

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

In the Matter of

Policies and Rules Concerning
Children's Television Programming

MM Docket No. 90-570

Revision of Programming and
Commercialization Policies,
Ascertainment Requirements,
and Program Log Requirements
for Commercial Television Stations

MM Docket No. 83-670

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1991; Released: August 26, 1991

By the Commission:

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I. INTRODUCTION

1. This *Memorandum Opinion and Order (Order)* responds to seven Petitions for Reconsideration of the *April 12, 1991*, decision in this proceeding.¹ The *April 12 Order* gave effect to the Children's Television Act of 1990,² by (1) implementing commercial limits of 10.5 minutes per hour on weekend and 12 minutes per hour on weekday children's programs aired on broadcast and cable television; (2) effectuating the requirement that the Commission review at renewal the extent to which a television broadcast licensee has served the educational and informational needs of children; and (3) clarifying the regulatory treatment of program-length children's commercials.

2. This *Order* reaffirms most of the decisions made in the *April 12 Order*, and in particular declines to modify the adopted definition of program-length children's commercial. We also clarify various aspects of the *April 12 Order*, including application of the Act to home shopping stations, implementation of the commercial record-keeping requirement, and the contribution that short-segment programming may make in serving children's educational and informational needs. In addition, we modify the *April 12 Order* in limited respects, including the extent to which the commercial limits are to be prorated for programs of under a half-hour in length, and the separation that is required between a children's program and a related commercial. Furthermore, we conclude that noncommercial stations have a statutory obligation to serve children's educational and informational needs. However, we toll application of specific record compilation, filing and submission requirements to noncommercial stations. Finally, we grant a request to extend the October 1, 1991 effective date for imposition of the commercial limits on barter contracts executed prior to April 12, 1991, but only until January 1, 1992.

¹ See *Report and Order, In the Matter of Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111 (*April 12 Order*), *Erratum*, 6 FCC Rcd 3535 (1991). The parties petitioning for reconsideration and/or clarification of the *April 12 Order*, as well as the parties submitting oppositions and

replies, and the abbreviations used for them are listed in Appendix A. We treat the late-filed pleadings of TRAC and ACT/NABB, as well as the Joint Comments filed by Cablevision *et al.*, as informal comments.

² 47 U.S.C. §§ 303a, 303b, 394 (Act).

II. COMMERCIAL LIMITS

A. Application to Cable

3. The Act restricts the amount of commercial matter that both television broadcasters and cable operators may air on children's programs. The *April 12 Order* found that cable operators were responsible for compliance with the commercial limits on locally originated programming and on cable network programming, but not responsible for compliance on passively transmitted broadcast stations or on access channels.³ CATA objects to cable operator accountability for cable network compliance with the commercial limits.⁴

4. As NAB and NABB suggest and the *April 12 Order* held, however, the statute and its legislative history evince a Congressional intent to make cable operators responsible for cable network compliance with the commercial limits.⁵ We do not agree with CATA's suggestion that the Act's definition of "television broadcast licensee" as including a "cable operator" means that the commercial limits apply to cable operators only when they act like broadcasters and originate their own programming.⁶ As NABB demonstrates, the legislative history evidences an intent to exempt passively carried broadcast transmissions. It is silent, however, on any similar exemption for cable network programming. Indeed, prior to passing the Act, Congress heard testimony from cable networks averring that they would comply with the commercial limits.⁸ Without cable operator liability for cable network programming, the bulk of children's cable programming would be beyond the scope of the statute. This would leave an unintended void in the Act's coverage.⁹ We decline to construe the Children's Television Act to have such a result.¹⁰ Although CATA states that monitoring compliance on multiple channels may consume significant resources, we cannot assume that Congress was unaware of any such burdens when it applied the commercial limits to cable operators.¹¹

5. Both CATA and Cablevision state that cable network affiliation agreements give cable networks control of most advertising time.¹² CATA claims that such contracts pre-

vent deletion of advertising time and even require carriage of the cable network program signal. However, no samples of such agreements and no evidence that they lack provisions providing for renegotiation in the case of a change in government regulation have been placed in the record. Moreover, Cablevision's request for a grace period to allow the parties to amend existing affiliation agreements suggests that these agreements are susceptible to modification.

6. A cable system's passive retransmission of a broadcast signal and its passive role with respect to access channel programming represent the two instances where cable operators are not responsible for compliance with the commercial limits. These are both cases where a specific statutory scheme prevents a cable operator from controlling the programming involved.¹³ Cable interests here acknowledge that their own voluntary contractual choice prevents them from controlling content.¹⁴ Moreover, as NAB and INTV observe, broadcast affiliates traditionally have been responsible for broadcast network compliance with Commission rules.¹⁵ We believe that similar responsibilities are appropriate for cable operators in this instance.¹⁶ We thus do not exempt cable operators from the responsibility for ensuring cable network programming compliance with the commercial limits.¹⁷

B. Definition of "Commercial Matter"

7. The *April 12 Order* clarified that we would deem broadcast and cablecast material to be "commercial matter" if the station or cable operator received consideration directly or indirectly for airing the material and the material was used to sell a product or service.¹⁸ Various parties seek clarification or modification of aspects of this definition.

8. The *April 12 Order* explained that barter contracts, depending on their terms, may involve consideration fur-

³ 6 FCC Rcd at 2113.

⁴ CATA Petition at 4.

⁵ NAB Opposition at 14-15; NABB Opposition at 13-17; *April 12 Order*, 6 FCC Rcd at 2113.

⁶ CATA Petition at 2-3.

⁷ NABB Opposition at 14 (citing 136 Cong. Rec. H8537 (daily ed. Oct. 1, 1990)(remarks of Rep. Markey)).

⁸ *Commercial Time on Children's Cable TV: Hearing Before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation*, 101 Cong. 1st Session 12, 14, 15-16 (1989) (*Cable Hearing*).

⁹ CATA argues that application of 47 U.S.C. §§ 315 and 312(a) to origination cablecasting suggests a different result in the instant case. We observe, however, that the legislative history underlying Sections 312 and 315 of the Communications Act differs from the legislative history leading to the enactment of the Children's Television Act.

¹⁰ CATA also questions the constitutionality of imposing commercial limits on cable. CATA Petition at 2 n. 4. As the *April 12 Order* stated, Congress itself has provided a vigorous defense of the Act's constitutionality. 6 FCC Rcd at 2123 n. 5.

¹¹ CATA Petition at 7. Both broadcasters and cable operators, subject to certain conditions, may reasonably rely on information provided by networks to substantiate compliance, thus ameliorating some of the administrative burden monitoring net-

work compliance might otherwise entail. See *infra* para. 22. Further, such monitoring is required only with respect to children's programming transmitted, not the entire schedule of all channels.

¹² CATA Petition at 3-4; Cablevision Joint Comments at 2.

¹³ See 17 U.S.C. § 111; 47 U.S.C. § 532 (c).

¹⁴ We thus agree with NAB that CATA's citation to *WGN v. United Video Inc.*, 693 F. 2d 622 (7th Cir. 1982), a case involving retransmitted broadcast signals and arising under 17 U.S.C. § 111, is inapposite.

¹⁵ NAB Opposition at 15; INTV Opposition at 12 n. 20.

¹⁶ Moreover, the cable network hearing testimony and submissions in this proceeding indicate that the cable networks will voluntarily comply. *Cable Hearing*, *supra* at 12, 14, 15-16; USA Network Comments at 1. Thus, cable operators' fears of being exposed to liability for cable network practices may never be realized and the contractual dilemma which CATA and Cablevision posit, as a practical matter, may never arise.

¹⁷ We also deny Cablevision's request for a grace period staying the effective date to permit modification of existing cable network affiliation agreements. Cablevision has failed to show why the period of time from release of the *April 12 Order* (April 12, 1991) until October 1, 1991, -- nearly six months -- is insufficient for this purpose.

