

January 9, 2001

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis for Children's Television Obligations of Digital
Television Broadcasters (MM Dkt. No. 00-167)

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA"),¹ the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") Initial Regulatory Flexibility Analysis ("IRFA") for the *Notice of Proposed Rulemaking* ("NRPM") in the above-captioned proceeding² and found that it does not satisfy the requirements of the RFA.³

Advocacy does not question the Commission's regulatory goal – to provide better quality programming for children. Rather, we ask the Commission to undertake this rulemaking with its eyes wide open to the costs and compliance requirements it will impose on small businesses, and we ask the Commission to explore alternatives that would minimize those costs. The IRFA did not sufficiently address either of these topics. We ask that the Commission revise its IRFA to address the points identified in this letter and issue a supplemental IRFA.

Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁴ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁵ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² *In the Matter of Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking*, MM Docket No. 00-167, FCC 00-344 (rel. Oct. 5, 2000).

³ Because this communication is a result of Advocacy's statutory duty, it is exempt from the Commission's rules on ex parte presentations. See 47 CFR § 1.1204(a)(5)(1997).

⁴ *Id.*

⁵ 15 U.S.C. § 634c(1)-(4).

1980,⁶ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act (“SBREFA”).⁷

The RFA was designed to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁸ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.⁹ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule’s effectiveness in addressing the agency’s purpose for the rule, and consider alternatives that will achieve the rule’s objectives while minimizing any disproportionate burden on small entities.¹⁰

Discussion

Advocacy has found that the IRFA did not satisfy the requirements of the RFA, as it did not describe a vast majority of the compliance requirements contained in the NPRM and their impact on small firms. Nor did it discuss significant alternatives that would accomplish the objectives while minimizing the significant economic impact on small entities. These two elements are crucial to the RFA. The IRFA lists a few of the major proposals in the NPRM under (a) Need for and Objectives of the Proposal Rules.¹¹ While this does enumerate the proposals, this does not satisfy the need for the FCC to examine the regulatory burdens under (c) Recording, Recordkeeping, and Other Compliance¹² Requirements nor does it explore alternatives under (g) Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives.¹³

Advocacy emphasizes that its comments should not be construed to question the Commission’s goals. Instead, we ask the Commission to be mindful of the costs and regulatory and seek ways to minimize the burdens on small businesses while still accomplishing the Commission’s goals burdens, as required by Section 603(a) of the RFA. The RFA outlines a process, which, if followed, will help agencies identify the impacts of their regulation and find ways to achieve their goals without putting unfair burdens on small businesses.

a. The IRFA Did Not Describe the Compliance Burdens

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁷ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁸ 5 U.S.C. § 601(4)-(5).

⁹ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 (“*Advocacy 1998 RFA Implementation Guide*”).

¹⁰ 5 U.S.C. § 604.

¹¹ NPRM Appendix B section a, which addresses the requirements of 5 U.S.C. § 603(b)(4).

¹² NPRM Appendix B section c, which addresses the requirements of 5 U.S.C. § 603(c).

¹³ NPRM Appendix B section g.

The NPRM includes a series of proposals that are designed to enhance children's programming. While it is likely that many if not all of these proposals would be beneficial to children's programming, they impose compliance costs on small broadcasters. The Commission does not describe the reporting, recordkeeping, and other compliance requirements for most of these proposals.

