

number should be substantial since it assures renewal.²² See infra at 24-25.

²² In their Comments, both RTNDA and The Media Institute assert that because Congress did not mandate a quantitative processing guideline, if the Commission were to adopt one, its decision would likely be overturned by the judiciary. RTNDA at 3, Media Institute at 2-3. This is simply untrue. Implementation of a quantitative processing guideline falls within the letter and spirit of the CTA and is not precluded by the legislative history. The Senate Report states that the "Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational programming that a broadcast licensee must broadcast to have its license renewed pursuant to this . . . legislation." S. Rep. No. 101-227 (emphasis added). Clearly, Congress was not prohibiting the Commission from adopting a processing guideline; it simply did not choose to impose one itself. Additionally, we again note that if such a guideline were instituted by the Commission, it would not represent a mandatory requirement that licensees must meet in order to be renewed, but instead would provide them and the Commission with a method of determining which licenses could be "automatically" renewed, and which require further scrutiny. Under the two-prong test of Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842-43 (1984), the Commission's decision to institute such a guideline would represent a reasonable policy choice, consistent with the intent of the CTA.

Under the first prong of the Chevron test, a court would look for a clear expression of Congressional intent. In this situation, Congress did not forbid the Commission from adopting a quantitative processing guideline to administer and enforce the CTA, and that silence indicates that Congress left it to the Commission to administer the CTA's requirements based on its experience and expertise. Again, while the legislative history of the CTA indicates that the committees did not want to impose at quantification standard upon the FCC, neither did they prohibit the Commission from applying such a standard for assessing renewal applications. They merely state that the Commission is not required to apply such a standard.

Furthermore, under the second prong of the Chevron test, if Congressional intent is ambiguous, a reviewing court typically affords great deference to agency interpretation. Basically, the court would determine whether the agency's construction of the statute is reasonable. Here, the Commission's adoption of a processing guideline is reasonable because it is consistent with Congress' objective of ensuring that broadcasters provide programming specifically designed to meet children's educational needs. For a more detailed analysis of this argument, see Comments of CME et al., May 7, 1993 at 24-28.

If the processing guideline is met, the staff routinely grants the renewal application. If it is not met -- if it is 'x' minus 1 or some greater number, that does not mean that renewal is foreclosed. It only means that the staff must then turn to the other factors listed above, and a judgment must be made, at times involving the full Commission, whether a renewal is called for, or whether some different course of action is indicated.

Absent such a processing standard in a public delegation of authority to the staff, we would be back to the most unsatisfactory situation described by Chairman Dean Burch in an address to the IRTS on Sept. 14, 1973:

If I were to pose the question, what are the FCC's renewal policies and what are the controlling guidelines, everyone in this room would be on equal footing. You couldn't tell me. I couldn't tell you -- and no one else at the Commission could do any better (least of all the long-suffering renewals staff).

The broadcaster and the public are entitled to some degree of certainty and predictability in the outcome of renewal proceedings. See United Church of Christ v. FCC, 707 F.2d 1413, 1432, n.65, (D.C. Cir. 1983), stated that such processing guidelines, while a matter of discretion for the agency, "served a useful function (1) by providing radio licensees with a rough yardstick by which to gauge whether they were devoting a reasonable amount of time to [non-entertainment] programming, and (2) by providing the Commission with at least one indicium of the licensee's responsiveness to his community that involved no intrusive inquiries into program content."

Whether or not to adopt processing guidelines along these lines is, as noted, a matter within the agency's discretion. See National Black Media Coalition v. FCC, 589 F.2d 578, 581 (D.C. Cir. 1976). It can decide to proceed with no guidelines and simply go forward on an ad hoc basis. The renewal staff will still have to focus on the licensee's core programming effort, and evaluate that effort in the context of the other factors. Over time, some quantitative standard may therefore emerge simply as a matter of practice and necessity in processing the applications. This ad hoc approach, however, may be confused or halting for some time, and may end up being unfair to the particular applicants caught up in it without any guidance as to what is a "reasonable" or "substantial" effort as to the "core" programming along these lines.

