STATEMENT OF COMMISSIONER JAMES H. QUELLO
Re: Children's Television Proceeding
July 16, 1996

I'm releasing this statement today to present my true position and to correct mischaracterizations by some who may not be aware of the unprecedented over-regulatory details of the draft Children's Television Report and Order.

Hopefully, this will be my final separate statement on this contentious, inordinately time-consuming issue.

Significantly, perhaps the most knowledgeable, responsible and publicly-aware group in free broadcasting, the Radio TV News Directors Association, is in full agreement with the position I have taken. So also is the Media Institute, a nonprofit foundation dedicated to protecting free speech and the First Amendment.

I again repeat that I am committed to a flexible three-hour-per-week processing guideline. In fact, I'm ready to concur with a three-hour processing guideline with the reasonable flexibility I have requested and was expecting to vote for.

I believe sensible flexibility is essential to obviate First Amendment Constitutional challenges and assure judicial acceptance of the FCC's implementation of the Act. All "processing guidelines," if they are truly processing guidelines rather than rules, have reasonable flexibility built into them. Without more flexibility, the draft children's TV proposals look more like government edicts than processing guidelines.

I also believe that most of the Congressmen who in good faith signed a letter generally supporting three hours of children's programming per week would not support the adoption of overly rigid rules that threaten to undermine the judicial sustainability of the Act itself.

The Children's Television Act as legislated by Congress wisely avoids charges of content and media control by providing for flexibility. It does not require any prescribed number of hours of specific types of programming that must be broadcast to comply with it. On the contrary, former House Subcommittee Chairman Ed Markey, a sponsor of the Act but now a leading proponent of a three-hour rule, explained when the Act was adopted that "the legislation does not require the FCC to set quantitative guidelines for educational programming, but instead requires the Commission to base its [license renewal] decision upon an evaluation of a station's overall services to children" (emphasis added). And the distinguished Senator Daniel Inouye, who was then Chairman of the Senate Communications Committee, further confirmed that each broadcast licensee should be afforded the "greatest possible flexibility in how it discharges its public service obligation to children" and that the "Committee expects the

Commission will continue to defer to the reasonable programming judgments of licensees."

In so framing the Children's Television Act, its sponsors were being careful to insulate the Act itself, and the range of permissible Commission action thereunder, from successful court challenge and reversal. And this was wise. For as the courts have repeatedly found, public interest requirements relating to specific program content create a high risk that such rulings would reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest and must be closely scrutinized lest they carry the Commission too far in the direction of censorship. Recently, in Turner Broadcasting Systems v. FCC, 114 S.Ct. 2445, 2463, the Supreme Court concluded that "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."

The draft programming guideline rules before me ignore the deliberate decision by the Congress to use flexibility as the way to avoid Constitutional challenges. Instead, the draft rules virtually invite such a challenge by severely limiting this flexibility.

Let me be as specific as I can be about why this is so. For example, the draft rules would allow only regularly-scheduled, half-hour length programming to be counted for purposes of satisfying most of the broadcaster's three-hour children's programming requirement. As a practical matter, this severely constrains stations' ability to broadcast not only programs which are shorter in length than 1/2 hour but also specials like President Clinton's hour-long talk with American schoolchildren, not because they aren't educational, but simply because neither fits the FCC-decreed format.

Also, with the way the proposed rules are structured, television licensees would for all intents and purposes have virtually no incentive to finance the broadcast of educational shows on local PBS stations. This not only eliminates a promising nongovernmental source of PBS support; it also eliminates any realistic possibility that commercial broadcasters would contribute to the development of new noncommercial sources of children's programming like "Sesame Street."

Even without a legal challenge, I don't think discounting specials, 15-minute programs and funding for worthy public broadcasting programs makes sense. And I'll bet neither the sponsors of the Children's Television Act nor the Congressmen who signed that recent letter would think so either.

These arbitrary rules are complemented by page after page of even more burdensome and pointless ancillary requirements. There are rules on how often the FCC-sanctioned programming must be shown each season, on how many times it can be preempted, and on what times of day it can and can't be broadcast. There is a new rule

requiring all 1444 television stations to file paperwork with the FCC every three months listing the children's programs they've already shown and the ones they propose to show, even though the exact same paperwork must be kept and made available on request at the TV station's local office. Then, still more rules say when and how often television stations must make on-air announcements of the fact that the material is available in the local office. There is also a provision that would encourage independent third parties to review and certify the educational purpose of children's programming so that the TV station wanting to show it can get a "rebuttable presumption of compliance." On and on and on it goes, for over 100 pages and 200 paragraphs -- an intrusive and meddlesome regulatory mess never envisioned, let alone sanctioned, under the Children's Television Act.

