

Before the
Federal Communications Commission
Washington, D.C. 20544

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

REPLY COMMENT
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I. INTRODUCTION

A new definition of “commercial matter” was introduced in the FCC Report and Order of November 23, 2004 under MM Docket 00-167, and is scheduled to take effect in 2006 for analog broadcasters and cables operators. Under the Children’s Television Act of 1990 (the CTA), there are specified time limits for broadcasting commercial matter, and now that definition is being changed to include promotions of other television shows (except for promotions of educational/informational shows for children). This definitional extension has been widely attacked in petitions for reconsideration by broadcasters and cable operators. The new definition would force those companies to either cut promotions or cut advertising to stay within the CTA’s time limits; either alternative would be a blow to revenues and, it is argued, would ultimately reduce children’s programming quality due to constrained budgets.

Along with the November 23, 2004 Report and Order was a Further Notice of Proposed Rulemaking, including a proposal to apply the new “commercial matter” definition to Digital Broadcast Satellite (DBS) service providers. This reply comment addresses several comments regarding the extension of the new definition to DBS.¹ The conclusion reached here is that the new definition should not be extended to DBS because the new definition contravenes the definitional framework expressly provided by Congress in the CTA. Yet, under the CTA, Congress did give

¹ See April 1, 2005 comments by The Children’s Media Policy Coalition (page 20) and the Walt Disney Company (page 16, footnote 21), and Time Warner Inc. (page 5, on the need for parity between DBS, analog, and cable).

the FCC broad authority to regulate children's television, so the FCC can reach essentially the same result by retaining the old definition and reducing the maximum minutes of "commercial matter" allowed on a children's program. Ultimately, logic dictates children should receive the same level of protection whether their parents have cable or receive a broadcast signal, but this parity should be achieved within the limits noted here.

While it makes sense to have a uniform definition of "commercial matter" applied to analog broadcasters, cable operators, and DBS service providers, a larger issue lurks in the background. The second leg of the FCC's children's programming requirements is not applied to cable operators at all. The FCC requires that analog broadcasters air three hours of children's educational/informational programming per week and has now applied a similar rule to DBS service providers (varying requirement based on hours of weekly broadcasting). Cable operators are exempt from the minimum programming rules. DBS allows the same sort of focused content channels as cable, but the FCC regulations essentially place a tax on DBS by subjecting DBS to the minimum children's programming rules. The playing field is not level, but it should be.

Imposing the minimum children's programming rules on cable operators is not feasible under the current rulemaking because notice was not provided to cable operators that such a proposal was under consideration. It is suggested here that the comment period should be reopened to consider a proposed rulemaking that would achieve parity among broadcasters and cable operators with respect to the

minimum children's programming rules. It simply does not make sense to insist on parity with respect to application of "commercial matter" without addressing parity with respect to minimum children's programming. In addressing this aspect of parity, it is necessary to address the constitutionality of FCC regulation of cable operators, which is addressed here. As well, this comment includes suggestions about how a "play or pay" system could be most effectively implemented.

A "play or pay" approach has been proposed in the past, but without clear direction on how to implement such a system. A guide for such a system now exists, in the form of pollution credits trading among electric utilities, both in the United States and in the European Union. The benefits of such a system in the context of children's programming include easier access to more programs, higher quality programs, and a lower overall cost to the broadcasters.

Establishing a market for trading children's programming credits would probably be cost prohibitive, but it is possible to establish the functional equivalent. Broadcasters could have the option to buy out of their children's programming obligation by paying into a general fund for distribution through grants to broadcasters and cable operators airing high quality children's programs. If broadcasters and cable operators opt out of more programming than the fund supports, then the opt out rate can be raised until an equilibrium is achieved. It is suggested here that the required minimum level of support should be based on a percentage of a broadcaster's overall advertising revenue, set at a level that gives most stations an incentive to participate.

The rationale for such a system is based on the reality that few children or parents search for children's programming on channels that do not focus on children. Various guides provide lists of children's programming options, but the standard approach is to turn to children's stations. Optimally, it seems that most parents and children would like a selection of dedicated children's channels with high quality programming, and they do not care whether three hours of children's programming is aired every week on channels that otherwise do not focus on children's programming.