Again, to quote Chairman Burch in his testimony concerning phrases similar to "reasonable" and "substantial",

[They are]... "marshmallow" phrases -- they mean almost nothing in and of themselves or, conversely, almost anything that one wants them to mean. Their use as statutory standards would come down in the end to wholly subjective judgments by transient Commission majorities, and thus perpetuate rather than alleviate the problems we now face.²³

But renewal clearly should not become an area of "unbridled administrative discretion."²⁴ As stated by the Court in Greater Boston, "a question would arise whether administrative discretion

²³ Hearings on Broadcast License Renewal, before the House Subcommittee on Communications and Power, 93d Cong., 1st Sess., ser. 93-35, pt. 2, at 1120 (1973) (statement of Chairman Burch).

²⁴ Id., at 119.

to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards"²⁵

To avoid unbridled administrative discretion, CME et al. recommends that the Commission institute processing guidelines. Under our proposed processing guidelines, a broadcaster's license would be automatically renewed by the staff if it aired at least one hour per day of regularly scheduled, standard-length core programming at a time when the target audience would be likely to be watching television.

B. One Hour Per Day of "Core" Educational Programming is a Reasonable Amount for the Guidelines

Given that children watch on average over 22 hours of television each week,²⁶ it is not unreasonable to require broadcasters to air one hour of children's educational programming per day. In a market with three commercial stations (assuming that each station chooses to meet the guideline), the total amount of educational programming available would then approximately match a child's weekly viewing. This does not mean that children could or would spend all of their viewing time watching educational children's programming. Most "core" programming would be targeted to particular age groups and will therefore not be appropriate for children at all cognitive

²⁵ Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 402 U.S. 1007 (1970).

²⁶ Corporation For Public Broadcasting, "Research Notes: Kids and Television in the Nineties," No. 64, Nov. 1993, at 2.

levels. Moreover, it is likely that some children's educational programming will be aired at the same time. Nonetheless, we think that an hour per day would be sufficient to ensure that children have available to them a reasonable opportunity to view diverse, engaging and age-appropriate educational programming. At the same time, one hour per day amounts to only 4% of the licensee total programming.

Act III proposes that whatever the "minimum number of hours per week" the guideline may eventually specify, that it be applied to the week as a whole and not to the individual days of the week. ACT III Comments at 4. CME et al. cannot support this position. The lack of educational and informational programming for children on weekdays was confirmed by a recent informal analysis conducted by CME of 20 television markets, in which 63% or nearly two-thirds of the stations aired no educational programming for children on weekdays.²⁷

If broadcasters are allowed to meet the FCC guidelines with programs aired exclusively on weekends, the current void of children's educational programming that now exists Monday through Friday will continue. Consequently, instead of acting to help correct the weekday imbalance, the Commission will have validated broadcaster's contention that educational programming provided

²⁷ The analysis was based on listings in TV Guide magazines from the week of November 13-19, 1993, provided to CME by the publisher of TV Guide. CME requested magazines for the top twenty markets, however the company was not able to supply all of them, so it substituted several smaller markets for the few that were missing. The sample represented approximately 33 million households, or approximately 35% of total U.S. viewers.

primarily on the weekends is good enough to serve the total educational needs of children.

Commenters who oppose processing guidelines argue that they would create a "ceiling" or maximum quota for children's educational programming.²⁸ But, the number of educational programs now being aired on most stations is so far below the proposed one hour per day that we do not foresee that this problem would exist. However, CME et al. believe that broadcasters will be unlikely to exceed the minimum level established by the Commission. Therefore, if the guideline is set too low, for example at 2 hours per week as INTV suggests, INTV Comments at 6-7, we would be concerned that the guideline could act as a ceiling.²⁹

It is therefore vital for the Commission to set the level of children's educational programming number at one hour per day to ensure that the educational needs of children will be adequately served. This will create a clear and non arbitrary guideline designed to spread the availability of an appropriate amount of children's educational programming throughout the entire week.

