and problems.

80. Broadcasters contend that ascertainment challenges, combined with license renewal challenges, severely hinder the station from operating successfully. In its final report on ascertainment, the FCC stated that these hearings unnecessarily delayed service to the public. Even without actual litigation, it is clear that substantial resources are expended to make certain that a formalistic challenge is avoided (*FCC 1100*). Former FCC Chairman Charles D. Ferris offers a different opinion:

Broadcasters contend that what is truly important, is the expense and time consumed by challenges, not whether the incumbent licensee ultimately prevails.

81. Ferris goes on to point out that the public can influence licensees when the quality of the station is in jeopardy, but he notes that this public involvement in the renewal process does not constitute significant numbers:

This renewal process strikes a reasonable balance between certainty and stability for broadcast licensees, on the one had, and the needs and interests of the public, on the other. In the one instance in which an incumbent television broadcaster lost his license, the public was the winner. WCVB, which in 1972 replaced WHDH on Channel 5 in Boston, went on to become a leader in quality television and was

considered by many to be the nation's best station in terms of local programming (Ferris 37).

82. Legal challenges to the ascertainment requirements requested in this *Notice of Proposed Rulemaking* are not likely since the FCC is the sole regulator and can create or dismiss policies as it sees fit. Strong opposition is expected by broadcasters who feel the job of serving the public interest is being completed well enough now.

83. When ascertainment requirements were eliminated in the early 1980s, the FCC and broadcasters said that stations should be required to act "reasonably" in the selection of particular issues for coverage (*Broadcasting*, 1983). A definition of reasonably would be helpful in determining what accountability stations should receive from local community. This use of "reasonably" safeguards stations into simply doing business as usual and was only meant to lessen the blow when ascertainment was eliminated.

84. The small market exemption with ascertainment poses one legal threat to any reintroduction to the requirement of the 1970s and 80s. In *National Black Media Coalition v. FCC,* the FCC found support with the Appeals Court that small market exemptions were acceptable rules. The three year study came under scrutiny because it was not done in a scientific manner, but the Court dismissed the claim saying that the FCC does not have to justify its rulemaking and that any study was more than enough. (*NBMC v. FCC*) The Commission exempted communities of fewer than 10,000 which accounted for only 14 commercial television stations (Ginsburg 182). Caution in regards to this case when drafting new ascertainment regulation can be beneficial to both the broadcaster and public.

85. "Although broadcasters theoretically could lose their government-granted licenses if they don't comply with the rule, several broadcasters predicted that this would be highly unlikely, given the vagueness of the regulation" (Farhi A1).

ECONOMIC IMPACT

86. The economic realities of children's television support the need for ascertainment requirements to foster educational programming. "Small audiences with little buying power, such as children's educational television

audiences, are unlikely to be able to signal the intensity of their demand for such programming in the broadcasting market. Therefore, broadcasters will have little incentive to provide such programming because the small audiences and small resulting advertising revenues means that there will be a substantial cost to them (the so-called 'opportunity cost') of forgoing larger revenues from other types of programs not shown" (*FCC 96-335*).

87. The implementation of ascertainment requirements for children's programming could prove to be a costly venture for local stations. The initial financial impact will be seen in administrative costs, including the hiring or reassigning of a professional designated as the liaison between the broadcasters and the community. According to the FCC:

> *We believe that it is reasonable to require licensees to designate a liaison for children's programming and to include the name and method of contacting that individual in the station's children's programming reports, since someone at each station must, as a practical manner, be responsible for carrying out the broadcaster's responsibilities under the CTA"* (*FCC 96-335*).

88. Additional charges will be incurred by the fees of professionals recruited to serve on the ascertainment board. Depending on the number of volunteers versus professionals, hourly rates and length of time necessary to fulfill the goals of the board, this figure could translate into a substantial cost to each station.

89. Other administrative costs include: the producing, distribution, collection and assessment of surveys; preparation of in-depth community reports; and production costs. Even without formal ascertainment requirements in effect, already "the paperwork [generated by current FCC guidelines] has significantly increased the time to produce children's television programs" (Craig 29).

