
FCC Issues New Rules for Children's Television Programming

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Earlier this fall, the Federal Communications Commission (the Commission or FCC) revised its 2004 order establishing new and expanded obligations for children's television programming, ostensibly for DTV channels but also applying to some extent to analog channels. This new order adopts a joint compromise crafted by a wide range of industry and public interest groups. These changes, **which go into effect on January 2, 2007**, are summarized below.

Rules Regarding the Provision of Core Programming

Multicasting Rule. The order retains the revised educational and informational programming processing guideline the Commission adopted in 2004 for DTV multicasting, with a clarification regarding the limit on the repeat of core programs that applies to DTV channels (this limit on repeats does not apply to analog channels).

In 1996, the Commission adopted a processing guideline that allows broadcasters to receive staff-level approval of their license renewal application if they air at least three hours of programming designed to serve the educational and informational needs of children ages 16 and under (core programming) per week. The 2004 order, reaffirmed in this new order, applies this three-hour guideline to multicast DTV streams in a roughly proportional way. The DTV stream that simulcasts analog programming does not have any additional children's programming obligations, so long as the core programming aired on the analog channel is also carried on that DTV stream.

If your station broadcasts additional free DTV streams, the Commission now will require you to air additional core programming. One-sixth of an entire week of programming is 28 hours. For each stream broadcast for free from 1 to 28 hours per week, stations will be obliged to program an additional half hour of core programming. For example, if you broadcast an additional 60 hours of free programming on a DTV stream, the Commission will require one and a half hours of additional core programming. If you air a multicast stream around the clock, you will be required to air an additional three hours of required core programming. If you have two free full-time multicast streams, six additional hours of core programming will be required.

You are permitted to air all or some of the additional DTV core programming on either your main DTV stream or on any multicast stream, so long as the multicast stream receives MVPD carriage

comparable to the stream that prompted the obligation. For example, if you have two full-time multicast streams, one carrying weather programming and the other programming from the CW, you could place all six additional weekly hours of core programming on the CW stream if the CW stream has cable and satellite carriage at least equal to that of the weather stream.^[i]

The new order clarifies the 2004 order's limit on the use of repeat programming for the purpose of satisfying the guidelines for DTV streams. Under the earlier order, at least 50% of core programming could not be repeated during the same week to qualify as core—with two exceptions. The first exception is for streams that merely shift the time of an entire programming lineup so as to give viewers a chance to watch the same programming at a different time. This would apply if you used a DTV stream solely to time-shift another program stream. The second exception provides that core programs that air on both the analog channel and the simulcast digital stream will not be considered repeats.

The new order clarifies that a repeat for these purposes is an episode that has already aired on any digital stream within the previous seven days. Under the clarified rule, you will, therefore, be able to use different episodes of the same program to satisfy your core programming obligations without any time restrictions, and you will also be able to use the same episodes that aired in previous weeks on another stream to do so. The order also amends Form 398—the quarterly Children's Television Programming Report—to require you to certify that you have complied with this restriction regarding repeats. The new version of the form should be used beginning with the one due April 10, 2007, for the first quarter of next year. Although you will not be required to identify each program episode, you will need to retain records to document the accuracy of this certification—including records of actual program episodes aired—and to make this documentation available to the public upon request. The form requires you to identify a children's programming liaison, and that person should be able to provide documentation of your compliance with the repeat rule.

Preemption Rule. To qualify as core programming, children's programming must be "regularly scheduled," which means that the program must be scheduled to air at least once per week and must air on a regular basis. In the 2004 order, the Commission imposed a 10% cap on the number of preemptions of core children's programming per calendar quarter, with the exception of preemptions for breaking news. This rule, which applied to both analog and DTV channels, was a particular hardship to Pacific and Mountain time zone stations given the frequency of preemptions for live sports events on Saturdays. The new order repeals this cap and returns to the staff's prior case-by-case approach for addressing the number of preemptions and rescheduling of core programming.

Pursuant to that approach, the new order requires all networks requesting preemption flexibility to file a request by August 1 of each year stating the number of expected preemptions, when the program will be rescheduled, whether the rescheduled time will be the program's established substitute time slot (second home) and how the network plans to notify viewers of the schedule change at the time of the preemption. The FCC expects that stations will air information about the substitute time slot at the time a preempted core program normally airs. The Commission said that it did not expect that non-network stations would require substantial preemption relief. If you expect

to have substantial preemptions of core programming on non-network stations or streams, you should develop a plan including second homes for your core programming. The Commission plans to monitor preemptions under this policy.

