PASSION, POLITICS AND THE PUBLIC INTEREST: THE PERILOUS PATH TO A QUANTITATIVE STANDARD IN THE REGULATION OF CHILDREN’S TELEVISION PROGRAMMING

James J. Popham*

According to the brave description of American administrative law scholars, the FCC is called an "independent agency." This means that formally we belong neither to the Executive branch — we are not a Cabinet agency nor report to one — nor to the Legislative Branch. Rather, we follow a statutory mandate from the Congress, and have staff of civil servants to carry it out.

So much for the theory.¹

Regulation of television programming reached a watershed with the adoption of the Federal Communications Commission’s (“FCC” or “Commission”) latest rules implementing the Children’s Television Act of 1990 (“Act”).² For the first time since the FCC deregulated broadcast services over a decade ago,³ the Commission defined one element of a broadcast television station licensee’s obligation to operate in the public interest in quantitative terms.⁴ It adopted a so-called processing guideline which essentially provides that television stations which broadcast three-hours-per-week of programming “specifically designed” to serve the educational and informational needs of children will be found in compliance with the their general obligation under the Act.⁵ The new rules emerged from a titanic struggle in which quantification became the focal issue. Children’s advocates touted quantification as the only effective means of provoking the broadcast industry to increase the amount of educational programming for children.⁶ Broadcasters saw quantification as anathema, an intrusive government edict intolerable under the First Amendment.⁷ Now, the zealous advocates of quantification are trumpeting a significant vic-

* James J. Popham is Vice President, General Counsel of the Association of Local Television Stations, which represents the interests of stations not affiliated with the three established networks (ABC, CBS and NBC). Mr. Popham previously served as Vice-President, Congressional Relations and Deputy General Counsel of the National Association of Broadcasters (1972-82). The author wishes to thank Jo P. Popham, Legal Assistant in the CBS Washington Office for her invaluable research, insight, editorial assistance, support and encouragement in the preparation of this article. The views expressed are strictly those of the author.

¹ FCC Chairman Reed E. Hundt, Reshaping Regulation, Remarks Before the Munich Circle Conference 1 (Sept. 25, 1995) (challenging the theory that the FCC is an independent agency) [hereinafter Hundt Munich Conference Remarks].


³ See e.g., In re The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Sta-

⁴ 1996 Report and Order, supra note 2, para. 1.

⁵ Id. para. 115; see also Broadcast Services; Children’s Television, 61 Fed. Reg. 43,981, 43,998 (1996) (to be codified at 47 CFR § 73.671(c)). The other salient feature of the Commission’s order was a new, strict definition of “programming specifically designed to serve the educational and informational needs of children,” which the Commission has chosen to refer to as “core” educational programming. 1996 Report and Order, paras. 73-76.

⁶ See, e.g., Comments of Center for Media Education to the Notice of Proposed Rulemaking in MM Dkt. No. 93-48, at 11-14, 17 (Oct. 16, 1995).

⁷ See, e.g., Comments of the National Association of Broadcasters to the Notice of Proposed Rulemaking in MM Dkt. No. 93-48, at 26 (Oct. 16, 1995) [hereinafter NAB Comments]. In the ultimate compromise NAB undoubtedly swallowed hard in accepting even a quantitative processing guideline.
tory. At the same time, many who have carried the banner of broadcasters' resistance to quantification over the years are wondering why an idea successfully resisted for so long suddenly gained sufficient momentum to become enshrined in the FCC rules. The simple answer is a confluence of passionately pursued good intentions and effectively leveraged political forces which gave quantification unprecedented momentum. Neither of these factors, however, assure a sound result. To the contrary, they raise danger signals which dictate an especially skeptical attitude about the results they have spawned. Furthermore, the new rules are the product of raw political compromise. This also prompts questions and a concern that tenets of sound decisionmaking have been abandoned in favor of political expediency. A final reason for concern arises from the nature of the debate. Despite some extraordinarily fruitful moments, the FCC's deliberations over the quantification question often better resembled a bench clearing brawl between two minor league teams struggling to stay out of last place on the final day of the season, than a rational exchange among principled advocates on the opposing sides of the issue.

I. A BRIEF HISTORY OF CHILDREN'S TELEVISION PROGRAM REGULATION

The issue of quantifying local television stations' obligation to provide educational and informational programming for children hardly was new to the Commission in 1996. More than twenty-five years ago, the same parties which proclaimed victory on August 8, petitioned the FCC to require stations to broadcast fourteen hours per week of children's programming. Ten months later a divided Commission issued a Notice of Inquiry and Notice of Proposed Rule Making, thereby initiating a proceeding which was to last for thirteen years. Foreshadowing the controversy which was to dog the issue, three commis-

9 No doubt ought to exist that in the matter of quantitative standards, for both sides, it was indeed "the principle of the thing." As a practical matter, the magnitude of the victory on one side and the defeat on the other appears marginal. Indeed, the victory may well be pyrrhic for children's advocates. For broadcasters, the defeat in practical terms was indeed "the principle of the thing." As a practical matter, the magnitude of the victory for both sides, it was indeed "the principle of the thing." As a practical matter, the magnitude of the victory on one side and the defeat on the other appears marginal. Indeed, the victory may well be pyrrhic for children's advocates. For broadcasters, the defeat in practical terms may well better resemble a victory when all is said and done.

10 As former Commissioner Glen Robinson once observed in this very context: There is an especially seductive appeal to the idea of "protecting" children against television. There are areas where the prospect of governmental control of programming has only to be suggested to evoke opposition and antipathy. This is not one of them. It is with respect to children's television that our strongest instinct is to reach out and put the clamp of governmental control on programming. For this reason, regulation of children's programming raises the most subtle and the most sensitive of problems. Everyone recognizes the free speech dangers of governmental control of political broadcasting. Not enough people appreciate the far more subtle problem of governmental control when it is extended into an area like this one, where there is widespread popular sentiment supporting some measure of governmental control. But if the First Amendment is to mean anything at all, it obviously does not mean that we can make judgments on the basis of majoritarian sentiment alone.

In re Petition of Action for Children's Television (ACT) for Rule Making 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, Notice of Inquiry and Notice of Proposed Rule Making, 28 FCC 2d 368, 368-69 (1971) (referring to Petition for Rule Making of the ACT, RM 1569 (Feb. 5, 1970) [hereinafter 1971 Notice]. Ten years earlier, the FCC's first recognition of a licensee's responsibility to provide programming which served the needs of children. Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 FCC 2308 (1960). The ACT petition further requested that neither sponsorship of nor commercials on children's programming be allowed and that performers on children's programming be forbidden to mention products, services, or stores during children's programming. Id. With respect to children's programming, ACT asked that programming be directed to specific age groups during specified dayparts (e.g., primary, ages 6-9, programming between 4 p.m. and 8 p.m. daily and between 8 a.m. and 8 p.m. on weekends). Id.

11 Such compromises also reduce the prospects for judicial review. In this case, the most likely antagonist of the Commission's new rules, the National Association of Broadcasters, has committed not to seek judicial review, despite its long-standing hostility to any form of quantitative standard. Letter from Edward O. Fritta, President, National Association of Broadcasters, to The Honorable William J. Clinton, President of the United States 1 (July 28, 1996) (on file with Commlaw Conspectus).

12 See In re Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14 Hour Quota of Children's Television Programs, Notice of Inquiry and Notice of Proposed Rule Making, 28 FCC 2d 368, 368-69 (1971) (referring to Petition for Rule Making of the ACT, RM 1569 (Feb. 5, 1970) [hereinafter 1971 Notice]. Ten years earlier, the FCC's first recognition of a licensee's responsibility to provide programming which served the needs of children. Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 44 FCC 2308 (1960). The ACT petition further requested that neither sponsorship of nor commercials on children's programming be allowed and that performers on children's programming be forbidden to mention products, services, or stores during children's programming. Id. With respect to children's programming, ACT asked that programming be directed to specific age groups during specified dayparts (e.g., primary, ages 6-9, programming between 4 p.m. and 8 p.m. daily and between 8 a.m. and 8 p.m. on weekends). Id.
sioners dissented, while one of the four commisioners voting to issue the notice lamented that the Commission had compiled a massive record over the preceding ten months, but had failed to make any specific proposals.\footnote{14}

The fundamental conflict between the First Amendment objections to specific Commission rules, as advanced by broadcast and advertising interests, and protecting and promoting the interests of children, was acknowledged and articulated by the Commission:

In support of their First Amendment and Section 326 contentions, the parties so arguing cite a number of well-known cases . . . . We recognize the importance and significance of these pronouncements and the concepts expressed in them. It may be that, ultimately, we will conclude that they substantially limit otherwise appropriate Commission action in this area. But it is also apparent that there are high public interest considerations involved in the use of television, perhaps the most powerful communications medium ever devised, in relation to a large and important segment of the audience, the nation's children.\footnote{15}

When all was said and done, the Commission had amassed a sixty-three volume file of formal, informal comments, and data plus 1,252 pages of transcript from three days of panel discussions and three more days of oral argument.\footnote{16}

Nine months after the oral arguments, the Commission adopted its Children's Television Re-

\footnote{14} 1971 \textit{Notice}, supra note 12, at 573 (concurring opinion of Commissioner Nicholas Johnson). Commissioner Johnson also complimented the unprecedented interest of conservative Republican FCC Chairman Dean Burch in the matter of children's television: Chairman Burch has taken a leading role in attempts to bring Big Broadcasting closer to a realization of its awesome responsibility for one of our nation's most precious resources: our children. He invited the ACT members to an almost unprecedented personal presentation by private citizens of their concerns to the Commissioners. He supported putting their proposal out for comment. He has delivered public speeches to broadcasters and written article [sic] on the subject. He has met privately with network executives. \textit{Id.} at 574.

\footnote{15} \textit{Id.} paras. 6-7.


\footnote{17} \textit{Id.} at 1.

\footnote{18} \textit{Id.} para. 20.

\footnote{19} \textit{Id.} paras. 20, 22. The Commission added that "we expect to see a reasonable amount of programming which is particularly designed with an educational goal in mind." \textit{Id.} para. 22. Examples of such programming noted by the Commission were \textbf{Captain Kangaroo}, \textbf{Multiplication Rock}, and \textbf{Wild Kingdom}. \textit{Id.} at 7 n.8.

\footnote{20} \textit{Id.} para. 25

\footnote{21} \textit{Id.} para. 26.

\footnote{22} \textit{Id.} para. 27.

