

scheme," as alleged by NAB and others. See, e.g., NAB Comments at 10; CBS at 20-24.

Congress clearly intended the Act to increase the amount of educational and informational programming available to children. See, e.g., S. Rep. No. 227, 101st Cong., 1st Sess. 1, 22-23 (1989) (hereafter "Senate Report"). More than two years later, no such increase has occurred. Thus, it is reasonable for the Commission to issue policy guidelines to encourage compliance with the CTA, provide advance notice of the Commission's criteria for renewing licenses, and simplify the renewal process.

As CME et al. discussed in our earlier comments, the CTA's legislative history does not bar such action. The Committee Reports merely clarify that the CTA does not require the Commission to take such a step (unlike previous versions of the bill³⁵). See H.R. Rep. No. 385, 101st Cong., 1st Sess. 17 (1989) (hereafter "House Report"); Senate Report at 23. However, nothing in either report prohibits the FCC from adopting internal guidelines to assist it in reviewing renewal applications.

In fact, because the CTA delegates renewal decisions to the Commission, without specifying the means by which it must evaluate licensees' service to children, it grants the Commission broad discretion in this area. CTA § 103 (a); 47 U.S.C. § 303b (a) (directing the Commission to consider "the extent to which"

³⁵ Compare 1983 bill, H.R. 4097, 98th Cong., 1st Sess. (1983) (requiring 5 hours per week for license renewal); H.R. 3216, 99th Cong., 1st Sess. (1985) (seven hours); S. 1505, 100th Cong., 1st Sess. (1987) (same).

licensee has provided programming "specifically designed" to educate children). Under Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842-43 (1984), the Commission is authorized to establish its own internal criteria for renewal as long as it is consistent with the plain language of the statute.³⁶

Several commenters insist that any "core" processing guideline will have the same effect as a mandatory rule. See, e.g., CBS at 27-28, NAB at 13, 17. This is incorrect as a matter of law. The CTA explicitly provides that overall programming is relevant to the renewal decision, and does not permit the Commission to deny license renewal without considering overall program service.³⁷

The fact that "few broadcasters [may] be willing to risk the isolation of their renewal applications for special scrutiny," as CBS asserts at 27-28, is not dispositive. In practice, the only impact on a licensee which provides less than the suggested

³⁶ Under the second prong of Chevron, if Congressional intent is ambiguous, an agency's reasonable construction of the statute is afforded great deference. Here, the FCC's adoption of a processing guideline is reasonable because it is consistent with the CTA's objectives and warranted by the facts. Compare Delegation of Authority Order, 43 FCC 2d 638, 640 (1973); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621 (1978) (upholding similar test used to review EEO compliance).

³⁷ ". . . the Commission shall, in its review . . . consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming . . . [and] any special nonbroadcast efforts by the licensee . . ." CTA §§ 103 (a)(2), (b)(1).

amount of "core" programming is that their renewal process might be more lengthy and cumbersome, since the Commission will be forced to examine their "overall" programming to determine whether they have complied with the Act. Thus, the proposed criteria are neither all-inclusive nor mandatory. In short, the CTA permits the Commission to adopt and apply a processing guideline.

The industry needs a wake-up call. Two and a half years of experience indicates that the Commission must require broadcasters to provide and document substantial quantities of quality "specifically designed" educational programming to demonstrate compliance with the Act. Far from outlawing such requirements, the CTA authorizes them and the industry's recalcitrance compels them.

2. Processing Guidelines would not violate the First Amendment.

Some commenters express concern about the First Amendment implications of processing guidelines. See, e.g., CBS at 26; NAB at 13-16; NBC at 22. However, it is clear that the Commission may utilize processing guidelines in evaluating broadcaster compliance with the Act without violating the First Amendment.

Both the House and Senate Committees carefully analyzed the constitutionality of the legislation, and concluded that the CTA was clearly constitutional. Senate Report at 10-18; House Report at 8-12. For example, the House Report specifically found that "requiring the FCC to consider, during the license renewal process, whether a television licensee has served the educational

and informational needs in the context of its overall programming, . . . passes muster under First Amendment analysis." House Report at 10. See also Senate Report at 16. We do not see how the FCC's use of processing guidelines to help it assess whether a licensee has served those needs presents a constitutional problem.

