FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

September 25, 1995

OFFICE OF COMMISSIONER
JAMES H. QUELLO

Honorable Larry Pressler
Chairman
Committee on Commerce, Science, & Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Chairman Pressler:

In response to your letter of September 21, 1995, I wish to express my views on social contracts and quantitative children's programming requirements. I will also respond to the specific questions set forth in your letter.

As I have indicated recently in speeches and press statements, I am extremely concerned that public interest groups, with the direct or indirect intervention of the Chairman of the Federal Communications Commission, will be granted the ability to extract, through purportedly "voluntary" social contracts, policy concessions that cannot otherwise be achieved through the notice and comment rulemaking process. This would also go beyond the Children's Television Act of 1990, in which Congress actively considered, but declined to adopt, quantitative children's programming requirements.

The recent announcement that Westinghouse "voluntarily" entered into a "plan," or social contract, with the United Church of Christ, et al. (UCC), which filed a petition to deny the CBS/Westinghouse assignment applications, epitomizes the danger to the First Amendment and due process that "rulemaking by social contract" represents. The Westinghouse/UCC social contract goes beyond any current Commission rule or policy to require Westinghouse to air a specified quantity of educational and informational children's programming on a weekly basis. Not coincidentally, the number of hours of children's programming "voluntarily" agreed to by Westinghouse is identical to the minimum number of hours of children's programming Chairman Hundt, NTIA Director Larry Irving, and President Clinton advocate.

The issue of whether to impose quantitative guidelines for children's educational programming is currently before the FCC in MM Docket No. 93-48. I would very much like the opportunity to decide this policy issue through the procedures established by law for administrative agencies: a notice and comment rulemaking proceeding which allows for the participation of all five Commissioners; which requires that any decisions be based on the factual record, the Children's Television Act, and First Amendment law; and which gives all affected parties the ability to appeal any Commission decision to the federal courts. The

"voluntary" agreement between Westinghouse, UCC and, directly or indirectly, the Chairman of this Agency, excludes the other four Commissioners from deciding vital policy issues; results in a decision based, not on the facts, the Act, and the law, but on political exigencies; and eliminates the ability of Westinghouse to appeal to the federal courts a vitally important constitutional issue. Allowing such "voluntary" agreements to be extracted through governmental arm-twisting would, in my view, make a mockery of the First Amendment.

While the airing of children's educational and informational programming is clearly an admirable goal, and one that I support, this goal should not be achieved through social contracts arrived at in this manner. If such social contracts are allowed for children's programming, what is to stop public interest groups and the federal government from extracting from broadcasters similar "voluntary" agreements to air programming on issues much less innocuous than children's programming? What is to prevent broadcasters from agreeing "voluntarily" to reimpose the Fairness Doctrine, or consenting "voluntarily" to air or not to air certain types of political speech or certain viewpoints on controversial issues?

Shakespeare might have said, "Methinks Westinghouse doth protest too much." I find it hard to imagine that any agreement could be truly "voluntary" in a regulatory environment rich with rhetoric actively advocating a federally-dictated number of hours of children's programming from the head of the Agency that must also approve the assignment applications in a $5.4 billion transaction; rich with threats from public interest groups in the form of petitions to deny that promise to delay administrative processes; and rich with uncertainty regarding the outcome of the outstanding children's television proceeding. It is a stretch of the imagination to believe that a social contract entered into in this environment was anything approaching "voluntary."

It is in this spirit that I respond to your concerns and inquiries. First, you ask what contacts my staff and I have had with Westinghouse, Disney, NBC, other television broadcasting companies, public interest groups, Members of Congress or the Administration, in which a social contract involving children's programming was discussed. As a general matter, discussions of this nature by myself and my staff have been few, given the fact that I strongly disapprove the use of a governmentally-imposed social contract as a means of implementing public policy that would infringe broadcasters' First Amendment rights. I currently recall only three:

1. A series of discussions initiated by Ms. Maureen O'Connell of my staff with representatives of Westinghouse

involved with the UCC negotiations on Friday, September 15, with a follow-up on Monday, September 18, concerning the contents of a press statement I had issued on the 15th expressing my views on social contracts. A copy of my September 15 press statement is attached to this letter. In one of these conversations, a Westinghouse representative expressed stong concern that Chairman Hundt, upon reading my press statement, might become angry and back out of ongoing discussions. I presume this reference could only mean discussions of a social contract. Such a social contract was, in fact, announced by Westinghouse just a few days following these discussions.

