

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Children's Television Obligations)
of Digital Television Broadcasters)

MM Docket No. 00-167

REPLY COMMENTS OF CME, *et al.*

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No. of Copies rec'd 074
List A B C D E

January 17, 2001

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SUMMARY

In our initial comments, CME, *et al.* urged the Commission to adapt the existing children's programming obligations to capitalize on the opportunities presented by digital television ("DTV"). We recommended that the Commission implement a point system processing guideline to allow DTV broadcasters to select from a set of flexible options to better serve the educational and informational needs of children. We also proposed that the Commission adopt restrictions on the interactive advertising practices enabled by digital technology. In addition, CME, *et al.* recommended that the Commission revise the definition of commercial matter to count program promotions toward a licensee's commercial limits, establish clear guidelines concerning program preemption, and include adequate promotion as an element of children's educational and informational programming.

In sharp contrast to the comments of CME, *et al.* and other children's advocates, the broadcast industry vehemently opposes all of these suggestions. Among other things, these commenters assert that setting the ground rules for DTV is premature; that the Commission does not have the statutory authority to adapt regulations to the digital environment; and that any extension of the three-hour guideline to the DTV would violate the First Amendment. CME, *et al.* submit these Reply Comments in response to those objections.

Contrary to the arguments set forth by the broadcast industry, it is not too early to clarify the affirmative obligations broadcasters owe to children in the digital environment. Laying the ground rules at this time helps the Commission ensure that broadcasters do not become entrenched in questionable business practices that are difficult and costly to amend. Clarifying the public service responsibilities broadcasters have to the child audience also helps broadcasters

fulfill the social contract they have with the communities they are licensed to serve. In turn, with a better understanding of what broadcasters' obligations are to children, the public can better assess whether broadcasters are meeting these responsibilities. The Commission also has enough information of the likely services that DTV broadcasters will offer to develop reasonable and flexible policies that will not impede the development of these new services.

The case for setting the ground rules for DTV is equally, if not more compelling, in the case of children's commercial safeguards. Experience demonstrates that the Commission cannot rely on market forces to ensure that children are not harmed by excessive and unfair commercial practices. With the advent of interactive advertising capabilities and the emergence of children as a prized demographic, there is no reason to believe that market forces will fare any better in the transition to digital. It is therefore necessary that the Commission act now to ensure that children are not harmed by unfair interactive commercial practices.

Setting restrictions on interactive advertising practices would not stifle the development of interactive opportunities for children's programming. CME, *et al.*'s proposed ban on direct links from children's programs to websites operated for commercial purposes is not as broad as some broadcasters contend. The prohibition would not apply to nonprofit websites, nor would it extend to most educational sites. To the extent that some program websites may be operated for commercial purposes, the Commission should qualify that direct links to complimentary program websites are valid so long as (1) the initial or gateway linked webpage from the program does not advertise or sell a product and (2) there is an adequate separation between the initial or gateway webpage and any other linked website or webpage that advertises or sells a product.

The Commission has ample authority under the Administrative Procedure Act to adopt CME, *et al.*'s recommendations. There is substantial evidence demonstrating that the needs of children are not being adequately met by the three hour guideline. This, combined with the transition to digital, provides a more than adequate basis to adapt broadcasters' obligations to children in the digital environment. And because of the predictive nature of the instant matter, the Commission has a wide discretion to revise its regulatory structure.

Nor do the proposals by children's advocates raise any First Amendment tensions. There is a compelling government interest in serving the educational and informational needs of children. In light of the scarcity of broadcast licenses, the Commission can adopt reasonable measures such as the proposed point system guideline to promote this interest. In addition, the point system does not substantially infringe upon broadcasters' editorial discretion because it does not dictate the specific content of the programming nor require or prohibit particular viewpoints to be espoused by the station.

Lastly, the Commission should dismiss broadcasters' opposition to revising the definition of commercial matter to include a station's promotions for other programming. CME, *et al.* obviously agree with broadcasters that PSAs should not count toward commercial limits. However, there is no reason why commercials for upcoming programs should not be counted. To provide broadcasters with an incentive to promote educational programming, CME, *et al.* recommend that the Commission exempt promotions of children's educational programming from the definition of commercial matter. CME, *et al.* also reiterate our proposal that the Commission amend the definition of educational children's programming to include adequate promotion as a core element.

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REPLY COMMENTS OF CME, et al.

The Center for Media Education, and the other public interest groups and individuals collectively known as CME, et al., by their attorneys the Institute for Public Representation, respectfully submit these Reply Comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking, *In the Matter of Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167 (rel. Oct. 5, 2000) ("*NPRM*").¹

CME, et al. note at the outset the unanimity among children's advocates and academics in support of the *NPRM*.² These parties fundamentally agree with CME, et al. that the Commission has a responsibility to set the ground rules for how broadcast licensees can use the enhanced capabilities of digital television ("DTV") to better serve the educational needs of our nation's children. Moreover, there is consensus among the public interest community that the

¹ For a description of the organizations and individuals comprising CME, et al., please refer to the Comments of CME, et al., MM Dkt. No. 00-167, filed Dec. 18, 2000, Appendix ("CME, et al. Comments").

² See generally Comments of Children NOW, MM Dkt. 00-167, filed Dec. 18, 2000 ("Children NOW Comments"); Comments of People for Better TV, MM Dkt. No. 00-167, filed Dec. 18, 2000 ("PBTV Comments"); Sesame Workshop, MM Dkt. No. 00-167, filed Dec. 18, 2000 ("Sesame Workshop Comments").

