

# COMMENTS

## WHAT ABOUT THE KIDS? THE FCC'S CURRENT DEREGULATORY PLATFORM POSES A THREAT TO THE COUNTRY'S YOUTH

JASON CHUN\*

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## INTRODUCTION

Since the beginning of the Trump Administration, federal agencies have taken a “less is more” approach to regulation.<sup>1</sup> The Federal Communications Commission (FCC) is no different, having rolled back many of its rules over the past two years.<sup>2</sup> Most notably, in late 2017, the FCC released its Restoring Internet Freedom Order,<sup>3</sup> better known as the repeal of “net neutrality” rules, which sparked significant controversy.<sup>4</sup> However, while net neutrality has dominated headlines since Chairman Ajit Pai has presided over the FCC, another potential rollback may have drastic consequences on the most vulnerable members of the public: children.<sup>5</sup>

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1. See Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Feb. 3, 2017) (“[F]or every one new regulation issued, at least two prior regulations be identified for elimination . . . .”); Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017); Dave Michaels, *Trump’s Man for the SEC: Time to Ease Regulation: Jay Clayton’s Legal Work Has Dealt with Some of the Biggest Challenges Agency Has Faced*, WALL ST. J. (Feb. 19, 2017, 12:55 PM), <https://www.wsj.com/articles/trumps-man-for-the-sec-time-to-ease-regulation-1487505602> (describing Securities Exchange Commission Chairman, Jay Clayton as less in favor of heavy regulations and enforcement); Jacob Pramuk, *Trump Tells Business Leaders He Wants to Cut Regulations by 75% or ‘Maybe More’*, CNBC (Jan. 23, 2017, 11:10 AM), <https://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html>.

2. See generally Cecilia Kang, *F.C.C. Opens Door to More Consolidation in TV Business*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/business/media/fcc-local-tv.html> (outlining the Federal Communications Commission’s (FCC’s) elimination of “media cross-ownership” ban); Jacob Kastrenakes, *FCC Begins Scaling Back Internet Subsidies for Low-Income Homes*, THE VERGE (Nov. 17, 2017, 10:04 AM), <https://www.theverge.com/2017/11/17/16669716/fcc-lifeline-scaled-back-tribal-lands-broadband-discount-limits> (limiting tribal discounts for phone and internet services).

3. Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (codified at 47 C.F.R. pts. 1, 8, 20) [hereinafter Net Neutrality Order].

4. See generally Keith Collins, *Net Neutrality Has Officially Been Repealed. Here’s How that Could Affect You.*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html> (explaining that the repeal of net neutrality rules could lead to Internet service providers blocking certain websites and offering faster speeds for those who paid premiums); Marguerite Reardon, *Net Neutrality is Really, Officially Dead. Now What?*, CNET (Apr. 23, 2018), <https://www.f3nws.com/news/net-neutrality-is-really-officially-dead-now-what-cnet-82b00d96/> (asserting that while consumers’ experience using the Internet could significantly change, it likely would happen gradually); Marguerite Reardon, *Net Neutrality Has Been Dead for a Year: What You Need to Know*, CNET (June 11, 2019), <https://www.cnet.com/news/net-neutrality-has-been-dead-for-a-year-what-you-need-to-know/> (providing an update on the net neutrality debate one year after the repeal of the Obama-era regulations).

5. See generally Amina Fazlullah, Common Sense Kids Action, Comments on Children’s Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018), <https://www.fcc.gov/ecfs/filing/1092449562343> (noting the potential negative

In May 2017, the Media Bureau opened a new docket titled Modernization of Media Regulation Initiative, aimed at reducing undue regulatory burdens in the media marketplace.<sup>6</sup> Under this docket, the Media Bureau released a Notice of Proposed Rulemaking<sup>7</sup> that sought comments on how to revise its children's television programming regulations—KidVid Rules.

The KidVid Rules impose certain requirements on broadcasters, aiming to provide children access to free educational television programming.<sup>8</sup> Some of the requirements include a three-hour-per-week standard for the amount of educational children's programming broadcasters are required to show,<sup>9</sup> that educational children's programming be at least thirty minutes long,<sup>10</sup> and that such programming can only be aired between 7:00 a.m. and 10:00 p.m.<sup>11</sup> The Media Bureau renews Broadcasters' licenses when they meet these requirements (Category A approval) or, if they fail to meet these standards, once broadcasters establish that they aired a package of programming deemed to be equivalent (Category B approval).<sup>12</sup>

The Media Bureau's interest in updating its KidVid Rules is due largely in part to the changes in how children access and watch programming.<sup>13</sup> The growing popularity of alternative ways to watch television shows—such as Netflix, Hulu, and Internet streaming—has led to a decline in traditional

impact on children's ability to access quality children's programming, especially children from families of lower income).

6. Commission Launches Modernization of Media Regulation Initiative, 32 FCC Rcd. 4406 (May 18, 2017). Although the Communications Act of 1934 requires the FCC to conduct a biennial review of its telecommunications services rules, it does not specifically require the same of its media rules (i.e. those that apply to media entities like television and radio broadcasters). Nonetheless, the FCC acknowledged that technological advancements have changed the way media is produced and consumed and that the rules should be updated accordingly. *Id.* at 4411 (statement of Chairman Ajit Pai).

7. Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. 35,158 (proposed July 25, 2018) (to be codified at 47 C.F.R. pt. 73, 76) [hereinafter KidVid NPRM].

8. *See id.* at 35,159–61.

9. 47 C.F.R. § 73.671(e)(2)(i) (2018).

10. *Id.* § 73.671(c)(4).

11. *Id.* § 73.671(c)(2).

12. *See In re Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations*, 11 FCC Rcd. 10,660, 10,723–74 ¶¶ 131–34 (Aug. 8, 1996) (1996 Report and Order).

13. *See KidVid NPRM*, 83 Fed. Reg. 35,158, 35,162 (proposed July 25, 2018) (to be codified at 47 C.F.R. pts. 73, 76) (noting that children can watch shows on channels “including Nickelodeon, Nick Jr., Teen Nick, Disney Channel,” Discovery Family, and Animal Planet as well as via Netflix, Hulu, and over the Internet).

television viewership among children.<sup>14</sup> The FCC believes that these rules need updating to properly reflect this demographic change.<sup>15</sup>

While the rules may need to be amended in some form, the FCC should not entirely eliminate the substantive regulations surrounding the quality and amount of educational programming broadcasters are required to provide. This Comment will examine whether the FCC may be able to give broadcasters the flexibility they need in complying with the KidVid Rules in the face of the changing media landscape without scrapping the substantive portions of the rules.

Part I of this Comment provides an overview of the FCC and the history leading up to the enactment of the Children's Television Act of 1990 (CTA), as well as the rules promulgated in accordance with it in subsequent years. Part II examines the KidVid Rules in relation to the recent repeal of net neutrality and how it will affect the FCC's ability to sufficiently enforce them. It also looks at the current disparity in cable and Internet access that is prevalent throughout the country and how the proposed revisions will only exacerbate the issue. Finally, Part III argues that many of the proposed revisions are unnecessary and recommends that the FCC clarify its Category B approval avenue by establishing substantive benchmarks that give broadcasters a more definitive standard of what alternative forms of educational programming may count toward their CTA obligations. It also recommends that the FCC introduce a Category C approval avenue that builds on the sponsorship

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14. Wayne Friedman, *Kids' TV Viewing Records Big Declines*, MEDIAPOST (Sept. 15, 2017), <https://www.mediapost.com/publications/article/307400/kids-tv-viewing-records-big-declines.html> (noting that the average audience for kids' networks went from about 2.5 million in 2011 to 1.25 million in 2017); Lucas Shaw, *Netflix-Loving Kids Are Killing Cable TV*, BLOOMBERG (Apr. 25, 2018, 8:00 AM), <https://www.bloomberg.com/news/articles/2018-04-25/netflix-loving-tykes-tune-out-nickelodeon-in-kid-tv-s-worst-year> (describing the growth of Netflix to the detriment of cable television, with Netflix having 125 million subscribers while a Nickelodeon show is a "hit" if it draws roughly 2 million viewers); *About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch TV*, PEW RESEARCH CENTER (Sept. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/>. However, one of the main arguments against this proposed rulemaking is the fact that many families across the United States do not have access to these non-broadcast mediums of content distribution. See Common Sense Kids Action, *supra* note 5, at 2; Francella Ochillo, National Hispanic Media Coalition, Comments Letter on KidVid NPRM 1, 7 (Sept. 24, 2018), <https://www.fcc.gov/ecfs/filing/1092567005943> ("[B]y the Commission's own estimate, 'nearly 30 million Americans cannot reap the benefits of the digital age,' meaning they lack meaningful access to broadcast alternatives.").

