

programming performance that would be entertained would be those questioning the *bona fides* of a licensee's claim to have met the processing guideline. A licensee that did not meet the processing guideline would have its application referred to the Commission for consideration and would have the opportunity to demonstrate that it had complied with the CTA in other ways. The Commission would then evaluate such a licensee's performance based on its overall efforts and other circumstances. Failure to meet the guideline would thus result in greater review of the application, but would not constitute a *de facto* violation of the Commission's rules.

13. Given the results of the studies submitted in the record thus far, and allowing for the possibility that these studies may be somewhat flawed, the Commission is currently inclined to think that, if a processing guideline is adopted, it should be set at 3 hours per week of core programming, at least initially. The Commission seeks comment on this suggestion and on whether, if a processing guideline is adopted, it should be increased in stages over time. If the Commission adopts a phased-in processing guideline, what should the ultimate level of the guideline be, and over what period of time should it be phased in? One possibility would be to increase the guideline by increments of the half hour each year until reaching a level of 5 hours of core programming per week.

14. A third option would be to establish a standard requiring that every station be responsible for the airing of a minimum amount of core programming in its market. Stations meeting this requirement would qualify for staff approval of the children's programming portion of their license renewal application. Those not meeting the standard would have their applications referred to the Commission for determination of the appropriate remedy. Notwithstanding failure to meet the standard, the Commission could hold that the licensee had in fact complied with the CTA's requirements. However, a licensee failing to meet a standard would have a much heavier burden to show that it complied with the CTA than would be the case if it did not meet a processing guideline. Thus, a licensee failing to meet a standard would have to make a compelling showing that the qualifying programming it did air, along with any of its other programming-related activities in its market, served the educational and informational needs of children in that market as well as or better than an additional amount of

programming specifically designed to serve the educational and informational needs of children. Again, the Commission believes that, given the current level of programming documented by the data submitted, the appropriate level of a programming requirement would be 3 hours of core programming per week, at least initially. The Commission seeks comment on this suggestion and, as with the option of a processing guideline, interested parties are invited to comment on whether it would be appropriate to increase the requirement by, for example, one half hour each year until a requirement of 5 hours of core programming per week is established. A programming standard, or rule, may be easier to administer and would give the Commission a broader range of sanctions than a processing guideline. The Commission solicits comment on these and other factors differentiating a processing guideline from a standard.

15. There are a number of questions on which the Commission seeks comment that are raised by both the option of a safe harbor processing guideline and that of a programming standard. First, comment is sought on the Commission's suggestion of a weekly processing guideline or programming standard averaged over a specified period, and the Commission asks for ideas as to the period of time over which a guideline or standard should be averaged. The Commission also seeks comment on the extent to which repeats during a weekly schedule and later reruns of programs should be counted toward fulfillment of any processing guideline or programming requirement that might be adopted. Second, the Commission seeks comment as to whether a processing guideline or programming requirement should be the same for all stations regardless of station type or market size. Third, it has been publicly suggested that to give stations an incentive to air high-quality programming, a programming requirement should be based entirely on a certain amount of rating points. The Commission invites comment on this suggestion and on whether it would be appropriate for either a processing guideline or a programming standard.

16. Finally, interested parties are asked to provide the Commission with further data and related information. The Commission requests in particular detailed information regarding any potential opportunity costs (*i.e.*, the difference in profits from children's educational programming and from other programming that might be aired instead) for broadcasters that would be created by the implementation of a

processing guideline or programming requiring set at various levels. More specifically, the Commission requests that commenters provide us with one or more studies that quantify any such costs for stations in different sized markets, as well as for the broadcasting industry as a whole. The Commission urges commenters to ensure that the sample data used to develop estimates of any opportunity costs that stations might face are representative and that the methodology used to develop the estimates is clearly explained. The Commission also reiterates to all interested parties the importance of providing information and studies, in addition to those already on record, documenting changes in the nature and amount of children's educational programming on the air, especially recently. In providing such studies, commenters should bear in mind that the utility of the material already presented to us in this inquiry is limited. For example, the results of certain station surveys accept at face value station claims as to the educational consent of their programming, and our experience with such claims suggests that the figures produced by these studies may be inflated. The Commission notes that if data were submitted that show that the educational and informational needs of children are being met consistent with the goals of the CTA, we would reassess the need for further action.

17. In weighing alternatives for further Commission action, the Commission must consider any limitations imposed by the First Amendment of the Constitution. Even assuming that the Commission's proposals were found to be content-based restrictions on speech, some restrictions on content have been judged permissible when applied to broadcasting because of the scarcity of frequencies and broadcasters' concomitant duty to provide public service. To be consistent with the First Amendment, content-based restrictions on speech in the broadcasting context must be narrowly tailored to further a substantial government interest. The Commission tentatively concludes, and the case law suggests, that the government has a substantial interest in furthering the education and welfare of children through implementation of the CTA. The courts have held that there is a compelling government interest in "safeguarding the physical and psychological well being of a minor."³

³ *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n. 18 (D.C. Cir. 1988) and Supreme Court Cases cited therein.