Commission must take action to ensure that children are adequately protected from the excessive and unfair advertising practices made possible by interactive DTV.

Unfortunately, members of the broadcast industry uniformly oppose the *NPRM* and the specific recommendations by children's advocates such as CME, *et al.* and Children NOW.³ The industry raises a litany of unwarranted policy, statutory and constitutional objections to reasonable proposals to adapt broadcasters' affirmative obligations to the digital environment, as well as recommendations to protect children from the possible advertising abuses of interactive DTV. Broadcasters also generally oppose counting commercials promoting upcoming programming aired during children's programming toward a licensee's commercial limits and taking any action to encourage broadcasters to promote children's educational core programming. These Reply Comments will focus on rebutting those objections.

I. THE COMMISSION SHOULD ACT NOW TO ADAPT BROADCASTERS' AFFIRMATIVE OBLIGATIONS TO THE DIGITAL ENVIRONMENT.

CME, *et al.* agree with the other children's proponents in this proceeding that the Commission should act now to establish broadcasters' obligations to children in the digital environment.⁴ Predictably, broadcasters contend that it is too early to clarify digital broadcasters' affirmative obligations to children. *See, e.g.*, NAB Comments at 3-8; Viacom

³ *See generally* Comments of the Association of Local Television Stations, MM Dkt. 00-167, filed Dec. 18, 2000 ("ALTS Comments"); Comments of the National Association of Broadcasters, MM Dkt. 00-167, filed Dec. 18, 2000 ("NAB Comments"); Comments of the State Broadcasters Association, MM Dkt. 00-167, filed Dec. 18, 2000 ("SBA Comments"); and Comments of Viacom, MM Dkt. 00-167, filed Dec. 18, 2000 ("Viacom Comments").

⁴ *See* Reply Comments of Children NOW, MM Dkt. 00-167, filed Jan. 17, 2001 ("Children NOW Reply"); Reply Comments of PBTv, MM Dkt. 00-167, filed Jan. 17, 2001 ("PBTv Reply").

Comments at 11-18. As discussed below, the Commission should reject these arguments and clarify from the beginning what public service digital licensees owe to America's children. The FCC has more than adequate knowledge of digital technology at this time to craft reasonable regulations that would provide regulatory certainty and flexibility for the industry, promote the public interest, and not stifle innovation.

A. The Commission Should Clarify DTV Licensees' Public Interest Obligations to Children Before Broadcasters Become Entrenched in Business Models.

In this case, regulatory certainty is good public policy.⁵ Setting the ground rules at the outset prevents broadcasters from becoming entrenched in business models that do not serve the needs of children.⁶ By adopting early affirmative obligations, the Commission avoids the difficulties associated with attempting to retrofit obligations. For instance, the FCC struggled with adopting equitable regulations concerning broadcasters' use of local marketing agreements ("LMAs"). *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC 12903, 12958-66 (1999). In that case, the Commission passively stood by as broadcasters crafted these questionable business arrangements to skirt the FCC's local ownership rules. *See id.* at 12990, Separate Statement of Commissioner Tristani. The result: the Commission's failure

⁵ *See* Reed Hundt & Karen Kornbluh, *Renewing the Deal between Broadcasters and the Public*, 9 HARV. J. L. & TECH. 11, 22 (1996) (explaining how government's failure to set early regulations regarding auto safety is similar to the error in neglecting to set public interest obligations for broadcasters at the onset of the transition to digital); Walter Effross, *Putting the Cards Before the Purse?*, 65 MISS. K.C. L. REV. 319, 336-39 (1997) (discussing why Congress determined to provide a basic framework for the transfer of electric funds early on to enable consumers and corporations alike to make more informed decisions on participating in these transactions despite concerns from the business community that setting ground rules was premature).

⁶ *See* Hundt & Kornbluh, *supra* note 5, at 22.

to address this issue early on encouraged LMAs to become standard practice until the FCC was forced to act years after the fact and adopt watered down regulations.

Regulatory certainty also clarifies to the public precisely what it should expect from its local broadcasters. Without knowledge of broadcasters' responsibilities, it is quite difficult for the public to monitor stations' public service. Public awareness is increasingly important because the Commission has come to rely more and more on the community to determine whether broadcasters are serving the public interest.⁷ Further, establishing broadcasters' obligations to children from the beginning ensures that communities benefit from broadcasters' transition to digital. The public cannot rely solely on the market to encourage broadcasters to meet the educational needs of children. *See* S. REP. NO. 101-227, at 7-9, 16 (1989) ("*CTA Senate Report*"); *1996 Children's TV Order*, 11 FCC Rcd at 10680.⁸

Establishing a regulatory framework from the outset will also assist DTV broadcasters in developing their business strategy. It would enable broadcasters to prospectively factor into their business models how they can satisfy their public interest obligations. By adopting rules now

⁷ *See Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd 10660, 10662 (1996) ("*1996 Children's TV Order*"); *Revision of Programming and Commercial Policies, Ascertainment Requirement, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *aff'd in part and remanded in part sub nom., Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("*Revision of Programming Policies Order*").

