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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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January 17, 2001

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, DC 20554

Re: MM Docket No. 00-167
Reply Comments of Named State Broadcaster Associations

Dear Ms. Roman Salas:

On behalf of the Named State Broadcasters Associations, enclosed you will find an original and nine copies of their Reply Comments in the above referenced proceeding.

Sincerely,



Millie Domenech

Enclosures

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

BEFORE THE

Federal Communications Commission

WASHINGTON D.C.

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

MM Docket No. 00-167

To: The Commission

JOINT REPLY COMMENTS OF NAMED STATE BROADCASTERS ASSOCIATIONS

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Dated: January 17, 2001

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SUMMARY

The Named State Broadcasters Associations joining in these reply comments (the “State Associations”) believe that it is too early to impose burdensome children’s television regulations on a digital broadcasting industry that is still in its infancy. A majority of those who filed comments agree with the State Associations that implementing new rules at this premature date would impede the quick transition to digital that the Commission has fought hard to ensure and would hamper innovative uses of the digital spectrum.

Not only is it too premature to predict the course that digital television will take, the Commission has no legal authority to require that broadcasters air a specified amount of programming content of the government’s choosing. There is no evidence in the record that could provide a legal justification for adding additional hourly children’s programming obligations on digital broadcasters or imposing other requirements. Similarly, there is no justification for changing the preemption policies or altering the definition of “commercial matter.” The speculative scenarios posited by some commentators in support of changing the preemption policy and the definition of commercials bear no relation to reality. Instead, the Commission should wait to see how broadcasters actually use digital technology.

The proposals to add new children’s programming obligations also contravene the Children’s Television Act of 1990 and raise serious First Amendment concerns. While the Commission is entitled to set generalized guidelines to encourage broadcasters in meeting their public interest obligations, it cannot arbitrarily create broad regulations that serve no substantial governmental interest. It cannot substitute its own views of what is “good” programming in place of the journalistic judgment of broadcasters. The imposition of proportional hour and

percentage requirements would violate the free speech rights of broadcasters throughout the country.

Finally, the Commission has no legal authority to regulate ancillary and supplementary services in a different manner than it does like services. To do so would violate Congress's clear intent in passing the 1996 Telecommunications Act.

Accordingly, for the reasons set forth herein, the State Associations recommend that the Commission defer imposing new children's programming requirements on digital broadcasters until there has been a sufficient opportunity to determine what the digital landscape will look like.

BEFORE THE
Federal Communications Commission

WASHINGTON D.C.

In the Matter of)
)
Children's Television Obligations) MM Docket No. 00-167
Of Digital Television Broadcasters)

To: The Commission

**JOINT REPLY COMMENTS OF THE NAMED STATE BROADCASTERS
ASSOCIATIONS**

The Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Georgia Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico

Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (each, a “State Association” and collectively, the “State Associations”), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s rules, hereby submit their joint reply to the Comments that have been filed in response to the *Notice of Proposed Rule Making (“NPRM”)*, FCC 00-344, in the above-referenced docket, released October 5, 2000, pertaining to the children’s television obligations of digital television broadcasters.

I. INTRODUCTION

Under their respective charters, each State Association has been established to protect and enhance the service and business of the free, over-the-air broadcast industry within its borders. Consistent with that mission, the State Associations submitted Comments in this proceeding on December 18, 2000. In their Comments, the State Associations urged the Commission not to hamper the development of digital broadcasting with burdensome new regulations but rather to wait to determine what additional regulations, if any, may be necessary once digital broadcasting has really commenced.

Many of the comments that have been filed in this proceeding agree with the State Associations that it is premature to impose additional obligations on broadcasters that have no

discernible nexus to the digital television transition. The record contains no evidence indicating that the current three-hour processing guideline has failed. In fact, all of the facts tend to show that broadcasters have been doing an excellent job with respect to children's educational programming.

Those who would have the Commission adopt new regulations have presented no evidence that the existing rules are not working. Indeed, their arguments are predicated on hypothetical claims as to how broadcasters "might" use multiple streams of programming and how advertisers "might" attempt to use the digital spectrum. Adopting new rules on the basis of such sheer speculation will not benefit anyone. Moreover, the proposals advanced by some of the Comments seeking additional children's programming requirements contravene the Children's Programming Act of 1990 and raise serious constitutional concerns.