¹⁸ 6 FCC Rcd at 2112.

nished as an inducement to air commercial matter.¹⁹ We gave as an example of a barter contract that did *not* involve consideration the contract for the program (exclusive of any spots contained within it) at issue in *National Association for Better Broadcasting v. Television Station KCOP P(TV)*.²⁰ We clarify at the request, of some parties²¹ that, absent extraordinary circumstances, as the *KCOP* case suggests, if a station gives more than nominal consideration in return for the right to air a program, the station will not be deemed to have *received* consideration as an inducement to air the program. In such cases, a station pays for the right to air a program and presentation of the program is not deemed to have been induced by receipt of consideration from others to air the material.

9. The *April 12 Order* also stated that air time sold for purposes of presenting educational and informational material, including "spot" announcements, with the only sponsorship mention a "sponsored by," would not be deemed commercial matter. We clarify at the request of several parties²² that the visual appearance of a sponsor's standard corporate logo during such material will not turn the material into "commercial matter," as long as the logo appears when the sponsor is verbally identified and lasts only as long as the required sponsorship identification. Such a brief visual appearance of the corporate logo will clarify the identity of the sponsor, without additionally promoting its commercial activities.²³

10. We also clarify that the provision of a promotional announcement to a station by the producer or distributor of that program would not, by itself, be regarded as "consideration" to run the announcement requiring it to be treated as an advertisement. We continue to believe, however, as reflected in the *April 12 Order*, that a program promotion must be considered "commercial matter" if it promotes a product or service related to the program, program sponsor, program producer or an advertiser, rather than the program itself.²⁴

11. NABB urges us to define "commercial matter" as any announcement or program, regardless of length, that has the predominant purpose of selling products.²⁵ We

find our two-step test -- receipt of consideration and promotional purpose²⁶ -- to be superior, however, and decline to modify it. Under NABB's approach, a program creatively styled around a product might be questioned as predominantly promoting that product, even though the program's writers and producers independently derived the idea for the program and received no inducement from the product manufacturer to create it. The requirement that a station directly or indirectly receive consideration for airing the material serves as a useful check on whether the material in fact is commercial in nature.²⁷ We conclude that our adopted definition is more precise and narrowly tailored than NABB's, and thus more sensitive to the constitutional and creative concerns which this area of regulation raises.²⁸ We clarify, however, that our definition of commercial matter is not restricted to material of any particular length, and could apply to program-length material as well as to spot announcements.²⁹

C. Definition of "Children's Program"

12. The *April 12 Order* defined "children's programming" subject to the commercial limits as programs originally produced and broadcast primarily for an audience of children 12 years of age and under. CATA asks whether music video programming qualifies under this definition.³⁰ Although it seems a matter of common knowledge that some music video programs are not primarily produced for a 12-and-under audience, the record does not permit us to make a general ruling concerning the intended audience of all music videos. However, music video programs which are produced and broadcast for the child audience will be considered "children's programming" for purposes of our rules.

13. The commercial limits apply on a "clock-hour" basis.³¹ Although the Act only applies the limits "per hour," the *April 12 Order* prorated the limits in cases where a half-hour "island" of children's programming airs between adult programs.³² We clarify at NAB's request that we impose no restrictions on how commercials within the statutory limits are configured within an hour's

¹⁹ 6 FCC Rcd at 2123 n. 19.

²⁰ 4 FCC Rcd 4988 (1989), *aff'd sub nom. National Ass'n for Better Broadcasting v. FCC*, 902 F. 2d 1009 (D.C. Cir. 1990) (per curiam). In *KCOP*, the station (one of at least 142 to which the program was syndicated), gave two minutes of air time worth about \$300,000 per year in exchange for the right to air 65 original episodes and six reruns of the program.

²¹ NAB Petition at 4-5; Disney Opposition at 10-11.

²² NAB Petition at 6; INTV Petition at 8-9; Disney Opposition at 12-13.

²³ The question has arisen as to whether use of a product as a prize in a program promotion would be a "commercial mention" counted against the allowed amount of commercial time. In the sponsorship identification area, the receipt and use of a prize (such being the only consideration received), and an identification not going beyond the mere use or mention of the product, would not require sponsorship identification. *Applicability of Sponsorship Identification Rules*, 40 FCC 141,147 (1963). Although the scope of Section 317 and the definition of commercial matter are not coterminous, *see* 6 FCC Rcd at 2112, this approach appears to be a reasonable one here. Accordingly, a promotional announcement will not be considered commercial matter simply because it includes a mere identification of a

product to be used as a prize.

²⁴ 6 FCC Rcd at 2112.

²⁵ NABB Petition at 8-9.

²⁶ *See supra* para. 7.

²⁷ It is our understanding that the consideration requirement will not affect our determination that the programming aired on home shopping stations will be deemed commercial matter for purposes of our rules. *See* para. 17 *infra*.

²⁸ *See* Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 11-15 (Senate Report).

²⁹ *See* 6 FCC Rcd at 2118 (any children's program found to be a program-length commercial would count toward the statutory commercial limits).

³⁰ CATA Petition at 7-8.

³¹ 6 FCC Rcd at 2112-13.

³² 6 FCC Rcd at 2112. The proration requirement also applies to a children's program bounded at one end by an adult program and at the other by children's program. Thus, a licensee airing an hour and a half of children's programming beginning at 10 am would apply the statutory limits to the hour of programming airing between 10 am and 11 am and prorate the statutory limits to apply to the half-hour of children's programming beginning at 11 a.m.

block of children's programming, even where there are two or more separate programs within the hour.³³ The instructions to the broadcast license renewal form make this clear.³⁴ We also clarify that with the exception of an unusual case in which a program is not scheduled on the hour or half-hour,³⁵ we will begin counting commercials associated with a particular hour of children's programming at the start of the hour and finish counting at the end of that clock hour. Thus, as NAB suggests, commercials in adjacent positions immediately outside a program's clock hour will not be attributed to that hour.³⁶

14. Although the Act does not explicitly require it, because children's programming is so often aired in half-hour segments, we decided in the *April 12 Order* to prorate the commercial limits when applying them to isolated half-hour children's programs or to half-hour programs otherwise not part of an hour-long block of children's programming.³⁷ We stated that we would not prorate for segments of shorter duration, unless such segments were part of a half-hour or hour block of children's programming. Upon further reflection, we believe that we would best further the intent of the Act by applying the commercial limits pro rata to segments of even shorter duration. There is growing interest in use of short-segment programming for children.³⁸ Exempting such material from the commercial limits may ultimately leave a significant void in the Act's coverage.³⁹ We therefore hold that all broadcasters and cable operators should prorate application of the commercial limits to program segments of five minutes or longer duration.⁴⁰

15. NAB states that in some cases the weekend network broadcast of a live sporting event may cause preemption in the western time zones of one half-hour of an hour's block of children's programming. This may result in a half hour of children's programming that contains 5.5 minutes of commercials, .25 minutes over the half-hour weekend limit.⁴¹ NAB asks that we permit such an overage, consider it "de minimis," or state that we would

favorably consider case-by-case waivers. We are unable to grant this request to the extent that such an overage is the result of foreseeable scheduling. However, as stated in the *April 12 Order*, where the facts demonstrate that a slight overage is caused by a last-minute, emergency scheduling change, we will consider such a lapse to be "de minimis."⁴²

16. Congress intended that the Children's Television Act would apply equally to all commercial stations.⁴³ We therefore fully agree with TRAC that the Act applies to home shopping stations.⁴⁴ Home shopping stations must comply with both the programming renewal review requirement and the commercial limits.⁴⁵

17. CATA asks whether consecutive commercials for children's products are subject to the commercial limits. The Act imposes commercial limits on "children's programs." As stated above, we defined such programs, in accordance with legislative intent, as programs directed to children 12 years of age and under.⁴⁶ The Act does not explicitly address the case of a home shopping station with a format that generally does not contain "programs," but consists primarily of advertising. Analogizing to the definition of "children's programming," the *April 12 Order* clarified that if a home shopping station directed commercials for children's products to *adult* viewers/purchasers, these would not be subject to the commercial limits.⁴⁷ We clarify that if a station airs a program-length show (of five minutes or longer in duration) consisting of advertising for only children's products, whether that program is subject to the commercial limits depends on whether it is primarily directed to

³³ NAB Petition at 3-4.

