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FEDERAL COMMUNICATIONS COMMISSION
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October 16, 1995

Our File No.
0040-113-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: Policies and Rules Concerning Children's Programming & Revision of Programming Policies For Television Broadcast Stations
MM Docket No. 93-48

Dear Mr. Caton:

Transmitted herewith, on behalf of Donrey Media Group are an original and nine (9) copies of its Comments in the above-referenced proceeding.

Should further information be required, kindly communicate directly with this office.

Very truly yours,

Ronald E. Quirk, Jr.

REQ/ned

Enclosures (10)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In The Matter Of	)	
	)	
POLICIES AND RULES CONCERNING CHILDREN'S PROGRAMMING	)	MM DOCKET NO. 93-48
	)	
Revision of Programming Policies For Television Broadcast Stations	)	

To: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF DONREY MEDIA GROUP

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October 16, 1995

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SUMMARY

Donrey Media Group opposes the Commission's proposals that would force commercial television licensees to air weekly a certain number of hours of narrowly defined children's programming ("quantitative standards"). The proposed programming requirements are antithetical to congressional inent, unconstitutional, violative of the Communications Act, and will not further the goals of the Children's Television Act of 1990 ("CTA").

The CTA was enacted in order to restrict advertising during children's programming and to ensure that television licensees fulfill their obligations to serve the educational and informational needs of children. In enacting the CTA, Congress recognized the fact that any content-based broadcasting restrictions must be narrowly-tailored in order to comply with the Constitution. The CTA's legislative history shows that Congress did not authorize the Commission to implement any sort of quantitative programming requirements on television licensees.

Moreover, the proposed quantitative standards would significantly restrict television licensees' discretion as to how they may satisfy their CTA requirements. By specifically defining the only type of programming that serves the educational needs of children and mandating that licensees air a certain quantity of such programming each week, the Commission would act as a censor, in violation of both the Communications Act and the Constitution.

In addition to the legal difficulties presented by the Commission's proposed implementation of quantitative standards, the actual execution of such a plan could result in less quality children's programming, because licensees would have no economic incentive to broadcast more than their minimum requirements. Conversely, under the current rules, licensees have

the impetus to produce quality programming which promotes the educational development of children while at the same time providing entertainment for adults. The result is more quality educational programming.

Television broadcasters are licensed as public fiduciaries. They have direct contact with their audiences, and are answerable to their communities. In the past the Commission recognized television licensees' expertise and has ruled on many occasions that licensees were to be granted deference in their programming choices. The CTA has been law for only a little over three years. Consequently, the Commission has not had adequate time to judge the effectiveness of the current rules, and is thus seeking to impose an undue burden upon television licensees prematurely.

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Washington, D.C. 20554

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

To: The Commission

COMMENTS OF DONREY MEDIA GROUP

Donrey Media Group ("Donrey") pursuant to Section 1.415 of the Commission's Rules, hereby provides its Comments with respect to the Notice of Proposed Rule Making ("NPRM")[1] issued by the Commission in the above-captioned proceeding.

I. Background and Introduction

A. Standing

Donrey is the operator of commercial television broadcast station KOLO-TV, Reno, Nevada, and is required to comply with the rules and policies adopted by the Commission in response to the Children's Television Act of 1990. Consequently, Donrey is interested and will be affected by any modification to the Commission's Rules in this proceeding.

B. Commission Proposals

The asserted goals of the NPRM are to: (1) empower the public with a greater ability to observe station compliance with the Children's Television Act

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1 *In re Policies and Rules Concerning Children's Programming*, 10 FCC Rcd. 6308 (April 7, 1995).

of 1990 ("CTA");[2] (2) clarify the Commission's rules and policies to provide television licensees with greater certainty as to the scope of their children's programming obligations; and (3) ensure that television licensees provide enough children's educational and informational programming to comport with the goals of the CTA.[3]

The Commission proposes that its goals are to be guided by three principles: (1) that the television audience, and not the federal government, is the best judge of the quality of a licensee's programming; (2) that the Commission's Rules should be as "clear, simple and fair as possible"; and (3) that to the greatest extent possible, market forces should guide broadcasters in determining whether they meet their CTA obligations.[4]

Although the Commission wishes to ensure compliance with the CTA by permitting television audiences and the free market to dictate the type of educational children's programming television licensees will air, the Commission does not believe that these forces alone will result in an increase in children's educational and informational programming.[5] Consequently, the Commission proposes to revise its definition of children's programming to fit a narrow category of "core" programming, and to either: (1) monitor the amount of core children's programming each licensee broadcasts by requiring all licensees to submit annual descriptions of their children's programming to the Commission for a suggested period of three years; (2) establish a quantitative processing guideline whereby licensees would broadcast a certain amount of core children's programming each week as one means of satisfying

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2 Pub. L. No. 101-437, 104 Stat. 996-100, codified at 47 U.S.C. Sections 303a and 303b (1995).

