CHANGES IN THE CHILDREN'S TELEVISION MARKETPLACE, THE CHILDREN'S TELEVISION ACT, AND THE FIRST AMENDMENT♦

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ABSTRACT

Since the passage of the Children's Television Act of 1990, broadcast television stations have been required to provide educational programming for children as a condition for license renewal. Since 1996, broadcasters can fulfill this obligation by providing three hours of such programming according to the Federal Communications Commission's (FCC) guidelines. These requirements were later extended to broadcasters' multicast channels. With more children's programming available today than ever before from a wide variety of sources, and with changes in the ways children consume programming, the FCC has proposed to revise its rules to reflect these changes. This Article considers the constitutionality of existing and proposed modifications of the children's programming requirements. Due to the relaxed level of First Amendment scrutiny applied to regulations of broadcast speech, many of the requirements would likely survive constitutional challenge. Others, though, may need to be changed or better justified.

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INTRODUCTION

Since the passage of the Children's Television Act of 1990 (CTA),[1] broadcast television stations have been required to serve the educational and informational needs of the child audience in order to renew their station licenses.[2] In 1996, the Federal Communications Commission (FCC or the "Commission") passed regulations that provided broadcasters with the option of airing three hours per week of "core programming" as a way to fulfill their obligations under the act and have their licenses renewed.[3] The core programming must satisfy a number of requirements: it must be specifically designed to serve the educational or informational needs of children, be regularly scheduled to air weekly, be at least a half hour in length, and be broadcast between the hours of 7 a.m. and 10 p.m.[4] The FCC extended these requirements in 2004 to also apply to any free multicast channels provided by broadcasters.[5]

Significant changes have occurred in the children's television marketplace since the Act and its core programming requirements were enacted. There are significantly more children's programming options available today than in the 1990s, and more sources of such programming than there were in the 1990s.[6] In addition, viewing behaviors have changed, as children are increasingly likely to access programming on devices other than a television set and to watch programming on demand, rather than at a set day and time each week.[7] These factors have led the FCC to consider whether changes to its rules are warranted. Consequently, in 2018, the FCC began a rulemaking proceeding to consider whether it should modify its children's television

[1] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000 (codified as amended at 47 U.S.C. §§ 303a, 303b, 394 (2010)).
[2] 47 U.S.C. § 303b(a)(2)(2010).
[3] In re Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd. 10660, ¶ 5 (1996) [hereinafter 1996 Report and Order].
[4] *Id.* ¶ 4. While broadcast stations are required by the Act to serve children's educational and informational needs, they need not necessarily air three hours of core programming to fulfill their obligation. FCC rules also provide broadcasters the discretion to fulfill their obligation in other ways. *Id.* ¶ 120.
[5] *See* In re Children's Television Obligations of Digital Television Broadcasters, 04 FCC Rcd. 221, ¶ 2 (2004) [hereinafter 2004 Report and Order]. Multicasting allows digital broadcasters to provide multiple channels of programming in addition to their primary channel of programming. *See, e.g.*, *What Is Digital Multicasting?*, NOCABLE, https://nocable.org/learn/what-is-digital-multicasting (last visited Mar. 13, 2019).
[6] *See infra* notes 72–74 and accompanying text.
[7] *See, infra* notes 75–78 and accompanying text.

requirements in light of these changes in the children's television marketplace.[8]

Many have suggested that the Children's Television Act and its core programming requirements, by mandating that broadcasters provide a certain type of speech, violate the First Amendment rights of television broadcasters.[9] An earlier version of the Act was vetoed by President Ronald Reagan, who believed it violated the First Amendment.[10] The U.S. Department of Justice, at the time the Act was being considered by Congress, also took the position that the Act was unconstitutional.[11] Once Congress passed the Act, President George H.W. Bush indicated that he viewed it as violating the First Amendment, although he did allow it to become law.[12] Some FCC commissioners expressed First Amendment concerns over the institution of the core programming requirements in 1996.[13] More recently, in 2018, FCC Commissioner Michael O'Reilly suggested that the rules might be unconstitutional.[14] Further, a number of scholars have questioned the constitutionality of the Act and the core programming requirements.[15]

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[8] Children's Television Programming Rules, Modernization of Media Regulation Initiative, 83 Fed. Reg. 143 (proposed July 25, 2018) (to be codified at 47 C.F.R. §73), ¶¶ 16-18 (2018) [hereinafter 2018 NPRM].

[9] *See, e.g., infra* notes 10–15 and accompanying text.

[10] *See, e.g.,* Ronald Reagan, *Memorandum of Disapproval on a Bill Concerning Children's Television*, REAGAN LIBR. (Nov. 5, 1988), https://www.reaganlibrary.gov/research/speeches/110588e.

[11] *See* S. REP. NO. 101-66, at 11 (1989). These doubts were largely based on the Department's view that the scarcity rationale, which allows greater regulation of speech in the broadcast media than in other forms of media, was no longer valid in view of the growth of media sources and options in the years leading up to the CTA's passage. *Id*. For a discussion of the scarcity rationale, see *infra* notes 99–105 and accompanying text.

[12] *See Congress Restricts Ads During Kids' TV*, CQ ALMANAC (1990), https://library.cqpress.com/cqalmanac/document.php?id=cqal90-1112827.

[13] Brittney Pescatore, *Time to Change the Channel: Assessing the FCC's Children's Programming Requirements under the First Amendment*, 33 COLUM. J.L. & ARTS 81, 100 (2009) (citing Quello comment in 1996 Report and Order, *supra* note 3, at 10765 (acknowledging he was "concerned with establishing a precedent for future First Amendment incursions")); *id*. at 10778 (citing Chong comment disfavoring quantification of the children's programming requirement because it "may set an uncomfortable precedent contrary to the principles of the First Amendment").

[14] John Eggerton, *FCC's O'Rielly Warns KidVid Opponents That Rules Could Go Away*, VARIETY (Oct. 25, 2018), https://www.broadcastingcable.com/news/fccs-orielly-warns-kidvid-opponents-that-rules-could-go-away (quoting O'Rielly who stated that "many legal scholars have argued that the rules and perhaps even the underlying statute [the Children's Television Act of 1996] are content-based restrictions not narrowly tailored to further a compelling government interest and therefore run afoul of the First Amendment").

[15] Brittney Pescatore observes,

> The children's programming requirements clearly implicate serious First Amendment issues. They produce content-based compelled speech that burdens the rights of both viewers and broadcasters. Thus, to be upheld, they must pass strict scrutiny-i.e., they must serve a compelling government interest and be narrowly tailored such that there are no less restrictive means.

This Article examines the constitutionality of broadcasters' children's television obligations. In doing so, it provides a brief overview of the history of children's television regulation.[16] Next, this Article observes that the rules are a content-based restriction of broadcasters' speech, which typically requires the rules to withstand strict scrutiny to be found constitutional. However, the children's television requirements apply to speech in the broadcast medium, where, due to the scarcity of broadcast licenses, restrictions on speech are subject to a less stringent standard of review—intermediate scrutiny.[17] This Article then examines whether changes in the children's television marketplace affect the analysis of the requirements' constitutionality. The same is considered for the FCC's proposed changes to the rules. The Article concludes that the three-hour core programming requirement would likely withstand a constitutional challenge, but that the FCC may still need to modify other core programming requirements and its multicasting requirement to reflect changes in the children's television marketplace and help ensure that the requirements actually promote their intended objective.

I. THE CHILDREN'S TELEVISION ACT OF 1990

As early as 1960, the FCC made it clear the importance of broadcasters serving the needs of child audiences in order "to fulfill their community public interest responsibilities."[18] The Commission took this further in 1974 by "specifically recogniz[ing] that broadcasters

Pescatore, *supra* note 13, at 103. Pescatore concludes that "the strength of the interest and the flexibility of the children's programming rules may allow them to survive even full scrutiny, but also suggests that more empirical evidence of the need for such requirements might be necessary." *Id*. at 84. Lili Levi argues that the FCC's children's television rules

> would likely pass First Amendment scrutiny. Although it is an important cliché of modern free speech doctrine that the government cannot constitutionally compel speech, broadcast regulation traditionally has been permitted more than the usual constitutional leeway, children have received special protection, and the children's educational television rules have been (and can be) structured to avoid formal compulsion.

Lili Levi, *A "Pay or Play" Experiment to Improve Children's Educational Television*, 62 FED. COMM. L.J. 275, 278 (2010) (internal citations omitted). James Popham, however, observes that "[e]ven assuming the validity of [the scarcity rationale], a serious constitutional attack could be mounted against the [core programming] rules." James J. Popham, *Passion, Politics and the Public Interest: The Perilous Path to a Quantitative Standard in the Regulation of Children's Television Programming*, 5 COMMLAW CONSPECTUS 1, 26 (1997).

[16] For a more detailed history of the regulation of children's television programming, see 1996 Report and Order, *supra* note 3, ¶¶ 14–24; 2018 NPRM, *supra* note 8, ¶¶ 3-14; Popham, *supra* note 15.

[17] While there are good reasons to question the continuing validity of the scarcity rationale for broadcast regulation, it can only be overruled and eliminated by the U.S. Supreme Court. The Court, to date, has repeatedly been disinclined to do so. *See infra* notes 106–111 and accompanying text.

[18] 1996 Report and Order, *supra* note 3, ¶ 14 (citing Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960)).

have an obligation to provide children's educational programming."[19] These statements, however, were not sufficient to ensure an adequate amount of educational children's television programming. In 1979, an FCC Children's Television Task Force concluded that "market forces failed to work to ensure that television programming was responsive to the needs and interests of children . . . ."[20]

As the FCC later explained it, this conclusion was based on the "marketplace constraints" which not only work to limit the provision of children's programming generally by broadcasters, but also limited educational and informational children's programming in particular.[21] Since commercial television stations earn their money selling advertising time, the size and demographic composition of their audiences directly affect their revenues.[22] The adult audience is much larger than the children's audience, meaning the potential advertising revenues from adult audiences is larger, which "provid[e] broadcasters with an incentive to focus on adult programming rather than children's educational television programming."[23] The "reduced economic incentive" to offer children's programming is further reduced in educational programming for children, as that "programming generally must be targeted at segments of the child audience. . . . An educational program for children aged 2-5 . . . . may well be of little interest to children aged 6-11 or children aged 12-17."[24] On the other hand, entertainment programs for children are "more likely to appeal to a broader range of children."[25] As such, "within the category of children's programming, broadcasters have an economic incentive to select entertainment programs that appeal to a broader range of children rather than educational programs that appeal to a narrower group."[26] These market forces and economic incentives "tend to lead to an underprovision of children's educational and informational television programming."[27] This led the 1979 Children's Television Task Force to recommend a series of options to correct for this disincentive ranging from simply relying on noncommercial television for children's programming to adopting mandatory requirements.[28] However, no

[19] *Id.* ¶ 14 (citing and quoting Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 5 (1974)).
[20] S. REP. NO. 101-66, at 3 (1989) (citing Susan Greene et al., *The Television Programming for Children: A Report of the Children's Television Task Force*, Vol. 1, 29-35, 41-44, 76 (Oct. 1979)).
[21] 1996 Report and Order, *supra* note 3, ¶ 30.
[22] *Id.*
[23] *Id.* ¶ 31.
[24] *Id.* (internal citation omitted).
[25] *Id.* (internal citation omitted).
[26] *Id.*
[27] *Id.* ¶ 34.
[28] S. REP. NO. 101-66, at 3 (1989).

action was taken on these recommendations.

