Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Children's Television Obligations	)	MM Docket 00-167
Of Digital Television Broadcasters	)	
	)	
	)	

SECOND ORDER ON RECONSIDERATION AND SECOND REPORT AND ORDER

Adopted: September 26, 2006 **Released: September 29, 2006**

By the Commission: Chairman Martin, Commissioners Copps, Adelstein, Tate and McDowell issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. In this *Second Order on Reconsideration and Second Report and Order* ("*Second Order*")[1] we resolve issues regarding the obligation of television broadcasters to protect and serve children in their audience. We address matters related to two areas: the obligation of television broadcast licensees to provide educational and informational programming for children and the requirement that television broadcast licensees and cable operators protect children from excessive and inappropriate commercial messages. Some of the rules and policies adopted herein apply only to digital broadcasters, while others apply to both analog and digital broadcasters as well as cable operators.[2] Our goals in resolving these issues are to provide television broadcasters with guidance regarding their obligation to serve children as we transition from an analog to a digital television environment, update our rules protecting children from overcommercialization in children's programming, and improve our children's programming rules and policies.

2. Specifically, this *Second Order* makes certain modifications to the rules and policies adopted in our September 9, 2004 *Report and Order and Further Notice of Proposed Rule Making* ("*2004 Order*") in this proceeding.[3] The modifications we make today respond to petitions for reconsideration filed in response to the rules as well as a Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules ("Joint Proposal") filed by a group of cable and broadcast industry representatives and children's television advocates, among others.[4]

3. Our decision today does not alter the new children's core programming "multicasting" rule adopted in the *Order*,[5] but does clarify the way in which repeats of core programs will be counted under the new rule. We do not make substantial changes to the four-

[1] In the first *Order on Reconsideration* in this proceeding, the Commission deferred the effective date of some of the rules initially adopted in the proceeding. *See Order on Reconsideration*, 20 FCC Rcd 2055 (2005). *See also* footnote 21, *infra*.

[2] For instance, for purposes of the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394, which provides the basis for these limits on children's television commercial content, "the term 'commercial television broadcast licensee' includes a cable operator, as defined in section 602 of the Communications Act of 1934 (47 U.S.C. § 522)."

[3] 19 FCC Rcd 22943 (2004).

[4] Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules, MM Docket 00-167, filed Feb. 9, 2006. In this *Second Order,* we dismiss the petitions for reconsideration filed in response to the *2004 Order*. We believe that the adoption of this *Second Order* renders the petitions moot, to the extent that the petitions are neither granted nor denied herein. Any remaining concerns can be raised on reconsideration of the new rules adopted in this *Second Order*.

[5] For those broadcasters that choose to "multicast" on their digital channel – *i.e.*, provide multiple programming streams rather than the one stream possible in an analog world – the new rule generally provides that a broadcaster's core programming obligation increases in proportion to the amount of free programming being offered.

prong website rule adopted in the *Order*, but do amend the host selling restrictions adopted in the *Order* to apply those restrictions less broadly and to exempt certain third party websites from the host selling restriction. We also revise the definition of "commercial time" adopted in the *Order* to limit the kinds of promotions of children's programs that must be counted under the advertising rules adopted in the *Order*. In addition, with regard to scheduling of core children's programming, we vacate the percentage cap on the number of permissible core program preemptions adopted in the *Order* and return to our prior practice of addressing the number of preemptions and rescheduling of core programming on a case-by-case basis. These modifications will serve the public interest by ensuring an adequate supply of children's educational and informational programming as we transition to digital television technology, and protecting children from excessive and inappropriate commercial messages in broadcast and cable programming, without unduly impairing the scheduling flexibility of broadcasters and cable operators.

II. BACKGROUND

4. Television plays a major role in the lives of American children. On average, children watch almost three hours of television every day, and more than half of all children (53%) have a television in their bedrooms.[6] Moreover, many children watch television before they are exposed to formal education. Children two to four years old watch on average two hours of television daily and a quarter of two to four year-olds have television sets in their bedrooms.[7] By the time most American children begin the first grade, they will have spent the equivalent of at least three school years in front of the television set.[8]

5. Congress has recognized that television can benefit society by helping to educate and inform our children. As Congress has stated, "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive."[9]

6. In 1990, Congress enacted the Children's Television Act of 1990 ("CTA").[10] The CTA imposes two requirements relating to children's television programming. First, commercial television broadcast licensees and cable operators must limit the amount of commercial matter

[6] Donald F. Roberts *et al.*, Kaiser Family Foundation, *Kids & Media @ The New Millennium* (1999) at 20, available at http://www.kff.org.

[7] *Id*.at 2, 12.

[8] Newton C. Minow and Craig L. LaMay, *Abandoned in the Wasteland: Children, Television, and the First Amendment*, Hill & Wang (1995) at 18; Daniel Anderson, *The Impact on Children's Education: Television's Influence on Cognitive Development*, U.S. Department of Education, Working Paper No. 2 (1988) at 12-13.

[9] S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989) ("Senate Report"); H. Rep. 385, 101st Cong., 1st Sess. 11 (1989) ("House Report").

[10] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394.

during children's programs to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.[11] Second, through its review of television broadcast license renewal applications, the Commission must consider whether commercial television licensees have served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."[12]

7. In 1996, the Commission adopted a *Report and Order* strengthening its children's educational and informational television programming requirements enforcing the CTA.[13] Among other things, the Commission adopted a processing guideline pursuant to which broadcasters that aired at least three hours per week of programming "specifically designed" to serve the educational and informational needs of children ages 16 and under (otherwise known as "core" programming) could receive staff-level approval of the CTA portion of their license renewal application.[14] Licensees were required to identify core programming at the time it was aired (in a manner left to the discretion of the licensee) and in information provided to publishers of television program guides. Licensees were also required to prepare and place in their public inspection files a quarterly Children's Television Programming Report (FCC Form 398) identifying their core programming and other efforts to comply with their educational programming obligations.

8. In the *2004 Order*, the Commission updated the children's television rules and policies to ensure that they continue to serve the interests of children and parents as the country transitions from analog to digital television. Among other things, the Commission revised the three-hour core programming processing guideline as it applies to DTV broadcasters that choose to multicast.[15] Specifically, the *2004 Order* increased the core programming benchmark for digital broadcasters in a manner roughly proportional to the increase in free video programming

[11] *Id.* at 303a.

[12] *Id.* at 303b.

[13] *Policies and Rules Concerning Children's Television Programming*, *Revision of Programming Policies*, 11 FCC Rcd 10660 (1996) ("*1996 Order*").

[14] Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming. 47 C.F.R. § 73.671, Note 2. (Note 2 was redesignated 47 C.F.R. § 73.671(d) in the *2004 Order*, *see* 70 FR 25-01 (Jan. 3, 2005).) In this regard, specials, public service announcements (PSAs), short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three hour processing guideline. Licensees not meeting these criteria will have their license renewal applications referred to the Commission. At a Commission-level review, licensees can demonstrate compliance with the CTA by relying, in part, for example, on sponsorship of core programs on other stations in the market that increases the amount of core educational and informational programming on the station airing the sponsored program or on special nonbroadcast efforts which enhance the value of children's educational and informational programming. *Id.*

[15] *2004 Order* at 22950.

offered by the broadcaster on multicast channels.[16] The *2004 Order* also permitted the display of Internet website addresses during children's programming only if the website meets a four-prong test limiting commercial matter on the site, and prohibited broadcasters from displaying website addresses during both children's programs and commercials appearing in those programs if the website uses host selling.[17] The *2004 Order* also imposed a percentage cap on the number of preemptions of core children's programs and revised the definition of "commercial matter" for purposes of the commercial limits to include promotions of other television programs unless they are children's educational or informational programs.[18]

9. Several petitions for reconsideration of the *2004 Order* were filed.[19] In addition, petitions for judicial review of the *2004 Order* and other requests for relief are pending before the U.S. Court of Appeals for the Sixth Circuit.[20]

10. On December 16, 2005, the Commission adopted an order extending the effective date of most of the rules adopted in the *2004 Order* until sixty days after publication in the Federal Register of an order on reconsideration in this proceeding.[21] The Commission noted that

[16] *Id.*

[17] *Id.* at 22961-62

[18] *Id.* at 22958, 22963

[19] A list of petitioners is attached hereto at Appendix A.