²⁸ See, e.g. Oral Testimony of Paul La Camera for NAB at June 28, 1994 FCC en banc hearing. See also, Comments of Media Institute at ¶ 12 (claiming that in an effort to avoid being audited, stations will ensure that they meet the minimum requirements and will do no more than is necessary).

²⁹ Although we believe NAB's finding of 3 1/2 hours per week overstates the actual amount of core educational programming on the air, see supra at 4-7, it does suggest that setting the guideline too low could actually lead to a decrease in the amount of educational programming available to children.

Some broadcasters object that a guideline specifying one hour per day of children's educational television would reduce the overall quality of programs being aired. See, e.g., CBS at 6 (implying that there is only a finite amount of money available for children's educational programming and that an expensive show like "Beakman's World" would have to be sacrificed in order to produce a larger collection of less expensive shows). This argument exposes the industry's unwillingness to dedicate the resources necessary to ensure the success of children's programming in the absence of greater regulatory incentive to do so.

If, however, all television licensees knew that they would have to demonstrate real commitment at renewal time, and that such commitment could be unequivocally shown (i.e., no need for further scrutiny) by airing one hour per day of television specifically designed to meet the educational and informational needs of children, we believe that the competition for the child audience would cause stations to devote greater resources to develop attractive educational programming.

C. Only Standard Length Core Programming Should be Counted Toward the Guideline

CME et al. support the Commission's proposal that to be considered "core" programming, children's educational programming should be standard length. While short form programs, contribute to the overall effort of a broadcaster to meet its obligation under the CTA and therefore clearly would be considered in any

further scrutiny, they should not be counted toward a licensee's obligation to provide "core" programming.

Some Commenters claim that short form programming segments better match the attention span of young children. ABC at 4. This is simply untrue. Research in this area indicates that short segment programming "diminishes learning opportunities and outcomes for children." See Comments of APA at 2-3 (May 7, 1993). In addition, experts have found that children learn best when they can focus on a concept for an extended period and when a single idea is presented and reinforced repeatedly, as long as the concept is presented at an appropriate developmental level.³⁰

Indeed, Disney's successful children's program, "Bill Nye the Science Guy," is a perfect example illustrating that kids will enthusiastically watch a 30-minute educational program that captures their interest. As Disney points out, "children will watch quality programs that are entertaining." Disney Summary at 1. The long-running popularity of the hour-long "Sesame Street" and half-hour "Barney," both aimed at the youngest children with presumably the shortest attention spans, similarly belies the

³⁰ Id. Similarly, the Maryland Campaign For Kids TV reports that "it is demeaning to claim children can't focus for more than a 60 second spot in educational programming; successful educational and informational programming belies this contention. Children will watch good programming that is not patronizing, has content of interest to them and speaks to their level of knowledge and understanding." Maryland Campaign For Kids at 1.

claim that children are better served by short format programming.

Some commenters argue that the best way to reach the greatest number of children is to run short form educational programming intertwined with a highly rated commercial program such as "Mighty Morphin Power Rangers." See, e.g., ACT III at 2; ABC at 4; NBA at 1. While it is true that more children may be reached in this way, the amount of information or education that can be transmitted in a 30-60 second message is obviously limited. While we certainly encourage stations to air these types of messages, we are concerned that if such messages are counted toward the processing guideline (especially if the guideline is set too low), some broadcasters will attempt to meet their entire obligation with this type of programming, thus undermining the goal of the CTA to make a variety of diverse quality educational programming available to children.

D. Only Regularly Scheduled "Core" Programming Should Count Toward the Processing Guideline

Several commenters assert that the processing guidelines should not require children's educational programming to be regularly scheduled because specials are legitimate programs that serve the educational needs of children. See, e.g., ABC at 3. If the processing guideline is set at one hour a day, as CME suggests, whether to count specials or not is not a major issue. Two different studies show that the total amount of time devoted to children's educational specials has been negligible. Compare, Kunkel Study at 4, Table 7 (1993) (finds an average of 12

"specifically designed" minutes per week) with NAB Study at 3, Figure 3 (1994) (finding a national average of 11.0 minutes of educational programming per week).