2. On Tuesday, September 19, one day before the Westinghouse social contract was announced, I received a telephone call from Mr. Greg Simon, Special Assistant for Telecommunications Policy Issues to Vice President Al Gore. In that call, Mr. Simon asked that I support not only a "voluntary" agreement between CBS and Westinghouse involving quantitative children's programming requirements, but also the imposition of such requirements on all broadcasters. I was advised that President Clinton and NTIA Director Larry Irving would be issuing letters that day expressing the view of the Administration that the FCC should adopt quantitative children's programming guidelines. These letters did, indeed, arrive later that day.

Mr. Simon further said he hoped I would contact Vice President Gore's office if I planned on giving a speech or making any public statement critical of Chairman Hundt, and expressing contrary views on children's programming, prior to finalizing any such statement. I declined to follow either of these recommendations, and gave a speech on September 21 expressing my views on quantitative children's programming requirements, the social contract between Westinghouse and UCC, and responding to Chairman Hundt's views on these issues. A copy of my speech is attached.

3. On September 20, Ms. O'Connell and Ms. Pete Belvin, my Senior Legal Advisor, met briefly with representatives of Westinghouse, and were provided with a copy of a press release announcing the Westinghouse plan to air a certain amount of children's programming per week. Westinghouse reiterated that the agreement was voluntary, and that social contracts should eliminate the need for official governmental action on quantitative programming guidelines. Ms. O'Connell and Ms. Belvin, on my behalf, expressed concern that any such agreement should be voluntary in fact, and not just in name. A copy of my press release in reponse to Westinghouse's announcement is attached.

In answer to your second question regarding the status of the pending children's television rulemaking proceeding, I refer you to Chairman Hundt. The Chairman of the FCC controls the timing in which items are brought to a vote at open Commission meetings, and through the circulation process. In any event, I strongly support bringing this item to a vote as quickly as possible so that the Commission can implement children's television policies in the rulemaking process where such decisions belong, and not through purportedly "voluntary" social contracts.

In answer to your third question regarding the Commission's authority to "encourage or otherwise solicit" social contracts in connection with any pending license transfer applications, I again refer you to Chairman Hundt for the proper citation to such authority, since I am of the view that the Commission does not have such authority. While the Commission has, from time to time, approved certain transactions, particularly those involving waivers of the multiple ownership rules, based in part on the increased public interest programming that efficiencies of multiple ownership could engender, such offerings of increased public interest programming are completely voluntary by the broadcaster, developed without any encouragement, orchestration, or other form of participation by public interest groups or by the Commission.

In answer to your fourth question as to whether the Commission **should** have the authority to "impose, encourage, or otherwise elicit" social contracts, I am strongly of the view that the Commission should not have the authority to adopt and implement policy decisions through social contracts. The Commission already has in place a Congressionally-approved process for making policy decisions: the notice and comment rulemaking procedures established by the Administrative Procedures Act. We must continue to follow this Congressionally-established method of policymaking. This is particularly true when "voluntary" social contracts involving policy issues are extracted during the time-sensitive license transfer and assignment process when licensees are relying on the FCC's approval to proceed with multi-million and -billion dollar mergers or acquisitions. Such direct or indirect efforts to extract a "voluntary" agreement are particularly troubling when orchestrated by the Chairman of the FCC, who controls the timing of agenda items and the flow of information through the Agency.

My position that the Commission does not and should not have the authority to extract agreements from licensees involving programming content are not based solely on my personal belief that the government should not tamper with the programming

content of the most powerful and influential news media in the world; my position is based on a careful reading of First Amendment law. In FCC v. WNCN Listeners Guild, the U.S. Supreme Court held that an FCC Policy Statement which concluded that the public interest in promoting diversity in radio entertainment formats is best accomplished through market forces and competition among broadcasters, rather than through review of a station's format changes in the renewal or transfer process. In finding that this Policy Statement reasonably accommodated the policy of promoting programming diversity without unnecessarily restricting licensee discretion, the Court noted:

> The Policy Statement is also consistent with the legislative history of the [Communications] Act. Although Congress did not consider the precise issue before us, it did consider and reject a proposal to allocate a certain percentage of the stations to particular types of programming. Similarly, one of the bills submitted prior to passage of the Radio Act of 1927 included a provision requiring stations to comply with programming priorities based on subject matter. **This provision was eventually deleted since it was considered to border on censorship.** Congress subsequently added a section to the Radio Act of 1927 expressly prohibiting censorship and other "interfer[ence] with the right of free speech by means of radio communication. That section was retained in the Communications Act.

450 U.S. 582, 597 (1981) (emphasis added, footnotes deleted). As I previously stated, Congress in the Children's Television Act of 1990 similarly declined to adopt quantitative programming requirements for children's television, no doubt recognizing that such numerical limits would cross the censorship line.