[20] In late September and early October 2005, the Office of Communication of the United Church of Christ ("UCC") and Viacom withdrew their participation in reconsideration petitions and filed separate petitions for judicial review of the *2004 Order*. UCC filed a petition for review of the *Order* in the U.S. Court of Appeals for the Sixth Circuit on September 26, 2005. *Office of Communication of the United Church of Christ, Inc. v. FCC*, No. 05-4189 (6th Cir., filed Sept. 26, 2005). Viacom filed a petition for review of the *Order* in the U.S. Court of Appeals for the D.C. Circuit on October 3, 2005. *Viacom, Inc. v. FCC*, No. 05-1387 (D.C. Cir., filed Oct. 3, 2005). Disney subsequently filed a petition for writ of mandamus with the D.C. Circuit requesting that the Commission be directed to act on the petitions for reconsideration or that the Court stay the rules until the Commission decides the reconsideration petitions. Viacom then also asked the D.C. Circuit to stay the rules until it resolved Viacom's petition for review. On November 16, 2005, the D.C. Circuit transferred both Viacom's petition and Disney's petition to the Sixth Circuit. Order, *In re Walt Disney Company*, No. 05-1393 (D.C. Cir. Nov. 16, 2005); Order, *In re Viacom, Inc.*, No. 05-1387 (D.C. Cir. Nov. 16, 2005).

[21] *Order Extending Effective Date*, 20 FCC Rcd 20611 (2005). Originally, the rules relating to the display of Internet website addresses in children's programming were scheduled to become effective on February 1, 2005. After a number of broadcasters and cable operators expressed concern that they would have difficulty complying with the new website rules by this date, however, the Commission deferred the effective date of those rules until January 1, 2006, consistent with the effective date of many of the other requirements in the *2004 Order*. *See Order on Reconsideration*, 20 FCC Rcd 2055 (2005). The decision to apply the commercial limits and policies to all digital video programming directed to children ages 12 and under, whether that programming is aired on a free or pay digital stream, went into effect February 3, 2005. *See Order on Reconsideration*, 20 FCC Rcd 2055, 2056 (2005). The rules regarding on-air identification of core children's programming became effective September 19, 2005, after approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995. *See* Public Notice, DA 05-2309 (rel. August 18, 2005). Those rules that are already in effect are not affected by this *Second Order*.

representatives of the broadcast and cable industries and public interest groups involved in children's television issues had been meeting in an attempt to resolve their differences regarding the new rules that are the subject of the litigation.[22] The Commission further noted that those parties had informed the Commission that they had reached an agreement on a recommendation that, if adopted, would resolve their concerns with the Commission's rules. In light of that agreement and the issues raised in the pending petitions for reconsideration, the Commission found that the public interest would be served by delaying the effective date of the new rules. The Commission noted that it would seek comment on the parties' joint recommendation separately.[23]

11. On February 9, 2006, the parties involved in negotiations regarding the *2004 Order* filed with the Commission the Joint Proposal, which contains the parties' recommended modifications to the rules adopted in the *2004 Order*. The parties to the Joint Proposal include the four major broadcast networks, major children's programming networks, cable operators, advertisers, and a coalition of children's advocacy groups.[24] The Commission issued a *Second Further Notice of Proposed Rule Making* ("*Second FNPRM*") on March 24, 2006, seeking comment "on the rules and policies adopted in the *[2004] Order* in light of the recommendations reflected in the Joint Proposal" and "asked for any alternative modifications" to the 2004 rules, in addition to the modifications proposed by the Joint Proposal.[25] Among the commenters supporting adoption of the Joint Proposal are two major industry trade associations, the National Association of Broadcasters and the National Cable and Telecommunications Association, as well as other children's programming networks, sports interests, and children's advocacy groups.

III. DISCUSSION

12. We commend the parties to the Joint Proposal for their hard work in negotiating a compromise among a group of entities with often widely divergent views on the appropriate rules and policies in the area of children's television. Negotiation among interested parties can often be productive in achieving a workable compromise proposal consistent with the public interest on issues before the Commission, and we encourage such efforts. This private agreement has now been subject to public scrutiny and we will, of course, consider all comments

[22] In light of the Commission's December 16, 2005 *Order Extending Effective Date*, all of the petitions involved in this litigation as referenced in footnote 20are currently being held in abeyance by the Sixth Circuit.

[23] *Order Extending Effective Date* at 20612.

[24] The parties to the Joint Proposal are: Viacom, Inc., CBS Corporation, The Walt Disney Company, Fox Entertainment Group, Inc., NBC Universal, Inc. and NBC Telemundo License Co., Time Warner Inc., 4Kids Entertainment Inc., Discovery Communications, Inc., the Association of National Advertisers, Inc., The Office of Communication of the United Church of Christ, Inc., Children Now, the National Parent Teacher Association, the American Academy of Pediatrics, Action Coalition for Media Education, and the American Psychological Association.

[25] 21 FCC Rcd 3642, 3643 (2006). A list of the comments and reply comments filed in response to the *Second FNPRM* is attached hereto at Appendix A.

in determining what rules and policies are most consistent with the statute and best serve the public interest. Based on the full record before us, we conclude that the Joint Proposal appropriately balances the concerns and needs of children and parents with those of industry, advertisers, and others, and will result in swift implementation of the rules.

13. We note that the Joint Proposal recommends only relatively minor clarifications to two of the rules adopted in the *2004 Order* – the digital broadcasting processing guideline and the website address rule. While some of the comments filed in response to the Joint Proposal indicate that some parties remain concerned about aspects of the digital broadcasting processing guideline,[26] by and large the comments support the Joint Proposal.[27] In this item, we retain both the digital programming processing guideline and the website address rule with only minor modifications. These and the other modifications we make to the 2004 rules are consistent with the recommendations of the Joint Proposal and with our overall goals of ensuring the provision of sufficient children's educational programming and protecting children from excessive advertising as we transition to the digital era.

A. Digital Core Children's Programming Processing Guideline

14. As discussed above, under the core programming processing guideline adopted in 1996, analog broadcasters that air at least three hours per week of core children's educational programming are entitled to staff-level approval of the CTA portion of their license renewal application. With the advent of digital broadcasting and the multicasting ability that technology offers, the Commission determined in the *2004 Order* that it would adopt a new method of quantifying the core programming guideline for digital broadcasters that choose to multicast. The Commission made clear that all digital broadcasters continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. In addition, for DTV broadcasters that choose to multicast, the guideline increases in proportion to the additional hours of free programming offered on multicast channels – up to an additional three hours per week for each 24-hour free multicast program stream.[28] Under the revised

[26] *See* Local Broadcasters Alliance Comments at 3; Belo Corp. Reply Comments at 1; Catamount Television Holdings Reply Comments at 1-2; Named State Broadcasters Associations Reply Comments at 4-7; Pappas Telecasting Companies Reply Comments at 2-3; Piedmont Television Holdings Reply Comments at 1-2. These commenters argue that the Commission either should not impose additional core programming requirements on digital multicast channels or, at least, should exempt multicast channels that offer educational, informational, and/or public interest programming. For the reasons discussed in the *2004 Order* and herein, we will retain the digital core children's programming processing guideline. *See 2004 Order* at 22950-51.

[27] *See, e.g.,* Comments of CBS Corporation, Fox Entertainment Group, Inc., NBC Universal, Inc. and NBC Telemundo License Co. ("CBS *et al.*") at 2; NAB Comments at 2; Time Warner Inc. Comments at 3; Walt Disney Company Comments at 3.

[28] *2004 Order* at 22950-22951. The revised guideline for DTV broadcasters works as follows. Digital broadcasters continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. DTV broadcasters that choose to provide additional streams of free video programming are subject to an additional ½ hour per week of core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, for example, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main (continued….)

guideline adopted in the *2004 Order*, digital broadcasters can choose to air some or all of the additional core programming on either the main stream or a multicast stream, as long as the multicast stream receives MVPD carriage comparable to the stream that generated the additional core programming obligation.[29]

15. In order to ensure that digital broadcasters do not simply replay the same core programming in order to meet this revised processing guideline, the Commission required in the *2004 Order* that "at least 50 percent of core programming not be repeated during the same week in order to qualify as core."[30] The Commission exempted from this requirement any program stream that merely time shifts the entire programming line-up of another program stream.[31] In addition, the Commission stated that during the digital transition we would not count as repeated programming core programs that are aired on both the analog station and a digital program stream. [32]

16. A number of broadcast interests argued on reconsideration that requiring additional programming obligations for multicast streams would stifle the deployment of specialized channels.[33] Broadcasters also claimed that there is no record evidence of a failure by commercial TV stations to meet children's educational programming needs.[34] To counter the disincentive to air multicast channels, some petitioners supported an exemption for digital program streams that carry non-entertainment programming.[35] Petitioners also argued that the Commission should waive the "comparable carriage" element of the guideline, at least until MVPDs are required to carry all free over-the-air channels.[36] In response, children's television advocates argued that history shows that broadcasters serve the educational needs of

(Continued from previous page)
program stream will have a guideline of ½ hour per week of core programming added to the 3 hours per week on the main program stream, those providing between 29 and 56 hours per week of additional free video programming will have one hour per week added, and so on.

