

NOV 20 1995

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)¹ hereby submits its reply comments in the above-captioned proceeding. NAB files but the briefest of reply comments because we believe that our initial comments are dispositive of the issues raised by the Commission's Notice and are, as well, responsive to the comments of other parties.

In particular, NAB points to the First Amendment arguments and analysis contained in our initial comments² and attached statement of the noted First Amendment scholar, Professor Rodney A. Smolla, as more than responsive to the strained First Amendment arguments in the Comments of the Center for Media Education et al. (CME).³ CME's basic argument is that the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), permits the Commission to impose regulations such as those contemplated here and that the discretion here contemplated by the Commission is less intrusive than other rules that have been upheld by the courts.

¹ NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

² Comments of the National Association of Broadcasters, (Comments of NAB), October 16, 1995, at 25-33 and Attachment 6.

³ Comments of Center for Media Education et al., October 16, 1995, at 32-36. (Comments of CME)

No. of Copies rec'd 0+11
List ABOVE

NAB's initial comments and Professor Smolla's analysis counter and, in fact, defeat CME's arguments by showing why the kind of intrusive regulation contemplated here is fundamentally different from the regulations upheld in Red Lion and its progeny. Moreover, CME does not even address the holding of Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), the Supreme Court's most recent elaboration on the Commission's power to regulate the content of broadcasting. NAB refers the Commission to Professor Smolla's discussion of Turner⁴ and indeed to the entirety of Professor Smolla's statement.

NAB does here respond specifically to the comments and study of Dr. Dale Kunkel, a professor of Communication.⁵ We note that Chairman Hundt⁶ has referred to Dr. Kunkel's research in his criticism of broadcasters' performances under the Children's Television Act. We offer comment on Dr. Kunkel's methodology and on a number of the arguments contained in his comments.

NAB here raises a number of criticisms of the methodology of Dr. Kunkel's study both to question his results and to compare his methodology to that of the NAB surveys. First, the Kunkel Study, by its own admission,⁷ undercounts broadcasters' specifically designed educational and informational programming. Dr. Kunkel indicates that his study "counted" only programs denominated as "specifically designed educational and informational" (or similarly labeled) in the examined renewal applications,⁸ even though there is no FCC

⁴ NAB Comments, *supra*, Attachment 6 at 10-14.

⁵ Comments of Dale Kunkel, Ph.D., filed on October 16, 1995. (Kunkel Comments). Kunkel, Dale and Ursula Goette, "Broadcasters' Response to the Children's Television Act," October 12, 1994, Department of Communications, University of California, Santa Barbara, (Kunkel Study).

⁶ Speech by Reed Hundt, "The FCC of the Future," October 19, 1995, delivered to George Washington Telecommunication Seminar. at 5. See also, "A Good Day for Kids," October 18, 1995, delivered to Center for Media Education.

⁷ Kunkel Study at 3.

⁸ Id.

requirement to so denominate, or segregate, specifically designed educational and informational programming in the renewal submission. Dr. Kunkel indicates that 10% of the stations examined (although he says “of all stations”) did not so denominate or segregate their listings. Thus the Kunkel Study apparently counted “zero” programs from 10% of the studied stations.

Second, Dr. Kunkel examined only 48 renewal applications, all from the northeast United States. NAB, on the other hand, examined 559 station listings solicited from the entire country. We think it self-evident which group has the more reliable generalizability.⁹

Third, the Kunkel Study uses a subjective weighting scheme, without scientific rationalization or basis. That is, each of the four “tiers” or market-size groupings in the Kunkel Study is weighted 25% for purposes of his overall averages,¹⁰ even though this weighting does not reflect the relative incidence of the each station type in the universe of all stations. Thus, his overall averages are not accurate reflections of the real world.¹¹

The Kunkel Study’s methodology, however, is far less flawed than most of the arguments in the comments accompanying his study. One, Dr. Kunkel states that “many” stations are trying to “fulfill” their obligations under the Children’s Television Act “not with truly educational” material, but with creative relabeling of mainstream entertainment programming, with the overall implication that this is the norm.¹² But he offers neither delineation of why broadcasters’ listings are “frivolous” nor any quantification of the asserted

⁹ The NAB Study also contained a non-response analysis which showed that there was no negative non-response bias in the 1994 NAB Survey. NAB Comments at 5.

¹⁰ Kunkel Study, at 3,4.

¹¹ Since Dr. Kunkel’s findings indicate a difference in results per market size, his subjective weighting scheme skews his overall average toward an underestimate of the actual average.

