

however, would be a fundamental change in our broadcasting system from one of licensee editorial discretion to one involving detailed agency oversight.<sup>118</sup>

Keenly aware of the nature of broadcasting and the scheme of regulation intended by Congress, the Commission for over 30 years has refused to adopt children's programming quotas. Thus, in 1984, the Commission stated:

In 1975, we stated that because "the considerations as to what constitutes a 'reasonable amount' may vary, according to service area demographics, existing children's programming, market size, network affiliation or independent status, prior commitments to locally-produced programs, and the availability of television, etc., we believe it desirable to avoid rules which are unnecessarily broad and inflexible." We continue to believe that this is true. It mirrors precisely the rationale set forth in the *En Banc Programming Inquiry* in 1960 as to why program quotas in other areas were not being adopted.<sup>119</sup>

In sum, the Commission consistently has considered -- and the courts have agreed -- that "rigid scheduling and quantity requirements would 'not make sense from a policy standpoint.'"<sup>120</sup>

#### **B. Rigid, Governmentally-imposed Quantitative Content Requirements Would Be Counterproductive.**

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Beyond turning broadcast regulation on its head, discarding decades of tradition, and defying Congressional intent, quantitative content requirements have no redeeming benefits. The best that might be said is that they would assure a set quantity of educational and informational programming for children on each broadcast television station. This only highlights the inherent infirmity of a quantitative guideline, *i.e.*, that it produces quantity and only quantity. With the sole

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<sup>118</sup>*Children's Television Programming*, 55 RR 2d 199, 213, n.49 (1984) [hereinafter cited as *Children Television Programming*].

<sup>119</sup>*Children Television Programming*, 55 RR 2d at 214, citing *Memorandum Opinion and Order*, 55 FCC 2d 691, 693 (1975) and *En Banc Programming Inquiry*, 44 FCC 2303 (1960).

<sup>120</sup>*Children Television Programming*, 55 RR 2d at 213, citing *Washington Association for Television and Children v. FCC*, 712 F. 2d 677, 684 (D.C. Cir. 1983).

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emphasis on quantity, quality is de-emphasized. With quality de-emphasized, programming is less attractive, and audiences desert it for more attractive alternatives. This not only erodes the economic base for the programming (and for the station as a whole), but also robs the program -- and the Act -- of its beneficial effect on children and society. This sequence defines counterproductive *vis-a-vis* the goals of the Act.

In practical terms, as WSYT's Linda Cochran emphasized in her testimony before Congress:

As to the quantitative issue....There is no doubt that if such regulations were enacted, stations would scramble to meet the requirement. However, this means putting on any educational show, regardless of its popularity with children. The first thing you will see is that viewing for these shows would be extremely low....

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Such an approach would not serve the public interest. It makes little sense for the government to force broadcasters to air programs children will not watch. What educational value is there in having children change channels.<sup>121</sup>

Not only independent station managers envision this response to a qualitative requirement. Paul La Camera, who manages affiliate WCVB-TV in Boston, testified in a similar vein:

[W]hatever that arbitrary number might be is going to degenerate into a numbers game, in the way we conduct our television stations and in the way we report our performance.

Whatever sense of idealism or public service imperative that now guide [*sic*] so much in what we do I think will evaporate.

Again, on a practical level, the ... minimum that...you determine and mandate will -- may very well become the maximum for most broadcasters. And I don't know quite what, what is served by that.<sup>122</sup>

In short, shifting the focus from quality to quantity produces quantity at the expense of quality and undermines the intended benefits of the Act.

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<sup>121</sup>Cochran at 15.

<sup>122</sup>Tr. at 121.



A de-emphasis on quality also frustrates broadcast stations' efforts -- thus far successful -- to exploit their position in the video marketplace and provide a uniquely high quality educational and informational programming for children on a free, ubiquitous basis. Jonathan Rogers of CBS put it this way:

My central message here today is that the goals of the Children's Television Act should be allowed to work together with broadcasters' natural incentive to reach large audiences with high quality programming.

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We broadcasters have to go to great lengths to attract viewers by utilizing high-quality entertainment and production values. Unlike cable based program services, we are a mass medium which must support itself with advertising revenue only. Our success is dependent on our reaching as many people as possible with our programming. If over-the-air broadcasting doesn't act on that incentive, it will wither and die.

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The flexibility Congress built in to the Children's Television Act makes sense and was intentional....The flexible approach...allows broadcasters to budget development money to create attractive entertainment values in their children's programming, and to concentrate resources on providing audience drawing quality rather than lowest common denominator quantity.<sup>123</sup>

In a worst case, requiring set amounts of children's programming could cause displacement of other beneficial program services. Ironically, these other program genres often form the economic base for provision of less remunerative program types like children's programming.<sup>124</sup>

Even vociferous proponents of quantitative requirements find their arguments imploding in self-contradiction. One need only consider the following exchange between moderator Linda Ellerbe and Dr. Katherine Montgomery:

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<sup>123</sup>Tr. at 164-165.