[29] *Id*. at 22952.

[30] *Id*.

[31] Given that the purpose of such a stream is merely giving viewers the opportunity to watch the same programming offered on the main stream but at a different time, we considered the station's core programming obligation for that stream to be fulfilled by also providing the same core programming as offered on the main stream.

[32] *Id*.

[33] National Association of Broadcasters ("NAB") Petition for Reconsideration at 4; Joint Petition for Reconsideration of Cox, Meredith, Media General, McGraw–Hill, Cosmos, Evening Post (Cox, *et a*l. Petition for Reconsideration) at 10.

[34] NAB Petition for Reconsideration at 4.

[35] Cox, *et al*. Petition for Reconsideration at 9-12.

[36] *Id*. at 12.

children and that the record in this proceeding demonstrates that the educational needs of children are not currently being met.[37]

17. The Joint Proposal generally accepts the new multicasting rule but recommends a clarification of the restriction on the number of repeated core programs that can count toward the new programming guideline. Specifically, the Joint Proposal would clarify that at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams.[38] This is not a change in the rule, but rather a clearer statement of what the rule was intended to cover. The Joint Proposal would also amend FCC Form 398 to collect information necessary to enforce this limit.

18. We will retain the revised core programming processing guideline as adopted in the *2004 Order*. As we stated then, we believe that the revised guideline translates the existing three-hour guideline to the digital environment in a manner that is both fair to broadcasters and meets the needs of the child audience. The previous core programming guideline represented the Commission's judgment as to what constituted a "reasonable, achievable guideline" that would not unduly burden broadcasters.[39] Now that digital broadcasters have the capability to significantly increase their overall hours of programming, increasing the amount of core programming will not result in an unreasonable burden. For example, if a station chooses to broadcast a second stream of free video programming twenty-four hours a day, seven days a week, it can satisfy the new guideline by providing merely three additional hours *per* week of core programming – or less than two percent of the channel's 168 hours of additional weekly programming. In addition, we believe that a guideline that increases the amount of core programming in a manner roughly proportional to the increase in free video programming offered by broadcasters is consistent with the objective of the CTA "to increase the amount of educational and informational broadcast television available to children."[40]

19. We also conclude that the revised quantitative processing guideline we reaffirm today is consistent with the First Amendment. It is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media.[41] Under this more lenient scrutiny, it is also well established that the government may regulate broadcast speech in

[37] Coalition Opposition to Petitions for Reconsideration at 2.

[38] Joint Proposal at 7.

[39] *1996 Order* at 10719. Some parties suggest that the previous core programming guidelines did not produce sufficient educational and informational programming for children. *See* Comments of Children's Media Policy Coalition, April 21, 2003, at 4-7.

[40] *2004 Order* at 22953 (*citing* Senate Report at 1).

[41] *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-41 (1994).

order to advance its compelling interest in promoting and protecting the well-being of children.[42] As we discussed in the *2004 Order*, our new guideline imposes reasonable parameters on a broadcaster's use of the public airwaves and is narrowly tailored to advance the government's substantial, and indeed compelling, interest in the protection and education of America's children.[43] In enacting the CTA, Congress explicitly found that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children."[44] As noted above, the multicasting rule substantially advances that interest by furthering "the objective of the CTA 'to increase the amount of educational and informational broadcast television available to children.'"[45] Moreover, consistent with the First Amendment, the rule is narrowly tailored to achieve its objective. It increases the guideline only for broadcasters that choose to use their digital capacity to air additional free video programming. Broadcasters continue to retain wide discretion in choosing the ways in which they will meet their CTA obligations. Under the rule, the core programming guideline increases in a manner roughly proportional to the additional amount of free video programming multicasters choose to provide. That guideline, by "giving broadcasters clear but nonmandatory guidance on how to guarantee compliance" with the CTA, provides "a constitutional means of giving effect to the CTA's programming requirement."[46] We reject the State Broadcasters Associations' argument that our revised guideline is constitutionally unacceptable because it "dictates the removal of one form of content over another."[47] The CTA itself reflects a preference for children's educational and informational programming, and no party has challenged the constitutionality of the CTA's provisions for promoting such programming.

20. A number of broadcast companies and industry associations, none of which are parties to the Joint Proposal, argue that the Commission either should not impose additional core programming requirements on digital multicast channels, or at least should exempt multicast channels that offer educational, informational, and/or public interest programming.[48] These commenters argue that many local broadcasters are planning multicast channels that focus on a single genre of programming, such as weather or news, and that the multicast guideline as

[42] *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc*), cert. denied*, 516 U.S. 1043 (1996).

[43] *2004 Order* at 22956.

[44] 47 U.S.C. 303a note.

[45] Senate Report at 1.

[46] *2004 Order* at 22956.

[47] Named State Broadcasters Associations Reply Comments at 5-6.

[48] Local Broadcasters Alliance Comments at 3; Belo Corp. Reply Comments at 1; Catamount Television Holdings Reply Comments at 1-2; Named State Broadcasters Associations Reply Comments at 4-7; Pappas Telecasting Companies Reply Comments at 2-3; Piedmont Television Holdings Reply Comments at 1-2.

adopted would discourage the provision of such specialized channels.[49] These commenters also argue that children are unlikely to watch programming aired on channels primarily devoted to news and other specialized adult programming.[50]

21. We decline to revise our processing guideline as suggested by these commenters. As we stated in the *Order*, we do not want to discourage broadcasters from providing channels with a specialized focus.[51] However, we agree with the Children's Media Policy Coalition that the guideline provides broadcasters the flexibility to move core programming to either their main programming stream or other multicast streams, so long as the stream the programming is moved to receives comparable MVPD carriage to the stream triggering the additional obligation.[52] Thus, the guideline preserves the principle that, in order to obtain staff level approval of their CTA compliance, broadcasters must provide three hours of children's core programming for every 168 hours per week of free video programming that they air, while at the same time giving broadcasters flexibility to choose the multicast stream that will air that programming. In addition, broadcasters could meet the guideline by airing children's programming on specialized channels, such as a children's news program on a twenty-four hour news channel or a children's educational weather program on a twenty-four hour weather channel. Furthermore, we note that our rules provide flexibility for licensees that have aired somewhat less core programming than indicated by the guideline but that nonetheless demonstrate an adequate commitment to educating and informing children.[53]

22. Some broadcast commenters also point out that there is no requirement for cable carriage of multicast channels, thereby limiting the flexibility of broadcasters to consolidate their core programming on a multicast stream under the comparable MVPD carriage requirement.[54] While we recognize that the comparable MVPD carriage requirement may limit the flexibility of some broadcasters to consolidate core programming on a single multicast channel, we believe that the comparable carriage requirement is necessary to ensure that, as additional free

[49] Local Broadcasters Alliance Comments at 6.

[50] Named State Broadcasters Associations Reply Comments at 5-6.

[51] *2004 Order* at 22953.

[52] Coalition Reply Comments at 6.

[53] *2004 Order* at 22951. *See also* 47 C.F.R. § 73.671(d). Specifically, licensees are eligible for staff level approval if they demonstrate that they have aired a package of different types of educational and informational programming that, while containing somewhat less core programming than indicated by the applicable guideline, demonstrates a level of commitment to educating and informing children at least equivalent to airing the amount of programming indicated by the guideline. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children may be counted toward the processing guideline. Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have an additional opportunity to demonstrate compliance with the CTA.

[54] Marantha Comments at 2-3; Local Broadcasters Alliance Comments at 3, n. 3.

programming is made available to viewers in the station's service area, the level of children's programming increases as well.

23. As noted, the Joint Proposal suggests a clarification of the number of permissible core program repeats under the processing guideline. Specifically, the Joint Proposal recommends that the Commission clarify that at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that had already aired within the previous seven days on either the station's main program stream or on another of the station's free digital program streams.[55] We will adopt this clarification; it makes the rule easier to understand and apply and is consistent with the intent of the *2004 Order*. All of the commenters that addressed this aspect of the Joint Proposal supported this clarification.[56] We will also adopt the Joint Proposal recommendation, supported by other commenters, that FCC Form 398 be amended to collect the information necessary to enforce the limit on repeats under the revised guideline.[57] As suggested by commenters, we will permit licensees to certify on Form 398 that they have complied with the repeat restriction and will not require broadcasters to identify each program episode on Form 398.[58] We will require licensees, however, to retain records sufficient to document the accuracy of their certification, including records of actual program episodes aired, and to make such documentation available to the public upon request.[59] The children's programming liaison, whose name and phone number must be included on FCC Form 398, should be able to provide documentation to substantiate the certification if requested.

