

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Children's Television Obligations of Digital  
Television Broadcasters

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MM Docket No. 00-167

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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## **EXECUTIVE SUMMARY**

The National Association of Broadcasters (“NAB”) hereby responds to the Commission’s *Public Notice* regarding the status of children’s television programming. NAB continues to share the Commission’s goal of promoting quality educational and informational children’s programming. In enacting the Children’s Television Act of 1990 (“CTA”), Congress enlisted broadcasters to advance the nation’s interest in educating its youth. As shown by NAB, broadcasters, who have provided beneficial free over-the-air programming for America’s youth since the inception of television, are today providing more high-quality, diverse educational and informational programming for children than ever before, and are amply meeting the needs of these young viewers. Television broadcasters are fulfilling the goals of the CTA both by offering programming specifically designed to serve the educational and informational needs of children, as well as programming aimed at broader audiences that nonetheless serves those needs.

Furthermore, parents have abundant additional choices, beyond the services provided by the nation’s commercial broadcast stations, of educational and informational programming that is specifically designed to meet children’s unique needs. These choices include programming on noncommercial broadcast stations; children’s programming carried on numerous cable/satellite channels and on-demand from cable/satellite systems; programming and content available via the Internet; and child-oriented DVDs and videos. This is a sea change in the amount, quality and availability of children’s programming since the adoption of the CTA.

In light of this strong record of services and options, as well as bedrock First Amendment principles counseling a light regulatory touch in the area of program content, the Commission should adhere to its long-standing practice of relying on broadcasters’ good faith judgments as to

whether programming serves the educational and information needs of children. Given the Commission's extremely limited authority to adopt rules significantly implicating program content, regulations increasing its oversight regarding whether particular programs meet children's educational and informational needs would raise serious First Amendment concerns.

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To: The Commission

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> hereby submits these comments in response to the Commission’s *Public Notice* regarding the status of children’s television programming.<sup>2</sup> NAB continues to share the Commission’s goal of promoting quality educational and informational children’s programming. In enacting the Children’s Television Act of 1990 (“CTA”), Congress, as the Commission previously has recognized, “enlisted the creativity of broadcasters to advance the nation’s powerful interest in educating its youth.”<sup>3</sup> As discussed in detail below, broadcasters, who have provided beneficial free over-the-air programming for America’s youth since the inception of television, are today providing more high-quality, diverse

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<sup>1</sup> NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations, as well as broadcast networks, before Congress, the FCC and other federal agencies, and the Courts.

<sup>2</sup> *Commission Seeks Comment on the Status of Children’s Television Programming*, DA 07-1716, MM Docket No. 00-167 (rel. Apr. 17, 2007) (“*Public Notice*”); see also *Extension of Time to File Comments on the Status of Children’s Television Programming*, Public Notice, DA 07-2287, MM Docket No. 00-167 (rel. May 31, 2007).

<sup>3</sup> *Policies & Rules Concerning Children’s Television Programming*, Report & Order, 11 FCC Rcd 10660, 10663 (¶ 8) (1996) (“*1996 Children’s Television Report & Order*”).

educational and informational programming for children than ever before, and are amply meeting the needs of these young viewers. Furthermore, parents have abundant additional choices, beyond the services provided by the nation’s commercial broadcast stations, of educational and informational programming that is specifically designed to meet children’s unique needs. This is a sea change in the amount, quality and availability of children’s programming since the adoption of the CTA. In light of this strong record of services and options, as well as bedrock First Amendment principles counseling a light regulatory touch in the area of program content, the Commission should adhere to its long-standing practice of relying on broadcasters’ “good faith judgments” as to whether programming serves the educational and informational needs of children.<sup>4</sup>

**I. BROADCASTERS ARE PROVIDING AN ABUNDANCE OF HIGH QUALITY, DIVERSE PROGRAMMING THAT AMPLY MEETS THE EDUCATIONAL AND INFORMATIONAL NEEDS OF CHILDREN.**

As the *Public Notice* explains, the CTA requires the Commission, in its review of each television broadcast station’s license renewal application, to “consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”<sup>5</sup> In enacting this mandate, Congress recognized, as the Commission itself has acknowledged, that broadcasters should be afforded “flexibility in determining how to meet their

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<sup>4</sup> 47 C.F.R. § 73.671, Note 1 (2007); *see also 1996 Children’s Television Report & Order*, 11 FCC Rcd at 10663 (¶ 7) (referencing the need to ensure that the children’s programming rules are “appropriately tailored to provide flexibility for broadcasters” in order for them to pass constitutional muster); *Policies & Rules Concerning Children’s Television Programming; Revision of Programming Policies for Television Broad. Stations*, Notice of Proposed Rulemaking, 10 FCC Rcd 6308, 6341 (¶ 66) (1995) (recognizing that the Commission, in adopting requirements related to broadcast content, must carefully “consider any limitations imposed by the First Amendment of the Constitution”) (“*1995 Children’s Television NPRM*”).

