

**APPENDIX B****Rule Changes**

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 73 RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, and 336.

2. Section 73.670 is amended to revise paragraphs (b) and (c), add paragraph (d), and revise Note 1 to read as follows:

Section 73.670 Commercial limits in children's programs.

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(b) The display of Internet website addresses during program material or promotional material not counted as commercial time is permitted only if the Web site:

- 1) Offers a substantial amount of *bona fide* program-related or other noncommercial content;
- 2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;
- 3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and
- 4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (e.g., contains no links labeled "store" and no links to another page with commercial material).

(c) If an Internet address for a Web site that does not meet the test in paragraph (b) of this section is displayed during a promotion in a children's program, in addition to counting against the commercial time limits in paragraph (a) the promotion must be clearly separated from program material.

(d) (1) Entities subject to commercial time limits under the Children's Television Act shall not display a Web site address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program:

- (i) Products are sold that feature a character appearing in that program; or
- (ii) A character appearing in that program is used to actively sell products.

(2) The requirements of this paragraph do not apply to:

- (i) Third-party sites linked from the companies' Web pages;
- (ii) On-air third-party advertisements with Web site references to third-party Web sites; or
- (iii) Pages that are primarily devoted to multiple characters from multiple programs.

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children's or other age-appropriate programming appearing on the same channel or promotions for children's educational and informational programming on any channel.

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3. Section 73.671 is amended to revise paragraph (e)(3) and to eliminate paragraph (f) to read as follows:

§ 73.671 Educational and informational programming for children.

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(e) The Commission will apply the following processing guideline to digital stations in assessing whether a television broadcast licensee has complied with the Children's Television Act of 1990 ("CTA") on its digital channel(s).

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(3) For purposes of the guideline described in paragraph (e)(2) of this section, at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams. This requirement does not apply to any program stream that merely time shifts the entire programming line-up of another program stream and, during the digital transition, to core programs aired on both the analog station and a digital program stream.

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Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended as follows:

Part 76 MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558,

560, 561, 571, 572, and 573.

2. Section 76.225 is amended to revise paragraphs (b), (c), and (d), add paragraph (e), and revise Note 1 to read as follows:

§ 76.225 Commercial limits in children's programs.

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(b) The display of Internet website addresses during program material or promotional material not counted as commercial time is permitted only if the Web site:

- 1) Offers a substantial amount of *bona fide* program-related or other noncommercial content;
- 2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;
- 3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and
- 4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).

(c) If an Internet address for a Web site that does not meet the test in paragraph (b) of this section is displayed during a promotion in a children's program, in addition to counting against the commercial time limits in paragraph (a) the promotion must be clearly separated from program material.

(d)(1) Entities subject to commercial time limits under the Children's Television Act shall not display a Web site address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program:

- (i) Products are sold that feature a character appearing in that program; or
- (ii) A character appearing in that program is used to actively sell products.

(2) The requirements of this paragraph do not apply to:

- (i) Third-party sites linked from the companies' Web pages;
- (ii) On-air third-party advertisements with Web site references to third-party Web sites; or
- (iii) Pages that are primarily devoted to multiple characters from multiple programs.

(e) The requirements of this section shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. 531(e) and 532(c)(2).

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service and

promotions of television programs or video programming services other than children's or other age-appropriate programming appearing on the same channel or promotions for children's educational and informational programming on any channel.

## APPENDIX C

## Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Second Further Notice of Proposed Rule Making* (“*Second FNPRM*”) in this proceeding.<sup>2</sup> The Commission sought written public comment on the proposals in the *Second FNPRM*, including comment on the IRFA. The Commission received one comment on the IRFA, as discussed below. This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Second Order**

The purpose of this proceeding is to determine how the existing children’s educational television programming obligations and limitations on advertising in children’s programs should be interpreted and adapted to apply to digital television broadcasting in light of the new capabilities made possible by that technology. The *Second Report and Order and Second Order on Reconsideration* (“*Second Order*”) makes certain modifications to the rules and policies adopted in our September 9, 2004 *Report and Order and Further Notice of Proposed Rule Making* (“*2004 Order*”) in this proceeding.<sup>4</sup> The modifications we make today respond in part to a Joint Proposal of Industry and Advocates on Reconsideration of Children’s Television Rules (“Joint Proposal”) filed by a group of cable and broadcast industry representatives and children’s television advocates, among others. The Commission sought comment on the Joint Proposal in the *Second FNPRM*.