While specials designed to educate children are surely worthwhile, we think there are nonetheless good reasons to not count them toward the processing guidelines.³¹ Predictability and regularity are important both to the success of children's educational television and to parental control over what children watch. Unless a program is regularly scheduled, its potential audience may have difficulty finding it, and the show will be unable to develop the kind of regular audience that is attractive to both stations and advertisers. Thus, CME et al. endorse the Commission's proposal to count only regularly scheduled programming as meeting the guidelines.

E. Only Programming Aired Between 7:00 a.m and 10:00 p.m. Should Be Counted Toward the Processing Guideline

CME et al. urges the Commission to only count toward the processing guideline programs aired between 7:00 a.m. and 10:00 p.m.³² As Disney points out, "children can't learn from programs they don't watch." Disney Summary at 1. To allow broadcasters to meet the guidelines by airing "core" programming at a time when only a handful of the targeted child audience is

³¹ Special programming will of course be taken into account in any further scrutiny.

³² Again, any educational programming aired at times other than between 7 a.m. and 10 p.m. would still be considered in evaluating a broadcaster's compliance with its overall obligation to provide educational programming under the CTA.

awake is to contradict the intent of the CTA to ensure a wide variety of realistic educational options for children.³³

NAB points out that 1.5 million children (ages 2-11) are watching television at 6:00 A.M. and that 2.4 million children (ages 2-11) are tuned in at 6:30 A.M.. NAB Testimony at 3. However, these numbers represent only a small portion of the child audience. In comparison, 9.5 million children (ages 2-11) are viewing television during the Saturday morning 8:00 A.M. to 1:00 P.M. time period; 9.1 million children (ages 2-11) watch from 5:00 to 7:00 P.M. Mon.-Fri.; 9.3 million watch during prime time 8:00 P.M. to 11:00 P.M. Mon.- Sat.; and 6.6 million watch 3:00 to 5:00 P.M. Mon.-Fri.³⁴

The NAB also asserts that broadcasters air the great majority of children's educational programming after 7:00 a.m. Its study claims that nearly 97% of all regularly scheduled educational and informational children's programming starts after 6:00 a.m. and that over 80% starts after 7:00 a.m. NAB Study at 1. However, these unverified figures are sharply contradicted by CME's recent interviews with producers and distributors of so-

³³ As was brought out at the hearing on June 28, 1994, Disney's "Bill Nye" is being aired in the Washington, D.C. area at 6:30 A.M., when most of its primary intended audience, school-age children, are sound asleep.

In Chicago, "Scratch"--a teen reality based show--aired at 5:30 A.M.; "Not Just News"--a news show designed for kids--aired at 6:00 A.M.; "Nick News"--a children's news show--also aired at 6:00 A.M. In Cleveland, "Name Your Adventure" aired at 6:00 A.M. Supra at footnote 26, TV Guide, Nov. 13, 1993.

³⁴ Copyright 1994, Nielsen Media Research, all rights reserved.

called "FCC friendly" programming, who informed CME that their programs are routinely relegated to early morning time slots, while more lucrative toy-based programs are often able to buy their way into more desirable time periods by offering stations either cash payments or purchases of advertising time which can amount to a million dollars or more. CME Study at 15-21.³⁵

This pattern was confirmed by the analysis of TV listings cited earlier.³⁶ Using the TV industry's own list of so-called "FCC friendly" syndicated shows,³⁷ CME found that 44% of the programs aired Monday through Friday in the top 20 markets were on at 6:30 A.M. or earlier; of those 25% were on at either 5:00 or 5:30 A.M. CME Study at 15.