15. See KidVid NPRM, 83 Fed. Reg. at 35,158 (arguing that the KidVid rules do not "reflect the dramatic changes" that have occurred over the years since they were first promulgated).

and special nonbroadcast efforts that stations may engage in which further the purpose of the CTA.

## I. THE EVOLUTION OF REGULATING CHILDREN'S PROGRAMMING

The Communications Act of 1934 created the FCC and eventually charged the agency with the authority to regulate telephone, television, telegraph, and radio communications across the country.<sup>16</sup> Among the powers Congress delegated through several iterations of the bill, the FCC granted the ability to grant and renew broadcast licenses. As with any regulation promulgated or application reviewed, the FCC must consider the broadcast station's continued service in support of the public's interest when deciding whether to renew a license.<sup>17</sup>

Over time, the public realized that children required even more consideration and protection due to their susceptibility to advertising and lack of power in the marketplace. In 1960, Action for Children's Television (ACT), a nonprofit advocacy group, was formed with the goal of encouraging the diversification of children's programming, discouraging over-commercialization of children's programming, and completely eliminating deceptive advertising aimed at children.<sup>18</sup> The efforts of ACT and other interest groups succeeded in getting the FCC to implement a policy statement in 1974 that, *inter alia*, asked commercial television licensees to provide a "reasonable amount" of educational programming for children.<sup>19</sup>

16. See 47 U.S.C. § 151 (2012).

17. *Id.* § 336(d); see also *id.* § 303 (conferring to the Federal Communications Commission (FCC) the power to regulate broadcasting as the "public convenience, interest, or necessity requires").

18. See also *In re* Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs, 28 F.C.C.2d 368, 368 (1971) (noting ACT's three-part proposal regarding children's programming). See generally Gloria Negri, *Judith Chalfen, 85; Took Action to Help Reform Children's TV*, BOSTON GLOBE (June 9, 2011), [https://web.archive.org/web/20120212232021/http://articles.boston.com/2011-06-09/bostonglobe/29639614\\_1\\_newton-new-art-center-judy](https://web.archive.org/web/20120212232021/http://articles.boston.com/2011-06-09/bostonglobe/29639614_1_newton-new-art-center-judy) (describing the origins of ACT); *Watchdog Group for Children's TV to Disband*, N.Y. TIMES (Jan. 9, 1992), <https://www.nytimes.com/1992/01/09/us/watchdog-group-for-children-s-tv-to-disband.html?scp=17&sq=Action%20for%20Children%27s%20Television&st=cse> (explaining the disbandment of ACT in 1990).

19. See generally *In re* Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs, Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 6-7 (1974) (asking licensees to make a "meaningful effort" to increase children's programming and air a "reasonable amount" of educational programming).

### A. Deregulation During the 1980s

Despite these protective measures, the 1980s signaled a shift in the FCC's overall approach to regulating the communications industry. During the Reagan Administration, the FCC took on a sweeping deregulatory stance.<sup>20</sup> Under Chairman Mark S. Fowler, the FCC rolled back many regulations that had been in place for years.<sup>21</sup> Yet the FCC was not the only entity responsible for the communication industry's sudden turn toward deregulation.<sup>22</sup> The National Association of Broadcasters (NAB), a trade association that represents commercial and noncommercial broadcasters, was faced with an antitrust lawsuit over its code of self-regulation.<sup>23</sup> Before the case had a chance to ultimately be decided, the Department of Justice and NAB came to a settlement agreement where the NAB would abandon its self-regulating guidelines, leaving the door open for the FCC to step in and promulgate regulations pertaining to these issues.<sup>24</sup>

However, following the NAB's abandonment of its litany of self-regulations, the FCC refused to impose any specific regulations on broadcasters when it came to children's programming.<sup>25</sup> It cited a follow-up report by the Children's Television Task Force, re-established to look into the effectiveness of its 1974 policy statement, which stated that although broadcasters had for

20. See Peter J. Boyer, *Under Fowler, F.C.C. Treated TV as Commerce*, N.Y. TIMES (Jan. 19, 1987), <https://www.nytimes.com/1987/01/19/arts/under-fowler-fcc-treated-tv-as-commerce.html> (highlighting that FCC Chairman Mark S. Fowler observed television as "nothing more than 'a toaster with pictures'"). This summed up the FCC's stance on how the administration viewed the communications industry, likening it more to the private commerce marketplace than to the public trust. See also Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209–210 (1982) (proposing the idea that broadcasters should be viewed as marketplace participants rather than community trustees, and that "[t]he public's interest, then, defines the public interest").

21. See generally Penny Pagano, *The Fowler Legacy and Shock Radio Facing Test of Time: At FCC, Word is Deregulation*, L.A. TIMES (Apr. 25, 1987), <https://www.latimes.com/archives/la-xpm-1987-04-25-ca-959-story.html> (detailing Fowler's efforts at deregulation while chairman of the FCC); KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2, 7 (2011) (recognizing that the FCC repealed the Fairness Doctrine in 1987, although it still technically remained codified).

22. See *United States v. Nat'l Ass'n of Broads.*, 536 F. Supp. 149, 152 (D.D.C. 1982).

23. *Id.*

24. *United States v. Nat'l Ass'n of Broads.*, 553 F. Supp. 621, 625–26 (D.D.C. 1982). Although the case mainly centered around antitrust laws regarding commercial advertising, the consent decree signaled a preference for deregulation by the industry as a whole and broadcasters' intent to leave the area of regulation untouched. *Id.* at 626–27.

25. See *In re Children's Television Programming and Advertising Practices*, Report and Order, 96 F.C.C.2d 634, 655 (1984).

the most part complied with the advertising guidelines, they had not complied with the programming guidelines.<sup>26</sup> Despite these findings, the FCC concluded that additional regulations would be unnecessary and that broadcasters were in a better position to determine the needs of children when it came to programming.<sup>27</sup>

### *B. The Children's Television Act of 1990*

Following the mass deregulation of the 1980s, Congress realized that the FCC had failed to protect children by ignoring the “common sense” obligations that broadcasters had in that regard.<sup>28</sup> It attempted to pass children’s programming legislation toward the end of the 1980s, signaling another change in attitude toward the regulation of the broadcasting industry.<sup>29</sup> After years of debate and fine tuning, Congress passed the Children’s Television Act of 1990 (CTA).<sup>30</sup>

The CTA requires the FCC to promulgate rules to limit the amount of commercials and advertising time on children’s television programming as

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26. *Id.* at 635–36. The Task Force found that there was an increase of 7.2% between 1973 and 1974 (the year before the policy statement went into effect) and 1977 and 1978 in the overall amount of time commercial broadcasters devoted to children’s programming. *Id.* at 636. Despite this increase, it still concluded that there had been no significant increase in the number of educational and instructional programs aimed at children due to an array of market factors such as an increase in broadcasting of syndicated programs by independent stations and a reliance on such programs by both independent and network-affiliated stations. *Id.* In its opinion, there was no economic incentive for broadcasters to support and promote specialized programming for children. *Id.*

27. *Id.* at 657–58. The FCC concluded that the presence of a vast number of video outlets would “provide diversity in children’s programs without the necessity of adopting specific quantification rules or renewal guidelines.” *Id.* at 657. It also stated that it would be counter-intuitive to replace broadcasters’ judgment on what amount or type of programming is needed to fully address children’s needs as “[t]he licensee is in a better position to determine the interests and needs of the particular children in its audience.” *Id.*

28. 134 CONG. REC. 31,694 (1988) (statement of Sen. Hollings).

