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NEW KID VID RULE: AN ANALYSIS OF THE FCC'S DEREGULATION OF  
THE CHILDREN'S TELEVISION ACT

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**I. Introduction**

Saturday morning cartoons are a pastime that many children of the twenty-first century do not remember.<sup>1</sup> Other than sleeping, in 1980, television was the number one activity that children in America took part in.<sup>2</sup> In 1990, Congress enacted the Children's Television Act ("CTA" or "Kid Vid Rule") to ensure the educational needs of children were being met by regulating broadcast television.<sup>3</sup> Research has

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<sup>1</sup> See Brian Boone, *THE REAL REASON WHY SATURDAY MORNING CARTOONS DISAPPEARED*, GRUNGE (Jan. 23, 2017), archived at <https://perma.cc/MW3W-H3XU> (pointing to the reason behind broadcast networks getting rid of Saturday morning cartoons was because of cable television). Before cable, Saturday morning cartoons were an easy way for networks to make money, but once cable networks began airing channels with unlimited cartoons, children were no longer watching broadcast television. *Id.*

<sup>2</sup> See SHALOM M. FISCH, *CHILDREN'S LEARNING FROM EDUCATIONAL TELEVISION: SESAME STREET AND BEYOND 2* (Bryant & Zillman eds., 2004) (validating prior research studies and their findings on children and television). Studies found that American children watch an average of twenty hours per week, and parents have verified that even children two to three years old spend at least eighteen hours per week watching television. *Id.*

<sup>3</sup> See Children's Television Act of 1990, H.R. 1677, 101st Cong. (1990) (emphasizing the importance of television station operators providing programs that serve the special needs of children). This act was purposed to restrict advertising during children's television. *Id.* See Press Release, Federal Communications

shown that children continue to steadily watch television more than any other activity, but now children have more ways to watch television than ever before.<sup>4</sup> With Over-The-Top (“OTT”) applications and services, children can now stream television shows from their cellphones, computers, or television sets using a connected device.<sup>5</sup> To keep up with the modernization of television, Commissioner Michael O’Reilly is proposing that the Federal Communications Commission (“FCC”) amend the CTA to give greater flexibility to broadcasters by allowing broadcasters to air a host of children’s programs on alternative networks.<sup>6</sup>

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Commission, Statement of Commissioner Deborah Taylor Tate (Sept. 29, 2006) (on file with the FCC) [hereinafter Press Release, FCC Tate] (quoting the American Psychological Association’s findings that “children under the age of eight lack the cognitive development to understand the persuasive intent of television advertising and are uniquely susceptible to advertising’s influence”).

<sup>4</sup> See Amy Watson, *Children and media in the U.S. – Statistics & Facts*, STATISTA (Mar. 8, 2019), *archived at* <https://perma.cc/6CN8-MXBE> (“Television still remains the media of choice . . . among young children . . . [but] [t]he viewing habits of teenagers are somewhat different . . . an increasing number of teens are watching their television online.”). Teenagers spend an average of fourteen hours per week watching television, with numbers increasing for young children. *Id.*

<sup>5</sup> See Sahil Patel, *WTF is OTT?*, DIGIDAY (July 7, 2015), *archived at* <https://perma.cc/AZ5D-XCNW> (defining the term “over-the-top,” which is the ability to watch movies or television via the internet without having to subscribe to traditional cable or satellite). Some examples of OTT services are Netflix, Hulu, HBO Now, YouTube, and Amazon. *Id.* These services can be subscription based, free and ad-supported services, or transactional services. *Id.*; see also MELISSA HENSON, PARENTS TELEVISION COUNCIL, *OVER-THE-TOP OR A RACE TO THE BOTTOM: A PARENT’S GUIDE TO STREAMING VIDEO 3* (2018) (reviewing OTT connected devices, such as Chromecast, Apple TV, Amazon Fire TV, and Roku). Chromecast is “controlled via a mobile app . . . [a user] ‘Cast[s]’ the content onto the television screen from [the] preferred mobile app.” See HENSON, *supra*. Apple TV has preloaded applications, as well as the option to choose preferred applications, however some applications require a separate subscription. *Id.* at 5. Amazon Fire TV is heavily focused on Amazon Prime Video content, but users have the ability to add other applications and channels. *Id.* Roku comes with preinstalled applications and channels, as well as the option to add others. *Id.* at 6. Each device is connected to the television and streams OTT content using applications. *Id.* at 2.

<sup>6</sup> See generally Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. 143,35158 (proposed July 25, 2018) (to be codified at 47 C.F.R. pt. 73) (outlining the 2018 Notice of Proposed Rulemaking). The purpose of the 2018 NPRM is to revise the CTA by modifying outdated requirements and giving broadcasters greater flexibility. *Id.* See Press Release,

Television not only entertains, but it also educates and informs.<sup>7</sup> Educational television programs are one way to positively influence children.<sup>8</sup> The CTA's main purpose is to mandate that broadcasters serve the educational and informational needs of children.<sup>9</sup> Yet, broadcast networks are not the only channels with children's educational programs; for example, cable channels such as Disney and Nickelodeon are geared solely for children.<sup>10</sup> These channels have become replacements for broadcast networks needing to air these types of educational programs.<sup>11</sup>

The FCC's proposal to deregulate the CTA has caused much debate about whether the proposed amendments are in the best interest

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Federal Communications Commission, Statement of Commissioner Michael O'Rielly (Feb. 13, 2018) (on file with the FCC) [hereinafter Press Release, FCC O'Rielly (2018)] (stating that the CTA was enacted more than two decades ago and may not hold the same power as it did back in the 90s).

<sup>7</sup> See Children's Television Act of 1990, H.R. 1677, 101st Cong. (1990) (quoting from the passed bill, Congress's findings that "it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them"); FISCH, *supra* note 2, at 5 (adding the amount of time children spend watching television does not affect the amount of time children devote to homework). Further, time spent watching television, merely eliminated time spent doing other activities that served similar functions. See FISCH, *supra* note 2.

<sup>8</sup> See FISCH, *supra* note 2, at 6 ("[Suggesting] that television viewing is inversely related to achievement when it displaces intellectually richer experiences, but positively related when it supplies such experiences.").

<sup>9</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35158 (providing background on the CTA and further detailing the past amendments).

<sup>10</sup> See Press Release, Federal Communications Commission, Statement of Chairman Ajit Pai (July 12, 2019) (on file with the FCC) [hereinafter Press Release, FCC Pai] (noting the shift in children's viewing habits). See Boone, *supra* note 1 (explaining how children no longer needed to wait for the scheduled broadcast networks' children's programs because cable networks had children's programs running all day long).

<sup>11</sup> See Milton Herman, *THE BEST FAMILY-FRIENDLY CHANNELS ON CABLE TV TODAY*, THE DIG (Mar. 14, 2016), archived at <https://perma.cc/EG4G-7SVM> (discussing the different cable television channels that were established for family-friendly viewing). The channels include: Nickelodeon, the Disney Channel, Freeform (formerly ABC Family), Boomerang, Cartoon Network, Hallmark Channel, and TLC. *Id.*

of children.<sup>12</sup> The FCC Commissioner has argued that the CTA is outdated and should be deregulated because it is regulating a form of television that is no longer being utilized by most children.<sup>13</sup> The way children watch television is more technologically advanced than ever before.<sup>14</sup> Nonetheless, groups against the deregulation of the CTA have argued that the 2018 Notice of Proposed Rule Making (“NPRM”) is ignoring low-income families, specifically by not quantifying educational programming as opposed to entertainment or considering the commercials and advertisements on OTT services.<sup>15</sup>

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<sup>12</sup> See Ted Johnson, *FCC Takes First Step Toward Easing Children’s TV Mandates on Broadcasters*, VARIETY (July 12, 2018), archived at <https://perma.cc/ZR7E-5W7F> (detailing the democrats’ opposition to the deregulation of the CTA). Senator Ed Markey (D-Mass.) and Senator Richard Blumenthal (D-Conn.) agree with modernizing the rules, but feel there needs to be a more substantial investigation into the potential effect the changing of the rules could have on children. *Id.*

<sup>13</sup> See Adam Jacobson, *Should The FCC Retire the ‘Kid Vid’ Requirements?*, RADIO AND TELEVISION BUS. REP. (Jan. 29, 2018), archived at <https://perma.cc/9PCP-C2KX> (asserting that most children are watching television on channels, such as Disney Jr., Nick Jr., Nickelodeon and Universal Kids). See Patrice Onwuka, *In the era of streaming shows, kids’ TV regulations are stuck in the 1990s*, WASH. EXAMINER (June 23, 2018), archived at <https://perma.cc/EB5F-S8A4> (noting with the change in children’s television habits, strict regulations like mandated time frames and preemption are no longer necessary). With OTT services, children have the luxury to watch television wherever they want. *Id.*

<sup>14</sup> See Julie Dobrow, *‘Watching Television’ Means Something Different for Today’s Kids*, HUFFPOST (May 14, 2014), archived at <https://perma.cc/HP5R-TUGN> (reporting how children of all ages are watching “old” television content through new platforms, such as OTT services); see also Wendy Goldman Getzler, *The impact of Netflix, YouTube and Hulu on US kids viewing habits*, KIDSCREEN (Feb. 20, 2014), archived at <https://perma.cc/W3QU-UVUP> (quoting Melanie Shreffler as saying “services such as Netflix, YouTube and Hulu in the US are now competing on equal footing with kids television networks—and winning”); Jacobson, *supra* note 13 (emphasizing how children’s programming, such as *Sesame Street*, is even being streamed on OTT services).

<sup>15</sup> See Center for Digital Democracy et al., *Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative* (Sept. 24, 2018) [hereinafter CDD Comment Letter] (criticizing the FCC’s argument that the CTA regulations are no longer necessary because of OTT services). OTT services have the ability to “track, profile and serve targeted advertising,” thus exposing children to risks not presented by broadcast television. *Id.* at 23. See National Hispanic Media Coalition, *Reply Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative* (Oct. 23, 2018) [hereinafter NHMC Comment Letter] (furthering that broadcast television is available to everyone, and seems to be on the rise with many households considering cutting the

The revision of the CTA in response to the increased use of OTT services is a big step in the right direction.<sup>16</sup> The main purpose of the CTA is to “enhance the education of children through the creation and production of television programming specifically directed toward the development of fundamental intellectual skills.”<sup>17</sup> Amending the CTA to give broadcasters greater flexibility in how they broadcast children’s programming will not deter from developing these skills.<sup>18</sup> Therefore, the proposed FCC Kid Vid Rule change does not neglect children because it addresses the modern challenges posed by OTT services, and keeps in mind the obligation to protect and educate all children.

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cable cord). *But see* James K. Wilcox, *How to Decide If Cord Cutting Is Right for You*, CONSUMER REPORTS (Mar. 8, 2019), archived at <https://perma.cc/A6AV-LQ3Z> (setting forth the steady decline in people paying for cable and the accelerating increase in people paying for streaming subscription services instead).

<sup>16</sup> See Daniel Lyons, *Kid Vid: Regulating children’s programming in an internet-based world*, AEIDEAS (July 17, 2018), archived at <https://perma.cc/4ZRN-RVMB> (discussing the importance of the FCC updating the Kid Vid Rule to adapt to the digital era). Two decades ago the Kid Vid Rule was enacted with three assumptions: (1) lack of marketing incentive; (2) lack of content to educate children; and (3) educational programming must mirror other broadcast programming to be incorporated into the viewing schedule. *Id.* “However accurate those assumptions were two decades ago, they did not age well as broadcast television was displaced by alternative forms of video entertainment.” *Id.* See Onwuka, *supra* note 13 (pointing out that children’s programming has significantly increased over the years because of OTT services and cable, but the regulations of children’s television have not followed suit).

<sup>17</sup> See H.R. 1677, 101st Cong. (1990) § 394(a) (summarizing the legislation’s goal).

<sup>18</sup> See *id.* § 202 (finding that children in the United States are falling behind other countries in regards to fundamental intellectual skills). Since children watch a significant amount of television, the CTA allows the opportunity for children to learn while watching television. *Id.* See Press Release, Statement of Commissioner Michael O’Rielly (July 12, 2019) (on file with the FCC) [hereinafter Press Release, FCC O’Rielly (2019)] (laying out the Commissioner’s four objectives in deregulating the CTA). The objectives are to “1) protect existing viewers; 2) give broadcasters needed flexibility in scheduling required programming; 3) respond to the shifting video marketplace; and 4) simplify compliance.” *Id.* See Lyons, *supra* note 16 (establishing that even households that rely solely on broadcast television are able to watch educational television programs). Because of multicasting, 95% of American households can watch PBS KIDS. *Id.* See also Onwuka, *supra* note 13 (“[O]nly an estimated 2.5 percent of households [do not] have internet or cable.”).

