

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

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

To: The Commission

**THE NATIONAL ASSOCIATION OF BROADCASTERS  
REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The National Association of Broadcasters (“NAB”)<sup>1</sup> hereby files this reply to the Children’s Media Policy Coalition (“CMPC”) Opposition<sup>2</sup> to Petitions for Reconsideration in the above-referenced docket.<sup>3</sup> In its Petition,<sup>4</sup> NAB urged the Commission reconsider its decisions to (1) impose new burdensome and inflexible children’s programming obligations on digital multicast channels; (2) alter the well-established definition of commercial matter; (3) virtually prohibit the mere display of Internet website addresses; and (4) strictly limit the number of preemptions of children’s educational and informational programming to ten percent. As discussed below, nothing in CMPC’s Opposition undermines the need for reconsideration.

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<sup>1</sup> NAB is a nonprofit incorporated association of radio and television stations. NAB serves and represents the American broadcasting industry.

<sup>2</sup> In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *Opposition to Petitions For Reconsideration of The Children’s Media Policy Coalition*, MM Docket No. 00-167, March 23, 2005 (“Opposition”).

<sup>3</sup> *Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, MM Docket No. 00-167 (released Nov. 23, 2004) (“R&O/FN”).

<sup>4</sup> In the Matter of Children’s Television Obligations Of Digital Television Broadcasters, *NAB Petition for Reconsideration*, MM Docket No. 00-167, Feb. 2, 2005 (“Petition”).

**I. In Light Of The Commission's Recent Must-Carry Decision, Reconsideration Of Expanded And Inflexible Children's Television Obligations Is Warranted.**

As discussed in detail in NAB's Petition, the additional obligations imposed in this docket on multicast channels would stifle development of digital television ("DTV") channels and limit not only the broadcasters' ability to decide how best to use digital technology to serve the needs of their audiences, but the public's ability to get maximum value from DTV service. NAB Petition at 2-9. This is particularly true in light of the Commission's February 10, 2005 decision not to mandate the carriage of multicast free-over-the-air channels.<sup>5</sup> Because the Commission has chosen to impose new children's programming obligations on multicast channels but not to require multichannel video programming distributor ("MVPD") carriage of all free, over-the-air channels, it has, contrary to CMPC's assertion,<sup>6</sup> severely limited the options of a broadcaster to fulfill the new obligations.

In its *R&O/FN*, the Commission essentially conditioned the placement of additional children's programming on whether a multicast channel obtains comparable MVPD carriage. *R&O/FN* at ¶19. This regulatory scheme does not afford broadcasters adequate flexibility. For example, a broadcaster may be able to negotiate carriage for its popular news or weather channel, but not be able to (based on ratings) obtain carriage of a third multicast channel, *e.g.*, a children's channel. Broadcasters, however, could not air the three-hours of children's educational and informational programming triggered by the specialized news or weather channel (a forum which is not conducive to children's programming) on the third channel (where children would be likely to be in the audience). Moreover, because 85% of households receive

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<sup>5</sup> In re Carriage of Digital Television Broadcast Signals, *Second Report and Order and First Order on Reconsideration*, CS Docket No. 98-120, Feb. 23, 2005.

<sup>6</sup> *Compare* Opposition at 4.

their video programming via cable or satellite,<sup>7</sup> educational and informational programming aired on channels that do not receive carriage will not be viewed by the vast majority of child audiences. Thus, not only is the MVPD-predicated carriage requirement an undue burden to broadcasters, and may ultimately deter the roll-out of multicast channels, but it also harms the public at large.

## **II. CMPC Has Not Demonstrated That The Educational And Informational Needs Of Children Were Not Being Met By The Three-hour Processing Guideline.**

The Commission can justify its new children’s programming obligations only if evidence demonstrates that the three-hour processing guideline was inadequate and that its recently adopted rules would remedy these inadequacies.<sup>8</sup> NAB strongly disagrees with CMPC’s claim that the record contains “substantial evidence that the educational and information needs are not currently being met by the three-hour processing guideline.” Opposition at 2-3. It is plainly invalid and irresponsible for CMPC to rely on a 1989 Congressional Report, made several years *prior* to the three-hour processing guideline, as evidence that broadcasters are *currently* failing to serve the educational and informational needs of children. Opposition at 3, *citing* S. Rep. No. 101-227 at 9 (1989). Moreover, CMPC would have the Commission ignore the proliferation of media outlets in the marketplace. The Commission has no such luxury – it must engage in reasoned decision making considering all evidence.<sup>9</sup> Similarly, it cannot rely on CMPC’s unsupported assertion that broadcasters’ full compliance with the minimum three-hour

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<sup>7</sup> Knowledge Networks/SRI *Home Technology Monitor* Survey, Spring 2004, and Nielsen Media Research U.S. TV household Estimates, 2003-04.