\footnote{23} \textit{Id.} para. 58. With respect to advertising, the Commission adopted no rule prohibiting advertising during children's programming, but noted that if it had done so, it likely would have considered a quantitative programming requirement necessary. \textit{Id.} para. 19. The Commission determined instead to rely on industry self-regulation to reduce advertising voluntarily, in the form of the now-defunct NAB Television Code, and an agreement by the Association of Independent Television Stations, Inc. ("INTV"). \textit{Id.} para. 42 n.12. The Commission also required stations to employ "[s]pecial measures . . . to insure that an adequate separation [between program content and commercial messages] is maintained on programs designed for children." \textit{Id.} para. 49. The NAB Code was abolished in 1982 following a Department of Justice antitrust suit. \textit{Broadcasters Reconsider Voluntary Programming Code}, \textit{Broadcasting}, Oct. 2, 1989, at 50. In the absence of regulations or a voluntary program code, the commercialization of children's programming increased steadily over the next six years. H.R. REP. No. 101-385, at 7 (1989) (citing to several studies, including the 1988 NAB Survey) [hereinafter \textit{House Report}] ; see also S. REP. No. 101-227, at 9-10 (1989) [hereinafter \textit{Senate Report}]. Consequently, Congress stepped in and enacted statutory advertising time limits for children's programming as part of the Children's Television Act of 1990. \textit{House Report} at 8; see also \textit{Senate Report} at 10. The statutory advertising limits are codified at 47 U.S.C. § 303a(b) (1994).
more readily revisit the issue if the industry failed to respond as expected.\textsuperscript{24} The Commission's decision in 1974 was unanimous. One Republican Commissioner called the policy statement "a milestone in the Commission's history."\textsuperscript{25} Another, a Democrat, warned, however, that "I would not have these efforts interpreted as merely the first step in a continuous series of measures by the FCC to act as a censor for children's programming."\textsuperscript{26}

ACT sought judicial review of the 1974 Children's Television Report and Policy Statement, complaining, inter alia, that the Commission should have adopted more specific programming rules, as ACT had urged in its initial petition.\textsuperscript{27} The court, however, affirmed the Commission.\textsuperscript{28} Noting the First Amendment and policy problems inherent in program content and advertising practices regulation, the court found the Commission's reticence to adopt the rules urged on it by ACT proper. "Heeding that counsel, the Commission has chosen to accord licensees a substantial measure of their customary discretion in the areas of programming . . . and yet it has made it quite clear that general improvements must be forthcoming . . . in increased educational and informative programming."\textsuperscript{29} Thus, the court resisted the temptation to cast itself in the role of \textit{primus inter pares} in its "partnership" with the FCC and held the Commission's action a "reasoned exercise of its discretion."\textsuperscript{30}

Within months, the issue, again, was joined at the FCC. Blanket oppositions were filed against the license renewal applications of television stations in Los Angeles and San Francisco in November 1979.\textsuperscript{31} The petitioners also requested that the children's television proceeding be reactivated.\textsuperscript{32} By January, NAB had responded with a study, which, according to NAB, showed that stations were providing children's programming of "adequate diversity, educational and cultural content and scheduling on other than weekends to satisfy" the Commission's policy.\textsuperscript{33} ACT responded with a Petition for an Inquiry and Notice of Proposed Rulemaking.\textsuperscript{34} Therein, ACT disputed NAB's conclusions and, again, urged the Commission to adopt a better definition of children's programming and rules specifying the amount, nature, age-specificity, and scheduling of children's programming.\textsuperscript{35}

Meanwhile, the Democrats regained control of the White House with the election in 1976 of President Jimmy Carter. President Carter appointed a new FCC Chairman in the person of Charles D. Ferris, a long-time protégé of then Speaker of the House "Tip" O'Neill. In 1978, only a year after the ACT I decision, the new Chairman launched an inquiry into children's television programming and advertising practices.\textsuperscript{36} The Commission pointed to its "long established intention to revisit the issue of voluntary compliance with our children's television programming and advertising policies."\textsuperscript{37} In its Second NOI, the Commission posed an extensive array of questions concerning the overall amount of children's television programming, the amount of educational and informational children's programming, age-specific programming, program scheduling, and over-commercialization of programs designed for children.\textsuperscript{38} The Commission also re-established its Children's Television Task Force which was directed to evaluate the effectiveness of industry self-regulation with respect to children's programming and advertising.\textsuperscript{39} For the first time, the Commission also embraced the advent of new video technologies, primarily cable television, and directed the Task Force to "investigate the overall effect of new technologies and alternative sources

\textsuperscript{24} 1974 Children's Television Report and Policy Statement, supra note 10, para. 58. The Chairman of the Commission emphasized this in testifying to Congress nine months after the policy statement was adopted. \textit{Broadcast Advertising and Children: Hearings Before the Subcomm. on Communications, of the House Comm. on Interstate and Foreign Commerce, 94th Cong. 367} (1975) (statement of Richard E. Wiley, Chairman, FCC).


\textsuperscript{26} Id. at 37 (separate statement of Commissioner Glen O. Robinson).

\textsuperscript{27} See generally \textit{Action for Children's Television v. FCC}, 564 F.2d 458 (D.C. Cir. 1977) [hereinafter \textit{ACT I}].

\textsuperscript{28} Id. at 459.

\textsuperscript{29} Id. at 480.

\textsuperscript{30} Id. at 482.

\textsuperscript{31} See \textit{In re Children's Programming and Advertising Practices, Second Notice of Inquiry}, 68 F.C.C.2d 1344, para. 21 (1978) [hereinafter \textit{Second NOI}].

\textsuperscript{32} Id.

\textsuperscript{33} Id. paras. 22-23.

\textsuperscript{34} Id. para. 25 (ACT petition filed Feb. 23, 1978).

\textsuperscript{35} Id. paras. 25-26.

\textsuperscript{36} Second NOI, supra note 31, at 1344.

\textsuperscript{37} Id. para. 19.

\textsuperscript{38} Id. paras. 37-45.

of programming on the availability of children's programming.\footnote{Id.}

The Task Force presented its report on October 30, 1979.\footnote{Id. para. 5.} The Task Force alleged that broadcast stations had failed to comply with the programming guidelines of the 1974 Children's Television Report and Policy Statement and recommended that the Commission quantify its expectations of broadcasters.\footnote{Id. paras. 5-6.} According to the Task Force, the average amount of time devoted to educational children's programs had shown no appreciable change since adoption of the 1974 Children's Television Report and Policy Statement.\footnote{Id. para. 16.}

Network originated educational children's programs amounted to 2.77 hours per-week per-station on average in 1973-74 and 2.76 hours-per-week per-station in 1977-78. In the same time span, syndicated programming fell from 1.42 to 1.14 hours-per-week per-station.\footnote{Id.}

Relying heavily on the Task Force's findings and recommendations the Commission quickly issued a Notice of Proposed Rulemaking.\footnote{See generally id. at 138 ("initiating proceeding because of our long standing concern for improved television service for children.").}

Therein the Commission delineated five options ranging from rescission of the 1974 Children's Television Report and Policy Statement to mandatory program rules.\footnote{Id. paras. 30-46.} Other options included a license renewal processing guideline and increasing the number of non-broadcast video outlets.\footnote{Id. para. 35.}

The proposed rule would have required stations to provide five hours per week of educational programming for pre-school children (two to five years of age) and an additional two-and-a-half hours per week for school-age children (six to twelve years of age).\footnote{Id.}

The programming would have had to be scheduled on Monday - Friday between 8 a.m. and 8 p.m.\footnote{Id. at 156 (separate statement of Commissioner Abbott Washburn, concurring in part and dissenting in part).} Commissioner Abbott Washburn dissented from the mandatory rule and processing guideline options.\footnote{Id.} He called the Task Force Report "incomplete and misleading."\footnote{Id. at 155 (concurrence of Commissioner James H. Quello).}

Commissioner James H. Quello, later to be a pivotal player in the 1996 deliberations, called the issuance of a notice of proposed rule making premature in light of the fact that the Commission had issued its Notice after providing interested parties "a mere 45 days in which to provide informal comments on the report."\footnote{Id.} Even Chairman Charles Ferris disclaimed any propensity to adopt a quantitative standard:

I would only turn to the option of FCC imposition of a requirement that each television station air a specific amount of weekday programming for preschoolers and school age children with very great reluctance. I would do so only if I found after we received all comments and studies submitted in this docket that every possible alternative had to be discarded as inappropriate.\footnote{Id. para. 40.}

Comments to the 1979 NPRM were filed in the summer of 1980. In November, 1980, Ronald Reagan was elected President. He appointed a new FCC Chairman, Mark S. Fowler. The new Chairman's attitude was illustrated by his remarks following CBS's shift of Captain Kangaroo from weekdays to weekends:

Frankly, I don't see how you could possibly mandate more children's television. I believe commercial broadcasters alone should decide what they shall broadcast, because they have the Constitutional right of free speech. It's too bad Captain Kangaroo is gone, but the Government should not be issuing directives about what should be on the air.\footnote{Id. paras. 16.}

Under the new administration, the children's proceeding was relegated to the proverbial back burner at the FCC. When nothing happened for 18 months, ACT, petitioned the U.S. District Court in Washington to force the FCC to act.\footnote{D. Ferris}. Three years later, as a former chairman, Mr. Ferris seemed more amenable to a mandated minimum amount of educational programming for children. He was quoted in the \textit{New York Times} as stating, "We are well aware that it is not in the economic interest of the broadcasters to aim this kind of programming at an audience amounting to 16 to 18 percent of the population — age 12 and younger — but if the obligation falls evenly on all, then no one is particularly disadvantaged." Ernest Holsendolph, \textit{Are Children No Longer in the Programming Picture?}, \textit{N.Y. Times}, July 25, 1982, \textit{§ 2}, at 21. These two themes were to find new life with the Democrats' return to the White House — and the Chairmanship of the Commission — some 12 years later. \textit{See infra text accompanying notes 1004-8.}

50 Holsendolph, \textit{supra} note 53, at 21.
The suit was dismissed on jurisdictional grounds.\footnote{Id. at 56.} The Commission then asked the U.S. Court of Appeals for the D.C. Circuit to review the FCC’s failure to act.\footnote{In re Petition of Action for Children’s Television (ACT) for Rule Making 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, RM 1569, Dkt. No. 19142 (Dec. 8, 1982) [hereinafter 1982 ACT Petition].} Responding to the court, Chairman Fowler promised that the Commission would complete action in the proceeding "by the end of the 1983 calendar year."\footnote{National Association of Broadcasters, Broadcasting and Government: An Update and Historical Perspect- tive 109 (1985).}

In March 1983, the Commission reopened the children's television proceeding for the purpose of updating the record.\footnote{In re Petition of Action for Children’s Television (ACT) for Rule Making 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, RM 1569, Dkt. No. 19142 (Dec. 8, 1982) [hereinafter 1982 ACT Petition].} The Commission heard oral presentations and entertained additional written comments. Shortly, thereafter, the FCC terminated the proceeding, stating that it found "no basis in the record to apply a national mandatory quota for children's programming."\footnote{1984 Programming Report and Order, supra note 13, para. 46.} Instead, the Commission restated the "continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs."\footnote{Id. at 662-63 (dissenting statement of Commissioner Antonin Scalia and Ruth Bader Ginsburg).} The basic rationale of the Commission’s decision was its conclusion that the market-place had not failed to provide an adequate supply of educational and informational programming for children.\footnote{Action for Children’s Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985) (ACT II). Of historical interest, perhaps, two of the three judges that heard the case later were to be named to the Supreme Court of the United States, Judges Antonin Scalia and Ruth Bader Ginsburg. Judge Ginsburg, however, took no part in the decision. Id. at 900. Judge Skelly Wright completed the panel. Id.} The Commission also relied on the oft-stated constitutional and policy objections to a quantitative requirement.\footnote{Id. at 901.}

In a brief per curium decision the D.C. Circuit affirmed the Commission’s 1984 Report and Order.\footnote{Id. at 902.} The court held that the Commission properly had considered children’s programming available on cable television and noncommercial broadcast stations in determining that no uniform, nationwide rule was necessary.\footnote{Id. at 901.} The court also dismissed ACT’s concerns that the 1984 Report and Order relieved licensees of the obligation to provide programming for different age groups.\footnote{Id. at 902.} Ultimately, the court called the 1984 Report and Order, "a far cry from the wholesale abolition of licensee responsibility perceived to meet.\footnote{Id.} We thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast. Recognizing that a balance must be reached, we believe this balance is best struck through a continued stress on the general licensee obligations emphasized by the Commission in its 1974 Children’s Television Policy Statement and through the general requirement that stations provide programming responsive to the needs and interests of the communities they serve. Id.; but see id. at 662-63 (dissenting statement of Commissioner Henry M. Rivera)."
by [ACT]."

