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June 8, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

Re: Children's Television
MM Docket No. 93-48

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Dear Secretary Caton:

On behalf of The Media Institute, I hereby submit one original and nine copies of the Institute's comments in response to the Federal Communication Commission's April 20, 1994 notice of *en banc* hearing on children's television (MM Docket No. 93-48).

Sincerely,

Andrew D. Auerbach
Staff Attorney

Enclosure

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of	)	MM Docket No. 93-48
	)	
Policies and Rules Concerning Children's Television Programming	)	
	)	
Revision of Programming Policies for Television Broadcast Stations	)	

Notice of Inquiry

Comments

of

The Media Institute

by: Sol Schildhause
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Of Counsel

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June 8, 1994

Summary

The Commission's Inquiry is not about whether good programming for children is desirable. It is desirable. These Comments of The Media Institute, however, address a serious constitutional concern that has arisen in the course of debate on children's television: the unwarranted assertion by Congress, and now by the Commission, of a right to dictate program content.

The First Amendment reflects a profound distrust of government and its willingness to influence private speech. And video programming is a form of speech that enjoys significant constitutional protection. The Children's Television Act of 1990 represents an attempt by government to coerce video publishers to offer up a certain class of government-approved programming. In a democracy dedicated to open speech and a free press, any governmental attempt to influence what is spoken or published is enough to raise a cautionary flag.

The validity of what the Congress has enacted will surely be tested. The Media Institute believes the Act will have difficulty passing a constitutional audit because (a) the scheme of the Act, that television stations must serve "the educational and informational needs of children through the licensee's overall programming," offers an insufficiently precise standard to constrain administrative discretion in assessing compliance, and because (b) the Act assumes an even more-alarming posture, for it is backed by a legislative history that actually specifies the precise programs and types of speech that have the congressional stamp of approval. This, The Media Institute respectfully suggests, is a profound move on the road to making the electronic media a voice of government. And the Commission's eagerness to put its own approval stamp on those same programs and speech validates that concern.

The Media Institute, a nonprofit research foundation dedicated to protecting the First Amendment and free speech generally, is not with this filing attempting to litigate the constitutionality of the Children's Television Act. The Commission has quite properly noted, in *Report and Order*, 6 FCC Rcd 2111, 2123 n.5 (1991), that challenges to the constitutionality of an act of Congress must be lodged in the courts. But the Commission, with its *Notice of Inquiry*, 8 FCC Rcd 1841 (1993), is now exceeding the requirements of the Children's Television Act. The Commission is striking out on its own and can no longer shelter its conduct as an unavoidable response to legislative direction. Thus, its entire program, which is designed to coerce the provision of approved children's programming, is now available for constitutional challenge.

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The Children's Television Act is not working; the Commission is exceeding its mission in trying to redeem the Act.

1. In its *Notice of Inquiry* the Commission frets (¶. 6) because early evidence "suggests little change in available programming that addresses the needs of the child audience." The Commission is clearly not pleased with that result. Thus (¶. 7): "We do not believe that this level of performance is, in the long term, consistent with the objectives underlying the CTA." To redeem the Act, the Commission then proposes a number of changes in its approach.

2. The Media Institute will, for the purpose at hand, pass over a number of the Commission's content-intrusive proposals, such as favoring "standard-length programming" over "short-segment programming"(¶. 8), or low-rating "entertainment" programming in favor of "educational and informational" fare, or giving an official thumbs-down to "The Flintstones" and "G.I. Joe" (¶. 6). The Institute is troubled that the Commission seems unconcerned about the propriety of such governmental pronouncements. For the moment, however, The Institute addresses the fact that the Commission is inappropriately exceeding the Act's requirements and is taking on an improper legislative function.

The Commission, in retreating to quantitative standards, is denying congressional intent and is itself forging new legislation.

3. The Commission has repeatedly noted that Congress has not only *not* adopted quantitative standards for measuring compliance, but in fact has *rejected* that proposition. *See, e.g.*, subject *Notice of Inquiry*, ¶. 4: "In accordance with the CTA's legislative history, however, no minimum amount of such programming has been prescribed"; *Report and Order*, 6 FCC Rcd 2111, ¶. 36 (1991): "We also do not adopt proposed processing guidelines based on percentages of children's programming, as

these would conflict with Congress' rejection of quantitative standards." As the drafters of the Children's Television Act made clear: "The Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review...."[1] Thus, the Children's Television Act intentionally left broadcasters discretion in meeting its requirements.