CME's data makes clear that the Commission needs to implement regulatory processing guidelines in an effort to correct the inability of the marketplace to ensure that children's educational programming is aired when children are most likely to be watching. Even assuming however, that NAB's claims are correct and most children's educational programming is

³⁵ See also Testimony of Kent Takano, House Subcomm. on Telecommunications, June 7, 1994, the producer of "Scratch" testified: "While cartoons like 'Gobots' and 'Teenage Mutant Ninja Turtles' air during the 9:00 a.m. to 11:00 a.m. block around the country, shows like 'Scratch' struggled to survive in pre-7:00 a.m. time periods -- the black hole of time slots -- guaranteeing not only poor ratings, but an extremely limited revenue stream . . . Or even when 'Scratch' was slated at 1:00 p.m., it was often bumped for network sports such as bowling, college football, or paid programming."

³⁶ Supra at footnote 26.

³⁷ This list may be found at INTV Testimony, Exhibit A.

aired after 7:00 a.m., broadcasters should have no objection to the adoption of the proposed 7:00 a.m. to 10:00 p.m. processing guideline for "core" programming. In any event, the benefit gained by children from the more appropriately scheduled educational shows would certainly far outweigh the minor burden associated with the rescheduling of shows on the broadcasters part.

IV. The Children's Television Act, As Well as the Proposed Definitions and Processing Guidelines, Are Constitutional

Several participants in this proceeding have questioned whether the Commission's utilization of processing guidelines would be constitutional. CME et al. believes that both the CTA itself and the use of processing guidelines would easily withstand any constitutional challenge.

A. The Public Trustee Scheme is Constitutional

RTNDA's constitutional challenge goes to the constitutionality of the CTA itself and to the public trustee concept of broadcast regulation in general. RTNDA Comments at 5, 10-13.³⁸ The short answer is, of course, that the agency "cannot invalidate an act of Congress," and must follow the Congressional direction. See Johnson v. Robison, 415 U.S. 361, 368 (1974); Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987). In the CTA, Congress has clearly directed the Commission,

³⁸ Arguments that the CTA itself is unconstitutional have been addressed at length in the legislative history, S. Rep. at 10-18, H. Rep. at 8-12, and in previous comments. See, e.g., Reply Comments of NABB et al, Dkt. No. 90-570 (filed Feb. 20, 1991) at 23-32.

"in its review of any application for renewal of a television broadcast license, [to] consider the extent to which the licensee ... has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." 47 U.S.C. § 303b(a)(2). The Commission must follow that clear direction.

In any event, the public trustee scheme is manifestly constitutional. This view was just reaffirmed by the Supreme Court in its recent opinions in Turner Broadcasting System, Inc. v. FCC, 62 USLW 4647, 4651 (1994), and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990). In a part of the decision in Turner joined by all nine Justices, the Court explained that the basis of its "distinct approach to broadcast regulation rests upon the unique physical limitation of the broadcast medium." 62 USLW at 4651. It then notes that "although courts and commentators have criticized the scarcity rationale since its inception . . . we have declined to question its continuing validity as support for our broadcast jurisprudence and see no reason to do so here." Id.

As the Turner Court explains, "[a]s a general matter there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." Id. Thus, the Government must choose one entity and -- to prevent engineering chaos -- enjoin all others from using the frequency. This scarcity -- based not on

the number of outlets³⁹ or a comparison of broadcast outlets with other media but on the number of those who seek broadcast frequencies compared to the number of frequencies available -- is the "unique characteristic" of radio that supports its regulatory scheme.⁴⁰ It is undisputed that this same scarcity -- many more people wanting to broadcast than there are available frequencies -- exists today.⁴¹

As the Court pointed out in Red Lion, 395 U.S. at 390-91, "[r]ather than confer monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each frequency should be shared among all or some of those who wish to use, each being assigned a portion of the broadcast day or the broadcast week." The Government instead decided upon a public trustee licensing scheme. The broadcast applicant is a volunteer who pays no money for this scarce privilege. But it receives no property right in the frequency⁴² -- "no right to an unconditional monopoly of a

³⁹ The seminal Red Lion case (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)) was a radio case at a time when there were roughly 6900 radio stations; today there are roughly 11,000 radio stations. It cannot be seriously argued that the public trustee scheme is constitutional at 7000 but at 11,000 is not.