Those who seek additional rules have also largely ignored the fact that commercial broadcasting is a business. In the next few years, commercial broadcasters will be spending very large sums of money to construct digital facilities and upgrade existing equipment. Many broadcasters, and particularly those in small markets, will be operating on thin margins. While ideally additional children's programming is beneficial, it is also in the public interest to have news and public affairs programming and to maintain a station's staffing. Broadcasters need to have discretion to determine where their resources are best spent to serve their local communities.

The transition to digital television promises many things. However, the Commission should exercise patience and allow the marketplace to dictate what kinds of services will be offered by broadcasters. In the end, this will better serve the public interest, including our nation's children.

II. DISCUSSION

A. The imposition of additional regulatory obligations is premature and will stifle innovation and hinder the transition to digital television

The State Associations agree with the concept that digital broadcasters, like their analog counterparts, are public trustees with a responsibility to serve the public interest. However, a transition to digital technology does not provide any basis to impose unnecessary additional regulations on broadcasters. This is especially true when we consider that it could be a number of years before most consumers even begin to reap the benefits of digital television.¹

The majority of commentators agreed with the State Associations' position that it is far too premature for decisions to be made that could potentially have an adverse impact on how digital technology will be used by broadcasters.² Commentators noted that broadcasters are still at the very early stages of the digital transition and most broadcasters do not yet even know what type of services they plan to offer once the transition to digital has been completed. For the

¹ Although the Commission has set a soft deadline of 2006 for the switch from analog to digital television, many believe that it will take even longer for digital television to achieve full market penetration. *See e.g.*, "Written Testimony of Gary Chapman, President and CEO of LIN Television Corporation Before the House Telecommunications Subcommittee," July 25, 2000 (available on www.nab.org).

² *See, e.g.*, Comments of Association of Local Television Stations, Inc. ("ALTV:") at pp.2-6 (Noting that local television stations are already coping with considerable risks that could hinder the expeditious deployment of digital television and that "the government's willingness to impose costly regulations before the service commences operation sends the wrong signal to the investment community."); National Association of Broadcasters ("NAB") at 3-6; Viacom at 4-7 and at 11-18 (arguing that new obligations will stifle experimentation and threaten the chances for the success of multicasting); NBC at 1-2.

Commission to impose burdensome rules for the digital spectrum at this early stage would only serve to hinder the successful deployment of digital television in this decade.

In particular, the NAB's comments noted that there are a host of problems that the Commission must deal with before the transition to digital can even be completed. These unresolved issues include cable compatibility, technical standards, digital must carry rules, receiver performance, and ensuring that digital tuners be placed in all new television sets sold³. A complete and successful transition is still years away. It is illogical for the Commission to impose any additional obligations, be it a point system, as proposed by CME or mandating a proportional hour rule as some have suggested when we do not yet even know what services broadcasters will or even can offer. The only thing that would result is a stifling of creativity and innovation. Broadcasters must be allowed flexibility to decide on their own whether or not they will offer datacasting, for example. The Commission cannot make such business decisions for broadcasters and for the public. More importantly, when we consider the vast benefits that can be reaped from new technologies, rather than burdening broadcasters with new and onerous obligations, the Commission should be promoting flexibility and innovation.

CME's chief argument in their comments is that digital television could allow television stations to multicast and interact with viewers. However, these are only possibilities right now. It is still completely plausible that a broadcaster could choose to only air one channel of high definition programming as opposed to multiple program streams. In that case, there would be no reason at all to alter the existing requirements.