More specifically with respect to social contracts entered into as a result of direct or indirect governmental coercion, the U.S. Supreme Court held in Bantam Books, Inc., et al. v. Sullivan, that a Rhode Island law creating a "Commission to Encourage Morality in Youth" was unconstitional. 372 U.S. 58 (1963). This state commission was established for the purpose of:

> educat[ing] the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth. . . .

The Court found that the acts and practices of the state commission, which published lists of material it found objectionable, directly and designedly stopped circulation of

certain publications in Rhode Island without any opportunity for judical review, and without any opportunity for the publisher or distributor to receive notice or a hearing before the state commission published its list. The "cooperative" scheme the state commission sought from book distributors, the Court found, invariably entailed complete suppression of listed publications and constituted censorship in violation of the First and Fourteenth Amendments. The "voluntary" social contract involving CBS and Westinghouse is reminiscent of the unconstitutional "cooperative" scheme in Bantam Books.

Finally, one cannot discuss the issue of indirect, heavy-handed government content regulation without being cognizant of the closely-similar facts in the "family viewing hour" case. Writers Guild of America, West, Inc. v. ABC, 609 F.2d 355 (1979). In the mid-1970's, in response to requests by both houses of Congress to submit a report setting forth the Commission's authority to control program violence and obscenity, particularly as to children, the then-Chairman of the FCC embarked on a campaign of "jawboning." The purpose of this campaign was to have the networks and the National Association of Broadcasters (NAB) adopt a system of self-regulation that would reduce the amount of sex and violence in television programming without the need for any "formal" Commission action. This campaign included meetings with industry representatives, public speeches exhorting the industry to take action, and telephone conversations with network executives. The "family viewing policy" espoused by the Chairman, and ultimately adopted by the NAB as an amendment to its Television Code, read, in relevant part, as follows: "[E]ntertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour."

In a challenge to the actions of the FCC, the networks, and NAB, the U.S. District Court for the Central District of California held that the FCC committed a per se violation of the First Amendment by exerting improper pressure on the networks and the NAB to adopt the family viewing policy. The Court also held that the FCC violated the APA by implementing public policy by informal pressure instead of by complying with the Act's procedural requirements. This decision was ultimately vacated by the U.S. Court of Appeals for the Ninth Circuit and remanded to the Commission on a procedural point. A decision was never issued by the Commission on remand, and thus the substantive issues were never reached by the Ninth Circuit. Despite the procedural status of this case, this decision and its implications for the current Chairman's "jawboning" on children's programming, should not be ignored.

In closing, I strongly oppose <u>any</u> action by the federal government, direct or indirect, that coerces broadcasters into acceding to social contracts which would implement content regulation that has not been adopted through established rulemaking processes. Without such processes, licensees are subject to the vagaries of a single Chairman or Commissioner, a changing political environment, delay in critical application processing, and rulemaking by fiat without the ability to appeal to the final arbiters of the Constitution: the federal courts.

Please let me know if I can be of further assistance, or provide further information on this very important subject.

Sincerely,

James H. Quello

James H. Quello
Commissioner

Enclosures

Press Statement of Commissioner James H. Quello
CBS/Westinghouse Transaction

Whether the Commission should require licensees to do more children's programming is an issue that belongs in the pending children's rulemaking proceeding. Whether Westinghouse is qualified to hold the CBS licenses belongs in the CBS/ Westinghouse assignment proceeding. It is inappropriate to use the CBS/Westinghouse assignment proceeding to decide, through a purportedly "voluntary" social contract, key issues in the children's rulemaking proceeding. There is a bright and unmistakable line between the two.

Any type of new regulatory obligation, including a "voluntary" social contract with quantitative programming guidelines or standards, must be approved by a **majority** of this Commission, and not dictated by a single Chairman or Commissioner. The FCC's democratic process must <u>not</u> be circumvented by the unauthorized demands or decisions of one Chairman or one Commissioner.

In my 21 years as a Commissioner, I have been vigilant to assure that our renewal and transfer process is not misused as an administrative form of extortion. I will remain vigilant to this concern in this and other proceedings.

REMARKS BY COMMISSIONER JAMES H. QUELLO
Before the
NAB's Children's Television Symposium
ANA Hotel, Washington, DC
September 21, 1995

ENOUGH ALREADY!

Congratulations to the NAB for conducting this Children's Television Symposium. The awards today provide timely evidence of the high standards that children's programming can meet. This Symposium is particularly pertinent because broadcasters have a continuing need to better inform the public and government officials of the many educational and informational programs available to both children and adults.