<sup>8</sup> *See, e.g., ALLTEL Corporation v. FCC*, 838 F.2d 551, 560 (D.C. Cir.1988) (FCC’s “facially plausible” claim that a local exchange carrier rule prevented certain abuses ultimately failed to justify the rule because there was “no showing that such abuse” did in fact exist and “no showing that the rule target[ed] companies engaged in such abuse”); *Home Box Office, Inc. v. FCC*, 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”). Thus, the Coalition’s argument that there are insufficient grounds for reconsideration is inaccurate. Opposition at 2.

processing guideline is *de facto* evidence that child audiences are “underserved.” Opposition at 3. Again, the record does not (and, indeed, could not) demonstrate that *compliance* with the three-hour processing guideline has led, in any measure, to a failure to meet the educational and informational needs of children.

While NAB agrees with CMPC that a “broadcaster’s public interest obligations continue to apply during and after the transition to digital television,”<sup>10</sup> a change in technology does not, by itself, warrant new and quantified content-based programming regulations. NAB disagrees that the “FCC’s action in the current regulation is no different than that taken in 1996” and that the NAB Petition is “an attempt to reopen matters settled in 1996.” Opposition at 6-7, and 7, respectively. While it is true that broadcasters did not challenge the 1996 three-hour processing guideline in court, that fact does not provide a *carte blanche* for ever-expanding public interest requirements. The Commission is required to show that these new, content-based regulations serve the public interest. Particularly when imposing government restrictions on broadcaster speech, the Commission must do more than assert that the regulations are needed.<sup>11</sup>

For this reason, NAB submits that before imposing these new obligations, the Commission should conduct the inquiry necessary to determine whether the educational and informational needs of children are currently being met. If the Commission ultimately were to determine, based on a detailed, factual record, that the current programming available to children in the video marketplace as a whole is somehow insufficient to fulfill the goals of the Children’s

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<sup>9</sup> See, e.g., *Cincinnati Bell Telephone v. FCC*, 69 F.3d 752, 763, 768 (6<sup>th</sup> Cir. 1995); *MCI v. FCC*, 842 F.2d 1296, 1300-06 (D.C. Cir. 1988).

<sup>10</sup> Opposition at 6.

<sup>11</sup> In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court required the government to do more than simply “posit the existence of the disease sought to be cured” to justify even a *content neutral* regulation of cable operators. 512 U.S. 622, 664 (1994), quoting *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Television Act of 1990 (“CTA”),<sup>12</sup> it could then formulate an appropriate and flexible remedy, *e.g.*, one that does not impose a specific, per-channel obligation.

### **III. Contrary To CMPC’s Claims, Specialized Channels Are Not Conducive To Children’s Programming.**

The Commission should reject CMPC’s argument that a specialized multicast channel is “the ideal place to show” children’s programs. Opposition at 4. In its Petition, NAB provided several examples of specialized news and weather multicast channels that have already been deployed. NAB Petition at 3. While indisputably serving the needs of their communities, these channels are not aimed at serving children. Rather, these channels serve a general audience with current news and weather information, including up-to-the minute breaking news. In contrast, children’s programming is not likely to follow a live, up-to-the-minute format. To ensure that the focus of the programming meets the educational and informational needs of children ages 16 years and under, children’s programs are likely to be scripted and focused on issues pertinent to child, not to general, audiences. Children are also highly unlikely to turn to channels focused on news and weather in order to find programming directed toward and appealing to them.

Moreover, because children’s educational and informational programs must be aired at regularly scheduled times, it would be extremely disruptive to general audiences who tune to specialized channels for timely information, such as weather and traffic, only to find that instead, children’s programming is being aired. Indeed, the Commission recognized that these channels are not conducive to children’s programming when it stated that it “does not want to discourage broadcasters from providing highly specialized channels on which content directed to children might depart from the specialized focus.” *R&O/FN* at ¶ 25. Children’s programs on these channels would likely be subject to *continuous* preemptions from breaking news stories, weather

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<sup>12</sup> Children’s Television Act of 1990, Pub.L. No. 101-437, 104 Stat. 996-1000, *codified* at 47 U.S.C. §§ 303a, 303b, 394.

information and emergencies. Accordingly, the Commission should revisit its decision that specialized channels trigger additional children's programming obligations.