Indeed, the FCC has used processing guidelines in the past to assess whether licensees have met their public interest responsibilities in presenting news, public affairs and other non-entertainment programming, without running afoul of the First Amendment. NBC claims that the Commission eliminated these processing guidelines in 1981 and 1984 in part because of its "concern over the constitutionality of guidelines which of necessity impinged on broadcaster discretion and programming judgements." NBC at 22 & n.16. However, the FCC decisions cited by NBC actually state that the main reason for eliminating the processing guidelines was an assumption that they were no longer necessary: that market forces would guarantee that community and public service needs will be met.³⁸ In the case of children's television, however, it is well-established that market forces do not ensure adequate amounts of educational programming for children.³⁹

³⁸ See, e.g., TV Deregulation, 98 FCC 2d 1076, 1077 (1984).

³⁹ Senate Report at 9; Children's Television Programming, 75 FCC 2d 138, 144-45 (1979). Moreover, in approving Commission regulations designed to increase the diversity of programming in broadcasting, the Court stated that "[t]he Commission has never relied on the market alone to ensure that the needs of the

Only one of the FCC decisions cited by NBC even mentions the First Amendment implications of quantitative guidelines. In deregulating television licensees in 1984, the Commission noted "potential First Amendment concerns" based on the "lack of a direct nexus between a quantitative approach and licensee performance."⁴⁰ Here, a direct nexus clearly exists between the quantity of educational programming required by the CTA and licensee performance. Moreover, each of the Commission decisions cited by NBC reaffirms the fundamental obligation of broadcasters to be responsive to their communities' needs.⁴¹ Children, of course, are part of that community, and are entitled to effective service.

CBS cites several decisions for the proposition that the Commission "treads on extremely sensitive ground" whenever it considers the adoption of "program quotas." CBS at 26.⁴² It

audience are met." Metro Broadcasting, 110 S.Ct. 2997, 3012 (1990).

⁴⁰ TV Deregulation, 98 FCC 2d at 1089. The cases cited for support, however, merely state that quantitative guidelines alone do not guarantee improved service. Id. at n. 44.

⁴¹ "We do expect, and will require, radio broadcasters to be responsive to the issues facing their community." Deregulation of Radio, 84 FCC 2d 968, 978 (1981); TV Deregulation 98 FCC 2d at 1077 ("we are by this Order retaining the obligation of licensees to respond to issues of concern to the community."); See also Deregulation of Radio, 87 FCC 2d 797, 804 (1981); Deregulation of Radio 96 FCC 2d 930, 940 (1984); TV Deregulation 104 FCC 2d 358, 363 (1986).

⁴² Of course, the proposed processing guidelines are not the same as quotas. Any broadcaster that does not meet the guideline will have ample opportunity to demonstrate that it has served the needs of children.

cites the 1974 Children's Television Policy Statement and the 1975 Reconsideration Order, in which the Commission refused ACT's request to establish quantitative guidelines.⁴³ However, those decisions were not final. In the 1974 report, the Commission stated that, "[w]e are just beginning to receive complete information on the children's programming performance of stations It may be that the question of rules will be revisited as we gain experience under the new form."⁴⁴ In fact, almost twenty years of experience has now proven that guidelines are needed. Absent any guideline, broadcasters have and will provide only minimal amounts of educational programming for children.⁴⁵

NAB attempts to distinguish quantitative guidelines from the recently upheld "must carry" requirements imposed by the Cable Act.⁴⁶ First, NAB states that unlike the "must carry" provisions, quantitative children's programming guidelines would be directly content based. This assertion is inaccurate. While the guidelines would implement the CTA requirement that

⁴³ Report and Order 50 FCC 2d 1,6 (1974) ("1974 Policy Statement"); Reconsideration Order, 55 FCC 2d 691, 693 (1975).