There are four key points I want to make to you today about television and the child audience. First, despite contrary views including the views of President Clinton which I respect, an objective review of the complete record will indicate that broadcasters are already doing an extensive job of airing educational and informational programming for children. I do not feel it is necessary to saddle broadcasters with federally imposed standards pertaining to the quantity of children's programming.

Second, I do not think that quantitative children's programming requirements have any chance of being upheld in the federal courts.

Third, any possible argument that could be made in favor of governmental content regulation of broadcasting has been eliminated in recent years by the development of an incredibly diverse, multichannel, multimedia video marketplace.

Fourth, this incredible programming diversity comes with an inevitability that children will be exposed to increased levels of sex and violence. It is this aspect of television and the child audience that should be our primary concern.

Now, let me develop each of these points.

I believe a current objective review would reveal that broadcasters have responded to the Children's Television Act of 1990 through increased programming. A study done by NAB last year found that there was an 81% increase in educational programming for children from 1990 to 1993. The study reflected that, in 1993, on average, broadcasters aired 3-1/2 hours per week of educational children's programming. Preliminary results from an even more recent study by NAB indicate that the increase in educational programming was even higher in 1994. This programming includes, for example, ABC's After School Specials, which have been

aired now for 24 seasons. Also, there are many general audience programs that provide educational benefits for children. They should not be disregarded just because they are not specifically developed for children.

In my opinion, any governmentally-imposed quantitative program requirements would constitute unnecessary, objectionable government intrusion and would never pass a First Amendment court challenge. Broadcasters need to better inform the public of the many children's educational and informational programs available today.

Specifically, I must respectfully register a dissent to some critical statements made by the FCC Chairman in a recent speech. He had a perfect right to express them and I have a perfect right to express opposing opinions.

So now it is my turn.

The Chairman's speech, titled "Long Live Frieda Hennock," extolled the regulatory viewpoint of a former FCC Commissioner named Frieda Hennock, who served on the FCC almost fifty years ago.

The Chairman's "Frieda Hennock" speech was exceptionally well-structured. The content, however, reminded me of the ancient story of the cow who gives superb rich milk, then kicks over the bucket and spills the milk. And this spill was big time!

The rich milk: The Chairman's strong, eloquent criticism of excessive violence and explicit sex available to children. I agree, and have been making similar strong statements and issuing stern warnings to broadcasters, cable and Hollywood producers for the past five years. In this connection, I also believe that parents are much more concerned with excessive TV violence and sex than the generalized, subjective, hard to substantiate need for more educational and informational programming for children.

I also give a 5-star approval rating to the Chairman's proposal to eventually link classrooms to the information highway by combining computer technology with wired and wireless transmission facilities, including TV, to produce a national "in-school viewing" capability -- whenever this becomes technologically and economically practicable. This link must be accomplished without placing an undue financial burden on any one segment of an industry that could result in higher costs to the consumer.

The kicked bucket: The Chairman's overbroad, almost unbelievable, castigation, first, of broadcasters for disregarding the public interest; and, second, of past commissions for a "long and undistinguished history of failing to apply responsibly [their] mandate to make sure broadcasters use the airwaves to serve the public and specifically to guarantee that television helps educate our children."

His intemperate statement doesn't just demean all previous Commissions and Commissioners, who he has on several occasions disparagingly referred to as "the old regime." It also suggests that the Chairman is casting himself as the sole public interest white knight in shining armor and the prime crusader for more FCC control and additional regulatory mandates -- like in the good ol' activist regulatory days of the 1950s and '60s. Is this the "new regime?"

The spilt milk: Advocating the outdated regulatory mandates of the Frieda Hennock era.

The Chairman has embarked on an unprecedented, unrelenting public relations campaign to urge support for his specific quantitative program requirements -- which are constitutionally suspect. A Democratic Congress, in the Children's TV Act, did not take that risk and did not enact quantitative standards.

I also endorse Commissioner Hennock -- to a point -- for her support of educational TV and UHF -- two worthy projects I have strongly supported during my own FCC tenure.

Because of my age, I am the only present Commissioner who actually knew Frieda Hennock. So, I am tempted to say (1) I knew Frieda Hennock; (2) I worked with Frieda Hennock; (3) Frieda Hennock was a friend of mine; and (4) Reed, you are no Frieda Hennock! And in some respects that's fortunate for you. Because, if you were a Frieda Hennock regulator in the competitive multi-channel world of today, you would be hopelessly outdated, beat up by Congress and overruled in the courts.