The Commission changed course in a 1984 Report and Order, concluding that "television was adequately serving the needs of children, and that any greater regulation would overburden the broadcast industry, possibly *reducing* the quality of programming available for children."[29] Accordingly, the Commission declined to impose any specific children's programming requirements on broadcasters,[30] believing that market forces could be relied upon to "cause licensees to meet the needs of the public, including children's educational programming."[31] Market forces, however, did not seem to lead to the provision of a significant amount of educational children's television programming, as the amount of educational programming provided by broadcasters "dropped 'from more than 11 hours per week in 1980 to . . . . fewer than two hours per week in 1990.'"[32] The FCC's reluctance to act in the area of children's educational programming led Congress to take up the issue,[33] with Congress concluding that "market forces were not sufficient to ensure that commercial stations would provide children's educational and information programming."[34]

This was a particular problem for Congress because, as a Senate Report observed, by the age of eighteen, most children will have spent more time watching television than in school.[35] Further, Congress found that television programming could be "an efficient and effective way to reach and educate children in both the home and in school."[36] Pointing to educational programs such as *Mr. Rogers' Neighborhood* and *Sesame Street*, the Senate Report observed that "studies on the impact of television programs designed to teach children specific skills conclude that these programs are effective."[37] The Senate Report also found that children would watch educational programming without being forced to do so, pointing to evidence that "in the 1980s children from all socioeconomic groups watch[ed] educational programming somewhere

[29] Diane Aden Hayes, Notes and Comment, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L.J. 293, 299 (1994) (citing Children's TV Programming and Advertising Practices, 96 F.C.C.2d 634 ¶¶ 32, 35 (1984) (outlining the FCC's decision against regulating children's television in the 1980s)).

[30] S. REP. NO. 101-66, at 4 (1989). This was consistent with the deregulatory bent of the FCC in the 1980s, under which many FCC programming content requirements were eliminated. *See* Scott R. Conley, *The Children's Television Act: Reasons & Practice*, 61 SYRACUSE L. REV. 49, 51 (2010).

[31] Conley, *supra* note 30, at 51.

[32] S. REP. NO. 101-66, at 3 (1989).

[33] *Id.* at 5.

[34] 1996 Report and Order, *supra* note 3, ¶ 29.

[35] S. REP. NO. 101-66, at 1 (1989).

[36] *Id.* at 2. (citing THE NATIONAL ENDOWMENT FOR CHILDREN'S EDUCATIONAL TELEVISION ACT OF 1989, S. REP. NO. 100-66 (1989) [hereinafter Endowment Report]).

[37] *Id.* at 2 (citing Aletha C. Huston, Bruce A. Watkins, and Dale Kunkel, *Public Policy and Children's Television*, AM. PSYCHOLOGIST (Feb. 1989)).

in the neighborhood of three to four hours a week."[38] While public television provided a significant amount of educational children's television, there was "disturbingly little educational or informational programming on commercial television."[39] This led Congress to enact the CTA[40] as a way "to increase the amount of educational and informational broadcast television programming available to children . . . ."[41] The Act directed the FCC, "in its review of any application for renewal of a commercial or noncommercial television broadcast license, [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."[42] Notably, however, the Act did not specify any amount of such programming be provided by broadcasters.[43]

II. THE FCC'S CHILDREN'S TELEVISION RULES

Adopting rules to implement the CTA in 1991, the FCC "defined 'educational and informational programming' as 'any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs.'"[44] The FCC required

[38] *Id.* (citing Endowment Report, *supra* note 36, at 6).

[39] *Id.* at 7.

[40] Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a–b, 393a, 394 (1990).

[41] S. REP. NO. 101-66, at 1. Another purpose of the Act was "to protect children from overcommercialization of programming," which was achieved by the Act's establishing "limits on the amount of time that can be devoted to commercials during a children's television program." *Id.* at 1. The Act also directed the FCC to act on program length commercials directed to children. *Id.* at 1. This Article, however, focuses on the Act's efforts "to increase the amount of educational and informational broadcast television programming available to children;" thus, the provisions of the Act aimed at protecting children from overcommercialization of television programming are not discussed in any detail. For a discussion of those provisions and their constitutional implications, see Conley, *supra* note 30.

[42] 47 U.S.C. § 303b(a) (2019). The Act also specified that

> [i]n addition to consideration of the licensee's programming as required under subsection (a), the Commission may consider- (1) any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children; and (2) any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children.

Id. § 303b(b). These provisions have seldom been used by broadcasters. *See, e.g.*, Statement of Commissioner Michael O'Reilly, *2018 NPRM*, *supra* note 8, at 40. Thus, these provisions are given little consideration here.

[43] *See, e.g.*, S. REP. NO. 101-66, at 23 (1989) ("The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to have its license renewed pursuant to this section or any section of this legislation.").

[44] 2018 NPRM, *supra* note 8, ¶ 4 (citing Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd. 2111, ¶¶ 15, 21 (1991)).

that TV stations air "some amount" of this programming,[45] but declined at that time "to adopt specific requirements as to the number of hours of educational and informational programming that commercial stations must broadcast or the time of day during which such programming must be aired."[46] In 1996, however, the FCC determined that this approach had not been effective in increasing "the amount of educational and informational broadcast television programming available to children,"[47] as some broadcasters were offering very little of this programming.[48] Furthermore, some broadcasters were claiming to fulfill their children's programming obligations "with shows that, by any reasonable benchmark, cannot be said to be 'specifically designed' to educate and inform childrenFalse"[49] For example, stations were claiming that programs like *Hard Copy*, *G.I. Joe*, *Chip 'n Dale Rescue Rangers*, *Super Mario Brothers*, *Leave It to Beaver*, and even *Santa Claus Is Coming to Town* were educational for children.[50]

This failed approach led the Commission to provide broadcasters with specific guidance to the programming that would fulfill their obligations under the Act. This programming, labeled "core" programming," has a number of requirements. First, it must be "'specifically designed' to educate and inform children,"[51] with "serving the educational and informational needs of children ages 16 and under as a significant purpose."[52] Further, this core programming must be regularly scheduled, at least thirty minutes in length, and air weekly between 7 a.m. and 10 p.m.[53] Broadcasters that complied with these requirements could file their renewal applications under a processing guideline labeled "Category A."[54] Under Category A, broadcasters merely need to certify that they have fulfilled these requirements in order to "receive staff-level approval of the CTA portion of their renewal applications . . . ."[55]

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45 1996 Report and Order, *supra* note 3, ¶ 26 (citing 8 FCC Rcd. 1841 at 1842 (1993)).

46 2018 NPRM, *supra* note 8, ¶ 4.

47 1996 Report and Order, *supra* note 3, ¶ 2 (quoting S. REP. NO. 227, 101st Cong.,1st Sess. 5-9 (1989)).

48 *Id.*

49 *Id.*

50 *See, e.g.*, Hayes, *supra* note 29, at 306–08; John J. O'Connor, *Review/Television; For Young Audiences, Reality in the Afternoon*, N.Y. TIMES (March 8, 1993), https://www.nytimes.com/1993/03/08/news/review-television-for-young-audiences-reality-in-the-afternoon.html.

51 1996 Report and Order, *supra* note 3, ¶3.

52 2018 NPRM, *supra* note 8, at ¶ 27 (citing 1996 Report and Order, *supra* note 3, ¶¶ 81–113).

53 1996 Report and Order, *supra* note 3, ¶ 4 (stating that core programs "must also be identified as educational and informational for children when . . . aired and must be listed in the children's programming report placed in the broadcaster's public inspection file.").

54 *Id.* ¶¶ 131–32.

55 *Id.* ¶ 5. There are also guidelines regarding preemption of core programming. *See, e.g.*, 2018 NPRM, *supra* note 8, ¶¶ 11, 57.

The FCC addressed the fact that, in instituting the processing guideline, it was departing from its 1991 decision not to require broadcasters to air a certain amount of educational and informational children's programming. The FCC also noted that although there was nothing in the statute that required a quantitative standard, there was nothing to forbid the imposition of one either.[56] The FCC believed that the processing guidelines would "remedy the shortcomings of [its] initial rules and thereby provide the appropriate counterweight to the market forces identified by Congress that tend to discourage broadcasters from airing children's educational and informational programming."[57]

It is important to note that broadcasters are not *required* to air three hours of core programming per week; however, those that do simply have the certainty that the CTA portion of their license renewal would be routinely approved. Broadcasters also have the option of fulfilling their obligations by showing that they have "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."[58] Programming such as specials, public service announcements (PSAs), and short or non-weekly programs could be used to establish this.[59] Known as the "Category B" processing guideline,[60] broadcasters which choose this option can also receive staff-level approval of their license renewal applications.