3 NPRM para. 88.

4 *Id.* paras. 4, 6, 8.

5 *Id.* para. 7.

their CTA programming obligations; or (3) implement a flat requirement wherein licensees must broadcast a certain number of hours of core children's programming each week or, in the alternative, demonstrate to the Commission that the programming which the licensees have aired, along with other local programming-related activities, serves the informational and educational needs of children "as well or better" than would additional core programming.[6]

The CTA itself is an attempt to reduce commercial advertising during children's programming, achieve a greater amount of educational and informational programming for children, while at the same time recognizing that governmental intrusion into programming decisions must be narrowly tailored in order to comply with the U.S. Constitution.[7] The Commission's efforts to effectuate the CTA must be implemented in a manner which serves the public interest, grants appropriate deference to Congress, and allows broadcasters the necessary programming discretion to permit them to exercise their First Amendment rights.

Donrey proposes that the Commission should not redefine children's programming, nor impose any form of quantitative standards. Donrey is opposed to any rule or policy that would require a broadcaster to air any amount of programming of which the government mandates the content. Accordingly, for the sake of convenience, the term "quantitative standards" is used herein to refer to both the quantitative processing guidelines and the programming standards proposed by the Commission.

As will be shown below, the proposals suggested in the NPRM are: (1) antithetical to Congressional intent; (2) contrary to the Commission's own

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6 *Id.*

7 *See* Children's Television Act of 1990, House Committee on Energy and Commerce, H. Rep. 385, 101st Cong., 1st Sess. 1, 8-11 (1989) ("House Report").

stated goals; (3) incompatible with the Communications Act of 1934; and (4) unconstitutional.

II. The Commission's Proposals Are Contrary To Congressional Intent

In the NPRM, the Commission abruptly reversed its prior position that the imposition of quantitative standards for children's programming is contrary to Congressional intent.[8] The following statements illustrate that the Commission's former policy correctly reflected the will of Congress regarding regulation of the CTA. During earlier proceedings involving the CTA, the Commission stated that (1) the "Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed,"[9] and (2) any quantitative standard would "conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion."[10]

In the NPRM, the Commission justifies its sudden about-face by claiming that "after reexamining the CTA and its legislative history" the Commission concluded that neither the CTA nor its legislative history prohibited it from adopting quantitative programming standards.[11] The Commission, while pointing out that it had previously held that imposing quantitative standards would be contrary to Congressional intent, cites no law or legislative history to justify its inexplicable reversal.[12]

The Commission argues that, although the legislative history indicates that Congress did not intend to require quantitative standards, there is

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8 NPRM para. 54.

9 *In re Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd. 2111 ("*Report and Order*"), *recon. granted in part*, 6 FCC Rcd. 5093(1991) ("*Memorandum Opinion and Order*") at para. 24.

10 *Memorandum Opinion and Order* para. 40.

11 NPRM para. 54

12 *Id.*

nothing in the legislative history to prevent the Commission from adopting such standards.[13] To support its assertion, the Commission cites House and Senate Reports in which Congress states that the Commission should not require quantitative standards for children's broadcasting.[14] This curious choice of legislative history does not in any way lend support to the Commission's claim that Congress granted it authority to impose quantitative standards. Instead, the Commission confuses the issue by actually lending credence to its previous position that Congress did not intend the Commission to impose quantitative standards on broadcasters.

Contrary to the Commission's claims, the legislative history of the CTA is replete with explicit indications that Congress did not grant the Commission the discretion to impose any quantitative standards upon television licensees.[15] During Senate debate regarding the passage of S.1992 (of which the CTA contains many pertinent provisions), Senator Danforth stated that he was willing to support the bill, because it "delet[ed] programming standards that were unnecessarily intrusive in the broadcasters' programming decisions, and indeed, unconstitutional."[16]

Additional evidence that Congress did not intend the Commission to implement quantitative standards exists in the language of the CTA itself. While the CTA explicitly limits the duration of advertising in children's

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13 *Id.*

14 *Id. See infra* Note 15.