#### **IV. Contrary To CMPC's Assertion, The Commission Does Not Have Statutory Authority To Alter The Definition Of Commercial Matter.**

In the *R&O/FN*, the Commission revised its definition of commercial matter to include promotions of non-educational and informational programming. *R&O/FN* at ¶ 57. CMPC argues that this was appropriate because the "FCC possesses clear authority" to revise the definition. Opposition at 14. This contention, however, is not supported by clear legislative intent. Both the House and Senate Reports on the CTA state that commercial matter "should be 'consistent' with the definition used in former Form 303-C."<sup>13</sup> The House Report clearly limits the scope of commercial matter as *paid for*:

The Committee intends that the definition of "commercial matter," as used in Subsection 3(a), will be consistent with the definition used by the Commission in its former FCC Form 303.... The FCC's former Form 303-C ***defined the following as not commercial announcements: promotional announcements*** ....

House Report at 1620 (emphasis added). This congressional language is clearly controlling: promotional announcements are simply not commercial matter.<sup>14</sup> Undeniably, the Commission's own *1991 Report and Order* implementing the CTA commercial limits defines commercial matter as *paid for*.<sup>15</sup> Thus, contrary to CMPC's assertion,<sup>16</sup> the Commission cannot simply

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<sup>13</sup> *R&O/FN* at ¶ 59, citing S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 17 (1989) and H. Rep. 385, 101 Cong., 1<sup>st</sup> Sess. 11 (1989) at 1622 ("House Report").

<sup>14</sup> It is well-settled that in interpreting legislative history, "[c]ommittee reports are recognized as the 'most persuasive indicia of congressional intent when enacting a statute.'" See *In the Matter of Direct Access to the INTELSAT System, Report and Order*, 14 FCC Rcd 15703, 15774 (1999) (citing *Mills v. United States*, 713 F.3d 1249 (7<sup>th</sup> Cir. 1983)). Here, a plain reading of the committee reports reveals Congress' intent to exclude promotions from the definition of commercial matter.

<sup>15</sup> The FCC defined "commercial matter" generally as "air time sold for the purposes of selling a product [or service]." In the *Matter of Policies and Rules Concerning Children's Television Programming*, MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111 (1991) at ¶ 4 ("*1991 Report and Order*").

ignore this history, including its own past interpretation of commercial matter, to diverge from clearly articulated legislative language.

CMPC's *indirect consideration* argument is essentially a resuscitation of the Commission's flawed analysis that "increased audiences for the promoted program presumably leads to increased advertising rates for the stations." *R&O/FN* at ¶ 59; Opposition at 14. This analysis, however, directly conflicts with the CTA's legislative history defining commercial matter as *paid for*. See NAB Petition at 13. Under this rationale, *all* promotions, including those for educational and informational programming, would presumably lead to an increase in revenue via indirect consideration. In fact, the Commission itself has rejected this *indirect consideration* rationale in the Telephone Consumer Protection Act Order.<sup>17</sup>

Moreover, promotions are irrelevant to the CTA's rationale for limiting the number of minutes of commercial matter in the first place – the unique susceptibility of children "to the *persuasive messages* contained in television advertising." House Report at 1610 (emphasis added). The substantial government interest articulated in the CTA is not to protect children from exposure to promotions for television programs, but to cap commercial matter because "young children could not distinguish conceptually between programming and advertising, and that guidelines on the permissible level of commercialization is a recognition of the vulnerability of children to commercial exploitation." House Report at 1614, *citing* Judge Starr in *Action for Children's Television v. FCC*, 821 F.2d 741, 743 (D.C. Cir. 1987). Thus, CMPC's declaration that the "revised definition...directly advances the goal of limiting excessive *commercial matter*"

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<sup>16</sup> Opposition at 17-20.

<sup>17</sup> See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278, 18 FCC Rcd 14014 (2003); *aff'd* on *Second Order on Reconsideration* (Feb. 18, 2005) (in which the FCC declined to define station promotions as "unsolicited advertisements" for the availability of property, goods and services in order to increase station revenue).

is incorrect. Opposition at 21 (emphasis added). Simply stated, promoting an upcoming news or entertainment program is not “advertising” in this sense, and cannot in any way lead to the “commercial exploitation” of children. Thus, NAB urges the Commission to revert to the original definition of commercial matter.