Broadcasters that do not satisfy either the guidelines of Category A or Category B can still be found to be in compliance with the Act, but would have their renewal applications "referred to the full Commission for consideration, where they will have a full opportunity to demonstrate compliance with the CTA, including through efforts other than 'core' programming and through nonbroadcast efforts."[61] These might include sponsoring core programming on other stations in the market, or even "nonbroadcast efforts which enhance the value of children's educational and informational television programming."[62] Broadcasters that do not fulfill their obligations could be sanctioned by the Commission. Those sanctions

56 1996 Report and Order, *supra* note 3, ¶ 129.
57 *Id.* (citing 1996 Report and Order, *supra* note 3, ¶¶ 29–34).
58 2018 NPRM, *supra* note 8, ¶ 8.
59 *Id.* (citing 1996 Report and Order, *supra* note 3, at ¶ 133).
60 1996 Report and Order, *supra* note 3, at ¶¶ 133–34.
61 *Id.*
62 *Id.*

> may include, in order of increasing severity of the level of non-compliance, letters of admonition or reporting requirements, a renewed commitment from the licensee with a contingent renewal based on performance, forfeitures and short-term renewals, and finally, in the worst case scenario, a designation for hearing to determine whether violations of the Act and the Commission's rules warrant non-renewal of license.[63]

The processing guidelines seem largely to have achieved their purpose: in a review three years after the core programming requirements went into effect, the Commission found that the broadcasters were "complying with the three-hour core programming guideline" with the average commercial station airing "approximately four hours per week."[64] The Commission's next major action on its children's educational television requirements was in 2004, when the Commission determined how broadcasters' children's television obligations apply to digital broadcasters that offer multicast channels,[65] i.e., offer additional streams of programming in addition to their main program service. In doing so, the FCC sought to ensure that any increase in the amount of programming provided by broadcasters through multicasting "translate[s] to a commensurate increase in the amount of educational programming available to children."[66] Thus, broadcasters who chose to offer additional free multicast programming were also required to provide additional educational and informational programming for children.[67] Specifically, digital broadcasters must still air three hours of core programming on their main program stream. However, broadcasters that air additional streams of free programming are also required to air "½ hour per week of additional core programming for every increment of 1 to 28 hours of [additional] free video programming provided."[68] This means that a broadcaster who provided a multicast stream of programming 24 hours per day, 7 days a week, would need to provide an additional three hours per week of core

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[63] Popham, *supra* note 15, at 16–17 (1997) (citing 1996 Report and Order, *supra* note 3, ¶ 136).

[64] FCC MASS MEDIA BUREAU, THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES: 1997-1999, ¶ 3 (2001) [hereinafter THREE YEAR REVIEW].

[65] 2018 NPRM, *supra* note 8, at ¶ 10 (citing 2004 Report and Order, *supra* note 5, ¶ 1). Multicasting is a "digital television technology that gives viewers access to additional local broadcast TV channels. A single local TV station can now provide multiple channels (e.g., 2.1, 2.1, 2.3, 2.4, etc.) that provides separate programming simultaneously, which is still all free and over-the-air. Each separate digital stream is called a multicast." NOCABLE, *What Is Digital Multicasting?*, https://nocable.org/learn/what-is-digital-multicasting.

[66] 2004 Report and Order, *supra* note 5, ¶ 17.

[67] *Id.* ¶ 19.

[68] *Id.* ¶ 19. "Moreover, the Commission amended its rules regarding on-air identification of Core Programming to require broadcasters to identify Core Programming with the symbol 'E/I' and to display this symbol throughout the program in order for the program to qualify as Core." 2018 NPRM, *supra* note 8, ¶ 12 (citing 2004 Report and Order, *supra* note 5, ¶ 46).

programming.[69] This additional programming may be aired on a single multicast stream or spread across multiple streams, as long as the stream carrying the core programming "has comparable carriage on MVPDs [multichannel video programming distributors, such as cable television operators] as the stream triggering the additional Core Programming obligation."[70]

III. 2018 NOTICE OF PROPOSED RULEMAKING

In 2018, the FCC issued a Notice of Proposed Rulemaking (NPRM), in which it proposed "to revise the children's television programming rules to modify outdated requirements and to give broadcasters greater flexibility" in meeting their obligations.[71] The NPRM was spurred by both the increase in the amount of children's programming, and the changes in the way children consume television programming, since the rules were first adopted in the 1990s.[72] Since then, the FCC observed, "the amount of programming for children available via non-broadcast platforms, including children's cable networks, over-the-top providers, and the Internet, has proliferated."[73] This increase in programming is coupled with the "dramatic changes in the way television viewers, including younger viewers, consume video programming" since the rules were adopted.[74] Children increasingly access programming on a variety of devices, many of which are portable, including phones, tablets, and computers.[75] At the same time, "[a]ppointment viewing—watching the same program on the same channel at the same time every week—has significantly declined,"[76] with viewers increasingly time-shifting programming with the use of

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[69] 2018 NPRM, *supra* note 8, at n.49 (citing 2004 Report and Order, *supra* note 5, ¶ 19).

[70] 2018 NPRM, *supra* note 8, ¶ 10 (citing 2004 Report and Order, *supra* note 5, ¶ 19). The Commission stated that educational and informational programming aired on subscription channels would not be considered Core Programming under the processing guideline. 2018 NPRM, *supra* note 8, ¶ 10.

[71] *Id.* ¶ 1.

[72] *Id.* The FCC pointed to full-time children's cable channels such as Nickelodeon, Nick Jr., Teen Nick, Disney Channel, Disney Junior, and Disney XD, as well as other channels

> such as Discovery, Discovery Family, National Geographic, National Geographic Wild, Animal Planet, History Channel, and Smithsonian Channel, that provide educational and informational programming intended for viewers of all ages. In addition, over-the-top providers such as Netflix, Amazon, and Hulu offer a host of original and previously-aired children's programming. There are also numerous online sites which provide educational content for children for free or via subscription, including LeapFrog, National Geographic Kids, PBS Kids, Scholastic Kids, Smithsonian Kids, Time for Kids, Funbrain, Coolmath, YouTube, and Apple iTunes U.

Id. ¶ 16 (citations omitted).

[73] *Id.* ¶ 1.

[74] *Id.*

[75] Fed. Comm. Commission, Comments of Nexstar Broad., Inc., at 3, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018).

[76] 2018 NPRM, *supra* note 8, ¶ 1.

DVRs other on-demand sources of programming.[77] Along with this, live television viewership is on the decline,[78] although the amount of time children spend watching television on all platforms combined is not.[79]

Given these developments, the FCC sought to update its "rules to reflect the current media landscape in a manner that will ensure that the objectives of the CTA continue to be fulfilled."[80] The Commission offered, and sought comment on, a number of proposed changes to its core programming requirements intended to achieve this. These proposals generally eliminated or loosened may of the core programming requirements. For example, the FCC proposed to eliminate the requirements that core programming be "regularly scheduled weekly programming"[81] that is at least thirty minutes in length.[82] It also asked whether "the existing 7:00 a.m. to 10:00 p.m. time frame [for airing core programming] should be expanded,"[83] or even eliminated.[84] Even more significantly, the Commission asked whether it should modify, or even eliminate, the three hour per week requirement.[85] Finally, the Commission proposed to allow broadcasters to air their core programming on any of their program streams, and to no longer require broadcasters to air educational and informational children's programming on their primary program stream.[86] This proposal would allow broadcasters to shift all of their core programming to their multicast streams. The Commission also sought comment on how the changes in the children's television marketplace "since the enactment of the CTA in 1990 may affect the First Amendment considerations applicable to [its children's programming requirements]."[87] The First Amendment issues associated with the FCC's children's television requirements, as well as with the proposed revisions to those requirements, are considered next.

IV. CONSTITUTIONAL STANDARDS AND ISSUES

The Supreme Court has stated:

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[77] *Id.* ¶ 16 (citations omitted).
[78] *Id.* ("Recent Nielsen data indicate that live TV viewing has been declining between 2% and 6% each year for the last four years in the U.S." *Id.* (citations omitted)).
[79] Among children of ages two to sixteen, "viewing across all platforms (including broadcast and pay TV) increased from an average of 4 hours and 19 minutes [in 2000] to an average of 4 hours and 30 minutes [in 2017]." Fed. Comm. Commission, Comments of the Network Commenters, at 3, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Network Commenters*].
[80] 2018 NPRM, *supra* note 8, ¶ 18.
[81] *Id.* ¶ 24.
[82] *Id.* ¶ 20.
[83] *Id.* ¶ 22.
[84] *Id.* ¶ 23.
[85] *Id.* ¶¶ 36, 42.
[86] *Id.* ¶ 49 (citation omitted).
[87] *Id.* ¶ 42. This is the only mention of the First Amendment in the NPRM.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.[88]

In addition to limiting the government's ability to restrict or prohibit speech, then, the First Amendment also restricts the government's ability to mandate or compel certain speech.[89] Indeed, it is considered an "established . . . . principle that freedom of speech prohibits the government from telling people what they must say."[90] For example, laws that "require[ed] schoolchildren to recite the Pledge of Allegiance"[91] and that "required New Hampshire motorists to display the state motto—'Live Free or Die'—on their license plates" have been found unconstitutional.[92] The children's television rules likewise mandate that broadcasters provide particular speech, educational, and informational programming for children, and so infringe on their free speech rights. The question is whether this infringement violates the First Amendment.

Laws that make reference to the content of speech are considered "content-based."[93] Such laws are subject to strict scrutiny, which requires that the law be "necessary to achieve a compelling governmental interest and be narrowly drawn to achieve that end."[94] On the other hand, laws that apply without reference to the content of speech are considered "content-neutral."[95] Content-neutral laws "do not pose the same 'inherent dangers to free expression,' that content-based regulations do," and thus "are subject to a less rigorous analysis . . . "[96]

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88 Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 641 (1994).

89 Pescatore, *supra* note 13, at 101 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)).

90 Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 61 (2006) (citing W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

91 *Forum for Acad & Institutional Rights*, 547 U.S. at 61 (discussing *Barnette*, 319 U.S. 624).

92 *Id.* (discussing *Wooley*, 430 U.S. at 717).

93 *Turner I*, 512 U.S. at 643 ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign") (citing Burson v. Freeman, 504 U.S. 191, 197 (1992)); Boos v. Barry, 485 U.S. 312, 318–19 (1988) (plurality opinion) (holding whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not").

94 *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

95 *Turner I*, 512 U.S. at 643 (citing Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (holding ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view.")); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (holding State Fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds").

96 Turner Broad. Co., Inc. v. FCC (*Turner II*), 520 U.S. 180, 213 (1997) (citing *Turner I*, 512

Content-neutral laws are subject to intermediate scrutiny, which requires that the law advance important government interests and not burden substantially more speech than necessary to further those interests.[97] The children's television requirements are content-based, as they require broadcasters to offer a specific type of content: educational and informational programming for children.[98]

Whether the law is content-based, and thus subject to strict scrutiny, or content-neutral, and thus subject to intermediate scrutiny, is not determinative of the standard to be applied to the children's television regulations. This is because the law regulates speech in the broadcast medium, where courts "have permitted more intrusive regulation of broadcast speakers than of speakers in other media."[99] This derives from the "inherent physical limitation on the number of speakers who may use the broadcast medium,"[100] or, in other words, the "scarcity of broadcast frequencies."[101] Because of the limited number of broadcast licenses, not everyone who might want one can be granted one. If too many people are broadcasting, they "would interfere with one another's signals, so that [none] could be heard [or seen] at all."[102] Because broadcast licenses are not available to all, broadcast licensees have a duty to act as fiduciaries for the public.[103] This scarcity, then, "has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees."[104] As the Court has observed, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or

U.S. at 661; Ward v. Rock Against Racism, 491 U.S. 781, 798–99, n. 6 (1989)).