B. There is no justification for changing the existing three hour programming guideline.

As the State Associations pointed out in their initial comments, there is no evidence that the current children’s television requirements are ineffective. The Commission has presented no evidence of the current level of children’s programming. Without a factual showing that status quo regulations are not functioning as intended, the Commission does not have a rational basis to impose additional burdens on broadcasters.⁴ In fact, even those commentators who disagree with the State Associations’ arguments concede that the current programming guidelines are working.⁵ Specifically, Sesame Workshop quotes Amy Jordan when they state that the current core programming requirements are working and are being followed by broadcasters. Ms. Jordan notes that “...broadcasters have made a solid effort to increase the quality and availability of educational programming since the introduction of the mandate.”⁶ In fact, as many commentators demonstrate, there is no dearth of educational and informational children’s programming. Viacom, in its comments, notes that in most markets, commercial broadcasters are currently collectively providing an average of 18 or more hours of children’s educational

Footnote continued from previous page

³ See Comments of NAB at 5.

⁴ See HBO, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (“[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”)

⁵ See Comments of Sesame Workshop at 4-5.

⁶ Comments of Sesame Workshop at 4.

programming per week.⁷ These numbers do not even include the many more hours of children's programming provided by public broadcast stations and cable stations such as Nickelodeon, Disney, and Fox Family. Therefore, without any factual evidence demonstrating that children's interests are not being served, it is impossible to justify a myriad of new rules and regulations for children's television.

C. The proposals seeking additional quantitative children's programming requirements violate the Children's Television Act of 1990

When the Commission originally adopted rules implementing the Children's Television Act of 1990 (the "CTA"), it decided against imposing any kind of quantitative processing guideline or standard because Congress "[did] not intend that the FCC interpret this section as requiring a quantification standard."⁸ When the Commission adopted the three hour processing guideline in 1996 "to provide clarity about broadcasters' obligation under the CTA," it claimed that the CTA did not prohibit the use of a processing guideline."⁹ Nevertheless, it was quite clear in the CTA that Congress had no intention of burdening broadcasters with quantitative requirements and any addition to the existing requirements would contravene congressional

⁷ See Comments of Viacom at iv. (Most large markets contain at least 6 major free over-the-air broadcast networks – ABC, CBS, NBC, FOX, WB, UPN.)

⁸ See *Report and Order, In the Matter of Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 6 FCC Rcd 2111, 2115, recon. granted in part, 6 FCC Rcd 5093 (1991).

⁹ See *Report and Order, In the Matter of Policies and Rules Concerning Children's Television Programming Revision of Programming Policies for Television Broadcast Stations*, 11 FCC Rcd 10660 (1996).

intent. Congress intended that broadcasters have discretion in complying with the CTA's requirements.¹⁰

D. CME and Children Now ignore the First Amendment when they urge the Commission to adopt mandatory children's programming proportional hours requirements

The initial comments of the State Associations demonstrated that the passage of the regulations proposed by the NPRM would violate the First Amendment. Comments filed by the NAB, Viacom, ALTV, and others, support this contention.

The First Amendment provides protection to broadcasters to the extent that the government is not allowed to dictate particular types of programming that broadcasters should air.¹¹ While traditionally the scarcity rationale set forth in Red Lion and its progeny¹² was held to justify less First Amendment protection for broadcasters, the scarcity rationale has become a questionable doctrine. In fact, it is the very advent of digital television, combined with the competition brought by cable, satellite, video and the Internet, that undermines the scarcity rationale. Even the Commission itself has questioned the scarcity rationale.¹³ Therefore, it is

¹⁰ See Comments of ALTV at 11 ("The quantitative processing guidelines were not mandated by the statute."); Comments of NAB at 11 (noting that Congress legislated a specific children's television obligation but did not attempt to ever quantify that obligation).

¹¹ Turner Broadcasting System v. F.C.C., 512 U.S. 662 (1994). See also, Comments of ALTV ("The strictures of the First Amendment and the Communications Act ... leave no room for the FCC to dictate the types or amounts of programs which local stations must broadcast.") at 14.

¹² Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

¹³ See Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd 5043, 5052 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989).

most surprising that the Commission would use the transition to digital as a tool for mandating a particular type of programming content.

Stated briefly, the First Amendment absolutely prohibits the government from mandating specific amounts of a certain type of programming. CME completely ignores the First Amendment rights of broadcasters when it urges the Commission to create a new point system processing guideline with points for airing additional children's programming, for funding the production of children's programming on public television stations, or for providing datacasting services to schools. CME's proposal is unrealistic and unworkable. Many television stations are publicly-owned companies whose shareholders are unlikely to approve of providing funding to other companies. There is no evidence that schools need or want datacasting services.