Whereas the matter then appeared dead letter at the FCC, children's television issues began to draw Congressional interest. Within months of the court's decision, bills directing the FCC to adopt quantitative guidelines to assess licensee performance had been introduced in both houses. The bills went nowhere. In 1987, Senator Lautenberg and, by then, Senator Wirth again introduced legislation seeking imposition of quantitative guidelines. The 100th Congress ultimately did pass the Children's Television Act of 1988. That bill, however, contained no quantitative standard. That provision had been jetisoned in order to eliminate broadcast industry opposition to the bill. Although the House had voted 328 to 78 to pass the bill and the Senate had passed it on a unrecorded voice vote that could have been stopped by opposition from a single senator, President Reagan exercised a "pocket veto" of the bill by not signing within ten days during a Congressional recess.

The process began again in the 101st Congress with the introduction of H.R. 1677, the Children's Television Act of 1989, by Rep. John Bryant (D-TX). Eighteen months later H.R.1677 was passed by Congress. Again, NAB and broadcast interests supported the legislation only after it was revised to include less specific programming obligations. On October 18, 1990, the bill became the Children's Television Act of 1990, Public Law No. 101-437, without President Bush's signature. The Act requires the FCC to consider, in its review of a local television station's application for the renewal of its license, the extent to which the licensee "served the educational and informational need of children through the licensee's overall programming, including programming specifically designed to serve such needs." The Act also permits the FCC to consider "any special non-broadcast efforts by the licensee which enhance the educational and informational value of such programming," as well as "any special efforts by the licensee to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children." No quantitative requirement or guideline was included. In fact the legislative history of the Act, according to the FCC in 1990, expressly rejected quantitative standards.

The Commission's 1990 NPRM proposing rules to implement the new law added no gloss to the basic requirements stated in the Act. The Commission simply acknowledged that Congress had intended to "afford licensees maximum discretion" in fulfilling the programming requirement. Consistent with its proposals, the Commission...
mission adopted no quantitative standard in its initial rules implementing the Act. The Commission was emphatic:

The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the program requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act’s requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station. We thus decline to establish any minimum programming requirement for licensees for renewal review independent of that established in the Act.\textsuperscript{92}

The Commission, however, did clarify that short-segment programming might qualify as "specifically designed" educational and informational programming for children.\textsuperscript{89} In addition, the Commission adopted a definition of educational and informational programming, noting that they "cannot properly apply or enforce the Act, and licensees cannot properly implement it, without some delineation of the boundaries of the programming requirement."\textsuperscript{84} The Commission relied on a statement by Senator Inouye (D-Haw.), who defined such programming broadly, as any programming which furthered a "child’s intellectual, emotional, and social development."\textsuperscript{85}

No one sought judicial review of the Commission’s 1991 Report and Order.

II. THE 1996 DECISION

A. The Political Landscape

For the first time in twelve years, the American public elected a Democrat president in November, 1992.\textsuperscript{86} The Democrats controlled the Senate and House, as well.

1. Congressional Pressure

By March 1993, the Commission, and key Democrats in Congress, were noisily unsheathing, if not outright rattling their sabers over broadcasters’ record of compliance with the Act. In fact, the race was on to see who could lead the charge. After the House Subcommittee on Telecommunications and Finance announced hearings to chide the Commission for inaction since 1991, the Commission, on March 2, 1993, issued a Notice of Inquiry to examine how its “rules and policies might be revised to more clearly identify the levels and types of programming necessary in the long term to adequately serve the educational and informational needs of children.”\textsuperscript{87} At hearings focusing specifically on broadcaster compliance with the Act, Chairman Edward Markey (D-Mass.) of the House Subcommittee of Telecommunications and Finance, warned that the change of administration meant “[t]he new era has begun.”\textsuperscript{88}

Indeed, it had. Chairman Markey never let up. He conducted extensive hearings in both 1993 and 1994.\textsuperscript{89} He endorsed a requirement that broadcasters air a certain amount of educational programming for children, complaining that “children’s programming remains the equivalent of a trip to Toys ‘R Us . . . [and that] the existing rules have not resulted in the increase in children’s educational programming that Congress envisioned when passing the act.”\textsuperscript{90} Even after groups forced the [FCC] . . . to ask for comments on how it might clarify the rules.” Kim McAvoy, Kids TV Stays on FCC Screen, Broadcasting & Cable, July 4, 1994, at 32.

Christy Fisher, Broadcast Regulators Turn Up the Heat, Advertising Age, Mar. 15, 1993, at 52. As ACT founder Peggy Charren was to point out after the Commission adopted its new rules in August 1996, “[M]y sense is that I won — I didn’t know this at the time, quite — the day Bill Clinton became President.” Harry A. Jessell, Peggy Charren: Victory At Long Last, Broadcasting & Cable, Aug. 12, 1996, at 20.


Broadcasters and America’s Children, Broadcasting & Cable, July 25, 1994, at 77.

\textsuperscript{82} 1991 Report and Order, supra note 78, para. 24.

\textsuperscript{83} Id. para. 25.

\textsuperscript{84} Id. para. 19.

\textsuperscript{85} Id. para. 19. The definition adopted by the Commission defined educational and informational programming for children as “any television programming which furthers the positive development of children 16-years-of-age and under in any respect, including the child’s intellectual/cognitive or social/emotional needs.” 47 C.F.R. § 73.671 Note (1996).

\textsuperscript{86} President William Jefferson Clinton first named FCC Commissioner Jim Quello as Chairman on an interim basis. See Cindy Skrzycki, D.C. Lawyer Chosen To Be FCC Chairman, Wash. Post, June 30, 1993, at F1. In 1993, however, he named Reed Hundt as Chairman, although Commissioner Quello remained on the Commission. Id.

\textsuperscript{87} In re Policies and Rules Concerning Children’s Television Programming, Notice of Inquiry, 8 FCC Rcd 1841, para. 1 (1993) [hereinafter 1993 NOI]. As was subsequently reported, “[c]riticism from Capitol Hill and public interest
the Republicans gained control of the Congress in the 1994 elections, now Congressman Markey, as ranking minority member of the Subcommittee, stayed on the soap box, calling children's television "the video equivalent of Twinkies: Kids like it, but it lacks any intellectual nutritional benefit."91 Congresswoman Markey was not alone. Earlier, in March 1993, Senator Paul Simon (D-Ill.) had pointed to recent interpretations of the Act by broadcasters which he characterized as comical.92 As the FCC's proceedings moved forward, Congressional concern over all aspects of television related to children grew significantly. For example, in early 1995, several bills were introduced by Congress that addressed violence on television and its effect on children.93 In October 1995 Congressman Markey was joined at his "Twinkie" press conference by Senator Diane Feinstein (D-Cal.).94

When 1996 began with no resolution of the FCC's rule making, Congressman Markey called again for the FCC to adopt a three-hour minimum, complaining that television stations had substituted The Flintstones and The Jetsons for truly educational children's programming.95 According to the Congressman, the stations were claiming that those programs taught children about the "archaeological age" and "the future," respectively.96 He called on all Members of the House to support his position to "advance th[e] children's television agenda at the [FCC]."97 Three days after his floor speech, Congressman Markey and 103 of his colleagues in the House sent a letter to the four sitting FCC Commissioners urging them "to defend the rights of children ... and to reject arguments against setting a clear, unambiguous 3-hour threshold for all broadcasters to meet in return for renewal of a license to use the public airwaves."98 Notably, the letter was signed by Republicans, as well as Democrats, and if any Republicans disagreed, their dissent was inaudible.99

2. Interest from the White House

A new administration also brought an entirely new view on the issue. In September 1995, President Clinton wrote to FCC Chairman Reed Hundt urging adoption of a three hour minimum.100 The President stated that "the dissemination of true educational programming across the public airwaves is a priceless gift to our children."101 The next day, Larry Irving, the Assistant Secretary for Communications and Information, U.S. Department of Commerce, also wrote Chairman Hundt urging him "to establish clear guidelines requiring broadcasters to air at least three hours, and preferably more, of children's educational programming each week during hours when children are in the audience."102 In April 1996, the Declaration of Independent Television Stations, Inc. (INTV), to the Notice of Proposed Rulemaking in MM Dkt. No. 93-48, at 13 (Oct. 16, 1995) [hereinafter INTV Comments].

92 199 CONG. REC. S2973 (daily ed. Mar. 16, 1993) (statement of Sen. Simon, offering as an example "[s]tations claiming that The Jetsons is educational because it teaches youngsters about space technology").
93 See e.g., 141 CONG. REC. S3052 (daily ed. Feb. 23, 1995) (statement of Sen. Hollings introducing S. 470, the "Children's Protection from Violent Programming Act of 1995"); see also 141 CONG. REC. H4177 (daily ed. Apr. 4, 1995) (statement of Rep. Jacobs introducing H.R 1390, the "Children's Media Protection Act of 1995"). Many of the bills were previously introduced in the 103d Congress, but received increased publicity in the wake of the Commission's public debate and the shadows of an upcoming presidential election year. These bills were a precursor to the "Parental Choice in Television Programming Act" which was ultimately incorporated into the Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56 (codified at 47 U.S.C. § 551). In what was supposedly a derogatory piece of legislation, this provision of the 1996 Act raised the level of government control of broadcast content.
94 Salem, supra note 91.
96 Id. Broadcasters vigorously disputed the notion that such practices were widespread. See e.g., Comments of Association of Independent Television Stations, Inc. (INTV), to the Notice of Proposed Rulemaking in MM Dkt. No. 93-48, at 13 (Oct. 16, 1995) [hereinafter INTV Comments].
99 Indeed, the target of the letter from Congressman Markey and his colleagues would appear to have been Commissioner Rachelle Chong, a Republican, who only days before had opposed a three-hour standard publicly for the first time. Lawrie Millfin, F.C.C. Urged to Strengthen Children's TV, N.Y. TIMES, Apr. 2, 1996, at A16.
100 Letter from Bill Clinton, President of the United States, to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission (Sept. 18, 1995) (as appended to Reply Comments of NTIA, to the Notice of Proposed Rulemaking in MM Dkt. No. 93-48 (Apr. 18, 1996) [hereinafter NTIA Reply Comments].
101 Id.
102 Letter from Larry Irving, Assistant Secretary for Communications and Information to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission 2
department's National Telecommunication and Information Administration ("NTIA"), headed by Assistant Secretary Irving, filed formal Reply Comments in the FCC's rule making proceeding which reiterated the administration's position.\(^{103}\)

Vice President Albert Gore also joined in the administration chorus. Addressing the National Association of Broadcasters' convention in April 1996, the Vice President reemphasized the administration's position favoring a three hour requirement.\(^{104}\) He repeated the theme in a speech at the National Cable Television Association convention two weeks later.\(^{105}\) He also took the opportunity to politicize the issue further by castigating Republicans for their purported lack of concern.\(^{106}\)

At the Democratic National Convention in August 1996, only a few weeks after the FCC adopted the new three hour processing guideline, the President touted the new rule as one of his administration's accomplishments, stating that "three hours of quality children's programming every week on every network are on the way."\(^{107}\) Vice President Gore echoed that theme, emphasizing that "[w]hen our children turn on the TV, let them learn how to read and add and spell and think, not how to kill."\(^{108}\)

B. The FCC Deliberations

In this context of consistent pressure from the White House and Congress to adopt a three hour minimum requirement, one might have taken for granted a quick, clean decision by the FCC to adopt such a rule. After all, the Chairman was a Clinton appointee, one of three Democrats along with Commissioners Jim Quello and Susan Ness. Of the two remaining Commissioners, both Republican, one, Andrew Barrett, was expected to leave after his term expired in June 1995 and the other, Rachelle Chong, was uncommitted.\(^{109}\) Even before the new chairman had been appointed, Chairman Jim Quello had moved quickly to initiate the 1995 inquiry into the efficacy of the new law and the FCC's rules.\(^{110}\) He later observed prior to the FCC's en banc hearings on the issue in June 1994 that "something has to be done; Congress is insisting on it."\(^{111}\)

After the 1994 hearings, however, the polarization of the issue began. Commissioners Quello and Barrett stated their opposition to more specific, quantitative requirements.\(^{112}\) Commissioner Ness declared children's television her top priority, stating that "[n]o one is keen about regulation for regulation's sake. But we are keen about having the intent of the Children's TV Act realized."\(^{113}\)

The issue became formally polarized in April 1995, when the FCC released another Notice of Proposed Rule Making.\(^{114}\) Among the Commission's proposals, three focused on the amount of children's educational programming. The first provided for Commission monitoring of programming broadcast in the wake of new measures adopted to improve the flow of information to the public and tightening the definition of programming specifically designed to serve the educational needs of children.\(^{115}\) The second was a "safe harbor processing guideline" which established an amount of educational and informational programming which would be sufficient to demonstrate compliance with the Act.\(^{116}\) The third was an outright requirement that stations broadcast a set minimum amount of such pro-

\(^{103}\) See 1993 NOI, supra note 87.

