

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

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JUL 15 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

To: The Commission (En Banc Hearing)

**REPLY COMMENTS OF RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION
AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS**

The Radio-Television News Directors Association
("RTNDA") and The Reporters Committee for Freedom of the Press
("Reporters Committee") hereby submit reply comments in the above-
captioned proceeding.

In their opening comments,^{1/} RTNDA and Reporters
Committee contended that that part of the Children's Television
Act of 1990 at issue in this proceeding violates the First
Amendment by requiring television broadcasters to provide
programming as the federal government demands. These journalistic
organizations argued that the Commission should proceed
accordingly to minimize the constitutional violation by

^{1/} "Comments of Radio-Television News Directors Association and
The Reporters Committee for Freedom of the Press"
("Comments"), filed in this proceeding on June 15, 1994.

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implementing the Act in the manner least restrictive of the programming judgments of station licensees.^{2/}

Several commenters and hearing witnesses addressed the First Amendment aspects of the existing and proposed children's television regulation. Since the filing of the comments and the oral hearing, the Supreme Court, in deciding the case concerning the constitutionality of the cable television "must carry" rule, made statements about the First Amendment standard for broadcasting. Turner Broadcasting System, Inc. v. FCC, 62 U.S.L.W. 4647, 4651, 4654-55 (U.S. June 27, 1994) ("Turner").^{3/} The Turner Court's statements about broadcast content regulation made two points that bear upon a proper evaluation of First Amendment precedents concerning broadcasting. The Court (1) acknowledged but did not reaffirm its precedents finding a lower order of First Amendment protection for broadcasters based on a theory of spectrum scarcity; and (2) posited only a "limited" scheme of broadcast content regulation by the FCC.

This pleading analyzes the Court's opinion with respect to the application of the First Amendment to the broadcast media and to regulation of educational and informational television programming for children.

^{2/} In their comments, these parties took the position also that the advertising limitations of the Act unconstitutionally burden both broadcasters and cable system operators.

^{3/} The First Amendment standard adopted for cable television in that case makes even more doubtful content regulation of cable, including the application to cable of the commercial standards of the Children's Television Act.

1. **The Supreme Court Has Recognized The Serious Doubt About The Red Lion Standard**

In declining to apply the First Amendment standard of Red Lion Broadcasting Co. v. FCC^{4/} to cable television, the Supreme Court in Turner carefully avoided reaffirming the spectrum scarcity rationale for greater regulation of broadcasting.^{5/} The Court made it clear that it was addressing itself only to a determination of the appropriate level of judicial scrutiny of cable television regulation and that Red Lion did not apply. In saying so, the Court implicitly declined to endorse Red Lion for broadcast regulation:

"[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."^{6/}

After describing the "unique physical limitations of the broadcast medium," the Court explained how the "inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." The Court recognized that "courts and commentators have criticized the scarcity rationale since its inception" and that the Court has "declined to question its

4/ 395 U.S. 367 (1969).

5/ This part II-A of Justice Kennedy's opinion for the Court in Turner was joined by seven other justices.

6/ Turner, 62 U.S.L.W. at 4651 (emphasis added).

continuing validity as support for our broadcast jurisprudence, see FCC v. League of Women Voters, supra, [468 U.S. 364] at 376, n. 11, and [we] see no reason to do so here."^{7/}

The Court's statement that it saw no reason to question "here" -- in a cable television case -- the spectrum scarcity rationale for broadcasting underscores the significance of the League of Women Voters footnote that the Court cited in the same sentence of Turner. That footnote from League of Women Voters states in part (id.):

"The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. See, e.g., Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."

The "signal" was in fact given in Syracuse Peace Council,^{8/} when the Commission invalidated the fairness doctrine on First Amendment and public interest grounds and called upon the courts to overturn the spectrum scarcity rationale for program

^{7/} Id. (emphasis added).

^{8/} In re Complaint of Syracuse Peace Council Against Television Station WTVH, 2 FCC Rcd 5043, recon. denied, 3 FCC Rcd 2035 (1988), aff'd sub nom. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

content regulation.^{9/} While the Turner Court chose not to acknowledge receipt of that signal while writing about cable television, it also chose not to reaffirm Red Lion and its spectrum scarcity rationale for broadcast content regulation. Beyond that, the Court cited a string of authorities criticizing that rationale:

"See, e.g., Telecommunications Research and Action Center v. FCC, 801 F.2d 501, 508-509 (CA DC 1986), cert. denied, 482 U.S. 919 (1987); L. Bollinger, Images of a Free Press 87-90 (1991); L. Powe, American Broadcasting and the First Amendment 197-209 (1987); M. Spitzer, Seven Dirty Words and Six Other Stories 7-18 (1986); Note, The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062, 1072-1074 (1994); Winer, The Signal Cable Sends-Part I: Why Can't Cable Be More Like Broadcasting?, 46 Md. L. Rev. 212, 218-240 (1987); Coase, The Federal Communications Commission, 2 J. Law & Econ. 1, 12-27 (1959)."^{10/}