⁴⁴ 1974 Policy Statement, 50 FCC 2d at 6, n.6. In 1975, the Commission reaffirmed that "it may be necessary to reconsider this policy decision in the future, in light of further experience. . . ." Reconsideration Order, 55 FCC 2d at 693.

⁴⁵ Another case cited by CBS, Report and Order, 96 FCC 2d 634 (1984), prompted Congressional action by weakening the already weak 1974 Policy Statement. See Senate Report at 4.

⁴⁶ NAB Comments at 14, n.31, citing Turner Broadcasting System v. United States, Civ. Action No. 92-2247, slip op. (D.D.C. April 3, 1993).

broadcasters air programming specifically designed to educate and inform children, stations will have complete control over the actual content of the programs. The must carry requirement, by contrast, prohibits cable companies from exercising any authority over the content of the broadcasters' programs.⁴⁷ Thus, if anything, processing guidelines would be less intrusive on content decisions than the must carry rules

carry regulations are constitutional, certainly quantitative guidelines are as well.

In sum, the comments of NBC, CBS and the NAB raise a phantom claim of First Amendment problems. Utilizing processing guidelines to assess whether television stations are meeting their public interest responsibilities under the CTA would not violate the First Amendment.

III. Additional Actions are Needed to Improve Broadcaster Service to Children and Permit Public Monitoring.

A. "Core" Programming Should Be Targeted and Licensees Should Identify Target Groups in Program Descriptions.

CME continues to believe that educational television is most effective when it is targeted to a specific age-range of children, and urges the Commission to adopt such a requirement, which is supported both by educational theory and by the Act's legislative history. See, e.g., Senate Report at 22-23; NAEYC at 1-2; CRETV at 7-8 and 11. Research has proven that it is extremely difficult to design a program which effectively educates kids aged 2-16. Indeed, Kunkel describes age-group targeting as "the technique proven most effective at accomplishing educational outcomes in child-viewers." Kunkel at 7. See also Levin at 3, 13-16 (describing how and why most current programming is developmentally inappropriate for younger children); CTW at 14.

Kunkel's research found that 84 % of stations did not identify any target audience for their educational programming.

Kunkel at 5 and Table 9 (of 195 programs, 1% were aimed at elementary ages, 5 % at preschoolers, and 10 % at teenagers); see also PTA at 3 (preschool programs "almost nonexistent"); NAEYC (same). NBC, which aims most of its programming at early teens, is the only network that claims to target a specific age group in its Saturday morning schedule. NBC at 12. Similar efforts are needed for preschoolers and younger children.

~~Other networks strongly support that younger children~~

the Commission's rules. Kunkel at 5. CME encountered similar problems while conducting our study last year.

For this reason, CME et al. again urge the Commission to standardize its reporting requirements. For example, it should require licensees to report weekly totals (or averages) of "specifically designed" or "core" programming, and whether they have met the processing guideline. The Commission should also clarify what and how it will consider in the way of short-segment programs and nonbroadcast efforts.⁵⁰ These simple steps would make monitoring by the Commission and the public much easier.

We also endorse the APA's suggestion that broadcasters identify their qualifying "core" programs in advance and publish such information, perhaps in the local TV Guide. Comments of APA at 5-7. Such a step would both discourage licensees from making outrageous claims for shows such as "GI Joe," while at the same time permitting parents to plan and supervise their children's educational viewing, and allowing any interested party to monitor

evaluate whether the program achieves its stated goals. CTW at 9; CRETV at 7.

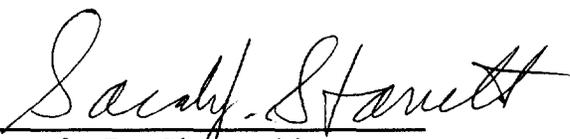
CONCLUSION

For the reasons given above, we again urge the Commission to take prompt, decisive action to improve licensee compliance with the Children's Television Act. At a minimum, the Commission should redefine qualifying "core" programming, institute a staff processing guideline of at least one hour a day, and implement other changes to assist the public in monitoring CTA compliance. Without such changes, the broadcast television industry will continue to drag its feet, while yet another generation of children waste their time in front of the TV set.

Respectfully submitted,

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