90. The long-range financial forecast could impact syndicators, as well as broadcasters. "Broadcasters argue that most television stations will have to obtain such [FCC-friendly] programming from the networks or independent syndicators and the cost will go up with many stations competing for the same programs" (Flick B14).

91. The economic shortfall may affect syndicators before it hits broadcasters. "The television syndication market has been radically changed by regulatory and market forces. For example, the imposition of a requirement that television broadcasters must carry educational programming for at least three hours each week may hurt syndicators as networks attempt to create such programming themselves" (Freeman 26).

92. In a recent panel on producing children's shows, syndicators bemoaned the state of syndication under the FCC-mandated rules. Michael Eigner of Tribune Broadcasting pointed out:

> "[It's] *becoming a lot harder to get ad dollars* [for such programming]" (*Communications Daily* 28 February 1998).

93. Eigner cited cable competition and low ratings for the decreased revenue, and predicted that the lackluster financial support for children's educational programming would translate into more stations with fewer kids' shows that meet FCC requirements (*Communications Daily* 28 February 1998). Although Tribune kids' shows have been profitable in the past, Eigner predicts that:

> *It's going to be harder and harder to maintain that profitability because competition is so intense* (*Communications Daily* 28 February 1998).

94. Advertising revenues are paramount to successful programming for producers and broadcasters. Regardless of educational intent or marketing strategy, without advertising support, quality programming--children's or otherwise-- will be sacrificed. According to Shelley Hirsh, president of Summit Media:

> *Lack of ads makes it a lot tougher to provide good children's shows* (*Communications Daily* 28 February 1998).

95. Despite dismal financial forecasting, the three-hour rule has already translated into the production of FCC-friendly shows, designed specifically to cater to the guidelines imposed on broadcasters. "Generally, there are 25 to 30 new kids stamps and weeklies on display at NATPE. This year [1997], in addition to the general interest kids shows, there will be no fewer than 15 that syndicators say are specifically designed to help TV stations fulfill the new three-hour quotas mandated by Congress and the FCC" (Freeman 27).

SOCIAL IMPACT

96. Television is the most pervasive and influential medium to which children are exposed. "By the time American children leave high school. they have spent more than 20,000 hours watching television -- almost double the 11,000 hours they have endured in the classroom. " (*The Economist* 65).

97. The framers of the CTA recognized the influence of the medium on child development, and Congress supported the authors' assessment of how television can impact children:

> *Television can assist children in to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them (FCC 96-335).*

98. In studies chronicling the impact of educational and entertainment programming, researchers have been able to draw conclusions concerning the social effects on children. In a study conducted in the late 1950s, researcher Hilde Himmelwit concluded that "television at its best can implant information, stimulate interest, and help the child to be less prejudiced and more tolerant. Television at its worst can lead to a reduction in knowledge, deter children from other worthwhile activities, and implant stereotypical value judgments" (Bryant 22-3).

SECTION V

ANALYSIS

99. Based on the information provided within this document, it is imperative that the Commission review ascertainment requirements for children's educational programming. By involving the community in evaluating and shaping m the local station's response to FCC regulation, we are ensuring that the needs of children are being met over the airwaves.

100. Section I of the proposal explores the lack of the public interest represented in broadcast programming. By showcasing the uneven support of the Children's Television Act, as well as the demise ascertainment

requirements, this section highlights the economic and political issues in children's television.

101. Section II illustrates the complicated histories of both children's programming and ascertainment requirements. Although presented separately, the two share threads of commerce before community in the broadcast industry.

102. Section III offers a wide array of comments and perspectives from industry professionals, political figures and long-time advocates. In both sets of comments, the problematic nature of broadcasting is evident. It is nearly impossible to serve the needs of the community without enlisting representatives on a local level.

103. Section IV presents an objective assessment of the impact this proposed legislation will have on broadcasters, local affiliates, political groups, community representatives, and most crucially, children.

SECTION VI

CONCLUSION

104. In compliance with this notice, it is hereby ordered that local stations institute ascertainment requirements for children's educational/instructional programming, as outlined by the Federal Communications Commission, under amendments made to the Children's Television Act of 1990.

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