¹² Kunkel Comments at 3.

“misclassifications.” Moreover, Dr. Kunkel offers no estimate or quantification of the amount of “truly educational” programs presented and listed.

Can it be that Dr. Kunkel is loathe to try *his* hand at saying exactly what “counts” and what doesn’t, other than a few tossed-out titles? Probably not, as he seems certain enough of a second argument, namely that he can “count on my fingers the number of children’s programs on commercial television that I would characterize as serious, good-faith efforts at educational programming.”¹³ Either Dr. Kunkel can not be serious in making this assertion or he reveals himself to have in mind the *most narrow* of definitions of “educational and informational” programming. In either case, Dr. Kunkel would appear to have in mind a definition so narrow as to bear no resemblance to the definition and examples of qualifying programming contained in the legislative history of the Children’s Television Act and referred to by the Congressional sponsors of the Act.¹⁴ That much is clear from Dr. Kunkel’s proffered “test,”¹⁵ which sounds very “academic” or “instructional,” much like that suggested by Chairman Hundt’s references to television’s “teaching.”¹⁶ This, NAB submits, Dr. Kunkel and Chairman Hundt are free to advocate as public policy goals, but not to suggest as what was contemplated by Congress in enacting the Children’s Television Act.

Three, Dr. Kunkel offers as academic explanation what is purely and simply speculation as the “reason” that his research showed much lower average numbers for the largest market groupings and much “higher” average numbers for the smallest market groupings.¹⁷ He

¹³ Id. at 8.

¹⁴ See, eg., 136 Cong. Rec. S10122 (July 19, 1990) (Remarks of Sen. Inouye). See also S. Rep. No. 227, 101st Cong., 1st Sess. (1989) at 7, 8.

¹⁵ Kunkel Comments at 8 et seq.

¹⁶ Speech by R. Hundt “A Good Day for Kids,” on October 18, 1995, to Center for Media Education at 6.

¹⁷ Kunkel Study at 5.

postulates (speculates) that stations in the largest markets may be more informed and more sensitive to compliance issues and thus have adopted more conservative judgments as to qualifying programs. But he offers no evidence for his “interpretation,” and NAB is at pains to see the basis for this generalization about the intent of individual broadcasters.

Four, even following the logic of Dr. Kunkel’s suggestion of “now-more conservative classifications” by large market stations leads one to question his conclusion of “no increase” in educational and informational programming because, under Dr. Kunkel’s reasoning, stations would have listed more programs in 1992 that they are not listing in 1994 and thus *per force*, less programs would have been listed and “counted” in his later study. That is, the “no increase” finding would be a result of the more conservative classifications, not a function of *less* educational fare. But, aside from the validity of Dr. Kunkel’s speculations, NAB suggests that the flaws in the Kunkel Study methodology, as opposed to the consistent methodology of the two NAB Surveys, the latter of which confirms the earlier-found “increases” with a high response rate from 559 responding stations suggest which study is more reliable when it comes to assessing the “increase” in educational and informational programming.¹⁸ NAB submits that a study of 559 stations is much more reliable than one of 48 stations which is all that Dr. Kunkel studied.

Five, Dr. Kunkel suggests that a great number of stations (10% of all stations by his count) are in non-compliance with FCC reporting requirements by not separately listing or

¹⁸ NAB further maintains that the percentage magnitude of the “increases” in educational and informational programming shown in the NAB survey would hold up or increase were one to “throw out” certain disdained titles, because the same titles would have to be “thrown out” from the pre-Act listings as well as from the later listings.

denominating their specifically-designed educational and informational program offerings.¹⁹ In this, Dr Kunkel is simply dead wrong. There is *no* requirement that stations list separately or specifically denominate their specifically designed educational and informational fare from their overall programming that also serves the educational and informational needs of children. Both “count” under the Act and the Commission’s rules do not require separate listings. NAB, in its numerous seminars and panel discussions on children’s television, has suggested that stations separately list their responsive programming. NAB’s comments suggest that perhaps the Commission should require separate listings. But today’s rules do not do so.

Finally, Dr. Kunkel asserts, *without any basis or evidence*, that children’s educational and informational television on commercial stations looks the same today as it did five years ago.²⁰ Dr. Kunkel simply has no base line statistics on which to make this assertion, nor is any basis for this statement found in his comments or studies. NAB, on the other hand, requested of stations an assessment of their pre-Act (*i.e.*, 1990) educational and informational children’s programming (using the same Congressional/FCC definition as used for later listings) and has included that “baseline” in both its surveys.