⁸ Contrary to broadcasters' assertions, the increase in the number of nonbroadcast outlets providing children's programming is irrelevant to setting broadcasters' obligations under the Children's Television Act ("*CTA*"). *See* H.R. REP. NO. 101-385, at 6 (1989) ("*CTA House Report*") ("*the new marketplace of video programming does not obviate the public interest responsibility of individual broadcast licensees to serve the child audience.*").

that establish these responsibilities, broadcasters will be better able to plan to meet those obligations. As one of the broadcasters on the Advisory Committee noted, "[i]n return for a license to use a public asset for private financial gain, a broadcaster agrees to serve the public interest . . . *As with all contracts, both parties to the agreement need to know exactly the responsibilities that they have to each other.*"⁹

B. The Commission Has More than Adequate Information Concerning the Likely Services Digital Broadcasters Will Offer to Establish Baseline Children's Obligations.

Another facet of the broadcasters' "premature" argument is that the Commission does not have enough knowledge of the digital marketplace to set effective regulations. *See, e.g., SBA at 3.* But as the FCC has recognized in the digital context, "broadcasters are not venturing into completely uncharted territory." *Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, Reconsideration Order, 14 FCC Rcd 19931, 19936 (1999). In fact, there are plenty of indicators demonstrating the general parameters of future digital service.

For instance, it is clear that DTV broadcasters must provide at least one free channel comparable to the one on which the public has come to rely. *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12820 (1997). It is also clear that most broadcasters will provide some conventional, albeit enhanced, television service, either on HDTV or multicasted as SDTV. *Digital Television*

⁹ Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998), Separate Statement of James Goodmon at 86 (emphasis in original).

'99: *Navigating the Transition in the US*, at <<http://www.nab.org/research/topic.asp#DIGITAL>>.

Broadcasters are developing plans to use the interactive capabilities of DTV to target advertisements and insert hyper-links into programming and ads. CME, *et al.* Comments at 27. Furthermore, broadcasters have entered into partnerships to capitalize on the broad range of datacasting services available through DTV.¹⁰ For example, numerous DTV broadcasters have banded with Wavexpress to provide various data services.¹¹ In sum, it is clear that DTV licensees will use the spectrum to broadcast in HDTV, to multicast in SDTV, to air interactive programming, to offer Internet or other data services or, more than likely, provide some combination of all of the above.¹² Thus, because there is more than enough information on how broadcasters will use the digital spectrum, it is entirely appropriate for the Commission to craft the regulatory framework concerning the broadcasters' obligations to children.

¹⁰ Jon Healey, *Co-op Offers Airwave Action*, at <<http://www.mercurycenter/news/indepth/docs/bcast032200.htm>>; *see also* Richard V. Ducey, *Internet +DTV Broadcasting = UN-TV*, available at <<http://www.nab.org/research/topic.asp#DIGITAL>> (discussing the wide array of non-traditional services DTV can provide, such as offering Internet bandwidth and DTV's market advantages in this area).

¹¹ Glen Dickson, *Wavexpress nets Bay Area Deal*, BROADCASTING & CABLE, Dec. 18, 2000 at 46; Glen Dickson, *Benedek bands with Wavexpress; Will begin datacasting in Madison, Wis., this fall*, BROADCASTING & CABLE, Sept. 11, 2000 at 43; Glen Dickson, *Clear Channel catches the Wavexpress, Will launch DTV dataservice at WKRC-DT Cincinnati next month*, BROADCASTING & CABLE, July 17, 2000 at 42.

¹² Notably, broadcasters' vehement opposition to delineating early regulations stands in direct contrast to their continued support for immediate adoption of must-carry obligations for DTV. *See* Alan Breznick, *FCC Plans Votes on DTV Must-Carry Rules for Cable and DBS*, COMM DAILY, Jan. 8, 2001 at 2.

C. Broadcasters' Concerns that Clarifying DTV Obligations Would Impede the Development of New Services Are Largely Based on a Faulty Premise.

Many broadcasters base their objections to early regulation largely on the erroneous assumption that the Commission would require additional children's educational programming on every program stream. *See, e.g.*, NAB Comments at 5-6; Viacom Comments at 11-15. Specifically, they argue that applying the three hour guideline to every program stream would create a disincentive to experiment with multicasting.

But children's advocates, such as CME, *et al.* and Children NOW, do not recommend such an inflexible proposal. In fact, CME, *et al.* have explicitly disavowed the proposal to mandate children's core programming on all program streams for various reasons. CME, *et al.* Comments at 8 n.18. Rather, CME, *et al.* advocate a flexible point system by which a digital broadcaster can determine how best to use its resources to serve the educational needs of children. *Id.* at 8.

The point system guideline would allow broadcasters to satisfy their obligations in myriad ways. *Id.* at 8-16. For example, a broadcaster inclined to provide datacasting services to local businesses could satisfy its obligations by extending those services to local schools. A broadcaster who believes multicasting several programs streams is the proper route could easily work in a few additional children's educational programs to meet its obligations. Because the point system provides broadcasters with maximum flexibility, it would not stifle innovation or discourage experimentation. Indeed, by providing broadcasters with a clear, flexible framework

for satisfying their obligations, the point system guideline could encourage innovation and the deployment of new services.¹³

II. THE COMMISSION SHOULD NOT DELAY IN SETTING THE GROUND RULES FOR CHILDREN'S INTERACTIVE ADVERTISING PRACTICES.

Broadcasters' objections are even less convincing with respect to immediately adopting regulations protecting children from excessive and unfair interactive advertising practices.¹⁴ Specifically, they contend that restrictions on direct linking present a premature solution to a non-existent problem. *See, e.g.* Viacom Comments at 29. They argue that regulating direct linking at this time would impede the development of interactive children's programming. The Commission should reject these contentions. History demonstrates that market forces are clearly insufficient to protect children from harmful commercial practices. Moreover, broadcasters' concern that a prohibition on direct linking to commercial websites, as proposed by CME, *et al.*, would affect links to legitimate educational sites is misplaced.