In the *2004 Order*, the Commission updated the children’s television rules and policies to ensure that they continue to serve the interests of children and parents as the country transitions from analog to digital television. Among other things, the Commission revised the three-hour core programming processing guideline as it applies to DTV broadcasters that choose to multicast. Specifically, the *2004 Order* increased the core programming benchmark for digital broadcasters in a manner roughly proportional to the increase in free video programming offered by the broadcaster on multicast channels. The *2004 Order* also permitted the display of Internet website addresses during children’s programming only if the website meets a four-prong test limiting commercial matter on the site, and prohibited broadcasters from displaying website addresses during both children’s programs and commercials appearing in those programs if the website uses host selling. The *2004 Order* also imposed a percentage cap on the number of preemptions of core children’s programs and revised the definition of “commercial matter” for purposes of the commercial limits to include promotions of other television programs unless they are children’s educational or informational programs.

Our decision today does not alter the new children’s core programming “multicasting” rule adopted

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> *Second FNPRM*, 21 FCC Rcd 3642, 3647-3651.

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> 19 FCC Rcd 22943 (2004).

in the *2004 Order*, but does clarify the way in which repeats of core programs will be counted under the new rule. We do not make substantial changes to the four-prong website rule adopted in the *2004 Order*, but do amend the host selling restrictions adopted in the *2004 Order* to apply those restrictions less broadly and to exempt certain third party websites from the host selling restriction. We also revise the definition of “commercial time” adopted in the *2004 Order* to limit the kinds of promotions of children’s programs that must be counted under the advertising rules adopted in the *2004 Order*. In addition, with regard to scheduling of core children’s programming, we vacate the percentage cap on the number of permissible core program preemptions adopted in the *2004 Order* and return to our prior practice of addressing the number of preemptions and rescheduling of core programming on a case-by-case basis. These modifications will serve the public interest by ensuring an adequate supply of children’s educational and informational programming as we transition to digital television technology, and protecting children from excessive and inappropriate commercial messages in broadcast and cable programming, without unduly impairing the scheduling flexibility of broadcasters and cable operators.

#### **B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

The U.S. Small Business Administration (“SBA”) filed the only comment in this proceeding responding to the IRFA.<sup>5</sup> The SBA notes that several alternatives were suggested to the FCC by various members of industry which could, according to the SBA, offer significant cost savings to smaller broadcasters while potentially serving the FCC’s goals.<sup>6</sup> First, the SBA notes that the Local Broadcasters Alliance (“LBA”) recommends that the FCC limit the applicability of the new core programming requirements to multicast streams that do not already offer educational, informational, and/or public affairs programming. According to the SBA, providing an exemption for small broadcasters who are already providing public affairs content, and who do not yet have the technical capabilities to insert children’s programming on their multicast channels, could serve the FCC’s goals and provide a reasonable amount of flexibility for small business. Second, the SBA notes that the National Association of Broadcasters (“NAB”) and others recommend that the FCC allow broadcasters to rely on certifications from programming providers that website addresses displayed during core programming meet the FCC requirements, instead of requiring stations to continuously monitor and edit programming containing website addresses. According to the SBA, adopting this alternative could offer significant cost savings to small broadcasters. Third, the SBA notes that the multicasting rule would require that at least 50 percent of the core programming counted toward meeting the additional core programming requirements not consist of program episodes that have already aired within the previous seven days. The SBA notes that the NAB recommends that the FCC amend Form 398 to allow broadcasters to certify compliance with the limitation. According to the SBA, adopting this alternative could provide significant compliance cost savings to both small and large broadcasters.

With respect to LBA’s argument that the Commission limit the applicability of the new core programming requirements to multicast streams that do not already offer educational or public affairs

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<sup>5</sup> See Letter from Thomas M. Sullivan, Chief Counsel of Advocacy, and Jamie L. Belcore, Mercatus Center Fellow to Advocacy, to Marlene H. Dortch, Secretary, FCC, dated August 21, 2006.