<sup>5</sup> *Public Notice*, ¶ 2 (quoting 47 U.S.C. § 303b).

obligation to children.”<sup>6</sup> Allowing broadcasters to rely on “general audience programming” to at least partially satisfy their statutory duty is an important part of the flexibility that Congress intended to provide, as the Commission itself has stated.<sup>7</sup> It is plain that, in considering whether the goals of the CTA are being met, the FCC must consider not only programming that is specifically directed at the educational and informational needs of children and meets other specified criteria (referred to as “Core Programming”), but also other programming that serves those needs. After all, children can clearly benefit from programming that may not fit within the Commission’s definition of Core Programming; for example, programming that is aimed at a

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<sup>6</sup> *1996 Children’s Television Report & Order*, 11 FCC Rcd at 10672 (¶ 24) (citing 136 Cong. Rec. S10121 (daily ed. July 19, 1990) (remarks of Sen. Inouye)).

<sup>7</sup> *See* 47 U.S.C. § 303b (directing FCC to focus on licensee’s service of educational and informational needs of children via “overall programming, including programming specifically designed to serve such needs”) (emphasis added); *see also* *1996 Children’s Television Report & Order*, 11 FCC Rcd at 10672 (¶ 24) (citing S. Rep. No. 227, 101st Cong., 1st Sess., at 3 (1989) (“Senate Report”)). Despite this clear statutory language, the Commission has historically focused primarily on the extent to which broadcasters provide programming that is “specifically designed” to serve children’s needs. In particular, the Commission has adopted a specific regulatory definition of “Core Programming” – *i.e.*, programming specifically designed to serve the educational and informational needs of children, among other factors. 47 C.F.R. § 73.671(c). The FCC has also adopted a “processing guideline” that permits staff-level approval of the CTA portion of the television license renewal application of any station that has provided at least three hours of “core programming” per week throughout its license term. *Id.* § 73.671(d). Under the “processing guideline,” the CTA portion of a station’s television license renewal application can also be approved by the staff “if the licensee demonstrates that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of Core Programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of Core Programming.” *Id.* As the D.C. Circuit has recognized, however, numerical “safe harbors” such as the three-hour Core Programming requirement tend to become *de facto* rules. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998) (explaining that an FCC licensing “screening device” “create[s] a strong incentive to meet the numerical goals” because “[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit” and thus “broadcasters, in order to avoid the inconvenience and expense of being subjected to further review, will treat the guidelines as safe-harbors”) (internal quotation and citation omitted). As a result, the vast majority of broadcasters opt to provide the three hours per week of Core Programming.

broader audience or is not regularly scheduled can obviously educate and inform young viewers.

The statutory requirement that the Commission expressly consider children's programming issues in the license renewal process was adopted based on Congress' finding – made in reliance on a record that is now nearly two decades old – that market forces were not at that time sufficient to ensure that commercial television stations would provide a sufficient quantity of children's educational and informational programming.<sup>8</sup> Today, however, it is clear that broadcasters (as well as many other players in the video marketplace, *see infra* Section II) are serving the needs of children by providing a wide array of high-quality, diverse programming. The programs below provide but a few examples of the educational and informational fare that is currently aired by the nation's broadcasters.

- NBC Weather Plus, a twenty-four-hour multicast weather programming channel, offers “Weather Plus University,” that provides educational programming about the weather and earth sciences geared to teenagers. One segment featured a lesson on how geysers erupt, and another showed viewers how to make snow. Shows are hosted by NBC Weather Plus meteorologists and reporters, and feature an entertaining combination of taped vignettes and timely segments designed to show young people how and why the weather changes, how forecasters try to predict the weather, the nature and scope of significant weather events, and how teens can better understand or react to weather, both in their hometowns and around the world.<sup>9</sup>
- NBC, ION Media Networks, Scholastic Media, Classic Media and Corus Entertainment have formed Qubo to acquire and create children's programming. Qubo programming currently airs on NBC and ION stations in English and on Telemundo stations in Spanish, and is targeted at children four to eight years of age. These programs, including “Veggie Tales” and “Jacob Two-Two,” emphasize problem solving issues of daily living – such as getting along with friends and family, how to accept responsibilities and fulfill obligations, be honest and stand up for the truth, overcome fears, and aim for mastery of new ideas and

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<sup>8</sup> See Senate Report at 9.