³⁴ NAB Petition at 3 & n. 4; INTV Petition at 15-16.

³⁵ See generally 6 FCC Rcd at 2124 n. 35.

³⁶ NAB Petition at 3-4.

³⁷ 6 FCC Rcd at 2112-13; *supra*, para. 13.

³⁸ TRAC Reply at 7 n. 10.

³⁹ We believe that proration below five minute segments will lead to inordinate difficulties in scheduling PSAs and other short segments that serve a positive purpose. See generally TRAC Reply at 7 n. 10.

⁴⁰ We are also amending Question 9, FCC Form 303-S to reflect the requirement that broadcasters prorate the commercial limits for children's program segments of five minutes or more in length where such segments are not part of an hour's block of children's programming. See Appendix B, *infra a*. We would apply the commercial limits proportionately to such short programs. For example, a 5 minute program, being 1/12 of an hour, could contain up to 1/12 of the allotted commercial matter for an hour of children's programming, or up to one minute of commercial matter. We propose to count commercial time for short segment programs that do not, by definition, conform to standard hour or half-hour time periods in the manner indicated in the *April 12 Order*. We would begin counting commercial time at the start of the program and allocate half of the commercial time at any break at the beginning or end of a program to the immediately preceding program and half to the next program. 6 FCC Rcd at 2124 n. 35.

⁴¹ NAB Opposition at 16-18. Without the preempting sports event, the program would have backed up against a children's

program with 5 minutes of commercials. The half-hours are programmed with 5 and 5.5 minutes to avoid airing 15 second spots. NAB Opposition at 16-18.

⁴² 6 FCC Rcd at 2126 n. 123.

⁴³ See, e.g., 136 Cong. Rec. H8540 (daily ed. Oct. 1, 1990) (colloquy between Rep. Cooper and Rep. Markey)(Act applies to "any" broadcaster, including home shopping stations).

⁴⁴ TRAC Petition at 3, 9-10.

⁴⁵ TRAC asks for a ruling on the case of a home shopping station airing a short segment (under 30 minutes) of children's programming, and filling the remainder of a clock hour with home shopping commercials. TRAC Petition at 4, 5. Because the question which TRAC asks may arise in a myriad of factual situations, we prefer to address it, if necessary, after stations have had an opportunity to implement the commercial limits, and in the context of specific factual circumstances. We observe that as a general matter, all broadcasters are required to air standard-length children's educational and informational programming in order to fulfill the programming renewal review requirement, although short-segment programming may also contribute to fulfilling that requirement. See *infra* Section IVB. Thus, it is unclear that the factual circumstances which TRAC posits will occur in the future. Should it appear that home shopping stations are able to evade the rules in any way, however, the Commission can take appropriate action at that time.

⁴⁶ See, e.g., Children's Television Act of 1989, House Committee on Energy and Commerce, H. R. Rep. No. 385, 101st Cong., 1st Sess. 16 (House Report).

⁴⁷ 6 FCC Rcd at 2123 n. 17.

children.⁴⁸ If so, the program would be subject to the commercial limits. If the program were not directed at the 12 and under audience, the limits would not apply.⁴⁹

18. Host-selling prohibits the use of program talent or other identifiable program characteristics to deliver commercials. It is a special application of our more general policy requiring separation of program and commercial material in order to help children distinguish between the two. Host-selling also takes unfair advantage of the trust which children place in program characters.⁵⁰ This policy would prohibit, for example, use of a cartoon character depicted in a children's program to sell a product in a commercial aired in close proximity to the program.⁵¹ It would not, however, as TRAC suggests, prevent an unrelated program host from selling products that are not associated with a preceding or subsequent children's program.⁵²

D. Reporting

19. The Children's Television Act requires that the Commission review television broadcast renewal applications for compliance with the commercial limits.⁵³ Accordingly, the *April 12 Order* required commercial television broadcast licensees to certify their compliance with the limits in their renewal applications. We agree with ACT's suggestion that a limited, supplementary program of random audits may be effective in ensuring compliance with the commercial limits,⁵⁴ and we retain the right to institute such a program. At this point, however, we wish to evaluate the efficacy of our three-part enforcement scheme, consisting of public monitoring, station certification and record-keeping requirements, before considering whether other enforcement mechanisms are necessary.

20. In the absence of a statutory requirement that we review cable operator compliance, and in light of the record-keeping requirements we imposed on operators, the *April 12 Order* relied on public monitoring to enforce cable operator compliance with the commercial limits. It did not impose a certification requirement.⁵⁵ We will not reconsider this ruling, as NABB requests. The responsibility for public monitoring is dispersed among many interested citizens and groups and is not overly burdensome and unrealistic as NABB argues.⁵⁶

E. Record-keeping

21. The *April 12 Order* required television licensees and cable operators to maintain records sufficient to verify compliance with the commercial limits. In the case of broadcast licensees, these records should be sufficient to permit substantiation of the broadcaster's certification of compliance at renewal time. For cable operators, not subject under the Act to renewal review, these records must be retained for a period of time sufficient to cover the applicable statute of limitations.⁵⁷ The *April 12 Order* also noted that cable operators may wish to arrange to have cable networks provide to them commercial records for the children's programming those networks supply.⁵⁸

1. Nature of record-keeping obligation

22. We clarify, at the request of INTV and NAB, that stations and cable operators may, but are not obliged to, keep program logs in order to meet the record-keeping requirement.⁵⁹ Tapes of children's programs, provided they are made available for viewing by the public, will also satisfy the requirement, as these provide the most complete record of how the licensee or operator has complied with the limits. We clarify at the request of INTV and NAB respectively, that the following types of documentation will also satisfy the record-keeping obligation, provided that such records are reviewed on a routine basis by responsible station or cable system officials:⁶⁰ (1) lists of the number of commercial minutes per hour aired during identified children's programs; or (2) certified documentation that the station and/or network/syndicator, as a standard practice, formats and airs identified children's program(s) within the statutory limit of commercials,⁶¹ together with a detailed listing of any overages. Any documentation maintained pursuant to the commercial record-keeping requirement must identify the specific programs which the broadcaster or cable operator believes are subject to the commercial limits. In addition, both broadcasters and cable operators may rely on network records or other information, provided such records meet the standards described in this paragraph.⁶²

23. We also clarify that commercial records should be placed in the station or cable system's public file no later than the tenth day of the quarter following the quarter in which they aired.⁶³ This requirement is analogous to that applied to broadcasters' issues programs lists.⁶⁴

⁴⁸ CATA Petition at 8.

⁴⁹ TRAC Petition at 3, 5. We disagree with TRAC that a determination of whether a commercial is directed to children or adults is impossible to make. TRAC Petition at 8n. 7. Such a determination is analogous to deciding whether program content is directed primarily to children or adults, the test suggested by the legislative history for classifying "children's programs" subject to the commercial limits. See, e.g., Senate Report at 22.

⁵⁰ *Action for Children's Television*, 50 FCC 2d 1, 8, 16-17 (1974) (1974 Policy Statement).

⁵¹ Cf. Letter to KCOP Television from FCC Mass Media Bureau, Enforcement Division (May 15, 1989).

⁵² TRAC Petition at ii, 11-15.

⁵³ 47 U.S.C. § 303b(a).

⁵⁴ ACT Petition at 9.

⁵⁵ 6 FCC Rcd at 2113.

⁵⁶ NABB Petition at 22-23.

⁵⁷ See *infra* para. 24.

⁵⁸ 6 FCC Rcd at 2124 n. 52.

