

ALERT

NPRM Proposes Momentous Changes to the Children's Television Programming Rules

July 25, 2018

On July 13, 2018, the Federal Communications Commission (Commission or FCC) released the text of a Notice of Proposed Rulemaking (NPRM) that, consistent with the draft item released in June, proposes sweeping changes to the current children's television programming rules. Comments on the FCC's proposals are due September 24, 2018 and replies are due October 23, 2018.

In the NPRM, the Commission points to several catalysts for modifying its "outdated" children's programming rules, including broadcasters' ability to carry more than one digital programming stream and the decline in "appointment viewing" as viewers increasingly access programming on demand. Recognizing that the Children's Television Act (CTA) requires television stations to provide some amount of programming specifically designed to meet the educational and informational needs of children – which the FCC has labeled "Core Programming" – the agency does not propose a wholesale repeal of its children's programming requirements. However, the NPRM seeks comment on nearly every aspect of the Commission's current rules and aims to give broadcasters increased flexibility to choose how to serve the educational and informational needs of children. Specifically, comments are sought on proposals to (i) revise the FCC's definition of Core Programming, (ii) relax the agency's renewal processing guidelines, (iii) revisit the Commission's rules that require Core Programming on multicast channels, and (iv) reconsider the agency's preemption policies.

CORE PROGRAMMING

Authors

John M. Burgett
Partner
202.719.4239
jburgett@wiley.law
Joan Stewart
Partner
202.719.7438
jstewart@wiley.law

Practice Areas

Media
Telecom, Media & Technology

The Commission seeks comment on revisions to each element of its definition of "Core Programming." The changes, if adopted, would allow broadcasters to meet their children's programming requirement with shorter length specials (e.g., School House Rock segments or after school specials).

The Commission seeks comment on its tentative conclusions that it should eliminate its current requirements that Core Programming be:

- at least 30 minutes in length;
- regularly scheduled; and
- identified on-screen by noncommercial stations with an E/I symbol. (The NPRM also asks whether commercial stations should be exempt from this obligation.)

The NPRM also seeks comment on:

- whether the time period during which Core Programming must air should be expanded outside of 7:00 am – 10:00 pm (e.g., to 6:00 am – 11:00 pm);
- whether it is still necessary to define the time frame in which E/I programming must be aired to be considered Core Programming; and
- whether the FCC should retain the requirement that broadcasters provide their Core Programming schedules to publishers of program guides.

Finally, the Commission seeks input on methods to streamline broadcasters' Core Programming reporting requirements, including by:

- modifying the reporting requirement to an annual filing (via the Form 398 Children's Television Programming Report) rather than on a quarterly basis;
- requiring disclosure only of current programming, not of programs scheduled to be aired in the future;
- evaluating whether reporting about target age groups is necessary;
- considering other methods to streamline reporting; and
- eliminating the requirement to publicize the Form 398.

With respect to each of the proposals summarized above, the Commission also asks a number of specific questions, which are organized by subject below.

Program Length

The Commission asks whether there are any studies or other data showing the benefits to children of educational and informational short segments or any recent studies that evaluate the utility of short form programming relative to long form programming. The Commission also asks whether concerns that short segments may be difficult to locate in a program guide can be addressed by requiring broadcasters to promote such segments, and whether for compliance purposes short segment programming should be

counted on a minute-for-minute basis (e.g., 30 minutes of short segment programming would be equivalent to 30 minutes of Core Programming).

Regularly Scheduled

The agency invites comment on whether the regularly scheduled weekly programming requirement is no longer needed given the decline in appointment viewing and whether the requirement may in fact undermine broadcasters' incentives to air a wider variety of children's programming. The Commission asks further whether elimination of the regularly scheduled weekly programming requirement is likely to incentivize broadcasters to invest in high quality educational specials and non-weekly programming; whether broadcasters would be motivated to promote educational specials and non-weekly children's programming; and whether the costs of the regularly scheduled weekly programming requirement outweigh the benefits.