<sup>9</sup> See NBC Weather Plus University, <http://www.weatherplus.com/university/index.html>; FCC Form 398 for WRC-TV, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for WRC, 2007 Q2) (last visited Aug. 23, 2007).

challenges. Qubo plans to expand its children's program offerings during the 2007 Fall season with the addition of "My Friend Rabbit," a playful series inspired by the popular book, and "Postman Pat," a top-rated show in the United Kingdom offering lessons about neighborliness and community through the adventures of a friendly neighborhood postman.<sup>10</sup>

- ION Media offers a twenty-four-hour children's digital channel, which airs the Qubo programming described above along with other children's programming.<sup>11</sup>
- Among other children's programs, ABC stations air "The Replacements," an original comedy series that features a brother and sister in their "tweens" with a fantasy-like ability to change adults (despite consequences of those changes). Geared towards kids aged six to eleven, the series features comedic hi-jinx of a brother and sister with fast-paced humor and quick wit to keep youngsters engaged as they watch the show's characters attempt to change situations that viewers will likely relate to, thereby learning lessons about self-esteem and accepting responsibility for choices.<sup>12</sup>
- CBS network programming includes both animated and live action programming, including "Cake," a live-action show-within-a-show about teenagers who produce and host a cable access show called "Cake TV," where the teens show their audience how to take ordinary, everyday items (*e.g.*, t-shirts, CD cases, lamp shades) and make them extraordinary with a little imagination (and a glue gun).<sup>13</sup>

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<sup>10</sup> See Qubo, *Shows*, <http://www.qubo.com> (last visited Aug. 23, 2007); *Qubo Bounces into Fall 2007 with Exciting Slate of New and Returning Series*, Entertainment World, Aug. 7, 2007, <http://entertainmentworld.us/EW1/templates/Television2.aspx?articleid=9944&zoneid=16>; FCC Form 398 for WRC-TV, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for WRC, 2007 Q2) (last visited Aug. 23, 2007). In addition, NBC stations previously featured "Time Warp Trio," an action-adventure series that transports kids on journeys into history using a "magic book" that was nominated for a 2007 Emmy® Award in the category of "Outstanding Children's Animated Program," among their children's programming lineup. See *Discovery Kids On NBC*, [http://www.nbc.com/nbc/Discovery\\_Kids\\_on\\_NBC/](http://www.nbc.com/nbc/Discovery_Kids_on_NBC/) (last visited Aug. 23, 2007); *Nominees For The Children's Programming Emmy® Awards Announced At Kidscreen Summit*, National Television Academy, Feb. 7, 2007, [http://www.emmyonline.org/releases/pdf/34th\\_daytime\\_entertainment\\_childrens\\_noms.pdf](http://www.emmyonline.org/releases/pdf/34th_daytime_entertainment_childrens_noms.pdf). The program now airs on the Discovery Kids cable network.

<sup>11</sup> See Qubo 24/7, <http://www.qubo.com/qubo247.asp> (last visited Aug. 23, 2007).

<sup>12</sup> See ABC Medianet, *The Replacements*, [http://www.abcmmedianet.com/web/showpage/showpage.aspx?program\\_id=002082&type=lead](http://www.abcmmedianet.com/web/showpage/showpage.aspx?program_id=002082&type=lead) (last visited Aug. 23, 2007).

<sup>13</sup> See CBS Entertainment Shows, *Daytime, 2007-2008 Children's Programming*, *About the*

- Local stations, including those unaffiliated with major networks, also offer quality children’s programming. For example:
  - A large number of stations, including WJAL, Channel 68 in Hagerstown, MD, airs “Teen Kids News,” with a target audience of kids between eleven and sixteen years of age. The mission of “Teen Kids News” is to produce a weekly news program that provides information and news to children in a manner that is not only educational but also entertaining. The show features teenagers reporting the news and interviewing other children.<sup>14</sup>
  - WMAR, Channel 2 in Baltimore, MD, airs the “Kinderman Show,” with a target audience of children seven to ten years old. The program is an interactive one in which the host introduces a different topic each week through graphical presentation, explanation and field trips in order to promote children’s intellectual and physical development, as well as educate viewers about the performing arts.<sup>15</sup>
  - A number of stations in North Carolina air “Smart Start Kids,” a locally-produced, award-winning children’s television program where preschoolers are the “stars” of the show. The children interact with show host “Willa” and travel to fun, educational places across the state of North Carolina to learn from hands-on activities and create their own memorable stories and music. Child viewers can also participate from home or a childcare center by calling the Smart Start toll-free phone number and sharing their own personal stories.<sup>16</sup>

Furthermore, broadcasters air a vast quantity of additional programming that, while perhaps not meeting the FCC’s definition of Core Programming, satisfies children’s educational

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(Continued . . .)

*Show*, [http://www.cbspressexpress.com/div.php/cbs\\_entertainment/original?id=1384&dpid=57](http://www.cbspressexpress.com/div.php/cbs_entertainment/original?id=1384&dpid=57).