\(^{104}\) Commissioners Prepare for Children's Hour, Broadcasting & Cable, June 27, 1994, at 10. Commissioner Chong also seemed far from closed to the idea of quantitative guidelines, although she clearly appeared reluctant to regulate unless "the amount of children's programming hasn't improved significantly." Id.

\(^{105}\) Jenny Honiz, Barrett, Quello Oppose New Kids TV Regulation, Electronic Media, July 4, 1994, at 3.


\(^{107}\) Id. paras. 24-26, 36-44.
gramming.\(^{117}\)

By July 1995, the positions of the Chairman and the four sitting Commissioners had taken shape. Chairman Hundt favored the third option — a mandatory three-hour rule.\(^{118}\) He was convinced that stations lacked the economic incentive in a competitive marketplace to broadcast children’s educational programming.\(^{119}\) Commissioner Chong advocated a three hour safe harbor, but would have left some flexibility for stations to demonstrate compliance with the Act in other ways.\(^{120}\) Commissioner Chong’s position emerged clearly in opposition to a “blanket quantitative guideline.”\(^{121}\) She saw no case for the proposition that children educational programming had decreased and, therefore, posited that the rules would fail to pass constitutional muster.\(^{122}\) Commissioners Quello and Barrett concurred with Commissioner Chong in their opposition of quantification.\(^{123}\)

The debate became more personal and antagonistic in September 1995. Westinghouse Electric Corporation, in its application for Commission consent to its acquisition of CBS, Inc., voluntarily committed to double its children’s educational programming to two hours of educational programming per week on the network, and increase it to three hours per week by 1997.\(^{124}\) As a result of the Westinghouse commitment, a petition to deny the application was withdrawn.\(^{125}\) Commissioner Quello accused Chairman Hundt of extracting the commitment from Westinghouse:

Any such agreement, particularly extracted after signific-

\(^{117}\) Id. para. 59.

\(^{118}\) Christopher Stern, FCC’s Hundt Takes Children’s Television Under His Wing, BROADCASTING & CABLE, July 24, 1995, at 61.

\(^{119}\) Id. According to the Chairman, stations fear to devote resources to children’s programming when their competitors are not required to do so therefore, a rule would place all stations on equal footing and remove that disincen-

tive. Id.

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) See id. (“Other FCC commissioners have raised First Amendment concerns about requiring broadcasters to air a minimum amount of educational programming. Not one of the four other commissioners has embraced Hundt’s propos-

eal. . . . ”).

\(^{124}\) In Re Applications of Stockholders of CBS Inc. and Westinghouse Electric Corporation for Transfer of Control of CBS, Inc. Licensee of WCBS-TV, Memorandum Opinion and Order, 11 FCC Rcd 3793, para. 13 (1995); see also Paul Farhl, Westinghouse to Air More Kid’s Shows, WASH. POST, Sept. 21, 1995, at D12. At the same time, Westinghouse Chairman

cant pressure has been exerted by the head of a govern-

mental agency through speeches and meetings, and in the context of a petition to deny from a public interest group that could have delayed the sale of the station, is an affront to the First Amendment and is unlikely to withstand court challenge.\(^{126}\)

In a speech the same day, the Chairman told his audience that “there is ample Commission precedent for [Commissioner Quello] to consult” in reference to Commissioner Quello’s statement that he would “consider long and hard” any transaction that includes an agreement relating to the content of a broadcaster’s programming.”\(^{127}\) The Chairman also reminded Commissioner Quello that when he, Quello, was Chairman, the Commission approved an ownership transfer relying on Pulitzer Broadcasting Company’s “representation that it would ‘enhance the station’s programming for children’ by producing and airing an informational show targeted to children ages 11 to 15 and hosted by teenagers.”\(^{128}\) The Chairman, after disclaiming any prejudgment of the Westinghouse application, remarked:

If the public interest is served by the concrete, quantifi-

able promise of one broadcaster to provide educational programming for children, then surely it is served by having a clear rule applicable to all broadcasters. In-

deed, without such a rule it is hard to see how one broadcaster standing alone, can keep its promise. The vigorous competition that characterizes the broadcast-

ing industry will drive even the best intentioned broad-

caster to the lowest level, as it does now.\(^{129}\)

In response, Commissioner Quello called the

Chairman’s claim of such a marketplace failure in children’s programming “a farcical notion in to-

Michael Jordan restates his company’s opposition to a mandatory standard. Id.

\(^{126}\) Commissioner James H. Quello, Enough Already!, Remarks Before the National Association of Broadcasters Children’s Television Symposium 8 (Sept. 21, 1995) [hereinafter Quello NAB Remarks]. “The Chairman has embarked on an unprecedented, unrelenting public relations campaign to urge support for his specific quantitative programming requirements — which are constitutionally suspect.” Id. at 3.

\(^{127}\) Chairman Reed E. Hundt, A New Paradigm for Broadcast Regulation, Remarks Before the Conference for the Second Century of the University of Pittsburgh School of Law 5 (Sept. 21, 1995) [hereinafter Hundt Univ. of Pittsburgh Remarks].

\(^{128}\) Id. at 6 (referring to In re Application of H & C Communications, Inc. and KCCI Television, Inc., Memorandum Opinion and Order, 9 FCC Rcd 144, para. 15 (1993)).

\(^{129}\) Id. at 6.
day's multi-channel, multi-faceted era and represents only the viewer's failure to locate the desired programs." Commissioner Quello also showed some sensitivity to the fact that he was a Democrat standing in opposition to a Democratic chairman and administration. "In my 20+ years tenure at the Commission, I have adhered to the principle that I don't decide important controversial issues on the basis of whether I am a Democratic or Republican appointee." With a bit more bite, he added, "I don't believe I have to disenfranchise myself as a Commission Democrat, particularly a middle of the road or conservative Democrat, by opposing politically liberal, outdated regulations in the competitive multichannel communications market of today."

Late in October 1995, Commissioner Chong entered the fray complaining initially that the "very public and quite heated" debate had focused too much on the issue of quantitative guidelines. Not that she was mute on the subject:

On this issue, I will make two points. First, I note that the legislative history clearly indicates that Congress considered and declined to adopt a quantitative approach and instead, left it up to the broadcasters to voluntarily meet their children's educational television commitment.

Second, studies in our children's proceeding show an increase has indeed occurred from the time the Act passed. How much of an increase is being debated in our record as various parties proffer studies, but roughly, the studies show that such programs increased from one hour a week to about three hours a week on average.

Commissioner Chong also encouraged commenters to address the Commission's proposed definition of educational and informational programs, as well as "ways to improve the dialogue between broadcasters and their communities."

Meanwhile, not even the first government shutdown in November 1995, could muzzle the debate. At a news conference concerning the shutdown, the Chairman could not resist the opportunity to urge adoption of a quantitative requirement, while Commissioner Quello opined

Larry Pressler concerning the Westinghouse commitment. "I

Id. at 7.


131 Hundt Munich Conference Remarks, supra note 1, at 1.

132 Quello FCBA Remarks, supra note 132, at 7.

133 "Commissioner Rachelle Chong, Remarks Before the Women in Cable and Telecommunications Political Advocacy Conference 6 (Oct. 30, 1995).

134 Id. at 5.

135 Commissioner James H. Quello, Remarks Before the Midwest Chapter of the Federal Communications Bar Association 3 (Oct. 19, 1995) [hereinafter Quello FCBA Remarks].

136 Id. at 1.

137 Chairman Reed Hundt, Remarks Before the George Washington University Telecommunications Seminar 4 (Oct. 19, 1995).


139 Id. at 5.

140 Id. at 7.

141 Id. at 7.
that repeal of the Children's Television Act would be a good idea.\textsuperscript{142} The issue retreated from the front pages of the press later in the year as the FCC received and digested comments filed in response to the Commission's 1995 NPRM. With no clear majority in his corner, the chairman understandably was in no hurry to bring the matter up for a vote. Thus, 1995 ended on a quiet note, which carried over into early 1996.\textsuperscript{143}

At the end of March 1996, Commissioner Barrett resigned and left the Commission, leaving in his wake an apparent two-to-two deadlock on the issue of a quantitative standard — and the name calling continued.\textsuperscript{144} When Commissioner Quello, in a speech before the NAB's Children's Television Symposium, pointed to the variety of media providing children's programming (including VCRs),\textsuperscript{145} supporters of quantification labeled it the "Let them eat VCR's" [sic] approach."\textsuperscript{146} Commissioner Quello called the Marie Antoinette analogy "a cheap shot."\textsuperscript{147} Commissioner Chong expressed her displeasure that no progress had been made, and stated that she had offered many compromise alternatives with no result. She remarked that "[i]t almost makes you wonder if this is politics or if they really want to do something marked that "[i]t almost makes you wonder if this is politics or if they really want to do something for kids."\textsuperscript{148}

The end of May 1996, saw the first appearance of a break in the impasse. Commissioner Quello signaled some flexibility on the quantification issue, stating a desire to end the "interminable war" that had torn the Commission.\textsuperscript{149} He proposed requiring that stations meet a quantification standard "based on industry norms."\textsuperscript{150} His proposal paralleled Commissioner Ness's proposal for a processing guideline, but stopped short of a fixed quantitative measure. The Chairman was happy and called Commissioner Quello's proposal "an invitation for a conversation."\textsuperscript{151} The conversation, however, still was to have its contentious moments.

Nonetheless, the discussions began in earnest and within several weeks, both Commissioners Quello and Chong had indicated their support for a three-hour processing guideline.\textsuperscript{152} In the interim, the President had reiterated his support for a three-hour rule and set an industry summit at the White House on children's television programming before the end of July.\textsuperscript{153} Congressmen Manley and Manley also by then had corralled 220 members of Congress in support of his quest for quantification at the FCC.\textsuperscript{154} However, Commissioners Quello and Chong still insisted that the processing guideline retain sufficient flexibility to allow stations to show compliance with the Act even if they fell short of the three-hour threshold.\textsuperscript{155}

If peace had broken out in June, both sides had returned to the battlements by mid-July. The impasse over a quantitative standard gave way to an impasse over the degree of flexibility for stations under the three-hour processing guideline. After the FCC's Mass Media Bureau staff had prepared and circulated a draft order adopting the new rules, Commissioner Quello complained to the

\textsuperscript{142} Kid TV Debate Continues Despite Government Shutdown, COMMUNICATIONS DAILY, Nov. 15, 1995, at 3-4. Commissioner Quello's remark drew a tart response from Jeffrey Chester, Executive Director of the Center for Media Education, who said that it "illustrates once again that Jim Quello is the official representative of the NAB at the FCC . . . ." Id.

\textsuperscript{143} The second federal government shutdown which began on December 16, 1995, and extended for a record 21 days also may have contributed to the quiet. See, e.g., David Espo, Impasse Fades, The Sun-Times, Dec. 16, 1995 at 3; see also Edward Walsh, An Avalanche of Work Meets Returning Federal Workers, WASH. POST, Jan. 9, 1996, at A9.