29. *Id.* at S16,857 (statement of Sen. Inouye). Congress’ first attempt at passing legislation aimed at regulating children’s programming, the Children’s Television Act of 1988, passed through both houses before ultimately failing via pocket veto by President Reagan; *see also* 135 CONG. REC. 13,333–34 (1989) (statement of Sen. Wirth) (“With the deregulation bent at the FCC in recent years, broadcasters seem to have abandoned educational children’s programs entirely. Today, not one of the three major commercial broadcast networks offers a single regularly scheduled educational program for children.”).

30. Children’s Television Act of 1990 (CTA), Pub. L. 101-437, 104 Stat. 996, at 996–1000 (1990) (codified at 47 U.S.C. §§ 303a, 303b, 394).

well as establish a national endowment for educational programming.<sup>31</sup> It further directs the FCC to condition broadcasters' license renewal in part on compliance with any children's programming rules that may be enacted.<sup>32</sup> Congress' initial concerns mainly pertained to the harms that advertising had on children; nevertheless, it did recognize the lack of educational and informational programming designed specifically for young children.<sup>33</sup>

One of the main components of the CTA that pertained to educational programming was the establishment of a National Endowment for Children's Educational Television.<sup>34</sup> Recognizing the lack of economic incentives for broadcasters to produce such programming, the endowment provided grants to broadcasters who met certain programming criteria, as established by the Secretary of Commerce and an Advisory Council on Children's Educational Television.<sup>35</sup> Congress concluded that educational programming could facilitate the development of well-rounded youth throughout the country because of how integral television had become.<sup>36</sup>

### 1. 1991 Report and Order

Following the passage of the CTA, the FCC promulgated rules to

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31. See *id.* at 996, 998. The CTA applies only to broadcasters that provide free over the air content and not to any subscription cable services. *Id.* at 998.

32. See 47 U.S.C. § 303b(a) (2012) (explaining that the FCC must consider the extent in which a broadcaster has complied with any rules and has served the educational needs of children in reviewing license renewal applications). In addition to conditioning broadcasting licenses on compliance with the KidVid Rules, the FCC has also imposed heavy penalties on broadcasters for failing to do so. See Frank Ahrens, *FCC Expected to Impose Record \$24 Million Fine Against Univision*, WASH. POST (Feb. 25, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401453.html> (noting the \$24 million fine for failing to comply with the KidVid Rules was nearly eight times greater than any fine ever imposed on a broadcaster at the time).

33. See 136 CONG. REC. 26,849 (1990) (statement of Rep. Markey); see also 47 U.S.C. § 303b(a)(2) (requiring the FCC to consider the extent a broadcaster "has served the educational and informational needs of children through [its] overall programming" when reviewing applications for renewal of broadcast licenses).

34. 47 U.S.C. § 394.

35. *Id.* at § 394(c); see also 136 CONG. REC. 26,851 (1990) (statement of Rep. Rinaldo); *supra* note 26 and accompanying text.

36. See § 202, 104 Stat. at 997–98. After considerable research, Congress found that "children in the United States [were] lagging behind those in other countries in [the fields of] reading, writing, mathematics, science, and geography." § 202, 104 Stat. at 997. It deemed these "fundamental skills" essential and concluded the country had a duty to improve its education of children, which in part could be through the use of educational television programming. § 202, 104 Stat. at 997–98.

implement the mandates of Congress—known as the 1991 Report and Order.<sup>37</sup> These rules were initially very broad and expounded on the CTA in regards to educational programming in a limited manner.<sup>38</sup> The 1991 Report and Order defined “educational and informational programming” to mean “any television programming which furthers the positive development of children [sixteen] years of age and under in any respect, including the child’s intellectual/cognitive or social/emotional needs.”<sup>39</sup> However, it did not mandate any specific hours-per-week requirement and simply stated that broadcasters had to air “*some* educational and informational programming.”<sup>40</sup>

The 1991 Report and Order also required commercial stations to keep records of their efforts to comply with the KidVid Rules.<sup>41</sup> While it initially did not impose these same requirements on noncommercial stations, it later did so in a reconsideration order, albeit holding noncommercial stations to a more lenient standard.<sup>42</sup>

## 2. 1996 Report and Order

While the passage of the CTA was important for children’s advocacy groups and an enormous step toward providing America’s youth with accessible educational information, the regulations promulgated shortly thereafter proved to be inadequate in serving the CTA’s purpose.<sup>43</sup> The FCC found that many stations either did not carry enough core educational programming

37. See Broadcast and Cable Services; Children’s Television Programming, 56 Fed. Reg. 19,611 (Apr. 29, 1991) (1991 Report and Order).

38. See *id.*

39. *Id.* at 19,616.

40. *Id.* at 19,613 (emphasis added) (concluding that the CTA “imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed”).

41. *Id.* at 19,614.

42. See Broadcast and Cable Services; Children’s Television Programming, 56 Fed. Reg. 42,707, 42,709 (Aug. 29, 1991) (1991 Reconsideration Order). The FCC concluded that both commercial and noncommercial broadcasters had a duty “to serve children’s educational and informational needs.” *Id.* at 42,707. However, it acknowledged that noncommercial stations generally demonstrated more of a commitment to serving children’s needs than commercial stations and that Congress’ intent with the CTA was to limit unnecessary restraint on broadcasters. *Id.* at 42,709. Therefore, it exempted noncommercial stations from many of its reporting requirements, mandating that such stations only need to upkeep “documentation sufficient to show compliance at renewal time with the CTA’s programming obligations in response to a challenge or to specific complaints.” *Id.*

43. The FCC recognized that its initial regulations were not effective in encouraging broadcasters to provide educational and informational programming. 1996 Report and Order, *supra* note 12, at 10,661 ¶ 2.

or claimed to be doing so through programming that could not reasonably be considered educational.<sup>44</sup> After realizing its shortcomings, the FCC issued a new Report and Order in 1996 amending its original regulations.<sup>45</sup>

One of the FCC's first goals in issuing these amendments was to provide the public with better access to information regarding the educational programming offered.<sup>46</sup> It found that some of the reasons that broadcasters were not offering adequate programming was because the public, especially parents, lacked sufficient information about what broadcasters were required to provide.<sup>47</sup> Some of the FCC's solutions to remedy this problem were to require on-air identification of core programming, an explanation of how programming meets the definition of core programming, and quarterly reports describing how a station has complied with these regulations.<sup>48</sup>

Another aspect of the 1996 Report and Order refined the definition of programming "specifically designed" to educate and inform children. Recognizing that its old definition was too vague, the FCC adopted the term "core programming."<sup>49</sup> To qualify as core programming, a show must (1) have its significant purpose be to serve the educational and informational needs of children,<sup>50</sup> (2) be a regularly scheduled weekly program of at least thirty minutes,<sup>51</sup> and (3) air between 7:00 a.m. and 10:00 p.m.<sup>52</sup> This more detailed

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44. See generally 1996 Report and Order, *supra* note 12 (discussing the need to promulgate further guidance).

45. See generally 1996 Report and Order, *supra* note 12.

46. *Id.* at 10,682 ¶ 48.

47. *Id.*

48. *Id.* at 10,685–86, ¶ 52, 10,691 ¶ 63, 10,693 ¶ 68.

49. *Id.* at 10,697–98 ¶¶ 77–78 (recognizing that the original definition did not delineate proper criteria for what would be considered "specifically designed to educate and inform children").

50. The standard for determining whether a show's significant purpose is to educate children is the reliance on the good faith judgment of broadcasters. *Id.* at 10,701 ¶ 88. While this may seem vague and fairly open to interpretation in its own right, the FCC felt that the addition of the public information initiatives would help hold broadcasters more accountable, leaving Commission review as a last resort. *Id.* Additionally, when promulgating these rules, it leaned more on the side of minimizing as many "burdens and potential intrusions on programming decisions of broadcasters" as possible. *Id.* at 10,702 ¶ 89.