A. Experience Dictates that Immediate Commercial Safeguards are Necessary to Protect Children from Excessive and Unfair Interactive Advertising Practices.

A cursory review of the history of broadcast advertising reveals a persistent and pervasive market failure with respect to children's advertising.¹⁵ As Congress explained in adopting the

¹³ At least one broadcast industry association recognizes the benefits of CME, *et al.*'s flexible proposal. *See* ALTS Comments at 24. ALTS agrees that CME, *et al.*'s recommendation provides a good starting point to discuss DTV broadcasters' public interest obligations. *Id.*

¹⁴ *See* Viacom Comments at 29; National Cable Television Association Comments at 2; Association of National Advertisers, *et al.* Comments at 3.

¹⁵ *See* CTA Senate Report at 9-10; *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 10-11(1974) *aff'd*, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir.

commercial limits for broadcasting and cable television, "total reliance on marketplace forces is neither sufficient nor justified to protect children from potential exploitation by advertising or commercial practices." *CTA House Report* at 6. Indeed, the "FCC's regulation of children's television was founded on the premise that the television marketplace does not function adequately when children make up the audience." *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1989).

In light of digital television's interactive capabilities, there is an even greater danger that some broadcasters will engage in unfair and excessive advertising practices. *See CME, et al. Comments* at 24. With the emergence of children as a lucrative demographic, there is too great an incentive for broadcasters to employ the interactive ability of DTV to take advantage of children. *Id.* Even now, many broadcasters have a hard time adhering to the FCC's present commercial safeguards.¹⁶ Considering the Commission's past experience, it would be irresponsible for the FCC to wait until children are harmed to set the rules for interactive advertising. The Commission also has a responsibility to conscientious broadcasters to clearly delineate at the onset what commercial practices are unacceptable in the digital age.

1977) ("*1974 Policy Statement*"); *see generally* Angela J. Campbell, *Self-regulation and the Media*, 51 FED. COMM. L.J. 711 (1999) (discussing the various failed attempts at self-regulation by the media to limit the overcommercialization of children's programming).

¹⁶ *See, e.g.* COMM DAILY, Dec. 20, 2000 (FCC plans to fine two TV stations \$41,000 for violating limits on advertising in children's TV programs); *see also* *Mass Media Bureau Advises Commercial Television Licensees Regarding Children's Television Commercial Limits*, 13 FCC Rcd. 10265 (1998).

B. Reasonable Restrictions on Direct Commercial Links Would Not Impede the Development of Interactive Educational Services for Children.

Despite the obvious concerns with interactive advertising, broadcasters contend that regulation is premature because it may stifle the development of interactive children's programming. *See, e.g.* Viacom Comments at 31. Contrary to broadcasters' alarmist assertions, preemptive restrictions on direct linking can be crafted without impeding the deployment of interactive programming. CME, *et al.* is not proposing that the Commission prohibit all interactive links. CME, *et al.* has repeatedly recognized that the interactive capabilities of DTV provide great opportunities to enhance children's educational programming. CME, *et al.* Comments at 5. Indeed, interactive educational applications should be encouraged. *Id.* But as demonstrated in our comments, the direct linking from a children's program, or a commercial aired during such programming, to a commercial website or online service would frustrate the Commission's longstanding advertising limits and commercial policies. CME, *et al.* Comments at 31-39. The objective of restricting direct links to commercial websites is to prevent marketers from abusing DTV's interactive potential to take advantage of children, not to hinder the development of interactive educational applications. *Cf.* Children NOW Comments at 37 (discussing striking the proper balance between protecting children and not stifling innovation).

That is why CME, *et al.* recommend that the Commission prohibit direct links to commercial websites, *i.e.*, websites that are "operated for commercial purposes." CME, *et al.* Comments at 38. This is similar to the formulation adopted by Congress in the Children's Online Privacy Protection Act ("COPPA"). *Id.* at 38 n.68. Using COPPA as a template, the ban would not apply to direct links to nonprofit websites. *Id.* For example, links to PBS,

www.pbs.org, or the Smithsonian, www.si.edu, would be exempt from CME, *et al.*'s proposal, despite the fact that these sites contain links to virtual "shops." Thus, concerns that CME, *et al.*'s proposal would detrimentally affect interactive applications incorporating nonprofit websites are based on an erroneous assumption. *See, e.g.* ALTS Comments at 26-27.

Nor do CME, *et al.* propose a complete ban on all direct links from a children's program to its corresponding websites.¹⁷ Although arguably some of these sites are operated for commercial purposes, in many instances their goal is to complement the underlying program, not to sell or advertise a product or service. With this in mind, the Commission should not prohibit direct links to such associated program websites so long as the digital broadcast licensee meets the following two conditions. First, the Commission should require that the initial directly linked webpage or gateway portal from the children's program to the program website does not sell or advertise any product or service. Second, the FCC should require that the initial directly linked webpage or gateway portal from the children's program to the program website maintains an adequate separation, *i.e.* bumper, between the initial webpage or gateway portal and any linked website or webpage on the program website that advertises or sells a product. *Cf.*

¹⁷ Unsurprisingly, Viacom uses examples of award-winning sites such as Nick Jr. and Noggin to argue that a restriction on direct links is bad policy. Viacom Comments at 31-34. However, these sites represent the best of the best and are not representative of the typical branded environment that most commercial websites embrace. *See generally* Kathryn Montgomery, *Digital Kids: The New On-Line Children's Consumer Culture*, in HANDBOOK OF CHILDREN IN THE MEDIA 635 (Dorothy G. Singer & Jerome L. Singer e.d., 2000). In this case, the Commission should err on the side of caution and adopt stringent safeguards that protect children from potentially abusive practices that employ commercial websites or online services. Moreover, even sites like Noggin may evolve over time to become more commercial. This development would be even more likely if the FCC neglects to adopt interactive safeguards.

