

broadcaster's loss of editorial control of on-air product.<sup>56</sup> The WB's concern about this proposal's infringement of the First Amendment are adequately discussed in several comments.<sup>57</sup> We wish to add only that the impact of imposing mandatory promotional or programming requirements effectively displaces disfavored speech (non-educational programs, commercials, and general promos) for favored speech (children's educational programs and related-promos.) This is the epitome of impermissible content-based regulation.<sup>58</sup>

**C. Promotion of Core Children's Programming Should Be Left to Voluntary Efforts By Broadcasters and the Commission's Own Promotional Initiatives.**

The Children's TV/DTV NPRM asks whether broadcasters or the FCC should undertake promotional efforts to increase awareness of the value of children's educational television initiatives. The WB encourages the FCC to promote the value of educational programming and the meaning of the E/I icon through its own website, publication of guides (in Spanish and English), speeches, and partnerships with trade associations, children's and public interest

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<sup>56</sup> Turner Broadcasting System v. FCC, 512 U.S. 622, 650 (1994) (citing 47 U.S.C. § 326); see also Radio-Television News Directors Ass'n v. FCC, 184 F. 3d 872 (D.C. Cir. 1994) (prior and subsequent history omitted).

<sup>57</sup> See, e.g., Viacom Comments, at 49-50; see also NAB Comments/Appendix B Prof. Smolla Comments, at 3-6 (arguing that a market dysfunction is not permissible constitutional basis for regulation), 11 (citing Turner Broadcasting System, Inc. v. FCC's discussion about the Children's Television Act and the FCC's limitation in "ordain[ing] any particular[] type of programming that must be offered by broadcast stations") (citations omitted).

<sup>58</sup> See Turner Broadcasting, 512 U.S. at 642-43 (Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous [exacting] scrutiny . . . . As general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." ) (citations omitted).

advocates. All other efforts should be left to the voluntary discretion of broadcasters in fulfillment of their public interest responsibilities.

**VII. THE CHILDREN'S TV/DTV NPRM IS PREMATURE AND SHOULD BE RECLASSIFIED AS A NOTICE OF INQUIRY.**

Last, but certainly not least, The WB believes that this proceeding is administratively flawed and is concerned about the impact on the network and its affiliates that an incomplete and insufficient administrative record would have on the FCC's rulemaking process in this important proceeding.

Several comments filed herein have addressed how the regulations proposed in this Children's TV/DTV NPRM are premature given the tenuous development of nascent digital television services, the unknown viability of multi-casting, and current very limited use of the Internet as a vehicle to enhance television programming.<sup>59</sup> In a given proceeding, it is necessary for the FCC, pursuant to a reasoned decision-making process, to clearly articulate the harms or problems that any proposed regulations are designed to address.<sup>60</sup> However, in this proceeding, the FCC offers no facts or rationale for its proposed expansion of children's television regulations to digital broadcasters.<sup>61</sup> This is especially troublesome given that broadcasters have

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<sup>59</sup> See, e.g., ALTV Comments, at 2; Comments of ANA & AAAA, at 1; Maranatha Comments, at 1-2; NAB Comments, at 3; NCTA Comments, at 2; State Broadcasters Joint Comments, at 3-4; Sinclair Comments, at 1-2; and Viacom Comments, at 3-4.

<sup>60</sup> Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983). The U.S. Constitution also requires that regulations alleviate "harms that are real, not merely conjectural." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 644(1994).

<sup>61</sup> See, e.g., ALTV Comments, at 6 ("no factual basis for extending the children's

(continued...)

been found to have fulfilled their obligations under the FCC's rules and guidelines in providing three hours of core programming weekly. In fact, it is generally perceived that: "broadcasters have made a solid effort to increase the quality and availability of educational programming since the introduction of the mandate."<sup>62</sup>

It is also important for those entities subject to the rules promulgated hereunder to have the ability to evaluate the express language of a proposed rule. This fundamental administrative precept is particularly relevant in this proceeding, where such regulatory action has the potential to stifle and/or impose major restrictions on speech which is clearly constitutionally protected. The instant Children's TV/DTV NPRM contains no actual terms or drafts of proposed rules. Instead, it seeks general comment on a multitude of topics, an approach more appropriate in a Notice of Inquiry ("NOI").<sup>63</sup> With such being the case, it is not possible for those members of the class that will be subject to the proposed regulation to understand and to meaningfully comment upon the proposed regulations.