<sup>6</sup> The SBA also noted that the version of the *Second FNPRM* published in the Federal Register on March 27, 2006, 71 FR 15145, did not include the Initial Regulatory Flexibility Analysis that was contained as part of the *Second FNPRM* as adopted by the Commission, 21 FCC Rcd 3642 (2006). On August 25, 2006, the Federal Register published a correction to the March 27 document that included the IRFA. See 71 FR 50380-01. No comments were filed in response to the IRFA.

programming, as noted in paragraph 20 of the *Second Order* a number of commenters joined the LBA in arguing that the Commission either should not impose additional core programming requirements on digital multicast channels, or at least should exempt multicast channels that offer educational, informational, and/or public interest programming. As discussed in paragraphs 18-21 of the *Second Order*, we decline to revise the guideline as suggested by these commenters. The Commission believes that the revised processing guideline translates the existing three-hour guideline to the digital environment in a manner that is both fair to broadcasters and meets the needs of the child audience. Now that digital broadcasters have the capability to significantly increase their overall hours of programming, increasing the amount of core programming will not result in an unreasonable burden. For example, if a station chooses to broadcast a second stream of free video programming twenty-four hours a day, seven days a week, it can satisfy the new guideline by providing merely three additional hours *per* week of core programming – or less than two percent of the channel’s 168 hours of additional weekly programming. That additional programming can be aired on the main program stream or on a multicast stream, at the discretion of the broadcaster. In addition, we believe that a guideline that increases the amount of core programming in a manner roughly proportional to the increase in free video programming offered by broadcasters is consistent with the objective of the CTA “to increase the amount of educational and informational broadcast television available to children.”

The digital programming processing guideline provides broadcasters flexibility to move core programming to either their main programming stream or other multicast streams, so long as the stream the programming is moved to receives comparable MVPD carriage to the stream triggering the additional obligation. Thus, the guideline preserves the principle that, in order to obtain staff level approval of their CTA compliance, broadcasters must provide three hours of children’s core programming for every 168 hours per week of free video programming that they air, while at the same time giving broadcasters flexibility to choose the multicast stream that will air that programming. In addition, broadcasters could meet the guideline by airing children’s programming on specialized channels, such as a children’s news program on a twenty-four hour news channel or a children’s educational weather program on a twenty-four hour weather channel. Furthermore, we note that our rules provide flexibility for licensees that have aired somewhat less core programming than indicated by the guideline but that nonetheless demonstrate an adequate commitment to educating and informing children.<sup>7</sup> With respect to the recommendation of NAB and others regarding reliance on certifications from program providers, as discussed in paragraph 38 of the item we decline to allow broadcasters to avoid liability by relying on representations from program providers that web addresses meet the four-prong test. We do not expect compliance to be burdensome, but we will revisit this issue if we receive evidence that this is imposing an undue burden on broadcasters.

Finally, as discussed in paragraph 23 the item adopts NAB’s recommendation, which was echoed by other commenters, that FCC Form 398 allow broadcasters to certify compliance with the revised limitation on the repeat of core digital programming adopted under the multicasting guideline

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<sup>7</sup> 2004 Order at 22951. See also 47 C.F.R. § 73.671 Note 2. Specifically, licensees are eligible for staff level approval if they demonstrate that they have aired a package of different types of educational and informational programming that, while containing somewhat less core programming than indicated by the applicable guideline, demonstrates a level of commitment to educating and informing children at least equivalent to airing the amount of programming indicated by the guideline. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children may be counted toward the processing guideline. Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have an additional opportunity to demonstrate compliance with the CTA.

rather than requiring broadcasters to identify each program episode on Form 398. We will require licensees, however, to retain records sufficient to document the accuracy of their certification, including records of actual program episodes aired, and to make such documentation available to the public upon request.

