licensees,"[27] and refrain from imposing burdensome new programming requirement on secondary digital channels.

In light of the intent and language of the Telecommunications Act, the current state of children's programming, the practical implications for the development of digital broadcasting, and the sound policy approach previously taken by the Commission, the appropriate standard is clear: broadcasters should be permitted to continue to carry out their current programming obligations to children on a primary channel of comparable[28] or better resolution, and operating during the same hours as, their current analog channel.[29]

2. There Is No Basis under Law for Imposing Children's Programming Obligations on Ancillary and Supplementary Digital Services

The Notice also raises the question of whether children's programming obligations should be imposed on services offered for a fee.[30] There is no basis in law or logic for such a requirement. The Telecommunications Act established the regulatory scheme for "ancillary or supplementary services" of this kind, and makes clear that imposing children's programming requirements on these services is unjustifiable.[31]

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27 *Fifth Order and Report*, 12 FCC Rcd at 12830, ¶50.

28 *Notice* at ¶21.

29 *Fifth Report and Order*, 12 FCC Rcd at 12820, ¶28.

30 *Notice* at ¶15.

31 As the Notice points out, at least one of the advocacy groups that submitted comments in response to the *NOI* acknowledged that children's programs should not be

As we pointed out in response to the *Public Interest Obligations NOI*, the Act requires that the Commission collect fees from digital broadcasters which offer ancillary and supplementary services, and that the fees must "recover for the public" an amount equal to that which would have been recovered if such services had been auctioned pursuant to section 309(j) of the Act.[32] It is illogical to suppose that Congress intended both to extract fair market value for these pay services from broadcasters *and* also to impose on them affirmative public interest obligations such as a requirement to broadcast children's programming. There is no basis for, in effect, taxing broadcasters' provision of these services twice, once in the form of fees and then again by the imposition of affirmative programming obligations.

Section 336(b)(3) of the Act reinforces the conclusion that affirmative programming obligations cannot be imposed on ancillary and supplementary services. That section states that the Commission shall apply to these services "such of the Commission's regulations as are applicable to the offering of analogous services by any other person...." If ancillary and supplementary services offered by digital broadcasters by statute cannot be subjected to regulations different from analogous services offered by non-broadcast providers, it is clear that public interest programming obligations cannot be imposed on them. Thus, there is no greater authority to require digital broadcast providers of ancillary and supplementary services to offer free "broadband or datacasting services to local schools, libraries, or community centers that serve children," as one

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required on pay services or other ancillary or supplementary services. *Notice* at ¶15, fn. 42.

[32] 47 U.S.C. §336(e)(2)(B).

advocacy group proposes,[33] than there would be to impose such a requirement on similar services provided by non-broadcasters.[34]

Nor does the "public interest" language of the statute support application of children's programming obligations to these pay services. Section 336(a)(5) recites that the Commission may adopt regulations with respect to these services that are "necessary for the protection of the public interest, convenience and necessity." And the section of the statute that *defines* the public interest requirement states that broadcasters are not "reliev[ed]" of their existing obligations and then goes on to state that licensees that provide ancillary or supplementary services must establish at renewal time that all of their services "are in the public interest."[35] The clear meaning of this language is that subscription services must not be in derogation of the public interest. It does not mean that these services, for which broadcasters are paying fair market value, must also provide other public benefits -- at their own, rather than taxpayer, expense.[36]

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[33] *Notice* at ¶21

[34] The Notice refers to various suggestions that digital broadcasters transmit data to or on behalf of schools or other institutions. On a voluntary basis, broadcasters who develop ancillary and supplementary services involving datacasting may well choose to provide this public benefit. But there is no legal basis under the Act for obligating broadcasters to do so.

[35] 47 U.S.C. §336(d)

[36] The Commission implicitly acknowledged as much in its *Report and Order* establishing a program for assessing and collecting fees for the provision of ancillary and supplementary services by DTV licensees. There, the Commission noted that the 1996 Act "permitted [broadcasters] to offer ancillary or supplementary services consistent with the public interest." In summarizing its directives from Congress, the Commission listed the requirements that such services: (1) be consistent with advanced television technology, (2) avoid derogating any advanced services required by the Commission, and

III. There Is No Justification For The Commission To Define A Limit On The Permissible Number of Preemptions of Core Programming, Nor To Define The Efforts Licensees Should Make To Reschedule Or Promote Preempted Children's Programs

In the Notice, the Commission asks whether it should issue regulations rigidly defining the number of times a core program may be preempted and still count toward the Commission's three-hour processing guideline. It also asks if it should define the "efforts that must be made to reschedule and promote preempted programs" in order for them to count toward the processing guideline.[37] The Notice raises these questions despite the absence of evidence that broadcasters have failed to fulfill their obligations to regularly broadcast core children's programming. To the contrary, the factual record reflects that preemptions of regularly scheduled children's programs have been infrequent, and where they have occurred, the programs have been rescheduled without reduction of their audiences. Consequently, there is no basis for adoption of these proposals.