97 *Turner I*, 512 U.S. at 662 (citing *Ward*, 491 U.S. 781; United States v. O'Brien, 391 U.S. 367 (1968)).

98 As Justice O'Connor observed,

> Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.

Turner I, 512 U.S. at 677 (O'Connor, J., dissenting) (citations omitted).

99 *Id.* at 637 (citing Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367 (1969) (discussing television regulation); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (discussing radio regulation); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (discussing print regulation); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781 (1988) (discussing personal solicitation)).

100 *Id.* at 638 (citing *Red Lion*, 395 U.S. at 390).

101 *Id.* at 637–38 (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

102 *Id.* at 637 (citing *Nat'l Broad. Co*., 319 U.S. at 212).

103 S. REP. NO. 101-66, at 11 (1989) (citing *Red Lion*, 395 U.S. at 388–89).

104 *Turner I*, 512 U.S. at 638 (citing *Red Lion*, 395 U.S. at 390).

publish."[105]

It has been argued that due to the growth in sources of media in recent decades, the scarcity rationale is no longer valid. In fact, in 1990, the U.S. Justice Department argued that the Children's Television Act was unconstitutional, largely because it viewed the scarcity rationale as no longer providing a valid basis for subjecting broadcast regulation to a more lenient level of First Amendment scrutiny.[106] Lower courts have also questioned the rationale's continuing validity, but have noted that they "are bound by Supreme Court precedent, regardless of whether it reflects today's realities" and that they are "not at liberty to depart from binding Supreme Court precedent unless and until [the] Court reinterpret[s] that precedent."[107] The Supreme Court has repeatedly declined to do this. A few years after the passage of the Children's Television Act, the Court noted that "courts and commentators have criticized the scarcity rationale since its inception."[108] Nevertheless, the Court "declined to question its continuing validity as support for our broadcast jurisprudence."[109] More recently, the Supreme Court took note of the argument that the scarcity rationale "should be overruled because the rationale . . . has been overtaken by technological change and the wide availability of multiple other choices for listeners and viewers."[110] Again, however, the Court declined to so.[111] Thus, the scarcity rationale remains a valid basis for subjecting regulation of broadcast speech to a less stringent standard of review.

In other contexts, the scarcity rational has justified government requirements that broadcasters air specific types of speech. For example, broadcasters were required to provide access to their stations to individuals who were the subject of an on-air personal attack (the personal attack rule) or to candidates for political office whose opposing candidate had been endorsed on-air by the broadcaster (the political editorializing rule).[112] In essence, the rules provided a right of reply for those attacked or opposed on-air by a broadcaster. In *Red Lion Broadcasting v. FCC*,[113] broadcasters challenged these rules as a violation of their First Amendment rights, alleging they interfered with

105 *Id.* at 637–38 (citations omitted).
106 S. REP. NO. 101–66 (1989).
107 Fox Television Stations, Inc. v. FCC (*Fox I*), 613 F.3d 317, 327 (2d Cir. 2010) (citations and internal quotations omitted).
108 *Turner I*, 512 U.S. at 638 (citations omitted).
109 *Id.* (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 376, n.11 (1984)).
110 FCC v. Fox Television Stations, Inc. (*Fox II*), 567 U.S. 239, 258 (2012) (citations omitted); *see also Fox I*, 613 F.3d at 325–27 (discussing and questioning the continued validity of the scarcity rationale for broadcast regulation).
111 *Fox II*, 567 U.S. at 258 ("These arguments need not be addressed here.").
112 *See* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 378 (1969). The rules are no longer in effect. *See* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (2000).
113 *Red Lion*, 395 U.S. at 367.

their ability to use their frequencies as they chose, including the right to exclude speakers from their airwaves when they so desired.[114] As the Court saw it, the scarcity of radio frequencies allowed the government "to put restraints on licensees in favor of others whose views should be expressed on this unique medium . . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[115] It was permissible under the First Amendment, then, to require broadcasters "to give suitable time and attention to matters of great public concern."[116]

Similarly, in *CBS, Inc. v. FCC*,[117] the Court upheld a law that required broadcast stations to provide "reasonable access" to their stations to candidates for federal office. The case arose after ABC, CBS, and NBC refused a request by President Jimmy Carter's re-election campaign to purchase a half hour of time on the networks to announce his candidacy and air "a documentary outlining the record of his administration."[118] In upholding the constitutionality of the reasonable access requirement, the Court observed that the law "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[119] As the Court saw it, the law simply "represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest."[120]

A somewhat analogous requirement to the children's television requirements was upheld in the context of direct broadcast satellite (DBS) service. The 1992 Cable Act required satellite television providers (also referred to as DBS providers) to set aside 4–7% of their channel capacity "exclusively for noncommercial programming of an educational or informational nature,"[121] over which DBS providers were to have "no editorial control."[122] The purpose of the DBS set-aside was to "assur[e] public access to diverse sources of information."[123] The reviewing court found that the same scarcity that applied to broadcast television and radio applied to DBS as well, here stemming from the limited number of orbital slots for use by satellites providing DBS

114 *Id.* at 386.
115 *Id.* at 390 (citations omitted).
116 *Id.* at 394.
117 CBS, Inc. v. FCC, 453 U.S. 367 (1981).
118 *Id.* at 367.
119 *Id.* at 370.
120 *Id.* at 397.
121 Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973 (D.C. Cir. 1996) (citing 47 U.S.C. § 335(b)(1)).
122 *Id.* (citing 47 U.S.C. § 335(b)(3)).
123 *Id.* at 976 (citing Cable Television Consumer Protection and Competition Act of 1992 § 2(b)(1), Pub. L. No. 102-385, codified at 47 U.S.C. §§ 521 et seq.).

service.[124] Because of this, the court applied "the same relaxed standard of scrutiny" traditionally applied to broadcasting,[125] noting that broadcast speech regulations have "been upheld when they further [the] First Amendment goal" of promoting "the widest possible dissemination of information from diverse and antagonistic sources."[126] The set-aside requirement achieved this, as its "purpose and effect" was "to promote speech, not to restrict it,"[127] leading the court to conclude that the set-aside did not violate DBS providers' First Amendment rights.[128]

Because of the continuing validity of the scarcity rationale, then, the children's television requirements should be upheld if they are "narrowly tailored to further a substantial governmental interest."[129] This is the standard for intermediate scrutiny.[130] In enacting the Act, the Senate Commerce Committee stated, "The interest here involved, promotion of the welfare of our children, is indisputably substantial. . . . Indeed, it is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and who rely upon it for much of the information they receive."[131] Courts have generally agreed that regulations that aim to protect or benefit children serve a substantial, or even compelling, government interest.[132]

The Supreme Court has described the government's interest in the well-being of minors as follows:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the

124 *Id.* at 975.

125 *Id.*

126 *Id.* at 969, 975 ("For example, in [*Nat'l Citizens Comm. for Broad.*], the Supreme Court recognized that 'efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be.'") (quoting FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799–800 (1978)); CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (stating "preservation [of] an uninhibited marketplace of ideas" is proper consideration in imposing public interest obligations on broadcasters); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (holding Congress may "seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance . . .").

127 *Id.* at 976–77 (citing *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 801–02).

128 *Id.* (citing *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 802).

129 FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).

130 Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. O'Brien, 391 U.S. 367 (1968))

131 Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, 15 J.L. & COM. 527, 543 (1996).

132 "[C]ourts have been sympathetic to government interests that involve protecting children." Pescatore, *supra* note 12, at 104 (citing Laurence H. Winer, *Children are Not a Constitutional Blank Check*, in RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA, 70 (Robert Corn Revere ed., 1997) ("Almost anything that arguably is pro-child immediately rises for many to the level of a substantial, if not compelling, state interest, the first prerequisite for overcoming First Amendment limitations on government action.").

> healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.[133]

Having established that a substantial government interest is served by the law, intermediate scrutiny next requires that the law not substantially burden more speech than necessary to further the substantial government interest it is meant to promote.[134] This does not require that the regulation "be the least speech-restrictive means of advancing the Government's interests." Instead, it only requires that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[135]

The previously discussed laws that required broadcasters to provide certain types of speech were found to be narrowly tailored. In *CBS v. FCC*, the Court examined the impact of the reasonable access requirement on speech. It observed that the requirement "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[136] At the same time, the requirement "does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming."[137] These factors led the Court to conclude that the law "properly balances the First Amendment rights of federal candidates, the public, and broadcasters."[138] The children's television requirements share these characteristics that were so important to the Court. The requirements make an important speech contribution by enhancing the availability of educational and informational programming for children. At the same time, they do not "impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming."[139] This was also significant to the *Red Lion* Court, which observed that the laws at issue there "posed no threat that a 'broadcaster [would be denied permission] to carry a particular program or to publish his own views.'"[140]

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133 New York v. Ferber, 458 U.S. 747, 756–57 (1982) (internal quotation marks and citations omitted); *see also* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("It is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens.").

134 *Turner I*, 512 U.S. at 662 (citing *Ward*, 491 U.S. 781; *O'Brien*, 391 U.S. 367 (1968)).

135 *Id.* (citing *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985))).

136 CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981).

137 *Id.* at 396–97.

138 *Id.* at 397.

139 *Id.*

140 FCC v. League of Women Voters, 468 U.S. 364, 378 (1984) (citing Red Lion Broad. Co., Inc.

Similarly, in upholding the DBS set-aside for educational and informational programming, the Court of Appeals for the D.C. Circuit observed "that the government does not dictate the specific content of the programming that DBS operators are required to carry."[141] The Court observed that "[the] purpose and effect [of the DBS set-aside] is to promote speech, not to restrict it."[142] It compared the effect of the set-aside with that of the cable-must-carry rules, which require cable operators to carry local television stations on their cable systems, and which were found by the Court to be constitutional:

> The rules . . . do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [DBS] operators or programmers because of the content of their programming. They do not compel [DBS] operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave [DBS] operators free to carry whatever programming they wish on all channels not subject to [the set-aside] requirements.[143]

These observations would all apply to the children's television requirements as well. The purpose of the children's programming requirements is to enhance the supply of a beneficial type of speech, one not likely to be adequately supplied in the free market in the absence of the requirement. Further, the children's television requirements do not require or prohibit broadcasters from offering programming with any particular ideas or points of view. The rules "do not censor or foreclose speech of any kind. They do not tell licensees what topics they must address."[144] Nor do the rules produce any net decrease in the amount of available speech, and broadcasters remain free to otherwise provide whatever programming they wish. Further, unlike the DBS set-aside, broadcasters can select the speech they provide to satisfy their obligations under the Act.