## II. History

### A. Before the Children's Television Act of 1990

In 1960, children's programming became scrutinized through a public interest standard.<sup>19</sup> Regardless, networks continued to struggle with enforcing quality children's programming because of commercial pressures.<sup>20</sup> The lead media advocacy group, Action for Children's Television ("ACT"), began pressuring Congress to act and regulate children's television programming.<sup>21</sup> The FCC initiated a

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<sup>19</sup> See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 4 (2004) (defining the public interest standard as a way for broadcasters to foster democracy through the use of local programs to create an informed and engaged community). Broadcasters obtain a license in exchange for producing "public interest" programs that educate and inform viewers. *Id.* Most public interest standards have been deregulated and the few remaining are overlooked by broadcasters and unenforced by the FCC. *Id.* at 5–6. See Scott R. Conley, Article, *The Children's Television Act: Reasons & Practice*, 61 SYRACUSE L. REV. 49, 57 (2010) (justifying Congress making children's programs a public interest standard because "children are special and education is important"). See ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTERING THE DIGITAL BROADCASTING FUTURE xii (1998) [hereinafter ADVISORY COMMITTEE] (explaining the government's two goals when overseeing broadcasting are fostering commercial development and ensuring the educational and informational needs of Americans). Before 1960, the needs of children were not mentioned in the public interest standard of the FCC, but is now one of the fourteen components. *Id.* at 23.

<sup>20</sup> See ADVISORY COMMITTEE, *supra* note 19, at 29 (discussing how broadcasters were being pressured to expand the number of advertising minutes per hour, while receiving push back from advocacy groups who did not want as much advertising during children's programs). See Broadcast Services; Children's Television, 47 C.F.R. § 73 (1996) (explaining how commercial stations earn their revenue through selling advertising time). Broadcasters have little incentive to produce more children's programming because the audience is smaller, and the revenue received from the sale of the advertising is determined by the size and socio-demographic characteristics of the audience. *Id.* Further, broadcasters have even less of an incentive to produce children's educational programming because the audience becomes even smaller due to different educational programs being geared toward different age groups. *Id.*

<sup>21</sup> See KATHRYN C. MONTGOMERY, CENTER FOR MEDIA EDUCATION, A FIELD GUIDE TO THE CHILDREN'S TELEVISION ACT 2 (Shelley Pasnik ed., 1997) (noting that pressure was not only coming from ACT, headed by Peggy Charren, but numerous other groups). Charren assembled a huge coalition of groups including "the National

rulemaking in 1970, which in 1973 led to the National Association of Broadcasters (“NAB”) voluntarily choosing to separate commercials from programming and ban host-selling.<sup>22</sup> The FCC did not implement any specific regulations, but did issue the 1974 Policy Statement and declared that “the broadcaster’s public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience.”<sup>23</sup>

The Commission sought for broadcasters to provide educational programming for children, increase the number of children’s programs targeted for specific age groups, and improve scheduling while limiting commercialization.<sup>24</sup> The FCC

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PTA, the National Education Association (NEA), and the American Academy of Pediatrics (AAP).” *Id.* See also Charren, *Peggy (1928-)*, AD AGE (Sept. 15, 2003) [hereinafter *Charren*], archived at <https://perma.cc/3BQ7-JWPT> (summarizing the history behind the advocacy group, ACT). In January 1968, disappointed by the Saturday morning programs, Peggy Charren and her associates formed Action for Children’s Television. *Id.* ACT focused on the needs of children and ensuring that broadcasters were not overlooking them. *Id.*

<sup>22</sup> See ADVISORY COMMITTEE, *supra* note 19, at 28–29 (explaining how in the 60s and 70s, there was a crucial debate over how to incorporate good children’s programming into the marketplace). The ACT petitioned Congress, requesting specific regulations be implemented in regards to children’s programming. *Id.* at 29. The regulations included “[fourteen] hours of children’s programming per week per station; age-appropriate programming for different groups of children; bans on performers promoting products during programs; and the clustering of commercials at the beginning and end of programs.” *Id.* The requests made by ACT were not adopted; however, NAB did regulate advertisements. *Id.* See also Conley, *supra* note 19, at 77 (characterizing program-length commercials as product advertisements within the program, and host-selling, as when a character or host appears in the commercial); CDD Comment Letter, *supra* note 15, at 2 (defining host-selling as deceptive and unfair advertising practices).

<sup>23</sup> See 47 C.F.R. § 73 (1996) (noting that the Commission did not feel it necessary to prescribe the number of hours that stations must air each week because they expected the industry to voluntarily incorporate more children’s educational programming); see also ADVISORY COMMITTEE, *supra* note 19, at 29 (demonstrating the trust that the FCC had in broadcasters to continue to self-regulate children’s programming).

<sup>24</sup> See Children’s Television Programming and Advertising Practices, 96 F.C.C.2d 634, 635 (1984) (elaborating on the specifics of the 1974 Policy Statement).

The Policy Statement specifically asked commercial television licensees to: (1) make a ‘meaningful effort’ to increase the amount of programming for children; (2) air a ‘reasonable amount’ of programming for children designed to educate and inform and not

accomplished these initiatives through self-regulation.<sup>25</sup> When self-regulating, it was up to the stations to determine if the programming needs of children were being met, and if not, to then increase children's programming.<sup>26</sup> In 1979, the Commission's Children's Television Task Force ("Task Force") concluded that broadcasters had complied with the commercial limits adopted in 1974, but the industry was not following the programming guidelines.<sup>27</sup> Nevertheless, the FCC's 1984 Order concluded that when relying on the video distribution

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simply to entertain; (3) air informational programming separately targeted for both preschool and school-age children; and (4) air programming for children scheduled during weekdays as well as on weekends. Commercial television broadcasters also were expected to: (1) limit the amount of advertising in children's programming; (2) insure an adequate separation between program content and commercial messages; and (3) eliminate host-selling and tie-in practices.

*Id.*; see also 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 [hereinafter Petition of ACT], 50 F.C.C.2d 1, 24 (1974) (concurring statement of Commissioner Benjamin L. Hooks: the report clearly outlines the concerns regarding children's programming, establishes that licensees have a duty to serve all important groups in their communities (children being one of those groups), effectively establishes limits on commercialization, and is open-ended).

<sup>25</sup> See *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) (affirming the Commission's decision to not adopt the rules proposed by the petitioner to improve children's television, but continue with policy guidelines). In response to the petitioner's proposal, broadcasters began self-regulating and implemented several restrictions. *Id.* See also Petition of ACT, 50 F.C.C.2d at 18 (reasoning that self-regulation allows for greater flexibility and opportunity for adjustment).

<sup>26</sup> See *Children's Television Programming and Advertising Practices*, 96 F.C.C.2d at 662 (recognizing that economic incentives continued to hold more weight than fulfilling the requirements of airing children's programming on commercial television). See Petition of ACT, 50 F.C.C.2d at 19 (setting forth that the FCC believed that broadcasters would put children first and profit second).

<sup>27</sup> See *Children's Television Programming and Advertising Practices*, 96 F.C.C.2d at 635 (finding that broadcasters failed to ensure that the programs were meeting the needs and interests of children). The Task Force attributed this failure to children audiences not being as influential to advertisers. *Id.* at 636. The Commission released a NPRM in 1979 with questions for comment varying from reliance on noncommercial television to adopting mandatory requirements. *Id.* at 673-74.

industry as a whole, a mandatory quota for children's programming was unnecessary.<sup>28</sup>

Furthermore, Mark Fowler was appointed as Chairman of the FCC in 1984, where he began repealing the commercialization guidelines.<sup>29</sup> This deregulation resulted in a dramatic decline in children's programming with an increase in advertisements.<sup>30</sup> The FCC was under the impression that if the public needed more quality programming, then the market would reflect that need.<sup>31</sup> The FCC received immense push-back from child advocacy groups and forced Congress to reexamine the Commission's 1984 Order.<sup>32</sup> The

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<sup>28</sup> See *Action for Children's Television v. FCC*, 756 F.2d 899, 901 (D.C. Cir. 1985) (concluding that the Commission's decision was within its discretion and was sufficiently justified by the 1984 Order). The court found that the Commission may appropriately consider cable and noncommercial programs when assessing the availability of children's programming. *Id.* Though cable is not offered in all areas, its presence is ever growing, and the FCC will take into consideration the areas in which cable is unavailable. *Id.* See Broadcast Services; Children's Television, 47 C.F.R. § 73 (1996) (noting that the Commission did not rely on the findings of the 1979 Task force because they did not include the video distribution industry). When including cable and noncommercial programming there is an abundance of children's programming available. *Id.*

<sup>29</sup> See ADVISORY COMMITTEE, *supra* note 19, at 29 (emphasizing the lack of importance that was given to children's programming during the Reagan-Era). Chairman Fowler believed that the marketplace was sufficiently meeting children's needs and serving the public interest. *Id.* See Charren, *supra* note 21 (noting that Chairman Fowler did not approve of regulating advertising or programming). The deregulation allowed stations to air unlimited advertisements. *Id.*

<sup>30</sup> See Conley, *supra* note 19, at 51 (providing that after the deregulation, children's educational programming dropped from more than 11 hours per week to about 4 hours per week). See MONTGOMERY, *supra* note 21, at 2 (asserting how networks were barely producing children's television programs, let alone E/I children's programs). By the end of the 1980s, E/I programming had become extinct. *Id.*

<sup>31</sup> See Conley, *supra* note 19, at 51 (reasoning that guidelines were no longer necessary and market forces would catalyst broadcasters to meet the needs of children's educational programming); Lili Levi, *A "Pay or Play" Experiment to Improve Children's Educational Television*, 62 FED. COMM. L. J. 275, 288 (2010) (prompting self-regulation through the FCC delivering hortatory statements about the benefits of children's programming).

<sup>32</sup> See *Action for Children's Television v. FCC*, 821 F.2d 741, 743 (D.C. Cir. 1987) (concluding that in 1987, the D.C. Circuit found no evidence to support the Commission's decision and remanded for further explanation). See Robert E. Fitzpatrick, *The Three Hour Mandate of Children's Television Programming: Is the FCC Teaching Your Child Well?*, 32 SUFFOLK U. L. REV. 767, 776 (1999) (arguing the immense difference between content-based programming and commercial based-

Commission issued a *Further Notice of Proposed Rule Making* and *Notice of Inquiry*, but took no additional action until Congress enacted the CTA in 1990.<sup>33</sup>

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

In 1990, Congress passed the CTA in an attempt to implement voluntary compliance procedures for broadcasters to regulate what they aired on television.<sup>34</sup> The CTA aimed to increase the quantity and quality of informational and educational broadcast television programming for children.<sup>35</sup> For the FCC to maintain the goal of improving children's programming, the CTA was divided into two divisions: (1) actual programming content, and (2) maintaining that commercial television licensees comply with the content requirement.<sup>36</sup> The CTA also imposed advertising limits that applied

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programming, and the effect on a child's mind). Children lack the cognitive ability to distinguish between program content and advertisements. *Id.*

<sup>33</sup> See, e.g., 47 C.F.R. § 73 (1996) (releasing the *Further Notice of Proposed Rule Making* and *Notice of Inquiry* in response to the D.C. Circuit decision).

<sup>34</sup> See Sandra L. Calvert & Jennifer A. Kotler, *Lessons from Children's Television: The Impact of the Children's Television Act on Children's Learning*, 24 APPLIED DEV. PSYCHOL. 275, 277–78 (2003) (justifying the enactment of the CTA). Before Congress acted and implemented the CTA, there was a 25-year long debate about regulating broadcast television. *Id.* See also Dale Kunkel & Julie Canepa, *Broadcasters' License Renewal Claims Regarding Children's Educational Programming*, 38 J. BROAD. & ELEC. MEDIA 397, 397–98 (2009) (highlighting a study conducted to gauge if broadcasters were fulfilling the CTA requirements). This study found that broadcasters "reported a weekly average of roughly three and a half hours of educational programming specifically designed for children, although many of the programs claimed were of questionable educational value." *Id.*

<sup>35</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (defining educational and informational programming "as any television programming which furthers the positive development of children 16 years of age and under . . . including the child's intellectual/cognitive or social/emotional needs"). See OFFICE OF PUBLIC AFFAIRS, FCC, FACT SHEET: CHILDREN'S TELEVISION PROGRAMMING (1995) (explaining that the amount of television watched by children influenced Congress's decision to pass the CTA). Research studies have indicated that children, ages two to seventeen, watch an average of over three hours of television per day, and are greatly influenced by the programs they are watching. *Id.*

<sup>36</sup> See Fitzpatrick, *supra* note 32, at 778 (setting forth that the CTA's two goals were to provide quality E/I children's programming, as well as limit children's exposure to advertisements). The specific methods that were implored by the FCC to manage

to all children's programming and not just educational programming.<sup>37</sup> The CTA broadly defined the educational program requirement as programs directed for children sixteen and under that furthered the positive development of children in any way.<sup>38</sup>

In 1991, the FCC implemented the newly enacted CTA.<sup>39</sup> Yet even with the implementation of the CTA, television was still considered "junk food for the mind."<sup>40</sup> Programs that were considered "FCC friendly" were placed in time slots not plausible for children to

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the number of commercials were sections 303(a) and 303(b) of the CTA. *Id.* at 778–79. *See also* 47 U.S.C. § 303(a) (1990) (applying the strict limitations on the amount of advertisements allowed during children's programming); 47 U.S.C. § 303(b) (1990) (proscribing the criteria that the FCC must follow during a station's license renewal to determine if they met the section 303(a) standard).