51. The FCC concluded that shows must be scheduled to air at least once a week to be considered regularly scheduled. *Id.* at 10,680 ¶ 42, 10,709–10 ¶ 103. In implementing the thirty-minute length requirement, the FCC noted that part of the reason for this requirement was that it was the dominant format for most shows and would allow more time for educational material to be presented. *Id.* at 10,713–14 ¶ 110. Additionally, it claimed that there was no evidence given during the comment period that supported the claims that children have short attention spans and would not benefit from such long programming. *Id.*

52. These hour limits were based on multiple studies that showed nearly four times as

definition would give broadcasters a clearer guideline for what they could show that would satisfy the “specifically designed” component of the CTA.<sup>53</sup>

The third major revision of the 1996 Report and Order was the establishment of a processing guideline that gave broadcasters clarity in how to comply with the CTA. Under this guideline, broadcasters applying to renew their licenses would have to show that they aired three hours per week, averaged over a sixth-month period, of core programming.<sup>54</sup> The FCC remained flexible in how broadcasters could prove they had complied with this guideline, allowing two different avenues to do so: (A) checking a box on its renewal application and providing supporting information showing they had shown three hours per week of core programming; or (B) showing it had aired a package of different types of programming that, although may have been less than three hours per week, demonstrates a “commitment to educating and informing children” equivalent to the purpose of the guideline.<sup>55</sup> Despite the FCC’s initial interpretation of the CTA, it concluded that this guideline would be instrumental in enforcing the CTA while remaining “clear, fair and efficient.”<sup>56</sup>

### 3. 2004 Digital Broadcasting Revisions

Beginning in 2009, all broadcast television stations started transmitting only via digital streams.<sup>57</sup> In addition to the changes that needed to be made

many children watched television by 7:00 a.m. as opposed to the originally suggested 6:00 a.m. limit. *Id.* at ¶ 99. Further, the studies also showed that most broadcasters aired a significant percentage—roughly twenty percent—of their educational programming prior to 7:00 a.m., meaning that most educational programming was being shown when most children were not watching. *Id.* at 10,707–08 ¶ 100.

53. *Id.* at 10,699 ¶ 80.

54. *Id.* at 10,718 ¶ 120.

55. *Id.* at 10,723–24, ¶¶ 131–34. The FCC also noted that repeats and re-runs would count toward the three-hour requirement and that a “package” of programming did not imply that it all had to be related by topics. *Id.* The standard for being approved under the second category is that of a reasonable observer. *Id.*

56. *Id.* at 10,663 ¶ 6. After the CTA was first passed, the FCC interpreted it as precluding any type of quantification of its requirement that the FCC “consider the extent” that broadcasters were serving the educational and informational needs of children. See 1991 Report and Order, *supra* note 37 and accompanying text. Despite this initial interpretation, the FCC pointed to the fact that the language of the CTA did not explicitly prohibit the use of a processing guideline—if anything it simply did not require one—and that the use of such a guideline would further the overall goal of the CTA of increasing the availability of educational programming. See 1996 Report and Order, *supra* note 12, at 10,721 ¶ 125. It also believed that the three-hour-per-week requirement was a fairly reasonable benchmark for stations to hit six years after the CTA was first enacted. *Id.* 10,719 ¶ 121.

57. See *Consumer Guide: DTV Transition Did Not Require Cable Systems to Switch to Digital*, FCC,

to infrastructure and in individuals' homes, the children's programming rules required an update as well.<sup>58</sup> The FCC recognized the potential challenges these additional streams would present, and sought to amend the rules to account for these obstacles in 2004.<sup>59</sup>

The first problem that the FCC addressed was the obligations of digital television broadcasters under the processing guideline.<sup>60</sup> The agency promulgated the original rules under the "one channel per broadcaster" model that applied to analog broadcasting.<sup>61</sup> With the introduction of digital broadcasting, broadcasters are able to stream shows not only over their main program stream, but also over multiple streams and through nonvideo services such as subscription video services.<sup>62</sup> This led the FCC to amend its three-hours-per-week processing guideline to impose additional requirements on digital television broadcasters, which provide additional streams, channels of free video programming, or both.<sup>63</sup> These broadcasters would have to provide an additional half hour per week of core programming for every increment of one to twenty-eight hours of free video programming they offered in addition to their main program stream.<sup>64</sup> Multiple streams also open the door for broadcasters to simply replay the same core programming, so the FCC required that at least fifty percent of such programming not be repeated during the same week.<sup>65</sup>

The 2004 Report and Order also amended the FCC's preemption standards.<sup>66</sup> Under the agency's original regulations, core programming had to be scheduled regularly, airing at least weekly.<sup>67</sup> However, if programs such as breaking news telecasts or live sports preempted a regularly scheduled

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<https://www.fcc.gov/consumers/guides/dtv-transition-did-not-require-cable-systems-switch-digital> (last updated Sept. 14, 2017).

58. See generally Sam Sewall, *The Switch from Analog to Digital*, NIELSEN (Nov. 2, 2009), <https://www.nielsen.com/us/en/insights/news/2009/the-switch-from-analog-to-digital-tv.html> (reviewing the process of the transition away from analog television).

59. See Children's Television Obligations of Digital Broadcasters, 19 FCC Rcd. 22,943, 22,948 ¶ 13 (2004) [hereinafter 2004 Report and Order].

60. *Id.* at 22,944 ¶ 2.

61. *Id.* at 22,950 ¶ 18.

62. *Id.* at 22,949 ¶ 15.

63. *Id.* at 22,950–51 ¶¶ 19–20.

64. *Id.*

65. *Id.* at 22,952 ¶ 23. The FCC noted, however, that repeated viewing of the same programming can be beneficial for children. *Id.* It also gave broadcasters flexibility during the digital transition in not counting core programs that were repeated on both the analog and digital streams. *Id.*

66. *Id.* at 22,957–58 ¶¶ 39–41.

67. See 1996 Report and Order, *supra* note 12, at 10,711 ¶ 105.

program, the FCC had the discretion to determine if the preempted core programming could still count toward the station's processing guideline requirement.<sup>68</sup> Initially, the FCC was fairly strict in requiring stations to reschedule preempted core programming to count toward the station's processing guideline requirement; however, the FCC took a more lenient approach with breaking news.<sup>69</sup> In the 2004 Report and Order, the FCC decided to apply the same standard to digital broadcasters.<sup>70</sup> However, for digital broadcasters, the FCC would not consider programming preempted if it was moved to the same time slot on another stream that the broadcaster offers.<sup>71</sup>

The other main amendment that the FCC made to its regulations regarding educational programming for children was the introduction of the E/I symbol to identify core programming.<sup>72</sup> In the 1996 Report and Order, the FCC merely stated that broadcasters had to identify core programming on air in some manner—there was no standardized way to do so.<sup>73</sup> Realizing the problems this created, the FCC adopted the E/I symbol as the standard core programming icon, and required broadcasters to show it on screen for the duration of the program.<sup>74</sup> The FCC concluded that this slight clarification would not burden broadcasters since most broadcasters already displayed some sort of on-screen identifier.<sup>75</sup>

#### 4. 2006 Reconsideration and Joint Proposal

The last time the FCC made amendments to its children's programming rules was in 2006, when it responded to petitions for reconsiderations of the 2004 Report and Order.<sup>76</sup> After the FCC issued its 2004 Report and Order,

68. See 2004 Report and Order, *supra* note 59, at 22,956 ¶ 36.

69. *Id.*

70. *Id.* at 22,957 ¶ 39.

71. *Id.* at 22,958 ¶ 40.

72. *Id.* at 22,959 ¶ 46 (abbreviating "educational and informational programming" to E/I).

73. See 1996 Report and Order, *supra* note 12, at 10,683 ¶ 49, 10,685–86 ¶ 51.

74. See 2004 Report and Order, *supra* note 59, at 22,958–59 ¶¶ 43–45. The FCC cited to several studies and comments that it received prior to implementing this Order that claimed the use of different symbols to identify core programming, such as a light bulb on one channel and a bald head with glasses on another, confused parents and impaired "their ability to choose core programming for their children." *Id.* at 22,959 ¶ 45. One study even found that only one in seven parents knew the meaning of the E/I symbol due to the many different ones used. *Id.* at 22,958–59 ¶ 43.