\textsuperscript{144} Notably, Commissioner Quello's term was set to expire on June 30, 1996.

\textsuperscript{145} Quello NAB Remarks, supra note 126, at 6-7.

\textsuperscript{146} Lawrie Mifflin, F.C.C. Officials Reconvene on Children's Programs, N.Y. TIMES, May 29, 1996, at C16.

\textsuperscript{147} Id.


\textsuperscript{149} Quello Endorses Quantitative Kidvid Standards Based On Industry Figures, COMMUNICATIONS DAILY, May 29, 1996, at 2.

\textsuperscript{150} Id. at 1.

\textsuperscript{151} Mifflin, supra note 146.

\textsuperscript{152} Lawrie Mifflin, Shift on Children's TV Programs Will Lead to 3-Hour Minimum, N.Y. TIMES, June 15, 1996, at 11. Commissioner Quello's motivation for depolarizing the issue via new flexibility on his part likely must await his memoirs. Nonetheless, by late May, the political landscape offered him no comfort. The President's unprecedented interest in the issue, Congressman Manley's increasing support from Republican colleagues, and a politically-correct silence from Republican quarters normally vociferous about over-regulation and preservation of First Amendment values were beginning to leave Commissioner Quello (as well as Commissioner Chong) very lonely in his resistance to quantification. Always astute politically, the dean of the Commission in all likelihood did not relish wrapping up his distinguished career with a futile, divisive struggle against long political odds.

\textsuperscript{153} Clinton Invites' Entertainment Industry to D.C. Again, COMMUNICATIONS DAILY, June 12, 1996, at 1.

\textsuperscript{154} Mifflin, Shift on Children's TV Program, supra note 152.

\textsuperscript{155} Impasse Develops at FCC Over Flexibility in Children's TV Rules, COMMUNICATIONS DAILY, July 11, 1996, at 1.
Chairman that the draft order, written initially to the Chairman's specifications, contained "unexpected and very unwanted stuff."156 The Chairman essentially accused Commissioner Quello of reneging on his support for a quantitative standard, to which Quello retorted, "It's [the Chairman's] way or no way."157

Commissioner Ness, whose proposal for a processing guideline formed the framework of the new rule, was said to be "very pleased" with the draft.158 Commissioner Chong had substantial reservations and was concerned that the draft "borders on content regulation."159 She was hopeful a consensus still might be reached, but an impasse again loomed large over the Commission's proceeding.160

As if the substantive impasse were insufficient fodder for the trade press, a peripheral procedural issue ignited new contentiousness. After the contretemps erupted, Commissioner Quello called for the Commission to waive its ex parte rules to permit the Commissioners and staff to describe the details of the draft order publicly.161 The Chairman immediately issued a statement opposing any such waiver of the ex parte rules, but suggesting (albeit conditionally) in lieu thereof that the Commission simply release the draft order in its entirety.162 Therefore, he stated his reluctant willingness to release the draft order if the three other Commissioners agreed.163

Four days later, Commissioner Quello released a statement to present his "true position and to correct mischaracterizations by some who may not be aware of the unprecedented over-regulatory details of the draft Children's Television Report and Order."164 After reviewing his concerns with the draft, Commissioner Quello again called for public release of the draft order. Again, he complained:

What's also going on here is that a most worthy project, children's educational and informational programming, with strong support among the public and the majority of broadcasters, is being cleverly manipulated to revive outdated and discarded "scarcity" theories of broadcast regulation . . . .

None of this is necessary for us to adopt a three-hour processing guideline that will work effectively and consistently with the purpose of the Children's Television Act (emphasis in original) . . .

Nevertheless, I will say again that I remain committed to a flexible three-hour guideline for children's educational programming. I hope that the announced White House summit on children's programming will be successful, and that President Clinton can set the stage for the creation of sensible, effective rules in a way that the intractable FCC Chairman has not.165

The next day, Congressman John Dingell from Michigan, Commissioner Quello's home state, and ranking Democratic member of the House Committee on Commerce, wrote to the Chairman also seeking public release of the draft order.166 Moreover, the Congressman stated his surprise that "several members of the Commission have chosen to conduct the debate about their differences of opinion in this matter through the press."167 Also on July 17, 1996, the Chairman and Commissioner Ness issued a joint statement presenting the proposed text of the rule changes they favor. They expressed their "hope that facts about the sensible reforms we support will lead to a more informed public debate about this important issue."168 Within hours, Commissioner Quello released a statement that, "I for one am tired of press spin and half-truth. Let's have it all out, and let's let people make up their own minds."169 The actual draft order, however, sup-

---

156 Id. What Commissioner Quello objected to primarily was a staunch constitutional defense of the rules which heartily embraced the Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), rationale for lesser First Amendment protection of broadcasting (i.e., spectrum scarcity) — a rationale which Commissioner Quello feared "would put broadcasters in 'a regulatory straitjacket for the next five years . . . .'" Id. Commissioner Quello was adamant that "[t]hat's a price I won't pay and a legacy I won't leave." Id.

157 Id.

158 Id.

159 Id.

160 Id. Some suggested, however, that delays in Commissioner Chong's Office providing suggested edits to the draft might indicate that her edits never would be forthcoming and that she ultimately would side with Commissioner Quello in opposition to the draft. Id.

161 Statement of Chairman Reed E. Hundt, FCC News, July 12, 1996.

162 Id.

163 Id.


165 Id. at 3-4.

166 Letter from Congressman John D. Dingell to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission (July 17, 1996).

167 Id.


posedly remained under wraps at the FCC's headquarters.

Unexpectedly, Communications Daily virtually mooted the issue of public release of the draft order. The July 17, 1996, edition reported that they "obtained [a] copy of [the] draft order from [a] source outside [the] Commission."\(^{170}\) The draft reportedly ran 121 pages with 435 footnotes.\(^{171}\) According to the report, the draft was highly critical of past FCC efforts with respect to children's television and relies heavily on spectrum scarcity in buttressing rules against First Amendment challenge.\(^{172}\) The report otherwise described key elements of new rules in considerable detail.

With the White House "summit" a week away, the Commission remained locked in impasse. For the White House, the opportunity to use the upcoming summit as the stage for announcing new FCC rules reflecting the President's desire for a three-hour per week standard was fading. At the same time, broadcast executives invited to the White House hardly relished the prospect of being chastised by a popular president in such a public setting. Broadcast industry lobbyists also saw significant risk in further delaying what already appeared inevitable. If, as anticipated President Clinton was re-elected in November, he would appoint two new Commissioners, both of which likely would share his position on children's television. If anything, a FCC without former broadcaster Jim Quello might be inclined to adopt even more stringent requirements. Therefore, neither the broadcast industry nor the White House remained willing to leave the issue of children's television to the bickering, deadlocked Commission any longer.


\(^{171}\) Id. at 2.

\(^{172}\) Id. at 1 ("Proof that spectrum scarcity still exists is found in huge sums paid for spectrum in auctions, draft says.").

\(^{173}\) The negotiations were conducted by representatives of NAB and Greg Simon from Vice President Gore's office. The accord was reached so late in the day that the Monday New York Times reported a la "Dewey Defeats Truman" that "the triumph the Clinton Administration had anticipated having as a backdrop for today's event — a new Federal Communications Commission rule requiring TV stations to broadcast each week three hours of educational programming for children — has vanished. A compromise reached among three of the four commissioners in June disintegrated in frustration and name-calling in mid-July, although marathon negotiations to patch it together again continued throughout the weekend." Lawrie Mifflin, Sealed-Back White

The weekend before the Monday summit, negotiators for the administration and the broadcast industry sought a compromise.\(^{175}\) Just after midnight on the morning of the summit, they reached agreement. At the White House later in the morning the President announced that:

"[T]he four major networks, the National Association of Broadcasters, and some of the leading advocates for educational television have come together to join me in supporting a new proposal to require broadcasters to air 3 hours of quality educational programming a week. This proposal fulfills the promise of the Children's Television Act, that television should serve the educational and informational needs of our young people. It gives broadcasters flexibility in how to meet those needs . . . . I urge the FCC to adopt this proposal to make the 3-hour rule the law of the land."\(^{174}\)

FCC Chairman Reed Hundt immediately responded that the compromise could be adopted at the FCC's next scheduled meeting on Thursday of that week.\(^{175}\) Commissioner Quello reserved judgment — as did Commissioner Chong.\(^{176}\) As Commissioner Ness — the original proponent of the safe harbor processing guideline approach — observed, however, Commission adoption of the compromise was inevitable.\(^{177}\)

On August 8, 1996, the inevitable occurred. The FCC released its 1996 Report and Order adopting the new children's programming rules dictated by the compromise.\(^{178}\) Each Commissioner took the opportunity to add their own "spin" to the Commission's action. First and foremost, Chairman Hundt stated, "[T]oday's action demonstrates our willingness to listen to the American people and, at their request, to try to improve the impact of broadcast television on our country."\(^{179}\) Commissioner Quello was measured in his concurrence:


174 Remarks at the Children's Television Conference, 32 WEEKLY COMP. PRES. DOC. 1362, 1363 (July 29, 1996).

175 Lawrie Mifflin, TV Broadcasters Agree to 3 Hours of Children's Educational Programs a Week, N.Y. TIMES, July 30, 1996, at A8.

176 See Chris McConnell, Kids TV Accord Reached, BROADCASTING & CABLE, Aug. 5, 1996, at 5. Their reservations centered on the legal rationale, a sticking point in the lingering impasse. Id. However, the compromise agreement addressed those concerns. Id. In return, the NAB promised not to challenge the rules in court if the Commission's order was faithful to the compromise. Id.

177 Id.


179 Id. at 10763 (separate statement of Chairman Reed E. Hundt).
I am concurring with the Report and Order today to end a contentious impasse at the FCC. For some time I have believed that three hours of children's programming per week is a reasonable number, but I was — and still am — concerned with establishing a precedent for future First Amendment incursions.\(^{180}\)

Commissioner Ness appeared gratified. She stated that, "The central feature of today's ruling is a three-hour safe harbor processing guideline, which I have long favored. It offers broadcasters the twin advantages of certainty and flexibility, and it is First Amendment-friendly."\(^{181}\) Commissioner Chong expressed reservations about quantification and the "highly restrictive definition of 'core programming.'"\(^{182}\) She also addressed the process by which the Commission had arrived at its decision:

It has been a long and tortuous road to get us all to this decision today. Reaching this agreement has been like making sausage. It was not a pleasant or pretty process. The end result is palatable, however, and I am pleased that at last we have been able to achieve this order together.\(^{183}\)

III. THE RULES

Three distinct but overlapping measures were adopted in the Commission's 1996 Report and Order. First, the Commission adopted public information initiatives to improve access to information about available programming specifically designed to educate and inform children ("core programming").\(^{184}\) Second, core programming was more carefully defined.\(^{185}\) Finally, the 1996 Report and Order established a processing guideline of three hours-per-week of core programming or its equivalent.\(^{186}\)

A. The Processing Guideline

The heart of the Commission's new rules is a processing guideline under which the FCC staff will review renewal applications. If a station has broadcast three hours-per-week of core programming over its license term, then the Commission staff will approve the children's programming portion of its license renewal application without delay.\(^{187}\) The three hours-per-week may be averaged over a six month period and may include repeats and reruns of core programming.\(^{188}\) The three hours may be demonstrated in either of two ways, by simply checking a box on the renewal application and providing documentation that three hours of qualifying core programs were aired ("Category A")\(^{189}\) or by a showing of an equivalent of three hours where "somewhat less" than three hours-per-week was aired ("Category B").\(^{190}\)

If a licensee's performance does not qualify to make a Category A or B showing, its renewal application will be referred to the full Commission.\(^{191}\) In this instance, licensees may show compliance with the Act in other ways. They may rely in part on non-broadcast efforts to augment the core educational and informational programming on their station and/or provide sponsorship of core programming on other stations in the same market.\(^{192}\)