<sup>37</sup> *See* Conley, *supra* note 19, at 53 (limiting commercials to 10.5 minutes per hour on weekends and twelve minutes per hour on weekdays).

<sup>38</sup> *See id.* at 55 (noting that programs were not to be reviewed by the FCC to determine if they were actually educational). The FCC instead relied on good faith judgments. *Id.* *See* John L. Sullivan & Amy B. Jordan, *Playing by the Rules: Impact and Implementation of Children's Educational Television Regulations Among Local Broadcasters*, 4 COMM. L. & POL'Y 483, 486 (1999) (setting forth that the FCC gave full discretion to the broadcasters on what programs to air with the intent to fulfill their obligations to children).

<sup>39</sup> *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (addressing the Commission's inability to adopt specific requirements as to the number of hours or time of day that the programs must air). The Commission did require that commercial stations air some form of educational programming for children who are sixteen and under. *Id.* A recordkeeping and reporting system were also established for commercial stations to maintain records of their children's programming efforts. *Id.* *See* Levi, *supra* note 31, at 288 (stating that even with the CTA, the FCC relied on self-governance); Sullivan & Jordan, *supra* note 38, at 486–87 (indicating that the inclusion of educational children's programs was determined on a station-by-station basis). "FCC friendly" programs were obtained through syndications or produced locally. *See* Sullivan & Jordan, *supra* note 38, at 487.

<sup>40</sup> *See* MONTGOMERY, *supra* note 21, at 2 (indicating television being littered with barely disguised commercials for action toys and other products). Instead of broadcasters producing new shows, stations were "re-labeling old reruns such as *The Jetsons*, *The Flintstones*, and *Leave it to Beaver* as 'educational.'" *Id.* at 3. Stations also considered raunchy afternoon talk shows as educational. *Id.* *See* Sullivan & Jordan, *supra* note 38, at 487 (quoting Kunkel's argument that "the principal impact of the CTA [has] been to force broadcasters to creatively re-label their existing program offerings as educational, rather than to generate many new shows of value to youth").

be watching television.<sup>41</sup> Public interest groups and legislators greatly criticized the FCC's failure to impose strict compliance guidelines and standards for broadcasters.<sup>42</sup> Further, the implementation of the CTA did not produce an increase in quality educational programming that Congress intended.<sup>43</sup>

*C. 1996 "Core Programming" Rules and Processing Guidelines*

In 1996, the FCC passed regulations designed to put "teeth" into the CTA.<sup>44</sup> The FCC adopted several public information initiatives to ensure parents understanding of educational and informational ("E/I") programs.<sup>45</sup> The FCC believed that if parents

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<sup>41</sup> See Richard Cortez, Jr., *Welcome to the 21st Century Classroom – Your Living Room: The FCC Requires Three Hours of Children's Educational and Informational Programming*, 51 SMU L. REV. 413, 419 (1998) (mentioning how nearly 60% of children's educational shows aired between 5:30 AM and 7:00 AM). Broadcasters had the ability to air shows at their discretion, thus choosing the least profitable shows (i.e. children's educational programs), during the least profitable time slots. *Id.*; see also MONTGOMERY, *supra* note 21, at 3 (highlighting how most children friendly programs were being aired at pre-dawn times when few people were actually watching).

<sup>42</sup> See Fitzpatrick, *supra* note 32, at 781 (noting that the CTA was failing because of the FCC's broad interpretation). Even after the passing of the CTA, children were continuing to be exposed to television violence and sexual content. *Id.* This continuous exposure was affecting children's ability to distinguish between appropriate and inappropriate behavior. *Id.*

<sup>43</sup> See *id.* at 782 (adding the limited guidance on what would be considered educational allowed many broadcasters to use cartoons to fulfill the educational programming quota); Sullivan & Jordan, *supra* note 38, at 487 (listing *The Jetsons* as an educational program because it taught children about life and technology in the 21st century); Cortez, Jr., *supra* note 41, at 418 (claiming the G.I. Joe cartoon was educational because it showed issues of "social consciousness and responsibility").

<sup>44</sup> See Fitzpatrick, *supra* note 32, at 786 (implementing regulations such as instituting better educational programs, limiting advertising during children's programming, and threatening loss of license for non-compliance).

<sup>45</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 (explaining how these public information initiatives were adopted with the hopes that people would support children's educational programs, and in turn influence stations to air more and produce better educational programs). See generally Extension of the Filing Requirement for Children's Television Programming Reports (FCC Form 398), 47 C.F.R. § 73 (2000) (asserting the importance of the public information initiatives).

had more knowledge about the E/I programs, this would attract a larger audience, and in turn, would increase the incentive for broadcasters to air more educational programs.<sup>46</sup> The public information initiatives required broadcasters to air educational programs, publicize quarterly reports, and provide on-air identification of the core programs.<sup>47</sup> Public information initiatives allowed the Commission to “rely more on marketplace forces to achieve the goals of the CTA.”<sup>48</sup> Broadcasters and local communities benefited from these initiatives because it allowed parents to work directly with broadcasters without government intervention.<sup>49</sup>

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*See* Jess Camp, *Traditional PR vs. Digital PR: What You Need to Know*, HUFFPOST (Dec. 6, 2017), archived at <https://perma.cc/GV67-98MJ> (defining public information initiatives as a type of public relations, which is “a strategic communications process that builds mutually beneficial relationships between organizations and their publics”).

<sup>46</sup> *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-659, CHILDREN’S TELEVISION ACT: FCC COULD IMPROVE EFFORTS TO OVERSEE ENFORCEMENT AND PROVIDE PUBLIC INFORMATION 23–24 (2011) [hereinafter GAO-11-659] (acknowledging that most parents were unaware of the CTA’s requirements despite the FCC’s public education efforts). Parent focus groups were conducted, and most parents admitted to not being aware that broadcast networks even had children’s educational programs. *Id.*

<sup>47</sup> *See* Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 (detailing the public information initiatives that the FCC took to help inform parents of the broadcast networks E/I programs). These public information initiatives required licensees to provide program guides that identified core programs and the target age groups for the programs; to submit quarterly reports using the FCC Form 398; to publicize where the children’s programming reports can be found; to provide a brief explanation as to how the programs meet the definition of Core Programming; to designate a liaison for children’s programming and include the contact information in the programming reports; and required licensees to provide on-air identification of the Core Programs at the beginning of each program. *Id.*

<sup>48</sup> *See* 47 C.F.R. § 73 (2000) (asserting that judgments of the quality of the programming should be left to the audience, not the federal government).

<sup>49</sup> *See id.* (highlighting the FCC’s desire for the public to have a more active role in children’s programming). With such a role, the public would have the ability to hold broadcasters accountable for the programs they were airing. *Id.* The FCC advocated for parents to contact the local stations on their own about their concerns with the core programming. *Id.*

The FCC also enacted the 1996 Core Programming Rules and Guidelines with the CTA.<sup>50</sup> The Core Programming rules were adopted to help guide broadcasters in producing E/I programs to satisfy the developmental educational needs of children.<sup>51</sup> The FCC mandated that broadcasters aired three hours of Core Programming each week.<sup>52</sup> Broadcasters still had some flexibility as to what programs they aired, but the programs had to specifically adhere to the Core Programming guidelines.<sup>53</sup> The Commission also created an incentive for broadcasters if they wanted to have their license renewal applications expedited; they had to comply with the three-hour Core Programming mandate.<sup>54</sup>

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<sup>50</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 (defining core programming as "programming that, among other things, has serving the educational and informational needs of children ages 16 and under as a significant purpose, is at least 30 minutes in length, is aired between the hours of 7:00 a.m. and 10:00 p.m., and is a regularly scheduled weekly program").

<sup>51</sup> See B.P. Mahesh Chandra Guru et al., *Role of Television in Child Development*, 3 J. MASS COMM. & JOURNALISM, 1, 2 (2013) (discussing how television can greatly influence children in both positive and negative ways). When a child is developing, it is important for them to be exposed to educational programs. *Id.* The messages expressed in television shows can influence how children acknowledge others. *Id.* See Calvert & Kotler, *supra* note 34, at 279 (noting that even when research showed that academically oriented shows had higher ratings, broadcasters overwhelmingly chose prosocial programs).

<sup>52</sup> See Cortez, Jr., *supra* note 41, at 415 (stressing this being the first time in history that the FCC established a rule that required a specific, quantified amount of airing time for E/I programs).

<sup>53</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 ("The Commission concluded that a processing guideline would provide broadcasters clarity about their programming obligations under the CTA and would minimize inequities created by stations that air little Core Programming by subjecting all broadcasters to the same scrutiny for CTA compliance at renewal time.").

<sup>54</sup> See Sullivan & Jordan, *supra* note 38, at 488 (asserting that the three-hour guideline had three fundamental goals: (1) encouraging stations to produce better educational programming by giving them a definition of core educational programming; (2) expediting the license renewal process by providing broadcasters with a guideline on how to comply with the CTA; and (3) enhancing accountability of local television stations to their communities by providing them with information about the shows being aired to fulfil their obligation under the CTA). See Calvert & Kotler, *supra* note 34, at 279 (noting that when the three-hour rule was enacted, children were able to watch more E/I programs because they were awake).

Under the three-hour Core Programming safe harboring rule, the Media Bureau staff can authorize the approval of a licensee's renewal application as long as the licensee aired the benchmark requirement of approximately three hours per week of Core Programming.<sup>55</sup> Renewal applications are put into two different categories, Category A or Category B.<sup>56</sup> Category A is more commonly used for renewal purposes because of its simplicity.<sup>57</sup> If a licensee applies for Category B, then they are not required to reach the three-hour per week requirement, and instead must demonstrate that their variety of E/I programs makes up for their lack of three-hours of Core Programming.<sup>58</sup> Because of the uncertainty as to how much Core Programming must be provided, licensees rarely use Category B.<sup>59</sup>

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Nevertheless, research showed that after the three-hour rule was enacted the sample group of educational and informational shows were found to be more moderately educational, than highly educational. *See id.* at 279.

<sup>55</sup> *See* MASS MEDIA BUREAU POLICY AND RULES DIVISION, FCC, THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999, at 11 (2001) [hereinafter THREE-YEAR REVIEW] (indicating that more than one-half of stations adhered to the three-hour rule). *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (noting how the FCC did not require noncommercial stations to follow any guidelines, but subsequently changed the policy to apply to all broadcasters). *See Public v. Private Broadcasting*, MEDIA-1-3-NIAMHBURKE (May 21, 2013), archived at <https://perma.cc/NB3G-FCS3> (defining public versus private broadcasting). Public broadcasting, also known as noncommercial broadcasting, is owned and financed by the public and is meant to entertain the public. *Id.* Private broadcasting, also known as commercial broadcasting, is financed by advertisements, and has free reign to air majority of what they want. *Id.*

<sup>56</sup> *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 ("Renewal applications are divided into two categories for purposes of staff-level review.").

<sup>57</sup> *See id.* (outlining the procedure for Category A is checking a box on the renewal application and providing supporting information that the broadcaster has aired three-hours per week of Core Programming).

<sup>58</sup> *See id.* at 35166 (providing the different types of E/I programming that will count under Category B is "public service announcements (PSAs), short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children").

<sup>59</sup> *See id.* at 35160 (explaining that if licensees do not fall within Category A or B, then the renewal applications are referred to the full Commission). Here, licensees can demonstrate compliance with the CTA through the use of special non-broadcast efforts. *Id.*

*D. 2004 Digital Broadcasting, Preemption, and E/I Symbol Requirements*

In 2004, the Commission addressed matters pertaining to two areas: (1) the obligation of broadcasters to provide E/I programming, and (2) the requirement that broadcasters protect children from inappropriate and excessive commercials.<sup>60</sup> Amendments to the CTA were made to reflect changes in technology.<sup>61</sup> For instance, broadcasters were beginning to transition from analog television to digital television (“DTV”).<sup>62</sup> DTV was considered advanced broadcast television; television with better picture, sound quality, and multiple channels.<sup>63</sup>

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<sup>60</sup> See Broadcast Services; Children’s Television; Cable Operators, 47 C.F.R. §§ 73, 76 (2005) (establishing that the main goal of the 2004 NPRM was to provide guidance to broadcasters regarding children’s television during the Digital Television Transition); see also *Digital Television*, FCC (Aug. 9, 2016), archived at <https://perma.cc/T5L6-K73Q> (summarizing the Digital Television Transition as the switch from analog television to digital television). See Conley, *supra* note 19, at 56 (acknowledging that the CTA is meant to protect children who cannot distinguish between programming and advertising).

<sup>61</sup> See Press Release, Federal Communications Commission, Statement of Chairman Kevin J. Martin (Sept. 26, 2006) (on file with the FCC) [hereinafter Press Release, FCC Martin] (setting forth that the public was also taken into consideration when amending the CTA by adopting the recommendations given by child advocates and media companies). See Press Release, FCC Tate, *supra* note 3 (expressing the belief that the changes to the CTA achieve an appropriate balance between the flexibility desired by broadcasters and the statutory obligation to protect children’s educational needs in a digital era).