75. *Id.* at 22,959 ¶ 46.

76. Children's Television Obligations of Digital Television Broadcasters, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd. 11,065 (2006) [hereinafter 2006 Reconsideration Order].

children's television advocates and groups from the cable and broadcast industries expressed concerns over the rules and filed a joint proposal.<sup>77</sup>

In its 2006 Reconsideration Order, the FCC adopted the joint proposal and clarified some of its policies.<sup>78</sup> First, the FCC retained its multicasting rule but acknowledged and accepted the joint proposal's clearer rendition of it.<sup>79</sup> It also got rid of the ten percent cap it had implemented on preempted programs, instead deciding to return to its case-by-case approach in determining whether a broadcaster has engaged in excessive preemption of core programming.<sup>80</sup>

The KidVid Notice of Proposed Rulemaking (NPRM) issued in the summer of 2018 was the first hint of the FCC's desire to update these regulations in over a decade.<sup>81</sup> While some of the regulations may appear to be outdated and in need of amending, the current deregulatory agenda of the FCC poses many of the same problems that emerged when the original KidVid rules were first implemented twenty-eight years ago.

## II. CONFRONTING THE CURRENT DEREGULATORY AGENDA

Under the current leadership, the FCC is undergoing a deregulatory era similar to that of the 1980s.<sup>82</sup> The media industry is in the midst of a digital transition that, although does not pose any technical obstacles such as those faced in 2009, has an even greater effect on providers and the marketplace as a whole. The continued emergence of the Internet as a ubiquitous source of information and entertainment, along with the introduction of over the top media services like Netflix, Hulu, and Amazon, has created even more competition for broadcasters.<sup>83</sup> These new media have put pressure on traditional broadcast and cable providers to keep up with the changing landscape.<sup>84</sup>

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77. *See id.* at 11,066 ¶ 2.

78. *Id.* at 11,066 ¶ 3.

79. *See id.* at 11,072 ¶¶ 17–18 (pointing out that the joint proposal's definition was “not a change in the rule, but rather a clearer statement of what the rule was intended to cover”).

80. *See id.* at 11,076–77 ¶ 28.

81. *See In re Children's Television Programming Rules Modernization of Media Regulation Initiative*, 33 F.C.C. Rcd. 7041, p. 37 (2018) (statement of Commissioner O'Rielly).

82. Kastrenakes, *supra* note 2.

83. *See Shaw, supra* note 14. Over the top (OTT) providers are having a detrimental effect on commercial programming and advertisements, which already give broadcasters and cable providers economic incentives to produce those shows. Free educational programming has even less of such an incentive. *See also* Elizabeth Ryder, Nexstar Broadcasting, Inc., Comments on KidVid NPRM, 5–7 (Sep. 24, 2018), <https://www.fcc.gov/ecfs/filing/10924225855695> (noting that traditional television viewership has declined dramatically for almost all age groups).

84. Many traditional broadcasters and cable networks are now offering streaming

As broadcasters fight to stay competitive, educational programming for children will likely face greater pushback. Part of the reason that Congress implemented the CTA in the first place was because it recognized the harm that deregulation of the media industry would pose to children, especially since this area was largely neglected due to the lack of economic incentives providing such programming presented.<sup>85</sup> In addition to the FCC's recent rollback of regulations in other areas of the communications industry, maintaining the KidVid Rules has presented new challenges.<sup>86</sup>

### *A. KidVid in the Face of Restoring Internet Freedom*

The repeal of net neutrality rules at the end of 2017 was the most notable action that the FCC took in this current era of deregulation.<sup>87</sup> The goal of the Net Neutrality Order was to increase competition, which in turn would increase investment into infrastructure development.<sup>88</sup> Most of the public was concerned with how this would affect its access to the internet, whether it be internet service providers' (ISP's) ability to throttle connections or

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services of their own in an effort to compete with Netflix and Hulu. *See generally* Nick Reilly, *Nickelodeon's New Streaming Service is Filled With All Your '90s Favorites*, NEW MUSICAL EXPRESS (Aug. 29, 2018, 4:52 PM), <https://www.nme.com/news/tv/nickelodeons-new-streaming-service-filled-90s-favorites-2372114> (explaining Nickelodeon's new service which streams its shows from the 1990's); Mike Sorrentino & Joan E. Solsman, *Disney+ Streaming Service: Release Date, Price, Shows and Movies to Expect*, CNET (July 16, 2019, 6:00 AM), <https://www.cnet.com/how-to/disney-disneyplus-streaming-service-name-release-date-shows-movies-to-expect/> (noting the different programs available on Disney's new streaming service and its competitive pricing); Brian Steinberg, *NBC News Unveils 'Signal' Streaming-Video Service*, VARIETY (Oct. 24, 2018, 10:00 AM), <https://variety.com/2018/digital/news/nbc-news-unveils-signal-streaming-video-service-1202992177/> (describing NBC's new service which streams original news content).

85. *See* Children's Television Act of 1990, Pub. L. 101-437, §§ 102, 103. Stat. 996, 997–98 (1990) (establishing the National Endowment for Children's Educational Television due to the lack of funds and lack of economic incentives that broadcasters and cable providers had to do so); 2004 Report and Order, *supra* note 59, at ¶ 27 (“The history of children’s television regulation shows that, in the absence of specific requirements, broadcasters have not provided sufficient programming that serves the educational and informational needs of children.”).

86. *See In re* Children's Television Programming Rules Modernization of Media Regulation Initiative, 33 F.C.C. Rcd. 7041, p. 30–31 (2018) (statement of Chairman Pai).

87. *See generally* Caitlin Cruz, *What Are the New Net Neutrality Rules? The Restoring Internet Freedom Order Just Took Effect*, BUSTLE (June 11, 2018), <https://www.bustle.com/p/what-are-the-new-net-neutrality-rules-the-restoring-internet-freedom-order-just-took-effect-9364535>; Salvador Rizzo, *Will the FCC's Net Neutrality Repeal Grind the Internet to a Halt?*, WASH. POST (Mar. 5, 2018), [https://www.washingtonpost.com/news/fact-checker/wp/2018/03/05/will-the-fccs-net-neutrality-repeal-grind-the-internet-to-a-halt/?utm\\_term=.b74d2841e84b](https://www.washingtonpost.com/news/fact-checker/wp/2018/03/05/will-the-fccs-net-neutrality-repeal-grind-the-internet-to-a-halt/?utm_term=.b74d2841e84b).

88. *See* Net Neutrality Order, *supra* note 3.

charge more for access to certain sites.<sup>89</sup> Yet the effects of the Net Neutrality Order have more reach and potential consequences than simply giving ISP's more leeway to up their prices.<sup>90</sup>

Before the digital transition in 2009, the FCC realized that the new ability to multicast on different streams would present problems for the KidVid Rules.<sup>91</sup> Instead of scrapping the regulations already in place, it understood that it needed to apply the rules to these new media to ensure that the purpose of the CTA continued to be upheld.<sup>92</sup> The Restoring Internet Freedom Order makes a similar application much harder, if not impossible.<sup>93</sup>

By reclassifying broadband internet from a Title II telecommunication service to a Title I information service, the FCC effectively eliminated its ability to regulate such entities.<sup>94</sup> The FCC can impose much more stringent,

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89. See generally Chuong Nguyen, *With Net Neutrality Gone, Carriers Throttle YouTube, Netflix, Other Streamers*, DIGITAL TRENDS (Sept. 5, 2018, 9:46 AM), <https://www.digitaltrends.com/computing/carriers-throttling-netflix-youtube/>; Mike Snider and Jefferson Graham, *Net Neutrality Rules Are Dead. Will My Internet Bills Go Up?*, USA TODAY (Dec. 14, 2017, 9:50 AM), <https://www.usatoday.com/story/tech/talkingtech/2017/12/14/net-neutrality-rules-dead-my-internet-bills-go-up/952839001/>.