The Children's Television Act contains no defined standard for the amount of children's programming that licensees must broadcast. While it requires broadcasters to

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(3) be subject to regulations applicable to analogous services. The Commission then went on to recite that Congress had given it the discretion to "prescribe such other regulations with respect to ancillary or supplementary services 'as may be necessary for the *protection* of the public interest, convenience and necessity.'" *Report and Order, Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996,* MM Docket No. 97-247, 14 FCC Rcd 3259, 3260-61, ¶ 2 (1998) (emphasis added). Thus, the Commission acknowledged that the "public interest" authority that it was granted with respect to ancillary and supplementary services is to protect the public from services in derogation of the public interest, not to pile on affirmative public interest obligations.

[37] *Notice* at ¶ 28.

provide some programming that is "specifically designed" to meet the educational and informational needs of children, it does not suggest when such programs should be broadcast.

In its Report and Order establishing rules for the implementation of the statute, the Commission created its processing guideline of three hours of "specifically designed" or "core programming"[38] and a set of criteria that must be met for programming to be considered "core."[39] Among those criteria is a requirement that the programming be "regularly-scheduled," and the Commission defined this criterion to require that the programs "be scheduled to air at least once a week" and "air on a regular basis."[40]

The Commission acknowledged, however, that individual episodes of children's programs scheduled to air once a week are sometimes preempted by breaking news or network sports events.[41] In order to accommodate the public's interest in such programming, the Commission has granted licensees flexibility to preempt children's programming in favor of such broadcasts, in the case of sports preemptions with the

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38 The Report and Order appears to equate these terms. *Report and Order, Policies and Rules Concerning Children's Television Programming*, MM Docket No. 93-48, 11 FCC Rcd. 10660, 10696, ¶ 74 ("*Children's Programming Report*").

39 *Children's Programming Report*, 11 FCC Rcd at 10695-10715, ¶¶73-114

40 *Children's Programming Report*, 11 FCC Rcd at 10710-10711, ¶105.

41 *Children's Programming Report*, 11 FCC Rcd at 10711, ¶106.

understanding that the children's programming will be rescheduled to a "second home" and that the reschedulings will be publicized in program guides and on-air.[42]

It is Viacom's view, based on the factual record, that this arrangement has worked extremely well, and is not in need of any change. In the Notice, the Commission indicates that a "random sample" of children's television programming reports purportedly showed that the average preemption rate by stations affiliated with the largest networks during the past two years is "nearly 10%."[43] Even assuming this random sample accurately reflects the practices of network affiliates,[44] it does not indicate the existence of a problem that requires the imposition of rigid limits on preemptions. The sample apparently found that stations are preempting on average slightly over one out of thirteen episodes of their core programming per quarter. Viacom submits that, in fact,

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[42] *See, e.g., Letters from Roy J. Stewart, Chief, Mass Media Bureau to Martin D. Franks, Senior Vice President, CBS, Inc.*, July 11, 1997 ("*July 11, 1997 CBS Letter*"), *Rick Cotton and Diane Zipursky, National Broadcasting Company,* July 11, 1997, and *Alan Braverman, Senior Vice President & General Counsel, ABC, Inc., July 11, 1997.*

[43] *Notice* at ¶28. The Notice also asserts that the random sample found that preemptions for stations affiliated with the largest networks ranged "as high as 25% during a quarter when a network had a large number of sports programming commitments." *Id.* There are, of course, seasonal variations in preemptions depending on the scheduling of different sports events that a broadcaster may carry. Assuming the sample's finding of an annual average preemption rate of "nearly 10%" were correct, the quarters during which preemptions are "as high as 25%" were obviously balanced by more numerous quarters during which preemptions were well below 10%.