⁴⁰ NBC v. FCC, 319 U.S. 190, 226 (1943).

⁴¹ There are no frequencies open in the large markets where the bulk of the population resides. If one were to open, there would be a plethora of applicants. See S. Rep. No. 100-34, on S.742, 100 Cong., 1st Sess., at 21-23 (1987); H. Rep. No. 100-108, 100th Cong., 1st Sess., at 13-18 (1987).

⁴² Section 301 of the Communications Act provides that it is the purpose of the Act "to provide for the use of [radio transmission] channels, but no the ownership thereof, by persons

scarce resource the Government has denied to others the right to use." Red Lion, 395 U.S. at 391. Rather, to protect the First Amendment rights of these others, the broadcaster receives only a short term license and agrees to serve the public interest in its administration of the frequency -- to be a "fiduciary" for its community. Id. at 390. Thus, under this scheme, "it is the rights of the viewers and listeners, and not the broadcasters, which are paramount."⁴³

The validity of the public trustee licensing scheme means, in turn, that the licensee must render public service, and is accountable to the FCC for demonstrating that it has operated in the public interest. Of course this interferes with the editorial autonomy of the licensee: It cannot, for example, decide to present only pure entertainment fare in order to maximize its profit. See supra at 8. On the other hand, the FCC

for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and period of the license." 47 U.S.C. § 301. Section 304 requires applicants to "waive any claims to the use of any particular frequency . . . as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. 47 U.S.C. § 304. For this reason, courts would also reject RTNDA's claim of a Fifth Amendment takings clause violation. RTNDA Comments at 6, n. 10 & 13. Since the Fifth Amendment only protects against taking "private property . . . for public use, without just compensation," U.S. Const. amend. V (emphasis added), no takings clause violation can occur where the licensee has no property interest in the license.

⁴³ Id. The decisions of the Supreme Court to this effect are numerous. In addition to Red Lion and NBC, see, e.g., FCC v. League of Women Voters, 468 U.S. 364, 377, 381 (1984); CBS, Inc. v. FCC, 453 U.S. 367, 395, 397 (1981); FCC v. NCCB, 436 U.S. 775, 799 (1978); CBS v. DNC, 412 U.S. 94, 111 (1973).

cannot censor (Section 326 of the Act) or engage in subjective judgments such as quality determinations. The law thus represents a "delicately balanced" system, with the licensee being afforded great discretion in the sensitive programming area.⁴⁴

It follows that as part of the public interest obligation of broadcasters, Congress can properly be concerned that children receive a reasonable amount of informational/instructional programming. Children are the bedrock upon which our society rests, Prince v. Massachusetts, 321 U.S. 158, 168 (1943), and they watch a great deal of television. Broadcasters must therefore render public service to this uniquely important segment. See the findings in the CTA and its legislative history;⁴⁵ Children's Television Report, 50 FCC 2d 1, 5-6 (1974).

Thus, if public service has any meaning, it must encompass such service to children, and therefore the programming classification, "specifically designed to serve the educational and informational needs of children," does not violate the First Amendment. See Red Lion, supra; NAITPD v. FCC, supra, 516 F.2d at 537 ("Nor does the program category method of reconciliation of the public interest create the risk of an enlargement of government control over the content of broadcast discussion of

⁴⁴ See CBS, Inc. v. FCC, supra, 412 U.S. at 102, 110 ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.")

⁴⁵ H. Rep. No. 101-385, 101st Cong., 1st Sess. (1990); S. Rep. No. 101-227, 101st Cong., 1st Sess. (1990).

public issues"). It simply brings objective focus to the public interest obligation, without involving the agency in the quality of the particular informational/educational program presented.