90. See generally Daniel Habif, Comment, *Getting Your Cake but Not Eating It Too: The Effect of Net Neutrality Repeal on Broadband Infrastructure Deployment*, 4 ADMIN. L. REV. ACCORD 1 (2018), [http://www.administrativelawreview.org/wp-content/uploads/2018/09/Habif\\_Final.pdf](http://www.administrativelawreview.org/wp-content/uploads/2018/09/Habif_Final.pdf) (providing insight on the ramifications of the FCC's net neutrality repeal and recommendations on moving forward).

91. See 2004 Report and Order, *supra* note 59, at 22,948 ¶ 13.

92. See *id.* at 22,944 ¶ 1 (“Our goals in resolving these issues are to provide television broadcasters with guidance regarding their obligation to serve children as we transition from an analog to a digital television environment, and to improve our children’s programming rules and policies.”).

93. See generally Net Neutrality Order, 83 Fed. Reg. 7852 (Feb. 22, 2018). A telecommunication service is the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” See 47 U.S.C. § 153(53) (2012). An information service is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunication service.” See *id.* § 153(24). See generally Net Neutrality Order, 83 Fed. Reg. 7852 (Feb. 22, 2018). The Net Neutrality Order reclassified broadband internet from a Title II telecommunication service to a Title I information service. *Id.*

94. See *Verizon v. FCC*, 740 F.3d 623, 632–33 (D.C. Cir. 2014); *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). The D.C. Circuit established that the FCC only has a limited ability to regulate Title I services. See also *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691–92 (D.C. Cir. 2005) (outlining the specific circumstances in which Title I entities may be regulated).

mandatory regulations on Title II services, which include broadcast services.<sup>95</sup> The reclassification to a Title I service means that the FCC can only use its ancillary power to regulate the internet.<sup>96</sup> So, while the Internet provides an unlimited amount of information that could be beneficial for children's educational needs, there is no way for the FCC to ensure that would happen.<sup>97</sup>

### B. "Bridging the Digital Divide"

Since Ajit Pai was appointed Chairman, one of the FCC's main initiatives has been to expand broadband networks to all Americans, especially those in rural areas.<sup>98</sup> By the end of 2016, roughly ninety-two percent of Americans had access to fixed terrestrial broadband of 25 Mbps/3 Mbps and mobile LTE speeds of 5 Mbps/1 Mbps—the minimum standard for download speeds.<sup>99</sup> However, when broken down between rural and urban areas, those

95. Title II common carriers may only charge reasonable rates and must contribute to the federal "universal service" fund. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

96. The D.C. Circuit established a two-part test in *Am. Library Ass'n* that explains the FCC can only use its Title I ancillary power when the entity subject to regulation is classified under Title I and the proposed regulations are "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." 406 F.3d at 691–92.

97. The KidVid Rules also do not apply to cable providers, as courts have held that its authority to regulate is limited to general broadcasters. *See Comcast Corp.*, 600 F.3d at 661 (holding that the FCC's authority to regulate rates is limited to "basic tier" service). Additionally, in *Comcast Corp.* the D.C. Circuit held that this ancillary authority does not extend to Comcast's Internet service. *Id.*

98. *See generally* Bridging the Digital Divide for All Americans, FCC, <https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans> (last visited Mar. 20, 2019) (statement of Chairman Pai) ("Since my first day as Chairman of the FCC, my number one priority has been closing the digital divide and bringing the benefits of the Internet age to all Americans.").

99. *See* FCC, 2018 BROADBAND DEPLOYMENT REPORT 58 (2018), available at <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report>; Micah Singleton, *The FCC Has Changed the Definition of Broadband*, THE VERGE (Jan. 29, 2015, 11:48 AM), <https://www.theverge.com/2015/1/29/7932653/fcc-changed-definition-broadband-25mbps> (noting that increase in the minimum standard effectively eliminated Digital Subscriber Line (DSL) services, which are delivered via telephone lines, from being considered up to par). These speeds are the standard for what is considered "broadband" internet connection. *See* FCC, 2015 BROADBAND DEPLOYMENT REPORT 3 (2015), <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2015-broadband-progress-report>. Thus, if a service does not meet those standards then it cannot be considered broadband. *Id.*

numbers are 69.3% and 97.9% respectively.<sup>100</sup>

Such disparity of access contradicts much of the reasoning that the FCC gave for wanting to update the KidVid Rules.<sup>101</sup> Although the Internet, cable providers, and over the top services are growing in popularity as individuals' preferred form of media and entertainment, many Americans still lack access to these services.<sup>102</sup> More than 24 million individuals in the United States do not have broadband access in their homes.<sup>103</sup> Not only is the access to Internet an issue in many of the rural and poor areas of the country, but over half of Americans cannot save enough each month to pay for a typical cable subscription.<sup>104</sup>

### *C. Interpreting the Purpose of the KidVid Rules*

Congress first implemented the CTA because children needed additional protection when it came to television programming.<sup>105</sup> While the FCC had managed to regulate children's television somewhat effectively before the CTA, when it started to backtrack on previous policy during the 1980s, the courts stepped in.<sup>106</sup> In *Action for Children's Television v. FCC*<sup>107</sup>, the D.C. Circuit held that the FCC failed to give a "reasoned basis" that adequately justified eliminating its children's television commercialization guidelines.<sup>108</sup> In attempting to rescind its children's television commercialization guidelines, the FCC merely gave a two-sentence explanation that indicated "the importance of advertising as a support mechanism for the presentation of children's programming."<sup>109</sup> Although the D.C. Circuit accepted the validity of the FCC's determination that the marketplace would sufficiently

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100. 2018 BROADBAND DEPLOYMENT REPORT, *supra* note 99.

101. See *In re Children's Television Programming Rules Modernization of Media Regulation Initiative*, 33 F.C.C. Rcd. 7041, p. 30 (2018) (statement of Chairman Pai).

102. See VIDEO ADVERTISING BUREAU, YOU DOWN WITH OTT? AN OVERVIEW OF THE COMPETITIVE VIDEO ECOSYSTEM 11 (2018) (projecting that roughly 200 million U.S. consumers will use an OTT service or connected TV at least once a month).

103. See *In re Children's Television Programming Rules Modernization of Media Regulation Initiative*, 33 F.C.C. Rcd. 7041, p. 35 (2018) (statement of Commissioner Rosenworcel).

104. *Id.*

105. See 136 CONG. REC. 26,850 (1990) (statement of Rep. Markey) ("It is time to put the interests of the children themselves back into the equation. Passage of the Children's Television Act of 1990 will provide broadcasters and children's program producers incentives to educate our Nation's creatively, rather than to exploit them economically.").

106. See generally *Action for Children's Television v. FCC.*, 821 F.2d 741, 743 (D.C. Cir. 1987).

107. 821 F.2d 741 (D.C. Cir. 1987).

108. *Id.* at 746.

109. *Id.* at 744.

regulate commercial content of television, the court specifically noted that it posed problems when applied to the “special realm” of children’s television.<sup>110</sup> It made clear that such a sudden departure from the FCC’s stance on the matter up until that point could not be upheld by its “barebones” reasoning.<sup>111</sup>

Although that case was decided before Congress enacted the CTA and involved a decision made outside of any notice-and-comment proceedings, it sheds light on how courts and the FCC itself have traditionally given this area of regulation careful consideration.<sup>112</sup> The FCC has expanded the breadth of its interpretation of the CTA over the years to ensure that it is providing adequate protections for children and limitations on broadcasters.<sup>113</sup> The subsequent amendments to the KidVid Rules during the early 2000s show as much, indicating that the FCC recognized the shortcomings of such vague regulations and the need for more stringent rules.<sup>114</sup>

By now looking to repeal these regulations in the face of a changing marketplace, the FCC is failing to carry out the purpose of the CTA.<sup>115</sup> Most of the proposed updates involve rescinding requirements on broadcasters because of their burdensome nature.<sup>116</sup> Yet the CTA was meant to protect children, not broadcasters.<sup>117</sup> Other than stating that giving broadcasters flexibility will in turn benefit children by allowing for more programming to be counted, the FCC does not offer any hard evidence to back up such claims.<sup>118</sup> If anything, based on the history of the KidVid Rules, the marketplace cannot adequately provide the educational content that Congress has mandated they deserve.<sup>119</sup> Nor does the fact that fewer children are watching broadcast

110. *Id.* at 745.