<sup>14</sup> See Teen Kids News, <http://www.teenkidsnews.tv/> (last visited Aug. 23, 2007); Mike Lipton, *New Kids on the Block*, *People*, Dec. 13, 2004, at 159-160, available at [http://www.teenkidsnews.tv/tkn\\_people.pdf](http://www.teenkidsnews.tv/tkn_people.pdf).

<sup>15</sup> See The Kinderman Show, *Home*, <http://www.kinderman.us/home.html> (last visited Aug. 23, 2007); ABC2, *TV Listings*, <http://www.abc2news.com/entertainment/listings/default.aspx> (set time to 6:30 am and view Saturday listing) (last visited Aug. 23, 2007); FCC Form 398 for WMAR-TV, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for WMAR, 2007 Q2) (last visited Aug. 23, 2007).

<sup>16</sup> See Smart Start Kids, <http://www.smartstartkidstv.com/kids.htm> (last visited Aug. 23, 2007). The program is produced in cooperation with the North Carolina Partnership for Children and is a three-time nominee (and one-time winner) of a MidSouth Regional Emmy® Award. See *id.*

and informational needs. For example, seventy television stations throughout the country – ABC, NBC, CBS and FOX affiliates – air the Emmy® award-winning “Connect with Kids” series of half-hour specials, which feature real kids sharing their true stories about important topics, including issues such as teenage depression, risky teenage behavior, drug abuse, literacy, and school attendance.<sup>17</sup> “K.E.Y.S. Kids,” which airs on WMYD Channel 20 in Detroit, MI, is a locally-sponsored and -produced program designed to entertain and educate children and families about the importance of living a happy, healthy, drug-free life.<sup>18</sup> WPVI-TV in Philadelphia airs “Youth Perspective with Rick Williams,” which focuses on panel discussions of major issues affecting young people and features regular panelists from local high schools.<sup>19</sup> KXAS in Fort Worth, TX last year aired “Latin American Treasures,” a one hour special showcasing over 270 works of art from fourteen countries which reveals much of the Latin culture and heritage dating back to 1492 and encourages young people to explore their history and take pride in what Latin Americans have accomplished in the areas of music, dance, art and cuisine.<sup>20</sup> And KNTV in San Jose, CA, among other NBC stations, has previously aired the “Quills Literary Awards,” a special awards program designed to inspire energy and focus around

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<sup>17</sup> See Connect with Kids, *The Best Family-Oriented Content on Television*, <http://www.connectwithkids.com/programs/> (last visited Aug. 23, 2007); Connect with Kids, 2007-08 Connect with Kids *Half-Hour Specials*, [http://www.connectwithkids.com/content/aboutus/pdf/CWK\\_Half-HourSpecials.pdf](http://www.connectwithkids.com/content/aboutus/pdf/CWK_Half-HourSpecials.pdf).

<sup>18</sup> See K.E.Y.S. Kids, *K.E.Y.S. Kids TV Overview*, <http://www.keyskids.net/Keystv.html> (last visited Aug. 23, 2007).

<sup>19</sup> FCC Form 398 for WPVI-TV, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for WPVI, 2007 Q2) (last visited Aug. 23, 2007).

<sup>20</sup> FCC Form 398 for KXAS, 4th Quarter 2006, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for KXAS, 2006 Q4) (last visited Aug. 23, 2007).

the importance of reading, and will air the 2007 awards program on October 27.<sup>21</sup> Many stations also air news and weather specials that are aimed at children. KSEE in Fresno, CA, for example, recently produced an interactive weather special featuring a visit to a local classroom that had participated in an ongoing educational exchange with the station by KSEE on-air weather reporters.<sup>22</sup> Local television stations additionally include short segments targeted to children in their newscasts.

**II. PARENTS TODAY HAVE AT THEIR DISPOSAL A MULTITUDE OF ADDITIONAL CHOICES FOR PROGRAMMING AND PRODUCTS SPECIFICALLY DESIGNED TO MEET THE EDUCATIONAL AND INFORMATIONAL NEEDS OF CHILDREN.**

In addition to the substantial amount of children’s educational and informational programming aired by commercial broadcasters, today’s larger – and ever-expanding – multi-platform media marketplace provides a myriad of additional choices for parents and children. These programming options not only provide alternatives to the wide variety of commercial broadcast programs that serve child audiences, but also place considerable competitive pressure on commercial broadcasters to offer quality children’s programming themselves. And, as the variety of platforms capable of distributing content continues to expand, the programming and service choices that are available for children and parents will grow exponentially as well.

For example, noncommercial broadcast stations affiliated with the Public Broadcasting Service (“PBS”) provide a substantial amount of children’s programming. In fact, some PBS

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<sup>21</sup> NBC 11, *Stephen Colbert To Open Quill Awards*, <http://www.nbc11.com/thequills/13413369/detail.html> (last visited Aug. 23, 2007).