The present proposed rulemaking and the order issued under the same docket in November of 2004 have the best interests of children at heart. Unfortunately, the effect of the well-intentioned expansion of the definition of commercial matter is likely to result in an explosion of generally lower quality programming. The current rulemaking is an opportunity for the FCC to return to the permissible definition of commercial matter and apply it to all providers, while simultaneously recognizing the need to have a further rulemaking to enhance programming quality. That enhanced programming quality is achievable through a "play or pay" system applicable to all providers.

The author is the father of three daughters, ages 15, 13, and 3. Law school graduation is one month away, and this comment has been prepared to meet the requirements of an administrative law seminar. No one is paying for this comment,

though I believe that I represent the viewpoint of many loving parents who want quality children's programming.

I have held two positions that have influenced this comment. First, with a master's degree in economics, I was an analyst in the planning department at a major electric utility, so I am particularly enamored with pollution trading systems. Relatively clean electric generation facilities sell pollution credits to low-cost, but relatively dirty, generation facilities. The net effect of this trading program has been far better than any blanket regulatory scheme, and a similar trading program could effectively be implemented to effectuate the best possible result for children's programming.

My second related position was serving as manager of government contracts for eight years for a firm making a new type of electric generator. The position gave me an appreciation of the burdensome effect that well-intentioned regulations can beget. Such regulations often seem to have been made without the benefit of any cost-benefit analysis or comparison to other schema. FCC Form 398 (the quarterly "Children's Television Programming Report") made me shudder with the recollection of the endless "simple" forms that represented the tips of icebergs of required action and data collection that often served little purpose.

II. THE CHILDREN'S TELEVISION ACT AND OTHER RELEVANT STATUTES

- a. **The CTA focuses on reducing commercial exposure during children’s programming and generally provides the FCC with broad authority to regulate in the area of children’s programming.**

The CTA is codified at 47 U.S.C 303a, 303b, and 394. Section 303a establishes initial caps of 10.5 minutes of “advertising” per hour of children’s programming during weekends, and 12 minutes per hour on weekdays. That section defines “licensees” to include cable operators, making them subject to the caps. Section 303a also allows the FCC the discretion to change those caps. Section 303b relates to license review based on compliance with the section 303a. Section 394 establishes a grant fund for children’s programming.

The CTA left a great deal of discretion in the hands of the FCC. It did not mandate how much children’s programming must be aired or how to define it, but only set an initial cap on the amount of commercial matter that may be shown during a children’s program.² The CTA established that license renewal shall be based in part on a licensee’s support for the “educational and informational needs of children” through its programming, but specifically allows the FCC to consider a licensee’s support of programming on dedicated children’s stations.³

The CTA is notable for what it does not require: Congress did not declare that more children’s programming was required, but instead focused on the amount of commercial time on children’s programs. While license renewal was made to hinge on support of children’s programming, the FCC was given the discretion to consider

² See the CTA at 47 U.S.C. 303a, mandates caps on commercial time during commercial programming, and gives the FCC the discretion to change those caps in the future.

³ The CTA at 47 U.S.C 303b establishes that license renewal shall depend on support of children’s programming, but allows evidence of support for programming on other channels.

a licensee's support of programming on other channels. In short, it seems that Congress' main focus was to assure that children's programming have fewer commercial interruptions.

b. Nothing in the CTA mandates a minimum three hours of children's programming; this was an FCC innovation.

It was the FCC that established in 1996 that broadcast licensees must broadcast at least three hours of children's programming per week, though it did retain the CTA language allowing support for children's programming on other stations to factor into a relicensing decision.⁴ But, that 1996 order did not make it clear what level of support of children's programming on other stations would ensure a licensee that it would maintain good standing with the FCC. Facing that uncertainty, caution dictated to broadcast licensees that they comply with the three hour minimum. The three hour minimum was not applied to cable operators, given concern about the FCC's authority to regulate cable providers.⁵

There is nothing in the CTA to indicate that Congress wanted to establish that a certain percentage of airtime be devoted to children's programming, which is the effect of the FCC's 1996 three hour rule. However, there is evidence that Congress did recognize the value of high quality children's programming and wanted the FCC to pursue such programming.