B. Preemption

24. To qualify as "core programming" for purposes of the children's programming processing guideline, the Commission requires that a children's program be "regularly scheduled"; that is, a core children's program must "be scheduled to air at least once a week" and "must air on a regular basis."[60] In adopting its 1996 children's programming rules, the Commission stated that television series typically air in the same time slot for thirteen consecutive weeks, although some episodes may be preempted for programs such as breaking news or live sports events. The Commission stated in the *1996 Order* that it would leave to the staff to determine, with guidance from the full Commission as necessary, what constitutes regularly scheduled programming and what level of preemption is allowable.[61]

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[55] Joint Proposal at 7.

[56] CBS, *et al*. Comments at 3; NAB Comments at 10.

[57] Joint Proposal at 7.

[58] CBS, *et al*. Comments at 3-4; NAB Comments at 10-11; Coalition Reply Comments at 9-10.

[59] *Id.*

[60] *1996 Order* at 10711; 47 C.F.R. § 73.671.

[61] *1996 Order* at 10711.

25. In the *2004 Order*, the Commission stated that core programs moved to the same time slot on another digital program stream would not be considered preempted, as long as the alternate stream has comparable MVPD carriage and the station provides notice of the move on both the original and the alternate program stream. In addition, the *2004 Order* limited the number of core programming preemptions for analog and digital broadcasters to no more than ten percent of core programs in each calendar quarter.[62] Any preemption beyond the ten percent limit would cause that program not to count as core under the processing guideline, even if the program were rescheduled. The *2004 Order* exempted preemptions for breaking news from the preemption limit and rescheduling requirement.[63]

26. On reconsideration, a number of petitioners argued that the preemption cap is unworkable in light of broadcasters' commitments to air live sports programming on Saturdays, particularly on the West coast.[64] In lieu of the new rules, some petitioners urged the Commission to continue its prior practice of case-by-case staff approval of network preemption practices.[65] Other petitioners supported exempting from the preemption cap live sports programming or children's programs rescheduled in accordance with the Media Bureau's current preemption policies.[66] In their original opposition to these petitions, children's advocates agreed that a modest modification of the new preemption rule would be appropriate to accommodate major sporting events such as the Olympics and World Cup.[67]

27. The Joint Proposal recommends that the Commission not adopt any percentage or other numerical limit on preemptions and instead return to the Commission practice of ensuring, on a case-by-case basis, that broadcasters do not engage in excessive preemptions of core programming.[68] All of the commenters that addressed the issue of preemptions supported the Joint Proposal recommendation to eliminate the cap on the number of preemptions and return to a case-by-case approach.[69]

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[62] *2004 Order* at 22958.

[63] *Id.*

[64] Disney Petition for Reconsideration at 14-15; Cox, *et al*. Petition for Reconsideration at 5-6; Joint Petition for Reconsideration of Fox Entertainment Group, NBC Universal, Inc. and Viacom ("Fox, *et al*. Petition for Reconsideration") at 5-6.

[65] NAB Petition for Reconsideration at 21.

[66] NAB Petition for Reconsideration at 21-22; Cox, *et al*. Petition for Reconsideration at 8; Fox, *et al*. Petition for Reconsideration at 13-14.

[67] Coalition Opposition to Petitions for Reconsideration at 8.

[68] Joint Proposal at 5-6.

[69] NAB Comments at 4; Professional and Collegiate Sports Interests Comments at 3; Univision Comments at 2; Named State Broadcasters Associations Reply Comments at 3.

28. We are persuaded that the burden created by the ten percent cap on preemptions outweighs the benefits the Commission sought to achieve, and therefore hereby repeal the ten percent cap on preemptions adopted in the *2004 Order*. We will instead institute a procedure similar to that used by the Media Bureau and the Commission following adoption of the 1996 children's television *Order* whereby networks sought informal approval of their preemption plans each year. Under the policy formerly developed by the Commission staff, a program counted as preempted only if it was not aired in a substitute time slot (otherwise known as a "second home") with an on-air notification of the schedule change occurring at the time of preemption during the previously scheduled episode. The on-air notification must announce the alternate date and time when the preempted show will air. As part of this policy, we will require all networks requesting preemption flexibility to file a request with the Media Bureau by August 1 of each year stating the number of preemptions the network expects, when the program will be rescheduled, whether the rescheduled time is the program's second home, and the network's plan to notify viewers of the schedule change.[70] We will presume that non-network stations are complying with the three hour core programming requirement, and do not need broad preemption relief. We intend to monitor the number, rescheduling, and promotion of preemptions of all stations under this policy by our quarterly review of their Children's Programming Reports to ensure that the interests of the child audience are being served. We find this approach to be a reasonable compromise for programmers that routinely face conflicts between their children's television blocks and sports programming as the result of time differences. We note that the concept of a "second home" is familiar to viewers, and are persuaded that those core programs that must be preempted are consistently rescheduled and promoted.[71] Indeed, the Media Bureau has previously found that children's educational and informational programming efforts have not been "unduly affected by the limited preemption flexibility granted" under the existing standard.[72]

C. Limit on Display of Internet Website Addresses

29. The CTA requires that commercial television broadcasters and cable operators limit the amount of commercial matter in children's programs to no more than 10½ minutes per hour on weekends and 12 minutes per hour on weekdays.[73] The Commission noted in the *2004 Order* that some broadcasters are displaying Internet website addresses during children's program material (for example, in a crawl at the bottom of the screen) and expressed concern that the

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

[71] *See, e.g., The Effect of Preemption on Children's Educational and Informational Programming,* Mass Media Bureau, Policy and Rules Division, DA 98-2306 (November 1998) at 12.

[72] *Three Year Review of the Implementation of the Children's Television Rules and Guidelines, 1997-1999*, Mass Media Bureau, Policy and Rules Division (January 18, 2001) at 5-6.

[73] 47 U.S.C. § 303a. Effective February 2005, these limits applied to all digital video programming directed to children 12 and under on broadcast or cable television, whether that programming is aired on a free or pay digital stream. *2004 Order* at 22,960. This *Second Order* does not modify this rule, which remains in effect.

display of such addresses for websites established for commercial purposes in children's programs was inconsistent with the CTA's mandate to protect children from excessive and inappropriate commercial messages. Accordingly, the *2004 Order* required that, with respect to programs directed to children ages 12 and under, the display of Internet website addresses during program material is permitted only if: (1) the website offers a substantial amount of *bona fide* program-related or other noncommercial content; (2) the website is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).[74] This restriction applies to analog and digital broadcasters as well as cable operators.[75]

30. On reconsideration, a number of petitioners claimed that the rule exceeds the Commission's authority because the CTA does not authorize regulation of website addresses, which petitioners assert are not commercials.[76] We disagree. As the children's television advocates asserted,[77] the Commission has the authority to enact these restrictions because they do not regulate Internet content, but rather the advertising of commercial websites in children's programming, a subject clearly within the scope of the Commission's jurisdiction. Several petitioners also challenged the rule on notice grounds.[78] In response, child advocates argued that the Commission gave adequate notice of the potential restriction, because it sought comment on whether to prohibit all direct links to commercial websites and the term website links can refer to either passive displays or interactive links.[79] We agree that adoption of the website display rules was within the scope of the NPRM. Furthermore, the *Second FNPRM* sought comment "on the rules and policies adopted in the [2004] *Order* in light of the recommendations reflected in the Joint Proposal" and asked for "any alternative modifications" to the 2004 rules, in addition to the modifications proposed in the Joint Proposal.[80] Thus, the notice issue is moot.

31. The Joint Proposal does not propose material changes to the website rule adopted in the *2004 Order* but requests two clarifications: (1) that the rule applies only when Internet addresses are displayed during program material or during promotional material not counted as commercial time; and (2) that if an Internet address for a website that does not meet the four-

[74] *2004 Order* at 22961.

[75] *Id*.

[76] NAB Petition for Reconsideration at 18-19; Turner Petition for Reconsideration at 16.

[77] Coalition Opposition to Petitions for Reconsideration at 22-23.