### C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.<sup>8</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction" under section 3 of the Small Business Act.<sup>9</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>10</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>11</sup>

*Television Broadcasting.* The proposed rules and policies apply to television broadcast licensees, and potential licensees of television service. The SBA defines a television broadcast station as a small business if such station has no more than \$13 million in annual receipts.<sup>12</sup> Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."<sup>13</sup> According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations<sup>14</sup> (or about 67 percent) have revenues of \$12 million or less and thus qualify as small entities under the SBA definition. We note, however, that in assessing whether a business concern qualifies as small under the

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<sup>8</sup> 5 U.S.C. § 604(a)(3).

<sup>9</sup> 5 U.S.C. § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>11</sup> 5 U.S.C. § 632.

<sup>12</sup> See 13 C.F.R. § 121.201, NAICS Code 515120.

<sup>13</sup> *Id.* This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>14</sup> Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,368. See *News Release*, "Broadcast Station Totals as of June 30, 2005" (dated Aug. 29, 2005); see <http://www.fcc.gov/mb/audio/totals/bt050630.html>.

above definition, business (control) affiliations<sup>15</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

*Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”<sup>16</sup> The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.<sup>17</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.<sup>18</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>19</sup> Thus, under this size standard, the majority of firms can be considered small.

*Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.<sup>20</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>21</sup> In addition, under the

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<sup>15</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>16</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>17</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>18</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>19</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>20</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

<sup>21</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>22</sup> Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>23</sup> Thus, under this second size standard, most cable systems are small.

*Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>24</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>25</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>26</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>27</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

#### **D. Description of Projected Reporting, Record Keeping and other Compliance Requirements**

The *Second Order* retains the revised core programming processing guideline for digital stations adopted in the *2004 Order* but clarifies the number of permissible core program repeats under the guideline. Specifically, we clarify that at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams. We also amend FCC Form 398 to collect the information necessary to enforce the limit on repeats under the revised guideline. We permit licensees to certify on Form 398 that they have complied with the repeat restriction and do not require broadcasters to identify each program episode on Form 398. Licensees must retain records sufficient to document the accuracy of their certification, including records of actual program episodes aired, and make such documentation available to the public upon request. The children's programming liaison identified in the FCC Form 398 must be

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<sup>22</sup> 47 C.F.R. § 76.901(c).

<sup>23</sup> Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>24</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>25</sup> 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>26</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

<sup>27</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

able to provide documentation to substantiate the certification if requested.

The *Second Order* repeals the ten percent cap on preemptions of core children's programming adopted in the *2004 Order* and instead institutes a procedure similar to that used by the Media Bureau and the Commission following adoption of the 1996 children's television *Order* whereby networks sought informal approval of their preemption plans each year. Under the policy formerly developed by the Commission staff, a program counted as preempted only if it was not aired in a substitute time slot (otherwise known as a "second home") with an on-air notification of the schedule change occurring at the time of preemption during the previously scheduled episode. The on-air notification must announce the alternate date and time when the preempted show will air. As part of this policy, we will require all networks requesting preemption flexibility to file a request with the Media Bureau by August 1 of each year stating the number of preemptions the network expects, when the program will be rescheduled, whether the rescheduled time is the program's second home, and the network's plan to notify viewers of the schedule change.<sup>28</sup> We will presume that non-network stations are complying with the three hour core programming requirement, and do not need broad preemption relief.

The *Second Order* retains the rule on website addresses adopted in the *2004 Order* with two clarifications: (1) the rule applies only when Internet addresses are displayed during program material or during promotional material not counted as commercial time; and (2) if an Internet address for a website that does not meet the four-prong test is displayed during a promotion, in addition to counting against the commercial time limits, the promotion will be clearly separated from programming material. We exempt from the website display rules certain PSAs, which are not commercial matter under our rules. Specifically, we define PSAs exempt from the website display rules as: PSAs aired on behalf of independent non-profit or government organizations, or media companies in partnership with non-profits or government entities, that display websites not under the control of the licensee or cable company. We also clarify that station identifications and emergency announcements are not subject to the rules governing the display of website addresses as long as the display is consistent with the purpose of the announcement. Closing credits are not exempt from application of the website address rules.