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<sup>61</sup>(...continued)  
programming obligation to digital television services"); NAB Comments, at 8 ("the need for additional content regulation has not been shown"); Viacom Comments, at 16 ("the notion that additional programming requirements are needed because of a lack of available educational programming is a premise without factual support").

<sup>62</sup> Sesame Comments, at 5 (citing Amy B. Jordan, *Is the Three-Hour Rule Living Up to its Potential?*, The Annenberg Public Policy Center of the University of Pennsylvania (2000).

<sup>63</sup> "In my view, the wiser course would have been to initiate an Inquiry at a time when we understand more about the proposed or likely application of digital television, so our proposal would bear some plausible nexus to the service itself, rather than its potential." Separate Statement of Commissioner Michael Powell, Children's TV/DTV NPRM (emphasis added). See also ALTV Comments, at 17.

The significant economic impact that would result from unjustifiable regulatory restrictions on programming, promotions and the ability to explore innovative uses of the Internet is particularly damaging to an emerging network like The WB. Even the FCC has noted that it is important that emerging networks and their affiliates have an equal opportunity to succeed in the marketplace.<sup>64</sup>

Further, in light of the fact that many of its affiliated stations are smaller businesses, The WB urges the Commission to keep in mind the Commission's own recognition that the process in which its rules are proposed and adopted is a "significant procedural barrier" for small business.<sup>65</sup> In its Section 257 Report, the FCC pledged to further its goal to facilitate meaningful comment on the effects of its rulemaking, especially by small businesses, by including in its notices the text of actual proposed rules or variations thereof.<sup>66</sup> We encourage the FCC to fulfill its pledge in this proceeding and convert the Children's TV/DTV NPRM into a NOI. Thereafter, if specific regulations are deemed warranted, the Commission should issue a new NPRM with specific proposals and express language of any proposed regulations, coupled with all empirical

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<sup>64</sup> "Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission." In re Amendment of Part 73 of the Commission's Rules and Regulations With Respect To Competition and Responsibility In Network Television Broadcasting, Memorandum Opinion and Order, 25 FCC 2d 318, para. 34 (1970) (subsequent history omitted).

<sup>65</sup> In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business, Report, GN Dkt. No. 96-113, FCC 97-164, 12 FCC Rcd 16802, para. 70 (1997). Section 257 mandates that the FCC identify and eliminate market entry barriers for telecommunications entrepreneurs and small businesses. 47 U.S.C. § 257(a). The FCC includes broadcast and cable television services within the scope of this statutory mandate.

<sup>66</sup> *Id.*, para. 71.

evidence relied upon to justify the regulations. The WB and its affiliates will then have an adequate opportunity to address the specific impact of the FCC's proposed rules on their business practices and financial viability.

The potential impact of the imposition of the rules that are contemplated could be severe and far-reaching. Before the Commission embarks down the path of promulgating such and important rulemaking, a factual predicate should be established demonstrating the need for new rules and that the rules proposed will be both prescriptive in nature and not unduly burdensome.

#### **VIII. CONCLUSION.**

For the foregoing reasons, The WB respectfully requests that the Commission allow broadcasters to continue their admirable efforts to fulfill the Congressional intent underlying the Children's Television Act by not imposing any of the proposed regulations on commercial broadcasters, including: 1) regulation of website links; 2) mandating promotions in primetime and other dayparts; 3) restricting promotions of core children's programming based on the content of the programs in which they will air; and 4) modification of the definition of commercial mater. Any of these unwarranted regulatory initiatives would serve to unduly burden The WB and its affiliated stations.

The WB also urges the Commission to resolve the major administrative deficiencies in this proceeding and: 1) reclassify this NPRM as a Notice of Inquiry; 2) issue a new NPRM only after the FCC has undertaken a separate inquiry to update its record and substantiate that there is evidence of harm to children that will support increased regulatory action, and 3) to make the express language of any actual proposed rules available for public comment before taking any

further action in this area.

Respectfully submitted,

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