Moreover, the broadcasters themselves acknowledge and accept the public trustee scheme. The NAB has vigorously opposed the spectrum usage fee put forward by OMB on the ground that broadcasters must render public service, and that such a fee is appropriate only if the public service obligation is withdrawn. See Broadcasting, June 6, 1994, at 50; Multichannel News, May 23, 1994, at 130 (quoting the President of NAB as saying, "We have never suggested that we be relieved from our public interest obligations and we are not doing so now.")

B. The Use of a Processing Guideline is Constitutional

In the past there have been a number of bills that would have required television broadcasters to present a specified number of hours of educational/informational programming for children during the week. In our view, such an approach is both constitutional and good policy. But that is not the approach of the 1990 Act. Rather, the CTA, by its terms, directs the Commission, in determining at renewal whether the broadcaster has served the educational needs of children, to look to the licensee's overall programming and to programming specifically designed to inform or educate.

Whenever programming categories are used -- whether they are "local", "informational", "non-entertainment", "community-issue oriented", "personal attack", or, as here, "specifically

designed to [educate or inform children]", difficult definitional problems can arise, particularly at the margins. See NAITPD v. FCC, 516 F.2d 526, 539-41 (2d Cir. 1975). But this does not mean that Congress and the FCC cannot properly focus on appropriate programming categories of public service, as both have long done. Were it not possible to do so, the public service obligation would become a nullity -- a vague command entirely unenforceable.⁴⁶ The categories must be reasonably related to the public interest standard, and must be reasonably implemented, taking into account the wide programming discretion afforded the licensee.

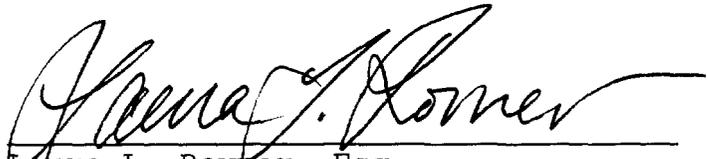
In short, since the public trustee scheme is constitutional, and the requirement of public service for children is constitutional, then processing guidelines such as those described above -- that, consistent with the Act and its legislative history, afford the licensee full discretion to rely upon other pertinent public interest considerations -- are certainly valid and constitutional. Far from contravening the First Amendment, the guidelines markedly serve the underlying purposes of the Amendment in this sensitive programming area.

⁴⁶ The Media Institute simultaneously claims that the CTA is unconstitutionally vague and that FCC is too specific in directing broadcasters to air certain types of program. Media Institute Comments at 6, 8. It is wrong in both respects. Obviously, the FCC does have to walk a fine line between saying too much and too little. But it is clear that the actions proposed would do not, as Media Institute claims, require licensees to "espous[e] a government-preferred viewpoint." Media Institute Comments at 10. Determining the educational goals, the content, the format, the views and ideas presented in children's educational programming are completely up left to the licensee.

Conclusion

For the foregoing reasons, CME et al. urge the Commission to act expeditiously to clarify the definition of educational and informational programming specifically designed for children, and to adopt processing guidelines for use at renewal in assessing licensee compliance with the CTA.

Respectfully submitted,



Of Counsel:

Henry Geller, Esq.

Gary Nelson
Law Student

Laura L. Rovner, Esq.
Angela J. Campbell, Esq.
Citizens Communication Center
Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

July 15, 1994

Counsel for CME, et al.

APPENDIX



COLLEGE OF ARTS AND SCIENCE

DEPARTMENT OF
COMMUNICATION

250 Newark Hall
University of Delaware
Newark, Delaware 19716-2524
PA: 302/831-8041

July 15, 1994

Kathryn Montgomery, Ph.D
President
Center for Media Education
1511 K Street, NW
Washington, DC 20005

Dear Dr. Montgomery,

I have closely examined the NAB report, The 1990 Children's Television Act: Its Impact on the Amount of Educational and Informational Programming.