Frieda Hennock was an effective, brilliant maverick several generations ago in an era when broadcast television was the only show in town, and a very limited number of television stations were the only source of video programs. Today, there is a superabundance of program choices -- over 1500 full power television stations, including 4 networks, 2 additional emerging networks, 363 noncommercial educational stations, and more than 1600 low power stations.

Nor is broadcast television even the dominant player in the video marketplace any more. Today, cable television reaches 97 percent of all television homes and 63 percent of households subscribe. Cable's 135 program networks, with 60 more in the planning stages, have brought an undreamed-of diversity of programming that responds to virtually every conceivable want and wish. DBS, MMDS, and, soon, video dialtone systems will augment and extend this array of programming. Also vying for the hearts and minds and eyes of the viewer are the Internet and VCRs, which are now in 82 percent of all homes.

With this incredible menu of program choices, the main legislative and regulatory thrust today must be toward competition and deregulation -- not program regulation and First Amendment intrusion. In fact, we are fast approaching the millennium when competition will replace the need for regulation -- a long-term goal sought by both Congress and the FCC.

However, deregulation doesn't seem to be what the Chairman has in mind. He recently equated the public interest with, and I quote, "specific, concrete, and meaningful duties" imposed on broadcasters. These are, of course, code words for quantitative programming requirements. If this is the deregulatory "new regime" at work, thank God for Congress, the federal courts of appeal and the Supreme Court!

The Chairman's claim of a "marketplace failure" in children's programming is a farcical notion in today's multichannel, multi-faceted era and represents only the viewer's failure to locate the desired programs. The public has many diverse sources of programming, including children's programming, to choose from. That fact has produced decisions like Syracuse Peace Council v. FCC, in which the court upheld the FCC's determination that the Fairness Doctrine no longer serves the public interest.

It is increasingly more difficult, both logically and legally, to justify legislation or additional regulation imposing program restrictions or quantitative children's educational requirements on broadcasters when a great and ever-increasing variety of program choices are available to the public for just a twist of the dial or the insertion of a VCR tape.

I also object to the Chairman's repeated diatribe that the Commission has not done its job because it has not revoked a single TV license in 15 years. This sounds to me like a thinly-veiled threat. Why does the Chairman find it necessary to threaten the ultimate sanction of revocation when so many other regulatory tools lie close to hand? In any event, in the final analysis, the Chairman is only one vote among five for the ultimate sanction.

I take little pride in the fact that I'm the only Commissioner who has voted for a substantial number of license revocations, mostly radio, during my tenure. I believe the license revocation power granted years ago during the "scarcity" era should be revisited in the competitive multi-media, multi-channel world of today. In fact, I question whether any government agency should have the power to revoke the license of a member of the most influential news medium in a democracy. In the few instances of proven egregious violations, distress sales to minorities should be considered instead of the industry "death sentence" of total revocation.

I must also take particular exception to the following statement in the Chairman's "Frieda Hennock" speech that ". . . it's time to abandon the fiction that asking broadcasters to do better on a volunteer basis has any chance of producing desired results." Sorry, but it is a somewhat fatuous statement.

Some of the most respected, responsible companies in America are broadcast licensees. I can't believe the following licensees, and hundreds like them, just can't be trusted to serve the public interest without Big Brother's program mandates and license renewal threats:

The New York Times
The Washington Post
The Chicago Tribune
The New York Daily News
The San Francisco Examiner
The Des Moines Register
The Boston Globe
The Atlanta Journal & Constitution
The Detroit News-Free Press
The Dallas Morning News
USA Today - Gannett
The Kansas City Star
The Oakland Press
The Miami Herald
The St. Louis Post Dispatch
And hundreds of other newspapers and all the broadcast networks

Need I go on?

Broadcasters serve the public interest every day in ways in which no other medium or business does. They provide news, information, emergency bulletins, documentaries and public service announcements, entertainment, and education -- all free of charge. No other medium can make that claim, and this tradition of free service is, in itself, an important, underestimated contribution to the public interest. In fact, broadcasters contribute millions of dollars worth of public service programs and announcements every single month. From my experience in broadcasting, I can tell you that the great majority of broadcasters make a commitment to community service over and above what the Communications Act requires because it is good citizenship and because it is good business -- <u>not</u> because of the FCC. And certainly not because broadcasting, the prime information medium, has a government mandate to make a "social contract" with their communities, outlining how many hours and what types of public interest programming they must air.

The simple fact is, broadcasters enter into a "social contract" with their communities every day when they turn on their transmitters, and the public votes its approval or disapproval daily through audience ratings. I hate to think how any government-mandated "voluntary" social contract is likely to fare under First Amendment scrutiny.

