Concurring Statement
of
Commissioner James H. Quello

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464.

I concur in this Report because Congress unequivocally declared that the Commission "shall promulgate regulations...to enforce the provisions of [section 1464] on a 24 hour per day basis."[1]

I agree completely with the Report's conclusion that our interest in helping parents control their childrens' media viewing habits is paramount. The courts have recognized that protecting the physical and psychological well-being of children is a compelling interest. See, e.g., Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2836 (1989).

Given the vital nature of this interest, it is important to keep in mind that this Report will be subject to immediate judicial scrutiny as the pending litigation regarding the 24 hour ban resumes.[2] Thus far, the courts have never upheld a ban on indecent material for any medium, and have struck down regulations deemed to be excessively burdensome.[3] Perhaps for

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[1]Making Appropriations for the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub.L.No. 100-459, Section 608, 102 Stat. 2186, 2228 (1988).

[2]Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (remanding issue of 24 hour ban to the Commission for "a full and fair hearing on . . . the propriety of indecent broadcasting").

[3]E.g., Sable Communications of California, Inc., 109 S. Ct. at 2836-39; Wilkinson v. Jones, 480 U.S. 926 (1987) (mem.), aff'ing, 800 F.2d 989 (10th Cir. 1986), aff'ing sub nom. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Sable Communications of California, Inc. v. Pacific Telephone & Telegraph Co., 890 F.2d 184 (9th Cir. 1989); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1987), cert. denied, 109 S. Ct. 305 (1988) ("Carlin III"); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) ("Carlin II"); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Carlin Communications, Inc. v. FCC, 749 F.2D 113 (2d Cir. 1984)

that reason, we might have gone farther in this Report to obtain empirical evidence of the viewing habits of children 12 and under.

Ever since I came to the Commission some 16 years ago, I unhesitatingly have pointed out the need to enforce our rules against those few licensees who go too far. At times in the past I felt like the only Commissioner who favored this policy. Nevertheless, I think it is important to give credit where it is due to the broadcast industry. Thus, while it may be true, as the Report points out, that theatrical presentations of certain films such as "Deep Throat" or "Debbie Does Dallas" have not been held to be obscene, it is also a fact that there has never been a threat that movies of this type would show up on free over-the-air television. Citing such hard core films, the Report strays far afield from the legitimate concern with broadcast indecency and runs the risk of tarring broadcasters with too broad a brush.[4] No licensee in America has ever aired the type films listed in the Report, and, to my knowledge, no licensee has ever considered doing so. Even on cable television, where courts have found a greater right to transmit such material, operators have steered clear of hard core fare except in a very few instances.[5]

("Carlin I"); Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n, 693 F. Supp. 332 (E.D. Pa. 1988).

I think we make a case that broadcasting is a more pervasive medium than those involved in previous cases. However, congressional sponsors of the ban on indecent dial-a-porn legislation stated that "[t]elephones are precisely like radio and television because of their easy accessibility to children and the virtual impossibility for parents to monitor their use," and asked, "[i]s there really a medium more 'pervasive' than the telephone?" 134 Cong. Rec. H1694 (April 19, 1988) (remarks of Rep. Bliley).

[4]As originally drafted, the Report even cited sex magazines, sex manuals and pornographic playing cards as examples of indecent but non-obscene materials. Such examples are irrelevant to broadcasting and wisely have been deleted from the final Report.

[5]While I understand that examples of hard core pornography were identified to illustrate the "broad range of material that ... could be considered indecent," Report of the Commission at para. 21, it would be well for us to remember that this "broad range" encompasses programming of real merit. See, e.g., Hickey, Four Letters Spell Dilemma on TV News, WASHINGTON TIMES, June 29, 1990 at B6 (detailing ways in which television stations modified their news coverage of the Vista Hotel sting operation in the Marion Barry drug and perjury trial).

Indeed, broadcasters have exhibited commendable sensitivity to issues of indecency, as befits their status as public trustees. In this regard, the Board of Directors of the National Association of Broadcasters in June issued a Statement of Principles for radio and television broadcasting. The Statement addressed various areas of programming content in order to "reflect what [the NAB] believes to be the generally-accepted standards of America's radio and television broadcasters." With respect to sexually oriented material, the Statement provided, in relevant part:

> "Programming that purely panders to prurient or morbid interests should be avoided.
>
> Where significant child audiences can be expected, particular care should be exercised when addressing sexual themes.
>
> Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.
>
> All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter."

Although the Statement of Principles is advisory only,[6] such efforts by broadcasters should be recognized and appreciated.

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[6]Unlike the NAB's Television Code, which for thirty years provided broadcasters with guidelines for meeting their statutory obligation to serve the public interest, the Statement of Principles provides no means of enforcement. The NAB unfortunately is barred from doing more by a judicial holding that the Television Code violates antitrust laws. See United States v. National Ass'n. of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982). This decision was a disservice to the American public that I hope will be overturned by congressional action. See, e.g., TV Violence Act, S. 593, which would grant antitrust immunity to allow the industry to adopt voluntary guidelines to help control depictions of violence, sexually explicit material and use of illegal drugs.

Finally, I agree with the Report that adults who wish to view indecent material have access to such programming from other media.[7] But I hesitate to conclude that the other sources are "largely indistinguishable" from, or "functionally equivalent" to broadcasting. Report paras. 84, 87. Such a characterization tends to undermine the public interest standard that makes broadcasting unique. For if we must consider the overall media environment to gauge whether or not the public has adequate access to information, it weakens the rationale for imposing special information obligations on Commission licensees. Suffice it to say that if adults wish to go to the extra trouble of obtaining indecent programming, nothing we do today prevents them from doing so.

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[7] Adult programming is widely available on audio and video cassettes, cable television and in theatres. But as the Commission recently concluded in our report to Congress on cable television, MMDS is currently available to only 300,000 subscribers nationwide and DBS does not yet exist. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Dkt. No. 89-600 (adopted July 26, 1990) at paras. 100, 104. Even cable is unavailable to some ten percent of television households, and approximately 43 percent to homes passed do not subscribe. Id. para. 3.