Remedies for non-compliance with the CTA may include, in order of increasing severity of the level of non-compliance, letters of admonition or reporting requirements, a renewed commitment from the licensee with a contingent renewal based on performance, forfeitures and short-term renewals, and finally, in the worst case scenario, a designation for hearing to determine whether violations of the Act and the Commission's rules war-

\(^{180}\) Id. at 10765 (concurring statement of Commissioner James H. Quello).
\(^{181}\) Id. at 10768 (separate statement of Commissioner Susan Ness).
\(^{182}\) Id. at 10771 (separate statement of Commissioner Rachelle B Chong, concurring in part).
\(^{183}\) Id.
\(^{184}\) Id. paras. 52-72.
\(^{185}\) Id. para. 76.
\(^{186}\) Id. para. 120.
\(^{187}\) See id. paras. 120, 131.
\(^{188}\) Id. para. 132.
\(^{189}\) Id. paras. 120(A), 131.
\(^{190}\) Id. paras. 120(B), 133. In a Category B showing specials, regularly scheduled non-weekly programs, short form programs, and educational and informational Public Service Announcements ("PSA") would count towards the processing guideline. Id. para. 133. Special consideration will be given to such programming or core programming aired during prime time and to broadcasters who have invested a substantial amount of money in the development of their own core programming. Id.
\(^{191}\) Id. para. 135 ("Licensees referred to the Commission should be on notice by this order that they will not necessarily be found to have complied with the Children's Television Act.").
\(^{192}\) Id. Sponsorship of core programming on other stations must increase the amount of core programming on the station airing the sponsored program to exceed the minimum three-hour guideline. Id.
rant non-renewal of license.193

The Commission adopted a processing guideline because a processing guideline was "clear, fair, and efficient."194 It clarified its expectations of broadcasters with respect to their responsibility to serve the educational and informational needs of children. According to the Commission, licensees now would know "with certainty and in advance" how to meet their statutory obligations under the Act.195 Thus, the Commission considered the processing guideline an "easy-to-administer regulatory method to determine broadcaster compliance with the CTA . . . ."196

Nonetheless, unanswered questions on the processing guideline remain. For example, what does "somewhat less" than three hours mean?2197 Which six month period does the Commission mean? How will the Commission monitor the industry as a whole for compliance with the Act?

The Commission based its decision to embrace the three hour quantified concept on "inferences that we can draw from the entire record," rather than the amount of educational and informational programming already in the market.198 It considered the three hour minimum to be reasonable six years after enactment of the Act.199 Finally, the Commission believed its processing guideline remedied the "shortcomings of [its] initial rules" and provided a counter-balance to the disincentives to airing educational and informational programming.200

B. Core Programming Defined

The critical companion element to the processing guideline is the definition of core programming (i.e., the types of programs which may be counted towards the three-hour per-week standard). The Commission defines core programming as educational and informational programming specifically designed to serve the educational and informational needs of children which satisfies all six of the following criteria:

1. Serving the educational and informational needs of children ages 16 and under must be a significant purpose of the program;
2. the program must air between 7 a.m. and 10 p.m.;
3. it must be regularly scheduled at least weekly;
4. it must be at least thirty minutes in length;
5. the station must specify the program's educational and informational objective in writing and the target audience in the station's Children's Television Programming Report; and
6. the station must provide a listing of educational and informational programs, including the target age group, to publishers of program guides.201

Because some broadcasters had claimed general audience and entertainment programming as programs specifically designed to meet the educational and informational needs of children in their renewal applications, the Commission decided that its definition was overly broad and that the requirement that programming be "specifically designed" was not being interpreted correctly by broadcasters.202 To conform more with the express language of the Act, the broad definition of educational and informational television programming was modified and now encompasses "any television programming that furthers the educational and informational needs of children 16-years-of-age and under in any respect, in-
cluding children's intellectual/cognitive or social/emotional needs."203 The Commission designed the definition of core programming to provide licensees with "clear guidance" as to how renewal applications will be processed.204 Adopting a definition of core programming will precisely define programming that qualifies as core programming and will provide incentives to increase the amount of these programs.205 Moreover, the Commission determined that in addition to facilitating public monitoring of broadcasters, requiring licensees to state the educational and informational objectives of core programming will ensure that the broadcasters focus on these goals.206 Likewise, identifying the target age group for core programs will guarantee that broadcasters focus on specific age groups and address particular skills appropriate for that aged child.207 According to the Commission, the 7 a.m. to 10 p.m. window for airing core programs is the time frame in which the maximum number of children view television.208 Furthermore, in the Commission's view, programming scheduled once a week will allow parents to anticipate and plan for the program and therefore, the program will develop a loyal audience.209

Again, additional clarification is necessary if broadcasters are to comply fully with the new core definition and produce the results expected by the Commission. For example, the Commission left it to the staff to determine the definition of regularly scheduled core programming and the extent to which this programming can be preempted.210 Similarly, broadcasters have heretofore relied upon their respective network's and/or a syndicator's classification of programming as educational or informational. May they continue to do so?211 Why did the Commission decline to provide guidelines on the particular age ranges of children?212

C. Public Information Initiatives

The Commission also adopted several public information initiatives to improve access to information on educational programs for parents and children.213 Commercial broadcasters must identify core programs on the air at the beginning of each program in a manner determined by the station.214 Stations also must provide to publishers of television program guides information which identifies core programs and indicates the target age group the core program is intended to reach.215 Lastly, stations must place, on a quarterly basis, in a separate section of their local public inspection files a new FCC Children's Educational Television Programming Report (FCC Form 398).216 The report will reflect the station's children's programming efforts from the preceding quarter and its proposed efforts for the ensuing quarter.217 The report also must include the name of a designated individual at the station who will be responsible for collecting comments and complaints from the public concerning the syndicator as a means to minimize any burdens in compliance with the public file requirements. 1996 Report and Order, supra note 2, at 10,745 (Final Regulatory Flexibility Analysis, Appendix A).

203 Id. para. 79.
204 Id. para. 80.
205 Id.
206 Id. para. 93.
207 Id. para. 95.
208 Id. para. 99.
209 Id. para. 105.
210 Id. para. 106. However, a few months after the 1996 Report and Order, Commission staff did not yet know how many preemptions would be too many. NAB Symposium Remarks, supra note 197. The staff stated that if an episode of core programming is preempted, it must be rescheduled and notice must be given to the public if time permits. Id. It was also indicated that an exception for breaking news coverage and coverage of natural disasters is likely, but that sports preemptions may not fall into the category of allowable preemptions. Id.
211 Commission staff and the panel of legal experts advised broadcasters not to rely only on syndicators, but to view more than the pilot or first episode of a program to make a good faith judgment. NAB Symposium Remarks, supra note 197. The Commission, however, will permit small stations to rely on the documentation provided by a network or a program
station’s compliance with the Act.\(^{218}\) The name of the children’s programming liaison and the availability of the station’s public inspection file must be publicized.\(^{219}\) In addition, for a trial period of three years, stations will be required to file their quarterly children’s reports with the Commission on an annual basis.\(^{220}\)

Through standardized reporting and other means, these new rules are intended by the Commission to facilitate easy access by the public to information about children’s educational programming.\(^{221}\) In addition, the Commission believes that the marketplace forces which led Congress to enact the new law “can be addressed, in part, by enhancing parents’ knowledge . . . .”\(^{222}\) According to the Commission, parents can increase a program’s audience by encouraging their children to watch only if they know that a program is educational and when it is scheduled.\(^{223}\) Increasing the audience size of educational programs will ensure the commercial viability of these programs.\(^{224}\) Access to programming information also should provide viewers with the opportunity to influence their local stations through viewer campaigns to air more and better educational programming for children.\(^{225}\) Finally, keeping the children’s programming report physically separate from other reports in the public inspection file will “ensure ease of access.”\(^{226}\)

Again, despite the Commission’s embrace of “certainty” regarding a station’s obligation to the public, the new rules tend to raise a number of questions. For example, the Commission set no guidelines that address the appearance of the on-air identifier, e.g. when at the beginning of a program, exactly how long in duration, and what should the on-air identifier look like?\(^{227}\) How must the public liaison and the public file be publicized?\(^{228}\) What, if any, liability does a broadcaster have if program guides misprint the information or do not print them at all?\(^{229}\)

IV. PRACTICAL EFFECTS OF THE NEW RULES

If the Commission is correct in its assessment of market incentives to produce and broadcast core programming,\(^{230}\) then the practical effect of the new processing guideline is readily predictable — stations typically will provide three hours of core programming per week, no more, no less. The minimum will become the maximum. If industry studies concerning the amount of currently available core programming are correct,\(^{231}\) the new rules will actually produce a reduction in the amount of educational programming for children on commercial broadcast television. Furthermore, by focusing on a narrowly-defined genre of core programming, the Commission arguably eliminated much of the incentive to broadcast other highly-beneficial types of programming responsive to the educational and informational needs of children.

Neither argument appears inconsistent with the evidence. Marketplace incentives to broadcast educational programming for children appear marginal and even may be in a continuing decline.\(^{232}\) When Congress was debating the Act in 1989, one network executive bluntly stated that, “If the bill passes, we’re going to have to put programming on which we will lose money on.”\(^{233}\) Such a statement came as no surprise. CBS years before had relegated Captain Kangaroo to its weekend schedule and as “the Captain,” Bob Keeshan, observed at the time, “The marketplace has come into play.”\(^{234}\) Keeshan explained that CBS had lost

\(^{218}\) Id. para. 62.

\(^{219}\) Id. paras. 62, 67.

\(^{220}\) Id. para. 68 (requiring “four quarterly reports filed jointly once a year”).

\(^{221}\) Id. para. 47.

\(^{222}\) Id.

\(^{223}\) Id. para. 48.

\(^{224}\) Id.

\(^{225}\) Id.

\(^{226}\) Id. para. 65.

\(^{227}\) The Commission left these specifics to the station’s discretion. NAB Symposium Remarks, supra note 197.

\(^{228}\) The NAB Symposium panel suggested station bulletin boards, ascertainment notices, station websites and on-air announcements as possible places to alert the public to these new initiatives, as long as they reach the people in the community. Id.

\(^{229}\) The NAB Symposium legal panel advised that the licensee is not at risk for violating the new rules if there are printing omissions or mistakes by the program guide publishers. See id.

\(^{230}\) 1996 Report and Order, supra note 2, para. 33.

\(^{231}\) See infra note 276.

\(^{232}\) This is not to say that stations did not provide programming specifically designed to serve the educational and informational needs of children. They clearly understood that they had an obligation to do so after the Act passed, and they complied. See, e.g., NAB Comments, supra note 7, at 5-9; ITV Comments, supra note 96, at 12-15.


\(^{234}\) Judy Mann, Kangarooicide, WASH. POST, Mar. 18, 1983,
millions on the show, while competing networks broadcast profitable adult programming on weekday mornings.235

Adding to the disincentive for commercial television stations to broadcast children’s programs has been the emergence of cable television with a plethora of programming, including Nickelodeon, a cable network targeted at children. This fall has already seen continued erosion of broadcast network children’s audiences on Saturday morning, while Nickelodeon continues to post double-digit increases.236 Syndicated children’s programming appears to be faring no better. As Broadcasting & Cable magazine reported recently, “[d]eclining ratings for most shows, loss of time periods, new competition from the two new networks and the defection of older kids to other forms of entertainment add up to a dismal state of affairs for syndicators.”237 These other forms of entertainment undoubtedly include “the growing range of computer services, new video game technologies and younger-skewing best-selling video releases.”238 In other words, with an ever-expanding array of entertainment options, children already seem to be viewing less and less broadcast television, and any educational program on a broadcast station or network will face enormous competition from the entertainment alternatives offered by these other media and activities.239

Dwindling audiences translate into dwindling revenues. The opportunity cost of scheduling children’s programming, combined with the higher costs of producing educational, but still entertaining programs, creates strong incentives for stations to abandon the genre in favor of more lucrative fare. The Commission’s fear that these rules are necessary to assure that stations continue to provide educational programming for children hardly may be dismissed.240

Under these market conditions, stations can be expected to do no more than they perceive is required of them.241 Stations will make for the Commission’s new safe harbor — three hours of core programming per week — at top speed. With neither an economic nor a regulatory incentive to broadcast more than three hours of such programming per week, stations will broadcast a uniform three hours-per-week of core programming and rest assured that they are in compliance with the Act.