[44] The Commission is aware, based on reporting by the three largest broadcast networks, that the average preemption rate for network owned and operated stations is far lower than the cited 10% figure. As reported in the Mass Media Bureau's report on preemptions of children's programs for the 1997-1998 season, the average preemption rate for CBS, ABC and NBC owned and operated stations was only 4.4%. See *The Effect of Preemption on Children's Educational and Informational Programming, 1997-1998 Season*, at 7. Mass Media Bureau, Policy and Rules Division, DA 98-2306 (November, 1998) ("*Preemption Report*").

this is an excellent result, and proves that stations are scheduling their core children's programming in a manner that is keeping preemptions to a very reasonable level.[45]

Moreover, any concern over even this low level of preemption is more than addressed by the factual record showing that stations have fulfilled their commitment to reschedule and broadcast preempted programs. The Notice presents no information whatsoever about stations' practices with respect to rescheduling preempted programs. But in its report on the effects of preemption on children's programming for the 1997-

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[45] There should be no question that Viacom's CBS Television Network and CBS Owned stations have given very high priority to minimizing the number of its children's programming preemptions. The Commission previously has received detailed submissions from CBS for the 1997-1998 and 1998-1999 seasons demonstrating that the levels of preemption of children's programming at the CBS Owned television stations were much lower than the random sample figures cited in the Notice for network affiliates. For example, for the period October 1, 1998 through June 30, 1999, encompassing the 1998-1999 television season, the then fourteen CBS stations average preemption rate was a mere 2.8% See Letter to Roy J. Stewart from Mark W. Johnson, Associate General Counsel, CBS, Inc., September 10, 1999 at 1-2 (*September10, 1999 CBS Letter*).

Viacom's former Paramount Stations Group (now merged with the CBS Owned stations) has experienced extremely low preemption rates. For the year October 1, 1999 through September 30, 2000, the 19 broadcast stations comprising the group, all affiliated with the UPN Network, had a total of eleven preemptions out of a total of 5928 programs scheduled. This is an average preemption rate of about one-half of one program preempted per station per year. This record represented a significant improvement on an already outstanding record compiled by the Paramount stations the previous year, October 1, 1998 through September 30, 1999, when they experienced a mere fifty-five preemptions, representing an average of less than three programs preempted per station per year. These miniscule preemption rates are hardly surprising, since, unlike the four major broadcast networks, smaller networks do not have significant network sports programming.

For the same reason, the hundreds of stations not affiliated with any network also can be presumed to have preemption rates far lower even than those of major network affiliates. Thus, the case for regulating preemptions is even less compelling when the full range of broadcast licensees is considered.

1998 season, the Mass Media Bureau concluded on the basis of information submitted by CBS, ABC and NBC that, "we believe that all three network O & Os and affiliates have generally complied with their rescheduling commitments."[46]

Speaking of our own experience, the CBS owned and operated stations have been extremely diligent in ensuring that children's programs preempted for network sports programming have been rescheduled. For example, as CBS has previously reported to the Commission, during the period October 1, 1998 to June 30, 1999, every one of the programs preempted by the then 14 CBS stations for network sports was rescheduled.[47] In addition, every one of these programs was rescheduled to a "fixed second home" – that is, a fixed, alternative time period to which particular programs were regularly rescheduled whenever they were preempted.[48]

There is also no evidence that preemption and rescheduling has resulted in smaller audiences for children's programming. The Notice does not assert this to be the case, much less present statistics to support such a claim. To the contrary, the Mass Media Bureau's report on the effect of preemptions during the 1997-1998 season cited – and did

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46 *Preemption Report* at 12.

47 A total of ninety-one programs, representing less than three percent of the total number of core programs for the period, were preempted and rescheduled. *September10, 1999 CBS Letter* at chart entitled, Preemptions of Children's Programs at CBS Stations During Fourth Quarter 1998 and First and Second Quarters 1999.

48 *See September 10, 1999 CBS Letter* at chart. During this period, two programs that were preempted for breaking news, which therefore did not need to be rescheduled at all, were rescheduled to time periods other than the programs' fixed second homes. *See Letter to Roy J. Stewart from Martin D. Franks, Senior Vice President, CBS, Inc. July 2, 1999*, at 2 n. 8 (*July 2, 1999 CBS Letter*).

not dispute – consistent CBS, ABC and NBC networks findings "that there was no significant adverse effect [on audience levels] from the preemption and rescheduling of some program episodes."[49]

In fact, as mentioned in the Bureau's report, CBS undertook a detailed market-by-market analysis of preemptions of its core programming during the 1997-1998 season that showed the ratings of our children's programs "did not suffer as a result of the limited rescheduling to which they had been subjected":

> For each of the core network programs broadcast by CBS O & Os in metered markets, CBS compared the ratings the program received in its rescheduled time period (in each market where it was rescheduled) against the ratings the program received in its regularly scheduled time period in the same market. This market-by-market analysis showed that in the majority of cases the programs received higher ratings in the rescheduled time period than in the regularly scheduled period.[50]

The only reasonable conclusion the Commission can draw on the present record is that the current levels of preemption and rescheduling of children's core programming are not reducing the audience for these programs.[51]

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[49] *Preemption Report*, at 13 (Emphasis added). *See July 2, 1999 CBS Letter*, at 4-5 and Exhibit 2.