[78] American Advertising Federation, American Association of Advertising Agencies, and Association of National Advertisers, Inc. ("Advertisers") Petition for Reconsideration at 16; National Cable & Telecommunications Association ("NCTA") Petition for Reconsideration at 7; Disney Petition for Reconsideration at 17-18

[79] Coalition Opposition to Petitions for Reconsideration at 22.

[80] *Second FNPRM* at 3463.

prong test is displayed during a promotion, in addition to counting against the commercial time limits, the promotion will be clearly separated from programming material.[81] The comments filed in response to the *Second FNPRM* generally support the Joint Proposal approach.

32. We will retain the rule on website addresses and, in addition, adopt the clarifications proposed in the Joint Proposal. As the Commission stated in the *2004 Order*, the website address rule fairly balances the interest of broadcasters in exploring the potential uses of the Internet with our mandate to protect children from over-commercialization.[82] The display of the address of a website that sells a product is the equivalent of a commercial encouraging children to go to the store and buy the product.[83] Thus, including the display during program material converts that program material into commercial matter just as a host telling children to race to their local toy store would. We note that broadcasters are free to display the addresses of websites that do not comply with the test during the allowable commercial time, as long as it is adequately separated from the program material; thus, the burden is minimal and outweighed by the benefits discussed above. The minor clarifications recommended by the Joint Proposal make this point clear.

33. We also disagree with petitioners, and conclude that the website rule we modify today is consistent with the First Amendment.[84] Because this rule regulates commercial speech, it is subject to less First Amendment protection than noncommercial speech.[85] The rule is therefore permissible under the First Amendment if it "directly advances" a "substantial" governmental interest in a manner that "is not more extensive than necessary to serve that interest."[86] The website rule satisfies these criteria. By limiting the display of commercial website addresses during children's programming, the website rule advances the government's substantial interest in protecting children from overcommercialization.[87] Numerous websites sell products with special appeal to children. Televised references to commercial websites are no different from other forms of advertising. A television commercial encouraging children to go to a toy store website, for example, is substantially similar to an advertisement telling children to

[81] Joint Proposal at 2.

[82] *2004 Order* at 22962.

[83] Programmers market products on websites in the same way that they market products in stores. *See, e.g.*, www.disneyshopping.com or www.shop.nickjr.com.

[84] *See, e.g.,* Advertisers Petition for Reconsideration at 17-19. One of the parties of the Advertisers Petition for Reconsideration, the Association of National Advertisers, subsequently withdrew from the Petition. Only the American Advertising Federation and the American Association of Advertising Agencies remain as petitioners. *See* Letter from Ronald G. Gordon, Counsel for the Association of National Advertisers, to Marlene H. Dortch, Secretary, FCC, dated October 4, 2005.

[85] *See, e.g., Central Hudson*, 447 U.S. at 562-63; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

[86] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 564-66 (1980).

[87] *See 2004 Order* at 22962.

go to their local toy store. As such, a limit on televised advertising of commercial websites during children's programming is necessary "to protect children, who are particularly vulnerable to commercial messages."[88] The rule is narrowly tailored. It only limits when certain types of website addresses may be televised; it places no limits on displays of websites that are not commercial in nature. In addition, these restrictions apply only during non-commercial portions of children's programs, which represent a tiny fraction of a broadcaster's programming. The rule does nothing to prevent broadcasters and cable programmers from publicizing their websites as often as they wish during their many hours of other programming or during properly buffered commercial portions of children's programming, regardless of whatever content those websites may contain. Further, despite petitioner's passing assertions, the website rule as modified is not constitutionally suspect on vagueness grounds.[89] We find that the four-part test is sufficiently clear to give broadcasters reasonable notice of what conduct is proscribed.[90]

34. A number of commenters, including the Ad Council, request that public service announcements ("PSAs") be exempt from the four-prong website rule.[91] The Ad Council states that the rule has created confusion within the broadcast industry and has had a chilling effect on broadcasters' willingness to run PSAs.[92] We agree that further clarification of this issue could help avoid confusion. We agree with the Children's Media Policy Coalition[93] that we should clarify that certain PSAs, which are not commercial matter under our rules, are exempt from the website display rules. The Commission has historically encouraged licensees to air PSAs as part of their obligation to fulfill the public interest.[94] Indeed, in the children's television context, as discussed above,[95] licensees that have not aired at least three hours of core programming may count educational and informational PSAs toward the three hour processing guideline.[96] Thus, the Commission has already adopted a policy of encouraging the airing of PSAs during programming directed to children. For these purposes, we will define PSAs exempt from the website display rules as suggested by the Coalition: PSAs aired on behalf of independent non-

[88] *2004 Order* at 22961.

[89] Advertisers Petition for Reconsideration at 18.

[90] *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498-99 (1982).

[91] Advertising Council ("Ad Council") Comments at 1; Named State Broadcasters Associations Joint Reply Comments at 7. *See also* NAB Comments at 7-8.

[92] Ad Council Comments at 3.

[93] Coalition Reply Comments at 14.

[94] For example, the former FCC television renewal form (Form 303) required licensees to specify the number of PSAs broadcast, as well as certain details about those PSAs. When the license came up for renewal, Commission staff reviewed the station's "performance" against the "promise" with respect to PSAs, as well as a number of other categories of programming. This approach to broadcast license renewal was eliminated in 1984.

[95] *See* footnote 14.

[96] 47 C.F.R. § 73.671(d).

profit or government organizations, or media companies in partnership with non-profits or government entities, that display websites not under the control of the licensee or cable company.[97] We believe it is unlikely that PSAs meeting this definition will display addresses for commercially-oriented websites, and we are persuaded by commenters that if we do not carve out an exception for PSAs licensees and cable operators will be discouraged from airing them because they do not want to incur the obligation of ensuring that any website addresses displayed comply with the four prong test. Given the non-profit nature of PSAs, we do not expect abuse of this exemption. But we will revisit this issue if the need arises.

35. For similar reasons, we also clarify that station identifications and emergency announcements are not subject to the rules governing the display of website addresses as long as the display is consistent with the purpose of the announcement.[98] The four prong website address rule applies to website addresses displayed during program material and, as clarified above, to promotional material not counted as commercial time. Station identifications and emergency announcements are neither program material nor promotions for purposes of the website rule. Rather, both are announcements required under the Commission's rules and must comport with certain requirements regarding their composition and timing.[99] To the extent a licensee includes a website address to provide more information about an emergency or about how to contact the station, we find it unnecessarily restrictive to require that such a website comply with the four prong test.[100]

36. We decline to exempt closing credits from application of the website address rules as requested by some commenters.[101] Closing credits are part of the television program material and should, therefore, be subject to the website restrictions.

37. We decline at this point to further define terms in the website rule. NAB argues that certain terms in the rule are vague and do not provide sufficient guidance to broadcasters on whether a website would comply with the website rule.[102] We believe that the rule, as clarified

[97] *See* Coalition Reply Comments at i, 14.

[98] NAB Comments at 6; Coalition Reply Comments at 15.

[99] *See, e.g.,* 47 C.F.R. §§ 11.01 *et seq.,* 73.1201, 73.1250, 76.1711.

[100] We would not expect either type of announcement to be geared toward children; thus, our concern about website displays luring children to commercial websites is minimal. We note, however, that if such an announcement was designed to promote the station or its website to its child audience, it would be subject to the website display restrictions. We do not expect abuse of this exemption. But we will revisit this issue if the need arises.

[101] NAB Comments at 8.

[102] NAB Comments at 5.

herein, is sufficiently clear to guide broadcasters' compliance.[103] Isolated concerns about the clarity of the website rule can be addressed by the Commission staff on a case-by-case basis.

38. We also decline to allow broadcasters to avoid liability by relying on representations from program providers that web addresses meet the four-prong test.[104] We do not expect compliance to be burdensome, but we will revisit this issue if we receive evidence that this is imposing an undue burden on broadcasters.

D. Host Selling

39. The Commission's long standing host selling policy prohibits the use of program characters or show hosts to sell products in commercials during or adjacent to shows in which the character or host appears.[105] Because of the unique vulnerability of children to host selling, the *2004 Order* prohibits the display of website addresses in children's programs when the site uses characters from the program to sell products or services.[106] In the *2004 Order*, the Commission stated that the restriction on websites that use host selling applies to website addresses displayed both during program material and during commercial material.[107]

40. Several parties argued on reconsideration that the host selling restriction is unnecessarily restrictive.[108] These petitioners contended that familiar television characters are often used in websites in ways that are not commercial in nature, such as to adorn a webpage or guide children from one page to the next.[109] Petitioners also argued that any website promotion of any product or service incorporating a program-related character appears to violate the rule even though the *2004 Order* permits the sale of program-related merchandise on appropriately cabined commercial sections of a website.[110] In response, children's advocates argued that there are clear examples of problems with host selling on websites, and that the Commission can address any concerns about the clarity of its rules on a case-by-case basis. [111]

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[103] Coalition Reply Comments at 11-12 (arguing that the language is clear on its face).