**V. CMPC’s Opposition To Website Content Underscores The Need For The Commission To Revisit Its Decision.**

NAB has urged the Commission to reconsider its decision to alter the long-standing definition of commercial matter to include program promotions and the display of Internet website addresses. NAB Petition at 15-20. Specifically, the Commission established a strict four-prong test that stations must meet in order to display an Internet website address during video programming directed to children ages 12 and under. *R&O/FN* at ¶ 50. CMPC argues such regulation is appropriate because the:

Website Reference and Host Selling Rules do not regulate websites but only the advertising of commercial websites in children’s television programming. A broadcaster need not make any changes to their websites to comply with the rules; it only needs to ensure that a website address displayed during a children’s program meets the four-part test and is free of host selling. Opposition at 23.

This contention, however, is fraught with error. First, the Commission’s rules govern the mere *display* (not advertising) of Internet Websites. Second, the Commission’s four-prong test includes vague terms, such as “substantial” and “not primary,” which do not provide a broadcaster with sufficient guidance to evaluate whether a website, including the station’s own website, would comply with the rules. *R&O/FN* at ¶16. Third, in addition to ensuring that their own websites comply with the four-prong test, broadcasters must go far beyond that. The rules require that prior to displaying *any* Internet website address during programming directed at children ages 12 and under, the majority of which are *outside the control of the broadcaster*, those websites must be reconfigured at a substantial cost to comply with the FCC’s four-prong

test.<sup>18</sup> The Commission’s rules would require a broadcaster to monitor such reconfigurations, and then *certify* at license renewal that these websites, whose content is continuously modified, are in compliance with the Commission’s rules. *R&O/FN* at ¶ 52. Thus, CMPC is incorrect that stations need only to monitor their own websites. In fact, the FCC’s existing four-part test is so strict as to be a *de facto* prohibition on the displaying of Internet website addresses.

But beyond this virtual prohibition on the display of Internet website addresses during television programming directed at children, CMPC is obviously interested in regulating the content *on* websites. For instance, CMPC cites Nickelodeon’s “homepage” as a “clear example[s] of problems with host selling on websites.” Opposition at 24. Clearly, CMPC has here raised concerns with the type of content on websites. As discussed in detail in our Petition, the CTA does not confer authority on the FCC to regulate the inclusion or exclusion of website links in television programming, much less regulate the actual content of Internet websites. NAB Petition at 18-20. It is therefore irrelevant whether the Commission can handle Internet website issues on case-by-case basis, as CMPC suggests. Opposition at 24. Because this is impermissible content regulation, NAB urges the Commission to reconsider its regulation of the display of Internet addresses.

## **VI. NAB Urges The Commission To Revisit The Ten Percent Preemption Limit.**

The FCC has revised its rules to limit preemptions to no more than ten percent of core programs per calendar quarter. *R&O/FN* at ¶ 42. This translates to a prohibition against preempting a show more than one time per thirteen-week quarter. Sports programming that

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<sup>18</sup> The scope of these regulations is dramatic. For example, under the current rules, no Internet website addresses could be posted in a show’s credits; no PSAs containing website links could air during children’s programming; no emergency information that directs viewers to websites for more information could be displayed; no broadcaster Internet website addresses could be displayed directing children to such materials as a kids-club; no station identification with website addresses could air, etc. A broadcaster would be forced to strip out or black out all

preempts weekend children's programming is particularly problematic on the West Coast. Under the Commission's revised rules, many stations will no longer be able to air their Saturday morning children's programming schedule because numerous sporting events *will* conflict with the ten percent rule, especially if sports events run over their scheduled programming times. CMPC states that because broadcasters are not required to air children's educational and informational programming "exclusively on Saturday mornings," the ten percent rule is flexible. Opposition at 12. The rule, however, effectively *precludes* educational and informational programming for Saturday mornings. Thus, with respect to Saturday mornings, a time where children traditionally tune in to over-the-air programming, the rule is wholly inflexible. NAB again urges the Commission either to (1) exempt live sports programming from its preemption policies, or (2) return to the case-by-case staff approval of network preemption practices.

## **VII. Conclusion.**

For the above-stated reasons, NAB urges the Commission to reject the arguments raised in CMPC's Opposition and reconsider its new processing guidelines for educational and informational children's television programming.

Respectfully submitted,

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website identification during programming to comply with the rules. The cost to stations to monitor and edit such programming would be enormous.

## **CERTIFICATE OF SERVICE**

I, Joan Flowers, Legal Secretary for the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent the 4th day of April 2005, by first-class mail, postage prepaid, to the following:

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