For its part, Congress viewed the Children's Television Act as

v. Fed. Commc'n Comm'n, 395 U.S. 367, 396 (1969)).

141 Time Warner Entm't Co. v. FCC, 93 F.3d. 957, 977 (D.C. Cir. 1996).

142 *Id.* (citing FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 801–02 (1978)).

143 *Id.* (quoting and citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 647 (1994)). The Court's holding in *Turner* also provides additional support, albeit only suggestive, that the CTA is constitutional. There, the Court observed, "It is true that broadcast programming, unlike cable programming, is subject to certain limited content restraints imposed by statute and FCC regulation." *Turner I*, 512 U.S. at 649. As an example of such a restraint, the Court cited the Children's Television Act, noting that the statute directs the "FCC to consider extent to which [a] license renewal applicant has 'served the educational and informational needs of children.'" *Turner I*, 512 U.S. at 650 n.7. While this does not constitute a formal finding of constitutionality for the requirement, "the Court explicitly recognized that a broadcaster may lose its license if it does not air enough children's educational programming, and the Court appeared to approve of that requirement." Hundt, *supra* note 131, at 545.

144 1996 Report and Order, *supra* note 3, ¶ 152.

being "narrowly and appropriately tailored to accomplish [its] substantial interest,"[145] because the Act provides broadcasters with the discretion to fulfill their obligations in the way they see fit. The FCC has observed that its children's television requirements provide broadcasters with "full discretion in selecting the topic, let alone viewpoint, of the educational programming."[146] As the Commission explained, the "regulations require broadcasters to air children's educational and informational programming, but do not 'exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited.'"[147]

Not only do broadcasters have the ability to choose the programming they air to satisfy their obligation, the FCC's rules also provide them with a degree of discretion in choosing *how* they air that programming. Broadcasters have the option of complying with the three-hour core programming requirements, to help ensure routine processing of their renewal applications under Category A,[148] but they also have the option of fulfilling their children's television obligations with Category B. Here, "any programming specifically designed to meet the educational and informational needs of children can 'count' for purposes of meeting the processing guideline," even those not satisfying the core programming requirements.[149] Furthermore, broadcasters have yet a third option, under which they can demonstrate to the full Commission their compliance with the CTA "through efforts other than 'core' programming and through nonbroadcast efforts."[150] Thus, broadcasters have a wide range of options with regard to both the programming they choose to air to satisfy their obligations, and the manner in which they air that programming, all of which helps to reduce the burdens imposed by the obligations and make them more likely to be found narrowly tailored.

The analysis has so far largely analyzed the constitutional status of broadcasters' children's television obligations generally. However, as has been discussed, the Commission had developed detailed criteria about what constitutes "core programming" that broadcasters can air to fulfill their obligations under the act. Again, this programming must be "'specifically designed' to educate and inform children,"[151] with

145 S. REP. NO. 101-66, at 17 (1989).
146 Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CALIF. L. REV. 1687, 1747 n.305 (1997) (citing 1996 Report and Order, *supra* note 3, at 10,699).
147 1996 Report and Order, *supra* note 3, ¶ 157 (citing S. REP. NO. 101-66, at 17 (1989)).
148 *See supra* notes 50–54 and accompanying text.
149 1996 Report and Order, *supra* note 3, ¶¶ 133–34.
150 *Id.* ¶ 5 (citing 47 U.S.C. § 303b(b) (2010)).
151 *Id.* ¶ 4.

"serving the educational and informational needs of children ages 16 and under as a significant purpose . . . ."[152] Core programming must also be regularly scheduled, air weekly, be at least thirty minutes in length, and be aired between 7:00 a.m. and 10:00 p.m.[153] In addition, broadcasters who offer free multicast programming are required to proportionately increase the amount of core programming they offer. Because of the clarity of these Category A core programming criteria, most broadcasters choose Category A to satisfy their children's programming obligations.[154] Do these core programming guidelines, however, satisfy intermediate scrutiny? Are they narrowly tailored to serve the act's substantial government interest? That is considered next. The same is considered for the Commission's proposals to modify the rules.

V. CONSTITUTIONALITY OF THE CORE PROGRAMMING REQUIREMENTS

When defining core programming in 1996, the Commission determined "that three hours per week is a reasonable benchmark for all broadcast television stations to meet six years after enactment of the CTA."[155] It offered a couple of justifications for settling on three hours. First, according to the National Association of Broadcasters (NAB), "commercial broadcasters were, on average, broadcasting two hours per week of regularly scheduled, standard length educational programming at the time the CTA passed in 1990."[156] At that time, Congress "found that 'the marketplace had failed to provide an adequate supply of children's educational programming.'"[157] Since the objective of the CTA was "to increase the amount of educational and informational broadcast television available to children,"[158] the Commission concluded that broadcasters needed to air more than the two hours per week of educational children's programming that they were airing in 1990 to achieve that objective.[159] Further, in 1996 the NAB had represented to the Commission that the average commercial television station was airing over four hours of educational and informational programming for children,[160] which the FCC took "as evidence that broadcasters believe that it is reasonable to devote three hours per week

152 2018 NPRM, *supra* note 8, ¶ 6 (citing 1996 Report and Order, *supra* note 3, ¶¶ 81–113).
153 1996 Report and Order, *supra* note 3, ¶ 4.
154 *See, e.g.*, Fed. Comm. Commission, Reply Comments of Hearst Television Inc., *In the Matter of Children's Television Programming Rules*, at ii, MB Docket No. 18-202 (Oct. 23, 2018) [hereinafter *Hearst Reply*] ("As the record in this proceeding clearly shows, Category A is routinely relied upon by stations . . . .").
155 1996 Report and Order, *supra* note 3, ¶ 121.
156 *Id.* (citation omitted).
157 *Id.*
158 *Id.* ¶ 22 (citing S. REP. NO. 101-66, at 1 (1989)).
159 *Id.* ¶ 121.
160 *Id.* ¶ 40 (citation omitted).

of their air time to educating children."[161]

Former FCC Chair Reed Hundt argues that a three-hour requirement is an appropriately "limited restraint," in that it only "amounts to 1.8% of the broadcast week . . . ."[162] Hundt compares this to the burden imposed on cable operators by must-carry requirements. The *Turner* Court, in finding must-carry to be narrowly tailored, "found the effects of must-carry on cable operators to be minimal," based partly on evidence that showed that "only 1.2 percent of all cable channels had been devoted to broadcast stations added because of must-carry. . . ."[163] Moreover, in *Time Warner Entertainment Co., L.P. v. FCC*, the court upheld a requirement that DBS providers set-aside four to seven percent of their channel capacity for noncommercial educational and informational programming and labeled the requirement as "hardly onerous[.]"[164] Thus, the burden of the three-hour requirement is in line with the burden imposed by other mandated speech requirements upheld by the courts.

Despite the burden the three-hour guideline imposes on broadcasters' speech, it does provide them with a significant benefit: certainty at renewal time. As one broadcaster observes,

> Category A is routinely relied upon by stations, which makes it undoubtedly a valuable regulatory option for broadcast licensees. It is clear, definitive, measurable, and predictable. The Category A rule allows Stations to know with a fair degree of certainty whether they will meet the three-hour guideline in any calendar quarter, how to schedule programming to maximize the likelihood of remaining compliant in future quarters, and whether they are likely encounter obstacles related to children's programming at license renewal time. Unsurprisingly, then, broadcast licensees almost uniformly satisfy their children's E/I programming obligations by demonstrating compliance with the "Category A" rules.[165]

In its 2018 NPRM, the Commission questioned whether three-hour requirement should be modified,[166] or even eliminated.[167] Reducing or eliminating the amount of programming that must be offered under Category A only reduces the requirement's burdens on broadcast speech. Thus, this proposed change would seem to enhance the ability of the requirement to survive constitutional challenge. However, in 1996, the FCC concluded that its initial regulations implementing the

161 *Id.* ¶ 122.
162 Hundt, *supra* note 131, at 545.
163 Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 188 (1997).
164 Time Warner Entm't Co. v. FCC, 93 F.3d 957, 976 (D.C. Cir. 1996) (citation omitted).
165 *Hearst Reply*, *supra* note 154, at 10.
166 2018 NPRM, *supra* note 8, ¶ 36.
167 *Id.* ¶ 42.

CTA had not been effective in increasing the amount of educational and informational broadcast programming for children,[168] leading the Commission to institute the three hour per week core programming requirement.[169] The fact that the CTA alone did not increase the amount of educational children's programming, without requiring that broadcasters air a specified minimum amount of educational children's programming, provides evidence "that broadcast television stations will provide little or no children's educational programming in the absence of a quantitative guideline."[170] In fact, the major broadcast networks currently only "air the required three hours of children's E/I [educational and informational] content a week and no more."[171] It is argued, then, with a quantitative requirement, "these networks would no longer air as much or perhaps any educational content for children."[172] Thus, while eliminating or reducing the three hour requirement would reduce the burden on broadcasters, the FCC will need to explain its departure from its earlier findings that broadcasters would not provide a sufficient amount of educational and informational children's programming without the quantitative standard.

The Category A guidelines also require that core programming be at least thirty minutes in length, regularly scheduled, and aired between 7 a.m. and 10 p.m.[173] The FCC concluded that programming so aired would be more likely to find an audience than programming that did not meet these requirements, and thus more likely to achieve the purpose of educating and informing children. The thirty-minute length requirement was instituted partly because "the dominant broadcast television format is 30 minutes or longer in length."[174] The FCC believed such programs were "more likely than shorter programming to be regularly scheduled and to be listed in program guides, and thus are easier for parents to identify for their child's viewing."[175] Thirty minute programs also provided "more time for educational and informational material to be

168 1996 Report and Order, *supra* note 3, ¶ 2.

169 *Id.* ¶ 5.

