



# Virginia Association of Broadcasters Legal Review



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## Legal Memorandum

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### FCC Launches Proceeding to Examine Children's E/I Television Programming Rules

The FCC has opened a docket for its examination of the children's television programming rules and has released its long-awaited draft [Notice of Proposed Rulemaking](#) ("Notice") on the subject. The draft Notice contemplates significant changes to the children's television programming rules that would, if ultimately adopted, affect both the E/I programming and reporting obligations of television broadcasters.

The Commission will consider—and likely adopt—this Notice at its July 12, 2018, meeting. As noted, only a draft of the Notice has been released at this time; the draft Notice is subject to change before the July 12 meeting, and the draft does not constitute official action by the FCC. We will update you after the July 12 meeting and provide a more detailed discussion of the specific nuances on which the Commission will be seeking comment. In addition, the Notice only addresses children's educational/informational programming, and it specifically declines to consider making any changes to the children's commercial time limits rules applicable to programming that targets children under the age of 13.

*Background.* The Children's Television Act of 1990 ("CTA") requires the FCC, when evaluating a television licensee's renewal application, to consider the extent to which the licensee "has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs." The FCC first adopted children's television programming rules more than 20 years ago, and the consumption of video programming has changed since that time; viewers increasingly watch video programming through DVRs and on-demand, rather than at its scheduled time, and more programming for children is available through non-broadcast platforms. In light of these developments, the Notice observes:

"It is appropriate at this time to take a fresh look at the children's programming rules, with an eye toward updating our rules to reflect the current media landscape in a manner that will ensure that the objectives of

the CTA continue to be fulfilled. Our proposals set forth below are intended to provide broadcasters more flexibility in fulfilling their obligations under the CTA, while at the same time recognizing that particularized guidance may provide them greater regulatory certainty.”

Commissioner O’Rielly—who was tasked by Chairman Pai to spearhead the effort to launch a review of the FCC’s children’s programming rules—has publicly stated that he hopes to conclude this proceeding by the end of 2018. By FCC standards, such a timeline would make this a very speedy proceeding.

Below is a general overview of the proposals on which the draft Notice seeks comment. We will provide a more detailed summary after the FCC adopts the final Notice at its July 12 meeting.

*Proposed Changes to the Definition of “Core Programming”.* Full-power and Class A television operators should be familiar with the concept of “Core Programming.” Currently, “Core Programming” is defined as programming that meets all of the seven following criteria: (1) it has serving the educational and/or informational needs of children ages 16 and under as a significant purpose, (2) it is at least 30 minutes in length, (3) it airs between the hours of 7:00 a.m. and 10:00 p.m., (4) it is regularly scheduled on a weekly basis, (5) the symbol “E/I” airs on the screen throughout the program, (6) the station instructs publishers of program guides that the program is educational/informational and provides an indication of the age group for which it is intended, and (7) for commercial stations only, it is accounted for in the station’s quarterly Children’s Television Programming Report (a/k/a “Form 398”) (under current rules, noncommercial stations are exempt from the Form 398 filing requirement).

The Notice proposes to change or eliminate several of the current criteria. Specifically, the Notice proposes—and seeks comment on whether—to eliminate the requirements that Core Programming be at least 30 minutes in length and air on a regular weekly schedule. The Notice also seeks comment on whether to expand the timeframe during which Core Programming can be aired or, alternatively, whether the timeframe requirement should be eliminated. NAB has suggested expanding Core Programming hours to 6:00 a.m. to 11:00 p.m.

Further, the Notice proposes to eliminate the requirement that *noncommercial* stations identify Core Programming with the “E/I” symbol, and it seeks comment on whether the FCC should also consider eliminating the “E/I” symbol requirement for *commercial* stations. The Notice also seeks comment on whether to maintain the requirement that stations provide information identifying children’s programming, including an indication of the intended age group, to publishers of program guides.