4. From the very beginning, Congress explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities.[2] The validity of broadcast regulations has often hinged on the amount of programming discretion broadcasters retain. "In the field of broadcasting, program categories must remain somewhat vague to avoid the implication that the guideline is rigid enough to be censorial...too precise a series of definitions might end in a stylized format close to censorship."[3]

5. The Commission has long recognized that rigid guidelines are legally suspect.[4] The courts, in turn, have affirmed the Commission's decisions to accord licensees "a substantial measure of their customary discretion in the area of programming."[5] As the scarcity principle comes under ever more withering attack, and as ever-increasing amounts and types of information sources reach the marketplace, it is difficult to imagine how programming guidelines could <u>now</u> be acceptable from a legal perspective. The Second Circuit noted in 1975: "it may be that *mandatory*

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1 H.R. Rep. No. 101-385, 101st Cong., 1st Sess. (1989).

2 *See* H.R. 7357, 68th Cong., 1st Sess. § 1(b) (1924).

3 *National Ass'n. of Indep. Television Producers and Distribs. v. FCC*, 516 F.2d 526, 539 (1975).

4 *Children's Television Programming and Advertising Practices*, 96 FCC 2d 634, 652 (1984).

5 *Action for Children's Television v. FCC*, 564 F.2d 458, 480 (D.C. Cir. 1977).

programming by the Commission even in categories would raise serious First Amendment questions."[6]

The Commission has, over the years, consistently rejected program quotas.

6. For some 25 years, the Commission has been wrestling with the question of how to compel more good television programming for children. The mere statement of the dilemma should be sufficient to explain why the solution is so elusive. Government is wisely constrained to avoid labeling what is "good" programming and has understandable difficulty in defining "children." (Similar considerations underlie the impossibility of defining "violence" in repeated congressional moves to curtail violence in television programming.)

7. All of which prompted the Commission to declare on earlier occasion and after extensive inquiry (in *Children's Television Programming and Advertising Practices,* 96 FCC 2d 634 (1984)), that: "...we find no basis in the record to apply a national mandatory quota for children's programming."(¶. 46.) In arriving at this judgment, the Commission observed (¶. 39) that: "Numerous judicial opinions have also noted that serious First Amendment concerns are raised..." and stated (¶. 38) that neither "...the famous 1946 'Blue Book' nor the 1960 program statement with its fourteen program categories, including the first specific reference to programming for children, found it either desirable from a policy perspective or acceptable from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public obligations of licensees."

8. In the final analysis, the Commission may be found to have resisted mandatory quotas because (¶. 43) it felt constrained by "Constitutional mandate" that

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6 *National Ass'n. of Indep. Television Producers and Distribs.*, 516 F.2d at 539.

"forbid[s] our direct involvement in program censorship and which require[s] that broadcast station licensees retain broad discretion in the programming they broadcast." The Media Institute respectfully observes that the constitutional constraints are undisturbed and obtain as forcefully today as they did in 1984 when the Commission confessed that it was helpless to intrude.

Processing guidelines are the equivalent of quantitative standards.

9. In spite of this legislative, judicial, and regulatory history, however, it appears the Commission currently looks favorably upon definite amounts and measured quantities of programming -- precisely the approaches rejected by Congress in drafting the Children's Television Act. And the concept cannot be sanitized by explaining it away as "processing guidelines" rather than strict regulation.

10. The distinction between "processing guidelines" and quantitative standards for directing station licensee compliance is faint indeed. Even the Commission admits as much. Thus, the *Notice of Inquiry* at ¶. 9 confesses that "processing guidelines in the renewal area can take on the force of a rule, at least in the perception of licensees." It should come as no surprise to the Commission that its licensees would conform their conduct to the processing guidelines as if the guidelines were standards mandated by regulation.

11. With processing guidelines, the Commission essentially tells its staff to pass those applications that meet the numbers and to scrutinize those that do not. *Notice of Inquiry*, ¶. 9, states that "failure to meet that guideline...would determine the intensity of Commission scrutiny." The Commission appears to be alerting licensees that those who have the numbers will pass; those who do not will be audited.

12. As experience instructs, this auditing process can take the form of requests for

detailed explanations, forfeitures, and short-term renewals, all of which licensees will ultimately endure because the costs of outright resistance are substantial. So, the auditing process -- or, as the Commission prefers, "the intensity of Commission scrutiny" -- is penalty enough to coerce licensee compliance with the numbers that are the stuff of the processing guidelines.

The Commission's program, in addition to its questionable proposal for quantitative standards, also fails to cure the vagueness defect in the Act.