The Commission's host selling policy prohibits the use of program characters or show hosts to sell products in commercials during or adjacent to shows in which the character or host appears. The *Second Order* adopts the following host selling rule with respect to website addresses:

Entities subject to commercial time limits under the Children's Television Act ("CTA") will not display a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program: (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products.

To clarify, this rule does not apply to: (1) third-party sites linked from the companies' web pages; (2) on-air third-party advertisements with website references to third-party websites; or (3) pages that are primarily devoted to multiple characters from multiple programs.

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<sup>28</sup> Because the August 1 deadline for this coming programming year has passed, networks should file their requests for preemption flexibility no later than 30 days after approval of this information collection by OMB.

The limitation on the duration of advertising in children's programming of 10½ minutes per hour on weekends and 12 minutes per hour on weekdays applies to "commercial matter." Prior to the *2004 Order*, the term "commercial matter" was defined to exclude certain types of program interruptions, including promotions of upcoming programs that do not mention sponsors. The *2004 Order* revised the definition of "commercial matter" to include promotions of television programs or video programming services other than children's educational and informational programming. The revised definition applies to analog and digital broadcasters and to cable operators.

The *Second Order* revises the definition of "commercial matter" to exclude (1) promotions for any children's or other age-appropriate programming appearing on the same channel, and (2) promotions for children's educational and informational programming appearing on any channel.

#### **E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered**

The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."<sup>29</sup>

Several steps were taken to minimize the impact on small entities. As noted above, the *Second Order* adopts the alternative recommended by NAB and others that broadcasters be permitted to certify on FCC Form 398 their compliance with the limit on the number of repeats of digital core programming under the revised processing guideline. *See* paragraph 23, *supra*. Thus, broadcasters will not be obligated to identify each program episode on Form 398, but will be required to retain documentation sufficient to substantiate the certification on Form 398. This step will make compliance with the rules easier for all broadcasters, including smaller broadcasters. The Commission considered, but rejected, the approach of requiring broadcasters to identify each program episode on the Form 398. That approach, if adopted, would have imposed a greater burden on broadcasters.

The *Second Order* also lifts the cap on the number of preemptions of core programs adopted in the *2004 Order* and instead returns to the prior practice of permitting networks that need scheduling flexibility to accommodate sports and other programming to request such flexibility from the Media Bureau. This change should help all broadcasters, including small broadcasters, by providing more scheduling flexibility. The Commission considered, but rejected, keeping the cap on the number of preemptions as adopted in the *2004 Order*, which would have been more burdensome to broadcasters.

In addition, the *Second Order* also revises the definition of "host selling" adopted in the *2004 Order* with respect to website address displays in children's programming. The revised definition is less restrictive than that adopted in 2004 and permits the sale of merchandise featuring a program-related character in parts of the website that are sufficiently separated from the program itself to protect children from the unique impact of host selling. This change should provide more flexibility to all broadcasters and cable operators, including smaller entities, and should be less burdensome to all affected entities.

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<sup>29</sup> 5 U.S.C. §§ 603(c)(1)-(4).

Another change made in the *Second Order* that will ease the burden on all entities in complying with the rules is the change in the definition of “commercial matter.” The revised definition provides additional flexibility for broadcasters and cable operators and permits them to air program promotions that would not have been permitted under the rule adopted in 2004.

#### **F. Report to Congress**

The Commission will send a copy of the *Second Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. s 801(a)(1)(A). In addition, the Commission will send a copy of the *Second Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. §§ 604(b). A copy of the *Second Order* and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. §§ 604(b).

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Children's Television Obligations of Digital Television Broadcasters*, MM Docket 00-167, Second Order on Reconsideration and Second Report and Order

I support this Order addressing the children's television obligations of broadcasters. It is important that television play a positive role in children's lives. Both Congress and the Commission have recognized television's potential to do so and taken steps to ensure that television helps to educate and inform children. Broadcasters must be mindful of the unique needs and vulnerabilities of children.