[104] *See* NAB Comments at 6.

[105] *Children's Television Report and Policy Statement,* 50 FCC 2d 1, 13-14 (1974).

[106] *2004 Order* at 22961.

[107] *Id.*

[108] Discovery Petition for Reconsideration at 7; NAB Petition for Reconsideration at 16-17; Nickelodeon Petition for Reconsideration at 23-24; Disney Petition for Reconsideration at 22; WB Television Network Petition for Reconsideration at 17-18.

[109] Discovery Petition for Reconsideration at 6.

[110] *Id*. at 6-7.

[111] Coalition Opposition to Petitions for Reconsideration at 24.

41. The Joint Proposal proposes that the host selling rule in the *2004 Order* be vacated and replaced with the following rule:

> Entities subject to commercial time limits under the Children's Television Act ("CTA") will not display a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program: (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products.
>
> To clarify, this rule does not apply to: (1) third-party sites linked from the companies' web pages; (2) on-air third-party advertisements with website references to third-party websites; or (3) pages that are primarily devoted to multiple characters from multiple programs.[112]

Commenters that addressed the host selling issue generally support the Joint Proposal recommendation.[113]

42. We continue to believe that it is important to restrict the practice of host selling in children's programming. As we have stated before, the trust that children place in program characters allows advertisers to take unfair advantage of the relationship between the hosts and young children.[114] This can occur whether the host selling occurs on the air or on a website to which the television program refers children.

43. We agree, however, with those who argue that our original formulation of the host selling rule was overly restrictive, and that we should revise it as recommended by the Joint Proposal. We believe the revised rule achieves a better balance than the existing rule between the goals of protecting children and permitting broadcasters and cable operators to make appropriate use of website displays. The *2004 Order* expressly states that commercial portions of websites that comply with the website display rules may sell or advertise products associated with the related television program.[115] As several parties noted, the host selling rule as originally written appeared to prohibit the sale of any merchandise incorporating a program-related character anywhere on a website, even if that portion of the site was clearly identified as commercial in nature and the site otherwise complied with the four-prong website rule.[116] The revised host selling rule we adopt today permits the sale of merchandise featuring a program-

[112] Joint Proposal at 3.

[113] NAB Comments at 8; Coalition Reply Comments at 11-12; Univision Comments at 4.

[114] *Children's Television Report and Policy Statement,* 50 FCC 2d 1, 13-14 (1974).

[115] *2004 Order* at 22961.

[116] Discovery Petition for Reconsideration at 6; Nickelodeon Petition for Reconsideration at 24; WB Television Network Petition for Reconsideration at 18-19.

related character in parts of the website that are sufficiently separated from the program itself to mitigate the impact of host selling.

44. Univision supports the Joint Proposal revision but states that the revised rule is vague with respect to the proposed exemption for certain third party sites as it fails to provide a definition of the term "third party."[117] We decline to adopt a definition of "third party" at this time as we believe that the purpose of the third party exemption from the host selling restriction is sufficiently clear to provide guidance to broadcasters and cable operators about the kinds of ads and websites to which the exemption applies. As stated by the Coalition, the intent behind the third party exemption to the rule is to alleviate the need for companies to police third party websites over which the company has no control.[118] In addition, the third party website would not be included in the relevant children's programming; rather the third party website would be displayed in a commercial (subject to the commercial limits) or would merely be linked to from the company's website. Advertisements with or without website addresses must be separated from programming material by use of bumpers, as currently required under the Commission's existing commercial limits rules and policies. As such, there will be multiple layers of separation between the program and the third party website, which will sufficiently attenuate the commercial content from the relevant programming.

45. Television licensees currently certify their compliance with the children's advertising commercial limits on their license renewal forms and are required to maintain in their public inspection file records sufficient to substantiate the certification.[119] As the Commission stated in the *2004 Order*, licensees will be required also to certify that they have complied with the requirements concerning the display of website addresses in such programming.[120] In addition, licensees will be required to maintain in their public inspection file, until final action has been taken on the station's next license renewal application, records sufficient to substantiate the station's certification of compliance with the restrictions on website addresses in programs directed to children ages 12 and under. Cable operators airing children's programming must maintain records sufficient to verify compliance with the website address and host selling rules and make such records available to the public. Such records must be maintained by cable operators for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).[121]

[117] Univision Comments at 4-5. Univision requests that the Commission clarify that a "third party" is "any entity other than the licensee and those entities directly under the licensee's control." *Id*. at 5.

[118] Coalition Reply Comments at 13.

[119] *See* FCC Form 303-S; 47 C.F.R. § 73.3526(e)(11)(ii).

[120] *2004 Order* at 22962.

[121] *See* 47 C.F.R. §§ 76.225, Note 3; 76.1703.

E. Definition of Commercial Matter

46. The limitation on the duration of advertising in children's programming of 10½ minutes per hour on weekends and 12 minutes per hour on weekdays applies to "commercial matter." Prior to the *2004 Order*, the term "commercial matter" was defined to exclude certain types of program interruptions, including promotions of upcoming programs that do not mention sponsors.[122] The Commission noted in the *2004 Order* that a significant amount of time is devoted to these types of announcements in children's programming, thereby reducing the amount of actual program material far more than the commercial limits alone might suggest. To address this problem, the *2004 Order* revised the definition of "commercial matter" to include promotions of television programs or video programming services other than children's educational and informational programming. The revised definition applies to analog and digital broadcasters and to cable operators.[123]

47. On reconsideration, petitioners generally argued that the revised definition of commercial matter would lead to lost ad sales in children's programming and reduced revenues from such programming as well as diminished opportunities to promote programming.[124] Petitioners claimed that reducing the number of program promotions would reduce the number of children watching the programs. Petitioners also argued that there is no evidence that counting internal promotions as commercials would increase the amount of content in children's shows or reduce program interruptions as programs are produced in a specific length.[125] Children's advocates claimed that new children's programs can be made longer and that the amount of program material in existing shows can be increased by supplementing existing programs with short-form programming, that is, programming lasting less than thirty minutes.[126]

48. As noted above, the *2004 Order* included all program promotions other than children's educational and informational programming in the definition of commercial matter. The Joint Proposal would change the revised definition of "commercial matter" to exclude (1) promotions for any children's or other age-appropriate programming appearing on the same channel, and (2) promotions for children's educational and informational programming

[122] *2004 Order* at 22963; *Report and Order*, *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2112 (1991), *recon. granted in part*, 6 FCC Rcd 5093 (1991).

[123] *2004 Order* at 22963.

[124] 4Kids Entertainment Petition for Reconsideration at 4-5; Advertisers Petition for Reconsideration at 4-5; Fox Entertainment Group Petition for Reconsideration at 9; Marantha Petition for Reconsideration at 6; NBC Telemundo Petition for Reconsideration at 2; Nickelodeon Petition for Reconsideration at 10; Turner Petition for Reconsideration at 6-7; WB Petition for Reconsideration at 10-11.

[125] NCTA Petition for Reconsideration at 5; Nickelodeon Petition for Reconsideration at 16; WB Petition for Reconsideration at 12.

[126] Coalition Opposition to Petitions for Reconsideration at 18.

appearing on any channel.[127] Commenters express general support for the Joint Proposal recommendation.[128]

49. We will revise our definition of "commercial matter" as recommended by the Joint Proposal. We believe that the revised definition of commercial matter is consistent with the public interest, provides additional flexibility for broadcasters and cable operators, and furthers our goal of making high quality children's programming available to the public. We also note that the CTA explicitly authorizes the Commission to review and evaluate the advertising duration limits;[129] the Commission is therefore authorized to change the definition of "commercial matter" consistent with the intent of the CTA and the public interest. Thus, we disagree with parties that argue the revised definition is inconsistent with the CTA.

50. While the revised rule may not limit program promotions in children's programming to the same extent as the rule adopted in the *2004 Order*, the revision will still reduce the number of interruptions that were permissible under the original rule and encourage the promotion of programming appropriate for children, including educational and informational programming. As we stated in the *2004 Order*, we believe that reducing the number of program promotions will help protect children from overcommercialization of programming consistent with overall intent of the CTA. In addition, exempting program promotions for programming appropriate for children may encourage broadcasters to promote children's programming with educational and informational value, thereby increasing public awareness of the availability of this programming.