⁵⁹ INTV Petition at 10-11; NAB Petition at ii, 10, 11.

⁶⁰ INTV Petition at n. 24; NAB Petition at ii, 11.

⁶¹ For example, a producer might submit an affidavit stating that the company's practice is to format a given children's half-hour program series with only four minutes of availabilities within the program, so that it would be impossible, unless adjacencies were added by the station, to exceed the commercial limits. The station would also have to keep similar documentation capable of showing that no additional commercials or at least no commercials in excess of the statutory limits were added by the station. Any instances where the limits were in fact exceeded would have to be detailed.

⁶² See generally CATA Petition at 7.

⁶³ See generally CATA Petition at 8, 9.

⁶⁴ 47 C.F.R. § 73.3526(a)(8). Cf. INTV Petition at 12.

24. We reiterate that cable operators must maintain commercial records until the applicable statute of limitations has run. Cable operators generally do not hold "broadcast station licenses" within the meaning of 47 U.S.C. § 503(b)(6)(B). Therefore, that statute of limitations, which runs for one year, applies to them, CATA's argument to the contrary notwithstanding.⁶⁵

2. Availability to the public

25. The records required to substantiate compliance with the commercial limits must be made available to the public. The *April 12 Order* stated that broadcasters and those cable operators subject to a public file requirement must make these records part of their public inspection file.⁶⁶ Various parties challenge aspects of this ruling.

26. NAB objects to the public file requirement. It contends that public monitoring is a better means of verifying compliance than use of station records. It states that the penalty for a broadcaster's false certification at renewal is severe enough to deter violations without public recourse to station records. NAB argues that such a requirement unnecessarily adds paperwork and consumes staff time. We disagree. Public monitoring by viewing programs and public monitoring by review of a station or cable operator's commercial records are complementary and useful checks on compliance.⁶⁷ We adhere to this requirement.⁶⁸

27. We also decline to adopt Cablevision's suggestion that we permit cable network records to be kept in a central clearinghouse, rather than in each operator's public file.⁶⁹ The public's ability to access necessary commercial records readily, including those of cable and broadcast networks, is an important part of our scheme for enforcement of the Act.⁷⁰ Moreover, in light of operators' ability to rely on records provided by the cable networks themselves, we do not believe that this requirement, which applies only to children's programming, will be unduly burdensome.⁷¹

III. PROGRAM-LENGTH CHILDREN'S COMMERCIALS

28. The *April 12 Order* defined a "program-length children's commercial" as a program associated with a product, in which commercials for that product are aired. The Commission found that this definition struck the best balance between the competing public interests involved. On the one hand, it protects children from the confusion and deception that the intermixture of related program and commercial material may cause. On the other, it preserves the creative freedom and practical revenue sources that make children's programming possible.⁷² With one exception relating to the required separation between a children's program and related commercial matter, we reaffirm this definition.

29. ACT and NABB again ask that we adopt a "facts-and-circumstances" test which they state the Commission employed in the *Hot Wheels* cases in 1969 and 1970.⁷³ As NAB and Disney explain, and contrary to ACT's contention, our rejection of this approach is not a recent change of policy.⁷⁴ In 1985, in *ACT v. KTTV*, we held that to the extent the *Hot Wheels* cases had been read as "including a finding that program product licensing and associated off-program advertising is inherently contrary to the public interest or deceptive to the child audience," those decisions had been read too broadly.⁷⁵ Moreover, the policy we have adopted with respect to program-length children's commercials harmonizes with longstanding policies regarding overcommercialization and adequate separation of program and commercial content in children's programming that the Commission has consistently enforced since 1974.⁷⁶

30. We also do not believe that it is administratively practical for the Commission to attempt to discern whether a producer had commercial intent in producing a given program through a review of the facts and circumstances surrounding its production and airing. Contrary to NABB, and as MPAA suggests, such an endeavor would intrude to a much greater degree into the creative process than a finding that a program was intended for a "child" audience for purposes of applying the commercial limits.⁷⁷ We also believe that such a test would create greater uncertainty in application than the one we have adopted, and would therefore tend to chill creative production of children's programs.⁷⁸

⁶⁵ CATA Petition at 9.

⁶⁶ 6 FCC Rcd at 2113.

⁶⁷ Review of station or operator records, for example, may disclose violations that a citizen had failed to notice when viewing programming. Or, it may disclose lapses in accurately reporting overages.

⁶⁸ NAB also states that the Final Regulatory Flexibility Analysis Statement in the *April 12 Order* did not discuss the public file requirement. NAB Petition at 10 n. 14. The Statement did generally discuss the commercial record-keeping requirement, however. In addition, the Regulatory Flexibility Analysis Statement in this order discusses the public file requirement. See Appendix D *infra*.

⁶⁹ Cablevision Joint Comments at 3-4.

⁷⁰ See *supra* para. 19.

⁷¹ See *supra* 22.

⁷² 6 FCC Rcd at 2117.

⁷³ ACT Petition at 5; NABB Petition at 5, 7 & n. 5. See *Topper Corp.*, 21 FCC 2d 148 (1969). See also *American Broadcasting Companies, Inc.*, 23 FCC 2d 132 (1970); *American Broadcasting*

Companies, Inc., 23 FCC 2d 134 (1970).

⁷⁴ NAB Opposition at 2-4, 7; Disney Opposition at 7 n. 11; ACT Petition at 3-4. See also NABB/ACT Joint Reply at 2 n. 2.

⁷⁵ 58 RR 2d 61, 67 n. 18 (1975), *rev'd on other grounds*, *NABB v. FCC*, 830 F. 2d 270, 275-77 (D. C. Cir. 1987), *on remand*, *National Ass'n for Better Broadcasting v. Television Station KCOP*, *supra*, *aff'd sub nom. National Ass'n for Better Broadcasting v. FCC*, *supra*. Both NABB and ACT were parties to *KTTV* when it was before the Commission and neither party appealed this aspect of the decision. *NABB v. FCC*, 830 F. 2d at 274 n. 25.

⁷⁶ Disney Opposition at 7 n. 11 (citing *1974 Policy Statement*, *supra*).

⁷⁷ NABB Petition at 5, 7 & n. 5; MPAA Opposition at 4-5.

⁷⁸ Kellogg Opposition at 2; NAB Opposition at 5; MPAA Opposition at 4-5. Although ACT argues that the *Hot Wheels* test never jeopardized renowned programs such as *Sesame Street* or *Disney shows* while the test was in effect, ACT provides no evidence that any parties ever challenged these programs on the basis of *Hot Wheels*. ACT Petition at 5.

31. In the alternative, ACT and NABB again urge us to establish a rebuttable presumption that if there is less than a given period of time between the introduction of a television program and a related product, or vice versa, this would be *prima facie* evidence that the show is a program-length children's commercial.⁷⁹ ACT and NABB have not demonstrated, however, that there is any necessary correlation between the commercial nature of a program and the timing of associated product marketing. We agree with MPAA and Disney that use of such a presumption lacks a rational basis.⁸⁰ We further agree with MPAA that such a rule would deter producers from employing marketing efforts necessary for a viable program and would stifle creativity by restricting the sources they could draw upon for stories and characters.⁸¹

32. Contrary to ACT/NABB's assertions, we are not "relying on the difficulty of line drawing" in rejecting their proposed approaches to this area.⁸² Rather, we are avoiding the adoption of tests that, if applied in a content-neutral fashion, could jeopardize acclaimed children's shows and other programs of benefit to children. Indeed, the measures proposed by ACT/NABB would be so intrusive to the commercial and creative processes critical to the production of high quality children's programming that the ultimate goals of the Act could be frustrated. We thus conclude that such approaches are overly broad, contrary to First Amendment principles, and inimical to the fundamental objectives of the Children's Television Act.⁸³

33. By contrast, we find that the definition we have adopted is practical and appropriately tailored to First Amendment concerns.⁸⁴ Contrary to ACT/NABB's assertions, in retaining this definition we are not "ignoring the public interest."⁸⁵ ACT/NABB's assertion is based on the assumption that the programs to which they object are "program-length commercials." This conclusion, however, is the very issue which confronts us. For the reasons stated above, we decline to define program-length children's commercials in the manner ACT and NABB advocate. We adhere to our adopted definition as the alternative that best furthers the public interest.