[50] *Id.* at 13, ¶ 30.

[51] The record also shows that stations have been taking the steps needed to inform viewers of preemptions and reschedulings. The Mass Media Bureau found that for the 1997-1998 season ABC and NBC each had "fully satisfied its preemption notification commitments" of the previous year. *Preemption Report*, at ¶¶ 49 and 53. The Bureau noted that CBS had not made a commitment to such notification, but believed the Commission had premised its acceptance of CBS's network sports preemptions on CBS's providing notification. The Bureau expressed dissatisfaction that only nine of the thirteen CBS stations that had experienced preemptions during the 1997-1998 season had provided notification. *Id.* at ¶¶50-51. In response, CBS took steps to ensure that on-air notification was given the following season, *see CBS Letter of July 2, 1999* at 3-4, and

The significance of the above-described record is clear: if the relatively small number of programs that have been preempted have been consistently rescheduled without any significant reduction in the audience for them, then there is no justification for setting a limit on the number of permitted preemptions, or for promulgating rules dictating the "efforts" that must be made to reschedule and promote them. There is clearly no need for a new set of burdensome and intrusive regulations to fix a system that is not broken.

As an independent matter, the Notice asks whether the Commission should continue its policy of exempting breaking news preemptions from the requirement to reschedule.[52] The public interest is well served by this exemption, and, we submit, it should be retained.

There is no doubt that the public benefits from licensees' broadcast of breaking news. Providing this kind of coverage is a fundamental aspect of broadcasters' fulfillment of their public interest obligations. Unlike network sports preemptions, which are anticipated, and for which there is time to plan rescheduling, breaking news preemptions are unplanned. If required to suddenly reschedule children's programs preempted by breaking news – perhaps to a fixed second home – a licensee would face a distinct disincentive to preempt. The result might be a reduction in coverage of breaking news, to the detriment of the overall audience.

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has continued to remind stations of their obligations where necessary. *See CBS Letter of Mark W. Johnson, Associate General Counsel, CBS, Inc., to Roy J. Stewart, Chief, Mass Media Bureau, October 18, 1999.*

[52] *Notice* at ¶ 28.

The Mass Media Bureau has previously acknowledged the validity of these very concerns. In letters to each of the networks expressing its approval of the preemption plans they had proposed, the Bureau wrote:

> We conclude that it is appropriate, as you suggest, to exempt from the above provisions core programming that is preempted for breaking news. ... Presentation of breaking news is plainly in the public interest. By definition, such programming is unpredictable, so that promotion is impractical. Moreover, while we would encourage stations to reschedule preempted programming in these circumstances, we believe such preemptions will happen sufficiently infrequently that a station's failure to reschedule a preempted episode would not defeat a station's programming otherwise qualifying as core on this basis.[53]

While the Bureau went on to say it would revisit the issue if, based on the experience of the 1997-1998 season, the exemption resulted in more preemptions than anticipated, no suggestion was made after the subsequent season that there had been an inordinate number of breaking news preemptions. The record is devoid of such evidence. To the contrary, the evidence shows that the exemption has facilitated the broadcast of breaking news of great importance to the public, such as the presidential impeachment proceedings in the United States House of Representatives and the presidential impeachment trial in the United States Senate. The exemption should remain.

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[53] *See, e.g., July 11, 1997 CBS Letter*, at 5.

IV. Proposals for Limiting Future Direct Interactive Links to Websites in Children's Programming Are Premature and May Unnecessarily Hamper the Development of Interactive Television for Children; Other Proposals for Expanding the Definition of Commercial Matter Are Contrary to Law and Would Undercut Legitimate Programming Objectives and Financial Support, Thereby Diminishing the Quality of Children's Television Programming

In the Notice, the Commission seeks comment on proposals to either prohibit or treat as commercial matter future direct links in children's programming to certain types of websites -- links that may become possible in the digital environment. It also seeks comment on proposals to expand the current, longstanding definition of commercial matter in children's programming to include promotions of upcoming programs, public service messages, and time sold for purposes of presenting educational and informational material.