15 The Commission itself cites two excellent examples: NPRM n.95, citing House Report at 17 ("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...."); and Senate Report at 23 ("The Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast...."). *Id.*

16 136 Cong. Rec. S 10125 (July 19, 1990).

programming to specified amounts,[17] the statute says nothing about requiring broadcasters to air any quantity of children's programming. It is contrary to logic, as well as general statutory construction, to conclude that where the statutory language in one instance sets a quantitative limit, and in another sets no quantitative limit, that both can be read to set quantitative limits.[18]

Moreover, the creation of the Endowment for Children's Educational Broadcasting[19] provides a strong indication that Congress sought to utilize economic incentives in order to increase the amount of children's educational programming, rather than to mandate the number of hours of such programming a licensee must broadcast. The Endowment was instituted, *inter alia*, to provide economic incentives for commercial and noncommercial licensees to produce more children's educational programming.[20] If Congress intended to implement quantitative standards, there would be no need to allocate federal money to increase the airing of children's programming, and hence no need for the Endowment.[21]

The evidence amply illustrates that Congress did not intend for the Commission to impose quantitative programming standards on television licensees. The Commission cites no law or legislative history to support its position that Congress authorized such standards. Quantitative programming

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17 47 U.S.C. § 303a(b) (1995).

18 As noted on pages 17-18 *infra*, Congress was concerned that the CTA be narrowly tailored so as not to violate the First Amendment. Congress was not willing to jeopardize the CTA by intruding on broadcasters' programming discretion, and hence did not wish that any quantitative standards be imposed.

19 47 U.S.C. § 609 note (1995).

20 47 U.S.C. § 394 note (5), (6) (1995).

21 The legislative history of the establishment of the Endowment contains language indicative of Congress' intent to increase children's programming solely through economic incentives to commercial and noncommercial licensees: "this legislation is intended to provide...low cost, high quality programming for distribution on the commercial video media." Children's Television Act of 1990, Senate Committee on Commerce, Science and Transportation, S. Rep. No. 66, 101st Cong., 1st Sess. 1, 13 (1989).

standards are contrary to Congressional intent, and therefore should not be adopted.

III. Quantitative Children's Programming Requirements Impose Illegal Censorship and are Otherwise Contrary To The Commission's CTA Guidelines and The Communications Act

In order to accomplish the objectives of providing licensees with sufficient guidance, and to ensure that licensees provide enough educational and informational children's programming to meet the goals of the CTA, the Commission proposes to redefine the type of programming licensees must air in order to comply with the CTA requirements. Specifically, the Commission proposes a narrow category of "core" programming. In order to qualify as "core" programming, a particular television show must meet six requirements:

> (1) the program is specifically designed to meet the educational and informational needs of children ages 16 and under; (2) the educational objective of the program and the target child audience must be specified in writing; (3) the program is aired between the hours of 6:00 a.m. and 11:00 p.m.; (4) the program is regularly scheduled; (5) the program is of a substantial length (e.g., 15 or 30 minutes); and (6) the program is identified as educational children's programming at the time it is aired, and instructions for listing it as educational programming are provided by the licensee to program guides.[22]

A. Imposition of Core Programming Requirements Amounts to Commission Censorship in Violation of the Communications Act

Donrey objects to the proposed core programming requirements. In addition to ignoring Congressional intent, the requirements, particularly when taken as a whole, violate the Commission's own policy of permitting licensees

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22 NPRM para. 36.

to exercise programming discretion,[23] and impose an undue burden upon broadcasters. Moreover, any Commission mandate which requires broadcasters to air narrowly defined programming would give the Commission censorship powers, which violates Section 326 of the Communications Act.[24]

Once a broadcast station is licensed as a public fiduciary, the choice of programs a licensee chooses to broadcast rests with that licensee.[25] Consequently, the burdensome imposition of the core programming requirements proposed by the Commission constitutes illegal censorship and belittles the public fiduciary concept which is one of the foundations of Title III of the Communications Act.[26]

While the Commission has some authority over broadcast content,[27] the extent to which the Commission may intrude on licensee programming discretion is limited.[28] For example, although the Commission has a degree of authority to define a licensee's public interest programming obligations, it has been held that "it is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike."[29]

Historically, the Commission has been able to exercise its limited programming police power by granting license renewals by means of reviewing a licensee's overall performance and good faith, rather than concentrating on

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23 *Id.* para. 34.

