

# **Children's Programming**

## **A SHORT PRIMER**

This paper provides a summary of the rules adopted by the Federal Communications Commission in its *Report and Order* implementing the Children's Television Act of 1990, and its recent order in *Revision of Programming Policies for Television Broadcast Station*, August, 1996. They are, however, only a summary. Because of the complexity of the rules and the consequences at renewal time, specific questions should be referred to communications counsel.

## **INTRODUCTION**

Through the implementation of the Children's Television Act of 1991 ("CTA"), the Federal Communications Commission ("FCC") adopted rules that affect the programming directed to children. These rules profoundly changed the requirements and obligations of television licensees.

Generally, the rules relating to children's programming are being implemented in two phases. On January 2, 1997, the first phase of the Commission's new children's television rules became effective. All television licensees are now required to:

- provide an average of at least three (3) hours per week of "core programming" that is specifically designed to educate and inform children;
- identify core programs on the air and provide information about children's programming to program guides;
- prepare quarterly children's programming reports on FCC Form 398 for placement in the station's local public inspection file; and
- file the quarterly reports with the Commission on an annual basis in electronic form for an experimental period of three years.

In the second phase, renewal applications filed after September 1, 1997, will be evaluated for compliance with the three-hour children's television programming standard. Licensee performance prior to September 1, 1997 will be evaluated under the old standard; thus, the new processing guidelines will have limited applicability in the current renewal cycle.

## **DEFINITIONS AND COMMERCIAL LIMITS**

### *"Core Programming"*

The Commission adopted a definition of programming "specifically designed" to serve the educational and informational needs of children. The definition, which tracks the language of the CTA, defines children's television programming as "any television programming that furthers the educational and informational needs of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs." In order to qualify as core programming, the broadcast must have as a "significant purpose" serving the educational and informational needs of children 16 and under.

In determining whether programming has a significant purpose of educating and informing children, the Commission will ordinarily rely on the "good faith judgment of broadcasters." The FCC's Television Branch will afford wide latitude to licensees as to how they identify core programming. It is using a "reasonable person" test; that is, whether a reasonable adult would be able to identify the broadcast as core children's programming. However, it also expects that public participation will ensure compliance with the significant purpose prong of its definition of core programming and that Commission review would take place only as a last resort.

In addition to meeting the "significant purpose test," children's programming must meet the following additional requirements in order to qualify as "core programming":

- the program must be aired between the hours of 7:00 a.m. and 10:00 p.m.;
- the program must be a regularly scheduled weekly program;
- the program must be at least 30 minutes in length; and
- the educational and informational objective and the target child audience are specified in writing in the licensee's quarterly children's television programming report.

While licensees must demonstrate responsiveness to the needs of children 16 and under, they are not required to target programming to specific age groups within the 16 and under range. Stations are permitted to select the age groups they prefer to serve.

The Commission sets forth the following "permissive guidelines" for the exercise of licensee discretion in applying the concept of "responsive" programming:

- the circumstances within the community;
- other programming on the station;
- programming aired on other broadcast stations within the community; and
- other programs for children available in the broadcaster's community of license.

While the Commission does not require the use of these guidelines, it does encourage their use.

### ***Commercial Limitation***

**For purposes of enforcing the limits on commercial matter, the Commission defines children's programming as "programs originally produced and broadcast for an audience of children 12 years old and under." Commercial matter in such programs shall be limited to 12 minutes on weekdays and 10.5 minutes on weekends. PSA's will not be counted against the limit nor will airtime sold for the purposes of presenting educational and informational material. Thus, if a toy manufacturer purchases time to present informational or educational material, that spot will not count against the limit so long as the sponsor identification required by the Commission's rules and the Communications Act does not mention a specific product. The sponsor ID could, therefore, say: "The preceding was sponsored by Hasbro Toys, Inc." but could not mention any specific product or**

**otherwise induce the viewer to purchase a product or service. Generally, promotional announcements sponsored by a commercial entity need not be counted against the commercial limit so long as there is no product mentioned.**

**The commercial limit will be counted by "clock hour" rather than program segment. That is, commercial content will be measured from the start of one hour to the beginning of the next hour, rather than at the start of a program segment that might begin on the half-hour. Half-hour programs will be pro-rated with a 30-minute weekend-program permitted 5.25 minutes of commercials.**

## **PROGRAMMING**

A description of each program's educational and informational objective must be included in the quarterly children's programming report. The description must also include an indication of the specific target age group for core programs. It can be expected that producers of children's programming will supply such a description to stations licensing the programs.