I reject the notion that it serves the public interest to use this Commission's authority to approve license transfers or assignments as a form of administrative extortion to extract supposedly "voluntary" commitments on programming from broadcasters as a quid pro quo for our approval. Those who wish to pursue such an unprecedented -- and unwise -- course should bear in mind that the entire Commission -- not just one Chairman or Commissioner -- will review and vote on all the terms of any license transfer or assignment.

I could not talk about so-called "voluntary" social contracts involving children's programming without commenting on the recent, very troubling, announcement, that Westinghouse has let the first domino fall in what promises to be a long row of falling dominos. The Center for Media Education, and apparently the Chairman of the FCC either directly or indirectly, have successfully extracted from Westinghouse a promise to increase their level of children's programming within two years to three hours per week. Westinghouse's public claims that this plan is "voluntary" does not change my bottom line position on this issue. Let me be very clear on this point: So long as the United States has attached to its Constitution a Bill of Rights, this Commissioner will consider long and hard before approving any transaction that includes an agreement that effectively functions to censor a broadcast licensee's programming. Any such agreement, particularly extracted after significant pressure has been exerted by the head of a governmental agency through speeches and meetings, and in the context of a petition to deny from a public interest group that could have delayed the sale of the station, is an affront to the First Amendment and is unlikely to withstand court challenge. Broadcasters beware: If you choose to sell out the First Amendment, you will have to do so without the support of this Commissioner.

So, how is it possible to demand more from broadcasters at a time when the government's rationale for making such demands is diminishing? The answer, at least for some, is to invent new justifications.

For example, we are told by some that broadcasters are given their spectrum for free, and that they must give something back for the "privilege" of engaging in broadcast speech. According to this argument, the ability to use a valuable public resource must be accompanied by an obligation to speak in ways that the government approves. Some have suggested that broadcasters must base their programming decisions on a government mandated quid pro quo because they are licensed by the government. In fact, we now have activist groups again trying to impose their own private version of the overall public interest on broadcasters through

petitions to deny, just as they did in the 1960s and 1970s. This was encouraged, no doubt, by the "new regime's" interpretation of deregulation.

This "free" argument suffers from a number of problems, not the least of which is that it is factually wrong. The vast majority of broadcasters -- over 90% -- already paid a full marketplace price when they purchased their stations.

The only "free" TV licenses -- if you can call them that -- were the original ones granted in 1949 and 1950 to a few entrepreneurs willing to take the expensive initial risk of developing a new video medium before TV sets were generally available in homes. The new licensees invested in buildings, equipment, personnel and TV programming without any initial source of advertising revenue. In fact, TV was an unprofitable exploratory investment for a number of years.

But beyond the factual problem, the argument lacks substance. There are many instances in which the government allows its resources to be used by speakers, but this does not allow it to control the content of the speech.

Local governments issue parade permits, but that does not give them the power to say who may or may not march in the parade. The Supreme Court recently affirmed that such decisions are the private editorial judgments of the parade organizers, not the government. Additionally, local governments issue cable television franchises, but they have no power to dictate the program content of the channels on the system.

Another argument being floated as a justification for an expanded government regulatory role in television is the one I alluded to earlier -- the notion of "marketplace failure." We are being told, for example, that the government must mandate specific amounts of children's programming because the market has failed -- that an insufficient amount of educational programming is being produced for the audience.

Apart from begging the question of whether the government should be involved in these marketplace decisions, this argument employs a rather strange notion of "failure." For in the television marketplace, people are willing to pay to receive the Learning Channel, Discovery, Nickelodeon, Arts and Entertainment, the Disney Channel and other cable channels. Children's Television Workshop similarly has announced plans to form a new cable channel. The 363 noncommercial educational broadcasting stations provide excellent children's programming and other general educational programming. Let's not forget that probably hundreds of educational and informational children's programs are available on VCR tapes, which are a particular favorite of children because they can be played over and over. Finally, and perhaps most important, over a thousand commercial television stations and over 1600 low power stations are now available to meet specific local educational and informational needs.

This is not marketplace failure: it is the market at work. If consumers have the ability to access a great variety of programming sources but choose not to, this is consumer failure, not market failure. Parents need to motivate their children to watch the educational programs that are already available.

Let me emphasize a point I made earlier. Broadcasters don't need another layer of government oversight in this competitive multi-channel program era. And the Commission doesn't need another opportunity to lose in court -- no matter how good our lawyers are.

But there is a larger problem that the debate over educational and informational programming for children misses -- namely, the adult-oriented violence and sexual content that pervades many prime-time television shows.