⁴ See FCC order released on August 8, 1996 under MM Docket 93-48, "In the Matter of Policies and Rules Concerning Children's Television Programming."

⁵ Comments of Kim Matthews, FCC, on May 2, 2005.

In the nine years since the three hour rule was established, most homes now have access to many more channels. Assuming that the number of accessible channels in the average home has tripled in the past nine years, there is no reason to think that the 1990 Congress intended that the children of 2005 should have access to three times as much children's programming as the children of 1996 could view. In comments made by the Children's Media Policy Coalition under the 2004 rulemaking and under the current proposed rulemaking, there is the suggestion that children's viewing options should be expanded as much as adults. This seems out of touch with the desires of typical parents; some expansion is desirable, but the important thing is to provide higher quality programming that will induce children to watch those shows.

As several comments indicated before the 2004 order on this docket, today's children have other options that were generally not available in 1990 when the CTA was passed. Most homes now have DVD or VCR players, allowing children to watch programming of their choice on command. Internet access provides an avenue for interactive children's programming almost unimagined in 1990. With such compelling options, children are unlikely to watch new programming that has been produced on a limited budget by a licensee trying to meet minimum programming requirements.

It would seem that the appropriate goal should be the fostering of high quality children's programming, rather than an explosion of lower budget programming that may be shunned by young viewers.

- c. Broadcasters and cable providers argue that the new definition of “commercial matter” will reduce revenues from children’s programs, causing lower budgets and lower quality programming.**

In its order of November 23, 2004, the FCC sought to improve children’s programming by effectively increasing the amount of required actual programming time per hour. It did this by expanding the definition of “commercial matter” to include promotions of other television shows (with the exception of promotions of educational/informational programs for children). While programmers had generally been complying with the section 303a caps on how much commercial matter could be aired, this was based on a definition that did not include promotions of other shows.

By expanding the definition, analog broadcasters and cable operators will be faced with the choice of either cutting the amount of paid advertising or cutting promotions of other shows. Either approach is likely to mean that revenues will be cut, leading to reduced budgets for children’s programming. Of particular note, such high quality children’s programmers as Nickelodeon and the Walt Disney Company provided such warnings.

The counter-argument to warnings of reduced revenues is that with less available air-time for children’s advertising, the rates can be raised. Service providers argue that this will not be the reality. They argue that advertisers have a myriad of advertising options, and the value of thirty seconds of airtime will not

change. That is, they argue that the demand curve for advertising on children's shows is relatively flat, which seems quite reasonable.

III. REDEFINING COMMERCIAL MATTER

- a. **The FCC does not have the authority to expand the definition of commercial matter to include promotions of other shows, but it can achieve the same end through reduction of allowed advertising time on children's programs.**

It has convincingly been argued in several of the petitions for reconsideration that Congress had a clear understanding of what would constitute commercial matter, and intended that the definition not include promotions of other shows. The logic of only placing airtime limits on advertisers selling a product seemed to be a concern that children not be bombarded with things that they would beg their parents to purchase for them.

As a parent, I appreciate the FCC's current approach that recognizes that parents are also not particularly fond of advertisements that encourage children to watch more television. Still, the argument that Congress has spoken is a strong one; the FCC does not have authority to establish rules contradictory to congressional intent. In any event, there is no need to repeat the FCC's arguments or the service providers' counter arguments, because the FCC has an alternative approach that is fully justifiable.

Under 47 U.S.C. 303a(c)(2), the FCC has the authority to alter the allowed advertising limits of 10.5 minutes per hour on weekends and 12 minutes on weekdays. This process requires notice, public comment, and demonstration of need. Presumably, the FCC could go through this process and achieve the same

ends that it has attempted to achieve through its inappropriate definitional change. This would mean that the order of November 23, 2004 would need to be reversed, but this is a better approach than extending the flawed approach to DBS.

In any event, it is argued below that the best solution would be to simply reverse the November order and apply the old standard to analog, cable, and DBS.