34. The *April 12 Order* stated that we would require a 60-second separation between the close or commencement of a children's program and related commercial matter.⁸⁶ ACT and NABB believe that this is inadequate.⁸⁷ We see

merit in NABB's concern that a child might still perceive a commercial for a related product occurring 60 seconds before or after a related program as part of the program. To guard against this possibility, we are modifying our rule to require instead that commercial material be separated from a children's program to which it is related by intervening and unrelated program material.⁸⁸ We believe that this requirement will ensure that there is an adequate break in program content to shift a child's attention.⁸⁹

IV. PROGRAMMING RENEWAL REVIEW REQUIREMENT

A. Definition of "Educational and Informational" Programming

35. The *April 12 Order* defined educational and informational programming as "programming that furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs."⁹⁰ NABB objects to the use of the phrase "in any respect," arguing that the definition is too broad.⁹¹ We agree with NAB that the breadth of this definition comports with Congressional intent, which was to include "any programming that does in fact serve the educational and informational needs of children."⁹² In addition, we believe that such latitude is necessary to foster the creativity that will result in programming both beneficial and attractive to children. We thus decline to modify our definition.

36. Congress intended that we afford broadcasters discretion in fulfilling the programming renewal review requirement and that we would defer to the "reasonable programming judgments of licensees in this field."⁹³ We clarify, at NAB's request, that we would only expect a broadcaster to defend the basis for its programming decisions in the event a nonfrivolous allegation of noncompliance is made or the reasonableness or good faith of the licensee's determination is otherwise called into question.⁹⁴

37. The *April 12 Order* adopted certain factors as "permissive guidelines" that licensees were free to use in determining how to meet the educational and informational needs of children in their community. We suggested that a licensee might take into account: (1)

⁷⁹ ACT Petition at 6-7; NABB Petition at 8. ACT originally favored a two-year gap, but now finds that a one-year period would suffice.

⁸⁰ MPAA Opposition at 6-7; Disney Opposition at 3-4. MPAA uses the re-release of the 1960s Batman series as an illustration of the lack of correlation between the proposed test and the commercial. The series was re-released in 1989 following the opening of a film of the same name and the merchandising of related products by the film producer. The television series syndicator was unrelated to the film producer. Under the proposed presumption, however, the release of the related products at the same time as the re-release of the television series could arguably constitute *prima facie* evidence that the series was a program-length children's commercial. MPAA Opposition at 6-7.

⁸¹ MPAA Opposition at 6-7. The Congressional findings predicate to the Act state that "the financial support of advertisers assists in the provision of programming to children."

⁸² NABB/ACT Joint Reply at 5.

⁸³ See generally Disney Opposition at 4-6 & n. 6; ANA Opposition at 2.

⁸⁴ Kellogg Opposition at 2; MPAA Opposition at 2-3.

⁸⁵ ACT/NABB Joint Reply at 4-5.

⁸⁶ 6 FCC Rcd at 2118.

⁸⁷ ACT Petition at 7; NABB Petition at 6-7 & n. 18.

⁸⁸ Thus, for example, a commercial related to a children's program could not air until after the start of a different, unrelated program.

⁸⁹ We specifically note that intervening commercial matter will not suffice as a separation device.

⁹⁰ 6 FCC Rcd 2114.

⁹¹ NABB Petition at 9-11.

⁹² Senate Report at 17; 136 Cong. Rec. S 10121 (remarks of Sen. Inouye); NAB Opposition at 8. See also INTV Opposition at 10.

⁹³ 136 Cong. Rec. S 10121 (remarks of Sen. Inouye) (July 19, 1990).

⁹⁴ NAB Petition at ii and iii, 13-15.

circumstances within the community; (2) other programming on the station; (3) programming aired on other broadcast stations within the community; and (4) the availability of other programs for children in the community of license. We also suggested that these assessment factors could serve to make the licensee's decision-making process more objective and would make it easier for licensees to justify programming decisions that are questioned.⁹⁵ We clarify, at INTV and NAB's request, that these are "permissive" guidelines which we believe will be particularly useful to licensees in the event of challenge.⁹⁶ At such times, for these factors to provide meaningful support to a licensee's decision, a licensee must be able to demonstrate the manner or process by which it has reached its assessment. We agree with INTV and NAB, however, that if a licensee's programming and nonbroadcast efforts are meeting the Act's requirements, we would not, either in our renewal review or in the context of a challenge, require an additional elaboration of the licensee's determination of how to serve children's educational and informational needs.⁹⁷

38. NABB would require licensees to target particular segments of the child audience in their educational and informational programming, but would not require that all age groups be targeted.⁹⁸ In light of Congressional intent to leave the "mix" of programming to licensee discretion, we decline to impose even this limited targeting requirement.⁹⁹ Because we do not impose a targeting requirement, we believe that ACT's suggestion that licensee records specify the particular part of the child audience to which programming is aimed would impose unnecessary burdens on stations.¹⁰⁰

39. NABB questions our decision to define "children" as age 12 and under for purposes of applying the commercial limits, and as 16 and under for purposes of applying the programming renewal review requirement. NABB believes that this disparity diminishes the incentive for broadcasters to air educational and informational programs aimed at children 12 and under, because these programs, in contrast to those targeted to the teen audience, would be subject to the commercial limits.¹⁰¹ We note that the commercial limits and programming renewal review are two distinct requirements with different objectives, and we are charged with implementing them both. As we have stated, younger children (12 years of age and under) constitute the audience primarily affected by overcommercialization because they are the persons who have the most difficulty distinguishing between commercial and programming material. They thus comprise the segment of the child audience that should be protected by commercial limits. On the other hand, we believe that

teenagers, a group with its own important issues and needs, should be part of the audience of children served through the programming requirement. In view of these distinct objectives -- and because we have no reason to believe that audience demand and other factors will not ensure that broadcasters serve the younger child audience -- we decline to modify the two different definitions of "children" adopted in the *April 12 Order*.

B. Issues Relating to Quantitative Standards

40. The *April 12 Order* stated that licensees must air some educational and informational programming "specifically designed" for children ages 16 and under in order to satisfy renewal review. We declined to adopt minimum quantitative criteria, finding that the Act imposes no such quantitative standards, and the legislative history indicates that none should be imposed.¹⁰² NABB urges, as it did in its comments, that the Commission should adopt quantitative processing guidelines.¹⁰³ We agree with NAB, however, that such guidelines, even if they do not automatically result in sanctions if violated, conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion.¹⁰⁴ We agree with INTV that such guidelines would tend to make compliance overly rigid, as broadcasters seek to meet the criteria in order to insulate themselves from further review. As INTV suggests, by providing safe harbors, such guidelines might well have the unintended effect of acting as a ceiling on the amount of educational and informational programming broadcasters air.¹⁰⁵

41. The *April 12 Order* stated that short-segment programming, including vignettes and PSAs, may qualify as the "educational and informational" programming required within the meaning of the Act.¹⁰⁶ We agree, however, with those who argue that broadcasters should not be able to satisfy the programming renewal review requirement solely through short-segment programming.¹⁰⁷ The *April 12 Order* stated that "[w]hether or not short-segment programming fully satisfies the requirement to air programming 'specifically designed' to meet children's needs depends on the *entire context of the licensee's programming* and nonbroadcast efforts directed at children."¹⁰⁸ As several parties suggest,¹⁰⁹ we did not intend by this statement that short-segment programming alone would fully satisfy the requirement to air educational and informational programming "specifically designed" for children. Rather, we meant that such programming can contribute towards satisfying the licensee's programming obligation. We agree with Golden Orange that Congress wished to give broadcasters the greatest possible flexibility

⁹⁵ 6 FCC Rcd at 2114-15.