<sup>22</sup> FCC Form 398 for KSEE, 2nd Quarter 2007, <http://svartifoss2.fcc.gov/KidVid/public/report/10/query.faces> (query for KSEE, 2007 Q2) (last visited Aug. 23, 2007).

stations air children's fare for *eleven hours* each weekday.<sup>23</sup> Many also have begun to multicast children's programming on additional digital streams, providing still more choices for educational and informational programming.<sup>24</sup> And, in the many markets where viewers have access to more than one PBS station, there may be multiple showings of PBS children's programs at various times throughout the day.<sup>25</sup>

On top of commercial and noncommercial broadcast offerings, there are now many more children's programming networks offering educational content carried by cable, DBS and other multichannel video programming distributors ("MVPDs") than ever before in history. These

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<sup>23</sup> See, e.g., WETA, WETA TV 26 Schedule, [http://www.weta.org/tv/whatson/index.php?station=WETA&time=All+Day&fromtime=true&sd ate=&cal\\_month=08&cal\\_year=2007](http://www.weta.org/tv/whatson/index.php?station=WETA&time=All+Day&fromtime=true&sd ate=&cal_month=08&cal_year=2007) (last visited Aug. 23, 2007). In August of 2007, for example, Washington, DC's WETA Channel 26 aired children's shows beginning at 7:00 am, with "Between the Lions" (an award-winning series designed to foster the literacy skills of four- to seven-year olds, see About the Program, <http://pbskids.org/lions/parentsteachers/program/summary.html> (last visited Aug. 23, 2007)), and ending at 6:00 pm, with "Arthur" (another award-winning series that is designed to encourage four- to eight-year olds to develop an interest in reading and writing, and to encourage positive social skills, see About the Program, [http://pbskids.org/arthur/parentsteachers/program/prog\\_summary.html](http://pbskids.org/arthur/parentsteachers/program/prog_summary.html) (last visited Aug. 23, 2007)).

<sup>24</sup> See WETA, WETA Family Schedule, [http://www.weta.org/tv/whatson/index.php?station=FAMILY&time=All+Day&fromtime=&sd ate=&cal\\_month=08&cal\\_year=2007](http://www.weta.org/tv/whatson/index.php?station=FAMILY&time=All+Day&fromtime=&sd ate=&cal_month=08&cal_year=2007) (listing additional children's shows on WETA's "Family" programming stream (channel 26.3) from 6:00 am to 7:30 am and 12:00 pm to 1:30 pm) (last visited Aug. 23, 2007); Maryland Public Television, Program Schedule, <http://www.mpt.org/schedule/> (set channel to MPT Select, MPT V-me, and MPT HD) (last visited Aug. 23, 2007) (listing numerous children's shows on the programming lineups of three Maryland Public Television ("MPT") digital and high-definition program streams, including Spanish-language children's programs from the new V-me network).

<sup>25</sup> In Washington, DC, for example, many viewers have access to both WETA and MPT stations, including WMPB, WMPT, WFPT, WWPB, WCPB, and WGPT. WETA airs "Sesame Street" at 10:00 am, while MPT stations air it at 9:00. See [http://www.weta.org/tv/whatson/index.php?station=WETA&time=All+Day&fromtime=true&sd ate=&cal\\_month=08&cal\\_year=2007](http://www.weta.org/tv/whatson/index.php?station=WETA&time=All+Day&fromtime=true&sd ate=&cal_month=08&cal_year=2007) (last visited Aug. 23, 2007); <http://www.mpt.org/schedule/home.cfm?thisday=2007-8-23&channelselected=mptv> (last visited Aug. 23, 2007).

include: Discovery Kids (which airs a daily, commercial-free, award-winning “Ready Set Learn!” preschool programming block);<sup>26</sup> Noggin (a commercial-free educational channel dedicated to preschoolers that airs 12 hours a day, 7 days a week);<sup>27</sup> Nickelodeon (which airs children’s educational shows such as “Blue’s Clues,” “Dora the Explorer,” “Go Diego, Go!,” and the new series “Yo Gabba Gabba,” a fun live-action program for young children that is designed to teach simple life lessons and get parents and children up off the floor to dance and sing along);<sup>28</sup> The Disney Channel (with its morning “Playhouse Disney” block designed to teach preschoolers a variety of skills);<sup>29</sup> and PBS KIDS Sprout (a partnership between Comcast Corporation, HIT Entertainment, PBS, and Sesame Workshop that provides programming for two- to five-year olds).<sup>30</sup> In addition, the ¡Sorpresa! network, America’s first Hispanic children’s television network, is now widely available on cable, DBS, and other platforms.<sup>31</sup> On top of these networks that air scheduled children’s programming, there is also an abundance of children’s programming that is now available on an on-demand basis from cable and DBS

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<sup>26</sup> Discovery Kids, <http://kids.discovery.com/> (last visited Aug. 23, 2007); Disney Communications, <http://corporate.discovery.com/brands/discoverykids.html> (last visited Aug. 23, 2007).