NAB refers the Commission to the station study contained in the initial comments of the Association of Independent Television Stations, as well as to the recently submitted station survey of Fox Broadcasting Company, for confirming evidence of the real increases in educational and informational children’s programming that NAB has similarly demonstrated to this Commission. We believe that the Commission cannot conclude that commercial television stations overall are not complying with the Children’s Television Act.

¹⁹ Kunkel Comments at 5,6.

²⁰ Id. at 7.

Whatever further public policy goals the Commission or particular advocacy groups might advance with regard to children's educational television aside, broadcasters have responded to the current FCC and Congressional mandates.

As to "Congressional mandates," NAB makes a final point with regard to the clear Congressional intentions seen in the legislative history to the Children's Television Act and a letter on that subject recently filed in this docket by Congressman Edward Markey, the chief House sponsor of the Children's Television Act and the then-Chairman of the House Telecommunications Subcommittee which produced and shepherded the bill through to passage.

Congressman Markey in his letter to the FCC says that neither his remarks in the Congressional Record, "nor any other expression of congressional intent," support NAB's contention that "Congress intended no quantification . . ." of children's educational programming.²¹ Congressman Markey correctly points out that the Act neither requires nor prohibits quantification and he rightly recites a part of his remarks, namely that "[t]he legislation does not require the FCC to set quantitative guidelines. . .".²²

What the Congressman in his letter neglects to add is the remainder of that sentence which is quoted in full in NAB's initial comments: "[t]he legislation does not require the FCC to set quantitative guidelines for educational programming, *but instead*, requires the Commission to base its decision upon an evaluation of a station's overall service to children."²³ NAB submits that the "but instead" following the assertion that the legislation does not require quantification clearly evinces that Congress intended something *other than* or *instead of*

²¹ Letter of Congressman Edward J. Markey, filed in MM Docket No. 93-48, November 14, 1995, at 1.

²² Id.

²³ Cong. Rec. H8537 (October 1, 1990) (remarks of Rep. Edward Markey) (emphasis added).

quantification and the remaining phrase tells us what that is -- an evaluation of a station's *overall* service to children. Webster's New Collegiate Dictionary defines "instead" as 1: as a substitute or equivalent, and 2: as an alternative to something expressed or implied. Thus, the plain meaning of Congressman Markey's words is that Congress intended something *instead of* or *rather than* or *as a substitute for* quantification.

Further underscoring this clear interpretation is the plain meaning and reiteration of these *same* words ("does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of educational and informational programming") by Senator Inouye,²⁴ the Senate Subcommittee Chairman and manager of the bill, and in *both* the Senate and House Reports on the bill.²⁵ Why, one might ask, would the *same* words be used by *both* Subcommittee Chairmen and by *both* committee reports if there was not in fact some specific intention or meaning to be attached to them? Why bother saying anything about "not intending quantification," much less saying the same thing at every opportunity, unless there was a specific intent there.

The answer obviously is that Congress specifically *did not intend* quantification and that saying so was part of the understandings that led to passage of the Act. Clearly, the FCC, under two different Chairmen, so interpreted the Congressional intentions and the Congressional language.²⁶ Thus, despite Congressman's Markey's attempt to revise history and protestations to the contrary, NAB stands by its assertion that the legislative history is clear

²⁴ See Cong. Rec. S10122 (July 19, 1990) (remarks of Sen. Daniel Inouye).

²⁵ See S. Rep. No. 227, 101st Cong., 1st Sess. (1989) at 23, H.R. Rep. No. 385, 101st Cong., 1st Sess. (1989) at 17.

²⁶ See Report and Order in MM Docket 90-570, 6 FCC Rcd. 2111 (1991) at para. 24 ("Congress meant that no minimum criterion be imposed"); Notice of Inquiry in MM Docket 93-48, 8 FCC Rcd. 1841 (1993) at para. 5 ("Congress' express preference for avoiding quantitative standards").

that the Congressional intention was that there be no quantification of the children's educational and informational programming standard. We accept the view that Congressman Markey *wishes* that "no Congressional intention as to quantification" had been part of the legislative package agreed to when the Act was passed. But our reading rests on the clear intentions that were behind the Act's passage and obvious in the legislative history.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036



Henry L. Baumann
Executive Vice President &
General Counsel



Valerie Schulte
Sr. Associate General Counsel

Richard V. Ducey, Ph. D.
Senior Vice President
Research and Information Group

Mark Fratrick, Ph. D.
Vice President/Economist

November 20, 1995