Rules Limiting Commercial Messages

Website Rule. In the 2004 order, the FCC for the first time restricted the display of website addresses during children's programming, and applied those rules to both analog and digital programming. It determined that an Internet website address could be displayed during programming aimed at children aged 12 and under only if the following four criteria are satisfied: (1) the website offers a substantial amount of bona fide program-related or other noncommercial content; (2) the website is not primarily intended for commercial purposes; (3) the website's pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the website page to which viewers are directed is not used for commercial purposes. This part of the 2004 order did not go into effect while the FCC considered changes. The new order adopts two clarifications to this website rule:

- First, it clarifies that the website rule applies only where Internet addresses are displayed during program material or promotional material not counted as commercial time. Thus, the FCC will not regulate website addresses displayed during commercials and promotions that count toward the commercial limits.
- Second, it clarifies that, if an Internet address for a website that does not meet the four-part test is displayed during a program promotion, the promotion must be clearly separated from programming material. Also, inclusion of a website address that does not meet the criteria of the four-part test during an otherwise-exempt program promotion (see below) will result in that program's promotions being counted towards the commercial time limits.

The new order also adopts two exemptions from the website rule:

- Public service announcements aired on behalf of independent nonprofit or government organizations (or media companies in partnership with either of these) that display websites not under the control of the licensee will be permitted.
- The display of website addresses during station identifications and emergency announcements will not be regulated, even if they do not meet the four-part test.

Note that the FCC declined to follow the National Association of Broadcasters' suggestion to permit stations to rely on representations from a network or other program provider that website addresses in their programs meet the four-part test. As a practical matter, this means that you will be responsible for confirming that websites appearing in children's programming meet the test. While you can certainly ask program suppliers for information to help make this determination, the FCC will place ultimate responsibility on licensees.

Host Selling Rule. The Commission has long prohibited the use of program characters or show hosts to sell products in commercials aired during or adjacent to children's programs in which they

appear. In the 2004 order, the Commission extended this ban to the display of website addresses that include program characters or show hosts, and required licensees to be able to document their compliance with the extended ban. This extension applied to both analog and DTV channels, and its effective date was also delayed until the most recent order.

The new order eases this restriction to a limited degree. The ban now applies only to website addresses displayed during or adjacent to a program if, on website pages primarily devoted to free, noncommercial content regarding the program or one of its characters, (1) the website sells products that feature a character appearing in the program or (2) a character that appears in the program is used "to actively sell products." Thus, addresses may now be displayed for websites where the pages selling merchandise featuring a program-related character are separated from the noncommercial material. Display of website addresses for pages that are commercial in nature will continue to be prohibited during programming, regardless of whether there is host selling, and commercial website addresses displayed during commercial breaks in a program must not use the program or its characters to sell products.

The Commission excluded from the new rule third-party sites linked from the advertisers' or broadcasters' web pages, on-air third-party advertisements with website references to third-party websites, and pages that are primarily devoted to multiple characters from multiple programs.

Promotions Rule: Definition of "Commercial Matter." The 2004 order expanded the definition of "commercial matter," for purposes of calculating compliance with the commercial limits for children's programs, to include all program promotions other than for children's educational or informational programs. That expansion covered both analog and digital channels, and its effective date was also postponed. The new order changes the rule and provides that (1) promotions for educational and informational programming on any channel and (2) promotions for any children's or other age-appropriate programming appearing on the same channel (whether or not informational or educational) will not be considered commercial matter.

The FCC did not answer the question of how it will define a "channel" in a digital environment. Arguably, a broadcaster could promote children's or other age-appropriate programming it airs on a different stream without having those promotions count towards the commercial limits.

The new rules are complicated and may be difficult to apply in practice, and the Commission's staff has been unable to answer numerous questions about interpretation of the rules. As questions arise, we can help you work through the rules or seek guidance from the staff.

For more information on this or other communications and e-commerce matters, contact the authors listed above.

[i] All core programming aired on the analog channel and on any digital stream must include the E/I identification during the entire time the program airs.