Specials, PSAs and other short-form programs will not qualify as core programming. Such programming can, however, count toward meeting the three-hour processing guideline when broadcasters air somewhat less than three hours per week of core programming. The Commission is encouraging licensees to continue to provide what it describes as "a diverse mix of educational and informational programming, including short segments and PSAs, toward their overall obligation to provide programming for children."

Many children's programs are being marketed as "FCC friendly." Stations are cautioned not to rely on a syndicator's promise that a program meets the core programming definition. Rather, the station should make its own good faith judgment, which the Commission says it will ordinarily respect, or obtain an evaluation of the program from a recognized expert. New warranties may be bargained for in the syndication agreement to protect the station against a failure by the producer to provide qualifying programs. Stations must avoid situations, such as have existed previously, where attempts were made to obtain credit for programs of minimal educational value.

**The Commission defines a program-length children's commercial as: "A program associated with a product, in which commercials for that product are aired." It requires that commercials for a product and a program featuring the product be separated by an interval of unrelated program material. Thus, a program featuring Teenage Mutant Ninja Turtles cannot carry commercials for that product. Nor may such commercials appear on the break preceding or following the broadcast. They may, however, appear in a break inside the program that immediately precedes or follows the core program in question.**

**The Commission's rules also prohibit host selling and require a clear separation between programs and commercials, e.g. "We'll be right back after these messages."**

## **REPORTING AND RECORD KEEPING DURING LICENSE TERM**

### ***Reporting Requirements***

Since 1992, licensees have been required to complete and place in their public file quarterly reports on their children's television programming efforts. Beginning in 1997, these reports must (a) be on Form 398 and (b) be filed with the Commission once a year for an experimental three-year period. We encourage you to familiarize yourself with this form, which is also available in electronic form for downloading from the FCC's World Wide Web site. (<http://www.fcc.gov>)

Licensees are encouraged to file their reports via the Internet. The Commission will then publish on its Web site a list of broadcasters that do so. For the first time the Commission is also asking licensees to provide an e-mail address for their children's programming liaison and the World Wide Web home page address for the station, if it has one. The Commission is moving rapidly toward electronic filing. Form 398 is said to be a prototype for other electronic forms that will be introduced in the near future. If your station does not already have Internet access, you should probably include it in your plans for the near future. Additionally, you should have one or more people on staff who are knowledgeable on this subject. Pepper & Corazzini has developed substantial expertise in this area and we would be pleased to work with you on this project.

The Commission is requiring that the children's programming report be maintained separately from other reports maintained in the station's public file. Licensees are also required to publicize "in an appropriate manner" the existence and location of their children's television programming reports. In addition to requiring licensees to report on their past efforts, the new rules also direct stations to report on their plans for the future.

The Commission encourages licensees to include specials in their listing of children's programming to augment regularly-scheduled programs, which already qualify as "core". However, broadcasters should avoid relying upon PSAs and other short-form programming as these are not likely to weigh heavily in determining whether a station meets the requirement for three hours per week of children's programming. Stations that do not air the requisite three hours per week are not likely to receive credit for a shortfall of more than one half hour per week of programming no matter how extensive their showing of supplemental content.

### ***Record-keeping Requirements***

The Commission requires television licensees to maintain children's television records as part of their public file. For the first quarter of 1997 and beyond, the report must be prepared on Form 398. The records should contain:

- nonbroadcast efforts; and
- a summary of the licensee's programming response;
- support for other stations' programming directed to the educational and informational needs of children.

These records may be made a part of the quarterly Issues/Programs List (if separately identified) or kept as a separate list. While the children's programming list may be updated quarterly or annually, we recommend that the list of children's programming be kept separately and that it be prepared each quarter at the same time that the Issues/ Programs List is prepared. As with the Issues/Programs List, the children's programming list must contain the time, date, duration and a brief description of each program that is broadcast which is responsive to the educational and informational needs of children. Licensees may

make general statements about PSA's and regularly scheduled programs. It is not necessary to provide the exact time of a short segment that is broadcast within a longer program.

The Commission has suggested two alternate forms of record-keeping to demonstrate compliance with the commercial limits that are acceptable for a station's public file so long as the records are reviewed on a routine basis by responsible station officials:

1. Licensee generated lists of the number of commercial minutes per hour aired during identified children's programs.
2. Certified documentation that the station and/or network/syndicator, as a standard practice, formats and airs identified children's programming within the statutory limit, together with a detailed list of any overages.

Any documentation maintained of compliance with the commercial record-keeping requirement must identify the specific programs which the licensee believes are subject to the commercial limits. For example, a producer might submit an affidavit that it is the company's standard practice to format children's programming with not more than four minutes of availabilities per half-hour program so that it would be impossible to exceed the commercial limits unless the station added adjacencies in excess of 2.5 minutes per hour on weekends and four minutes per hour on weekdays. Licensees may rely on network or other records provided they are routinely reviewed by responsible station officials. The Commission also permits a licensee to demonstrate compliance by making available to the public tapes of children's programs.