^{9/} In the appeal of Syracuse Peace Council, Judge Starr, who was the only member of the court to reach the First Amendment issue, explained that the allocational scarcity so often used as the justification for FCC broadcast regulation is not enough to justify program regulation under Red Lion. He called allocational scarcity a "necessary" but not a "sufficient" condition for special regulation of broadcasting. Referring to the Commission's argument in Syracuse Peace Council, Judge Starr agreed that, in the sensitive area of programming protected by the First Amendment, numerical scarcity has been the controlling factor on the theory that without government intervention the public would not be provided access to diverse viewpoints. This analysis led Judge Starr to agree with the Commission in that case that large increases in the numerical diversity of broadcast stations are highly relevant to determining whether program regulation is necessary and therefore constitutional under Red Lion. Syracuse Peace Council v. FCC, 867 F.2d 654, 682-84 (1989) (Starr, J., concurring), cert. denied, 493 U.S. 1019 (1990).

^{10/} Turner, 62 U.S.L.W. at 4651 n.5. The Court could have also
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In Turner, eight members of the Court have thus indicated their awareness that it has become increasingly difficult for courts to endorse the inferior status of broadcasters' First Amendment rights in a competitive and growing multi-channel programming marketplace. See, also, opening Comments; and "Comments of Radio-Television News Directors Association" In the Matter of Review of Policy Implications of the Changing Video Marketplace, MM Docket No. 91-221, filed Nov. 13, 1991.

2. The Supreme Court Has Prescribed A Limited Role For FCC Program Content Regulation

Another indication that the Court will not accept further intrusive broadcast content regulation, such as that proposed for specific kinds and amounts of children's informational programming on television, is the Court's understanding of what the First Amendment and the no-censorship provision of Section 326 of the Communications Act permit the Commission to do in regulating program content. While recognizing that the Congress has directed the FCC to "consider the extent to which license renewal applicant has 'served the educational and informational needs of children',"^{11/} the Turner Court

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cited Arkansas AFL-CIO v. FCC, 11 F.3d 1430, 1442 n.12, 1443 (8th Cir. 1993) (en banc); and Forbes v. Arkansas Educational Television Communication Network Foundation, 22 F.3d 1423, 1431 (8th Cir. 1994) (en banc) (concurrence in part and dissent in part), which are discussed in the opening Comments, pp. 11-12.

^{11/} 62 U.S.L.W. at 4654 n.7.

majority^{12/} showed sensitivity to the limits of

"the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in 'censorship' or from promulgating any regulation 'which shall interfere with the [broadcasters'] right of free speech.' 47 U.S.C. §326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it 'has no authority and, in fact, is barred by the First Amendment and [§326] from interfering with the free exercise of journalistic judgment.' Hubbard Broadcasting, Inc. 48 F.C.C. 2d 517, 520 (1974). 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.'"^{13/}

Coming closer to the kind of detailed regulation of informational programming proposed in this proceeding, the Court went on to state 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.' En Banc Programming Inquiry, 44 F.C.C. 2d 2303, 2312 (1960). The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the

^{12/} This part II-C of Justice Kennedy's opinion for the Court was joined by four other justices.

^{13/} 62 U.S.L.W. at 4654.

creativity and innovative potential of these stations.' [citations omitted]"^{14/}

These statements of the Supreme Court's understanding of the statutory regime and its constitutional limits for broadcast program regulation by the FCC should encourage the Commission to decline to go any further than -- and, indeed, to withdraw as much as possible from -- its current regulation of informational and educational television programs for children. In regulating this kind of programming, the Commission is clearly treading on the journalistic discretion of broadcasters.

Conclusion

The Supreme Court has acknowledged the authoritative criticism of the spectrum scarcity rationale for broadcasting and declined to reaffirm that rationale. The Court has also characterized the scope of FCC broadcast program content regulation as very limited, stating that licensees "are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs."

In view of the foregoing discussion and the opening Comments of RTNDA and Reporters Committee in this proceeding, the Commission should not adopt any rule specifying the kinds or amounts of educational and informational programs for children that must be presented by television broadcasters. Further, considering the constitutional doubts about the legislation, the

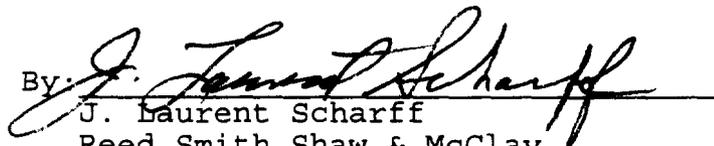
^{14/} 62 U.S.L.W. at 4655 (emphasis added).

Commission should reconsider its existing rules with the purpose of promulgating the least restrictive rules possible under the Children's Television Act of 1990.

Respectfully submitted,

RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS

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