⁹⁶ NAB Petition at 12 and 13; INTV Petition at 14, 15. These permissive guidelines are by no means, therefore, a formal ascertainment requirement.

⁹⁷ INTV Petition at 14; NAB Petition at 13.

⁹⁸ NABB Petition at 18.

⁹⁹ Senate Report at 17, 23; House Report at 12, 17.

¹⁰⁰ ACT Petition at 10.

¹⁰¹ NABB Petition at 20.

¹⁰² 6 FCC Rcd at 2115. Senate Report at 23.

¹⁰³ NABB Petition at 11-13 & n. 9. See also NABB Comments at 20.

¹⁰⁴ NAB Opposition at 10-12.

¹⁰⁵ INTV Opposition at 7. We also do not agree with NABB

that quantitative processing guidelines would result in less government intrusion than if no such guidelines were established. Indeed, the very establishment of such guidelines would infringe on broadcaster discretion regarding the appropriate manner in which to meet children's educational and informational needs. In addition, we find no support for NABB's speculation that such a guideline would eliminate unnecessary citizen complaints against licensees.

¹⁰⁶ 6 FCC Rcd at 2115.

¹⁰⁷ APA Petition at 1-10; NABB Petition at 14; TRAC Reply at 7 n. 10.

¹⁰⁸ 6 FCC Rcd at 2115 (emphasis added).

¹⁰⁹ NAB Opposition at 9; Disney Opposition at 8; INTV Opposition at 3.

and did not intend to exclude any programming "that does in fact serve" children's needs.¹¹⁰ As APA observes,¹¹¹ however, Congress used standard-length programming to exemplify the type of programming the Act sought to encourage. On this basis, the broadcast of short-segment programming alone would not satisfy completely the intent of the Act.

42. Nevertheless, in accord with most parties commenting on this issue and contrary to the apparent views of APA,¹¹² we believe that short-segment programming has a place in serving children's educational and informational needs. In light of the flexibility afforded broadcasters under the Act, and the fact that Congress intended no minimum standard,¹¹³ we find that broadcasters airing such programming are entitled to receive credit towards fulfilling the programming renewal review requirement. As Golden Orange states, short-segment programming can provide programming that children will watch and local stations can afford to produce.¹¹⁴ APA submits that, contrary to a statement in the *April 12 Order*, children do not have short attention spans when watching television at their cognitive level.¹¹⁵ Although this may be so, we fear, as Golden Orange suggests, that children will end up paying little attention to programming that is not at their level because appropriate programming is too expensive for a station to produce.¹¹⁶ We believe it is in the public interest to encourage stations, even those with limited resources, to air quality programming that will attract and hold a child audience. As Golden Orange suggests, permitting only conventional-length programming may discourage innovative programming on the part of broadcasters with limited resources, who may opt instead for inferior but inexpensive standard-length material that nevertheless fits the letter of the programming renewal review requirement.¹¹⁷ Moreover, as TRAC states, "[t]here is widespread agreement within the private and public sectors about the positive aspects and growing use of vignette and other 'interstitial' children's programming."¹¹⁸ As Disney also suggests, short-segment programming may have a role in the upcoming season should there be a dearth of suitable educational and informational material because of long production lead times.¹¹⁹ We will thus

permit short-segment material to contribute to fulfilling the programming renewal review requirement, although broadcasters must air some standard-length children's programs in order to fulfill this requirement.

C. Application to Noncommercial Stations

43. The *April 12 Order* found that application of the Act's programming provisions to noncommercial stations is not required by the statute, its legislative history or the public interest.¹²⁰ NABB and ACT dispute this finding.¹²¹ NABB alternatively advocates granting noncommercial stations a limited waiver from the renewal review requirement.¹²² Although we do not adopt the details of NABB's alternative proposal, its general approach does lead us to further reflection and to modify our original decision.

44. The purpose of the Act, as demonstrated in the findings upon which it is based,¹²³ and the Act's fundamental policies as reflected in its legislative history,¹²⁴ imply that all broadcasters, commercial and noncommercial alike, have a general obligation to serve children's educational and informational needs.¹²⁵ We thus construe this statutory obligation to meet children's educational and informational needs as applying to all broadcasters, including noncommercial/educational broadcasters.

45. However, we toll application of specific record-keeping, filing and submission requirements to noncommercial stations. Congress intended that the Act afford flexibility to, and not place undue burdens on, broadcasters.¹²⁶ In light of the Congressional intent to avoid unnecessary constraints, and the commitment noncommercial stations in general have demonstrated to serving children,¹²⁷ we believe that such obligations are inappropriate. We conclude that noncommercial broadcasters' substantial level of compliance with the intent of the Act as evidenced by noncommercial stations' delivery of high-quality children's programming would not be substantially improved by application of the particular record-keeping and reporting obligations that we have applied to commercial stations.¹²⁸ We believe that we can accomplish the programming renewal review of noncommercial stations required by the Act by means of

¹¹⁰ Golden Orange Partial Opposition at 3 (citing 136 Cong. Rec. S10121 (daily ed. July 19, 1990)); Senate Report at 17.

¹¹¹ APA Petition at 4 (citing House Report at 12,16-17 (1989) (providing 15 examples of standard program-length educational and informational programming)).

¹¹² NAB Opposition at 8-9; INTV Opposition at 2-5; Golden Orange Opposition at 4; TRAC Reply at 7 n. 10; ACT/NABB Joint Reply at 1 n. 1. *But cf.* APA Petition at 1.

¹¹³ See 136 Cong. Rec. S10121 (remarks of Sen. Inouye) (July 19, 1990). See also House Report at 12, 16-17 (stressing licensee flexibility and no minimum standards); Golden Orange Partial Opposition at 2-3 and n. 4. *Cf.* INTV Opposition at 4 (stating that the Commission has never considered 30 minutes as the smallest amount of time that could be considered a program) (citing House Report at 16).

¹¹⁴ Golden Orange Opposition at 5-6.

¹¹⁵ APA Petition at 6. *But cf.* Anderson & Collins, *The Impact on Children's Education: Television's Influence on Cognitive Development*, U.S. Dept. of Education, (April, 1988) (extended attention for several minutes rare).

¹¹⁶ Golden Orange Partial Opposition at 4-5.

¹¹⁷ Golden Orange Partial Opposition at 5-6. See also INTV

Opposition at 4-5.

¹¹⁸ TRAC Reply at 7 n. 10. See also Kellogg Opposition at 2 (PSAs play a valuable educational role).

¹¹⁹ Disney Opposition at 8-9.

¹²⁰ 6 FCC Rcd 2116.

¹²¹ ACT Petition at 8-9; NABB Petition at 16-17.

¹²² NABB Petition at 17 n. 18. NABB's alternative permits the Commission to apply the statute should noncommercial stations cease contributing to children's television in the substantial fashion many of them now are. PBC would, in the alternative, agree to this suggestion. PBC Opposition at 4-5.

¹²³ Act, § 101 (as part of public interest obligation, broadcasters should provide programming that serves the special needs of children).

¹²⁴ Senate Report at 5, 11; House Report at 6,10.

¹²⁵ House Report at 8-12; Senate Report at 10-16.

¹²⁶ House Report at 12; 136 Cong. Rec. S 10121 (daily ed. July 19, 1990) (remarks of Sen. Inouye).

¹²⁷ PBC Opposition at 4-5. See also NABB Petition at 16-17.

¹²⁸ See, e.g., Senate Report at 6-7. *Cf.* "Annenberg Pledges \$60 Million to Fun Public TV Program," *Wall Street Journal* (June 20, 1991) at A5 (funding for mathematics and science programming for students K-12).

less detailed administrative requirements. Accordingly, we require noncommercial stations to maintain documentation sufficient to show compliance at renewal time with the Act's programming obligations in response to a challenge or to specific complaints.