This study of the amount of educational and informational programming on broadcast television revealed an 81% increase in this type of programming between the fall of 1990 and the fall of 1993. The NAB report found that the typical station airs over 3.5 hours of regularly scheduled educational and informational children's programming each week, 97% of which are broadcast after 6AM. These increases were found for both network affiliates and independent stations as well as stations in all market sizes.

Overall the NAB evaluation of the impact of the Children's Television Viewing Act concluded that the industry's response to the Children's Television Viewing Act has been positive in that there has been a substantial increase in the amount of educational and informational programming for children.

There are, however, several flaws with this study all of which point to the need for more stringent compliance with the stipulations of the act as well as the need for further research.

The NAB study sent questionnaires to all commercial television stations with known fax numbers in May of 1994; stations were asked to respond by May 18th. The questionnaire asked each station to list when the program was broadcast (Fall 90, 93, or 94), the title, day and time broadcast, length, and whether the program was a regular series or special. Broadcasters were asked to list programming which in their judgement met the following definition:

Programming originally produced and broadcast for an audience of children 16 years old and younger which serves their cognitive/intellectual or social/emotional needs.

In the first place the definition of educational or informational programming is quite vague and overly broad. Broadcasters are asked to use the same criteria they would use to list programs in their public files or for renewal proceedings. These criteria, however, are never spelled out. The definition also does not use the crucial language from the legislation: "specifically designed" to serve the educational and informational needs of children. Finally, and most importantly, there are no examples of specific programs that fit this description. This is especially critical in light of the Center for Media Education's 1992 study of license renewal applications which found that programs such as "The Jetsons" and "The Flintstones" were classified as educational by broadcasters and that "Ninja Turtles" was cited as educational because it illustrated the moral forces of good and evil. Thus, it is impossible to ascertain if the programs included in this analysis would be judged as educational or informational by people other than the broadcasters themselves.

Second, there is some concern about the nature and size of the sample. NAB sent questionnaires to 920 commercial stations with "known fax numbers." The response rate of the study, as is typical of most surveys conducted by mail, is low. Responses were received from 286 stations, a response rate of 31.1% of the stations sampled. (This is 24.8% of all commercial stations based on the total number of commercial stations--1154--listed in Broadcasting & Cable, July 11, 1994.) More importantly, there probably is a high degree of self-selection in this process. The respondents may be those stations who broadcast more educational and informational programming and therefore might not be representative of the entire population of commercial stations. Consequently, it is likely that the numbers cited in this study over-estimate the amount of educational/informational programming available on a weekly basis.

A third concern is that the stations, because they are no longer required to maintain programming logs, had to review four-year-old programming schedules in order to reconstruct programming broadcast in the Fall of 1990 that would meet the stations' now existing criteria of "educational or informational" programming. The report also notes that "some of the responding stations were not included in the results reported for 1990" but does not indicate how many stations were not included. Consequently, we are unable to assess the accuracy of the report. The analysis would be more parsimonious if it compared only those stations that supplied information at both points in time.

Finally, the report states that practically all of the programs (97%) were broadcast after 6AM and that four out of five were broadcast after 7AM. The report does not indicate, however, how many programs were broadcast in the afternoon hours, the time when most school aged children (5 to 16) would be likely to watch. The questionnaire indicates that this analysis could have been conducted. Consequently, it is impossible to ascertain if

the programming deemed to fit the educational/informational criteria by broadcasters actually is broadcast when most children, and particularly school aged children, would be in the audience. If educational/informational programs are broadcast in time periods when the relevant audience is unavailable, then it is quite likely that these programs would not attract a sufficient number of viewers and the programming might not be renewed.

In light of these concerns, I believe that the NAB's conclusion that the industry has responded adequately to the conditions of the Children's Television Viewing Act is unwarranted. I would also suggest that the Center continue to conduct research to further our understanding of compliance with the Act.

If I can be of further assistance please do not hesitate to get in touch with me.

Sincerely,



Nancy Signorielli, Ph.D.
Professor