13. Schemes providing for the administrative regulation of speech must contain "narrowly drawn, reasonable and definitive standards" to constrain the decisionmaker's discretion.[7] The careful limiting of administrative discretion is foremost among free speech principles. The First Amendment forbids government from "vest[ing] restraining control over the right to speak [in] an administrative official where there are no appropriate standards to guide his action."[8]

14. The standard that the Congress has offered up for the guidance of television licensee conduct demands, as a condition for the renewal of license, that the licensee be found to have "served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." The legislation is desperately vague -- for example, there is no definition of who is a child, nor is there any specification of what children need. The incurable defect in the legislation has moved the Commission to supply its own definition of "children" (1991 *Report and Order, supra,* ¶¶. 3, 15, 16), and to explain that what children need is "programming that furthers...[their] positive development in any way, including serving their cognitive/intellectual or

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7 *Forsythe County v. Nationalists Movement*, 112 S. Ct. 2395, 2402 (1992) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

8 *Kunz v. New York*, 340 U.S. 290, 295 (1951).

social/emotional needs."[9]

15. That clarification of standard is, we respectfully submit, small if any enlightenment for licensee or administrator. An unbroken line of decisions from the U.S. Supreme Court in recent decades frowns on laws that subject "the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority."[10] To the same effect, the Court in *City of Lakewood v. Plain Dealer Publishing Co.* held invalid a local newsrack law, explaining that "[w]ithout...guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."[11]

16. Against that array of precedent, it is pertinent to gauge whether the Commission has defined the congressional standard sufficiently to permit a finding of constitutionality. In the view of The Media Institute, the Commission has not. How, for example, would the law now guide a television licensee as to which programs in a station's broadcast schedule further the positive development of children or serve their cognitive/intellectual or social/emotional needs? The licensee would appear to be at the whim of the Commission's discretion unless, of course, only government-approved programs were broadcast. But the only useful guidance that Congress and the Commission have heretofore made available is heedless of constitutional principle.

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9 47 C.F.R. § 73.671 (1993).

10 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969).

11 486 U.S. 750, 758 (1988).

The Commission, by adopting a list of approved programs by name, is moving toward making the electronic media a voice of government.

17. It is ironic that, in an attempt to remedy an incurable defect in the legislation, the Commission has been driven to the very brink of ignoring both the no-censorship provision of the Communications Act, 47 U.S.C. § 326, and the First Amendment to the Constitution. To illustrate, the Commission gives the green light to "Fat Albert and the Cosby Kids," "CBS Schoolbreak Specials," "Winnie the Pooh and Friends," "ABC Afterschool Specials," "Saved by the Bell," "Life Goes On," "The Smurfs," "Great Intergalactic Scientific Game Show," and "Action News for Kids." *Notice of Inquiry*, ¶. 3, referring to *Report and Order*, 6 FCC Rcd 2111, ¶. 26 (1991). "Pee Wee's Playhouse" also gets good marks (*Notice of Inquiry*, fn. 15), but "The Flintstones" and "The Jetsons" do not measure up. *Id.*

18. To satisfy the Children's Television Act, programming must present certain types of information in a manner accessible to children 16 years of age or younger. Even worse, fiction must espouse values selected by the government as most edifying for children.[12] (The FCC, by explicitly designating "Fat Albert and the Cosby Kids," "Saved by the Bell," "Winnie the Pooh," and the "Smurfs" as "educational and informational," entreats broadcasters to engage in the moral education of our youth. These programs, which the FCC described as "emphasizing pro-social values," are only educational in the sense they tell children how the government wants them to behave in society.)

19. Endorsing certain programs and discrediting others by name are clear examples of forbidden government conduct. Yet the Commission does not seem to

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12 *See Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2115 (1991). The FCC cites with approval certain television programs as examples of educational and informational programming.

recognize that there is a problem in identifying by title the program messages the government would have its licensees deliver. The Media Institute expresses its deep concern over the Commission's apparent willingness to dictate program content in this instance.

20. The FCC has historically avoided placing content-specific programming criteria on broadcasters. The now-defunct[13] fairness doctrine and its corollaries, the equal time rule, the prime time access rule, and commercial time limits all seriously encroach on a broadcaster's right to speak freely. None, however, forces broadcasters to air programming of an identified content to an identified audience. The fairness doctrine was triggered by controversial issues of public importance and required that the opposing view be aired. Balance was the purported objective, not the dissemination of any particular information or values.

21. Similarly, the equal time rule required that all candidates be permitted a reasonable opportunity to purchase air time. It expressed no preference for candidates the government found particularly informative or educational. The prime time access rule and limits on commercial advertising severely restrict a broadcaster's programming decisionmaking. Yet, they do not require programming to express certain government approved values and information. These FCC rules *alter* the content of programming but do not compel programming of a specified content.[14]

22. Moreover, because some fiction can satisfy the Children's Television Act,[15]

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13 *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986); *see also General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d 143 (1985).