D. Record-keeping and Reporting

46. The *April 12 Order* required commercial television broadcast licensees to keep records demonstrating the extent to which licensees have responded to the educational and informational needs of children in their overall programming, including programming specifically designed to serve such needs. These records must include a summary of the licensee's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and reflect the most significant programming related to such needs which the licensee has aired. The *April 12 Order* stated that licensees would be required to submit this summary at renewal time.¹²⁹ We now respond to NAB's request for clarification of certain aspects of this decision.¹³⁰

47. As the legislative history suggests, commercial licensees must submit all of their children's program lists at renewal time.¹³¹ These lists should already be in summary form, so this requirement should not be unduly burdensome to licensees or to Commission staff charged with reviewing them. Commercial licensees need not submit documents identical to those contained in the public file with their renewal application. They may, if they choose, format the public file information differently when submitting it at renewal.¹³² However, the factual information and data submitted to the Commission should be identical to that contained in the public file. In particular, we do not adopt NAB's suggestion that the renewal submission may contain information other than that presented in the public file. Interested members of the public have the right to know the basis for a claim that a station has met the educational and informational needs of children.

V. EFFECTIVE DATE

48. The *April 12 Order* adopted October 1, 1991 as the effective date for the rules regarding commercial limits, program-length children's commercials, and the programming renewal review requirement.¹³³ The Commission declined a request for a blanket temporary waiver of the

commercial limits for children's programming acquired pursuant to long-term barter contracts, finding the record deficient in a number of respects.¹³⁴ On reconsideration, NAB and INTV renew their waiver request for barter contracts executed before the release of the *April 12 Order*.

49. We recognize that applying the new rules to stations that have contracted for children's programming prior to the adoption of these rules would invoke undue hardship on local stations, especially independent stations.¹³⁵ Uncontroverted evidence contained in the record demonstrates that the losses due to immediate compliance may be substantial.¹³⁶ Moreover, it is unlikely that stations with pre-existing contracts will be in a position to renegotiate with program suppliers. Finally, we observe that given the current economic climate, stations are unlikely to be in a position to raise rates to compensate for these losses.

50. Nevertheless, the intent and mandate of the Children's Television Act is clear. INTV has requested a complete grandfathering of contracts for children's programming entered into prior to the adoption of our rules. This request is denied. Such an unlimited extension cannot be justified. However, we do recognize that severe economic repercussions could occur from immediate implementation of these rules, thereby jeopardizing the financing of children's programming throughout the year. We believe that we must implement the Act to avoid such negative results.¹³⁷

51. Therefore, for a brief transition period we will extend the effective date of our commercial rules in the following circumstances. The new commercial limits shall not apply until January 1, 1992 to advertising appearing during and adjacent to children's programming, which was separately contracted for prior to April 12, 1991, the date of the release of the Commission's rules implementing the Children's Television Act. This extension shall apply to children's programming acquired either individually or in a children's program package. Extension of the effective date shall not apply to children's programming purchased solely on a cash basis.

VI. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. §§ 154 and 303, as amended, and the Children's Television Act of 1990, 47

¹²⁹ 6 FCC Rcd 2116-17; 47 C.F.R. § 73.3526; FCC Form 303-S, Question 9(a).

¹³⁰ NAB Petition at iii, 16.

¹³¹ Senate Report at 23-24.

¹³² Any reformatted information that is part of licensees' renewal applications must be placed in the public file as part of our requirement that such applications be made part of licensees' public files. 73 C.F.R. § 3526.

¹³³ 6 FCC Rcd at 2118.

¹³⁴ 6 FCC Rcd at 2119. In barter contracts, both the station and program supplier each have the right to sell a portion of the advertising time in the program.

¹³⁵ Indeed, a recent OPP Working Paper expressly recognizes that UHF independents are at risk. Setzer, F. & Levy, J., OPP Working Paper, No. 26, *Broadcast Television in a Multichannel Marketplace*, at 35 (June 1991).

¹³⁶ INTV Petition 2-8. INTV estimates industry-wide losses to

be \$67.9 million. See *id.*, affidavit of Susan M. Rynn, director of marketing information for INTV, at 7. In a supplemental filing, INTV corroborated these potential losses, estimating an average loss per station during the fourth quarter of 1991 to be \$160,000. Ex Parte Letter from James J. Popham, INTV Vice President, to Donna R. Searcy, Secretary, FCC (filed July 24, 1991). While the data submitted provide somewhat different estimates of potential losses, we find that the potential adverse effects from accompanying immediate compliance with the new rules to be substantial.

¹³⁷ *Ripley v. United States*, 926 F. 2d 440, 448 (5th Cir. 1991); *United States v. Meyer*, 808 F. 2d 912, 919 (1st Cir. 1987) (it is an axiom of statutory construction that legislation should be interpreted to avoid unreasonable results whenever possible).

U.S.C. §§ 303(a), 303(b), 394, the Petitions for Reconsideration and/or Clarification filed by NAB, NABB, ACT, INTV, APA, CATA, and TRAC, ARE GRANTED to the extent indicated herein and OTHERWISE DENIED.

53. It is FURTHER ORDERED that FCC Form 303-S IS AMENDED as set forth below and that Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth below, effective **October 1, 1991**.

54. Further information on this proceeding may be obtained by contacting Gina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

American Psychological Association; American Academy of Pediatrics; the National Parents-Teachers Association (APA) (filed May 10, 1991)

Action for Children's Television (ACT) filed May 13, 1991

Association of Independent Television Stations, Inc. (INTV) (filed May 30, 1991)

The Community Antenna Television Association; TCA Cable TV, Inc.; Limestone Cablevision Co., Inc.; AMRAC Cable Television; St. Joseph's Cablevision; Massillon Cable Tv., Inc.; Clear Picture, Inc.; Amerciable International, Inc.; Gateway Cablevision Corp.; Cascade Cablevision, Inc. (CATA) (Petition for Clarification and Reconsideration) (filed May 30, 1991)

Telecommunications Research and Action Center; Maryland and Virginia Chapters of the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (TRAC)(Petition for Reconsideration and/or Clarification) (filed May 30, 1991, correction filed May 31, 1991)

National Association for Better Broadcasting; National Educational Association of the U.S.; American Association of School Administrators; Washington Association for Television and Children (NABB) (filed May 29, 1991)

National Association of Broadcasters (NAB) (Petition for Clarification and Reconsideration) (filed May 30, 1991)

OPPOSITIONS AND PARTIAL OPPOSITIONS

Association of America's Public Television Stations, The Corporation for Public Broadcasting and The Public Broadcasting Service (PBC) (filed June 26, 1991)

INTV (filed June 26, 1991)

Association of National Advertisers, Inc. (ANA) (filed June 26, 1991)

Golden Orange Broadcasting Co., Inc. and Sarkes Tarzian, Inc. (Golden Orange) (Partial Opposition) (filed June 20, 1991)

HSN Communications, Inc. (HSN) (filed June 26, 1991)

Kellogg Company (Kellogg) (filed June 26, 1991)

Motion Picture Association of America, Inc. (MPAA) (filed June 17, 1991)

NAB (filed June 26, 1991)

NABB (filed June 26, 1991)

Walt Disney Company (Disney) (filed June 26, 1991)

REPLIES TO OPPOSITIONS

INTV (filed July 8, 1991)

OTHER PLEADINGS

Cablevision Industries Corp., Comcast Cable Communications, Inc., Cox Cable Communications and Multimedia Cablevision, Inc. (Cablevision Joint Comments) (filed June 26, 1991)

HSN Reply to Opposition to Petition for Reconsideration and/or Clarification (filed July 9, 1991)

ACT, NABB, National Education Association of the U.S., American Association of School Administrators, and Washington Association for Television and Children (Joint Replies) (filed July 10, 1991)

APPENDIX B

1. FCC Form 303-S is amended by adding question 9 (revised from the version published at 6 FCC Rcd 2120), to read as follows:

FCC Form 303-S Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station

* * * * *

9. The following sections apply only to commercial television broadcast applicants:

(a) Attach as Exhibit No. a summary of the applicant's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and reflecting the most significant programming related to such needs which the licensee has aired as described in 47 CFR Section 73.3526(a)(8)(iii).