IV. CONCLUSION

51. The rules and policies adopted herein will serve the public interest by both protecting children from excessive and inappropriate advertising on television and ensuring an adequate supply of children's educational programming as we transition from an analog to a digital television environment. Our actions today further the public interest and the mandate of the CTA and provide a reasonable balance between the concerns of industry and protecting the well-being of the nation's children.

[127] Joint Proposal at 4.

[128] CBS, *et al*. Comments at 2; NAB Comments at 3; NCTA Comments at 2; Nickelodeon Comments at 1.

[129] 47 U.S.C. § 303a. A program promotion fits within the meanings of the terms "commercial matter" and "advertising" as those terms are used in 47 U.S.C. 303a(a) and (b). For example, the word "commercial" means "an advertisement broadcast during a sponsored radio or television program." *See* Webster's Third New International Dictionary 456 (1993). Further, the term "advertisement" is defined as "the action of advertising" which entails "calling something (such as a commodity for sale, a service offered or desired) to the attention of the public." *Id*. at 31.

V. ADMINISTRATIVE MATTERS

52. *Final Regulatory Flexibility Analysis* As required by the Regulatory Flexibility Act,[130] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this Report and Order. The FRFA is set forth in Appendix C.

53. *Final Paperwork Reduction Act Analysis.* This *Second Order* contains new and modified information collection requirements which were proposed in the *Second FNPRM*, 21 FCC Rcd 3642 (2006), 71 FR 15145 (March 27, 2006), and are subject to the Paperwork Reduction Act of 1995 ("PRA").[131] Our requirements regarding the requests that may be filed with the Media Bureau by networks seeking preemption flexibility will become effective after approval by the Office of Management and Budget ("OMB"). Upon OMB approval, we will issue a Public Notice announcing the effective date of this rule. In addition, a revised FCC Form 398 was submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA and approved by OMB on June 23, 2006, OMB Control No. 3060-0754. This *Second Order* adopts this information collection requirement as proposed. In addition, the general public and other Federal agencies were invited to comment on the information collection requirements in the *Second FNPRM*.[132] We further note that pursuant to the Small Business Paperwork Relief Act of 2002,[133] the Commission previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We received no comments concerning these information collection requirements. For additional information concerning the information collection requirements contained in this Report and Order, contact Cathy Williams at 202-418-2918, or via the Internet to Cathy.Williams@fcc.gov.

54. *Congressional Review Act*. The Commission will send a copy of this *Second Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

55. *Additional Information*. For additional information on this proceeding, please contact Kim Matthews, Policy Division, Media Bureau at (202) 418-2154, or Holly Saurer, Policy Division, Media Bureau at (202) 418-7283.

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[130] *See* 5 U.S.C. § 604.

[131] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (*codified in* Chapter 35 of Title 44 U.S.C.). The version of the *Second FNPRM* published in the Federal Register on March 27, 2006 did not include the Initial Regulatory Flexibility Analysis that was contained as part of the *Second FNPRM* as adopted by the Commission. On August 25, 2006, the Federal Register published a correction to the March 27 Federal Register document that included the IRFA. *See* 71 FR 50380-01.

[132] *Second FNPRM*, 21 FCC Rcd at 3645, ¶ 7.

[133] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (*codified in* Chapter 35 of title 44 U.S.C.); see 44 U.S.C. 3506(c)(4).

VI. ORDERING CLAUSES

56. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303a, 303b, and 307of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, this Second Order on Reconsideration and Second Report and Order IS ADOPTED.

57. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

58. IT IS FURTHER ORDERED that the rules as revised in Appendix B SHALL BE EFFECTIVE 60 days after publication of the *Second Order* in the Federal Register.[134] With respect to renewal applications, we will evaluate compliance with these requirements in applications filed after that date. Licensee performance during any portion of the renewal term that predates the effective date of the rules in the *Second Order* will be evaluated under current rules, and licensee performance that post-dates the effective date of the revised rules will be judged under the new provisions.

59. IT IS FURTHER ORDERED that the Media Bureau make available to the public an electronic version of FCC Form 398, Children's Television Programming Report, that reflects the changes adopted in this *Second Order*. A revised version of this form has already been approved by OMB. Licensees will be required to use the revised electronic version of FCC Form 398 to report their children's core programming, including their digital core programming, for the first quarter of 2007. Thus, licensees must use the revised electronic version of FCC Form 398 for their quarterly filing due no later than April 10, 2007.

60. IT IS FURTHER ORDERED that the Petitions for Reconsideration and Oppositions to Petition for Reconsideration filed in response to the 2004 *Report and Order and Further Notice of Proposed Rule Making* in this docket are granted in part and denied in part, as discussed above, and otherwise dismissed as moot.

61. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Order on Reconsideration and Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

62. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Second Order on Reconsideration and Second Report and Order* in a report to be sent to

[134] *See Order Extending Effective Date*, 20 FCC Rcd 20611.

Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters, Reply Commenters and Petitioners

Parties filing Petitions for Reconsideration of the 2004 *Report and Order*
4Kids Entertainment, Inc.
The American Advertising Federation, the American Association of Advertising Agencies, and the Association of National Advertisers, Inc.
Children's Media Policy Coalition
Cox Broadcasting, Inc., Meredith Corporation; Media General, Inc.; McGraw-Hill Broadcasting Company, Inc.; Cosmos Broadcasting Corporation; and Evening Post Publishing Company
Discovery Communications, Inc.
Fox Entertainment Group, Inc.
Fox Entertainment Group, Inc., NBC Universal, Inc. and Viacom
Maranatha Broadcasting Company, Inc
NBC Telemundo License Co.
National Association of Broadcasters
National Cable & Telecommunications Association
Nickelodeon
Turner Broadcasting System, Inc
Univision Communications Inc.
The WB Television Network
The Walt Disney Company

Parties filing Oppositions to Petitions for Reconsideration of the 2004 *Report and Order*
Children's Media Policy Coalition
Fox Entertainment Group, Inc., NBC Universal, Inc. and Viacom

***Second Further Notice of Proposed Rulemaking* Commenters**
The Advertising Council
CBS Corporation; Fox Entertainment Group, Inc.; NBC Universal, Inc. & NBC Universal License Co.
KIDSNET
Local Broadcasters Alliance
National Association of Broadcasters
National Cable & Telecommunications Association
Nickelodeon
Professional and Collegiate Sports Interests
Strategic Alliance for Healthy Food and Activity Environments
Time Warner Inc.
Univision Communications Inc.
The Walt Disney Company

***Second Further Notice of Proposed Rulemaking* Reply Commenters**

Belo Corp.
Catamount Television Holdings, LLC
Childhood Obesity Brain Trust
Children's Media Policy Coalition
Maranatha Broadcasting Company, Inc.
Named State Broadcasters Associations
Pappas Telecasting Companies
Piedmont Television Holdings, LLC

APPENDIX B

Rule Changes

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

Part 73 RADIO BROADCAST SERVICES

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

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

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

Section 73.670 Commercial limits in children's programs.

***

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

1) Offers a substantial amount of *bona fide* program-related or other noncommercial content;

2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;

3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and

4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).

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

(d) (1) Entities subject to commercial time limits under the Children's Television Act shall not display a Web site address during or adjacent to a program if, at that time, on pages that are

primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program:

(i) Products are sold that feature a character appearing in that program; or

(ii) A character appearing in that program is used to actively sell products.

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

(i) Third-party sites linked from the companies' Web pages;

(ii) On-air third-party advertisements with Web site references to third-party Web sites; or

(iii) Pages that are primarily devoted to multiple characters from multiple programs.

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

* * * * *

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

§ 73.671 Educational and informational programming for children.

* * *

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

***

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

* * * * *

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

Part 76 MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

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

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

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

§ 76.225 Commercial limits in children's programs.

* * * * *

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

1) Offers a substantial amount of *bona fide* program-related or other noncommercial content;

2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;

3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and

4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).

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

(d)(1) Entities subject to commercial time limits under the Children's Television Act shall not display a Web site address during or adjacent to a program if, at that time, on pages that are

primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program:

(i) Products are sold that feature a character appearing in that program; or

(ii) A character appearing in that program is used to actively sell products.

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

(i) Third-party sites linked from the companies' Web pages;

(ii) On-air third-party advertisements with Web site references to third-party Web sites; or

(iii) Pages that are primarily devoted to multiple characters from multiple programs.

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

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

APPENDIX C

Final Regulatory Flexibility Act Analysis

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

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

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

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

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

[2] *Second FNPRM* , 21 FCC Rcd 3642, 3647-3651.