14 Although no prior FCC rules justify a children's television mandate, the Act has been proffered as precedent by those who wish the FCC to regulate violence in television. *See Oversight Hearing on the Television Program Improvement Act of 1990: Before the U.S. Senate Judiciary Subcommittee on the Constitution*, (1993)(testimony of Dr. William H. Dietz).

15 *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2114 (1991).

mandatory requirements can have grossly unconstitutional applications. Any standard in which the broadcast of "Fat Albert and the Cosby Kids" helps fulfill an obligation necessary to retain a license when the broadcast of "Beavis and Butthead" does not is necessarily viewpoint based. The only difference between these two fictional entertainment programs is the pro-social viewpoint expressed. As the Supreme Court has stated, "although the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern."[16]

23. The Government's power to compel "a balanced presentation of views," a power itself of dubious constitutionality,[17] does not include the power to compel the broadcast of programming of a certain viewpoint. In *R.A.V. v. Minnesota*,[18] the state had the power to regulate fighting words, far greater than the federal government's power to control the content of the airwaves. *R.A.V.* held that the government's broad power to regulate fighting words did not include the power to proscribe fighting words of only a certain viewpoint.[19] Under *R.A.V.*, the FCC's power over the airwaves does not comprehend conditioning a license renewal, even in part, on the basis of programming espousing a government-preferred viewpoint.

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16 *League of Women Voters*, 460 U.S. at 380 (emphasis added).

17 *See Telecommunications Research and Action Ctr.*, 801 F.2d at 508 ("Since scarcity is a universal fact, it can hardly explain regulation in one context and not another."); *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d 143 (1985); The scarcity principle has been described as "the target of withering attack: 'Economists, political scientists and lawyers generally agree' that the interference rationale for public interest is 'nonsensical.' It is 'simply silly'; it 'has worn so thin that continuing to refute it would be gratuitous.'" Jonathan Weinberg, *Broadcasting and Speech*, 81 Cal. L. Rev. 1101, 1106 (1993) (internal citations omitted).

18 112 S. Ct. 2538 (1992).

19 *Id.* at 2548. Minnesota did not criminalize all fighting words, only fighting words containing messages of "bias motivated" hatred. This "selective limitation upon speech" invalidated the statute. *Id.* at 2548.

24. In view of the likely penalties for noncompliance with the otherwise vague standard, the Commission's program suggestions amount to compelled speech. In other words, a licensee should broadcast programs that the Commission approves of or risk running afoul of processing guidelines. Free speech and constitutional purists will surely find this outcome to be unlawful and dangerous to traditional freedoms of speech and press.

Finally, it is bad policy for the Commission to impose program requirements and quotas, and to endorse specific programs.

25. Even if the Commission believes that it can implement a package of program percentages and approved programs, The Media Institute respectfully counsels otherwise. This suggestion flows from a view that the approach the Commission is courting is a regression, a backsliding from a growing enlightenment over the decades about the futility of assessing programs and the quality of programming efforts.

26. From the high point of the 1946 "Blue Book," where the Commission expressly specified the components of well-balanced programming, through various inquiries that focused on the ascertainment of community needs and on how to assess programming efforts in a renewal setting, one proposition seems well-settled: The Commission is in an awkward role when it evaluates artistry and creativity in the context of the severe limitations that it not censor (47 U.S.C. § 326), nor encroach on the constitutional barrier of the First Amendment. See, *e.g.*, discussions in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, ¶. 3 (1965), and *Deregulation of Radio*, 84 FCC 2d 968 (1981).

27. Having perseveringly and methodically arrived at a truce in a cautious

blending of the duty to assess service in the public interest while observing narrow legal restraints, the Commission and its processes would be served, it is respectfully urged, by being faithful to the history of the struggle. Adoption of a regulatory structure for children's programming that goes beyond the absolute minimum required by Congress would, we believe, unnecessarily fan old disputes over the Commission's jurisdiction in appraising broadcast programming. "Unnecessarily," we stress, because the Commission is not obliged to improve on what Congress has enacted. If the Children's Television Act is not working, it is not the Commission's fault. The Act suffers from severe constitutional infirmities as we have noted herein. Moreover, the Commission's attempts to make the Act work (which attempts are constitutionally suspect in their own right) may just prove futile in a culture that demands a separation between those who govern and those who speak.

Respectfully submitted,

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