The newly proposed V-chip would give parents the power to prevent the viewing of objectionable programming. Although they have always possessed the ultimate power -- to merely tune out undesirable programs -- this requires "hands-on" supervision of each show a child watches, something that many parents find impracticable.

I believe the V-Chip is probably the least intrusive means of empowering parents to protect children so long as the government does not dictate the ratings systems. The V-chip lessens the need for legislation like the Hollings bill, which would require the FCC to define and regulate violent programming. But, I had warned broadcasters, cablecasters, and Hollywood producers of the possibility of Congressional action to curb graphic TV violence and explicit sex available to children in 1993, 1994 and again this year. If the Hollings bill passes, I can only say "I told you so."

With the V-chip, increased parental supervision, and existing indecency regulations, children can be protected from excessive violence and sex -- the prime public concern. And let's not forget the Commission's rule that requires all broadcasters to maintain an "issues-programs" list that is open to public and FCC inspection. These lists must show that the broadcaster has presented programming responsive to the needs and interests of the local community, including the educational and informational needs of the child audience. So, as to any additional regulation, I say "ENOUGH ALREADY!"

In the multichannel world of today with cable, DBS, movies, video dialtone, Internet, VCRs, along with magazines and newspapers, it is disingenuous to center primary blame for society's ills on broadcasting. Also, there are other more important influences to consider besides the media -- like parents, relatives, home environment, friends, teachers and schools.

Thus, government regulators must resist the temptation, in a multi-channel universe, to single out broadcast licensees as the primary source of all the ills of society. Then too, regulators must be careful not to lose the trust or respect of regulated industries in over-zealous attempts to direct the programming choices of licensees, threaten license revocation or to extract social engineering concessions in the name of serving the public interest.

Broadcasting today, as the most influential and pervasive of all news media, merits full First Amendment rights.

Now, let me briefly switch gears. Beyond the current debate over requirements for children's programming, I'm delighted today to have an opportunity to present my views on several other contentious issues before this prestigious forum. In fact, I have been asked to broaden my comments to include auctioning of digital ATV spectrum and multiple ownership.

HDTV and Digital Compression: Broadcasters have worked for over seven years to develop HDTV and digital compression. I have stated that the first priority for this new improved technology must be to improve and expand universal free TV. I applaud former Senate Communications Committee Chairman Fritz Hollings and House Commerce Committee Chairman Jack Fields for their foresight in preserving HDTV and broadcast digital spectrum for free TV.

Multiple Ownership Rules: It is past time for relaxation of multiple ownership rules and for expanding national caps. However, I believe that there should be sensible local caps to prevent local market domination and to obviate antitrust problems.

New Satellite DAB Service: Although the issue is still open for comment and I therefore have not finally made up my mind on this issue, I do believe at this time that satellite DAB should be authorized as a subscription service. I also believe we must give in-band, on-channel DAB a chance to develop to provide terrestrial broadcasters with the ability to compete with digital satellite services.

Minority Ownership and Employment: I support EEO reform, particularly for small stations. However, I am a firm believer in tax certificates as the most direct way to increase minority ownership.

Congressional budget reductions: I support the Chairman's efforts opposing the untimely drastic cut in FCC funding and personnel. This comes at a time when the agency will probably be required to implement massive resource-intensive communications legislation. It seems to me that the size of the reduction should await the outcome of the legislation. Then too, the FCC is experiencing an unprecedented burgeoning in new, innovative communications technology requiring Commission action. In fact, I disapprove of our proposed reductions in our field office

staff because I choose to wait and see what Congress does and because I believe other parts of the Commission would more appropriately bear the brunt of any required cuts. And at the very least, current field office employees should have the first opportunity to relocate to Washington if legislation causes a shift in FCC regulatory priorities.

Separate and apart from my views on regulating children's television or anything else, let me give you my views on the most constructive approach to regulation in general.

Overall, I believe government regulation is best conducted in a spirit of mutual cooperation with regulated industries -- broadcasting, cable, telephone, wireless, DBS, etc. If some choose to label this an "old regime" approach, so be it.

I believe progress can best be achieved with a constructive government attitude that provides incentives for innovation, growth and improvement in service and products for the public. We should reserve adversary proceedings for egregious violations. In return, we should expect that telecommunications companies, because of their great impact on the American way of life, maintain a strong sense of social consciousness.

The great majority of American telecommunications and broadcasting corporations have reasonably fulfilled most expectations by providing the American people with the largest communications services in the world and their employees with a good standard of living. One of our highest government priorities must be to preserve America's markets and our preeminent position in world communications to assure healthy, progressive industries with gainfully employed Americans.