<sup>27</sup> Noggin, <http://www.noggin.com/> (last visited Aug. 23, 2007).

<sup>28</sup> Nick, <http://www.nick.com/> (last visited Aug. 23, 2007); <http://www.nickjr.com/shows/yo-gabba-gabba/yo-ga-about-the-show/yo-ga-about-the-show.jhtml> (last visited Aug. 23, 2007).

<sup>29</sup> Disney Channel, <http://home.disney.go.com/tv/index> (last visited Aug. 23, 2007); Disney, *Guide for Grown-Ups*, [http://tv.disney.go.com/playhouse/grown-ups/phd\\_about.html](http://tv.disney.go.com/playhouse/grown-ups/phd_about.html) (last visited Aug. 23, 2007).

<sup>30</sup> PBS Kids Sprout, <http://www.sproutonline.com/sprout/Info/About.aspx> (last visited Aug. 23, 2007).

<sup>31</sup> Firestone Communications, <http://www.sorpresatv.com/goout.asp?u=http://www.firestoneinc.com> (last visited Aug. 23, 2007).

operators.<sup>32</sup> As the FCC has found, almost 86% of the nation's television households subscribe to an MVPD, meaning that these programming sources are widely available.<sup>33</sup>

On top of the choices available through MVPDs, the 81.2% of American households with DVD players and the 79.2% of American households with VCRs<sup>34</sup> have access to still more and, indeed, almost *unlimited*, options for children's educational and informational programming.<sup>35</sup>

At the end of 2005, 95% of households with children under 13 had at least one DVD player, and many children even have DVD players in their rooms.<sup>36</sup> In addition, the Internet, widely available not only through residential Internet access subscriptions<sup>37</sup> but also in public libraries,

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<sup>32</sup> See, e.g., Kids On Demand Preschool, [http://www.timewarnercable.com/CentralNY/Programming/ondemand/KOD\\_Preschool.html](http://www.timewarnercable.com/CentralNY/Programming/ondemand/KOD_Preschool.html) (last visited Aug. 23, 2007) (indicating that programming from PBS KIDS Sprout, Noggin, and BBC Kids is available on demand on Time Warner); Optimum, *Free On Demand*, [http://www.optimum.com/io/on\\_demand/free/free.jsp](http://www.optimum.com/io/on_demand/free/free.jsp) (last visited Aug. 23, 2007) (indicating that children's programming from Nickelodeon and PBS is available on demand on Cablevision systems); *Comcast ON DEMAND Tops Three Billion Views*, Comcast, Sept. 6, 2006, <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=902620> (indicating that Comcast's On Demand programming includes programs from PBS KIDS Sprout, Nickelodeon, Cartoon Network, Boomerang, Noggin and Discovery Kids).

<sup>33</sup> *Annual Assessment of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506 (¶ 8) (2006) ("*Twelfth Annual MVPD Competition Report*").

<sup>34</sup> See *Nielsen Study Shows DVD Players Surpass VCRs*, Nielsen Media Research, Dec. 19, 2006, available at <http://www.nielsenmedia.com>. The FCC has reported that, as of 2004, 90% of U.S. television households had at least one VCR and nearly 75% had at least one DVD player, and that household penetration of DVD players was predicted to reach 80% by the end of 2005. *Twelfth Annual MVPD Competition Report*, 21 FCC Rcd at 2569 (¶ 141).

<sup>35</sup> A search on Amazon.com for DVDs in the "Kids & Family" category, for example, yielded 20,514 results.

<sup>36</sup> *Holiday Gift Ideas*, ICR, Nov. 17, 2005, [http://www.icrsurvey.com/Study.aspx?f=DEG\\_Holiday\\_Gift\\_Ideas\\_1105.html](http://www.icrsurvey.com/Study.aspx?f=DEG_Holiday_Gift_Ideas_1105.html).

<sup>37</sup> The FCC has reported that, as of June 2005, there were 70.3 million residential Internet access subscribers. See *Twelfth Annual MVPD Competition Report*, 21 FCC Rcd at 2509 (¶ 18). The Pew Institute found that, as of April 2006, 73% of Americans have Internet access. See *Internet Penetration & Impact*, Pew Internet & American Life Project, Apr. 2006,

offers still more choices for programming and other children's content. For example, the increasing popularity of MP3 players has spawned a wide variety of podcasts for children.<sup>38</sup> And, of course, there are thousands more websites devoted to educating and informing the nation's youth in other ways, through interactive lessons, games, and downloadable tools for parents, teachers, and children.<sup>39</sup>

The fact that all of these varied sources of educational and informational programming and products exist *over and above* the substantial amount of such programming that is available on free, over-the-air television demonstrates without doubt that the needs of child audiences are being met in today's multimedia marketplace. And of course the amount of children's programming on broadcast television is increasing because digital broadcasters offering multicast programming streams must air additional core programming. It is also important to

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[http://www.pewinternet.org/pdfs/PIP\\_Internet\\_Impact.pdf](http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf). According to Arbitron/Edison Media Research, 81% of Americans ages twelve and older are now online, and 71% have the Internet at home. Bill Rose and Joe Lenski, *Internet and Multimedia 2006: On-Demand Media Explodes*, Arbitron/Edison Media Research at 10 (2006).