24 47 U.S.C. § 326 (1995).

25 *McIntyre v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 599 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779(1945).

26 47 U.S.C. § 307 (1995).

27 *See, e.g., National Broadcast Company v. United States*, 319 U.S. 190 (1943).

28 *See Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied* 396 U.S. 842 (1969).

29 *Id.* at 1095.

specific errors the Commission may have found a licensee to have made.[30] This general approach minimizes the danger of illegal censorship by the Commission.[31] Accordingly, whenever the Commission has imposed more specific programming duties, courts have demanded that these rulings be subject to exacting scrutiny, "lest they carry the Commission too far in the direction of forbidden censorship."[32] Because of the undue meddling with licensees' programming choices, the core programming requirements, if implemented, would grant the Commission excessive censorship powers which violate the Communications Act.

B. Imposition of Core Programming Requirements is Inimical to the FCC's Guiding Principles

i) General Audience Programming Can Serve Educational Needs Under the CTA

The Commission justifies its proposed implementation of core programming requirements by arguing that the current definition of educational and informational programming is too broad, and "makes no distinction between general audience/entertainment programs and programs that are specially designed to educate and inform."[33] The idea that general audience programming is mutually exclusive with children's educational and informational development is incorrect for a number of reasons. First, it is contrary to Congressional intent; second, it violates all three of the Commission's professed guiding principles; and third, it may actually reduce the quantity of children's programming.

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30 *Id.*

31 *Id.*

32 *Id.* at 1095-6.

33 NPRM para 27. The present definition of children's educational and informational programming is "programming that furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs." *Id.* (citation omitted).

The CTA's legislative history explicitly provides that licensees should have broad discretion as to the type of programming they may air to fulfill their CTA requirements. The House Energy and Commerce Committee stated that "general purpose programming can have an informative and educational impact and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area."[34] Conversely, there is no indication that Congress intended the Commission to be the arbiter of what constitutes educational, as opposed to strictly entertainment, programming.

Moreover, some general audience programming does serve children's educational and informational needs. For example, the Disney Channel recently aired a special entitled "Anne Frank Remembered." This show, in addition to chronicling the tribulations of Anne Frank's life during the Holocaust, also contained some material specifically directed toward children. For instance, the program presented Anne Frank as "an average 15 year old who loved Rin Tin Tin movies and had a great desire to be a famous writer."[35]

Because of its historical content and social value, the Anne Frank program unquestionably serves the educational and informational needs of children. Because this program was created for a general audience and was not regularly scheduled, it would not qualify as core programming. Surely, Congress could not have intended that this type of instructional programming be placed out of the realm of the CTA.

Under the Commission's current CTA guidelines, the Anne Frank program could be categorized as programming that contributes to the educational needs of children and would thus be credited in a station's license renewal. Because the Commission's current CTA rules allow for a wider

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34 House Report at 17.

35 *TV Guide*, June 3-9, 1995 at 47.

variety of children's educational and instructional programming than do the proposed rules, they should be retained. In contrast, the imposition of the new core programming standard would chill the incentive for licensees to broadcast valuable programming such as the Anne Frank special, and thus should be rejected.

ii) The Commission's Proposed Overhaul of Current CTA Rules is Premature and Based on Insufficient Data

The Commission's principles of allowing market forces and the television audience to determine whether licensees have met their children's programming obligations are violated by the core programming concept which requires the federal government to impose intrusive guidelines. Additionally, because of the abundance of broadcasting outlets that serve children's educational and informational needs, it is inequitable to force all licensees to provide a certain number of hours of narrowly defined programming in order to supply an audience niche which is already well-served. In fact, the volume of children's programming which is currently broadcast far exceeds the minimum amount required under the Commission's proposed quantitative standards.[36]

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[36] Some examples of television outlets which provide a large quantity of children's programming include the Disney Channel, Nickelodeon, PBS (which presents educational programming that is age-specific), and many local broadcasters that specifically target the child audience. For example, the television listings for the Washington, D.C. area on a typical weekday (Monday, June 5, 1995) reveal that *eleven and one half hours* of children's educational programming was broadcast between the hours of 6:00 a.m. and 10:00 p.m. PBS provided six hours of children's programming: "Barney"; "Kidsongs"; "Sesame Street"; "Mr. Rogers' Neighborhood"; "Puzzle Place"; "Storytime"; "Lambchop's Playalong"; "Reading Rainbow"; "Ghostwriter"; "Where in the World is Carmen San Diego?"; and "Bill Nye, the Science Guy." The Disney Channel provided three hours of children's programming: "Winnie the Pooh"; "Ocean Girl"; "Snoopy and Charlie Brown" (visit the signing of the U.S. Constitution); "Mickey Mouse Club"; "Red Kangaroos of the Outback"; "House at Pooh Corner"; and "Mousercise." Nickelodeon provided one hour of children's programming: "Mr. Wizard's World." Local broadcasters provided one and one half hours of (FN Cont'd)