Below, Advocacy has listed the proposed rules from the NPRM that were not included in the IRFA but have compliance and reporting requirements. The IRFA discussed two proposals under its compliance requirement section: (1) a possible change to the definition of commercial matter and (2) a requirement to screen promotions for other programs that are unsuitable for children to watch. Our list does not include these two issues since the Commission has already addressed them. Throughout our list, Advocacy poses questions as to what the costs would be, because Advocacy does not have this data. As the expert agency, the FCC has or should have the information to answer these questions. If not, it has the authority to solicit comment on them, explain why it does not have the data, and offer a delayed implementation option until data from the public is received, analyzed, and published as a new IRFA

- **Proportional Hours:** This proposal would require broadcasters to use 3 percent of their total air-time on children's programming.¹⁴ This would require small broadcasters to increase the amount of children's programming they air for each new channel that they add. What are the costs of per hour of airing an hour of children's programming? Is the cost to broadcasters inconsequential compared to the additional revenue gained from adding a new channel? Since the budgets of smaller stations are limited, this proposal may discourage them from adding additional programming channels, which could undermine the Commission's efforts to promote digital broadcasting.
- **Technical format:** This proposal would require broadcasters to provide children's educational programming in a certain technical format.¹⁵ Will this restrict a broadcaster from using different technical formats to suit the needs of the program or the audience? Do different technical formats have varying costs to produce? Are there changeover costs if a broadcaster has to adopt a different technical format? Will small broadcasters have to purchase new equipment or is existing equipment sufficient?
- **Menu Approach:** This proposal would raise a broadcaster's children's television obligations above the three hours-per-week that is currently required but would allow the broadcaster to satisfy these obligations through a variety of community service actions.¹⁶ Any increase in the children's programming requirement will impose substantial costs on small broadcasters, and may discourage small broadcasters from introducing new services. What are the costs for the increased number of hours? Are there economies of scale or does the price escalate exponentially per addition hour? What are the costs of the community service alternatives and how do they compare to the costs of airing the programming?

¹⁴ NPRM para. 17.

¹⁵ *Id.* para. 18.

¹⁶ *Id.* para 21.

- **Daily Core Programming Obligation:** This proposal would require a small broadcaster to air at least one hour of children’s educational programming every day. A daily one-hour obligation would be seven hours of programming weekly, more than twice the current requirement which is three hours per week. If a broadcaster airs a two-hour program, will the second hour not count toward the broadcaster's obligation? If not, would such a limitation discourage broadcasters from setting aside blocks of time greater than one hour? Are there different costs to airing a program daily rather than weekly, even if the total number of hours are the same?
- **Datacasting Explanations of Children’s Programming:** This proposal would require broadcasters to use digital datacasting facilities to explain why a program qualifies as a children’s educational program.¹⁷ What are the costs of this? Will this be a major burden? Will the constant simultaneous broadcasts of many explanations deplete the commercial usefulness of the spectrum in any measurable way? In addition, the small broadcaster would have to set aside staff time to draft the explanations that are broadcast. How much time would this take? What are the costs for paying a professional to draft these explanations?
- **Independent Content Information:** This proposal would require small broadcasters to provide independent third parties, such as reviewers, magazines, and family resource organizations, with information and ratings on core programs.¹⁸ The proposal suggests that the information be posted on the broadcaster’s Web page. If adopted, small broadcasters would have to identify and obtain the third-party information, which will incur staff time costs and possible contract costs to use the third-party information. Do all or even most small broadcasters have a Web page? What are the costs to drafting and posting this information? Will this cost continue to increase as these reports compile over the years and require more server space to store them? Is this cost negligible?
- **Rescheduling Preempted Programs:** This proposal would limit the number of times broadcasters could preempt a regularly scheduled children’s educational program before the program no longer counted toward the broadcaster’s children’s television requirement.¹⁹ In addition, it would require broadcasters to make efforts to reschedule the program.²⁰ This proposal would require small broadcasters to make efforts to rescheduled pre-empted which would in effect pre-empt other shows later in their schedule. Since the broadcasters are limited in the commercial time available during children’s program, this reschedule would force a small broadcaster to drop commercial slots, jeopardizing contracts with advertisers and resulting in lost revenue. Are there any other costs to rescheduling? Will the broadcaster have to run announcements stating when the rescheduled program will be broadcast? How will these announcements be aired and what are the costs? These questions are relevant as to how the FCC will evaluate whether a station has “made efforts” to re-schedule, as this becomes a de facto record keeping requirement.
- **Commercial Tie-In Limitation:** This proposal would prohibit the broadcaster from using

¹⁷ *Id.* para 24.