<sup>38</sup> Such podcasts include "Classic Fairy Tales," [www.alphadvd.com/ClassicFairyTales.htm](http://www.alphadvd.com/ClassicFairyTales.htm) (last visited Aug. 23, 2007); the "Children's Story Podcast," [www.storynory.com](http://www.storynory.com) (last visited Aug. 23, 2007); and "My Baby Monsters," <http://mybabymonsters.com/stories/archive/podcasts/> (last visited Aug. 23, 2007), to name but a few.

<sup>39</sup> See, e.g., Ask Dr. Math, <http://mathforum.com/dr.math> (last visited Aug. 23, 2007); Math Playground, [www.mathplayground.com](http://www.mathplayground.com) (last visited Aug. 23, 2007); iKnowThat.com, [www.iknowthat.com](http://www.iknowthat.com) (last visited Aug. 23, 2007); Kinder Printables, [www.kinderprintables.com](http://www.kinderprintables.com) (last visited Aug. 23, 2007); Kinder Helper, [www.kinderhelper.com](http://www.kinderhelper.com) (last visited Aug. 23, 2007); Gamequarium.com, [www.gamequarium.com](http://www.gamequarium.com) (last visited Aug. 23, 2007); HowStuffWorks, [www.howstuffworks.com](http://www.howstuffworks.com) (last visited Aug. 23, 2007); Starfall.com, [www.starfall.com](http://www.starfall.com) (last visited Aug. 23, 2007); Math Cats, [www.mathcats.com](http://www.mathcats.com) (last visited Aug. 23, 2007). Numerous federal and state government agencies also have websites devoted to children. See, e.g., NASA Quest, <http://quest.arc.nasa.gov> (last visited Aug. 23, 2007); NASA, Space Place, <http://spaceplace.jpl.nasa.gov/en/kids/> (last visited Aug. 23, 2007); Kids.gov, The Official Kid's Portal for the U.S. Government, [www.kids.gov](http://www.kids.gov) (last visited Aug. 23, 2007); Kids' Capital, [http://kids.dc.gov/kids\\_main\\_content.html](http://kids.dc.gov/kids_main_content.html) (last visited Aug. 23, 2007); Maryland Kids Page, <http://www.mdkidspage.org/> (last visited Aug. 23, 2007).

bear in mind that media and technology make up only a small part of the mix of elements – including school, family life, entertainment, and play – that vie for the attention of, and contribute to the educational and social development of, today’s youth. Broadcasters, for their part, are continuing to serve child audiences by offering a wide variety of choices in commercial television programming.

**III. THE COMMISSION SHOULD ADHERE TO ITS LONG-STANDING PRACTICE OF RELYING ON BROADCASTERS’ GOOD FAITH JUDGMENTS REGARDING WHETHER PROGRAMS SERVE THE EDUCATIONAL AND INFORMATIONAL NEEDS OF CHILDREN.**

The Commission has long relied on broadcasters’ “good faith judgments” regarding whether particular programming serves the educational and informational needs of children.<sup>40</sup> This approach has served the Commission, broadcast stations, and the viewing public remarkably well, as broadcasters, who take seriously their special historical role of service to their local communities, have provided and today continue to provide quality educational and informational programming for children. In light of this strong record of service, as well as the numerous other sources of children’s programming available in the modern video marketplace, NAB respectfully submits that the Commission should adhere to its long-standing practice of reliance on the good faith judgment of broadcasters. Moreover, principles underlying the Administrative Procedure Act and, more importantly, the First Amendment, counsel strongly in favor of such adherence.

As a matter of administrative law, it is elementary that regulatory intervention is inappropriate in the absence of a record establishing the existence of a problem, for “a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.”<sup>41</sup> Furthermore, when the Commission first decided to limit its

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<sup>40</sup> 47 C.F.R. § 73.671, Note 1.