<sup>62</sup> See *Digital Television*, *supra* note 60 (pointing out that by June 12, 2009, television channels were no longer allowed to broadcast using analog signals). See *The Basic Facts of Analog vs. Digital*, HOTWIRE COMM. (2014) [hereinafter *Analog vs. Digital*], archived at <https://perma.cc/WZ4Q-8WLV> (addressing that the difference between analog and digital television is the way the signal is transmitted or transferred from the television, as well as the type of television that the consumer could use). Analog television was transmitted similar to the radio—video transmitted in the AM, and audio transmitted in the FM; it was subject to interference, and the bandwidth assigned restricted the resolution and image quality. *Id.* DTV is transmitted as data bits of information; the bandwidth size can accommodate a higher quality image in digital form, plus additional features. *Id.*

<sup>63</sup> See *Digital Television*, *supra* note 60 (acknowledging the importance of switching from analog to digital television was to free up valuable broadcast spectrum for public safety communications).

The Commission revised the CTA to address “how children’s programming requirements apply to digital broadcasters that multicast.”<sup>64</sup> Networks that had more than one stream were now required not only to reach three hours of Core Programming, but the Commission increased this Core Programming benchmark.<sup>65</sup> To safeguard that digital broadcasters did not simply repeat the same Core Programming shows, the FCC required that at least half of Core Programming on multicast streams not be repeated during the same week to be considered “Core.”<sup>66</sup>

The Commission also revised its policies as to when preempted Core Programming could count towards meeting the three-hour requirement.<sup>67</sup> For preempted programs to be considered Core

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<sup>64</sup> See Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35160 (describing the process taken for digital broadcasters that utilize multicasting). See also Cadillac Telecasting Company, Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Cadillac Comment Letter] (setting forth digital multicasting increases the amount of daily programming to 48, 72, or even 96 hours of content). See also *What is Digital Multicasting?*, NOCABLE (2019), archived at <https://perma.cc/72PE-CW8U> (defining digital multicasting as “television technology that gives viewers access to additional local broadcast TV channels”). For example, one local broadcast station can now have several different channels that are playing simultaneously with a different program. *Id.* “Each separate digital stream is called a multicast.” *Id.*

<sup>65</sup> See Broadcast Services; Children’s Television; Cable Operators, 47 C.F.R. §§ 73, 76 (2005) (detailing the increased Core Programming benchmark to be proportional to the additional amount of free video programming the stations chose to provide).

Digital broadcasters will continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. DTV broadcasters that choose to provide additional streams or channels of free video programming will, in addition, have the following guideline applied to the additional programming: ½ hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream.

*Id.*

<sup>66</sup> See *id.* (recognizing repeating programs can be beneficial for children to reinforce the message, but at least 50% of programs cannot be repeated during the same week to be considered core). See Conley, *supra* note 19, at 67–68 (explaining how some stations recycle educational programming by airing the same program on another broadcast station, which decreases the amount of educational programming).

<sup>67</sup> See Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35161 (“[T]he Commission stated that it

Programming, they must be rescheduled programs.<sup>68</sup> The FCC determined that a program would not be considered “preempted” if a Core Program was moved to a different stream, as long as the program was in the same time slot, on the same station, and the station provided adequate on-screen information about the move.<sup>69</sup> Further, preemption was limited to 10% of core programs in each calendar quarter, for both analog and DTV.<sup>70</sup>

Broadcasters also had to label the E/I programs with an E/I logo on the screen for parents and children to identify these programs easier.<sup>71</sup> This requirement applied to both commercial and noncommercial broadcasters.<sup>72</sup> Due to these amendments, the FCC revised the definition of Core Programming to include the E/I logo.<sup>73</sup>

In the 2004 NPRM, the FCC also addressed the issue of excessive and inappropriate commercials being aired during children’s

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would consider, in determining whether the rescheduled program counts as core educational program, the reason for preemption, the licensee’s efforts to promote the rescheduled program, the time when the rescheduled program is broadcast, and the station’s level of preemption of Core Programming.”)

<sup>68</sup> *See id.* (highlighting that preempted programs do not need to be rescheduled if interfered with by breaking news).

<sup>69</sup> *See* 47 C.F.R. §§ 73, 76 (2005) (allowing broadcasters to utilize their multicasting capabilities with the intention of avoiding preemption).

<sup>70</sup> *See id.* (establishing the purpose for the ten percent preemption limit was to help parents and children locate Core Programming and anticipate when it will air).

<sup>71</sup> *See* Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35161 (indicating that the Commission adopted the E/I label after studies showed a continued lack of awareness of Core Programming). *See also* GAO-11-659, *supra* note 46, at 24 (finding that many parents did not know that children’s programming was aired on commercial broadcast networks, did not know the meaning of the E/I symbol, and rarely sought access to the public inspection file). The public inspection file detailed the station’s core children’s programming, along with the air time. *Id.*

<sup>72</sup> *See* Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35161 (stressing that the FCC believed the more the E/I symbol was used, the more it would reinforce awareness to the meaning of the symbol). The FCC felt it was important for all educational programs to be easily identifiable. *Id.*

<sup>73</sup> *See id.* (acknowledging the importance of making parents aware of core programming by including the E/I logo). *But see* MONTGOMERY, *supra* note 21, at 14–15 (pointing out an issue with the E/I symbol is fitting it onto the screen with other television details).

programming.<sup>74</sup> With DTV beginning to overwhelm broadcast networks, the FCC addressed the prohibition of advertisements to only free over-the-air channels, or to all digital channels, both free and paid subscriptions.<sup>75</sup> The FCC concluded that commercial limits and policies would apply to all digital programming directed to children under twelve years old.<sup>76</sup>

#### *E. 2006 Reconsideration Order and Joint Proposal*

In 2006, the FCC modified the CTA in response to petitions for reconsideration of the 2004 Order, as well as a Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules ("Joint Proposal") recommending modifications.<sup>77</sup> The FCC retained the Core Program processing guideline established in the 2004 Order.<sup>78</sup> Similarly, the Commission believed that the guideline to increase the amount of free video programming being broadcast met the objective of the CTA.<sup>79</sup> The Commission did not alter the

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<sup>74</sup> See 47 C.F.R. §§ 73, 76 (2005) (establishing that without policies and limits, children could be exposed to abusive advertising practices). *But see* Calvert & Kotler, *supra* note 34, at 325 (explaining how children are still exposed to aggressive advertising from entertainment-driven programs not regulated by the CTA). See Conley, *supra* note 19, at 71 (proposing that Congress not only enforce advertising restrictions for educational programs, but also for all children's programming).

<sup>75</sup> See 47 C.F.R. §§ 73, 76 (2005) (noting that "commercial limits and policies currently apply to cable operators and DBS providers and that cable operators are defined as 'broadcast licensees'").

<sup>76</sup> See *id.* (adding the reason behind limiting advertisements on all digital programming is because children are so susceptible as television viewers). See Press Release, FCC Martin, *supra* note 61 (acknowledging the "unique needs and vulnerabilities of children," and thus the importance of "television play[ing] a positive role in children's lives").

<sup>77</sup> See Broadcast Services; Children's Television; Cable Operators, 47 C.F.R. §§ 73, 76 (2006) (holding that the Joint Proposal "balance[d] the concerns and needs of children and parents with those of industry, advertisers, and others"). See generally Second Order on Reconsideration and Second Report and Order, Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules, MM Docket 00-167 (adopted Sept. 26, 2006) (introducing the Joint Proposal).

<sup>78</sup> See 47 C.F.R. §§ 73, 76 (2006) (establishing that the revised guidelines are reasonable for broadcasters plus meet the needs of children).

<sup>79</sup> See *id.* (noting the objective of the CTA is to increase the availability of children's E/I programming).

multicasting rule adopted in the 2004 Order.<sup>80</sup> The FCC further clarified that at least 50% of the Core Programming for multicasting stations could not consist of episodes that had already aired in the previous seven days on either station.<sup>81</sup>

The FCC also amended the Children's Television Programming Report, or FCC Form 398, which is used to collect the necessary information to enforce the limits on repeat programs.<sup>82</sup> The Commission adopted the "commercial matter" definition proposed by the Joint Proposal.<sup>83</sup> The benefit of this revision was in the public's interest because the adoption increased flexibility for broadcasters and cable operators with advertisements, and furthered the FCC's goal of producing high quality children's programs.<sup>84</sup> Finally, the

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<sup>80</sup> See *Rethinking the Children's Television Act for a Digital Media Age: Hearing on S. Hrg. 111-485 Before the Comm. On Commerce, Sci., and Transp.*, 111th Cong. 11 (2009) (statement of Hon. Julius Genachowski, Chairman, FCC) [hereinafter *Rethinking the CTA for a Digital Media Age*] (emphasizing the power of multicasting). Broadcasters have the ability to multicast as many as four or five streams). See GAO-11-659, *supra* note 46, at 9 ("At the end of 2010, half of all full-power commercial broadcast stations nationwide were multicasting a total of more than 1,000 additional channels.").

<sup>81</sup> See 47 C.F.R. §§ 73, 76 (2006) (defining either station as the station's main network or the station's free digital program stream). Also, the Commission exempted any program stream that shifted the entire programming line-up of another programming stream. *Id.*

<sup>82</sup> See *id.* (providing that FCC Form 398 was amended to collect information necessary to enforce the limit on repeat programs). Licensees can show on Form 398 that they complied with the repeat restrictions, and no longer have to identify each program episode, but they must retain records to prove their certification. *Id.* Upon request, the documentation must be available to the public. *Id.*

<sup>83</sup> See *id.* (defining the revised definition of commercial matter to "exclude (1) promotions for any children's or other age-appropriate programming appearing on the same channel, and (2) promotions for children's educational and informational programming appearing on any channel"). See Press Release, Federal Communications Commission, Statement of Commissioner Robert M. McDowell (Sept. 29, 2006) (on file with the FCC) [hereinafter Press Release, FCC McDowell] (recognizing the plethora of commercial messages that children are bombarded with daily).

<sup>84</sup> See 47 C.F.R. §§ 73, 76 (2006) (noting that the revised rule does not limit advertisements during children's programming, but will reduce the number of interruptions). See Press Release, FCC McDowell, *supra* note 83 (applauding the media and advertising industry for collaborating with the public interest community in "find[ing] solutions that strike a workable balance between entertainment and commerce for children's television").

Commission repealed the 10% cap on preemptions and instead enacted a procedure whereby broadcast networks are required to seek approval of their preemption plans each year.<sup>85</sup>

*F. 2018 NPRM—Modernization of Media Regulation Initiative*

For over twenty years the CTA has been regulating broadcasters and ensuring that they include E/I children’s programs.<sup>86</sup> For the first time in 2018, the FCC proposed to begin rolling back the CTA regulations.<sup>87</sup> The FCC began deregulating the Act by releasing a 2018 NPRM.<sup>88</sup> In the 2018 NPRM, the FCC is revising “children’s television programming rules to modify outdated requirements and to give broadcasters greater flexibility in serving the educational and informational needs of children.”<sup>89</sup> More specifically, the 2018 NPRM

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<sup>85</sup> See Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35161 (describing preemption under the new procedure). A program will count as preempted if it was not aired in a permanent substitute time slot of the station’s choosing (known as a “second home”) “with an on-air notification of the schedule change occurring at the time of preemption during the previously scheduled time slot.” *Id.*

<sup>86</sup> See *id.* (justifying the reasons behind the FCC adopting the CTA). See FISCH, *supra* note 2, at 9 (comparing educational television to a type of informal education).

<sup>87</sup> See Press Release, FCC O’Rielly (2018), *supra* note 6 (quoting Commissioner O’Rielly’s statement on reviewing the Kid Vid rules).

[His] goal in reviewing the Kid Vid rules is to understand whether the rules the Commission imposed on broadcasters to carry out the Children’s Television Act—in many cases more than two decades ago—still make sense in today’s media marketplace and whether these rules enhance or hamper the family broadcast experience. Specifically, since 1990, [society has] seen a proliferation of media platforms, including cable networks, over the top providers, and premium channels, that, though not subject to Kid Vid, offer competitive or vastly superior children’s programming.

*Id.*

<sup>88</sup> See *Rulemaking Process*, FCC (Nov. 18, 2018), *archived at* <https://perma.cc/NBP5-ZS26> (defining the FCC rulemaking process as “notice and comment”). The FCC gives the public notice about the proposed rule changes and seeks the public’s comment. *Id.*

<sup>89</sup> See Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (addressing the reason behind the NPRM is due to the dramatic changes in the way children watch television). See NCTA – The Internet & Television Association, Comment Letter on Children’s

was released to modify programming rules, such as Core Programming, the renewal processing guidelines, special sponsorship efforts, non-broadcasting efforts, multicasting stations, and preemptions.<sup>90</sup> The 2018 NPRM has been filed, adopted, and has received comment from the general public.<sup>91</sup>

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Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter NCTA Comment Letter] (commenting that by giving networks more flexibility it will help to strengthen their ability to serve the needs of parents and children). See Maranatha Broadcasting Company, Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Maranatha Comment Letter] (expressing the burden that the CTA imposes on local stations not affiliated with major television networks). These regulations can restrict programming creativity, and the restrictions make no sense in "today's competitive and dynamic video marketplace." *Id.* at 3.