Broadcast executives, many of them concerned parents, in general make a much larger contribution to their communities, to advance technology and to the overall public good than their detractors. Do broadcasters make mistakes? Yes, like all human beings, even Commissioners -- and even Chairmen.

Government officials must remind themselves that it was private investment, not government funds or regulation that years ago received empty spectrum out of the air and built the most comprehensive, diversified, technologically advanced, and best free broadcasting system in the world.

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Press Statement of Commissioner James H. Quello
September 20, 1995

Westinghouse Broadcasting has just announced a "plan" to increase their level of children's programming within two years to three hours per week. Although Westinghouse claims publicly that this agreement is voluntary, it is highly suspect because it follows closely on the heels of an unprecedented, relentless public relations campaign by the Chairman of the FCC to impose specific, quantitative program requirements on broadcasters. Neither the Commission nor Congress has endorsed quantitative children's programming standards, and the courts are unlikely to ever approve such a regulatory scheme. **I do not think that any government agency, or public interest group acting directly or indirectly at the behest of a government official, should have the power to impose its programming will on the broadcast media, the most pervasive and influential news media in America.**

Let me be clear on this point: So long as the United States has attached to its Constitution a Bill of Rights, this Commissioner will consider long and hard before approving any transaction that includes an agreement that effectively functions to censor a broadcast licensee's programming. **Broadcasters beware: If you choose to sell out the First Amendment, you will have to do so without the support of this Commissioner.**

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United States Senate
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
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JAMES H. QUELL

September 21, 1995

The Honorable James Quello
Commissioner
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Quello:

I am increasingly concerned by reports that Federal Communications Commission (the Commission) members or staff may currently be or have been involved, directly or indirectly, in discussions with Westinghouse, Disney, NBC, and other television broadcast companies, regarding purportedly "voluntary" social contracts. As I understand it, these social contracts potentially would address quantitative children's programming requirements and free time for political advertisements, among other matters.

The reason for my concern is that a social contract of this nature -- especially were it to extract programming concessions that go beyond any formal policy adopted by the FCC -- could violate the First Amendment and the processes established by the Administrative Procedures Act. Moreover, such a contract could allow public interest groups to unfairly gain the ability to control broadcast programming content in a way that could not otherwise be accomplished through established notice and comment rulemaking proceedings.

Specifically, section 309 of the Communications Act sets forth in detail the procedures governing broadcast license transfers. That section was amended in 1952. The Senate Report accompanying the 1952 amendments repeatedly refers to the "necessity for definite provisions" (see S. Rep. No. 44, 82d Cong., 1st Sess. [Jan. 25, 1951)]. Comparable language appears throughout the House of Representatives's report as well [see H. Rep. No 1750, 82d Cong.,2d Sess. (Apr. 8, 1952)]. Given the specificity of the statute and its legislative history, a compelling argument can be made that the Commission lacks legal authority to impose, encourage, or otherwise elicit "social contracts" or other impositions in connection with broadcast license transfers.

In light of these concerns, I would very much appreciate your response to the following questions and requests:

1. What contacts have you, your staff, or other employees of the Commission had with Westinghouse, Disney, NBC, other television broadcasting companies, public interest groups, members of Congress or the Administration, in which a social contract involving children's programming, political programming, and/or other obligations was, directly or indirectly, discussed?

2. Please indicate the status of the pending children's rulemaking proceeding, including the anticipated date by which the Commission intends to decide each of the issues raised in that proceeding.

3. If, indeed, Commission members or staff have engaged in negotiations or discussions concerning "social contracts" with any company or other entity, please provide a report specifying the legal authority under which Commission members or staff may have sought to encourage, or otherwise elicit such contracts or any other impositions in connection with any pending license transfer application.

4. Finally, I would very much appreciate receiving your views as to whether, as a matter of public policy, the Commission should have the discretion to impose, encourage, or otherwise elicit "social contracts" or other impositions in connection with broadcast or other license transfers. In recent months, as you know, there have been a number of

cable television industry consolidations, as well as mergers and acquisitions in the commercial mobile radio, satellite, and other fields. To the extent that broadcast license transactions are made subject to "social contracts," should transactions affecting broadcasters's direct competitors, cable television firms, also be so conditioned, in order to avoid competitive unbalance? Should all transactions affecting the radio spectrum be so conditioned and, if so, should there be specific language added to the Communications Act authorizing such actions?

Thank you very much for your consideration in this matter. I look forward to hearing from you in the near future.

Sincerely,

Larry Pressler

Larry Pressler
Chairman

LP/dms