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Separate Statement of
Commissioner James H. Quello

RE: ***Policies and Rules Concerning Children's Television Programming (MM Docket No. 93-48)***

This item has good news and bad news. The good news is, we have proposed a range of options for encouraging broadcasters to air more and better children's educational and informational programming. The bad news is, two of these three options, quantitative programming standards and probably processing guidelines, are First Amendment time bombs waiting to explode in a court of law.

The First Amendment will be uppermost in my thinking when I develop my ultimate position in this proceeding. At least one commentary published before the Commission's 1994 en banc hearing on Children's Television has asked "Who Speaks for the First Amendment?" Robert Corn-Revere, Who Speaks for the First Amendment?, Broadcasting and Cable, June 27, 1994 at 18, 20. *I* speak for the First Amendment in this proceeding, loud, long and clear. While the Chairman and Commissioners were advised by our General Counsel that quantitative programming standards or processing guidelines would pass constitutional muster, I beg to differ. As Broadcasting and Cable pointed out, the D.C. Circuit has suggested several times in recent years that the scarcity rationale, which was the basis of the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC,395 U.S. 367 (1969) (broadcasters are entitled to less constitutional protection than traditional speakers due to scarcity of spectrum), may already have been rendered obsolete by the existence of new technology. Corn-Revere, supra at 18 (citing CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); FCC v. WNCN Listeners Guild, 450 U.D. 582 (1981); CBS, Inc. v. FCC, 453 U.S. 367 (1981); FCC v. League of Women Voters, 468 U.D. 364 (1984)). Indeed, in cases adopted since Red Lion, the trend has been to restrict the government's ability to intrude on editorial decisions and instead to place greater reliance on broadcasters' discretion. See id.

In perhaps the strongest statement to date, the Supreme Court last summer, in a ruling on the must carry provisions of the 1992 Cable Act, stated:

> The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.

Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2463 (quoting Network

Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)), reh'g denied, 115 S. Ct. 30 (1994). Quantitative programming standards or processing guidelines, in my view, would fall squarely within this warning that the FCC ought not impose on broadcasters their own notion of what the public ought to hear. We ignore this potent warning from the Supreme Court at our peril.

Congress itself recognized the importance of the First Amendment by devoting a great deal of discussion (seven pages) in the legislative history to the constitutionality of the programming portion of the Children's Television Act. H.R. 385, 101st Cong., 1st Sess. (1989). Congress concluded that, after close examination of the constitutionality of the legislation, "imposing...an affirmative obligation on licensees to serve the special needs of children in no way would violate the Constitution." Id. Accordingly, Congress directed the FCC, in ensuring that licensees include as part of their overall programming, programming that serves the educational and informational needs of children, to review broadcasters' applications for license renewal for compliance with the Act. Congress *did* adopt quantitative commercial limits; the fact that it *did not* adopt quantitative programming standards or processing guidelines, with an extensive First Amendment analysis as a backdrop, speaks volumes.

In addition to the First Amendment implications, I am concerned with the proposal to adopt quantitative programming guidelines or processing standards in light of the significant changes in the video programming marketplace since passage of the Children's Television Act in 1990. Let me clarify that I take very seriously the mandates of the Act, and our obligation to enforce these mandates. However, I also would argue that the Children's Television Act was sufficiently broad so as not to require us to make decisions in a regulatory vacuum. We should seriously consider the need for numerical requirements for children's television programming in a world that now includes, or will soon include, cable television (which brings us Nickelodeon, the Learning Channel, Discovery, the Disney Channel), direct broadcast satellite, wireless cable, video dialtone, video cassette recorders, and interactive video and computer programs. To ignore the realities of the marketplace in reaching a decision in this proceeding would be nothing short of regulatory malfeasance.

There are several good proposals in this NPRM which, together, could result in an effective means of encouraging broadcasters to improve on their children's programming record, without imposing unnecessarily on their editorial discretion. These proposals include: (1) clarifying the definition of educational and informational programming "specifically designed" to serve the needs of children; (2) requiring broadcasters to specify in writing in a children's programming report the educational objective of the program and the target child audience; (3) providing the public with more information regarding the educational and informational programming provided by broadcasters, including placing their children's programming report in a separate "children's file" at the same location as the station's public inspection file; (4) urging

the public to use this information by first approaching the stations in their community if they have any concerns about the amount and type of children's programming being aired before complaining to the Commission; and (5) monitoring for a specified period of time the progress of broadcasters under the new definitions and improvements in information flow. These proposals, taken together, could go a long way toward improving the amount of educational and informational programming for children while at the same time preserving the First Amendment rights of broadcasters.

One final aside. Although not before us in this item, there has been much talk recently about auctioning broadcast spectrum, or exchanging spectrum for an agreement from broadcasters to air more children's programming or to provide free time to political candidates. I strongly oppose any scheme to auction off spectrum used for broadcasting. To the extent such spectrum is used to offer subscription-based services, I think it is reasonable to require broadcasters to pay a fair value for that use. However, by "fair value" I do not mean to encourage the auctioning of the spectrum or the extraction of any content-based quid pro quo on the altar of Commission regulation. I consider this type of "social compact" nothing more than regulatory extortion.