These changes are completely unwarranted, both because they would unduly hamper the development of interactive television services for children and deny children access to valuable entertainment and educational and informational material, and also because they would adversely affect the economic viability of children's programming by undercutting legitimate methods by which program providers promote and fund it. In addition, the Commission lacks the statutory authority to make many of the proposed changes.

The burdensome regulations under consideration would have a disproportionate and particularly damaging impact on children's television channels, like Nickelodeon, whose entire program schedules are comprised of programming aimed at children. Penalizing efforts to enhance, promote and fund children's television channels, as these proposals do, threatens the economics of operating television channels directed primarily to children and the quality of programming on them.

A. Prohibitions or Restrictions on Future Direct Interactive Links In Children's Programming To Websites Would Unnecessarily Burden the Development of Interactive Children's Television

Looking to the future, the Commission notes that "[b]y converging internet capabilities with broadcasting, digital television permits a new level of interactivity between broadcasters, advertisers and viewers."[54] The Commission asks whether it should "prohibit the use of digital television interactivity capability in children's programs to sell products?"[55] Specifically, the Commission seeks comment on the proposal of one advocacy group that the Commission "prohibit all direct links to commercial websites during children's programming."[56] Perhaps cognizant that this proposal is rigid and overbroad, the Commission, asks whether it should "make a distinction between websites that carry only commercial products, and websites that also offer educational information related to the program."[57]

At the outset, it should be noted that the development of interactivity between television and the Internet is still in the research and development stage. Indeed, to date, prototypes of interactive television have only been made available to consumers on a limited or trial basis. While industry watchers speculate that interactive television will permit television viewers to freely move back and forth between television and the Internet via links, until actual interactive television equipment and services are marketed

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54 *Notice* at ¶ 29.

55 *Notice* at ¶ 32.

56 *Id.*

57 *Id.*

to consumers, the functional features of interactive television (i.e. the use of links) will remain uncertain. It is premature for the Commission to adopt a rule now to apply to an activity or conduct that may occur in a manner which is currently unforeseen. For the reasons previously discussed, the Commission should refrain from imposing restrictions on these nascent services. Doing so now may kill in their infancy possible interactive services that the Commission acknowledges have great potential to benefit children.

If, notwithstanding the foregoing, the Commission were to adopt a prohibition or restriction on interactive links in children's programming, Viacom submits that the distinction between pure commercial sites and sites that contain both commercial and editorial components is critical. References in our current children's programming – whether on the CBS Owned television stations or on Nickelodeon cable channels – are to websites that supplement and enhance the entertainment, educational, and informational content of the television programming, and that provide children with a variety of other material and information of value to them. There is little doubt that future, direct interactive links, if they are created, similarly would have as their primary function the enhancement of children's television viewing experience, by having editorial material that would supplement the entertainment, educational and informational value of the programs.

For example, Nickelodeon has created websites – such as Nick.com, Nickjr.com, GAS.nick.com and Noggin.com – which complement and enhance the value of the Nickelodeon children's channels, as well as the three-hour Nick Jr. block aired by the CBS Television Network. References on the Nickelodeon channels and CBS to these websites are essential if the websites are to serve their function of extending the learning

and entertainment experience begun in the program. This has been done to particularly valuable effect with Nick Jr. programs and the sites dedicated to each program on the NickJr.com website. For example, a recent episode of the program BLUES'S CLUES that explored for young children questions about deafness and American Sign Language[58] sent viewers to the NickJr.com website, where they could learn more about American Sign Language, in part through an online game. Similarly, the NickJr.com site for DORA THE EXPLORER, which features a seven-year-old Latina heroine, includes "Say It Two Ways," an online game that extends the bilingual aspect of the program using an interactive English-Spanish dictionary for preschoolers. Nickelodeon websites allow children to have influence on the course and content of Nickelodeon television programming. Their online votes permit them to register their presidential preferences on the program KIDS PICK THE PRESIDENT and to help decide who gets "slimed" on SLIMETIME LIVE. During NICK NEWS programming this year on Nickelodeon, host Linda Ellerbee encouraged children to visit the Nick.com website to learn more about the presidential campaign. Noggin, Nickelodeon's educational service, is founded on the principle that cross-fertilization between television and the Internet can have great value for children.[59] Nickelodeon programming has also driven children to Nick.com to learn

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[58] As reported in TV GUIDE of April 22, 2000, "The charming series *Blue's Clues* has always been, more or less, about reading signs.... It's a short but inspired step, then for *Blue's Clues* to devote an entire show ... to teaching the fundamentals of American Sign Language (ASL)."