Children NOW Comments at 38; Sesame Workshop Comments at 23 (outlining similar proposals for addressing interactive advertising).

The bumper must clearly state that the child is now leaving the program area and entering a space where she will be persuaded to buy a product or service. However, a bumper between a commercial aired during a children's program and a commercial website is insufficient to address the concerns of overcommercialization. Maintaining a bumper between a Coke commercial and the Coke website does not prevent a thirty second commercial from becoming an hour long advertisement. *See* CME, *et al.* Comments at 37.

These conditions would allow broadcasters to freely develop interactive applications while protecting children from excessive and unfair commercial practices. In addition, they are consistent with addressing the dangers of interactive advertising highlighted by CME, *et al.* CME, *et al.* Comments at 23-40. The Commission should apply these restrictions equally to directly linked nonprofit program websites as well.

III. THE CONTINUING UNMET NEEDS OF CHILDREN AND THE TRANSITION TO DIGITAL PROVIDE THE COMMISSION WITH AN AMPLE BASIS TO ADAPT DTV BROADCASTERS' OBLIGATIONS.

Along with the policy arguments discussed above, several broadcasters attack the Commission's authority to adapt DTV broadcasters' obligations on administrative procedure grounds. *See, e.g.* NAB Comments at 8-9; SBA Comments at 5-7. But in doing so broadcasters ignore the substantial record of this proceeding and fundamentally misconstrue the Commission's authority to revise its regulatory structure. These commenters wrongly assert that the only legitimate rationale for adapting broadcasters' obligations is evidence that the current three hour guideline is inadequate. They further erroneously contend that because there are no

facts demonstrating that the three hour guideline has failed to meet the educational needs of children, there is no rational basis for adapting broadcasters' obligations to the digital environment. This conclusion is contrary to the record in this proceeding and evinces a deeply flawed understanding of the administrative rulemaking authority of the Commission.

Contrary to the broadcasters' argument, there is substantial evidence that the educational needs of children are not being adequately met by the three hour guideline. *CME, et al.* Comments at 6-7. For instance, there is evidence that commercial broadcasters have tended to underserve preschool children and girls of all ages. *Id.* at 7. The record also highlights the paucity of locally originated or oriented children's core programming, as well as an emphasis of core programming on socio-emotional themes. *Id.* Accordingly, various noted children's media experts explained that the enhanced capabilities of DTV provide an ideal opportunity to address these shortcomings. Children NOW Comments at 5-7; Children NOW Reply Comments at 8.

In light of the record and the transition to digital, the Commission has much greater latitude to adopt reasonable regulations in this case than broadcasters contend. Judicial review of an administrative proceeding of this nature is very limited. *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982). Under section 706(2)(A) of the Administrative Procedure Act, a court will only overturn an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). "This standard of review is a highly deferential one. It presumes agency action to be valid . . . and requires affirmance if a rational basis exists for the agency's decision." *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) (citations omitted). In addition, "to the extent that the FCC's decision is based upon a 'predicative judgement,' the court's review is 'particularly deferential.'"

BellSouth v. FCC, 162 F.3d 1215, 1221 (D.C. Cir. 1999) (citations omitted); *see also NAACP v. FCC*, 682 F.2d 993, 1002 (D.C. Cir. 1982)("discretionary authority of agency is broader, and a finding of irrationality is harder to make, when its decisions are based on . . . predictive judgments as to the future effects of present acts.").

Under this standard, the transition to digital and the continuing unmet needs of children are more than adequate foundations upon which to revise broadcasters' affirmative obligations. The three hour guideline was a political compromise dictated by the limitations of analog television. *CME, et al. Comments* at 6; *NAB Comments* at 10. In light of the enhanced capabilities of DTV, it is only logical for the Commission to revisit that compromise and alter it according to the opportunities presented by digital technology. *CME, et al. Comments* at 2-7; *Children NOW Reply Comments* at 5. This conclusion is buttressed by the fact that the present system does not fully address the educational needs of children. To the extent that some broadcasters argue that the FCC cannot adapt its commercial safeguards to address the transition to digital, these contentions hold even less weight. As discussed above, the Commission has a long history of regulating broadcasters' commercial practices to rely upon conforming its rules to the challenges of DTV.

The Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'n v. Atchison, Topeka, and Sante Fe Ry. Co.*, 387 U.S. 397, 415 (1967). Indeed, "an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted). In this

case, the Commission not only has the authority to adopt reasonable regulations to reflect the transition to digital, but also has an obligation to do so.¹⁸

IV. ADAPTING BROADCASTERS' OBLIGATIONS TO SERVE THE EDUCATIONAL NEEDS OF CHILDREN IN THE DIGITAL ENVIRONMENT DOES NOT RAISE ANY FIRST AMENDMENT CONCERNS.