<sup>90</sup> See American Cable Association, Comment Letter on Children's Television Programming; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter ACA Comment Letter] (advocating for the changes in recordkeeping requirements because they are burdensome on cable operators); Gray Television, Inc., Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Gray Comment Letter] (clarifying that due to the evolution of technology, viewing habits have changed, and recordkeeping rules and policies have become obsolete); Network Commenters, Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Network Comment Letter] (noting how these changes would align with how children actually consume television today). See John M. Burgett, *NPRM Proposes Momentous Changes to the Children's Television Programming Rules*, WILEY REIN LLP (July 25, 2018), archived at <https://perma.cc/8Z37-XDK7> (providing extensive detail about the proposed changes that were released by the FCC's NPRM to change the CTA). This NPRM is not addressing commercial matters. *Id.*

<sup>91</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (adopting the 2018 NPRM on July 12, 2018 and releasing it on July 13, 2018). Comments on the proposal were due on or before September 24, 2018, and replies were due on or before October 23, 2018. *Id.* at 35158; see *ECFS Filing Results*, FCC (Mar. 31, 2019), archived at <https://perma.cc/7YFC-QV8W> (listing all of the comments that have been filed for the 2018 NPRM). See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 47 C.F.R. § 73 (2019) (adopting the Commission's *Report and Order* on July 10, 2019 and releasing it on July 12, 2019). In the 2018 NPRM, the FCC began the proposal for revising the CTA, however since then, the FCC has taken the steps to modernize the CTA. *Id.*

### III. Facts

Modern society is more technologically advanced than ever before.<sup>92</sup> The Commissioner and Republican lawmakers believe that broadcast networks no longer need the guidelines and requirements of the CTA because children are no longer turning the television on to broadcast networks.<sup>93</sup> Democrats, however, are voicing concerns about the deregulation of the CTA causing issues for low-income families.<sup>94</sup> The parties are unable to agree that although OTT services

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<sup>92</sup> See Watson, *supra* note 4 (discussing how children of this era will never grow up without smartphones or the internet).

<sup>93</sup> See Jacobson, *supra* note 13 (quoting how “[the Commissioner] can[not] think of the last time, if ever, [his family] turned to a local broadcast television station for children’s programming”). How children choose to view television programs is extremely different from 17 years ago. *Id.* See Press Release, FCC Pai, *supra* note 10 (“Media that did not exist in 1990, most notably the commercial Internet and online streaming services, have completely transformed what we watch, how we watch, and when we watch it.”); Press Release, Federal Communications Commission, Statement of Commissioner Brendan Carr (July 12, 2019) (on file with the FCC) [hereinafter Press Release, FCC Carr] (noting that cable networks such as “Baby First, Disney Junior, and Teen Nick, which have never been subject to KidVid rules, also provide 24/7 children’s programming”). Additionally, children are using OTT services like YouTube, Amazon, and Hulu with limitless options. *Id.* See Rob Owen, *Cornucopia of Children’s Content Comes to Streaming Services*, VARIETY (Aug. 2, 2018), archived at <https://perma.cc/L925-FDV4> (articulating how kid friendly content has become a huge genre on streaming services). See Jacobson, *supra* note 13 (adding there are a plethora of children’s programming options on cable networks). Further, Commissioner O’Reilly believes that channels such as PBS are going to continue to produce and deliver educational programming because that is their mission. *Id.* However, he also believes that the CTA is not needed to accomplish PBS’s mission to educate children through the use of television programs. *Id.*

<sup>94</sup> See NHMC Comment Letter, *supra* note 15, at 2 (voicing concerns that without the CTA, quality educational programming will eventually disappear from public airwaves); CDD Comment Letter, *supra* note 15, at 20 (expressing concern for low-income families who do not have the finances to afford advanced technology and rely on broadcast television); Common Sense Kids Action, Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Common Sense Comment Letter] (“Low-income families generally cannot afford high-speed internet necessary for streaming video, or devices capable of streaming video on a television.”); Johnson, *supra* note 12 (stressing how children are our nation’s most vulnerable residents, and changing these rules so quickly could have a detrimental effect on children of low income and rural families).

are useful tools to stream shows immediately, the deregulation of the CTA is the best alternative for the American public.<sup>95</sup>

#### A. *Television and Low-Income Families*

Television is a staple in low-income households.<sup>96</sup> Children of low-income families are intellectually inhibited by too much television compared to children of wealthier backgrounds because children of low-income families typically watch more than two hours of television a day.<sup>97</sup> Monitoring television use in low-income households is found to be more difficult because these children's parents are not home, but instead working or obtaining a degree.<sup>98</sup> Because children spend a sizeable amount of their time watching television, especially children

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<sup>95</sup> See SMARTY PANTS, 2018 CLICKS, TAPS & SWIPES: AN IN-DEPTH ANALYSIS OF THE DIGITAL BEHAVIORS OF U.S. CHILDREN 6–7 (2018) [hereinafter CLICKS, TAPS & SWIPES] (reporting how children's use of phones and tablets to watch television is continuing to increase, while traditional viewing of television programs is decreasing). See Janko Roettgers, *Netflix's Latest Price Hike May Have Scared Away Low-Income Consumers*, VARIETY (Aug. 28, 2018), archived at <https://perma.cc/N8XK-2M4B> (graphing subscription trends according to each streaming service).

<sup>96</sup> See Alice Park, *Background TV: Children Exposed to Four Hours a Day*, TIME (Oct. 2, 2012), archived at <https://perma.cc/46Y2-2ZT3> (indicating children that come from lower income households are exposed to more television traditionally as well as "secondhand" exposure). "Secondhand" television exposure is when the television is on but simply background noise. *Id.* It was found that children in low-income households have the highest average of indirect exposure. *Id.*

<sup>97</sup> See Katie Moritz, *How TV Affects Kids Depends on How Much Parents Earn*, REWIRE (Apr. 4, 2017), archived at <http://perma.cc/G65W-42H2> (noting how children in families at or near the poverty line have the most significant drop in school readiness). See *American Academy of Pediatrics Announces New Recommendations for Children's Media Use*, AMERICAN ACADEMY OF PEDIATRICS (Oct. 21, 2016) [hereinafter *AAP Recommendations*], archived at <https://perma.cc/E3JU-F2KP> (discussing the American Academy of Pediatrics' ("AAP") recommendations for television viewing times among different age groups). According to the AAP, children between the ages of two and five years old should not be watching more than one hour of television per day. *Id.*

<sup>98</sup> See Erica N. Fletcher et al., *Screen Time at Home and School Among Low-Income Children Attending Head Start*, 7 CHILD INDICATORS RES. 421, 427 (2014) (finding that children of low-income families are more likely to have a television in their bedroom).

from low-income households, they are greatly influenced by the programs they watch.<sup>99</sup>

Television directly affects a child's social skills as well as his or her ability to learn.<sup>100</sup> However, this is dependent on the type of television programs children are exposed to.<sup>101</sup> OTT services are continuously expanding their children's content; most recently, Disney launched their first OTT application, which is targeted specifically for children.<sup>102</sup> As for broadcast stations, they air their programs on other

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<sup>99</sup> See Guru et al., *supra* note 51, at 2 (discussing research on children's television). Television is a medium of communication because it appeals to one's senses. *Id.* "The live nature of television allows it to transmit visuals and information almost instantly." *Id.* Therefore, television has a tremendous influence on modern society. *Id.*

<sup>100</sup> See *id.* (delving into the effects that television viewing can have on child development). Studies have shown that educational programs can have a positive effect on overall achievement. *Id.* at 5. See also FISCH, *supra* note 2, at viii (discussing the impact that children's educational television programs has on children's literacy, mathematics and problem solving, science and technology, and civics and social studies). This book studies educational programming and the positive effects it can have on children academically as well as socially. *Id.*

<sup>101</sup> See ALETHA HUSTON STEIN & LYNETTE KOHN FRIEDRICH, *IMPACT OF TELEVISION ON CHILDREN AND YOUTH* 1, 41 (Univ. of Chi. Press 1975) (discussing the effects of prosocial television). "[T]elevision could teach many forms of prosocial behavior that would provide [children] with alternatives to the violent and deviant problem solutions so often shown." *Id.* See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 47 C.F.R. § 73 (2019) (finding that children who watch PBS KIDS have "gained the equivalent of 1.5 months of literacy development beyond typical growth"). Children who watch PBS KIDS have better vocabulary and language knowledge, as well as alphabet knowledge. *Id.* See Calvert & Kotler, *supra* note 34, at 326 (asserting that popular educational programs are well liked and often understood by children). Studies show that children are learning lessons of value and how to interact with other children on a more social-emotional level. *Id.* at 321.

<sup>102</sup> See Julia Alexander, *Disney+ will be available on November 12th for \$6.99 a month*, THE VERGE (Apr. 11, 2019), archived at <https://perma.cc/LKR7-3Y6U> (introducing Disney's streaming service, which includes new television series and movies, as well as content from all of Disney's various franchises: Disney, Pixar, Marvel, Star Wars, and National Geographic); Connie Chen, *Disney Plus: Everything you need to know about Disney's ad-free streaming service*, BUSINESS INSIDER (Dec. 13, 2019), archived at <https://perma.cc/6K43-6V5X> (announcing Disney Plus's launch in November of 2019 had more than 10 million people subscribe on the first day); Alex Kane, *How to choose the right streaming services for your kids*, USA TODAY (Dec. 11, 2019), archived at

independent outlets, which allow children the opportunity to view educational content on more channels.<sup>103</sup> Children’s programming shifting to multicast streams does not impede low-income families from being able to access these channels because they are free to the public.<sup>104</sup> For example, PBS continues to follow their goal of educating young children by implementing a 24/7 PBS KIDS broadcast and online streaming channel.<sup>105</sup>

### B. Modern OTT Applications

OTT applications and services are merging the world of television and digital video.<sup>106</sup> Amazon Prime has over 100 million subscribers globally, which is a close second to Netflix, which has over

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VDHF (outlining the OTT streaming services most used by children, and describing the pros and cons of each).

<sup>103</sup> See Calvert & Kotler, *supra* note 34, at 322 (explaining how networks “enhance brand loyalty” and establish their audiences). For instance, Nickelodeon will repeat shows that bring in audiences and views, while completely removing shows that are not doing well. *Id.* Further, ABC will air their programs on other independent lineups, similar to Disney. *Id.* By contrast, “NBC and CBS only broadcast their educational programs against each other and against ABC on Saturday Morning.” *Id.*

<sup>104</sup> See ABC Television Affiliates Association et al., Reply Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative (Oct. 23, 2018) [hereinafter ABC Comment Letter] (noting that 0.5% of households with children ages two to seventeen have neither internet nor cable).

<sup>105</sup> See 47 C.F.R. § 73 (2019) (stipulating that 24/7 PBS KIDS has performed very well among underserved households). Children’s viewing of PBS has increased 47% among low-income households. *Id.*; see also Jacobson, *supra* note 13 (adding how Commissioner O’Rielly believes that channels such as PBS are going to continue to produce and deliver educational programming because that is their mission). O’Rielly also believes that the CTA is not needed to accomplish PBS’s mission to educate children through the use of television programs. See Jacobson, *supra* note 13.

<sup>106</sup> See Nexstar Broadcasting, Inc., Comment Letter on Children’s Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter Nexstar Comment Letter] (pointing to households with children under nine years old being more likely to have OTT subscriptions than cable subscriptions). See Patel, *supra* note 5 (setting forth how television networks and studios helped give rise to the Netflix empire). Television networks and studios were licensing their old programs to Netflix, which helped boost Netflix’s appeal. *Id.* Further, media consumers began watching their favorite shows on Netflix and Hulu instead of broadcast television. *Id.*

120 million subscribers worldwide.<sup>107</sup> One main reason for the increase in subscribers to OTT services is that their prices are affordable; OTT services are a cost-effective alternative to cable.<sup>108</sup>

Since OTT services are a streaming service, the services do need a broadband connection (i.e., high-speed internet), thus families are paying for the broadband connection along with the OTT service subscriptions.<sup>109</sup> The average package for high speed internet is around \$50 per month during the service's promotional offer and \$60 per month after the promotional period expires.<sup>110</sup> The price of the broadband package will determine the speed of the internet.<sup>111</sup>

OTT services are increasingly becoming a staple in U.S. households.<sup>112</sup> While cable or satellite services range from \$40 to \$80

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<sup>107</sup> See Alex Shephard, *Can Netflix Take Over Hollywood?*, THE NEW REPUBLIC (Apr. 24, 2018), archived at <https://perma.cc/67GQ-PJ9R> (exploring how OTT services are not only competing with traditional television, but also with each other). See *Cable TV – Statistics & Facts*, STATISTICA (Jan. 21, 2019) [hereinafter *Cable TV*], archived at <https://perma.cc/H8LN-LZGA> (setting forth how cable television is facing increasing competition from OTT services).