At renewal time, licensees will be required to submit those records that are required to be maintained as part of the local public file. Any other supporting data will not have to be submitted unless questions regarding licensee compliance arise. The implication is that the burden of proof of compliance will be on the licensee. It would, therefore, be advisable to keep as much supporting data as possible until the license has been renewed.

### ***Processing Guidelines***

Beginning with your next renewal application, the Commission will evaluate licensee performance for compliance with the standard of an average of three hours per week of core programming over a six-month period. For purposes of staff-level review of compliance, applications will be divided into two categories.

In the first category will be broadcasters who air an average of three hours or more per week of programming that meets the new definition of "core programming." A licensee seeking review under this category would check a box on the revised renewal application form and provide supporting information indicating that it has aired three hours per week of regularly scheduled weekly shows that are 30 minutes or longer and otherwise meet the definition. The three-hour core programming benchmark can be averaged over a six-month period. Repeats and reruns of qualified core programming run between 7 a.m. and 10 p.m. will be counted towards meeting the three-hour guideline.

In the second category will be broadcasters who air somewhat less than three hours per week of core programming. Licensees in this category will receive staff-level approval if they are able to show that they have aired a package of different types of educational and informational programming demonstrating a level of commitment to educating and

informing children that is "at least equivalent to airing three hours per week of core programming." Specials, regularly scheduled non-weekly programs, short-form programs and PSAs with a significant purpose of educating and informing children aged 16 and under can qualify toward meeting the processing guideline; however, as noted above, it appears that such programs will not count towards making up any more than 30 minutes of the required three hours per week of children's programming.

Licensees that do not fall within the first two categories will have their renewal applications referred to the full Commission. The Commission expects that few broadcasters will fail to meet the three-hour guidelines. Those that do will have an opportunity to demonstrate compliance with the CTA in other ways such as sponsorship of core programming on other stations in the market - an even riskier approach. The Commission has left open the possibility that serious economic hardship, such as bankruptcy, might excuse noncompliance with the CTA. It appears unlikely that any other explanation would avoid a finding of noncompliance.

### **ENFORCEMENT**

The Commission will excuse inadvertent or *de minimis* violations of the rules; however, willful or repeated violations will expose the licensee to liability for forfeitures when the record is reviewed at renewal time. The licensee's overall performance with regard to children's programming, as with all other aspects of the licensee's record during the course of the license term, will be considered in determining whether the licensee is entitled to renewal. The Commission may impose reporting requirements, forfeitures, short-term renewals (as with EEO violations), or designation of the renewal application for hearing to determine whether it should be renewed. Further, violations of the children's programming rules may be taken into account in determining the weight of the renewal expectancy the licensee may be entitled to at the time it files for license renewal.

### **CONCLUSION**

It is clear, then, that the FCC places substantial requirements on the television broadcaster to be constantly aware of its compliance with children television rules. In order to confirm that you are in compliance, and that your renewal application will not come under serious Commission review, we suggest the following steps:

- Assign a senior management staff person to have primary responsibility for compliance.
- Review your program schedule to determine that sufficient programs meet the Commission's definition of children's programming.
- Implement a system for maintaining the required Form 398 reports. We recommend that you maintain in a non-public file as much substantiation as you can obtain to support the representations made in the Form 398. This material would only have to be produced in the event the Commission raises questions at renewal time.
- Evaluate and document any support provided to other television stations for children's programming. If you are presently supporting non-commercial television stations in a general fashion, you may wish to specify that your

support be ear-marked for children's programming in order to obtain credit at renewal.

- Evaluate and document any non-broadcast efforts directed toward children to ensure that they are related to over-the-air programming. While afforded very little weight, they may be vital if a substantial amount of the licensee's core programming is challenged.

We would be pleased to work with you in developing systems to implement the new rules. Questions are sure to arise as you begin the process of compliance. You should proceed under the assumption that your station's performance will be observed closely by both the FCC and citizens groups. The Children's Television Act enjoyed considerable support in Congress, which has been and will continue watching the Commission and licensees to determine that the letter and the spirit of the Act are enforced.

As with EEO, many stations may be subject to petitions to deny at renewal time. Therefore, we suggest, since these are new and very important rules, that you share with us your efforts at compliance and documentation. At least until we are all comfortable with the FCC's implementation of these new rules, we can provide an independent view to assure that every effort has been made for compliance with the letter and intent of the rules.