A little over two years ago, the Commission revised its rules governing children's television to reflect changes in technology, such as the advent of digital television.<sup>1</sup> These revisions were challenged by a number of parties, representing diverse interests, and many have not taken effect. Recognizing the important issues involved, children's advocates and media companies came together to discuss their concerns with the rule changes. Working together, they developed recommendations designed to ensure that the interests of children are well protected. In March, the Commission issued a Second Further Notice of Proposed Rulemaking, seeking comment on their proposals.<sup>2</sup>

I am pleased that the Commission today adopts these recommendations. I'd like to again recognize the efforts of the children's organizations and companies who spent an enormous amount of time and energy developing these proposals. These proposals recognize the business environment in which broadcasters and cable programmers operate and the need for flexibility but do not sacrifice the interests of children.

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<sup>1</sup> *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 (2004).

<sup>2</sup> *Children's Television Obligations of Digital Television Broadcasters*, Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 3642 (2006).

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Children's Television Obligations of Digital Television Broadcasters* (MM Docket No. 00-167), Second Order on Reconsideration and Second Report and Order

Kids today live in a super-saturated media environment. They are interacting with more media more often than at any other time in our nation's history. Television, radio, cable and now the Internet are perhaps the most powerful forces at work in the world today. When used for good, they enlighten minds, convey powerful ideas, educate and lay the foundation for human development. But when they are used to misinform and mislead they can—and sometimes do—inflict lasting harm.

We have reason to be concerned. The Kaiser Family Foundation tells us that children are spending over 6 ½ hours per day exposed to media, almost 4 hours of that time with television. The average child sees tens of thousands of commercials a year. More disturbing still are studies demonstrating that children 8 and younger don't—because they can't—distinguish between advertisements and programming. They accept commercials as true because they don't have the skills and cognitive resources to distinguish between fact and fiction.

Congress recognized these tough challenges for parents and the high stakes for children long ago. More than that, Congress made clear that broadcasters' public service responsibilities include providing programming that meets the needs of children. Indeed, in the Children's Television Act Congress specifically directed the Commission to protect children against excessive advertisements on television and required the Commission to consider during the license renewal process whether a station's programming has served the educational and informational needs of children.

Two years ago, the Commission began the task of updating our policies adopted under the Children's Television Act. The goal was simple: ensuring that our rules continue to serve the interests of children and parents as the country transitions from analog to digital television. With the February 17, 2009 transition now fixed in law, this effort has grown more urgent with each passing day.

We've had some fits and starts getting this digital children's agenda on the road. But I am pleased today to support this decision. It resolves at long last important outstanding issues regarding the obligation of television broadcasters to protect and serve the children in their audience. These range from digital core programming to limits on the display of Internet website addresses to restrictions on host selling—something to which children are particularly vulnerable.

We have reached this milestone because so many worked so hard to bring this effort to a successful conclusion. We especially owe a debt of gratitude to the key players in the children's media community and media companies who decided to get together and hammer out a solution instead of engage in a lengthy legal tussle. Let me thank the signatories to the Joint Proposal that is the foundation of our effort today: the American Academy of Pediatrics, the American Psychological Association, the National Parent Teacher Association, the Action Coalition for Media, Children Now, the United Church of Christ, the Association of National Advertisers, Viacom, CBS, the Walt Disney Company, Fox, NBC Universal and NBC Telemundo, Time Warner, 4Kids Entertainment and Discovery Communications. Let me also thank others like the National Association of Broadcasters and the National Cable and Telecommunications Association for jumping in along the way to support the proposal. There is no doubt that this item will advance the quality and quantity of children's programming.

But our work on the digital transition remains unfinished. We are overdue for a similarly constructive dialogue on the more general public interest obligations of digital television broadcasters. The vast majority of television stations are already broadcasting in digital. Others are already multicasting. But our signals are crossed when it comes to what broadcasters must do to discharge their public interest duties in the digital age. We have yet to provide the kind of clear guidance broadcasters need and viewers deserve. So it's time to address now how the digital transition can enhance political discourse, improve access to the media for those with disabilities, and increase localism, diversity and competition on the people's airwaves. It's also time to commit to a disclosure policy for digital television broadcasters.