This action could produce two adverse effects. First, the overall amount of core programming actually may decline. Industry studies have shown that stations on average have been broadcasting in excess of three hours of educational programming for children each week, the majority of which was scheduled after 7 a.m.242 Whereas a few stations might have to provide additional programming to meet the processing guideline, the industry average will tend to decline to the three-hour level established by the Commission, because those stations which presently exceed the guideline may now adhere strictly to the three-hour compliance standard.

Second, the amount of beneficial programming which falls outside the Commission’s strict defini-

\[\text{Zenithmedia:} \]

The prize will seemingly go to the network/programmer who develops a show that entertains children long enough to also educate them . . . . What this season — though it has been tough on network programmers and syndicators — has shown is that even in this time of technology-savvy, videotape-addicted, Internet surfing kids, good television still has the power to draw them in, although they may easily, unpredictably shift between viewing options.


\[\text{241 See infra note 276.} \]
tion of core programming will diminish. Stations will have no remaining regulatory incentive to broadcast specials or short-segment interstitial programs, although these types of programs have been highly responsive to the educational and informational needs of children.

V. POTENTIAL LEGAL INFIRMITIES

As a result of the compromise, no requests for reconsideration were filed with the Commission. No petitions for review were filed in the court of appeals. For the moment, therefore, the Commission’s order is secure and intact. This hardly should obscure the oft-compelling legal case which might have been, and might yet be, mounted against the rule.

A. The Rules Impose Specific Programming and Scheduling Requirements Which Contravene the Scheme of Regulation Contemplated by the Communications Act of 1934.

1. While Cloaked in an Aura of Flexibility, the Processing Guideline Is For All Intents and Purposes, a Rule.

Whether read as a three hour or a two-and-a-half hour “plus change” standard, the processing guideline essentially requires stations to broadcast a set amount of a very specific type of programming each week. The Commission itself describes the processing guideline as “a clear benchmark for assessing broadcasters’ performance.” Moreover, the Commission states that:

[licensurees referred to the Commission should be on notice by this order that they will not necessarily be found to have complied with the Children’s Television Act. Given the modest nature of the guideline described in Categories A and B, we expect few broadcasters will fail to meet this benchmark.

As Commissioner Ness emphasized, “Category B is not a safe haven for those whose commitment is lacking.” She further observed, that the safe harbor processing guideline is “certain, for it establishes a clear level of expectation: three-hours – a mere two percent of the broadcast week.” In fact, even President Clinton described the rule as “a new proposal to require broadcasters to air 3 hours of quality educational programming a week.” A Federal Communications Commission with two new Clinton appointees may be expected to focus much more on the certainty than the flexibility in the new rules.

Broadcast licensees will have the same tendency to embrace certainty. No station licensee is likely to test the “Category B” option, much less opt for full Commission review. The certainty inherent in attaining the three-hour threshold is complemented by the broadcasters’ ability to comply without costly legal advice or extensive supplemental justifications. Moreover, given the increasing value of a television station license, the beacon of the safe harbor will be too inviting to resist.

2. The Communications Act Contemplated Only Very General Oversight of Broadcasters’ Programming Performance

The Communications Act of 1934 (“1934 Act”) never contemplated the application of specific program content and scheduling requirements on broadcast licensees. Whereas some may complain that lack of definitive requirements is troublesome, Congress eschewed such detailed regula-

245 As stated in the 1996 Report and Order, the Commission “believ[es] that specials, regularly scheduled non-weekly programs, short-form programs, and PSAs with a significant purpose of educating and informing children ages 16 and under can help accomplish the objectives of the Act . . . .” 1996 Report and Order, supra note 2, para. 133.
246 See supra note 176 and accompanying text.
247 Id. para. 135.
248 Id. at 10769 (separate statement of Commissioner Susan Ness) (emphasis in original).
249 Id. at 10768.
251 Some stations may find themselves unexpectedly in Category B if, for example, they have preempted one of their core programs too often, such that it no longer may be considered “regularly scheduled.”
252 Station licensees value prompt action on their renewal applications. Delay leaves as cloud over the station’s status and can block approval of station sales and related transactions.
tion of broadcasting and contented itself to require only that broadcast stations operate in the public interest. 258 As recognized by the Supreme Court in Columbia Broadcasting System, Inc. v. Democratic National Committee, 254 "the Government's power over licensees . . . is by no means absolute and is carefully circumscribed by the Act itself." 255 The Court delineated the limits of government control over broadcasting, stating that "Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard." 256 The Court reiterated that a station licensee is "held accountable for the totality of its performance of public interest obligations." 257

Similarly, in Turner Broadcasting System, Inc. v. FCC, 258 the Court disavowed the notion that the FCC could control content of broadcast programming:

In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear." 259

The Commission's insistence that stations broadcast a narrowly-defined category of "core programming" arguably clashes head on with these relatively recent pronouncements by the Court restating the very limited role to which the Commission is constrained by the Act.

B. The Children's Television Act Never Authorized or Contemplated Adoption of Any Quantitative Measure of Station Compliance with the Act

Congress resisted crafting the Children's Television Act in a manner inconsistent with the basic regime established by the 1934 Act. As the Court pointed out in CBS v. DNC, license renewal proceedings are a principal means of government oversight of broadcasting under the 1934 Act. 260 Congress preserved that mode of regulation in the Children's Television Act. As described by the sponsor of the programming provision:

Under this act, the FCC will have the responsibility to weigh broadcaster's efforts at serving the educational and informational needs of children in their community, both in the ordinary and comparative renewal situation. To fulfill the required standards, each licensee must demonstrate that some educational and informational programming targeted specifically at children was provided. Of course, it is expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensees [sic] judgment to determine how to serve the educational and informational needs of children in its community. 261

Senator Inouye, who managed the bill on the Senate floor in his capacity as Chairman of the Subcommittee on Communications, similarly recognized the wide discretion afforded broadcast television licensees under the Act:

We have left the licensee the greatest possible flexibility in how it discharges its public service obligation to children. We recognize that there is a great variety of ways to serve this unique audience — including programming specially designed to entertain and inform children; family and adult programming that can also contribute to the information needs of children; and cooperative efforts with noncommercial stations to produce and present educational fare. The list can be extended as far as the imagination of the creative broadcaster and must rely on the good-faith, dedicated judgment of the broadcaster. 262

Thus, after the bill was passed, Senator Wirth reiterated:

Of greatest import . . . is the programming requirement. Every station must comply. Therefore, each station in a community must offer at least some educational children's programming. No longer will such content be relegated solely to PBS. No longer will commercial broadcasters be able to get out of the responsibility in that way. The nature of the content offered is up to the discretion of the broadcaster. Leeway is granted in deference to broadcasters' first amendment rights, of course, and with the expectation of good-faith judgments . . . . 263

Congress' mandate to the Commission, therefore, was to accord broadcasters the greatest flexibility in complying with the Act.

256 Turner, 114 S. Ct. at 2465 (quoting Network Program-
The Commission embraced this mandate expressly in its initial implementation the Act, acknowledging "the legislative intent to afford broadcasters maximum flexibility in determining the 'mix' of programming they will present to meet children's special needs." The Commission similarly recognized "the open-minded perspective taken in the legislative history, a perspective consistent with allowing sufficient breadth of discretion for licensee creativity and sensitivity to community needs to develop."

Congress's disdain for quantitative requirements vis-à-vis the children's programming requirement was abundantly clear. A quantitative requirement was anathema. Senator Inouye stated unambiguously that, "The committee does not intend that the FCC interpret this legislation as requiring or mandating quantification standards governing the amount or placement of children's educational and informational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation." Senator Inouye's counterpart in the House of Representatives, none other than Congressman Edward Markey, echoed the view that a quantitative measure clashed with the congressional intent that the Commission examine a licensee's overall service to children. Congressman Markey stated, "The legislation does not require the FCC to set quantitative guidelines for educational programming, but instead, requires the Commission to base its decision upon an evaluation of a station's overall service to children." Congressman Al Swift, a member of the Telecommunications Subcommittee, also emphasized the general obligation placed on stations in lieu of specific requirements:

The other thing this bill does, importantly, is to suggest that local television stations, when they determine what it is they do to provide service to the community in which they are licensed, consider children as an important audience to which they must respond. It does not dictate specific amounts of time that will be devoted to children's programming; it does not dictate what kinds of programming must be used. It simply says, in making that judgment, which they have to do under the license that they get from the Federal Government, to determine how it is they are going to be dealing with the community in which they serve, how they are going to provide their public service time, that children be one of the audiences seriously considered in providing that programming.

These two things are so elemental, so simple, so fair, so just, so prudent and so necessary that it is difficult to understand why anyone would have any objection. These views, expressed during the debate were, of course, consonant with the committee reports for the bill.

In 1991, the Commission itself embraced this view of the Act:

The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station.

One easily might argue, therefore, that the Commission's new quantitative processing guideline clashes head on with the Act, the underlying Congressional intent, and the Commission's own prior perception of its mandate under the Act.

In response to such a claim the Commission would bear the especially heavy burden of explaining and justifying a complete reversal of its prior position. In changing its interpretation of the Act in its 1996 Report and Order, the Commission provides only a terse paragraph.

---

264 1991 Report and Order, supra note 78, para. 18.
265 Id. para. 20.
269 See House Report, supra note 23, at 17 ("The committee does not intend that the FCC interpret this legislation as requiring or mandating a quantification standard governing the amount or placement of children's educational and informational programming that a broadcast licensee must air to pass a license renewal review pursuant to this legislation.").
270 1991 Report and Order, supra note 78, para. 24 (emphasis added).
271 Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 852 (D.C. Cir. 1970) ("But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."). (footnote omitted).
272 1996 Report and Order, supra note 2, para. 129. In essence the Commission offers two justifications for its new interpretation of the Act. First, it says that "nothing in the stat-
Whether it is tolerably so is a point worthy of contention.

C. Certain Aspects of the Commission's Order May Constitute Impermissibly Arbitrary and Capricious Agency Action in Contravention of the Administrative Procedure Act

An agency decision which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" must be set aside. To avoid such a result "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

Several avenues of attack on the 1996 Report and Order would be available under the "arbitrary and capricious" standard of the APA. First, the Commission's processing guideline arguably is a solution to a problem which does not exist. Such "solutions" have suffered especially harsh treatment in the courts. The Commission's fundamental rationale is an insufficient amount of programming specifically designed to meet the educational and informational needs of children and the underlying cause of such deficiency — a marketplace failure resulting from the economic inability of even well-intentioned stations to schedule a sufficient amount of such programming due to competitive pressures from other stations. The record before the Commission, however, arguably demonstrates that stations, at least on average, already broadcast three or more hours of indisputably core programming. If this could be shown, then neither of the Commission's rationales makes sense. If no shortfall exists, if stations by and large are providing more core programming than the Commission considers minimally acceptable, then a requirement to broadcast that amount of programming is a needless and hollow gesture. Furthermore, if most stations already are exceeding the criterion despite the fact that a few of their competitors are doing less, then the Commission's marketplace equalization rationale has no basis in fact. Broadcasters simply are not behaving the way the Commission fears they would in the absence of a requirement.