<sup>108</sup> See Rachel Cruze, *9 Cost-Effective Alternatives to Cable TV*, DAVE RAMSEY (Nov. 27, 2018), archived at <https://perma.cc/XEK2-DQ3S> (exploring the different OTT services and the prices). A subscription to Netflix or Hulu only costs \$6-12 per month, for Amazon Prime Video \$8.99 per month, and for HBO Now, Showtime, and Starz \$9-15 per month. *Id.* See Harvey Spector, *What is the Average Cost of Cable TV Per Month?*, TECHWALLA (Apr. 2, 2020), archived at <https://perma.cc/Z5CY-UGC9> (setting forth how cable bills vary depending on the specific package, the location, and the company that supplies the cable television). See *Types of Broadband Connections*, FED. COMM. COMM'N (June 23, 2014) [hereinafter *Broadband Connections*], archived at <https://perma.cc/JN2W-ETNA> (defining broadband connection as a high-speed internet access). Modern cable services will provide broadband in the cable package. *Id.*

<sup>109</sup> *But see* Press Release, Federal Communications Commission, Statement of Commissioner Jessica Rosenworcel (July 12, 2019) (on file with the FCC) [hereinafter Press Release, FCC Rosenworcel] (noting how “broadband is not available everywhere”).

<sup>110</sup> See John Dille, *How Much Should I be Paying for High-Speed Internet?*, HSI (Mar. 28, 2018), archived at <https://perma.cc/Y9KN-NFH6> (noting this monthly price does not include equipment fees or bundle discounts).

<sup>111</sup> See *id.* (asserting that the lower the cost of the package, the less Mbps of speed).

<sup>112</sup> See National Association of Broadcasters, Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter NAB Comment Letter] (indicating that 69% of households subscribe to Netflix, Amazon Prime and/or Hulu, 80% have access to at least one on-

per month, OTT services on average cost between \$8 to \$15 per month, depending on the service.<sup>113</sup> Further, most Americans cannot afford cable because 59% of Americans struggle to save \$100 per month.<sup>114</sup> Although OTT services require high-speed internet, according to Nielson, only 0.5% of television households do not have access to internet.<sup>115</sup>

### C. Challenges Posed by OTT Applications

Even though OTT services are storming the nation, they still have their issues.<sup>116</sup> For children to use OTT services, they must have a tablet, smartphone, smart television, or gaming console to stream the application.<sup>117</sup> With the mobility that children have with mobile devices, it is difficult for parents to monitor the content their children

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demand television service, and 74% have at least one internet-connected television device).

<sup>113</sup> See CDD Comment Letter, *supra* note 15, at 19 (setting forth many families are abandoning cable and satellite because of the prices).

<sup>114</sup> See *id.* at 18 (stating that most cable packages cost a rough average of \$58.62 - \$63.37 per month, not including taxes and installation fees). See NAB Comment Letter, *supra* note 112, at 9 (addressing the decline in basic cable viewing from 7 million per day in 2011-2012 to 3.4 million per day between 2017 and 2018).

<sup>115</sup> See *id.* at 3 (illustrating how majority of households have embraced online video options). See Patel, *supra* note 5 (establishing that OTT applications do need internet, which can be purchased through a cable company).

<sup>116</sup> See HENSON, *supra* note 5, at 4 (examining the challenges posed by OTT services). Some challenges include inconsistency in the applications of age-based content, issues with child user profiles, menu screens not separating adult content from children content, and limited parental control. *Id.*

<sup>117</sup> See Institute for the Study of Knowledge Management in Education et al., Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Sept. 24, 2018) [hereinafter ISKME Comment Letter] (offering statistics on ownership of devices by family income). Low-income households (< \$35,000/year): 54% have laptops in home; 25% own their own laptop; 51% have their own smartphone; and 71% have a tablet in the home. *Id.* High-income households (\$100,000+/year): 92% have laptops in the home; 62% have their own laptop; 78% have their own smartphone; and 89% have a tablet in the home. *Id.* These statistics are based off of teenagers in the household. *Id.* See Benedicte Guichard, *The Current State of Kid-Centric SVOD Services*, CLEENG (Jan. 17, 2017), archived at <https://perma.cc/35CY-7PRM> (reporting how the viewing habits of children has greatly changed).

are watching.<sup>118</sup> Nevertheless, parents do have the ability to create accounts with parental controls enabled (i.e., “a kid’s account”).<sup>119</sup> However, this does not stop a child from merely switching to an adult account.<sup>120</sup> Thus, the use of parental controls does not necessarily inhibit children from being able to view graphic adult content.<sup>121</sup>

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<sup>118</sup> See NAB Comment Letter, *supra* note 112, at 28–29 (establishing children’s ability to access unlimited content 24/7 online and via applications on a range of devices, however, there are sources available to guide parents toward recommended educational and family friendly websites and applications); HENSON, *supra* note 5, at 7 (discussing the difficulties that OTT services pose for parents). Henson conducted a study where a team analyzed the OTT streaming devices and programs, and then graded them based on use of ratings, parental controls, visibility of adult titles/content, and original content for families. See HENSON, *supra* note 5, at 3–4. The study showed that even with parents switching to OTT services for better children’s content, it does not mean that it is a safer platform for children. *Id.* at 4

<sup>119</sup> See Amy-Mae Turner, *How to set up controls on Netflix, Amazon Prime Video, and Hulu*, MASHABLE (Oct. 16, 2018), archived at <https://perma.cc/PF4M-2AMZ> (explaining the process for safe-guarding children from inappropriate content on OTT applications). For example, Netflix allows parents to create kid profiles that have only children-friendly content which can be managed further through the settings, as well as a PIN number so that children are unable to change these settings. *Id.* Further, Hulu allows parents to create a new profile and immediately set it to “Kids,” which should make all content on that profile kid-friendly. *Id.*; but see HENSON, *supra* note 5, at 7–9 (explaining how even with these restrictions, Netflix users can simply change to adult profiles, and Hulu does not even have a password to try and deter children from changing the settings).

<sup>120</sup> See Turner, *supra* note 119 (emphasizing how Amazon Prime Video does have parental controls to set up a PIN, and restrict viewing and purchases). But cf. HENSON, *supra* note 5, at 8 (pointing out how even with the parental controls, Amazon Prime Video simply stops children from viewing and purchasing mature content, but children can still see the content when scrolling to find a program).

<sup>121</sup> See HENSON, *supra* note 5, at 2 (discussing the parental control functions of the OTT streaming devices and programs). For streaming programs, the providers that were studied were Hulu, Amazon Prime Video, and Netflix. *Id.* Of the three programs, Netflix and Amazon Prime Video received a B+ for parental controls, whereas Hulu received a C-. *Id.* at 4. For streaming devices, the devices that were tested were Google Chromecast, Apple TV, Amazon Fire TV, and Roku. *Id.* Of the four, Google Chromecast received the best grade of an A; Apple TV received a B; Amazon Fire TV received a C; and Roku received a D. *Id.* See also Kate Kozuch, *Disney Plus parental controls are missing a key feature*, TOM’S GUIDE (Nov. 13, 2019), archived at <https://perma.cc/VT22-WW5Z> (emphasizing how even Disney Plus, which is a family-friendly streaming service, allows parents to create kids’ profiles, but does not have a lock on the parental controls). Without this lock, children have the ability to find their way into more mature content. *Id.*

Further, parents are unable to block explicit content across all devices that their child is using.<sup>122</sup>

#### *D. Benefits Posed by OTT Applications*

Nevertheless, the pros of OTT services outweigh the cons.<sup>123</sup> With the use of an OTT application or service, children have the ability to watch age appropriate and educational programs whenever they want.<sup>124</sup> Nielsen data shows that children watch significantly less traditionally scheduled television and instead watch their shows on OTT services.<sup>125</sup> OTT services do not have time slot limitations, which makes it easier for a child to watch educational programs at a

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<sup>122</sup> See HENSON, *supra* note 5, at 2 (summarizing the key findings, which illustrate the inconsistency in the OTT providers). For instance, when children are scrolling to find their genre they may come across explicit language and titles. *Id.* at 4. It was found that no OTT providers offer family plans to be able to block this explicit content across all devices. *Id.*

<sup>123</sup> See HENSON, *supra* note 5, at 2 (highlighting how OTT services attract families because of their commercial free alternatives and abundance of children's programming); Cruze, *supra* note 108 (discussing the best alternatives to cable television); Jeanne Croteau, *30 Great Educational Disney+ Shows, WE ARE TEACHERS* (Apr. 6, 2020), archived at <https://perma.cc/UWE9-469G> (listing prime educational children's content that has been created, as well as streamed on Disney's new streaming service). See Center for Digital Democracy et al., Reply Comment Letter on Children's Television Programming Rules; Modernization of Media Regulation Initiative (Oct. 23, 2018) (setting forth how OTT providers have no obligation to offer educational content). *But see* Jeremy Harvey, *HOW OTT STREAMING IS CHANGING THE FACE OF MEDIA*, WICKET LABS (Aug. 19, 2019), archived at <https://perma.cc/MZH2-GY6S> ("A recent survey shows that fifty percent of OTT subscribers pay for educational content, typically in the form of instructional streaming programs.").

<sup>124</sup> See NCTA Comment Letter, *supra* note 89, at 3 (setting forth television viewing by children on internet connected devices has increased 122% between the second quarter of 2016 to the second quarter of 2018). See also Jacobson, *supra* note 13 (pointing to the fact that children's television programming has become increasingly popular on OTT services).

<sup>125</sup> See NAB Comment Letter, *supra* note 112, at 12 (finding that "93 percent of teens ages 13-15 use social platforms to access videos, including 82 percent through YouTube, 72 percent through Netflix, and 64 percent through cable or satellite TV").

time that works best for them.<sup>126</sup> Further, a majority of OTT video services have minimal or no advertisements and commercials.<sup>127</sup>

#### IV. Analysis

##### A. *The CTA is Outdated*

Presently, the CTA is regulating a form of television that is becoming extinct to children of the twenty-first century.<sup>128</sup> When the CTA was first enacted, children's educational programming needed firm guidelines.<sup>129</sup> The children's best interests were being neglected because broadcasters were profiting from large audiences and advertisements, thus preventing children's needs from being at the forefront of broadcasters' motivations in promoting children's programming.<sup>130</sup> Nonetheless, the digital age has dramatically changed the television viewing process.<sup>131</sup> The public, and more

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<sup>126</sup> See Boone, *supra* note 1 (contending that a lot of children's programs are now available on OTT streaming services and children would much rather lay in bed and watch their favorite program, than have to wait for it to be on traditional television in its regular time slot).

<sup>127</sup> See HENSON, *supra* note 5, at 3 (addressing a pro for utilizing OTT services over traditional broadcast and cable television is the lack of commercials and advertisements).

<sup>128</sup> See Press Release, FCC Pai, *supra* note 10 ("Media that did not exist in 1990, most notably the commercial Internet and online streaming services, have completely transformed what we watch, how we watch, and when we watch it.").

<sup>129</sup> See Lyons, *supra* note 16 (explaining the Kid Vid Rule in the digital era of streaming). When the Kid Vid rule was enacted, broadcast television was the leading form of entertainment. *Id.* Broadcast television no longer owns the entertainment industry and has been taken over by cable television and more importantly OTT services. *Id.*

<sup>130</sup> See MONTGOMERY, *supra* note 21, at 13 (noting that broadcasters did not want to air children's programs because the audiences were small, which meant a smaller profit margin). See ADVISORY COMMITTEE, *supra* note 19, at 86 (adding broadcast networks' issues with the CTA regulations being based off of the profit motive).

<sup>131</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35158 (providing that the CTA was first adopted more than twenty years ago, and has not been amended since 2006); see also Press Release, FCC O'Rielly (2019), *supra* note 18 ("Multichannel News recently generated a graphic listing all the television devices, services, and content producers competing in today's market, and it consisted of well over a hundred different entities.").

specifically children, no longer watch traditional broadcast television, but instead use OTT services.<sup>132</sup>

### B. Modernization of the Kid Vid Rule

By modernizing the Kid Vid Rule, the Commission's deregulation is giving broadcasters much needed flexibility on how to serve the needs of children.<sup>133</sup> Commissioner O'Rielly presents the current deregulation as a modernization of the Kid Vid Rule.<sup>134</sup> FCC Chairman Ajit Pai stands fully behind the Commissioner's decision to take a hard look at the CTA and begin deregulation.<sup>135</sup> Nevertheless, comments from advocacy groups such as Center for Digital Democracy, Common Sense Kids Action, and the National Hispanic Media Coalition disagree with the FCC's decision to deregulate the CTA.<sup>136</sup> These groups feel that the CTA should not be deregulated,

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<sup>132</sup> See Cadillac Comment Letter, *supra* note 64, at 2 (explaining the Commission's reason for modernizing the Kid Vid Rule is because of the dramatic changes in which television is being consumed). See Watson, *supra* note 4 (noting the increasing amount of time that children watch television online).