[59] Noggin's current mission statement says, "By designing a television channel and online site that cross-fertilize one another, kids can enjoy the best of both mediums and learn twice as much. Noggin was developed as a multi-media network so kids can apply what they learn on Noggin TV to the activities at Noggin.com, and what they learn at Noggin.com can be applied when they watch Noggin TV."

about and, it is hoped, participate in "The Big Help," Nickelodeon's campaign that provides connections through which children can volunteer for and help create public service projects across the country. [60]

Nickelodeon's example stands as a clear demonstration of the value of coordinating children's programming with website material. As the Commission acknowledges, the emergence of Internet/broadcasting interactivity will offer "great potential for enhancing the educational value of children's programs by, for example, permitting children to click on icons that appear on the screen during the program which take them to websites with more in-depth information about the topics covered in the programs."[61] In addition to educational material, websites affiliated with television programming contain games and other entertainment-based activities which can offer children fun and challenge – elements of play that are integral to a child's development. Websites can also build a virtual community among a television audience through activities such as polling and chatting. By broadcasting in real time on television children's thoughts and opinions collected via the Internet about the programs they are watching, Internet-linked television channels can give children an unprecedented voice in the media. The ability to link to websites that offer those interactive activities, however, is critical to the success of any such program. Moreover, because a significant purpose of the link would be to complement or enhance the value of program material, the links

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[60] The outstanding results achieved by The Big Help campaign are described in Section IV B, *infra*.

[61] *Notice* at ¶ 29.

should not be restricted to commercial breaks, but should be permitted during the program itself.

The Commission should not obstruct the use of this capability if and when it emerges. Rather, interactivity should be welcomed as a tool to enhance the educational and entertainment value of children's programming, and should not be used as an excuse for more regulation. Even if a website is advertiser-supported, as long as it provides editorial content and is not purely commercial, there should be no restriction on direct links to it in children's programming.

B. Expanding The Definition Of Commercial Matter To Include Program Promotions, Public Service Announcements And Air Time Sold For Purposes Of Airing Educational And Informational Children's Programming Would Be Contrary to the Clear Intent of the Children's Television Act, and Would Unnecessarily Interfere With Programmers' Ability to Promote and Fund Children's Programming

The Notice asks whether the Commission should embark on a significant expansion of the definition of "commercial matter" in children's programming that it has adhered to since it first promulgated rules in 1991 implementing the CTA. Specifically, the Commission seeks comment on whether it should now treat as commercial matter "promotions of upcoming programs that do not contain sponsor-related mentions, public service messages promoting not-for-profit activities, and air-time sold for the purposes of presenting educational and informational material."[62]

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[62] *Notice* at ¶ 33.

As a preliminary matter, we note that the Commission's stated reason for considering these changes are unrelated to the conversion to digital broadcasting. In the Notice, the Commission asks whether these forms of programming should be treated as commercial so as to "maximize" the amount of time devoted to "program material" in children's programs. There is simply no nexus between the desire to make children's programs a little longer and the conversion to digital broadcasting that would justify the issue's being raised in this proceeding.

Whether appropriate to this proceeding or not, the question of whether these forms of programming should now be treated as commercial must be answered in the negative. As the Notice suggests,[63] Congress made very clear in the legislative history of the CTA that it intended that public service announcements and promotions not be considered commercial matter. The Senate Report states that "[t]he Committee intends that the definition of commercial matter [as used in the statute] will be consistent with the definition used by the FCC in its former FCC Form 303."[64] Eliminating any doubt as to its intent, the Senate Report then specifically recites that the "FCC's former Form 303-C defined the following as not being commercial announcements: promotional announcements; ... [and] public services announcements...."[65] Including these forms of programming in the definition of commercial matter would clearly contradict the intent of Congress.

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63 *Id.* at ¶ 33 and fn. 60.

64 *Senate Report* at 21 (emphasis added). *See also House Report* at 15-16.

65 *Senate Report* at 21. Again, the House Report makes the very same point. *House Report* at 15-16.