With five of the seven definitional Core Programming criteria “in play,” the Notice strongly suggests that the Commission is planning to significantly overhaul the Core Programming concept.

*Quarterly Form 398 Reporting Requirements.* Additionally, the Notice seeks comment on whether the FCC Form 398 quarterly filing requirement for commercial stations should be changed to an annual filing obligation. The Notice also proposes to streamline the Form 398 Children’s Television Programming Report by eliminating the requirements that broadcasters: (1) provide

information on children’s E/I programs that they plan to air in the future, (2) specify the educational and informational purpose and the target age group of each Core Program, and (3) publicize the existence and location of their Form 398s (the FCC is not proposing to change the requirement that each Form 398 be maintained in the station’s online public file). The FCC also seeks comment on whether a television licensee should be allowed to simply certify that it has complied with the children’s programming requirements for a particular reporting period, as opposed to providing detailed information documenting its compliance.

*Proposed Changes to License Renewal Processing Guideline and Multicast Option.* Under the current rules, the Media Bureau can approve the children’s programming portion of a station’s license renewal application if the station has aired approximately three hours per week of Core Programming (as averaged over a six-month period) on its primary channel and an additional three hours of Core Programming per week for each of its multicast channels (if the station is multicasting). This three-hour-per-week “processing guideline” for the primary channel and each multicast channel has provided regulatory certainty for stations over the course of multiple license renewal cycles. The Notice seeks comment on whether (and how) the FCC should modify the processing guideline, and the FCC tentatively concludes that the current “primary plus multicasting” requirements should be eliminated and replaced with a more flexible approach that would require most stations to air less Core Programming.

More specifically, the Notice proposes to allow multicasting stations the flexibility to choose the channels on which to air Core Programming. In other words, stations would no longer be required to air three hours per week of Core Programming on their primary channel and an additional three hours per week of Core Programming for each multicast channel; instead, a station would be required only to air three hours per week of Core Programming (irrespective of how many channels the station broadcasts), and it could elect to distribute the Core Programming between/among one or more of its channels, including the option to air all of its Core Programming on a multicast channel that lacks MVPD carriage. The Notice also questions whether the three-hour quantitative processing guideline is even necessary at all.

*Preemption Flexibility.* Under the current rules, when a station preempts a Core Program for any reason other than breaking news, it must—in order to get “credit” for airing the episode—reschedule the preempted episode to a consistent day and time (known as a “second home”) and notify the public of the schedule change. The Notice seeks comment on NAB’s proposal to eliminate the “second home” policy and, instead, to permit stations to reschedule preempted Core Programming whenever they choose, so long as they give the public adequate notice of the rescheduled time.

*Special Non-Broadcast Efforts and Special Sponsorship Efforts.* Historically, the FCC’s rules have given stations the option (which stations have rarely—if ever—used) to demonstrate compliance with the children’s programming rules by relying in part on special non-broadcast efforts and special sponsorship efforts. Under the current rules, to receive “credit” for special non-broadcast efforts, a licensee must show that it has engaged in substantial community activity that has a close relationship with its Core Programming, i.e., that such non-broadcast efforts “enhance the value” of children’s E/I programming. To receive “credit” for special sponsorship efforts, a licensee must demonstrate that its production or support of Core Programming that aired on another station in its market increased the amount of Core Programming that aired on such other station. Because of the ambiguity associated with these options—and the regulatory risk of relying

upon them to demonstrate compliance with the rules at license renewal time—the number of stations that have relied on these options during the past two decades is probably close to (and may, in fact, be) zero. The Notice seeks comment on how the FCC could create a framework under which the use of special non-broadcast and sponsorship efforts would be more viable options for broadcasters to use to fulfill their children’s E/I programming obligations.

**To reiterate, this is a draft of the Notice that the FCC will consider at its July 12, 2018, public meeting.** We will keep you apprised of developments in this significant proceeding.

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If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

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