Several broadcasters also raise misplaced objections to the proposals by children's advocates on constitutional grounds. These commenters argue that the Commission should not extend the requirements of the CTA to digital because the underlying premise of First Amendment broadcasting jurisprudence - - scarcity - - rests on precarious ground. SBA Comments at 8-9; Viacom Comments at 7-8. In addition, others argue that an extension of the three hour guideline to DTV, and even the three hour guideline itself, are unconstitutional infringements on broadcasters' free speech rights. NAB Comments at 11-16; SBA Comments at 8-10. As discussed below, the Commission should summarily dismiss these contentions. Scarcity is alive and well and under current First Amendment standards, a reasonable adaptation of the CTA to the digital environment easily withstands any constitutional challenge.

¹⁸ Moreover, as discussed by Children NOW, the Commission has wide discretion under the CTA to adopt proposals such as CME, *et al.*'s and Children NOW's. Children NOW Reply Comments at 17. Because of the broad language of the CTA and the Commission's ample public interest authority under the Communications Act, adoption of these proposals would easily withstand judicial review under a *Chevron* analysis. *Id.*

A. The Consistent Application of *Red Lion* and the Persistent Scarcity of Broadcast Frequencies Support the Continued Vitality of the Scarcity Doctrine.

Scarcity is a legal and a factual reality. Thirty years after *Red Lion v. FCC*, 395 U.S. 367 (1969), the fact remains that the "the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." *Turner Broadcasting v. FCC*, 512 U.S. 622, 638 (1994). The Supreme Court has never strayed from this analysis,¹⁹ and neither have the lower federal courts.²⁰ In enacting the CTA, Congress explicitly stated that broadcasters are

¹⁹ *CBS v. DNC*, 412 U.S. 94, 101 (1973) (affirming that "[u]nlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource . . . All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated"); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978) (upholding broadcast/newspaper cross ownership rule under scarcity rationale); *CBS v. FCC*, 453 U.S. 367, 395 (1981) (relying on *Red Lion* to uphold law requiring broadcasters to provide reasonable access to federal candidates); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (discussing that "our cases have taught, that given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community'" (citations omitted); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (explaining that "some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers.").

²⁰ See, e.g. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996) *reh'g en banc denied*, 105 F.3d 723 (D.C. Cir. 1997) (extending *Red Lion* to uphold requirement that direct broadcast satellite (DBS) systems operators set aside four to seven percent of their channel capacity for noncommercial educational programming). Viacom relies on the dissent of the denial to rehear the *Time Warner* case *en banc* to support its argument that the scarcity rationale rests on a questionable foundation. Viacom Comments at 7. But the dissent explicitly stated that *Red Lion* remained good law, the crucial point being that it balked in extending the holding of *Red Lion* to DBS. *Time Warner*, 105 F.3d at 724 n.2. Nevertheless, CME, *et al.* submit that the dissent's understanding of scarcity is flawed. Scarcity does not turn on the number of channels available to the licensee or the number of other available media outlets. See

subject to the relaxed standard of review articulated by *Red Lion*. *CTA Senate Report* at 10-11. The FCC correctly agreed with this conclusion in implementing the CTA. *See 1996 Children's TV Order*, 11 FCC Rcd at 10728-33. Thus, broadcasters' contentions that the Commission should be wary of extending *Red Lion* to the digital environment have no legal basis.

Nor is the factual premise of scarcity any less viable then it was thirty years ago. "As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." *Red Lion*, 395 U.S. at 390. Because "[b]roadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated." *CBS*, 412 U.S. at 101. This fact is no less true today. Many more people want to broadcast than there are available frequencies.²¹ For example, the recent battle over low power FM, and the continuing difficulty with allocating spectrum to address the growing demand of

CTA Senate Report at 11. The standard of *Red Lion* turns on the fact that the spectrum is a public resource and that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Red Lion*, 395 U.S. at 388; *see also Community Television v. FCC*, 216 F.3d 1133, 1149 (D.C. Cir. 2000) (discussing FCC's responsibility in "allocating the valuable public resource that is broadcast spectrum" in light of the "the competing interests of the various broadcasters and viewers concerning the use of limited spectrum.").

²¹ *See, e.g.* Testimony of Henry Geller before the Senate Rules Committee on Campaign Finance Reform, May 15, 1996 (explaining the persistence of scarcity by noting that there are no open television frequencies in any large market and any transfer of licenses in such densely populated areas engenders a very large price). Moreover, Congress exacerbated the scarcity of broadcast frequencies by limiting eligibility for digital licenses solely to broadcasters already licensed for analog stations. *See* 47 U.S.C. § 336(a)(1) (2000). By excluding any new voices from the opportunity to obtain a digital television license, Congress reinforced the inherent physical limitation in broadcasting, perpetuating the scarcity of broadcast licenses.

wireless technologies,²² illustrate the persistent scarcity of frequencies and the insatiable demand for spectrum.

B. The Point System Guideline Proposal is a Reasonable, Content and Viewpoint Neutral Regulation that Directly Furthers a Substantial, even Compelling, Government Interest.

Because of the scarcity of broadcast licenses, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion*, 395 U.S. at 390. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here." *Time Warner*, 93 F.3d at 975 (citing *Red Lion*, 395 U.S. at 390). To that end, broadcasters are "given the privilege of using scarce radio frequencies [and in exchange are] obligated to give suitable time and attention to matters of great public concern." *Red Lion*, 395 U.S. at 394.²³ In determining the constitutionality of a broadcast regulation, it is the "right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390. Under this standard, the key question is whether the broadcast regulation is a "reasonable means of promoting the public interest," while not substantially infringing upon broadcasters' editorial discretion. *Time Warner*, 93 F.3d at 976.