170 Fed. Comm. Commission, Comments of Center for Digital Democracy, Campaign for a Commercial-Free Childhood, and the Benton Foundation, at 12, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Advocacy Group Comments*].

171 Fed. Comm. Commission, Comments of Common Sense Kids Action, at 4, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Common Sense Comments*] (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-659, CHILDREN'S TELEVISION ACT: FCC COULD IMPROVE EFFORTS TO OVERSEE ENFORCEMENT AND PROVIDE PUBLIC INFORMATION, GAO REPORT TO THE CHAIRMAN, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION 6 (2011)).

172 *Id.*

173 1996 Report and Order, *supra* note 3, ¶ 4.

174 *Id.* ¶ 110.

175 *Id.*

presented[.]"[176] Similar reasoning supported the Commission's requirement that core programming be regularly scheduled, airing at least once a week, as the Commission considered it to be "the dominant form of television programming."[177] As such, it was more likely than programming airing less frequently "to be anticipated by parents and children, to develop audience loyalty, and to build successfully upon and reinforce educational and informational messages . . . ."[178]

The Commission required that core programming air between 7 a.m. and 10 p.m. so that it would air "at times the maximum number of child viewers will be watching."[179] It chose these specific times based on ratings data that showed that few children were in the audience outside of those hours.[180] The Commission also found that broadcasters previously had been airing "a significant percentage of their educational programming before 7:00 a.m.,"[181] which meant that broadcasters were "airing a disproportionately large amount of educational programming during early morning hours in relation to the relatively few children watching television at that time."[182] This practice, in the FCC's view, reflected the economic incentives that resulted in the underprovision of educational children's programming: "it is less costly for broadcasters to show children's educational programs very early in the morning than to show them at later hours because the number of adult viewers lost, and hence the advertising revenues lost, will be relatively low."[183]

Thus, these core programming requirements were based on the predominant industry practices and audience behaviors at the time they were adopted. However, as the Commission has noted, industry practices and audience behavior have changed since that time. There is evidence that much online programming, in particular, is less than thirty minutes in length and is popular with children.[184] Appointment viewing, which is tied to the regularly scheduled requirement, is less widespread than it was in the past, with children increasingly used to accessing programs on-demand and on their own schedules.[185] Further, it appears

176 *Id.* The FCC also noted commenters provided "no evidence . . . to support claims . . . that children have short attention spans and thus will not benefit from substantial length programming." *Id.* (citation omitted).

177 *Id.* ¶ 105.

178 *Id.* (citation omitted).

179 *Id.* ¶ 99.

180 *Id.*

181 *Id.* ¶ 100–01 (citations omitted).

182 *Id.* ¶ 100.

183 *Id.* ¶ 32.

184 *See, e.g.*, Fed. Comm. Commission, Comments of Cadillac Telecasting Company, at 7–8, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) (citation omitted).

185 "Furthermore, given the on-demand nature of the PBS Kids App, Netflix, or YouTube, today's children have become accustomed to watching programs in a back-to-back-to-back manner, often referred to as 'binge viewing.'" Fed. Comm. Commission, Comments of Meredith

there are significantly more children in the audience today before 7 a.m. and after 10 p.m. than there were in the past.[186] Thus, while the FCC provided justifications for its specific core programming requirements, those justifications may carry significantly less force today, which also reduces the likelihood of their surviving First Amendment scrutiny.

The Commission's proposals recognize these changes. Thus, the Commission proposed to eliminate the thirty-minutes-in-length requirement, which would allow broadcasters to fulfill their obligations with the use of shorter-form programming.[187] The FCC also recognized the decline in appointment viewing, proposing to eliminate the "regularly scheduled weekly programming" requirement.[188] This would allow broadcasters the flexibility to offer "blocks of several different episodes of the same program on a single day,"[189] or "[o]ne-off programming (e.g., space launches with STEM focuses), programming that airs for less than 13 weeks (e.g., seasonal weather programming focused at children), or programming that airs at different times (e.g., more on school holidays when children are home) . . . ."[190] The Commission is also considering whether to expand the 7:00 a.m. to 10:00 p.m. timeframe for airing core programming,[191] or even eliminating it,[192] as data presented to the Commission shows, for example, that "tens of millions of children ages 2 to 15" are in the audience "between the hours of 5:00 a.m. and 7:00 a.m."[193] All of these proposed rule modifications provide broadcasters with additional flexibility, while at the same time reducing the burden of the children's television obligations. As such, they seem to enhance the constitutionality of the requirements. At the same time, if children's viewing habits have changed such that the original requirements are no longer as effective in attracting audiences to the programming, then the constitutionality of those guidelines is undermined, in that the requirements may now restrict more speech than is necessary to achieve their purpose. Again, modifying those requirements could enhance their constitutional prospects.

Corporation's Local Media Group, at 1–2, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Meredith Comments*].

186 *See, e.g.*, *Network Commenters*, *supra* note 79, at 5–6.

187 2018 NPRM, *supra* note 8, ¶ 20 (citations omitted).

188 *Id.* ¶ 24.

189 Fed. Comm. Commission, Comments of Block Communications, Inc., at 8, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Block Comments*].

190 *Meredith Comments*, *supra* note 185, at 2.

191 2018 NPRM, *supra* note 8, ¶ 22.

192 *Id.* ¶ 23.

193 *Network Commenters*, *supra* note 79, at 5 (citation omitted).

VI. CONSTITUTIONALITY OF THE MULTICASTING REQUIREMENTS

When promulgating the multicasting requirements in 2004, the FCC observed that the history of children's television regulation shows that, in the absence of specific requirements, broadcasters have not provided sufficient programming that serves the educational and informational needs of children. Further, in enacting the CTA, Congress made clear that the FCC could not rely solely on market forces to increase the educational and informational programming available to children on commercial television.[194]

This led the FCC to believe that it was necessary to institute requirements to ensure that digital broadcasters who offered free multicast programming would also offer additional educational and informational children's programming. Under the multicast guidelines, broadcasters are still required to air three hours of core programming per week on their main programming streams. In addition, broadcasters that air additional streams of free programming must also air "½ hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream" to satisfy the Category A processing guideline.[195] In other words, a digital broadcaster must provide an additional three hours per week of core programming for each multicast stream that airs free programming twenty-four hours per day, seven days per week.[196]

Since digital broadcasting provides broadcasters with the capacity to offer additional programming, it might have been viewed as reducing the burden of the children's television obligations on broadcasters' speech; instead, the FCC decided to burden multicast programming to the same extent that broadcasters' primary channels are burdened by the children's television obligations. The burden remains proportionate,

194 2004 Report and Order, *supra* note 5, ¶ 27 (citing 1996 Report and Order, *supra* note 3, ¶ 21 (citing S. REP. NO. 101-66, at 9 (1989); H.R. REP. NO. 101-385, at 6 (1989))).

195 *Id.* ¶ 19.

196 2018 NPRM, *supra* note 8, at n.49 (citing 2004 Report and Order, *supra* note 5, ¶ 19). At the same time, the FCC recognized that "requiring every programming stream to carry core programming could discourage broadcasters from experimenting with innovative multicasting services[,] [such as] highly specialized channels on which content directed to children might depart from the specialized focus." 2004 Report and Order, *supra* note 5, ¶ 25. Consequently, the FCC allowed digital broadcasters "to air all of their additional digital core programming . . . on one free digital video channel or distribute it across multiple free digital video channels, at their discretion, as long as the stream/s on which the core programming is aired has comparable carriage on multichannel video programming distributors ('MVPDs') as the stream whose programming generates the core programming obligation under the revised processing guideline." *Id.* ¶ 24. The FCC also specifies 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." Fed. Comm. Commission, Second Order on Reconsideration and Second Report and Order, In the Matter of Children's Television Obligations of Digital Television Broadcasters, 21 FCC Rcd. 11065, ¶ 23 (2006) [hereinafter 2006 Report and Order]; *see also* 47 C.F.R. § 73.671 (2018).

although the broadcaster must offer additional speech to meet that burden. The FCC, however, did not provide much justification for requiring multicasters to offer additional core programming, beyond wanting "to ensure that the needs of children continue to be served 'through the licensee's overall programming,'"[197] as required by the Children's Television Act.[198] However, there was no finding that the needs of children were not being adequately served by the Commission's existing core programming obligations.

This seems to be in contrast to FCC findings in the years prior to the adoption of the multicast requirements, which generally indicated that the core programming guidelines had been successful in helping to achieve the act's purpose of "increase[ing] the amount of educational and informational programming available on television."[199] For example, three years after implementing its core programming requirements in 1996, the Commission found that the industry was "complying with the three-hour core programming guideline," with the average commercial broadcast television station airing approximately four hours per week of core programming.[200] Similarly, in a 2001 Report to Congress, FCC Chair William Kennard observed that studies showed that, since the core programming requirements had gone into effect, "there has been improvement in the quality and quantity of educational programming for children."[201] One study found that "approximately 80% of the 'core' programs evaluated complied with the requirements of the core programming definition, and that one-third of these programs could be considered 'highly educational.'"[202] At the same time, Kennard noted some issues, in that some studies showed that "some stations are claiming programs with little or no obvious educational value as 'core' programs," and that there seemed to be a "lack of sufficient core programming directed to very young children . . . ."[203]

These findings seem to indicate that the Commission's rules had generally been successful in achieving their purpose,[204] although there

197 2018 NPRM, *supra* note 8, ¶ 17.

198 47 U.S.C. § 303(b) (2010).

199 THREE YEAR REVIEW, *supra* note 64, at ¶ 4 (citing S. REP. NO. 101-66, at 1 (1989)).

200 *Id.* ¶¶1–2. The FCC also found that "Broadcast licensees have also complied with the other aspects of the children's television rules. These include airing programming during hours when children will be in the audience, airing programs of a substantial length, and providing better information to the public regarding their educational children's television programming." *Id.* ¶ 2.

201 WILLIAM E. KENNARD, FED. COMM. COMMISSION, REPORT TO CONGRESS: ON THE PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCASTERS AS THEY TRANSITION TO DIGITAL TELEVISION 17 (2001) (*available at* https://transition.fcc.gov/Speeches/Kennard/Statements/2001/stwek106.pdf).

202 *Id.*

203 *Id.*

204 THREE YEAR REVIEW, *supra* note 64, ¶ 3, at 1–2 (citing S. REP. NO. 101-66, at 1).

were issues with the educational value of some core programming and with the insufficient amount of core programming for young children.[205] However, in considering and enacting its multicast requirements, the Commission never addressed these findings, nor whether there was even a need for additional educational and informational programming for children. Nor was there any discussion of the findings that the three-hour requirement had largely been successful in increasing the amount of educational children's programming on television. Instead, the Commission simply imposed additional obligations on multicast programming without ever considering or justifying the need for additional programming.