CME attempts to promote its proposal as being flexible but such rhetoric does not disguise the fact that it is in fact an imposition of affirmative speech obligations on broadcasters. Broadcasters would be threatened with heightened review of their licenses if they do not provide free datacasting to schools or air additional children's programming beyond what is required by the current three-hour guideline. CME's proposal ignores the fact that there may be segments of the community that want their local station to air something other than children's programming such as more news, more public affairs or more programming for the elderly. Broadcasters must have the ability to evaluate the needs of each of their communities and determine what programming will best meet those needs. The NAB, in an appendix to its comments, presents an analysis by Professor Smolla, which persuasively details why a proposal such as that advanced by CME would not pass judicial scrutiny. It is important to keep in mind that the proposals by CME and Children Now violate the First Amendment whether or not we use the

current intermediate scrutiny standard or the more heightened scrutiny which is given to other media.

Thus, while the Commission may encourage broadcasters to air more children's programming, it may not mandate what broadcasters choose to air. ALTV's comments support the State Associations' position that the Commission only has the right to review overall performance. The Commission simply does not have the power to dictate content. With the transition to digital should come added innovation and added speech, not less. It is up to the viewing public to determine what type of programs they wish to watch and not the government. In fact, studies done by the Annenberg Center show that what parents perceive as educational is not necessarily always what the stations or the FCC find to be educational and informative.¹⁴

The State Associations agree with the Commission that it is important for there to be programming aired that serves an educational purpose for our nation's children as children are one of our most valuable resources. However, the Commission cannot ignore the constitutional rights of broadcasters when creating new rules and regulations. The Constitution must take precedence.

E. Ancillary and supplementary services provided by digital broadcasters are not subject to children's television obligations

A number of commentators support the State Associations' contention that the Telecommunications Act of 1996 prohibits the Commission from imposing its children's

¹⁴ See Schmitt, Kelly L., "Public Policy, Family Rules and Children's Media Use in the Home," Annenberg Public Policy Center (2000) (Noting that when mothers watch television with their children, they are not watching children's educational programming but watching Biography, Who Wants to Be a Millionaire, and other general audience shows.)

programming obligations on a digital broadcaster's ancillary and supplemental services.¹⁵ Section 336(b)(3) requires that all ancillary and supplementary services be given the same regulatory treatment. Unquestionably, it was the intent of Congress, in passing the Telecommunications Act, to afford the same regulatory treatment to like technologies. Hence, a broadcaster who uses its digital spectrum to datacast should be given the same regulatory treatment and held to the same public interest requirements as those who offer similar services, i.e. those providing Internet access for example. To treat digital broadcasters who might ultimately choose to provide datacasting differently from other media who remain unfettered by the additional regulations proposed by the Commission would impair broadcasters in their strive to remain competitive with other media. As other commentators pointed out, Congress never intended for public interest obligations to adhere to ancillary and supplementary services and the Commission does not have the authority to implement rules which clearly violate Congressional intent.¹⁶

F. It is premature to change the current preemption policy

There is no basis for changing the existing preemption policy. First, most of the comments offered on this issue assume that all broadcast stations will multicast.¹⁷ However, it is simply too early to determine whether or not that will be the case. Multicasting may not even be economically feasible for broadcasters. It is illogical to create a rule that requires a broadcaster

¹⁵ See Comments of Viacom at 18-20; ALTV at 18-19; NAB at 16-19.

¹⁶ See Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

¹⁷ See e.g., Comments of CME at p.19 where they argue that with multicasting, preemptions would no longer be a problem because stations would have the ability to show both E/I programming and other content at the same time.

to move programming onto another channel when most stations do not even have that capability at this moment and may never have that capability. Any Commission action on preemptions at this date would be at best premature.

Secondly, the comments in support of a change in the preemption policy fail to consider the fact that stations are constrained by network agreements and would face economic consequences if they violated their network agreements. Additionally, in its comments, NBC notes that when a children's program needs to be rescheduled for a live sporting event, for example, each station notifies its local listings of the change in advance and also posts its change on their website. Stations also advertise the schedule change a week prior to the change, according to NBC.