²² Frank Saxe, *Digital-Age Airwaves Battle Begins: Spare Spectrum Due to Digital TV Conversion May Be Key To Expansion of Wireless Industry*, BILLBOARD, Dec. 23, 2000 at 13.

²³ This stems from the broader principle that "a licensed broadcaster is 'granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966)).

There is no doubt that "the authority to order 'suitable time and attention to matters of great public concern' includes the authority to require broadcasters to air programming specifically designed to further the educational needs of children." *1996 Children's TV Order*, 11 FCC Rcd at 10729. As Congress recognized, "it is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." *CTA Senate Report* at 17. Affirming the constitutionality of the current three hour processing guideline, the Commission emphasized that the guideline directly furthered this substantial interest by requiring broadcasters to demonstrate how they have met children's educational needs and by providing guidance on how licensees can meet this obligation. *1996 Children's TV Order*, 11 FCC Rcd at 10732. The Commission also underscored the flexibility of the guideline and the fact that it did not materially interfere with broadcasters' editorial discretion, nor censor or suppress speech of any kind. *Id.* at 10730.²⁴

Adaption of the three hour guideline to digital television would likewise not offend the First Amendment. The hallmark of CME, *et al.*'s proposal, as well as Children NOW's, is its flexibility. CME, *et al.* Comments at 12-16. Similar to the three hour guideline, these recommendations grant broadcasters a tremendous amount of discretion in determining how to meet their obligations. In fact, CME, *et al.*'s point system proposal is even more flexible than

²⁴ Contrary to the NAB's present posture in this proceeding, NAB originally supported the three hour guideline because of its flexible nature. In its 1996 supplemental comments, the NAB stated that :

"[b]ecause this proposal [the three hour guideline] retains substantial flexibility for broadcasters in meeting their obligations under the Children's Television Act, NAB believes that a constitutional rationale can be crafted in support of these regulations that rests on established First Amendment doctrines long accepted by the Commission." *1996 Children's TV Order*, 11 FCC Rcd at 10730 n. 321 (citations omitted).

the three hour guideline because it allows broadcasters to meet their obligations through additional core programming, funding to local public TV stations, free datacasting services or a combination of all three. *CME, et al.* Comments at 8-16. This flexibility, combined with the fact that the point system directly furthers a substantial, even compelling government interest, ensures its constitutionality.

Significantly, the D.C. Circuit affirmed an even more burdensome regulation requiring DBS operators to set aside four to seven percent of their channel capacity for noncommercial educational programming. *Time Warner*, 93 F.3d at 976. Applying *Red Lion*, the court concluded that "requiring DBS operators to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity" was a "reasonable means of promoting the public interest" and did not offend the First Amendment. *Id.* Rather, the court concluded that the set aside promoted fundamental First Amendment values. *Id.* Similarly, a flexible point system guideline is a "reasonable means of promoting the public interest" because it ensures that DTV broadcasters serve the educational needs of children. Moreover, the point system promotes core First Amendment values by asking "trustees of the public airwaves to pursue reasonable, viewpoint-neutral measures designed to increase the likelihood that children will grow into adults capable of fully participating in our deliberative democracy." *1996 Children's TV Order*, 11 FCC Rcd at 10731.

In addition, the point system guideline would survive intermediate scrutiny because it is content and viewpoint neutral. Similar to the DBS set aside, the point system guideline would "not dictate the specific content of the programming" the broadcaster is required to air. *Time Warner*, 93 F.3d at 977. Nor would the point system guideline "require or prohibit the carriage

of particular ideas or points of view." *Id.* (citations omitted). The guideline would "not penalize [broadcasters] because of the content of their programming ... [nor] compel [broadcasters] to affirm points of view with which they disagree." *Id.* Finally, the "overriding objective" of the point system is the content and viewpoint neutral goal of promoting educational children's programming. *See Turner I*, 512 U.S. at 646. Furthermore, as discussed above the point system would directly address this goal without unduly burdening broadcasters' speech.

Finally, CME, *et al.* note NAB's contention that an extension of the three hour guideline to DTV is a violation of the compromise worked out between the broadcasters, the public interest community, and the administration. NAB Comments at 10-11. NAB not so subtly threatens litigation if the FCC "reneges" on this agreement by adopting any children's public interest obligations for DTV broadcasters. However, digital television was not on the table during these negotiations.²⁵ Even the NAB's own letter to President Clinton makes no reference to DTV. *See* NAB Comments, Appendix A. In conclusion, the Commission should dismiss NAB's not so thinly veiled threat and again reject broadcasters' First Amendment arguments.

²⁵ *See* Statement of Kathryn Montgomery, Center for Media Education, released July 29, 1996, available at, <<http://www.cme.org>>; *The White House Summit; Clinton, Industry Execs Iron out Kids TV Pact; Text of President Clinton's Speech at the White House Kids TV Summit*, ELECTRONIC MEDIA, at 27, Aug. 5, 1996.

V. THE COMMISSION SHOULD COUNT PROMOTIONS FOR NON-EDUCATIONAL CHILDREN'S PROGRAMMING TOWARD BROADCASTERS' COMMERCIAL LIMITS AND TAKE STEPS TO ENCOURAGE BROADCASTERS TO PROMOTE CHILDREN'S EDUCATIONAL PROGRAMMING.

Several broadcasters also raise objections to the Commission's proposals to deal with issues concerning both analog and digital children's programming. Many broadcasters contend that the Commission should not amend its definition of commercial matter to include program promotions. *See, e.g.* Viacom Comments at 34-42. They also object to the Commission's proposals to take steps to encourage the promotion of children's educational programming. *See, e.g.* NAB Comments at 20.²⁶ The Commission should reject both of these lines of argument.