In its 2018 NPRM, the Commission proposed to make several significant changes to its multicasting requirements. However, before making any proposals, the FCC observed that the Children's Television Act did not require that children's television requirements be imposed in multicast streams.[206] It then proposed to eliminate the multicasting requirement,[207] meaning broadcasters would only be required to provide three hours of core programming in total, no matter how much free multicast programming they offered. The Commission also proposed "to allow broadcasters the flexibility to choose on which of their free OTA [over-the-air] streams to air any Core Programming," and to eliminate the requirement that they air their core programming "on their main program stream or on a stream that has comparable MVPD carriage as the main program stream."[208]

From one standpoint, the proposed changes enhance the likelihood of the requirements being found constitutional, as they both reduce the burdens imposed on broadcasters by the obligations and provide them with additional flexibility in meeting those obligations. Digital multicasters would no longer need to provide more than three hours of programming, and they could air that programming on any stream they desired. If, however, as a result of the proposed changes, broadcasters only aired educational and informational programming on multicast streams that had small audiences and little viewership, that programming would presumably be watched by far fewer children, meaning that the requirements would be less effective in achieving their government interest.[209]

This may very well be the case, as it appears that core

205 KENNARD, *supra* note 201.

206 2018 NPRM, *supra* note 8, ¶ 52, ¶ 24 (citing 47 U.S.C. § 303b(a)(2) (1994)).

207 *Id.* ¶ 51.

208 *Id.* ¶ 49 (citation omitted).

209 The FCC seemed to recognize this concern when it "[sought] comment on how to ensure that the current viewership of children's programming is not reduced." *Id.* ¶ 53. It also asked about the extent that audiences benefitted from core programming on multicast channels and whether that programming was "well-known to or frequently watched by children." *Id.* at ¶ 52.

programming aired on multicast channels may be seldom viewed by children. Commenters responding to the NPRM presented evidence that core programming on multicast channels reaches few viewers, which does not appear to have been disputed by commenters on any side of the issue. One commenter to provide such evidence is Litton Entertainment, a major producer and provider of E/I (children's educational and informational) programming, which claims to have produced over 1,500 hours of such programming since the enactment of the CTA.[210] Litton provides three hours a week of this programming "to ABC, CBS, NBC, CW, and Telemundo stations,"[211] and also "provides [core] programming to a number of diginets that are broadcast on stations' multicast stream . . . ."[212] Litton reports that viewership of its multicast programming "averages less than 5 percent of programming on a station's main channel . . . ."[213] On the other hand, Litton reports significant viewership for core programming on stations' primary streams.[214] Based on this, Litton argues that since multicast streams "are nearly bereft of any viewership, removing the requirement to provide three hours on each multicast stream would not harm children since so few actually watch programming on multicast streams."[215] The fact that a producer, whose business model is dependent on broadcasters' need for programming that is compliant with the FCC's children's television requirements, sees little benefit in the multicast requirements seems significant.

The issue of viewership of multicast core programming is an important one constitutionally, as it is not enough under intermediate scrutiny for a law to serve a substantial government interest and be narrowly tailored. Under intermediate scrutiny, the government "must demonstrate that the recited harms are real, not merely conjectural, and

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[210] *See* Fed. Comm. Commission, Comments of Litton Entertainment, at ii, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *Litton Comments*].

[211] *Id.* "Using sponsorship to help underwrite production costs, Litton has been able to offer its quality children's programming to stations free of charge – neither networks nor individual stations pay for the programming, but rather receive it in exchange for allowing Litton to sell limited, designated advertising within the programs." *Id.* at 4 (citations omitted).

[212] *Id.* at 27.

[213] *Id.* at ii.

[214] "[In 2017] . . . Litton's programming alone was viewed 1.5 billion times. Litton Network partners air 15 hours per week (ABC/CBS/NBC/CW/Telemundo) of E/I programming reaching an average of approximately 900,000 unique teens in the average month . . . nearly equaling the total reach of PBS' six to 12 hours of E/I programming per day." *Id.* at 6 (citations omitted). On the other hand, NAB provided data that showed that 95% of the audience for core programming on NBC and CBS owned-and-operated stations was over 18, and that "on the average NBC or CBS station – counting some of the biggest markets in the country – fewer than 90 children are accessing each E/I program over-the-air (OTA)." Fed. Comm. Commission, Reply Comments of the National Association of Broadcasters, at 3, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *NAB Reply*].

[215] *Litton Comments*, *supra* note 210, at 27.

that the regulation will in fact alleviate these harms in a direct and material way."[216] Congress made such findings when it enacted the Children's Television Act. It found that U.S. children lagged behind children of other countries in education, children watched a significant amount of television, children would watch and benefit/learn from educational television programming, and there was a lack of such programming being provided due to market incentives.[217] The FCC made similar findings when instituting the core programming requirements, finding that children benefit from viewing educational and informational programming,[218] most children have access to and spend a considerable amount of time watching television,[219] and children will watch educational programming.[220] Similar findings should be made to support the need for the multicast requirements. However, the Commission would have been unable to do this in 2004, as digital broadcasting and multicasting were in their infancy.

Thus, the Commission should determine whether its multicasting requirements actually achieve their purpose, and whether its proposed changes to those requirements would do the same. Based on the evidence presented by a number of commenters on different sides of the issue, it appears there is little viewership of multicast core programming.[221] Thus, there seem to be good reasons, both from a constitutional standpoint and from a practical standpoint to eliminate the additional multicast programming requirement, as the requirement may not actually play any significant role in achieving the act's objective. At the same time, in order for core programming to reach sizeable child audiences and achieve the act's objective of promoting the welfare of children, it may be necessary to retain the requirement that broadcasters air some amount of such programming on their main program streams.

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216 Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 664 (1994) (citing Edenfield v. Fane, 507 U.S. 761 (1993); City of L.A. v. Preferred Commc'ns, Inc., 476 U.S. 488, 496 (1986); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977)).

217 *See* S. REP. NO. 101-66, at 5–9 (1989).

218 1996 Report and Order, *supra* note 3, ¶¶ 9–10.

219 *Id.* ¶¶ 11–12.

220 *Id.* ¶ 13.

221 *See, e.g.*, *Hearst Reply*, *supra* note 154, at 3, 7; *Litton Comments*, *supra* note 210, at iii, 2. A significant reason for the lack of multicast viewership is that "MVPDs are not required to carry stations' multicast streams . . . ." 2018 NPRM, *supra* note 8, ¶ 55 (citing 47 U.S.C. § 534(b)(3)(A) (2014)). Consequently, many multicast streams are not carried by MVPDs, and "DBS providers do not carry multicast streams" at all. This "lack of DBS carriage alone represents an instant loss of 40 million television households." *Litton Comments*, *supra* note 210, at 15 (citation omitted). This lack of carriage limits the ability of multicast streams to reach significant audiences. "Nevertheless, [multicast streams] would still be available over the air and therefore should be available to children in households that do not subscribe, and therefore do not have access to, the myriad of children's programming options available on cable or satellite." 2018 NPRM, *supra* note 8, ¶ 55. According to Litton, however, "[t]he bulk of Americans television households view children's E/I programming over the facilities of MVPDs or DBS providers." *Litton Comments*, *supra* note 210, at 15 (citation omitted).

If the FCC were to relax or eliminate its three-hour processing guideline altogether, it must explain its departure from its 1996 conclusion that broadcasters would not air a sufficient amount of children's educational and informational programming in the absence of such a guideline.

VII. OTHER ISSUES

As the foregoing discussion indicates, the Commission will need to justify any changes to its children's television requirements, and it may be necessary for the FCC to obtain a more complete record to do so.[222] In addition to those described above, another area where FCC information-gathering seems lacking involves the FCC's pointing to the increased availability of children's programming from non-broadcast sources (cable, streaming, online) as a potential justification for modifying its requirements. However, as commenters to the NRPM have pointed out, the FCC "makes no attempt to quantify how much actual educational—as opposed to entertainment—children's programming is available on non-broadcast services."[223] As a result, "absent from the record is any support that non-broadcast media alternatives provide quality children's educational content [or] that these alternatives are a meaningful educational substitute for E/I programs on television."[224] Some commenters see the FCC as "conflat[ing] 'children's media' with 'educational media' and vice versa."[225] The FCC had characterized this as a problem in the past, when it found that "some stations were identifying general audience and entertainment programming in their renewal applications as programming specifically designed to serve children's educational and informational needs."[226] This was a factor that led the FCC to adopt its detailed core programming requirements in 1996.[227]

The FCC's consideration in its NPRM of children's programming from non-broadcast sources also represents a departure from its earlier approach. In its 1996 Children's Television Order, the FCC rejected

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[222] *See, e.g.*, Fed. Comm. Commission, Reply Comments of Parents Television Council, at 2, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Oct. 22, 2018). "Members of Congress, many of whom authored the CTA, have also expressed their concerns over the lack of a 'thorough fact-gathering process' in this NPRM." Comments of the National Hispanic Media Coalition, at 6, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *NHMC Comments*].

[223] *Advocacy Group Comments*, *supra* note 170, at 2.

[224] Fed. Comm. Commission, Reply Comments of the National Hispanic Media Coalition, at 9, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Oct. 23, 2018).

[225] *Common Sense Comments*, *supra* note 171, at 10.

[226] 1996 Report and Order, *supra* note 3, ¶ 73. "[S]ome broadcasters are claiming to have satisfied their statutory obligations with shows that, by any reasonable benchmark, cannot be said to be 'specifically designed' to educate and inform children within the meaning of the CTA." *Id.* ¶ 2.

[227] *Id.* ¶¶ 1–2.

broadcasters' arguments that it "should assess not just the educational programming being provided over-the-air by broadcast stations, but rather the overall availability of educational programming in the video marketplace."[228] Instead, the Commission determined that "the proper focus . . . should be on the provision of children's educational programming by broadcast stations, not by cable systems and other subscription services such as direct broadcast satellite systems that, in contrast to broadcast service, require the payment of a subscription fee."[229] In doing so, the FCC noted that in enacting the CTA, "Congress found that, as part of their public interest obligations, '*television station operators and licensees* should provide programming that serves the special needs of children.'"[230] Furthermore, the Commission observed, broadcasting is a "ubiquitous service, which may be the only source of video programming for some families that cannot afford, or do not have access to, cable or other subscription services."[231] Thus, the CTA has particular importance for those who do not have access to these additional sources of children's programming.