The Commission criticizes various studies conducted by the National Association of Broadcasters ("NAB") and the Association of Independent Television Stations, Inc. ("INTV"). Their studies indicate that many stations are currently exceeding the number of hours of children's educational programming which would be required by the Commission under its quantitative standards proposal. NAB's study reveals that the average commercial station increased the amount of standard-length, regularly-scheduled educational children's programming from slightly more than two hours per week in the fall of 1990 to 3.6 hours per week in the fall of 1993.[37] The INTV study indicates that the average independent station aired 4.6 hours per week of standard-length, educational children's programming in the first quarter of 1994.[38]

The Commission rejected those studies because they accepted "at face value station claims as to the educational content of their programming."[39] If, for example, the Commission were to implement clear guidelines for licensees to follow in their renewal applications for categorizing children's programming, the Commission would be better able to ascertain exactly how much children's programming is being aired, without mandating a quota of programming. Adopting this alternative would ease the administrative burden on the Commission and better serve the public interest.[40]

In support of its argument that the current CTA rules are ineffective in increasing the amount of educational children's programming, the Commission cites a study made by Dr. Kunkel of the University of California,

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children's programming: "Raring to Read"; "School is Cool"; and "Feed Your Mind." *TV Guide* at 105-113.

37 NPRM para. 16.

38 *Id.*

39 *Id.* para. 18.

40 See *infra* pp. 19-20.

Santa Barbara, in which renewal applications filed in 1992 revealed: (1) more than 25 percent of the stations surveyed failed to comply with their children's programming reporting requirements; and (2) more than 20 percent of the stations provided inadequate information.[41] Dr. Kunkel's study, however, reviewed only those renewal applications filed during the first year of implementation under the CTA. As such, the evidence is insufficient to support the conclusion that the current CTA rules have failed to produce the desired results of increasing the amount of children's television.

The Commission has not yet had a full renewal term to review children's programming under the current CTA rules. The rules did not go into effect until January 1, 1992.[42] Programming takes time to develop. As no station has had the opportunity to report for a full five year renewal term, any analysis thus far would be incomplete and premature. Accordingly, the time is not ripe for the Commission to impose new onerous governmental restrictions on broadcasters.[43] Rather, the current rules should be given the opportunity to work. The Commission must develop a record on the old rules, which are more narrowly tailored than the new rules, before substituting new rules without an adequate record.[44] Regulatory assumptions must be grounded in

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41 *Id.* n.38.

42 *In re* Policies and Rules Concerning Children's Television Programming, *Memorandum Opinion and Order*, 6 FCC Rcd. 5093 (August 26, 1991), para. 1.

43 It may be questioned whether the Commission has made out a case for undertaking the present rulemaking. The D.C. Circuit has held that "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *Home Box Office, Inc. v. FCC*, 507 F.2d 9, 36 (D.C. Cir. 1977)(citation omitted). The Commission states that one of the main reasons for this rulemaking is that any increase in children's programming since the implementation of the CTA has been "modest at best." NPRM, para. 19. Given the short period of time which has elapsed since the CTA was made law, the Commission's allegation of the lack of children's programming is untimely. Due to the large amounts of time broadcasters must expend to produce new programming, at least one renewal cycle should elapse before any conclusion as to the effectiveness of the current CTA rules should be asserted.