(b) For the period of time covered by this report,

Yes No

has the applicant complied with the limits on commercial matter as set forth in 47 CFR Section 73.670? (The limits are no more than 12 minutes of commercial matter per hour on weekdays, and no more than 10.5 minutes of commercial matter per hour during children's programming on weekends. The limits also apply pro rata to children's pro-

grams which are 5 minutes or more and which are not part of a longer block of children's programming.)

(c) If no. submit as Exhibit No. a list of each segment of programming 5 minutes or more in duration designed for children 12 years old and under and broadcast during the license period which contained commercial matter in excess of the limits.

For each programming segment so listed, indicate the length of the segment, the amount of commercial matter contained therein, and an explanation of why the limits were exceeded.

APPENDIX C

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

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

Authority: 47 U.S.C. 154,303

2. A new Section 73.520 is added to read as follows:

Section 73.520 Educational and informational programming for children on noncommercial television.

(a) Each noncommercial television broadcast station licensee has an obligation to serve, over the term of its license, the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.

(b) Any special nonbroadcast efforts which enhance the value of children's educational and informational television programming, and any special effort to produce or support educational and informational television programming by another station in the licensee's marketplace, may also contribute to meeting the licensee's obligation to serve, over the term of its license, the educational and informational needs of children.

Note: For purposes of this section, educational and informational television programming is any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs.

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of this Action:

1. The actions taken in this decision respond to several Petitions for Reconsideration of the *April 12 Order* in this proceeding. This *Order* reaffirms most aspects of the *April 12 Order*. It also clarifies some portions of, and makes

limited modifications to, that action. This *Order* is thus intended to make the regulations enacted by the *April 12 Order* as effective in implementing the Children's Television Act and as responsive to the needs of children as possible, and to ensure compliance with those regulations by enabling television broadcast licensees and cable operators to better understand what these rules entail.

II. Summary of Issues Raised by the Public Comments in Response to the Final Regulatory Flexibility Analysis:

2. NAB, in its petition for reconsideration/clarification, contends that the Final Regulatory Flexibility Analysis Statement in the *April 12 Order* failed to discuss the burden placed on licensees by the requirement that the public have access to station records substantiating compliance with the commercial limitations. NAB further alleges that the Final Regulatory Flexibility Act Statement did not address the alternatives to that requirement considered by the Commission and rejected. We note that no comments were filed in response to the Initial Regulatory Flexibility Analysis set out in the *Notice of Proposed Rule Making* in this proceeding, and that the Final Regulatory Flexibility Analysis did discuss the commercial record-keeping requirement generally. However, we will address the public file issue in more detail below.

III. Significant Alternatives Considered and Rejected:

3. Several alternatives to the public file requirement were considered by the Commission and rejected. NAB, for example, suggests public monitoring as a means for verifying compliance with the commercial limits. NAB argues that, not only is public monitoring an effective means to corroborating compliance, but it also does not carry the strain of unnecessary paperwork and expenditure of station staff time intrinsic to the public file requirement. A public file requirement is an excessive regulation, according to NAB, because the severe penalty for a broadcaster's false certification at renewal should serve as a deterrent for such abuse without public recourse to station records. The Commission, however, finds that public monitoring by viewing programs and public monitoring by reviewing a station or cable operator's commercial records are not mutually exclusive, but complementary and useful checks on compliance. The burden placed on licensees by allowing the public access to their records verifying compliance with the children's television commercial limits should be minimal because licensees have long been required to make available to the public documents such as Annual Employment Reports, records reflecting compliance with filing announcements in connection with renewal, and lists of community issues addressed by the station in their public files.

4. We also decline to adopt Cablevision's proposal that the public file requirement be modified to allow cable network records to be kept in a central clearinghouse, as opposed to each operator's public file. It is essential, to facilitate public monitoring of compliance with the commercial limits, that the public have ready access to the commercial records. Moreover, in light of cable operators' ability to rely on records provided by the cable networks, this requirement should not be unduly burdensome.

5. This *Order* also clarifies the types of records that will satisfy the commercial limit record-keeping obligation, holding that documents other than program logs or tapes may satisfy this obligation. In light of the legislative his-

tory, the *Order* also clarifies that licensees, although they need not submit the identical physical documents, and may reformat the information contained in their children's programming records, may not submit added or different information from that contained in their public files with their renewal applications. The Commission states that the public is entitled to know the basis for a licensee's claims that it has complied with the programming requirement.

6. CATA asks that cable operators be exempt from the commercial limits except when they originate their own programming. This proposal is denied, because without cable operator liability for cable network programming, the bulk of children's cable programming would be beyond the scope of the statute, creating an unintended void in the Act's coverage. Just as broadcast affiliates have traditionally been responsible for network compliance with the Commission Rules, cable operators will be held responsible for cable network compliance with the commercial limitations. We also deny a request for a grace period staying the effective date to permit cable operators to renegotiate cable network affiliation agreements, finding the record insufficient to justify an extension beyond the nearly six months already permitted between the release of the *April 12 Order* and the October 1 effective date.

7. The *April 12 Order* pro-rated the limits to apply to isolated half hour children's programs, *i.e.*, programs that are not part of a longer, hour-long block of children's programming. That decision stated that we would not prorate for segments of shorter duration, unless such segments were part of a larger bloc of children's programming. We now modify that conclusion and find that all broadcasters and cable operators, including home shopping stations, should pro-rate application of the commercial limits to program segments of five minutes or longer duration. We do believe, however, that pro-ration below five minute segments would lead to inordinate difficulties in scheduling PSAs and other short-segments that serve a positive purpose, so we do not adopt that alternative.

8. We also decline to initiate a program of random audits immediately to ensure compliance with the commercial limits, preferring instead to permit our three-part enforcement scheme, consisting of public monitoring, station certification, and record-keeping requirements, a chance to achieve the desired results. We retain the right to institute a program of random audits if such a program is warranted in the future.

9. The *April 12 Order* enacted a required 60-second separation between opening or closing of a children's program and related commercial matter. We have reviewed this issue and do not believe that separation based on a specific time period will ensure that a child can distinguish between a program and a related commercial. We thus modify the rule to require instead that commercial material be separated from a children's program to which it is related by intervening and unrelated program material.

10. We considered the role of short-segment programming in fulfilling the Act's programming renewal review requirement, -- whether such programming should count at all or whether it could completely satisfy stations' children's programming requirements, -- but chose to allow such programming to contribute towards meeting the requirement. However, airing short-segment programming will not fully satisfy stations' programming obligations. Congress primarily envisioned standard program-length

material of a half-hour or more in duration when it formulated the Act. Thus, shortsegment programming can supplement other programming in fulfilling children's programming obligations, it cannot alone completely satisfy the requirements of the Act.

11. This *Order* also revises a decision adopted in the *April 12 Order* exempting noncommercial stations from the Act's programming requirements. We now hold that the statutory obligation to meet children's educational and informational needs applies to all broadcasters, including noncommercial/educational broadcasters, but that we will toll application of specific record-keeping, filing, or submission requirements. Rather, noncommercial stations must maintain records sufficient to show at renewal time that they have complied with the Act's programming obligations in response to a challenge or to specific complaints.

12. Several petitioners asked for a blanket waiver of the October 1, 1991, effective date for commercial limits for children's programming acquired prior to April 12, 1991 pursuant to barter contracts. On reconsideration, we find considerations of transitional equity justify a partial grant of this request, permitting an extension of the effective date until January 1, 1992 for barter contracts for children's programming executed prior to the release of the *April 12 Order*.