<sup>41</sup> *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted); *see ALLTEL Corp. v. FCC*,

direct scrutiny of the content of children’s programming, it appropriately recognized that the First Amendment dictates a restrained approach.<sup>42</sup> Indeed, the Commission’s authority to adopt rules significantly implicating program content – as an increase in governmental oversight regarding whether particular programs meet children’s educational and informational needs would undoubtedly do – is extremely limited.<sup>43</sup> For a content-based restriction on broadcast speech to pass constitutional muster, it must be “narrowly tailored to further a substantial governmental interest.”<sup>44</sup>

NAB agrees that the government’s interest in ensuring that the needs of child audiences are met may well qualify as a “substantial” one in the abstract. However, the Supreme Court has clearly held that the FCC does not have the power to require broadcasters to air particular program content, stating that:

[T]he FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.<sup>45</sup>

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838 F.2d 551, 560 (D.C. Cir. 1988) (finding that FCC failed to justify adoption of a rule because there was “no showing that [the] abuse” to which the rule was directed actually existed and “no showing that the rule target[ed] companies engaged in [the] abuse”).

<sup>42</sup> *1996 Children’s Television Report & Order*, 11 FCC Rcd at 10663 (¶ 7) (referencing the need to ensure that the children’s programming rules are “appropriately tailored to provide flexibility for broadcasters” in order for them to pass constitutional muster); *1995 Children’s Television NPRM*, 10 FCC Rcd at 6341 (¶ 66) (recognizing that the Commission, in adopting requirements related to broadcast content, must carefully “consider any limitations imposed by the First Amendment of the Constitution”).

<sup>43</sup> *E.g., Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 802-03 (D.C. Cir. 2002).

<sup>44</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

<sup>45</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (internal citation omitted).

In light of the evidence that broadcasters are providing a wide array of high-quality, diverse programming that meets the educational and informational needs of children, there is simply no basis or need for the Commission to increase its oversight of programming content.<sup>46</sup> And, the large, and ever-increasing, amount of additional media and other sources of programming and products that are available to meet those needs only serve to lessen any possible justification for intruding on broadcasters' good faith judgments, from both an administrative law and a First Amendment perspective.<sup>47</sup>

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<sup>46</sup> See *supra* Section I. Recent Commission action in connection with Univision's request for a transfer of control does not provide substantive precedent as to the definition of Core Programming. See *Shareholders of Univision Commc'ns Inc. (Transferor) & Broad. Media Partners, Inc. (Transferee), for Transfer of Control of Univision Commc'ns Inc., & Certain Subsidiaries*, Mem. Op. & Order, 22 FCC Rcd 5842 (2007). Univision did not admit to any rule violation, and the Commission did not purport to adjudicate whether violations in fact had occurred. Under these circumstances, the consent decree cannot be used as evidence of noncompliance. It has long been clear that "consent decrees constitute proof of no fact, nor any admission." *Applications of Gross Telecasting Inc., For Renewal of Licenses*, 51 FCC 2d 313 (¶ 4) (1975) (quoting *Cowles Fla. Broad., Inc.*, 32 FCC 2d 436, 449 (¶ 30) (1971)); see also *Policy Regarding Character Qualifications in Broad. Licensing*, 6 FCC Rcd 3448 (¶ 6) (1991) ("[w]here . . . litigation has ended in a settlement agreement, consent decree, or acquittal and there is no admission or finding of unlawful misconduct, we believe it is generally inappropriate for us to reach legal conclusions on the basis of any stipulated facts"). Case law further makes clear that consent decrees such as Univision's can have no legal or precedential value with respect to other broadcasters. See, e.g., *Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995); *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 312 (7th Cir. 1976).

<sup>47</sup> Furthermore, to the extent that the Commission *does* believe there is a problem regarding broadcasters' compliance with the children's programming rules sufficient to justify increased oversight, it would be required to provide broadcasters with clear notice regarding the substance of the alleged problem, by explaining *why* the Commission thinks that certain programs do *not* serve children's educational and informational needs. As the D.C. Circuit has instructed, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (citing *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). When, as here, First Amendment rights are implicated, even greater specificity is required. See, e.g., *Smith v. Gogven*, 415 U.S. 566, 573 (1974); see also *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (a regulation of speech is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or if it "authorizes or even encourages arbitrary and discriminatory enforcement").

The Commission's original and wise decision to credit broadcasters' judgments as to the nature of specific programming in terms of its educational and informational value for children has worked well in practice, to the benefit of viewers, and at the same time has honored these important legal principles.

#### **IV. CONCLUSION**

Educating and informing the nation's children is a laudable goal, and is a goal that NAB shares with the Commission. It is clear that commercial broadcasters are doing much to meet the needs of children, and that there are an overwhelming number of additional resources available today – via alternative programming sources, DVDs and videos, the Internet, and many others – for parents and children. In light of this vast array of options, there is no need for the Commission to intrude further into the judgments made by television broadcasters about the content of children's programming, and, indeed, the First Amendment strongly counsels otherwise.

Respectfully submitted,

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