

Broadcast Television Station Reminder: FCC Form 398 Children's Programming Quarterly Reports due Oct. 10

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By Oct. 10, 2011, all commercial full-power television stations and Class A LPTV stations must prepare and file an FCC Form 398 Children's Programming Report for the Third Quarter of 2011 with the FCC. By this date, stations must also prepare and place in their public inspection files documentation sufficient to demonstrate their compliance with the limitations on the amount of commercial matter during children's programming.

Children's programming summary

Under the Commission's rules, commercial full-power television stations and Class A low-power television (LPTV) stations are required to air programming that is responsive to the educational and informational needs of children aged 16 and younger. Under the Commission's current license renewal guidelines, stations are generally required to air an average of at least three (3.0) hours of core children's programming per week during the calendar quarter.

In general, core children's television programming is defined as programming that is designed to meet the educational and informational needs of children aged 16 years or younger as one of its significant purposes, that is at least 30 minutes in length, that is identified throughout the program with the educational/informational (E/I) symbol, and that is aired weekly at a regularly scheduled time between the hours of 7 a.m. and 10 p.m. Furthermore, the programming must be identified at the time of airing and to program guide publishers as being "core programming" designed for a specific age range of children.

The three-hours-per-week core-programming guideline applies to both digital television (DTV) stations and analog stations (such as Class A low-power television stations that have not yet converted to digital). For DTV stations that choose to multicast other program streams in addition to the main digital program stream, the Commission's rules require an additional amount of core children's programming in proportion to the amount of additional free programming offered on the multicast channels.

Under the Commission's rules, the amount of children's programming required for DTV stations increases in proportion to the additional hours of free programming offered on the multicast channels, up to an additional three hours per week for each 24-hour free multicast stream. Specifically, for every 28 hours, or portion thereof, of free video programming provided by a DTV station on an additional digital stream per week, the station is required to provide an additional 0.5 hours of children's programming per

week, up to a maximum of three hours per week for a station providing a programming stream 24 hours a day, seven days a week. For each additional free digital programming stream, the same analysis would apply.

The FCC's rules also contain limitations on the extent to which a station can simply repeat children's programming from one multicast channel to another and still claim credit for the program. Under the Commission's rules, at least 50 percent of the core programming counted toward meeting the additional programming guideline cannot consist of program episodes that have already aired within the previous seven days on either the station's main digital program stream or on another of the station's free digital program streams. The FCC Form 398 has been updated to require licensees to certify as to their compliance with the limit on repeats under this guideline.

Please note that during the digital transition, any core children's program that aired on both the analog and the main digital program stream was not considered a repeat of the same program. Also exempt was any program stream that merely time-shifts the entire programming line-up to another program stream. However, to the extent that a station broadcasts additional digital programming streams beyond the main channel or beyond the simple time delay of the simulcast signal, the Commission's limitations on repeating children's programming will apply.

The quarterly children's programming report and commercial limitations certification, described further below, are critical to show a station's compliance with these important programming rules. Stations have often been fined at renewal time for insufficient documentation to support their compliance with the children's rules or for missing documentation for any quarters during the license term. Accordingly, stations should prepare and maintain carefully all quarterly FCC Form 398s and commercial limitation certifications consistent with the Commission's rules.

FCC Form 398

To confirm that stations are meeting their children's programming requirements, within 10 days after the end of each calendar quarter, stations must prepare and file an FCC Form 398 Children's Programming Report with the FCC. By that day, stations must also place this report in their public inspection file. For the Third Quarter of 2011, the Form 398 must be filed with the FCC and placed in the station's public inspection file by Oct. 10, 2011. The Form 398 must be prepared and filed electronically on the Commission's Web site. Please note, the FCC has not yet revised its Form 398 to reflect the end of analog broadcasting for full-power television stations.

Stations are also reminded that periodically they should publicize the existence and location of these quarterly children's programming reports. While currently there is no prescribed language or manner for informing the community about these reports, we recommend airing a commercial spot at least twice a month announcing that the station prepares and files an FCC Form 398 with the FCC on a quarterly basis, which reports

on the station's children's programming efforts during the previous calendar quarter. These announcements should also inform viewers that the reports are available for review on the FCC's Web site or at the station's main studio. Posting the report or a link to the FCC's Web site on the station's own Web site is also a good way to publicize the existence and location of the Children's Programming Reports.

In addition, stations are reminded that the FCC's rules require broadcasters to provide on-air identification of core programs that are specifically designed to educate and inform children. Thus, at the beginning of each core children's program, stations should announce that the upcoming program satisfies the Commission's core children's programming requirements. Furthermore, core children's programming must also contain the E/I symbol or "bug" superimposed on the program to identify the program as meeting the educational and informational needs of children. The revised Form 398 now includes a question requiring certification that the symbol was included during each particular core program.

Commercial limits

In addition to broadcasting programming responsive to the educational and informational needs of children, the Commission's rules limit the amount of commercial material that can be aired during programming aimed at children. Specifically, the rules state that "no commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays." In order to demonstrate compliance with this rule, stations must prepare and place proof of compliance with the commercial limitations in the public inspection file by the tenth day of the month following the end of the calendar quarter. *So for the Third Quarter of 2011, proof of compliance with the children's television commercial limitations must be placed in stations' public inspection files by Oct. 10, 2011.*

Documentation confirming that the station has met the requirement can be kept in several different forms. Stations may keep program logs demonstrating compliance with the commercial limitations; however, if the logs are kept to satisfy the documentation requirement they must be placed in the public inspection file. Stations may also keep tapes sufficient to demonstrate compliance, and must make the tapes available for review upon request by a member of the public. Alternatively, stations may maintain lists of the number of commercial minutes per hour aired during children's programs, including a detailed listing of any overages. Such lists should be reviewed routinely by the station manager or program manager to ensure accuracy. Finally, the station (or the network or program syndicator) may certify that as a standard practice, the station, network or syndicator formats and airs identified children's programs so as to comply with the limit on commercials in children's programming.

The station, network or syndicator should provide a detailed list of any overage, and the station manager or program manager should routinely review the certification and any

overages to ensure accuracy. If the station chooses to document its compliance with the commercial limits by means of a list of programs and overages, or by using certifications, such lists or certifications must be prepared, reviewed and placed in the station's public inspection file by the 10th of the month following the end of each quarter.

Stations are reminded that they must identify the programs that are subject to the rule and any overages that have occurred. In addition, it is noted that while children's programming can be aimed at serving the educational and information needs of children up to 16 years of age, the commercial limits apply only to programs originally produced and broadcast primarily for an audience of children aged 12 and under.

Noncommercial stations

Given they do not air commercials, noncommercial stations are not subject to the commercial limitation rules, and thus do not have to maintain commercial limits documentation in their public inspection files. Similarly, noncommercial stations are exempt from the requirement to prepare and file Form 398 reports with the FCC. However, noncommercial stations must still air programming responsive to the educational and informational needs of children, and must maintain evidence of their compliance with this programming requirement should the station face a challenge at renewal time.

For more information about the FCC's children's television programming rules, or for assistance in preparing and filing your Form 398, please contact any of the lawyers in the Davis Wright Tremaine LLP Broadcast Group.

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