It has, after all, been eight years since a blue-ribbon Presidential advisory committee first made recommendations regarding broadcasters' digital public interest obligations. It has been nearly seven years since the Commission first opened a proceeding on this issue. And it has been nearly a year since the Commission's own Consumer Advisory Committee called for swifter action in this area. If the American people are ever going to realize the full benefits of digital television, then this agency has a duty to call these remaining digital public interest issues forward and accord them the high priority they deserve. Without such action, the digital transition will fall far short of its promise.

Again, let me thank the public interest and industry players who worked so hard to see today's decision through. Thanks also to the Bureau staff who have worked on this issue over the last few years. We appreciate your commitment and are grateful for your efforts on behalf of our nation's children.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Children's Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order*

For decades, the Commission has recognized that broadcasters must serve the programming needs of children as part of their obligations as trustees of the public's airwaves. Today, the Commission takes an important step in fulfilling its obligation to ensure that American children are provided quality educational and informational programming and are protected from the rampant commercialism that seems to dominate television programming.

While digital television is an emerging technology that can be used to educate, inform, and entertain our children in many respects, it could also be used to commercialize and exploit their young, inexperienced minds. So despite my lingering concerns with certain elements of today's Order, I support it because it advances the goals of the Children's Television Act, diminishes the likelihood of protracted litigation, and, most importantly, finalizes much needed rules to protect our children in the digital television age.

In an attempt to establish a certain framework that is supported by all interested parties, we aspired to clarify several standards developed in our *2004 Order*<sup>1</sup>. For instance, we appropriately carved out an important exception to the website address display rules for public service announcements. We also removed the limit on preemption of core programming available to broadcasters in favor of a case-by-case determination. While that approach gives broadcasters needed flexibility, we must remain vigilant that preemptions do not significantly interfere with providing regularly scheduled children's programming.

In today's Order, however, two clarifications unnecessarily retreat from laudable standards developed in the *2004 Order*. First, the *2004 Order* firmly maintained FCC's policy against host selling by restricting the display of websites that utilize program-related characters during the airing of the program and accompanying commercials. The language of the new host selling restriction and the third party advertising exceptions in the instant Order, however, are not models of regulatory clarity and certainty. It is unclear why web pages that are "primarily devoted to multiple characters from multiple programs" are categorically exempted from our host selling restrictions. It is my hope that when the day comes for the Commission to interpret and enforce these new rules, we will be guided by the Commission's long-standing recognition that "the trust children place in program characters allows advertisers to take unfair advantage of the relationship between hosts and young children."<sup>2</sup> The Commission should not retreat to the days when it believed that market forces can best protect children from poor children programming and excessive commercialism. The new capabilities that will be made possible by digital technology should be used to improve the quality of children programming.

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<sup>1</sup> See, In the matter of Children's Television Obligations Of Digital Television Broadcasters, Report and Order and Further Notice of Proposed Rulemaking, MM Docket 00-167, released November 23, 2004 (2004 Order).

<sup>2</sup> 2006 Order, at 42, citing, *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 13-14 (1974).

Another concern I have with today's order is that it retreats from a bright line rule that treats any promotion of upcoming programs, other than educational or informational programs, as commercial matter. Today's order relaxes this standard so that promotions of any other children's programming that appear on the same channel are not considered to be commercial matter. While this change seriously concerns me, I find some solace in the representation that this relaxed standard will still reduce the amount of advertising to children on television.<sup>3</sup> In these times of excessive commercialism, I would have preferred to retain our definition of commercial matter in the 2006 Order.

Nevertheless, today's order remains a very positive step overall. The concerns I have raised should in no way detract from the praise deservedly given to the Media Bureau staff, the participants in the Joint Proposal and public commenters. The media industry and children's rights advocates were able to come together and produce agreement on issues that concern a serious threat to the well being of all our children. The Joint Proposal is the product of hard work, conscientious negotiations and a strong willingness of the two sides to compromise. I believe this bodes well for Commission action on other challenging items, such as the pending media ownership rules proceeding, enhanced disclosure requirements, public interest obligations of digital broadcasters and the localism proceeding.

I believe today's positive step continues an ongoing process that will ensure our children can exploit the potential of digital television rather than digital television exploiting the potential of our children.