44 It should be noted that television stations have contractual obligations with their programming suppliers which must be honored. If television licensees are (FN Cont'd)

empirical evidence, not inferences based on an inadequate record. Insufficient experience and data to support an assumption of the Commission undermines the foundation for the regulation so adopted[45]

iii) The Proposed Definition Is Vague

An additional problem with the Commission's definition of "core" programming, is that it is just as vague as the prior definition when it comes to the actual content of the programming.[46] Merely requiring a producer and station to make the claim that a program is educational does not in fact make it educational. Stations are constantly bombarded with products from syndicators that are "FCC friendly" or "educational," that to many critics are nothing more than pure entertainment with a short socially relevant message. Educational material truly is in the eye of the beholder, and relying on stations to "know it when they see it" puts a station in severe jeopardy of becoming the victim of 20-20 hindsight should it choose to rely on a program that a small number of vocal critics claim is not truly educational. With educators, child psychologists, and parents often at odds about how children learn, and how best to educate them via television, stations have virtually no guidance as to how to meet the proposed "core" programming requirements as currently proposed.[47]

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suddenly forced to air a certain amount of core children's programming each week, said licensees will have to significantly alter at least some of these agreements. Consequently, compliance with the Commission's proposed quantitative standards would mean that broadcasters may be vulnerable to lawsuits for breach of contract.

45 *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1342-43 (D.C. Cir. 1988)

46 *See supra*, note 33.

47 An example brings this into sharp focus. In an episode of the critically acclaimed PBS series "Lambchop's Playalong," Sheri Lewis described a game whereby several children took turns sliding pennies across a table. The child getting closest to the edge of the table got all the pennies. Sheri concluded by saying "Play this game long enough and you can win a lot of pennies." Sounds sort of like pitching pennies and gambling, doesn't it? We can think of a number of parental groups that might well argue that exposing their children to that kind of "education" was not in the public interest. We do not raise this point to chastise Lewis, "Lambchop's Playalong" or PBS, but rather bring it up to show that even (FN Cont'd)

iv) The Proposed Rules May Actually Limit the Amount of Programming Available to Children

A further unintended result of the Commission's proposal to require broadcasters to air a certain number of hours of core programming could be a reduction in the number of hours of children's programming already on the air. Because the economics of the marketplace do not make core programming lucrative, broadcasters will have a strong incentive to broadcast the bare minimum of children's programming and no more. In other words, the nature of regulatory floors is that they become ceilings. If, however, licensees are permitted to meet their CTA requirements at least partially with general audience programming, they will have more incentive to air shows that will be educational for children, as well as entertaining for adults.

v) The Commission Has Tried and Rejected Quantitative Standards

Finally, it should be noted that the Commission has previously rejected the notion of imposing quantitative standards on broadcasters. For example, during a proceeding in which expedition of the broadcast license renewal process was considered, the Commission rejected a proposal that broadcast licensees air a certain amount of nonentertainment programming in order to create a strong presumption in favor of renewal.[48]

The Commission concluded that quantitative standards were undesirable for two reasons. First, as public fiduciaries, licensees are attuned to the needs of their individual communities. Accordingly, the federal government should defer to the licensees' expertise, rather than imposing a national standard of performance on them: "quantitative standards would

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critically acclaimed, government-subsidized educational programming can be picked apart and exposed in some instances as not being educational if placed under a powerful enough microscope.

[48] *In re* Formulation of Policies Relating to the Broadcast Renewal Applicant, *Report and Order*, 66 F.C.C.2d 419 (April 7, 1977).

be. . . an encroachment on the broad discretion licensees now have to broadcast the programs they believe best serve their audience."[49]

Second, the Commission stated that although implementing quantitative standards might increase the amount of nonentertainment programming, there is no guarantee that the programming which results would be worthwhile. Some licensees, "by choice or necessity, might only spread their resources thinner, and reduce the quality and value of such programming."[50]

As indicated above, the Commission's bases for rejecting the implementation of quantitative standards in the past also apply to this proceeding.[51] Individual licensees have a duty to broadcast in the public interest. Because licensees are now, as always, answerable to the public, and because they have direct contact with their audiences, they should be granted deference in their programming choices. Conversely, the Commission has offered no proof that merely increasing the quantity of children's television programming would result in an increase in the quality of children's television programming. Accordingly, the Commission would do well to heed the wisdom of its own precedent and reject the idea of implementing quantitative standards.

IV. The Proposed Regulations are Constitutionally Infirm Because They Impinge to a Greater Degree Than Necessary on the Broadcasters' First Amendment Right to Select the Nature, Quantity, and Time of its Programming

The United States Supreme Court has recognized that the selection by a broadcaster of its programming content is a "vital and independent form of

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49 *Id.* para. 16.