But even if this were not so, sound policy, as expounded and applied consistently by the Commission, dictates that these programming forms should continue to be excluded from the definition of commercial matter. As the Commission long has recognized, promotions for other programming, PSAs, and air-time sold to present educational and informational material are of significant value to children and provide important financial support to children's programming. In promulgating rules pursuant to the statute in 1991, the Commission determined that:

> [P]ublic service messages sponsored by nonprofit organizations that promote not-for-profit activities will not be considered commercial matter for purposes of applying the commercial limits. Similarly, air time sold for purposes of presenting educational and informational material, including "spot" announcements, with the only sponsorship mention a "sponsored by," is not commercial matter.[66]

The Commission further stated that "[P]romotions of upcoming programs which do not contain []sponsor-related mentions will not be deemed commercial matter."[67]

Originally, the Commission held the view that these shorter programming elements were not only valuable to children, but qualified as "specifically designed" educational and informational programming:

> We clarify that short segment programming, including vignettes and PSAs, may qualify as specifically designed educational and informational programming for children. Such material is well suited to children's short attention spans....[68]

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66 *Report and Order, Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, at 2112, ¶ 7 (1991) *recon. granted in part*, 6 FCC Rcd 5093 (1991) ("*Children's Television Policies*").

67 *Id.*

68 *Children's Television Policies*, 6 FCC Rcd at 2115, ¶ 25.

It is true that in 1996, the Commission determined that short-form programs would no longer be credited as core programming, and retreated from its position that children have short attention spans. Nonetheless, it still encouraged "all broadcasters to continue to provide a diverse mix of educational and informational programming, including short segments and PSAs, toward their overall obligation to provide programming for children."[69] The Commission was clearly of the opinion that such short-form children's programming has educational and informational value.

There can be no doubt that the Commission's original view that all these materials should be excluded from the definition of commercial matter because they are valuable to children was correct. Whether sponsored or not, educational and informational material and public service announcements provide important information to youngsters. For example, Nickelodeon devotes ten percent of its non-programmed airtime to its public service campaign, "The Big Help," which is designed to encourage children to connect to their world through volunteering.[70] Launched in 1994, the campaign has drawn over 33 million children to pledge over 383 million hours to volunteer projects in cooperation with Big Help partners including Big Brothers/Big Sisters of America, Feed the Children, Habitat for Humanity, National Wildlife Federation, March of Dimes, and WGBH Access Services (previously known as The Caption Center). "The Big Help" is not simply a public service campaign, but one specifically designed to reach children and

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69 *Children's Programming Report*, 11 FCC Rcd at 10713-10714, ¶¶ 110-112.

70 PSAs for "The Big Help" are also broadcast during children's programming on the CBS Television Network.

motivate them to act in a pro-social way. The campaign is integral to the overall message and values Nickelodeon seeks to impart to children.

It is difficult to imagine any reason why time devoted to this public service campaign should be considered "commercial." Inevitably, if public service announcements were deemed commercial matter, Nickelodeon would have to reduce the number of messages devoted to "The Big Help campaign" in order to stay with the statutory limits on commercial matter.[71] We submit that the Commission would be hard pressed to explain why rule changes causing this unfortunate result were necessary.

Program promotions similarly provide useful information to children. In the Notice, the Commission essentially concedes this point stating, "[w]e note that some of the types of program interruptions currently excluded from the commercial limits may contain information valuable to children, such as promotion of upcoming educational programs or certain types of public service messages."[72] In fact, we submit it is instructive that elsewhere in this Notice the Commission asks if it should require promotion of children's programming during prime time or other specific day parts.[73] While, as discussed *infra*, we believe the Commission has no reason or authority to

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[71] To the extent advocates seek to force reductions in commercials so that public service announcements and other valuable program elements can be preserved, they are ignoring the reality that children's programming, like other programming, must have commercial support to survive. They also would be attempting to circumvent the will of Congress, which, while setting the statutory limits of 10.5 minutes per hour on weekends and 12 minutes per hour during the rest of the week, specifically found that "the financial support of advertisers assists in the provision of programming to children." 47 U.S.C. § 303a note (3).

[72] *Notice* at ¶ 34.

[73] *Notice* at ¶ 38.

impose such obligations, the Commission's apparent interest in doing so reflects its view that promotion of children's programming is important for "increasing public awareness of the availability of core programming." If the Commission thinks promotion has this value, why should it penalize program providers when, on a voluntary basis, they promote children's programs in other children's programs – the very venue where they are most likely to find child viewers?

But even leaving aside educational and informational programming, promotions of entertainment programming can have very tangible and significant value to children. Nickelodeon uses on-air promotional time to give voice to the network's core values of gender neutrality, diversity, and non-violence, and to let children know that Nickelodeon is a place designed specifically for them, where they can have fun and learn. Nickelodeon's ability to present this overall editorial message in a coherent and effective manner would be seriously damaged, to the detriment of children, were promotions to be redefined as commercial matter.