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<sup>3</sup> 2006 Order, at 50 ("While the revised rule may not limit program promotions in children's programming to the same extent as the rule adopted in the 2004 Order, the revision will still reduce the number of interruptions that were permissible under the original rule....").

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: Children's Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order (MM Docket 00-167)*

Television commands a prominent place in our daily lives and, more importantly, in the lives of our children. In fact, just last week, Nielsen Media Research reported that, despite growing competition from all types of emerging media platforms and devices, such as video iPods, cell phones, and streaming video over the Internet from websites like the wildly popular YouTube.com, traditional television viewing in the average household reached another record high this year: 8 hours and 14 minutes a day. Younger children age 2-11 increased their total viewing levels by 4 percent, and teenage girls increased theirs by 6 percent. Research like this, as well as our common sense, confirms that we – as a society – must continue to look for ways to ensure that television has a positive effect on our children's lives. There is simply no doubt that what children watch shapes their values, choices, and actions.

I am, therefore, extremely pleased to vote today to adopt this item, in which we clarify and revise our children's television rules in accord with a joint proposal filed by representatives of the media industry and a coalition of child advocacy groups. Thank you to all who contributed to the joint proposal for your efforts over the past two years. It is a great example of the private dispute resolution that I have advocated throughout my career. I believe that it achieves an appropriate balance between broadcasters' need for flexibility in exploring the potential uses of their digital spectrum and our statutory obligation, set forth in the Children's Television Act of 1990, to ensure that the educational needs of our children are met in today's digital and increasingly commercial environment. I also believe that our action today will significantly benefit families all across America.

Congress and the Commission have long recognized that, as trustees of the public airwaves, television broadcast stations have a special obligation to provide programming that benefits society by educating and informing children. Today, we reaffirm the extension of that obligation to the digital age by requiring that, if a broadcaster chooses to offer additional news, sports, and entertainment programming on multiple digital program streams, it also must provide additional children's programming, no more than half of which may repeat program episodes aired earlier in the week. As these rules go into effect, I hope that broadcasters will surpass this minimal requirement and take advantage of digital technology to create a more robust and diverse children's television environment.

Congress and the Commission have also recognized the need to protect children from excessive and inappropriate commercial messages, resulting in the enactment of regulations such as commercial time limits, separation between commercials and program material, and the prohibition of "host selling." This recognition stems from research that shows that children under the age of eight lack the cognitive development to understand the persuasive intent of television advertising and are uniquely susceptible to its influence. Nonetheless, advertising directed toward children remains a big business, valued at between \$800 and \$900 million annually, according to an article in the *Wall Street Journal* earlier this year. Today, we update our regulations to protect "generation i," the first generation of our children to grow up with the Internet, by significantly restricting the commercial nature and content of websites that are promoted during program material.

Finally, while I fully support this item and believe that it will lead to the creation of more and better quality children's programming, our children cannot benefit from this much needed additional programming if they cannot see it. I will continue to be vigilant in calling on cable and satellite

operators, as well as new entrants to the video programming market like Verizon and AT&T, to carry more family-friendly programs. It's the right thing to do.

**STATEMENT OF  
COMMISSIONER ROBERT M. MCDOWELL**

*Re: In the matter of Children's Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order, MM Docket 00-167*

I am delighted to support this Order. Most of the rule modifications adopted in the Order were proposed by an unlikely coalition of entities, all of whom share a commitment to serving the interests of children, but who often find themselves on opposing sides in proceedings before the Commission. I applaud this diverse coalition of children's advocacy groups, broadcast networks, children's programming networks, cable companies and advertisers for their efforts to forge a private sector solution to this challenge. It is no secret that I prefer private sector solutions over government intervention whenever possible. The proposal we are approving today provides helpful clarifications of our programming processing guidelines and website address rules.

In the end, our children will be the ones who will benefit from the implementation of these rules. As a father a 7-year-old and a 5-year-old, I am particularly aware of the plethora of commercial messages that bombard our children daily. I am pleased that representatives of the media and advertising industries have worked so hard with members of the public interest community to find solutions that strike a workable balance between entertainment and commerce for children's television. Congratulations!