This leads to another criticism of the Commission's fact-finding efforts in its NPRM, as the NPRM makes "no consideration of the low-income, rural, and minority children who would be impacted by" the proposed rule changes.[232] Commenters point out that "[t]o obtain access to non-broadcast programming, households must have access to cable or broadband service, and be able to afford subscription fees and equipment. Many families, especially low-income families and families in rural areas cannot access or afford alternative program options."[233] Commenters have presented evidence that ethnic minorities are more likely to rely exclusively on broadcast television and lack access to other sources of media.[234] Moreover, it is argued that adequate

[228] *Id.* ¶ 43 (citation omitted).

[229] *Id.*

[230] *Id.* (citing 47 U.S.C. § 303a (2010) (emphasis added)).

[231] *Id.* (citation omitted).

[232] *NHMC Comments*, *supra* note 222, at 5.

[233] *Advocacy Group Comments*, *supra* note 170, at 2. "Roughly one-third of households with incomes below $50,000 and children ages 6-17 do not have a high-speed internet connection at home. This low-income group makes up about 40% of all families with school-age children in the United States . . . ." *Advocacy Group Comments*, *supra* note 170, at 20 (citations omitted). "Only 45% of adults making less than $30,000 a year have access to broadband Internet in their homes, as opposed to 87% of adults making at least $75,000 having access to broadband Internet in their homes." *NHMC Comments*, *supra* note 222, at 9 (citing *Internet/Broadband Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/factsheet/internet-broadband/).

[234] Nielsen reports that "20% of Hispanic households, 16% of black households, and 15% of Asian households rely exclusively on broadcast television, in comparison to the national average of 13%." Fed. Comm. Commission, Comments for the Institute for the Study of Knowledge Management in Education, Projected, Evolved, and Explorer at Large, at 10, *In the Matter of Children's Television Programming Rules*, MB Docket No. 18-202 (Sept. 24, 2018) [hereinafter *ISKME Comments*]. At the same time, "Only 47% of Hispanic and 57% of African-American adults have in-home broadband, while 72% of White adults have home broadband." *NHMC*

broadband service is not available to a significant number of rural households, even those that can afford to pay for it.[235] Thus, it is argued that "broadcast television remains the great equalizer for lower income households and children who have limited access to other platforms and broadband Internet access."[236]

Another argument advanced against considering online sources of children's programming as substitutes for that provided by broadcasting is that, in contrast to other sources of children's programming, broadcast television is a relatively safe space for children. As opposed to children watching broadcast programming, children watching programming online or on streaming services may be subject to data tracking and ad targeting.[237] Online programming also presents potential "threats such as online predators, hackers, identity theft, [and] cyberbullying . . . [as well as] expos[ure] to inappropriate, malicious, and violent content."[238] This results partly from the fact that the FCC does not regulate Internet sources of media content.[239] In fact, among all forms of media, "[o]nly children's programs on broadcast and cable are subject to advertising limits and policies prohibiting deceptive and unfair advertising practices such as host-selling."[240] As Litton Entertainment observed,

> [n]o other platforms are subject to requirements to provide programming specifically designed to educate and inform children, reduce to writing the educational purpose of the programming, inform parents that the programming has an educational intent through use of the "E/I" watermark, limit the number of commercial

Comments, *supra* note 222, at 9–10 (citing U.S. CENSUS BUREAU, P60-259, INCOME AND POVERTY IN THE UNITED STATES: 2016 13 (2017) (*available at* https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf).

[235] "[B]roadband deployment in rural areas continues to fall behind urban areas. Despite efforts to encourage rural broadband deployment, fixed rural broadband deployment of 25 Mbps/3 Mbps is only at 69.3%. American children in 30.7% of rural households do not have access to sufficient broadband services . . . ." *NHMC Comments*, *supra* note 222, at 10–11 (citing 2018 FCC Broadband Deployment Report, at 22, *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199 (Feb. 2, 2018)).

[236] *ISKME Comments*, *supra* note 234, at Summary.

[237] *See, e.g.*, *Advocacy Group Comments*, *supra* note 170, at 31.

[238] *NHMC Comments*, *supra* note 222, at 12 (citation omitted).

[239] *See Common Sense Comments*, *supra* note 171, at 9.

[240] *Advocacy Group Comments*, *supra* note 170, at 2. It has been argued that "much of the children's programming on YouTube and YouTube Kids would violate the FCC rules." *Id.* at 24 (citation omitted). For example, "[m]any of the most popular videos on YouTube are nothing more than Program Length Commercials." Fed. Comm. Commission, Reply Comments of Litton Entertainment, at 5–6, *In the Matter of Children's Television Rules*, MB Docket No. 18-202 (Oct. 23, 2018) [hereinafter *Litton Reply*] (citations omitted).

> on videos aimed at children 12 and younger, or avoid Program Length Commercials or Host Selling.[241]

Regardless of the amount of children's programming available online or whether that programming is educational or not, relying on online sources to supply educational and informational children's programming presents risks that are not present on broadcast television.

The Supreme Court has shown some awareness of these aspects of broadcast programming as compared to other forms of media. In a 2009 opinion, "Justice Scalia suggested that the abundance of media choices for children does not weaken the interest in regulating broadcast programming but actually strengthens it."[242] Scalia stated, "The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children."[243] In a congressional hearing on the Children's Television Act, former FCC Chair Julius Genachowski made a similar observation: "The bottom line is that twenty years ago, parents worried about one or two TV sets in the house. Today, parents worry not only about the TV in the den, but about the computer in the kitchen, the gaming console in the basement, and the mobile phones in their kids' pockets."[244] Brittney Pescatore characterizes these statements as suggesting that "[t]he need for a safe haven, where required educational programming exists alongside profanity-free awards shows, might serve as a sufficiently compelling interest to justify the [children's] programming requirements."[245]

CONCLUSION

Despite concerns about the constitutionality of the Children's Television Act and its associated core programming requirements,[246] the children's educational television requirements have never been challenged in court.[247] As the foregoing analysis has demonstrated, it

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241 *Litton Reply*, *supra* note 240, at 5 (citing 47 C.F.R. § 73.671(c)(6) (2018); 47 C.F.R. § 73.671(C)(5) (2018); 1991 Report and Order, *supra* note 45, ¶¶ 40–46; Children's Television Report and Policy Statement, 50 F.C.C.2d 1,11 (1974).

242 Pescatore, *supra* note 13, at 108 (citing FCC v. Fox Television Stations, Inc. (*Fox II*), 556 U.S. 502, 529–30 (2009)).

243 *Fox II*, 556 U.S. at 529–30.

244 Pescatore, *supra* note 13, at 108 (citing *Rethinking the Children's Television Act for the Digital Media Age: Hearing Before the Comm. on Commerce, Sci. & Transp.*, 111th Cong. (2009) (statement of Julius Genachowski, Chairman, FCC).

245 *Id.* at 108.

246 *See supra* notes 10–14 and accompanying text.

247 Pescatore, *supra* note 13, at 100 (citations omitted). "The children's television rules have not yet been subject to as applied constitutional attacks either." Levi, *supra* note 15, at 294 (citation omitted) (emphasis removed).

seems likely that the Children's Television Act and its requirement that broadcasters serve the educational and informational needs of children as a condition of license renewal would survive the relaxed level of scrutiny applied to regulation of broadcast speech. The government has shown a need for the speech by demonstrating that educational and informational children's programming is unlikely to be adequately supplied by the free market in the absence of the requirement. Furthermore, requirements that broadcasters provide certain types of speech for the benefit of the public have been upheld by the courts, so long as they do not burden speech too much,[248] do not prohibit or require programming with particular ideas or viewpoints, do not compel broadcasters "to affirm points of view with which they disagree," and leave broadcasters free to otherwise provide whatever programming they wish.[249] All of these factors apply to the requirement that broadcasters provide educational and informational children's programming. There is also one other factor that reduces the burden on broadcasters: they are to serve the educational and informational needs of children, but have complete freedom to select the programming and the views or ideas it contains.[250]

There have been concerns about the constitutionality of requiring broadcasters to air three hours per week of children's programming,[251] but there are reasons to believe that that rule could withstand a constitutional challenge. First, the requirement is not mandatory, but only one of the options broadcasters have to demonstrate their compliance with the rule is through their children's television programming.[252] In addition, the FCC provided reasonable justifications for setting the requirement at three hours.[253] The FCC is now proposing to reduce or even eliminate the three-hour-per-week requirement.[254] While this would reduce the burden on broadcast speech, it may also make achievement of the act's objective of promoting the availability of educational and informational programming for children more difficult to achieve. In this case, the FCC would need to provide justification for its action in light of previous congressional and FCC experience and findings that market incentives would not on their own produce an adequate amount of children's educational and informational programming on broadcast television.[255]

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248 *See supra* notes 112–128, 136–144 and accompanying text.
249 *See* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 977 (D.C. Cir. 1996) (quoting and citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 647 (1994)).
250 *See supra* notes 146–147 and accompanying text.
251 *See supra* note 13 and accompanying text.
252 *See supra* notes 51–62 and accompanying text.
253 *See supra* notes 155–161 and accompanying text.
254 *See supra* notes 166–167 and accompanying text.
255 *See supra* notes 20–28, 35, 181–183 and accompanying text.

Some other core programming guidelines may be on weaker constitutional ground. Requirements that core programming be regularly scheduled, thirty minutes in length, and aired between 7 a.m. and 10 p.m. may have been adequately justified and narrowly tailored at the time of their adoption.[256] However, as both the FCC and commenters responding to the FCC's 2018 NPRM recognize, circumstances have changed,[257] calling into question the continuing validity of the reasoning behind those requirements. The multicast requirements are on even weaker ground. In instituting those requirements, the FCC made no effort to justify the need for broadcasters to provide additional educational and informational children's programming.[258] Now that the multicasting requirements have been in effect for more than a decade, there is considerable evidence that this multicast programming is little viewed,[259] meaning the burden that the requirements place on speech does not actually do much to achieve their objective of educating children and promoting their welfare. The FCC needs to examine this, along with its other core programming requirements, and modify or eliminate those that never, or that no longer, contribute significantly to the achievement of their intended objectives.

256 *See supra* notes 173–183 and accompanying text.
257 *See supra* notes 74–80 and accompanying text.
258 *See supra* notes 216–221 and accompanying text.
259 *See supra* notes 210–215 and accompanying text.