<sup>133</sup> See ABC Comment Letter, *supra* note 104, at 5–6 (establishing how by giving broadcasters greater flexibility, they can schedule programming to fit children's expectations, rather than the Commission's requirements). Children no longer watch scheduled programs, but instead record shows or watch them on OTT services. *Id.* See Burgett, *supra* note 90 (discussing the several catalysts for modifying the outdated Kid Vid Rule, such as "broadcasters' ability to carry more than one digital programming stream and the decline in 'appointment viewing' as viewers increasingly access programming on demand").

<sup>134</sup> See Press Release, FCC O'Rielly (2019), *supra* note 18 (stating that the changes to the Kid Vid Rule continue to account for the importance of children having E/I programs, while also acknowledging the importance of broadcast networks no longer being bogged down by irrelevant rules and mandates).

<sup>135</sup> See Press Release, FCC Pai, *supra* note 10 (mentioning how until the current revisions to the Kid Vid Rule, it was living in the past, along with classrooms of maps with the Soviet Union and *Bill Nye the Science Guy* had yet to even air on television). See Johnson, *supra* note 12 (noting FCC Chairman Ajit Pai believes that the CTA has not progressed with the changes in the media landscape).

<sup>136</sup> See CDD Comment Letter, *supra* note 15, at 33 (commenting that the FCC is not taking into account any of the obstacles that they will face once the CTA has been deregulated); Common Sense Comment Letter, *supra* note 94, at 6, 9 (commenting that the proposed rules would make children's programming less effective, as well as make it harder for parents to find quality programming); NHMC Comment Letter, *supra* note 15, at 2 (commenting that in an ever-changing media marketplace, the CTA is the only safeguard for children's educational programming).

and the FCC needs to do a more thorough investigation into the potential impact into the changes of the rules.<sup>137</sup> Despite criticism from advocacy groups, the Commission is not being given enough credit with their deregulation process of the CTA.<sup>138</sup> Though the 2018 NPRM has already tentatively modified certain parts of the CTA, the Commission is utilizing the comments they have received to help in their deregulation process; this includes comments from the advocacy groups.<sup>139</sup> Though not everyone is going to agree with the changes, the majority of comments received have been supportive of the deregulation.<sup>140</sup>

### C. OTT Services and the Kid Vid Rule

With the dramatic changes in viewer habits, the Kid Vid Rule is in need of change.<sup>141</sup> The main purpose of the CTA is to promote positive children's programming, but this goal is moot when the majority of children are not watching broadcast television.<sup>142</sup> Families

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<sup>137</sup> See Johnson, *supra* note 12 (asserting that some Democrats, along with CTA advocate groups would like a more thorough fact-finding before implementing any change). Nevertheless, O'Rielly does have support for this proposed amendment to the CTA. *Id.*

<sup>138</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (noting that before the 2018 NPRM is finalized, the FCC is tentatively implementing rules, while waiting to receive comments on the proposal).

<sup>139</sup> See generally *ECFS Filing Results*, *supra* note 91 (listing all of the comments and responses received).

<sup>140</sup> See Nexstar Comment Letter, *supra* note 106, at 1 (supporting the deregulation of the Kid Vid Rule because the requirements have become onerous); ACA Comment Letter, *supra* note 90, at 1 (agreeing with the FCC's proposal to reduce recordkeeping requirements); ABC Comment Letter, *supra* note 104, at 2 ("The changes more than justify the rule changes proposed by the Commission, and supported by most of the comments, because they will serve the public interest.").

<sup>141</sup> See ABC Comment Letter, *supra* note 104, at 3 (emphasizing children's broadcast network viewing statistics). In 1991-1992, four million children watched broadcast television, however in 2017-2018, only 600,000 children watched broadcast television. *Id.* These numbers reflect *all* broadcast programming being watched by children, not just E/I programs. *Id.* See Press Release, FCC Pai, *supra* note 10 (adding that the FCC is revising the CTA to reflect today's media marketplace).

<sup>142</sup> See Watson, *supra* note 4 (asserting that children spend more time watching online television and using OTT providers than traditional television). In the fall of 2017, 37% of teenagers viewed video content on Netflix, and 29% on YouTube. *Id.*

are becoming increasingly frustrated by the lack of child-friendly content on broadcast and cable television, and thus are turning towards OTT services.<sup>143</sup> Children deserve to have high-quality programming, and OTT services are producing these types of educational and entertaining programs.<sup>144</sup> Though some commentators may argue that by amending the CTA, the FCC is allowing broadcast stations to decrease the amount of child-friendly content on television, a majority of households no longer have cable or watch broadcast television.<sup>145</sup> Instead, parents are solely subscribing to OTT services for their children's programming.<sup>146</sup> Further, as trends have shown, television viewing among adolescents is no longer stagnant, but mobile and fluid.<sup>147</sup> Children are watching television on a variety of devices—sometimes watching full length programs and other times watching

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*See* Press Release, FCC Pai, *supra* note 10 (stating that “rather than viewing programming live on broadcast TV, most children now watch educational content on non-broadcast platforms, and they prefer to do so”).

<sup>143</sup> *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 47 C.F.R. § 73 (2019) (“As of March 31, 2019, there were 270 more full-power commercial stations and 25 more noncommercial educational television stations than there were in 1990.”). *See generally* HENSON, *supra* note 5, at 11–12 (acknowledging how OTT services and applications are taking over, and setting forth recommendations to make them a stronger and safer platform for children).

<sup>144</sup> *See* Owen, *supra* note 93 (explaining how in the past decade broadcast networks have begun producing the bare minimum of children's programming that the FCC would allow, however, since this occurrence, streaming services have increased their kid friendly content).

<sup>145</sup> *See* CDD Comment Letter, *supra* note 15, at 10 (arguing that the 2018 NPRM asserts that core programming is no longer necessary, but the data relies on adults not children). *But see* Press Release, FCC O'Rielly (2019), *supra* note 18 (acknowledging that the changes to the Kid Vid Rule, only slightly change the overall framework of the rule). Broadcasters must still air 156 hours per year of Kid Vid programs. *Id.*

<sup>146</sup> *See* HENSON, *supra* note 5, at 3 (citing how hundreds of thousands of former cable subscribers are cutting the cord and only subscribing to OTT services).

<sup>147</sup> *See* CLICKS, TAPS & SWIPES, *supra* note 95, at 8 (“Kids are looking for endless content that meets their specific interests and passions . . . [t]hey are looking for endless interactivity with the devices and peripherals that surround them—activated by motion, click, tap or swipe.”); Guichard, *supra* note 117 (explaining how the world has gone mobile).

quick segments.<sup>148</sup> Television companies are being advised to produce “shorter, more targeted and less structured content” to follow the trends of adolescent viewers, and the FCC is merely attempting to amend the Kid Vid Rule in the same manner.<sup>149</sup>

#### *D. Low-Income Families and OTT Services*

With scaling back the CTA, concerns have been voiced about children from low-income families being neglected.<sup>150</sup> Unfortunately, OTT services do come with extra costs other than subscription fees.<sup>151</sup> When these costs are taken into consideration, it could seem unreasonable for a low-income family to be able to afford anything other than broadcast television.<sup>152</sup> Regardless, the FCC is not getting rid of the CTA, but the Commission is merely reevaluating the guidelines and requirements for educational programming.<sup>153</sup>

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<sup>148</sup> See NAB Comment Letter, *supra* note 112, at 11–12 (mentioning the ever-evolving viewing habits of adolescents due to new technology consistently being produced).

<sup>149</sup> See Network Comment Letter, *supra* note 90, at 2 (purporting how “children’s programming [is] available on non-broadcast platforms—including full-time children’s cable channels, over-the-top platforms serving both original and previously-aired children’s programming, and numerous online sites that provide educational and informational content for children”). See ABC Comment Letter, *supra* note 104, at 3 (adding that children no longer follow scheduled programming, but instead now make their own viewing schedules).

<sup>150</sup> See CDD Comment Letter, *supra* note 15, at 2 (acknowledging that many rural and low-income families cannot afford alternative programs). See NHMC Comment Letter, *supra* note 15, at 11 (stressing the importance of ensuring that rural and low-income families will continue to receive sufficient E/I programming before deregulating the CTA). *But see* 47 C.F.R. § 73 (2019) (highlighting the importance of multicasting for rural and low-income families).

<sup>151</sup> See CDD Comment Letter, *supra* note 15, at 20 (discussing the additional expenses of OTT programs). Along with subscription fees, OTT programs need either a smartphone, smart television, laptop, or tablet. *Id.* at 22. Research has found that families struggling to make ends meet cannot afford these subscriptions or technological devices. *Id.*

<sup>152</sup> See *id.* (noting that low-income families that do have broadband are more likely to have cheaper internet plans and less expensive packages). These types of broadband packages tend to not have enough Mbps to be able to work properly with activities that require a lot of data. *Id.*

<sup>153</sup> See Jacobson, *supra* note 13 (concluding that as far as the Commissioner is concerned the requirements of the CTA are “ineffective and burdensome”). See 47 C.F.R. § 73 (2019) (noting that some commentators are criticizing the FCC’s reliance

Children's programming continues to be scrutinized under a public interest standard, thus networks continue to be committed to serving all children.<sup>154</sup> Since children from low-income households tend to be exposed to more television, they greatly benefit from E/I programs.<sup>155</sup> Through the innovations of technology, children of low-income families will continue to benefit from E/I programs with the use of multicast streams, such as PBS KIDS.<sup>156</sup> Multicast streams allow broadcast stations to air programs on different channels that are free to the public.<sup>157</sup> This furthers the reasoning behind the need for the deregulation of the CTA because society's technological advancements are already enabling broadcasters to serve the needs of children, and lessen the need for such strict regulation.<sup>158</sup>

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on non-broadcast platforms). Nevertheless, broadcast networks and non-broadcast networks both face the same hurdle of providing educational programming as well as entertainment. *Id.*

<sup>154</sup> See NCTA Comment Letter, *supra* note 89, at 1 (expressing how networks have spent many years and a lot of money on children's programs, and will continue even with rule restructuring). See Press Release, FCC Pai, *supra* note 10 (ensuring that children of rural and low-income families will continue to have E/I programs available to them). PBS and ION air hundreds of hours of children's programming over a multicast stream, which was adopted after the CTA, and will not be affected after this amendment. *Id.* See Press Release, FCC O'Rielly (2019), *supra* note 18 (adding "two-thirds of the programming must still be aired on a primary stream").

<sup>155</sup> See Fletcher et al., *supra* note 98, at 421 (indicating that television is utilized as an activity for children of low-income families to keep the child occupied while the parent, or parents, work or get a degree).

<sup>156</sup> See Lyons, *supra* note 16 (acknowledging that PBS is known for its educational content, and even more its children's programming). PBS has exceeded the core programming Kid Vid requirement with the amount of E/I cable or OTT services. *Id.*

<sup>157</sup> See *Rethinking the CTA for a Digital Media Age*, *supra* note 80, at 50 (highlighting how multicasting has given parents and children a multitude of broadcast and non-broadcast children's programming). See also 47 C.F.R. § 73 (2019) (mentioning the plethora of cable channels, OTT services, and online websites that provide informational and educational children's programs and content).

<sup>158</sup> See *Rethinking the CTA for a Digital Media Age*, *supra* note 80, at 77 (asserting how the digital era promised new opportunities to broadcasters). See also 47 C.F.R. § 73 (2019) ("The marketplace for children's programming has undergone a dramatic transformation since the passage of the CTA in 1990.").

Still, the Commission should be careful when eliminating the Core Programming guideline applicable to multicasting stations.<sup>159</sup> History shows that without full guidelines, broadcasters can forget their purpose.<sup>160</sup> Prior to the passing of the CTA, the FCC gave broadcasters full discretion by following a free-market approach.<sup>161</sup> This approach was unsuccessful and broadcasters were neglecting their duties to children.<sup>162</sup> Thus, the Commission should continue to pay close attention to broadcasters keeping up with multicast channels for children, and maintaining the purpose of the CTA.<sup>163</sup>

#### *E. Proposed Changes to the CTA and OTT Services*

The FCC's proposed changes seem more drastic in theory than they are in practice.<sup>164</sup> Though the CTA has many facets, Core Programming has always been the focal point of the regulation.<sup>165</sup> The FCC's decision to adjust Core Programming from three hours to at least thirty minutes and eliminate regularly scheduled programming does not destroy the purpose of the CTA.<sup>166</sup> First, cable television is

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<sup>159</sup> See CDD Comment Letter, *supra* note 15, at 10 (noting that if networks stop following the Core Programming multicast guidelines, it could result in a loss of 16,500 hours of Core Programming). *But see* Press Release, FCC O'Rielly (2019), *supra* note 18 (asserting that he has been informed by both PBS Kids and Ion Television's Qubo that both fully intend to continue airing 24/7 kids' content).

<sup>160</sup> See Conley, *supra* note 19, at 51 (reviewing how when broadcasters were left to their own devices, they did not produce enough children's programming, thus enforcing the need for the CTA).