111. *Id.* at 746.

112. *Id.* (stating that for almost fifteen years the FCC had regulated under the presumption that the marketplace does not adequately protect children and that the FCC had not provided any facts or analysis that proved those presumptions were “overemphasized, misguided, outdated, or just downright incorrect”).

113. *See* 1996 Report and Order, *supra* note 56 and accompanying text, at 10,721.

114. *Id.*

115. *See* 136 CONG. REC. 36,907 (1990) (statement of Sen. Markey).

116. *See* KidVid NPRM, 83 Fed. Reg. 35,158, 35,164 ¶ 30 (proposed July 25, 2018) (to be codified at 47 C.F.R. pts. 73, 76) (concluding that the quarterly reports should be filed annually instead due to the undue burden it places on stations).

117. *See* 47 U.S.C. § 303b(a)(2) (2012) (stating that the FCC must consider the extent a broadcaster licensee “has served the educational and informational needs of children”).

118. *See* KidVid NPRM, 83 Fed. Reg. at 35,159 (explaining that amending the KidVid Rules will improve broadcasters’ ability to provide educational programming).

119. 134 CONG. REC. 31,694 (1988) (statement of Sen. Hollings) (claiming that it was “nonsense” to believe that the marketplace could meet children’s programming needs).

television eliminate the FCC's obligation to provide programming for those who still watch TV.

### III. KIDVID RULES IN THE DIGITAL AGE

There is no doubt that the media landscape has changed drastically after the FCC updated the KidVid Rules.<sup>120</sup> The FCC, in issuing the KidVid Notice of Proposed Rulemaking, is seeking to amend the rules in a way that would address both this changing landscape and the need to serve the country's youth.<sup>121</sup>

The FCC is looking to update five main aspects of the KidVid Rules: (1) the "core programming" definition and requirements, (2) the processing guideline, (3) the special sponsorship/nonbroadcast options, (4) regulation of multicasting stations, and (5) preemption requirements.<sup>122</sup> The FCC can still carry out the purpose of the CTA without revising these sections so much that it eliminates their effectiveness.

#### *A. Clarify Category B Under the Processing Guideline*

The Notice of Proposed Rulemaking tentatively concludes that it should eliminate the thirty-minute long, regularly scheduled per week, on-air notification, and quarterly reporting requirements that fall under what constitutes core programming.<sup>123</sup> It also considers whether to eliminate the requirement that broadcasters must show at least three hours per week of educational programming and giving broadcasters discretion to air such programming on streams other than their main stream regardless of comparable coverage.<sup>124</sup> Instead of eliminating them entirely, the FCC can still provide broadcasters the flexibility they need while upholding the already lenient standards of the rules by simply clarifying Category B of the processing guideline.

Under Category B, a broadcaster can have its license renewal application approved even if it does not meet the three-hour-per-week requirement as long as it can show that it aired a package of programming that demonstrates a "commitment to educating and informing children" equivalent to the

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120. See generally *The State of Traditional TV: Updated with Q2 2017 Data*, MARKETING CHARTS (Dec. 13, 2017), <https://www.marketingcharts.com/featured-24817> (highlighting that traditional TV viewing by 18–24-year-olds fell by 43.6% between 2012 and the second quarter of 2017).

121. See KidVid NPRM, 83 Fed. Reg. at 35,159 (describing how the different avenues available to children to view programming necessitate a more flexible approach to regulation).

122. See generally KidVid NPRM, 83 Fed. Reg. at 35,158–72 (proposing greater flexibility for broadcasters to ensure they can meet children's "educational and informational needs").

123. *Id.* at 35,170.

124. *Id.* at 35,165–66.

programming envisioned in the guideline.<sup>125</sup> This provides that noncore programming is potentially counted toward a broadcaster's compliance.<sup>126</sup> However, there is no quantitative standard for this provision, as it only requires that "any reasonable observer" would be able to recognize the broadcaster's commitment to educating children in a manner equivalent to Category A.<sup>127</sup> Broadcasters have routinely avoided being approved under Category B because it is vague and fails to give them an idea of how the FCC would consider noncore programming in its evaluation.<sup>128</sup>

By clarifying Category B's viability as an option for complying with the KidVid Rules, the FCC would provide broadcasters greater leeway. It should make clear that it will allow short form and nonregularly scheduled programming to be permissible under the rules so long as the broadcaster gives sufficient notification of the programming, at least one quarter ahead of time. This would eliminate the need to revise the reporting requirements, as the Notice of Proposed Rulemaking proposes, by making the quarterly reports even more useful and beneficial for broadcasters.<sup>129</sup> It would also no longer require the FCC to consider repealing the requirement that core programming be at least thirty minutes in length, as allowing short-form

125. See 1996 Report and Order, *supra* note 12, at 10,723–24 ¶¶ 133–34.

126. *Id.* ("Although core programming is our primary focus under the Children's Television Act, we believe that specials, regularly scheduled non-weekly programs, short-form programs, and PSAs with a significant purpose of educating and informing children ages 16 and under can help accomplish the objectives of the Act and can count toward the staff-level processing guideline.")

127. *Id.*

128. See Rick Kaplan, Jerianne Timmerman & Emmy Parsons, Nat'l Ass'n of Broads., Reply Comments on KidVid NPRM, at 29–30 (Oct. 24, 2018), <https://www.fcc.gov/ecfs/filing/1023887925246> (stating that "many stations are understandably reluctant" to produce this type of content under the current rules); see also Elizabeth Ryder, Nexstar Broadcasting, Inc., Comments on KidVid NPRM, at 7 (Sept. 25, 2018), <https://www.fcc.gov/ecfs/filing/10924225855695> ("[T]he current rule disincentivizes one-time KidVid productions or specials created by broadcasters, or even other program providers, regardless of duration, since those programs would only be considered non-core programming and not necessarily cost effective or beneficial from compliance perspective.")

129. Many comments from stations and broadcasters highlighted their belief that the quarterly reports were burdensome and unnecessary. See Robert J. Folliard, III, Gray Television, Inc., Comments on KidVid NPRM (Sep. 25, 2018), <https://www.fcc.gov/ecfs/filing/10925016553883> ("[S]taff at Gray's WCAV/WAHU station in Charlottesville regularly spend up to six hours each quarter filling out the reports."). By allowing broadcasters to count noncore programming toward their compliance with the KidVid Rules and requiring that they give notice, the FCC would give them more flexibility while reiterating the importance of the quarterly reports.

programming to be considered does just that.<sup>130</sup>

Additionally, the FCC should give broadcasters a quantitative standard for how much noncore programming may be permissible. This standard should hold that broadcasters must still aim for the three-hour-per-week standard, but may be approved under Category B if they air at least two hours per week of core programming, averaged over a six-month period, and an additional twenty-four hours total of short form or nonregularly scheduled programming (or both), over the same six-month period.<sup>131</sup> This would not only give broadcasters more flexibility in the types of shows they choose to air, but also ensure that children are receiving a sufficient amount of quality programming.<sup>132</sup> The additional hours of noncore programming required of broadcasters that choose to pursue Category B approval will prevent all broadcasters from abandoning Category A approval, as some may find the three-hour-per-week requirement of core programming easier to comply with than airing twenty-four hours of additional programming.

### *B. Category C: Special Sponsorship and Nonbroadcast Efforts Guideline*

In addition to clarifying Category B, the FCC could give broadcasters even more flexibility in complying with the KidVid Rules by spelling out the special sponsorship and nonbroadcast efforts avenue to obtain license approval into an informal Category C.<sup>133</sup> Currently, the rules states that if a broadcaster does not fall within either Category A or Category B, its renewal

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130. See KidVid NPRM, 83 Fed. Reg. 35,158, 35,166 (proposed July 25, 2018) (to be codified at 47 C.F.R. pts. 73, 76). The FCC suggests that if the thirty-minute length requirement is eliminated, then there would not necessarily be a need for Category B. *Id.* However, by revising Category B, the FCC can keep the thirty-minute length requirement in place while still allowing for other types of shows to count. *Id.* (recognizing that the need for the thirty-minute length requirement is dependent on there being a Category B).