Finally, a cap imposed on preemptions will seriously affect a broadcaster's discretion to air important news. What is important to a given community may vary depending on the community and broadcasters must be free to consider when preemptions are in the public interest. CME's proposal to define "breaking news" as an unscheduled event is unworkable. It would mean that such events as the Inauguration, which falls on a Saturday this year and will undoubtedly preempt a large amount of children's programming, would not qualify as "breaking news."

G. There is no basis for changing the longstanding definition of commercial matter

As the State Associations explained in its comments, there is no basis for altering the longstanding definition of commercial matter at this juncture. Promotions, PSAs promoting not-for-profit activities and airtime sold for the purposes of presenting educational and informational material should continue to be excluded from the definition of commercial matter.

The proposal to modify the definition has no connection to digital television and, more importantly, the Commission does not have the statutory authority to change this definition because of the constraints imposed by the Children’s Television Act.¹⁸

The promotions and PSAs that the Commission proposes to eliminate also provide valuable information to children as well as providing important advertising revenue to broadcasters. The Sesame Workshop, in its comments, agrees with the State Associations and strongly urges the Commission to keep the current definition as is. They stress that PSAs and sponsored educational programming provide an important service by promoting anti-drug and anti-smoking campaigns for example. Ironically, the proposed change in definition would actually contravene the intent of the CTA and have a negative impact on educational programming. Furthermore, any change in the definition would create difficulties for public broadcasters who are now arguing that any narrowing of the definition should not apply to them.¹⁹ Thus, a change in the definition of “commercial matter” would create the added complication of requiring separate definitions for commercial and noncommercial broadcasters – likely leading to an unworkable situation.

As CME concedes, promotions benefit the station in terms of increased audiences and ultimately increased revenue. In fact, as already mentioned, the promotions aired during children’s programming are often for other children’s programs. They attract larger audiences

¹⁸ See Comments of Viacom at p.35 noting that the Senate Report of the CTA states, “the 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.” Should the Commission alter the definition, it would clearly be going against congressional intent in that the definition of commercial matter would no longer be consistent with what the CTA envisioned.

¹⁹ See Joint Comments of America’s Public Television Stations and the Public Broadcasting Service.

and increased revenue that is necessary in order for children's educational programming to thrive and flourish. CME argues that including program promotions in the definition of commercial matter would be more consistent with the definition intended by Congress, which was that used in the former FCC Form 303. Yet, they present no evidence on this point. The definition that was used in Form 303 defined commercial matter in terms of air time sold for the purposes of selling a product. Program promotions and PSAs were never included in this definition.²⁰

H. The proposals attempting to place limits on interactive links and commercial advertising directed towards children are based on sheer speculation

In its comments, both CME and Children Now spend a great deal of time arguing for new rules to protect children from advertising via interactive links. Despite the length of their comments, neither organization has pointed to a single broadcaster who is currently advertising to children through interactive web links. This is because interactive television is still in its early stages. There is much more research and development needed before interactive television even hits the marketplace. The hypothetical arguments in support of increased regulation do not even approach the level of a problem in search of a solution. There is no apparent problem. Lastly, should the FCC decide to create new rules regulating advertisements, it would face serious constitutional scrutiny because of the First Amendment concerns noted by the comments of The Association of National Advertisers, the American Association of Advertising Agencies and the Motion Picture Association of America.

²⁰ *Policies and Rules Concerning Children's Television Programming, Notice of Proposed Rule Making*, FCC 90-373 at 3 & n.10 (1990).

III. Conclusion

The State Associations, like the Commission, believe strongly in the service and business of the free, over-the-air broadcast industry. In order to ensure the success of this medium, the Commission must facilitate, and not impede, the transition to digital broadcasting. It would be a mistake for the Commission to risk violating constitutional and statutory standards in order to impose new and burdensome obligations without any factual predicate. The marketplace must be allowed to develop on its own and only in that manner can the public interest truly be served.

Respectfully Submitted,

THE NAMED STATE BROADCASTERS
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