- b. While all parents would like to have their children watch fewer commercials, the need to regulate commercial air-time is not as compelling as it was in 1990.**

In 1990, most children were still faced with the same set of entertainment options that most adults had as children. There were few enough channels that kids just flipped through them all to see what was on, VCR's had just begun to invade homes, and the internet was unknown. Today, that has all changed. Children began their search for programming by checking channels that they know target children; most children have so many channels available that it is impractical to check channels one by one. VCR's, DVD's, and the internet are now commonplace in most homes, giving children viable alternatives to television.

With the current range of entertainment options, children do not watch low budget children's programming. Instituting a program that reduces revenue will have a corresponding effect on quality that will simply drive children away from children's programs and towards more adult-oriented fare. While the FCC's definitional change of commercial matter is well-intended, it ends up doing more harm than good. As a parent, I would prefer that my daughters see compelling new children's programming with twelve minutes of advertising plus promotions, rather

than the alternative. The alternative they would chose is to switch away from lower quality children's programming, over to non-children's programming (which has no advertising restrictions, and inappropriate advertising content).

Another effect of the wide range of options available to children today is that they will turn away from excessive advertising on children's programming.

Preschoolers are in a different category, but most six year old can operate a remote control. Like adults, they tire of long interruptions of their programs. Adult programming does not have substantially more advertising than twelve minutes.

My non-scientific analysis is that there is an average of about 15 minutes commercials and promotions on general audience programming. That means that the effect of the CTA is to avoid a couple minutes of advertising. The regulatory burden seems unwarranted.

While it appears that there is little use for caps on advertising at all, the FCC is not in the position to overturn the CTA. It does, however, have the power to increase allowed advertising. Given the logic that less advertising will hurt the quality of children's programming, it follows that more advertising would improve quality. That may sound like heresy coming from a parent, but I am willing to trade extra commercial exposure for higher quality programming.

The larger picture in my opinion is that the burden of requiring all stations to keep track of their advertising time directed at children is not cost effective. Form 398 requires a diligent record keeping and reporting with little benefit. Shows can circumvent the spirit of the CTA through product placement, selling products

related to the show, ignoring the time limits, or deeming a show to not be targeted towards children (a decision that is first left up to the station, and only occasionally reviewed by the FCC). While it is beyond the scope of this comment, it is my opinion that the Congress should rewrite the CTA to focus on encouraging high quality programming, while dropping the advertising time restrictions all together.

Restrictions on commercial airtime, under either the old definition of “commercial matter” or the new definition, are largely ineffective. The appropriate focus for the FCC should be on the revamping the minimum children’s programming requirement to include cable operators and to institute a “play or pay” system.

IV. MINIMUM CHILDREN’S PROGRAMMING AND A SUGGESTED APPROACH TO IMPLEMENT A “PLAY OR PAY” SYSTEM

- a. Just as parity in the application of a “commercial matter” definition is appropriate, parity in the required minimum programming is appropriate – cable operators should be subject to the same rules as broadcasters.**

At present, the three hour children’s programming requirement is not applied to cable operators. Concern about the FCC’s authority to regulate cable providers did not stop the FCC from requiring that cable providers meet the commercial matter requirements of the CTA, so it is somewhat baffling that the minimum programming requirements are not applied to cable operators. One might expect that cable operators would either be fully under the FCC’s jurisdiction or not at all.

While I am not aware of the full debate concerning FCC regulation of cable providers, it would appear that the Communications Act of 1934, as amended in

1996, provides the greatest hurdle to regulation of cable operators under Title I, Section 2 (47 U.S.C. 152). Part b announces that “. . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .”

The language of the Communications Act is not the barrier that it might appear. The language was created just before the courts expanded the scope of the commerce clause to allow a wide variety of activities to constitute “affecting interstate commerce.” By 1942, the Supreme Court allowed that a farmer growing wheat for use exclusively on his farm was subject to federal harvest quotas because his wheat was taking the place of wheat available on the market, so he was affecting interstate commerce. *Wickard v. Filburn*, 317 U.S. 114. To a far greater extent, cable operators operating solely intrastate affect interstate commerce.

Using the same broadened analysis adopted by the courts, the FCC can find jurisdiction over cable operators with cable located only within a single state. While the wires are all within a state, the communication service provided is “interstate” under the Supreme Court’s commerce clause reasoning. Cable operators directly compete with interstate broadcasters. As well, cable operators show advertising intended to induce its customers to engage in interstate commerce through product purchases.