A. There Is No Rationale Basis for Continuing to Exempt Program Promotions for Non-Core Educational Children's Programming from the Definition of Commercial Matter.

Broadcasters argue at length that the Commission should not revise the definition of commercial matter to include program interruptions. *See, e.g.* Viacom Comments at 34-42. In particular, broadcasters attempt to cloud the issue by harping on the public interest benefits of such program interruptions as PSAs. But broadcasters know full well that PSAs are not at question here. CME, *et al.* obviously agree that PSAs should not count toward a broadcaster's commercial limits. CME, *et al.* Comments at 44. To the extent that some broadcasters do air PSAs, the Commission should continue to encourage licensees to broadcast PSAs because of their public interest benefits.

²⁶ CME, *et al.* applaud the new initiative by NAB, "Getting the Word Out: NAB Action Kit on Children's Programming." NAB Comments, Appendix D. However, this promotional campaign, and other laudable efforts by the private sector, should be a supplement to clear promotional guidelines, not a substitute.

But CME, *et al.* do not see any justification, legal or otherwise, for exempting promotions for upcoming programming from the definition of commercial matter. As explained in our comments, broadcasters clearly receive significant consideration from airing program promotions for their own programming. CME, *et al.* Comments at 42. Moreover, failing to count program promotions toward the commercial limits leads to inconsistent results. *Id.* at 43. Broadcasters do not provide any persuasive arguments to the contrary.

B. The Record Supports the Adoption of Initiatives to Improve the Promotion of Children’s Educational Programming.

CME, *et al.* however do recommend that promotions for children’s educational and informational programming ("E/I") should not count toward a broadcaster’s commercial limits. *Id.* at 43-44. There is substantial evidence in the record that parents are unaware of the availability of educational programming and how to locate it. CME, *et al.* Comments at 46. Various academics conclude that adequate promotion of this programming is essential to its viability. *See* Children NOW Comments at 31-32. The record also suggests that some broadcasters do not adequately promote their E/I programming. CME, *et al.* Comments at 46-47. Exempting promotions for E/I programming from the definition of commercial matter would provide an attractive incentive to broadcasters to promote this valuable programming.

In light of the record, the Commission should take further steps to promote children’s educational programming. *Cf.* Children NOW Comments at 30-32 (proposing that a "reasonably proportional share of promotional time be dedicated either to promoting core programming or to airing public service announcements"). CME, *et al.* recommend that the FCC amend the definition of educational core children’s programming to include adequate promotion as one of

the core elements. *CME, et al.* Comments at 47. Revising the definition of E/I to include the promotion of programming enhances the Commission's existing children's programming public information initiatives. *1996 Children's TV Order*, 11 FCC Rd at 10682-95. Similar to these information initiatives, incorporating the promotion of programming as an element of E/I is consistent with the Commission's statutory authority under the CTA and the Communications Act. *See id.* at 10686-87.

CME, et al. also propose that the FCC revise its requirement that an educational program be "identified as educational children's programming at the time it is aired" to include the use of a standardized E/I icon. *CME, et al.* Comments at 48-49. To complement these measures, *CME, et al.* encourage the Commission to require broadcasters to air PSAs concerning their educational programming as well as the provision of educational programming in general. *Id.* at 49.

Finally, it is telling that broadcasters summarily ignored the Commission's request for information detailing broadcasters' promotional practices of children's programming.²⁷ *CME, et al.* attempted to obtain this information from local DC area broadcasters, but were rebuffed at every turn. This information would be helpful not only in determining to what extent local broadcasters are airing program promotions during children's programming, but also to what extent broadcasters actually promote E/I programming and how that figure compares to their promotion of other programs.

²⁷ In response to the FCC's questions, NAB submitted a list of children's programs, the source of the programming, whether it qualified as E/I, and their ranking and rating. NAB Comments, Appendix C. Although some of this information is helpful, *CME, et al.* question how programs such as *Digimon: Digital Monsters* and *Digimon* qualify as E/I, as listed in Appendix C.

CONCLUSION

For the foregoing reasons, the Commission should dismiss the arguments raised by the broadcasters and others seeking to block any meaningful attempt to promote the educational needs of children in the digital environment. It is not premature to adopt preemptive ground rules to ensure broadcasters address the educational and informational needs of children. Similarly, in light of market failure with regards to children's advertising, the FCC has a responsibility to clarify at the outset what interactive commercial practices are clearly unacceptable. The Commission has wide discretion to adopt these recommendations to revise rules under basic principles of the APA. Proposals like the point system guideline are also entirely consistent with the First Amendment. The privilege given to broadcasters to use scarce radio frequencies is limited by a reasonable duty by the FCC to regulate broadcasters in the public interest, while not substantially infringing on their editorial discretion. Finally, broadcasters have not provided any reasonable arguments for exempting program promotions from the definition of commercial limits, nor have they provided any evidence that the FCC should not take affirmative steps to promote E/I programming.

CME, *et al.* therefore reiterate our proposal that the Commission adopt a flexible point system guideline to allow broadcasters options for fulfilling their public interest obligations to children; prohibit direct links to websites operated for commercial purposes; establish limits on the amount of permissible program preemptions; revise the definition of commercial matter to include program promotions toward the commercial limits; and amend the educational core children's programming definition to include adequate promotion as a core element.

Respectfully submitted,



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January 17, 2000

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