The three categories of programming under consideration in the Notice were excluded from the definition of commercial matter not only because of their value to children, but also because the Commission wisely understood that it is necessary to allow programmers to financially support educational and informational programming. In support of its 1991 decision to exclude from the definition of commercial matter time sold for presenting educational and informational material – even if carrying a sponsor mention – the Commission stated, "Indeed, we wish to encourage the sponsorship of

educational and informational material...."[74] Treating these materials as noncommercial allows programmers to bring educational and informational material to children, while at the same time allowing them to derive funds that can support their development and presentation of quality children's programming.

Nickelodeon is a prime example of a program provider whose outstanding record of bringing numerous quality programs to children would be threatened by the proposed definitional changes. Despite the fact that it relies on advertising and license fees for its revenue base, Nickelodeon on a weekly basis airs 103 hours of children's programming of which dozens of hours per week would meet the Commission's definition of "core" programming. It is critical to the success, both from a quality of programming and commercial standpoint that Nickelodeon and other children's channels be accorded the flexibility to promote their quality programs in other such programs, and to run sponsored PSAs in them.

The unfairness of the proposals to expand the definition of commercial matter affects all providers of children's programming,[75] but would have a disproportionate and devastating impact on Nickelodeon or any other network that primarily or exclusively

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[74] *Children's Television Policies*, 6 FCC Rcd at 2112, 2123-2124, ¶ 7 & n. 24.

[75] Defining commercial matter to include promotions would harm children's programming on the CBS Owned television stations as well as on Nickelodeon. As part of its public announcement that Nick Jr. programs would appear on the CBS Television Network, Viacom stated, "CBS's new children's line-up will be promoted Monday through Friday on NICK Jr. which, in turn, will receive promotion from the Network during Saturday morning." *CBS and Nickelodeon Join Forces to Present CBS's 2000-2001 Children's Programming Schedule,* at 1. Cross promotion of this kind, aimed at informing children where they can find educational and informational and other quality children's programming throughout the week, should not be sacrificed.

airs children's programs. Where children's programming represents so much of a programmer's schedule, reduction of the time available for promotions and for sponsored PSAs penalizes the network severely.

In Nickelodeon's case, *the* unique service that the network has to offer is a children's programming environment that children know has been designed just for them. This environment is created in significant part through the use of innovative and carefully constructed program promotions. Treating these promotions as commercial matter would effectively prevent the network from promoting its network identity and entire schedule during most of its programming.[76] It is simply not possible to effectively build and sustain a children's network and program schedule while being prohibited from promoting that children-centered environment and schedule on the network. Forcing Nickelodeon either to air all of its sponsored PSAs for "The Big Help" within commercial time or drop them from the schedule would similarly undermine the core values and identity of the network.

If the proposed expansion of the definition of commercial matter were adopted, Nickelodeon would be forced to reduce the promotional material necessary to sustain and expand the child viewership for its quality children's programming. It would be extremely unfortunate, but predictable because of economic realities, that the proposed definitional changes would result in the reduction in the quality and quantity of children's programming – the opposite result from the Commission's professed goals.

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[76] The alternative of using the limited available commercial time for promotion is infeasible economically, particularly where children's programming represents such a significant component of the schedule.

Moreover, as noted above, the Commission's stated rationale for considering removal of the non-commercial status of these categories of programming is that they take away from time that would otherwise be devoted to the program. It should not be forgotten that children's programs now contain less commercial matter than does most other programming. When this fact -- and the educational and informational value of these types of short-form programming -- are taken into consideration, it is clear that the arguments for additional regulation in this area are misplaced.

Finally, the Commission provides no evidence whatsoever that its current policy governing commercial matter has adversely affected children. Indeed, as noted above, exempting paid PSAs and educational and informational material has helped underwrite quality children's programming.

As a separate matter, the Commission notes the receipt by staff of informal complaints about "inappropriate promotions in programs viewed by children."[77] Without attempting to evaluate how frequent or widespread such occurrences are, the Notice seeks comment on several proposals to regulate promotions. Acknowledging, however, that the current ratings system for programs was a voluntary industry standard, the Commission asks, "[w]ould it be preferable to urge the industry itself to make a voluntar[]y commitment to take steps to protect against the airing of inappropriate promotions in children's programs?"[78] Viacom submits that the Commission should not adopt any regulations in this area, since it is clear that the industry does take seriously its

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[77] *Notice* at ¶ 35.

[78] *Id.* at ¶ 37.