E/I Symbol

If display of the E/I symbol is eliminated for noncommercial stations, the Commission asks how parents will distinguish between programming specifically designed to educate and inform children and programming that may be intended for general audiences. The Commission also requests information on the technical and viewability challenges created for noncommercial stations when displaying the E/I symbol and asks whether, if the E/I symbol requirement is not eliminated for Core Programming displayed on television sets, it should nonetheless be eliminated when that programming is transmitted over-the-air to and received by smaller devices, such as smartphones and tablets. Regarding commercial stations, the Commission asks to what extent parents use the E/I symbol to locate and choose programming for their children, whether the costs of displaying the E/I symbol outweigh the benefits, and whether the current requirement causes undue technical difficulties for commercial stations or limits their flexibility to air programming on a variety of devices.

Core Programming Hours

The Commission asks whether data exist showing when children ages 16 and under watch television programming and whether appointment viewing by children has declined to the extent that there is no longer a need to require that Core Programming be aired during a prescribed time period. The FCC also seeks comment on the costs associated with the Core Programming hours requirement and the savings or other benefits viewers would receive if Core Programming hours were expanded.

Program Guides

Regarding program guides, the Commission asks for comment on whether guides publish the information provided by stations and whether parents use program guides to identify educational and information programming for their children. In addition, the agency asks how information provided to publishers is made available for use by over-the-air viewers and whether stations include information on their websites to identify their Core Programming as educational and informational.

Reporting Requirements

The Commission asks whether broadcasters' E/I programming changes significantly from quarter to quarter so as to justify quarterly reports and whether the burden of quarterly reports is outweighed by the benefits to the public of having the information on a quarterly basis. If an annual reporting requirement is adopted, the Commission seeks comment on when licensees should be required to file their annual reports and place them in their public files. The Commission tentatively concludes that the reports should only require broadcasters to provide information on the programs aired, rather than also including programs planned for the next quarter and seeks comment on that tentative conclusion. In addition, comment is sought on whether the requirement that broadcasters specify the educational and informational purpose and the target age group of Core Programming in their reports continues to serve its intended purposes.

The FCC also asks whether the reporting requirements should be streamlined to permit broadcasters to certify their compliance instead of providing detailed information documenting their compliance. To the extent that a station does not fully comply with the rules, the Commission proposes that the licensee be required to provide details concerning its non-compliance. If the reports are streamlined, the agency asks whether it should require commercial stations to maintain documentation sufficient to show compliance at renewal time in response to a challenge or to specific complaints. The Commission states that it expects that its proposed rule changes would "largely eliminate the need for preemptions of Core Programming," but asks whether it should continue to require stations to provide detailed information on preemptions and any necessary rescheduling. Comment is also sought on the Commission's tentative conclusion that it should eliminate the requirement that licensees publicize their Form 398s.

RENEWAL PROCESSING GUIDELINES

The Commission's current rules provide two methods for a station to demonstrate during the license renewal process that it has satisfied its statutory obligation to meet the educational and informational needs of children. The "safe-harbor" option allows Media Bureau staff to grant a station's license renewal if the broadcaster can demonstrate that it provided an average of three hours per week of Core Programming during the license term. Alternatively—under the so-called Category B option—if the station relied on other methods (e.g., sponsored programming, off-air initiatives) in place of providing an average of three hours a week of Core Programming, the station's renewal application must be considered by the full Commission.

The Commission requests comment on whether it should retain the three-hour "safe harbor" standard or adopt another standard. The agency also asks whether it should keep its Category B option to demonstrate compliance during the license renewal process. If it does retain the Category B option, the FCC asks for comment on how to provide more certainty for stations that choose to use this "alternative" option and whether it should allow the Media Bureau to approve license renewal applications for stations that use this option.

Safe-Harbor

The Commission asks commenters to explain the costs and benefits of the three-hour obligation per program stream. The agency seeks information on whether this obligation has prevented broadcasters from providing other programming. If it has, the Commission asks what type of programming the broadcaster would provide.

If the FCC did alter this requirement, it asks what type of changes would provide the most relief (e.g., allowing three hours' worth of children's programming to air on a multicast channel and/or allowing a mix of 30-minute programs and interstitials). The Commission also asks for comment on whether additional programming flexibility would incentivize a station to air more children's programming.