Indeed, one might argue with some force that the rule will be counterproductive. This "minimum becomes the maximum" argument takes on added weight if one accepts the Commission thesis that marketplace considerations discourage the broadcast of core programming. In that circumstance, stations logically would be expected to provide no more than what is actually required of them — three hours per week of core programming and not one minute more. If the average amount of time devoted to core programming now exceeds three hours per week, then the average will decline to three hours as every station gravitates to the minimum level of performance dictated by the three-hour processing guideline. On an overall basis, however, less core programming will be available — a result contrary to the Commission's desire to increase the amount of core programming and hardly the epitome of rational agency decisionmaking.

Pointed questions also might be directed at the Commission's selection of a three-hour standard. The stated rationale appears rooted in broadcasters' supposed belief that the three-hour standard is reasonable and achievable. The same could be said of a two-hour or a one-hour requirement.

---


275 See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.") (citation omitted).

276 The NAB and INTV studies found that stations, in deed, were providing in excess of three hours per week of core programming on average. Richard V. Ducey & Mark R. Fratrick, NAB, The 1990 Children's Television Act: A Second Look On Its Impact 3 (1995) (as appended to NAB Comments, supra note 7, Attachment 1); Association of Independent Television Stations, Inc., 1995 Status Report on Children's Educational Programming 11 (1995) (as appended to INTV Comments, supra note 96, Exhibit A) [herein after INTV 1995 Study]. The Commission discounted the results of studies submitted by broadcast interests. 1996 Report and Order, supra note 2, para. 40. This action alone might be considered arbitrary. For example, INTV (now ALTV) was very sensitive to the improper inclusion of programs like The Flinstones in stations' listings of core programming and sought to avoid such definition problems in its survey. INTV 1995 Study, at 12.
More to the point, if children and their parents are the purported beneficiaries of the rule, ought not the rationale be rooted in an effort to optimize that benefit? One might presume that the Commission would respond that when it comes to core programming, more is better, and that the ability of broadcasters to achieve a level of performance at an acceptable cost (including opportunity cost to the viewing public as well as broadcasters) is the only constraint on the amount to be required. Courts, however, typically are reluctant to presume why agencies have chosen to act in a certain way.

Finally, the Commission might be pressed to explain why clearly beneficial program genres have been excluded from consideration as core programming. The narrow definition adopted by the Commission is additionally suspect because the Act itself contemplates consideration of a broader range of programming in evaluating a licensee’s compliance with the Act.

D. A Quantitative Standard May Violate the First Amendment Rights of Broadcasters

Whereas the Chairman was correct in reminding Commissioner Quello that the Commission has applied formal processing guidelines in the past, the constitutionality of those guidelines never was tested and certainly not in the current video programming marketplace. Judicial review of the new children’s programming processing guideline would provide the opportunity for a constitutional test of a quantitative processing guideline, although the existence of other grounds for overturning the guideline likely would permit a reviewing court to avoid the constitutional question.

In any case, the petitioner would have to determine whether to seek reversal of the venerable, but perhaps, outdated standard enunciated in Red Lion Broadcasting Company v. FCC. In Turner Broadcasting System, Inc. v. FCC, the Supreme Court acknowledged a history of jurisprudence that supports Red Lion’s doctrine of according broadcasting a lesser degree of protection based on the “special physical characteristics of broadcast transmissions.” Because spectrum is limited, not everyone can be a broadcaster. Therefore, those who are licensed to use the broadcast spectrum may be subject to more government oversight than other organs of the press. The Court so far has “declined to question” the continuing validity of Red Lion, but is well-aware that it is a suspect doctrine.

The line of attack on Red Lion is neither mysterious nor subtle. Whereas spectrum limitations inherently may limit the number of persons who may communicate to the public via broadcasting, numerous other media now provide other means of reaching the broadcast audience. Red Lion was decided at a time when broadcast television consisted primarily of a limited number of powerful VHF stations concentrated in large markets, virtually all of which were affiliated with one of three national television networks. Moreover, broadcasting was the only video news and entertainment medium. This is hardly the case today. As observed by Commissioner Quello in the heat of the children’s television debate:

Today, there is a superabundance of program choices—over 1,500 full power television stations, including 4 networks, 2 additional emerging networks, 363 non-commercial educational stations, and more than 1,600 low power stations . . . .

Nor is broadcast television even the dominant player in the video marketplace any more. Today, cable tele-

---

277 See Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962). Appellate courts also must assure themselves that an agency has articulated a satisfactory explanation for its action. See id.

278 1996 Report and Order, supra note 2, para. 111.

279 47 U.S.C. § 303b(a)(2) (1994) (“[T]he Commission shall, in its review of any application for renewal . . . consider to the extent to which the license . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”) (emphasis added).

280 See Hundt Univ. of Pittsburgh Remarks, supra note 127, at 6. Those processing guidelines were eliminated in the television deregulation proceeding over a decade ago in large part because the Commission found that the radio and television industries on the whole were providing amounts of the requisite programming in excess of the levels established in the processing guidelines. 1984 Commercialization Report and Order, supra note 3, para. 2.

281 See supra notes 275 and accompanying text.


284 Red Lion, 395 U.S. at 398. (“[I]t is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”).

285 See Turner, 114 S. Ct. at 2457.
sion reaches 97 percent of all television homes and 63 percent of households subscribe. Cable’s 135 program networks, with 60 more in the planning stages, have brought an undreamed-of diversity of programming that responds to virtually every conceivable want and wish. DBS, MMDS, and, soon, video dialtone systems will augment and extend this array of programming. Also vying for the hearts and minds and eyes of the viewer are the Internet and VCRs, which are now in 82 percent of all homes.296

Broadcast television does remain unique in that it is a free, locally-based, ubiquitous service. However, the emergence of other media by which speakers may transmit programming to the public does raise valid questions about the vitality of the spectrum scarcity rationale — which was based on the inability of all speakers to gain access to a channel of communications to the public, not on the fact that broadcasting was a free, universal service. Any serious challenger to the new children’s television rules would find it hard to resist a head-on challenge to Red Lion.

Even assuming the validity of Red Lion, a serious constitutional attack could be mounted against the new rules. As noted above, the Court in Turner repeatedly emphasized the constraints on the Commission’s power to regulate broadcasting.297 The Court was very particular in stating that the FCC lacks the power to prescribe specific types of programming which stations must broadcast.298 The instructive examples used by the Court hit very close to home regarding the new children’s television rules. The Turner Court described the nature of the requirements imposed on noncommercial licensees with respect to educational programming:

> What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of “educational” programming or any particular “educational” programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve “the public interest, convenience or necessity.”299

The Court also cited the Children’s Television Act as an illustration of the sort of permissible, but “limited content restraints imposed by statute and FCC regulation” on broadcasters.290 Notably, the Court characterized the Act as “directing [the] FCC to consider [the] extent to which [a broadcast] license renewal applicant has ‘served the educational and informational needs of children.’”291 Faced with a constitutional challenge to the FCC’s new rules, the Court would find it difficult to distance itself from such recent elaborations on its views of the proper scope of broadcast content regulation.

The Commission’s truncated First Amendment defense of the rules would have to be addressed. First, the Commission says, most of the arguments used to attack the Commission’s proposals are “not applicable” because the Commission has adopted a flexible processing guideline in lieu of a rule.292 As observed by one legal scholar, however:

> For First Amendment purposes, the imposition of a minimum number of hours of specifically defined programming [sic] violates established constitutional norms whether the regulatory mechanism is a safe harbor quantitative processing guideline or a flat-out rule; in constitutional terms, these two options present a distinction without a difference, for in either case the government is effectively imposing affirmative obligations on broadcasters to air programs falling within a definition established by the government within time parameters established by the government for a minimum number of hours established by the government.293

Thus, whether this is a “distinction without a difference” or a loophole of sufficient dimension to forestall constitutional jeopardy would be a material issue for a reviewing court.

The FCC also relies on judicial approval of rules requiring broadcast stations to provide reasonable access to candidates for federal elective office.294 Like the new children’s television rules, the Commission asserts, the reasonable access provision also requires stations “to air certain types of programming they might not otherwise choose to provide.”295 Several distinctions might be raised in response to the Commission’s position. First,

---

296 See Quello NAB Remarks, supra note 126, at 3-4; see also Syracuse Peace Council v. FCC, 867 F. 2d 654, 684-85 (D.C. Cir. 1989) (Starr, J. concurring).
298 Id.
299 Id. at 2,465 (quoting En Banc Programming Inquiry, 44 F.C.C.2d 2903, 2312 (1960)).
300 Id. at 2,462.
the reasonable access provision is directed at a problem resulting from perceived spectrum scarcity, the inability of all speakers (and in particular, candidates) to secure access to a broadcast channel. Thus, as in Red Lion, the provision in question was designed to assure access to viewpoints on matters of public concern. This is a far cry from rules effectively requiring stations to broadcast a specific amount of a very specific type of programming. No suggestion has been made that spectrum scarcity is a factor in stations’ decisions to broadcast or not to broadcast educational programming for children. As the Court noted in upholding the reasonable access requirement, it was a “limited right to ‘reasonable access’” which did “not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming.” Furthermore, as Professor Smolla posits, “[T]he First Amendment ‘window’ opened by Red Lion and its progeny has been limited to regulations aimed narrowly at ensuring equality of access in public debate and the channeling of indecent programming.” Second, as noted above, unlike the reasonable access provision, quantitative children’s programming standards enjoy no statutory basis. Indeed, they clash with the clearly expressed intent of Congress.

The Commission also asserted that the new rules would survive heightened constitutional scrutiny (assuming the demise of Red Lion) because they advance a compelling interest—the intellectual development of our nation’s children—and are narrowly tailored. It claims the rules “are no more burdensome than necessary to ensure that children will be able to watch educational and informational programming.” The Commission then emphasizes the flexibility accorded stations under the processing guideline. None of this can obscure the fact that the Commission may have imposed rules to increase educational and informational children’s programming which not only is demonstrably unnecessary, but possibly counterproductive. Indeed, as Justice Kennedy pointed out in Turner, the importance of the government’s interest does not automatically lead to the conclusion that a rule will advance those interests.

VI. CONCLUSION

Nothing said herein is to denigrate politics (as usual or otherwise) or the influence of political forces on the deliberations and decision of the Federal Communications Commission. Indeed, to suggest that the FCC ought remain aloof or insulated from political pressure would be naive and unrealistic. Moreover, it would deny the need for political accountability essential in a democracy.

Similarly, no implication that the Commission should discard or discount the views of the well-meaning advocates of better children’s programming is intended. The rights and interests of children certainly are a proper concern of government, and the FCC would be remiss in turning a blind eye to the needs of children.

At the same time, the FCC, as an administrative agency, operates in a legal framework which is designed to assure that its decisions are products of reason and reality, not just whim, caprice, or even the best of intentions. The Bill of Rights (of which the First Amendment is the most prominent article) also exists to assure that a majoritarian political viewpoint does not trample fundamental freedoms. Therefore, the Commission also must be accountable to its statutory mandate and the Constitution. The sensitivity of the FCC to the legal and constitutional limits on its authority must be especially acute when, as in the case of children’s television, considerable political pressure and undeniably good intentions weigh heavily on the Commission’s decision making process.

Whether the Commission was sufficiently sensitive to legal and constitutional constraints in regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posist the existence of the disease sought to be cured." (citation omitted); see also Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 115 S. Ct. 2388, 2350 (1995) ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.")
adopting a quantitative standard for children's television programming will remain a matter of academic, but apparently, not, judicial interest. Significant legal and constitutional issues will linger momentarily in the wake of the Commission's decision and in all likelihood will fade from view. This is unfortunate, not only because the issues are serious and the precedent worrisome, but also because sound reasons exist to question whether the FCC's new rules actually will improve programming for children.