131. Category B only states that a broadcaster that airs “somewhat less than three hours per week” can be approved under it. *Id.* The minimum two-hour-per-week standard gives broadcasters an exact standard they can base their programming decisions on. *Id.* (“According to NAB, Category B’s vague ‘somewhat less than three hours per week’ requirement creates uncertainty as to how much Core Programming a licensee is expected to provide.”).

132. Under the current three-hour-per-week standard, broadcasters must air at least seventy-two hours of core programming over six months. The proposed two-hour-per-week standard for Category B requires a minimum of forty-eight hours of core programming, with the additional 24 hours of short form programming making up the difference. This would maintain the total amount of programming provided while allowing broadcasters the flexibility to fill in a third of their requirements with noncore programming that still meets the educational and informational needs of children.

133. See generally 47 U.S.C. § 303b (2012) (establishing factors to consider when determining whether to renew a license).

application will be referred to the full Commission, which will consider other ways the broadcaster may have satisfied its CTA obligations.<sup>134</sup> This includes considering any special sponsorship and special nonbroadcast efforts that the broadcaster has engaged in.<sup>135</sup> A special sponsorship effort is anything a licensee does “to produce or support programming broadcast by another station” in its marketplace that meets the core programming standards.<sup>136</sup> It defines special nonbroadcast efforts as ones that enhance “the educational and informational value”<sup>137</sup> of a broadcaster’s children’s programming, and requires the broadcaster to show “a close relationship between its core programming and its [nonbroadcast] efforts.”<sup>138</sup>

Despite the availability of this renewal option, few broadcasters choose to pursue it.<sup>139</sup> The FCC could simplify this process by first specifying that broadcasters that wish to gain approval via Category C must still air a minimum of two hours of core programming per week.<sup>140</sup> This would give the broadcasters a quantitative standard of what is required of them. Additionally, the FCC should, as it proposes, allow the Media Bureau to review applications that are seeking approval under Category C as opposed to subjecting broadcasters to a full Commission review.<sup>141</sup>

In regards to sponsorship efforts of another in-market station, the FCC should require a station that wishes to sponsor another station to, on top of its existing two-hour requirement, provide an additional two hours of programming per week. The sponsorship should be set on a minute-for-minute basis, allowing broadcasters to count every minute that they sponsor on another station toward fulfilling their total of four-hours-per-week requirement. The FCC should also retain, and emphasize, the burden on the broadcaster to demonstrate that its sponsorship increased the amount of core

134. 1996 Report and Order, *supra* note 12, at 10,724 ¶ 135; *see also* 47 U.S.C. § 303b (making clear that these considerations would be made “in addition” to considering a licensee’s programming).

135. *See* 47 U.S.C. § 303b(b).

136. *Id.* at § 303b(b)(2).

137. *Id.* at § 303b(b)(1).

138. 1996 Report and Order, *supra* note 12, at 10,725 ¶ 137.

139. *See* KidVid NPRM, , 83 Fed. Reg. 35,158, 35,160 (proposed July 25, 2018) (to be codified at 47 C.F.R. pts. 73, 76) (stating that “use of this option to demonstrate compliance with the CTA is even rarer than use of Category B”).

140. *See* 1996 Report and Order, *supra* note 12, at 10,725 ¶¶ 137–38 (noting that under both the special non-broadcast efforts and special sponsorship efforts, the provisions do not “relieve a broadcaster of the obligation to air core programming”).

141. *See* KidVid NPRM, 83 Fed. Reg. 35,158, 35,167 (proposed July 25, 2018) (to be codified at 47 C.F.R. pts. 73, 76) (noting that establishing a “framework” could encourage broadcasters to seek out “special sponsorship efforts and special non-broadcast efforts).

programming aired on the sponsored station.<sup>142</sup>

The FCC should also clarify what types of nonbroadcast efforts are permissible. These efforts may include, *inter alia*, hosting or sponsoring educational events at public schools, museums, community centers, bookstores, or other areas within a local community where kids will be able to participate.<sup>143</sup> While these would be permissible events, the FCC should also leave open the opportunity to review efforts on a case-by-case basis to give broadcasters the ability to develop their own original events. In such situations, the FCC should give broadcasters guidance in adopting similar language to that of Category B by stating it will evaluate whether there is a “commitment to educating and informing children.”<sup>144</sup> It should give broadcasters the opportunity to report any anticipated nonbroadcast educational events they may be planning to host in their quarterly reports so that the Media Bureau may review to see if the events are closely related to broadcasters’ core programming.<sup>145</sup> Further, these nonbroadcast efforts should equate to a total of twelve hours over the span of six months to ensure that an adequate amount of alternative educational opportunities are provided.

Category C would give broadcasters a third option for complying with the KidVid Rules—one that gives them even greater flexibility. By requiring the broadcaster to air a minimum of two hours of core programming, it upholds a broadcaster’s CTA obligations.<sup>146</sup> The additional hours required of both sponsorship of other in-market stations and of nonbroadcast efforts holds a broadcaster wishing to pursue Category C approval to a somewhat higher level of involvement due to the lesser amount of core programming itself is providing.

Since the KidVid Rules already provide for such an avenue (albeit without much detail), the FCC could create Category C without having to promulgate a new rule.<sup>147</sup> It could simply issue a policy statement that further details

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142. *See id.* (“We tentatively agree that a licensee should not receive credit where its sponsorship results in no net increase in the amount of Core Programming on the other in-market station; rather, the licensee should be required to demonstrate that its sponsorship resulted in the creation of new Core Programming or expanded the hours of an existing core program.”).

143. *See id.* The FCC notes that PBS engages in similar educational activities in its community and recognizes that such efforts are beneficial to the educational development of children. *Id.* However, it also proposes to consider educational programming provided via Internet streams under the nonbroadcast efforts prong. *Id.* The FCC should not include such programming, as it would still not address the needs of those children who lack basic Internet access.

144. *See* 1996 Report and Order, *supra* note 12, at 10,718–19 ¶ 120.

145. *See* 1996 Report and Order, *supra* note 12, at 10,725 ¶ 137.

146. *See id.* at 10,725 ¶¶ 137–38.

147. *See generally* 47 U.S.C. § 303b (2012) (containing the existing, albeit vague, statutory

what sponsorship and nonbroadcast efforts would comply with the already existing KidVid Rules.<sup>148</sup> Category C would not be erroneous or inconsistent with § 303b, as it would be an interpretation of an existing regulation.<sup>149</sup> The same policy statement could outline the clarifications of Category B as well.

### CONCLUSION

The introduction of new technologies that allow individuals to communicate and access information at any time and place has changed the way we interact, not only with each other, but with every aspect of the world around us. Even something as embedded in society as television has drastically changed over the past twenty years—the idea of adhering to a network's schedule of shows is a thing of the past. Nowadays, viewers can watch their favorite sitcom or drama on their own time.

While the media landscape has changed drastically since the CTA was passed and last updated, the need to protect children from the marketplace has not. Access to these technological advancements is not ubiquitous. Many families still rely on traditional broadcast television as a source of entertainment and information. These parents tune into many of the traditional children's programming provided over free broadcast television to teach their kids basic fundamental skills. The KidVid Rules play an important role in ensuring that such families continue to have fair access to such programming. By proposing to eliminate many of the substantive standards of the KidVid Rules, the FCC is threatening to end critical programs that enhance the development of the country's youth. If it follows through with these proposals, it will have failed the children.

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language on consideration on non-broadcast efforts and sponsorship); *see also* Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (stating that an agency shall identify at least two existing regulations to repeal for every new regulation it proposes to implement).

148. *See generally* *Auer v. Robbins*, 519 U.S. 452, 453 (1997) (holding that an agency's interpretation of its own regulation is permissible as long as it is not erroneous or inconsistent with the regulation or purpose).

149. *Id.*