Applying the minimum children’s programming requirement to broadcasters without making cable operators subject to the rule is inherently unfair. The legal

basis to enforce the rule appears to exist, and parity dictates that the every channel should have to abide by the same rules.

- b. Requiring all FCC licensees to show three hours of children’s programming will not induce children to watch those programs, and the FCC has not given licensees adequate guidance on alternative means to meet their obligations.**

Children are not going to check a news channel, a sports channel, or any other focused channel to see if it happens to be showing its required three hours of children’s programming. Airing such programs is an exercise in futility, but the providers face uncertainty over their FCC license renewal if they do not comply.

The CTA does allow in section 303b that in reviewing a licensee, the FCC may consider the licensee’s special non-broadcast efforts and its support of children’s programming on other channels. But, there are no clear guidelines to indicate what level of alternative support is necessary. There is no reason for this state of affairs. The FCC can provide licensees with a clear alternative to providing children’s programming that will allow licensees to be assured of their continued good standing. That alternative is a fee based on the size of the licensee, with those fees used in turn to support children’s programming on other channels.

- c. “Play or pay” systems have been proposed before, but without clear guidelines.**

Two decades ago, former FCC general counsel Henry Geller supported the concept of a spectrum fee to support public television.⁶ The FCC order under this docket on November 23, 2004 discusses the advantages of flexible “play or pay” systems as well, but there was no indication of how an appropriate fee might be determined. The Public Broadcast System commented favorably on the advantages of such a “play or pay” system in its comments under this docket, but again did not provide suggestions for implementation.

While a fee for a portion of the spectrum has the advantage of simplicity, it would permit the largest licensees to skirt their obligations at relatively minimal cost. At the same time, it would force the smallest licensees to develop children’s programming if that was a less costly alternative than the fee.

Trading systems might be possible, following the lead of pollution trading in the energy sector. The flaw with this approach is that large licensees would buy children’s programming credits from small licensees, but children will not necessarily look to the smaller licensee for programming or even have access to that licensee. What is needed is an approach that relates the fee to the size of the licensee.

- d. The best “play of pay” system would use licensee fees to support grant funding of children’s programming; this would be the functional equivalent of trading children’s programming credits.**

⁶ See the Christian Science Monitor, Aug. 12, 1997, available at <http://csmonitor.com/cgi-bin/durableRedirect.pl?durable/1997/08/12/us/us.4.html>

Congress saw a need for financial support of quality children's programming through grant funding, and established a government funded program.⁷ A vastly enlarged grant funding mechanism could have an enormous impact, far beyond what is currently possible. Licensees could have the option of either meeting their children's programming obligation or paying a fee based on their size.

To be attractive to licensees, the fee has to be set below the amount of revenue lost by being forced to air three hours of children's programming rather than alternative programming.

This will vary from one licensee to the next, but may be roughly equivalent for licensees of the same size. The fee should be based on a percentage of operating revenue (neither the revenue figure nor the fee would need to be publicly disclosed). The appropriate fee would certainly be no greater than 1%, but that might be a good starting figure. Then, the percentage can be reduced to induce more licensees to pay rather than play, until the maximum fee collection is achieved.

The advantage of such a system is that it is completely voluntary. Licensees would be given an alternative to their current minimum children's programming obligation. Those licensees who choose to continue airing programming would be the best situated to provide such programming. Those who take the fee option instead will be doing so because it saves them money. And finally, the grant fund would potentially be able to funnel tens of millions of dollars to high quality children's programming – programming that my children will want to watch.

⁷ See 47 U.S.C. 394, establishing a government-funded National Endowment for Children's Educational Television.

V. CONCLUSION

The FCC has an opportunity to level the playing field for broadcasters and cable providers, both in the application of the definition of “commercial matter” and in the requirements for minimum children’s programming. I believe that under the current rulemaking, a first step is possible, by returning to the previous definition of “commercial matter” and applying that definition to all licensees. Under subsequent rulemakings, the FCC can both level and elevate the playing field by instituting a practical “play or pay” system.

Thank you for considering my comments.