50 *Id.*

51 *See supra* pp. 8-11.

communicative activity," and, therefore, that "the First Amendment must inform and give shape to the manner in which [the government] regulates in this area."[52] While a greater degree of intrusion continues to be countenanced by the Court with respect to regulation of the broadcast media when compared with other media,[53] broadcasters nonetheless enjoy a fundamental entitlement, secured by the First Amendment to the Constitution, to "exercise the *widest possible journalistic freedom*," consistent with their public interest responsibilities.[54] To a much greater degree than the current rules, the proposed regulations call for substitution of the Commission's editorial discretion for that of the broadcaster, mandating explicitly not only a particular type, but also the precise quantity, of programming. Because the regulations supplant broadcasters' choices as to the type and quantity of programming necessary to serve the public interest with those of an instrumentality of the federal government, they must be scrutinized extremely carefully.

The Supreme Court has cautioned the Commission to exercise great care in weighing the interests in support of content-based rules, and in assessing the precision with which they are crafted.[55] Congress, as well, in the legislative history of the CTA, clearly recognized the strength of the broadcaster's constitutionally-protected interests, by expressing its intent that the legislation: (1) "not exclude any programming which does in fact serve the educational and informational needs of children," and (2) provide the

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52 *League of Women Voters v. FCC*, 468 U.S. 364, 378 (1984).
53 *See Turner Broadcast System* v. *FCC*, 129 L.Ed.2d 497, 514 (1994).
54 *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395(1981) (citation omitted) (emphasis added).
55 *League of Women Voters* at 383.

broadcaster with enough discretion "to meet its public service obligations in the way which it deems best suited."[56]

According to applicable constitutional standards, regulatory restrictions on a broadcaster's discretion to choose the content of its programming may be upheld "only when they are narrowly tailored to further a substantial government interest."[57] In other words, the means the Commission chooses to accomplish its stated public interest goals must be reasonably precise, and no more restrictive of the broadcaster's freedom than necessary. By mandating a quantitative quota of "core programming," the Commission has selected far too blunt an instrument -- one which impinges upon broadcasters' discretion more than is reasonably necessary to further the stated objective.

The professed goal of the CTA is to further the education and welfare of children.[58] The Commission's rule changes are not narrowly tailored, but instead restrict more speech than is necessary to achieve the government's objective. Indeed, the current rules are a less restrictive alternative than rules the Commission proposes here. The current rules at least leave to the broadcaster the discretion to determine when to broadcast children's television programming. The proposed rules would regulate that time and insist it be regularly scheduled.[59] The current rules allow the broadcaster to choose whether to air programming that contributes to the educational and information needs of children, even if that programming is directed toward the general audience. The proposed rules compel the broadcaster to air only educational programming specifically designed for children in order to comply with their CTA obligations. Most importantly, however, the current rules do

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56 House Report, at 12.
57 *League of Women Voters* at 380.
58 NPRM para. 67.
59 *See supra* page 7.

not dictate a finite amount of children's programming each broadcaster must air. Instead, the proposed rules place the government in the role as program director, insisting that each television station air three to five hours per week of regularly-scheduled programs, targeted to a children's audience, and dedicated to a purely educational objective. Consequently, because the current CTA regulations are a less restrictive alternative to the Commission's proposed rules, they should be maintained.

A basic problem the Commission appears to have with the current rules is staff processing during the license renewal review process.[60] The proposal in the NPRM -- to adopt quantitative standards -- tramples the First Amendment rights of broadcasters and broadly tackles the problem like using a steamroller to crush a fly. A less restrictive alternative would be for the Commission to require broadcasters to submit their programming materials in a standardized exhibit. Standardized exhibits would ease the administrative burden of reviewing thousands of renewal applications all with individual formats. Suggesting an exhibit format would also provide the Commission with a means of assessing the effectiveness of its current rules. With standardized renewal forms for children's television materials, the Commission would have a uniform basis for determining whether broadcaster's efforts in providing children's programs have improved.

V. Conclusion

The Commission should refrain from adopting the aforementioned policy changes proposed in the Notice of Proposed Rule Making. Due to the short period of time that has elapsed since the implementation of the Children's Television Act of 1990, the Commission has inadequate information

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60 NPRM para. 14.

by which it may gauge the success of the Act. Accordingly, the Commission's proposed rules are premature. Moreover, the proposed changes are contrary to Congressional intent, incompatible with the Commission's stated goals, and violative of broadcasters' First Amendment freedom.

For all of the foregoing reasons, Donrey opposes the implementation of the proposals set forth in the Notice of Proposed Rulemaking.

Respectfully submitted,

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