¹⁸ *Id.*

¹⁹ *Id.* para 28.

²⁰ *Id.*

direct links to commercial Web sites during children's programming.²¹ The proposal discusses the possibility of only restricting certain types of links to Web sites, such as links to Web pages that exclusively carry commercial product and do not carry educational information related to the program, links to Web pages that sell products associated with the program, or links to the program host Web pages that sells product. If commercial links are allowed, the proposal also could limit the duration that they appear on the screen. What costs would this impose on small broadcasters? Would small broadcasters have to follow every link to review the Web page to ensure they conform to FCC regulations? If the Internet and broadcasting converge to the extent predicted, how many links is a broadcaster likely to use during a program? Does this put the broadcaster in a position of determining whether the material on the Web page is educational as opposed to commercial and determining whether material is related to the children's educational program?

b. The IRFA Did Not Describe Possible Alternatives to Minimize Impact

The Commission does not explore possible alternatives in the IRFA that would minimize the significant economic impact on small businesses while still achieving the agency's goal of promoting children's television. Advocacy recommends that the Commission consider the alternatives described below.

- **Delayed Enforcement:** Switching to digital broadcasting will be difficult for small broadcasters as it involves sizable expenses which the FCC needs to analyze. If additional children's television requirements were delayed for a year or more after a small broadcaster starts using the digital broadcasting, it would give small broadcasters an opportunity to absorb the cost of changing to a digital system and make the transition before the additional compliance requirements were initiated.
- **Reduced Requirements:** Smaller broadcasters tend to serve smaller markets and some are not affiliated with a network, which puts them at a great disadvantage not just in business resources, but community resources from which they can draw to select programming. In the interest of promoting competition and encouraging the growth of small stations, the Commission should consider reducing the requirements for the smaller broadcasters, such as broadcasting fewer hours per week or being exempt from the various reporting requirements proposed. The Commission can encourage all small broadcasters to voluntarily promote children's programming which could be considered to go toward satisfying their public interest duty. This in combination with delayed implementation would do much to promote the stability of small broadcasters and their continued service to less populated communities.
- **Pay of Play:** The Commission should explore the pay or play approach proposed in the NPRM as a possible alternative. The proposal would allow broadcasters the choice of either airing their own programming, paying other stations to air these hours for them, or a combination of the two.²² Advocacy sees two ways that this proposal may minimize the economic burden of the regulations to small broadcasters: (1) larger broadcasters may pay smaller broadcasters to carry their children's educational programming, and (2) small

²¹ *Id.* para. 32.

²² *Id.* para. 20.

broadcasters may find it more economically efficient to pay another station to carry the programming for them.

- **Menu Approach:** As discussed above, this proposal would impose additional children's educational television obligations but also would allow the broadcaster a variety of means to satisfy those obligations. Even if the Commission does not adopt the additional children's educational television obligation, the FCC should explore the possibility of allowing small broadcasters meet their children's television obligations in a variety of ways, such as those recommended in this proposal. By allowing small broadcasters flexibility in the means of meeting their children's television obligations, the Commission will minimize the impact on small broadcasters.

Conclusion

The current IRFA does not satisfy the requirements of the RFA. It fails to describe many of the compliance burdens that the proposed regulations would impose on small businesses. Furthermore, the IRFA does not describe alternatives that are available to the Commission that would lessen the impact on small entities while still achieving the FCC's regulatory goals. These deficiencies can be cured, if the Commission issues a supplemental IRFA that explores the costs of and alternatives to the proposed regulations.

Sincerely,

/s/ _____
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Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

cc:
Commissioner Susan Ness
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Roy Stewart, Chief, Mass Media Bureau
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