The Commission is considering whether to evaluate a broadcaster's compliance with its Core Programming obligation over the course of a year. Currently, a station must demonstrate that it averaged three-hours a week over a six-month period. The FCC asks commenters to provide information describing the benefits and drawbacks of changing this obligation to an annual requirement (i.e., 156 hours a year). If the Commission adopts this change, it asks if it should require a minimal level of programming each week or month so all the programming isn't aired at one time.

Category B Processing Guidelines

The Commission requests comment on how its proposals in the NPRM will impact its "alternative" renewal processing guidelines. Under the Category B processing guidelines, a television station can presumably demonstrate compliance with its obligation to "serve the educational and informational needs of children" by airing less than three hours of Core Programming. In place of the full three hours, the station must show that it aired other programming that "demonstrates a level of commitment to educating and informing children" in the form of specials, PSAs, or short-form programs.

The Commission specifically asks (i) whether it should retain Category B if it otherwise revises and relaxes its three-hour requirement; and (ii) if it does keep Category B, how it should revise these guidelines to provide additional certainty and predictability for broadcasters.

Interestingly, the FCC seeks comment on whether it should retain any type of quantitative guidelines, or instead leave the amount of Core Programming provided up to the broadcaster. Specifically, the NPRM asks for information on the following:

- the amount of educational and informational programming available on other platforms, including noncommercial stations, cable platforms and other non-broadcast platforms and the percentage of children that watch Core Programming over-the-air;
- whether the availability of this programming has changed since 1990 (when the CTA was enacted);
- how changes in sources of programming, viewing patterns (on demand), and other developments since 1990 should affect First Amendment considerations; and

- whether removing the requirement to air a certain amount of children's programming would affect the amount of Core Programming in the marketplace.

SPECIAL SPONSORSHIP EFFORTS AND NON-BROADCAST EFFORTS

The Commission seeks comment on how a broadcaster could meet its educational and informational obligations by relying (in part) on efforts to produce Core Programming, support Core Programming that airs on another station in the market, or non-broadcast efforts that enhance the value of Core Programming.

MULTICASTING STATIONS

The FCC tentatively concludes that the CTA does not mandate that a station broadcast Core Programming on its primary stream. The Commission seeks comment on this conclusion and specifically asks whether (and how) increased flexibility may enhance stations' scheduling and delivery of content to both adult and children viewers.

The Commission also seeks comment on a proposal to eliminate the requirement that a station air additional Core Programming on each of its multicast digital streams. Instead, the agency proposes to grant stations the flexibility to choose on which of their free over-the-air streams to air Core Programming. The Commission believes this will give broadcasters more flexibility to air programming when children are likely to be watching and also reduce the need for preemptions for sports or other events.

In addition, the Commission asks whether consumers have benefited from the additional Core Programming on digital streams and whether that programming is known or regularly watched. Importantly, the FCC asks whether the current obligation requires stations to forego other programming options and whether the requirement increases programming costs for stations.

The Commission tentatively concludes that its current prohibition on moving programming between digital streams that do not have comparable MVPD carriage is no longer necessary. If adopted, this rule change could result in Core Programming airing only on an over-the-air stream, rather than one with MVPD carriage. The Commission asks if broadcasters have an incentive to ensure that the programming on their over-the-air channels attracts as many viewers as possible. It also seeks comment on whether a station is fulfilling its obligation to serve the educational needs of children if the programming cannot be viewed on an MVPD.

The Commission asks if it should impose an obligation on broadcasters to tell viewers on which program stream it is airing its children's programming. It requests comment on whether a station should be required to broadcast on-air announcements or provide a notice through its website of where Core Programming can be located. The agency also asks if there is a more relevant way to provide the notifications to viewers.

Finally, the FCC asks how the NPRM's proposed rule changes would impact the ATSC 3.0 rules that were recently adopted. For example, the Commission asks whether it needs to build into the ATSC 3.0 rules the flexibility for a broadcaster to air Core Programming on only its 1.0 or 3.0 stream, rather than requiring that the programming air on both.

PREEMPTIONS

The Commission asks if it should revise its preemption policies or if the other rule changes it proposes will eliminate the need for preemptions. For example, if Core Programming can be short-form and does not need to be regularly scheduled, would that give a station enough flexibility to work the programming around news and sports such that it would not be preempted?