<sup>161</sup> See Fitzpatrick, *supra* note 32, at 775 (recalling the approach for regulating television in the 1980s to be a decrease in government intervention).

<sup>162</sup> See *id.* (reasoning that Congress enacted the CTA because the market theory of deregulation was ineffective). See ADVISORY COMMITTEE, *supra* note 19, at 13 (pointing out that even with less government involvement, the networks still had an obligation to act in the public interest).

<sup>163</sup> See *Rethinking the CTA for a Digital Media Age*, *supra* note 80, at 45 (highlighting how multicasting was just the beginning for giving broadcasters more flexibility in airing children's programming).

<sup>164</sup> See Cadillac Comment Letter, *supra* note 64, at 5–6 (emphasizing how children are already relying on different platforms for viewing television).

<sup>165</sup> See Press Release, FCC O'Rielly (2019), *supra* note 18 (noting that networks will still have to air core educational programming, but in forms such as after-school specials and short form shows).

<sup>166</sup> See NCTA Comment Letter, *supra* note 89, at 1 (providing that the flexibility will allow broadcasters to adjust more easily to the rapidly changing environment of

not regulated by the FCC when it comes to educational programming.<sup>167</sup> When a child is watching Disney Channel or Nickelodeon, he or she is watching cable television, which is completely unassociated with the CTA guidelines.<sup>168</sup> Additionally, OTT services have created a substantial platform for child-friendly content.<sup>169</sup> The purpose of Core Programming was to ensure that children's programming had a platform; however, cable channels and OTT services overtook this platform.<sup>170</sup> Lastly, children's educational programming on broadcast networks has already been depleted.<sup>171</sup> Broadcast stations are producing the bare minimum to pass the CTA guidelines, but children are not suffering.<sup>172</sup> This enforces the FCC's decision to deregulate the CTA in lieu of OTT services.<sup>173</sup> Children are no longer loyal to traditional television because of the flexibility given to them through the use of OTT services.<sup>174</sup>

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children's programming). *See also* Gray Comment Letter, *supra* note 90, at 7 (setting forth that by allowing Core Programming to be aired through a channel that is not the primary stream will alleviate the issues networks are facing with preemption). *See* Press Release, FCC O'Rielly (2019), *supra* note 18 (adding that the thirty-minute gold standard was established in 1996 when broadcast television dominated).

<sup>167</sup> *See* CDD Comment Letter, *supra* note 15, at 6 (indicating the FCC did not impose the duty to provide educational children's programming to cable television). The FCC did impose this duty on broadcast television because of its free use of public airwaves as public interest licensees. *Id.*

<sup>168</sup> *See* Herman, *supra* note 11 (establishing that cable television has produced a plethora of channels that are appropriate for all ages).

<sup>169</sup> *See* Boone, *supra* note 1 (recognizing as time progressed cartoons went from mornings to afternoons to cable television, to eventually OTT providers).

<sup>170</sup> *See* 47 C.F.R. § 73 (2019) ("[F]rom 2000 to 2017, children's viewing of broadcast television has dropped from an average of 115 minutes to 37 minutes per day while their viewing of internet-based content has increased from an average of two minutes to 123 minutes per day.").

<sup>171</sup> *See* Owen, *supra* note 93 (recalling how broadcast networks were no longer producing strong child-friendly content).

<sup>172</sup> *See id.* (noting with the digression of E/I programs on broadcast networks, there has been an influx on streaming services). *See* Kane, *supra* note 102 (pointing out the different children programs that can be watched on various OTT streaming services).

<sup>173</sup> *See* Harvey, *supra* note 123 (explaining how "OTT streaming is changing media").

<sup>174</sup> *See* Owen, *supra* note 93 ("If kids and family is not an audience you serve, there's going to be a limit to how many subscribers you're ever going to have."). OTT services provide programming and flexibility to children, and children provide the

The 2018 NPRM has also proposed that the E/I logo, which identifies Core Programming, no longer be required.<sup>175</sup> The CTA is meant to enforce E/I children's programming, and the use of the E/I logo was able to help further enforce this purpose.<sup>176</sup> In 2004, seeing the E/I logo may have been helpful for parents, but with the emergence of OTT services, parents merely need to look through the children and family sections to find a show for their child.<sup>177</sup> This would also affirm the FCC's decision to eliminate the requirement providing identifying information on children's programming for program guides.<sup>178</sup> Further, if parents are not utilizing OTT services, then they are more likely to turn on a channel that is already geared solely toward children (i.e., Disney Channel, Nickelodeon, Freeform, etc.).<sup>179</sup>

Moreover, the FCC is not eliminating children's programming and has already brainstormed new ideas.<sup>180</sup> The Commission is proposing options such as public service announcements ("PSA"), short-form programs, and regularly scheduled non-weekly programs.<sup>181</sup> Broadcast networks such as ABC and CBS used to air

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audience, and thus the necessity for streaming services to produce valuable children's content. *Id.*

<sup>175</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35163 (addressing how the E/I symbol tends to obstruct viewing, especially on smaller television sets, which poses an issue). But, the question arises as to how parents will be able to identify E/I programs without the logo. *Id.*

<sup>176</sup> See *id.* (explaining the purpose of the E/I logo was to help parents easily identify children's educational programming).

<sup>177</sup> See HENSON, *supra* note 5, at 2 (discussing different types of OTT services and the family friendly content that is provided).

<sup>178</sup> See Network Comment Letter, *supra* note 90, at 7 (outlining the many other forms of finding children's programs than program guides, such as newspapers, internet searches, television guides, and other devices).

<sup>179</sup> See Herman, *supra* note 11 (describing the best family-friendly channels, along with descriptions of shows that are aired on those channels).

<sup>180</sup> See Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35158 (discussing the changes being made to the CTA, along with new ideas for continuing to provide children's educational programming).

<sup>181</sup> See CDD Comment Letter, *supra* note 15, at 11 (arguing that by removing the three-hour guideline, it would be reverting back to when broadcasters had too much flexibility and not enough children's educational television programs). *But see* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35162 (noting that the public interest can still be

after-school specials that tackled controversial or socially relevant issues, which had a big following among children.<sup>182</sup> Nonetheless, these programs were cut because they did not meet Core Programming guidelines.<sup>183</sup> Currently, similar types of programs could be the solution to preemption because shorter segments would mean less conflict, such as dealing with program rescheduling.<sup>184</sup> The flexibility given to broadcasters by the 2018 NPRM is the main reason for the resistance to the Kid Vid deregulation, but viewership is already on the decline, and tightening regulations will not solve this issue in of itself.<sup>185</sup>

The FCC is aware that OTT services are the solution to dissipate the fear of too much flexibility.<sup>186</sup> OTT services are constantly adding programs that have educational and informational merit.<sup>187</sup> For instance, Netflix and Hulu produce their own children's programs, and children no longer have to worry about missing an episode, or a lesson being taught within that episode.<sup>188</sup> While the CTA is meant to protect and educate children through the use of

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satisfied with short programs). For instance, *Schoolhouse Rock* and *In the News* used to be very popular children's educational programming. *Id.*

<sup>182</sup> *See id.* at 35171 (discussing the options to allow broadcasters to satisfy their children's programming obligations with special sponsorships). No longer needing the approval of the full Commission, but instead the Media Bureau staff. *Id.* *See* Onwuka, *supra* note 13 (commenting that by deregulating the Kid Vid Rule, it could bolster new ideas for children's programming).

<sup>183</sup> *See id.* (noting a disadvantage of Core Programming).

<sup>184</sup> *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35169 (explaining that by revising the policy regarding preemption, it would provide flexibility to broadcasters).

<sup>185</sup> *See* CDD Comment Letter, *supra* note 15, at 11 (asserting that the Center for Digital Democracy has already voiced their concerns about giving the broadcasters too much flexibility).

<sup>186</sup> *See* Children's Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (highlighting how viewers no longer watch the same show on the same channel at the same time every week, but instead watch the program after it has aired); Press Release, FCC O'Rielly (2019), *supra* note 18 (stating that "[t]his flexibility also better reflects the current video marketplace where viewers tend to watch video on demand or in large quantities, so-called 'binge-watching'").

<sup>187</sup> *See* Owen, *supra* note 93 (discussing how OTT services have been rolling out original children's content for several years).

<sup>188</sup> *See id.* (highlighting how streaming services eliminate timeslots, and allow children a wider array of educational programming at any time).

television, parents also want to know that their children are watching beneficial programming.<sup>189</sup> Unfortunately, entertainment and educational programming can get crossed; sometimes programs become more entertaining than they are educational.<sup>190</sup> Nevertheless, cable channels, geared particularly for children, as well as OTT services, are consistently producing new shows.<sup>191</sup> For example, OTT services have a plethora of educational shows varying from a wide range of ages, such as *Wishenpoof!* on Amazon (ages four and up) and *Our Planet* on Netflix (suitable for all ages).<sup>192</sup> OTT services have become the new norm for most children, and the FCC is only going to continue to watch these viewing patterns rise.<sup>193</sup>

Furthermore, OTT services want to continue to thrive and satisfy all audiences, especially children.<sup>194</sup> Although all OTT providers have parental controls, the parental controls are not fool proof.<sup>195</sup> Moreover, though certain OTT providers have limited advertisements and commercials, the content is not regulated for

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<sup>189</sup> See HENSON, *supra* note 5, at 2 (indicating that parents are searching for the best place to find child-friendly content). Though Henson can agree that OTT services have strong family-friendly content, these video services give children too much leeway to be able to obtain content that is not age appropriate. *Id.* at 4.

<sup>190</sup> See Calvert & Kotler, *supra* note 34, at 325 (explaining how even with the three-hour rule in place, broadcasters managed to produce more prosocial programs than academically oriented programs).

<sup>191</sup> See Boone, *supra* note 1 (describing how in the mid-1990s cable television entered many American households, and with it brought dozens of niche channels). Of these channels, there were multiples that only showed nothing but children friendly content all the time. *Id.*

<sup>192</sup> See Chen, *supra* note 102 (mentioning Disney Plus, and how they are not only streaming all of Disney's movies and shows, but are also producing all new exclusive original programming). For example, one of their new programs will follow around Jeff Goldblum as he travels the world and explores different subjects, while another new program "pays tribute to extraordinary children who have helped their community." *Id.*

<sup>193</sup> See Watson, *supra* note 4 (highlighting that twenty-six million people living in households use OTT services to watch children's programming).

<sup>194</sup> See Owen, *supra* note 93 (noting that streaming services establish their own brand, and are continuously evolving). Streaming services maintain a full assortment of programs to maintain subscribers. *Id.*; Jacobson, *supra* note 13 (noting the popularity that OTT services are having in regards to children's programming).

<sup>195</sup> See HENSON, *supra* note 5, at 2 (analyzing OTT providers and the parental controls, as well as how to set them up and which services have the best parental controls).

specific audiences.<sup>196</sup> But, there are more ways for parents to regulate and restrict their child’s ability to view mature content with OTT services than with broadcast television regulated by the CTA.<sup>197</sup> The regulations in the CTA are no longer relevant to broadcast television because broadcast television is becoming irrelevant to children.<sup>198</sup>

## V. Conclusion

For many years now, the FCC has been regulating a dying trend—children’s educational programs on broadcast networks. When there was once a need for the CTA and the regulations that it encompassed, there is now a need for a shift in focus. Broadcast television is no longer the new normal, and has been replaced with OTT services. OTT providers are producing a plethora of entertaining and educational children’s programming, all without FCC regulations. OTT services have demonstrated the wide range of benefits that they can provide in the category of children’s educational programs, but these services do not come without their faults. Thus, it will be crucial for the FCC to continue monitoring children’s television programming, and making sure that children’s needs in regards to educational programming are continuing to be met. The CTA was implemented to protect children and give them an outlet to advance

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<sup>196</sup> See CDD Comment Letter, *supra* note 15, at 23 (noting that streaming services do not adhere to specific commercials and advertisements depending on the program); *but see* Patel, *supra* note 5 (depending on the OTT service, commercials and advertisements may not be applicable).

<sup>197</sup> See Turner, *supra* note 119 (expressing how to protect children while using OTT streaming services). See Fitzpatrick, *supra* note 32, at 781 (explaining how the CTA has failed in many regards including keeping children away from violent and inappropriate content).

<sup>198</sup> See Press Release, FCC O’Rielly (2018), *supra* note 6 (asserting the purpose of this 2018 review is to modernize media regulations); Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 47 C.F.R. § 73 (2019) (noting in the final *Report and Order*, “[the FCC] take[s] steps to modernize the children’s television programming rules and give broadcasters greater flexibility in serving the educational and informational needs of children”); Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 83 Fed. Reg. at 143,35159 (providing that with all of the television viewing options that allow broadcasters more flexibility also allow them to provide a host of alternative children’s programming). See Owen, *supra* note 93 (acknowledging that streaming services maintain a full assortment of programs to maintain subscribers).

their knowledge through entertaining and educational television programming, but the fear is the effect this deregulation may have on children. Nevertheless, OTT services are still giving children the same opportunities. Television viewing has advanced, and the FCC is merely choosing to adapt to this change instead of getting left behind.