[3] *See* 5 U.S.C. § 604.

[4] 19 FCC Rcd 22943 (2004).

website uses host selling. The *2004 Order* also imposed a percentage cap on the number of preemptions of core children's programs and revised the definition of "commercial matter" for purposes of the commercial limits to include promotions of other television programs unless they are children's educational or informational programs.

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

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

The U.S. Small Business Administration ("SBA") filed the only comment in this proceeding responding to the IRFA.[5] The SBA notes that several alternatives were suggested to the FCC by various members of industry which could, according to the SBA, offer significant cost savings to smaller broadcasters while potentially serving the FCC's goals.[6] First, the SBA notes that the Local Broadcasters Alliance ("LBA") recommends that the FCC limit the applicability of the new core programming requirements to multicast streams that do not already offer educational, informational, and/or public affairs programming. According to the SBA, providing an exemption for small broadcasters who are already providing public affairs content, and who do not yet have the technical capabilities to insert children's programming on their multicast channels, could serve the FCC's goals and provide a reasonable amount of flexibility for small business. Second, the SBA notes that the National Association of Broadcasters ("NAB") and others recommend that the FCC allow broadcasters to rely on certifications from programming

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

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

providers that website addresses displayed during core programming meet the FCC requirements, instead of requiring stations to continuously monitor and edit programming containing website addresses. According to the SBA, adopting this alternative could offer significant cost savings to small broadcasters. Third, the SBA notes that the multicasting rule would require that at least 50 percent of the core programming counted toward meeting the additional core programming requirements not consist of program episodes that have already aired within the previous seven days. The SBA notes that the NAB recommends that the FCC amend Form 398 to allow broadcasters to certify compliance with the limitation. According to the SBA, adopting this alternative could provide significant compliance cost savings to both small and large broadcasters.

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

The digital programming processing guideline provides broadcasters flexibility to move core programming to either their main programming stream or other multicast streams, so long as the stream the programming is moved to receives comparable MVPD carriage to the stream triggering the additional obligation. Thus, the guideline preserves the principle that, in order to obtain staff level approval of their CTA compliance, broadcasters must provide three hours of children's core programming for every 168 hours per week of free video programming that they air, while at the same time giving broadcasters flexibility to choose the multicast stream that will air that programming. In addition, broadcasters could meet the guideline by airing children's programming on specialized channels, such as a children's news program on a twenty-four hour news channel or a children's educational weather program on a twenty-four hour weather channel. Furthermore, we note that our rules provide flexibility for licensees that have aired

somewhat less core programming than indicated by the guideline but that nonetheless demonstrate an adequate commitment to educating and informing children.[7]With respect to the recommendation of NAB and others regarding reliance on certifications from program providers, as discussed in paragraph 38 of the item we decline to allow broadcasters to avoid liability by relying on representations from program providers that web addresses meet the four-prong test. We do not expect compliance to be burdensome, but we will revisit this issue if we receive evidence that this is imposing an undue burden on broadcasters.

Finally, as discussed in paragraph 23 the item adopts NAB's recommendation, which was echoed by other commenters, that FCC Form 398 allow broadcasters to certify compliance with the revised limitation on the repeat of core digital programming adopted under the multicasting guideline rather than requiring broadcasters to identify each program episode on Form 398. We will require licensees, however, to retain records sufficient to document the accuracy of their certification, including records of actual program episodes aired, and to make such documentation available to the public upon request.

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

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

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

[8] 5 U.S.C § 604(a)(3).

[9] 5 U.S.C § 601(6).

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

[11] 5 U.S.C. § 632

Television Broadcasting. The proposed rules and policies apply to television broadcast licensees, and potential licensees of television service. The SBA defines a television broadcast station as a small business if such station has no more than $13 million in annual receipts.[12] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[13] According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on October 18, 2005, about 873 of the 1,307 commercial television stations[14] (or about 67 percent) have revenues of $12 million or less and thus qualify as small entities under the SBA definition. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[15] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

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

Cable and Other Program Distribution. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These

[12] *See* 13 C.F.R. § 121.201, NAICS Code 515120.

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

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

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

establishments do not generally originate programming material."[16] The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having $13.5 million or less in annual receipts.[17] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[18] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[19] Thus, under this size standard, the majority of firms can be considered small.

Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[20] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[21] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[22] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[23] Thus, under this second size standard, most cable systems are small.

Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[24] The Commission has determined that an operator serving

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[16] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[17] 13 C.F.R. § 121.201, NAICS code 517510.

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

[19] *Id*. An additional 61 firms had annual receipts of $25 million or more.

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

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

[22] 47 C.F.R. § 76.901(c).

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

[24] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[25] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[26] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[27] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

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

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

The *Second Order* repeals the ten percent cap on preemptions of core children's programming adopted in the *2004 Order* and instead institutes a procedure similar to that used by the Media Bureau and the Commission following adoption of the 1996 children's television *Order* whereby networks sought informal approval of their preemption plans each year. Under the policy formerly developed by the Commission staff, a program counted as preempted only if it was not aired in a substitute time slot (otherwise known as a "second home") with an on-air notification of the schedule change occurring at the time of preemption during the previously scheduled episode. The on-air notification must announce the alternate date and time when the preempted show will air. As part of this policy, we will require all networks requesting preemption flexibility to file a request with the Media Bureau by August 1 of each year stating

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

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

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

the number of preemptions the network expects, when the program will be rescheduled, whether the rescheduled time is the program's second home, and the network's plan to notify viewers of the schedule change.[28] We will presume that non-network stations are complying with the three hour core programming requirement, and do not need broad preemption relief.

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

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

> Entities subject to commercial time limits under the Children's Television Act ("CTA") will not display a website address during or adjacent to a program if, at that time, on pages that are primarily devoted to free noncommercial content regarding that specific program or a character appearing in that program: (1) products are sold that feature a character appearing in that program; or (2) a character appearing in that program is used to actively sell products.
>
> To clarify, this rule does not apply to: (1) third-party sites linked from the companies' web pages; (2) on-air third-party advertisements with website references to third-party websites; or (3) pages that are primarily devoted to multiple characters from multiple programs.

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

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

informational programming. The revised definition applies to analog and digital broadcasters and to cable operators.

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

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

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

Several steps were taken to minimize the impact on small entities. As noted above, the *Second Order* adopts the alternative recommended by NAB and others that broadcasters be permitted to certify on FCC Form 398 their compliance with the limit on the number of repeats of digital core programming under the revised processing guideline. *See* paragraph 23, *supra.*

Thus, broadcasters will not be obligated to identify each program episode on Form 398, but will be required to retain documentation sufficient to substantiate the certification on Form 398. This step will make compliance with the rules easier for all broadcasters, including smaller broadcasters. The Commission considered, but rejected, the approach of requiring broadcasters to identify each program episode on the Form 398. That approach, if adopted, would have imposed a greater burden on broadcasters.

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

In addition, the *Second Order* also revises the definition of "host selling" adopted in the *2004 Order* with respect to website address displays in children's programming. The revised definition is less restrictive than that adopted in 2004 and permits the sale of merchandise featuring a program-related character in parts of the website that are sufficiently separated from

[29] 5 U.S.C. §§ 603(c)(1)-(4).

the program itself to protect children from the unique impact of host selling. This change should provide more flexibility to all broadcasters and cable operators, including smaller entities, and should be less burdensome to all affected entities.

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

F. Report to Congress

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

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

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

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

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

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

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

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

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

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

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

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

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

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

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

We have reached this milestone because so many worked so hard to bring this effort to a successful conclusion. We especially owe a debt of gratitude to the key players in the children's media community and media companies who decided to get together and hammer out a solution

instead of engage in a lengthy legal tussle. Let me thank the signatories to the Joint Proposal that is the foundation of our effort today: the American Academy of Pediatrics, the American Psychological Association, the National Parent Teacher Association, the Action Coalition for Media, Children Now, the United Church of Christ, the Association of National Advertisers, Viacom, CBS, the Walt Disney Company, Fox, NBC Universal and NBC Telemundo, Time Warner, 4Kids Entertainment and Discovery Communications. Let me also thank others like the National Association of Broadcasters and the National Cable and Telecommunications Association for jumping in along the way to support the proposal. There is no doubt that this item will advance the quality and quantity of children's programming.

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

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

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

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

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

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

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

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

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

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

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

days when it believed that market forces can best protect children from poor children programming and excessive commercialism. The new capabilities that will be made possible by digital technology should be used to improve the quality of children programming.

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

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

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

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

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

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

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

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

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

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

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

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

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

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

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

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