<sup>124</sup>Tr. at 205 (Testimony of Jonathan Rogers, stating, "For the Commission to legislate that we would have to do X number of hours per day of children's programming, especially on a network affiliate, would cause us to take off a local news programming or an access programming -- or fringe programming which is, in fact, where we make the money in order to lose money on children's program, public affairs, public access, local news.").



MS. ELLERBE: ....Let me, let me start, Dr. Montgomery, do you agree with Mr. Rogers from CBS that quantitative mandates would merely cause the available program dollars to be spread thinner for educational children's programming?

DR. MONTGOMERY: No, I don't. I mean I, I, -- it's really difficult to try to figure out what kind of a policy can be developed that will really be a true effective mechanism for encouraging the industry to do right by kids. I mean there's certainly -- *if, if broadcasters are sort of committed to, to not trying to fulfill the spirit of the law, they'll do it any way they can.* But I think that as a -- just as a, as a principle the, the guidelines, the rules need to be more clear in order to send a very clear signal to the industry that the FCC takes this law seriously.<sup>125</sup>

INTV respectfully submits that ongoing proceedings at the Commission, hearings in Congress, station inspections, and regular scrutiny of station performance at license renewal constitute "a very clear signal," indeed, that the FCC takes the Act seriously. Moreover, broadcasters have responded to the law, as the record of the industry -- and the record in this proceeding -- show. Broadcasters have not complied "any way they can." They have complied with a substantial amount of quality programming. The regimentation of quantitative requirements would breed sameness and mediocrity, nether of which offers much hope of engaging children's minds, hearts, and souls to their growth and betterment.

Therefore, a quantitative requirement would be highly destructive of any effort educate or inform children via broadcast television.

**C. The First Amendment Would Tolerate No Such Intrusive Government Program Content Requirements.**

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Congress and the Commission appropriately have shied away from quantitative programming requirements in light of the First Amendment's limitations on the power of government over speech. In passing the Act, Congress was especially conscious of the need to tread lightly. In the words of Senator Wirth:

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<sup>125</sup>Tr. at 218-219 [emphasis supplied].



The nature of the content offered is up to the discretion of the broadcaster. Leeway is granted in deference to broadcasters' first amendment rights....<sup>126</sup>

Similarly, Congressman Lent pointed out that the First Amendment placed limits on Congress's prerogatives in the area of programming:

This bill is not a cure all. It does not pretend to be. Rather, the committee has taken a hard look at children's TV in the last two Congresses, and has tried to encourage sensible behavior toward children by television licensees. We can do no more and still be consistent with the First Amendment. <sup>127</sup>

This sensitivity to the limits of governmental power must pervade and shape the debate.

INTV submits that a quantitative content requirement is fatally defective under the First Amendment. Others may offer extensive constitutional analysis in support of this view. INTV, however, offers only the following points for consideration:

- Ineffectual actions like quantitative standards are especially vulnerable to First Amendment challenge.
- No empirical support exists for the proposition that any particular amount of educational and informational programming for children on broadcast stations would provide an optimal level of educational and informational programming for children.
- Lesser scrutiny of broadcast regulation under *Red Lion v. FCC* no longer may be tenable legally. Whereas the Court recently has acknowledged *Red Lion*, it has not been confronted squarely with the questionable validity of its scarcity premise.

These points and others leave no doubt that the Commission would face a futile task in urging the consistency of quantitative requirements with the First Amendment.

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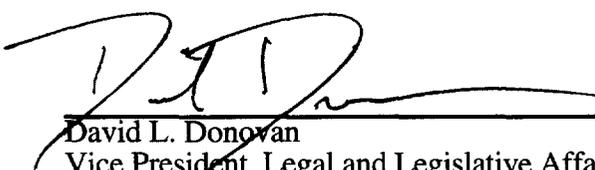
<sup>126</sup>136 CONG. REC. S 16340 (1990).

<sup>127</sup>136 CONG. REC. H 8536 (1990).

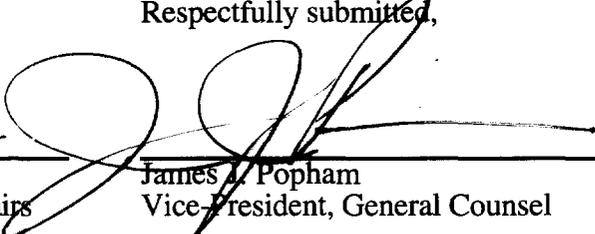


Broadcasters will continue to heed the call for something better for the nation's children. They ought not be forced into the mold of mediocrity. The Commission, therefore, must resist the temptation to follow the dictates of good intentions rather than good sense. When the well-being of this nation's children is involved, the tug of good intentions is especially strong. They must not, however, yank the Commission from the path of reasoned decision making and plain old common sense. They must not drag the Commission into the constitutional thicket of content regulation. Instead, the Commission's undoubtedly good intentions must propel it to actions which really will work to assure that the children of this nation may find a substantial array of enticing, exciting, and enlightening broadcast programming which actually will contribute to their educational and informational needs.

Respectfully submitted,



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October 16, 1995