What's also going on here is that a most worthy project, children's educational and informational programming, with strong support among the public and the majority of broadcasters, is being cleverly manipulated to revive outdated and discarded "scarcity" theories of broadcast regulation. If adopted, this item would set a precedent that would shackle broadcasting, the nation's leading news and information medium, with even more extensive content and structural regulation in many other areas in the future.

Scarcity was a justification for regulation years ago when broadcast TV was the only show in town and a very limited number of TV stations were the only source of video programs.

Today, there is a superabundance of broadcast outlets -- over 1400 full power TV stations, including 4 networks and 2 additional emerging networks, and 263 noncommercial educational stations. On top of this, there are an additional 1600 community low power stations, of which 90% claim to broadcast children's programs.

Despite this abundance of over-the-air channels, broadcast television is no longer the sole dominant player in the video marketplace. Today, cable reaches 98 percent of all television homes with over 66 million subscribers. Cable's 135 program networks, with 60 more still to come, have brought an undreamed-of diversity of programming that responds to virtually every conceivable want and wish. There is rapid growth of DBS, MMDS and, thanks to the passage of the Telecommunications Act earlier this year, there will soon be OVS. VCRs are now in 83 percent of all American homes, and, to top it all off, the computers and the Internet are becoming an outlet for our children's time and energy.

With this incredible menu of program choices, claims of marketplace failure are outdated and farcical. The main legislative and regulatory thrust today must be toward competition and deregulation, not program content regulation and First Amendment intrusion. 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.

Thus, it is increasingly difficult, logically and legally, to justify additional regulation of broadcasting, the only medium providing universal free service, when a great and ever-increasing variety of program choices is available to the public.

Then too, we must be careful not to have unrealistic expectations of what can be achieved from increasing children's educational TV programs. More children's programming is a worthy cause, but it doesn't treat the pressing problems of children's health, children's welfare, disease, poverty, crime, drugs, lack of schooling and lack of family unity. These and other vital community problems are regularly treated by broadcasters as part of their overall service to the local community.

In sum, armed with an outdated scarcity argument and "extra-censory" zeal, this draft order constitutes an over-reaching attempt to regulate broadcast programming far exceeding anything the FCC has, in my memory, attempted before. And it attempts to do this at a time of multi-station, multi-channel abundance in the most competitive communications marketplace in history, and at a time when both President Clinton and the Congress have declared that "the era of big government is over."

This proposed FCC exercise in over-regulatory micromanagement is a package I can't accept and a heritage I refuse to leave.

None of this is necessary for us to adopt a three-hour processing guideline that will work effectively and consistently with the purpose of the Children's Television Act. And I have offered specific ways to change these draft rules to make them both workable and sustainable.

I believe this controversial FCC order should be released for public comment to fully inform everyone of its contents. This is an unusual step, but this issue is deteriorating into an unusually misguided proceeding. If this draft order were made public, I can't imagine anyone with any First Amendment sensitivity supporting it insofar as it calls for unprecedented government micromanagement of the nation's leading news and information medium. I also believe public disclosure would serve as a nationwide wake-up call to what is potentially at stake for all communications media.

Nevertheless, I will say again that I remain committed to a flexible three-hour guideline for children's educational programming. I hope that the announced White House summit on children's programming will be successful, and that President Clinton can set the stage for the creation of sensible, effective rules in a way that the intractable FCC Chairman has not.

It is time either to put reasonable programming guidelines in place or else place this issue on hold so that we can focus our energies on implementing the all-important 1996 Telecommunications Act.

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Statement of Commissioner James H. Quello
In re: Children's TV Proceeding
July 11, 1996

I can't and I don't see how any reasonable person can, support this over-regulatory Report and Order because it calls for unprecedented government micromanagement of a leading news and information medium.

I believe that most Congressmen who signed a good faith letter generally supporting three hours of children's programming would disapprove the FCC method of implementing the Act.

A worthy project, children's educational-informational programming, is being manipulated to revive largely outdated and discarded theories of broadcast regulation that would shackle broadcasting with even more extensive content and structural regulation in the future.

To implement the Act according to this Report and Order, broadcasters would have to submit to Constitutionally-suspect, specific government requirements -- not what I believe Congress intended or legislated.

First -- only programming 1/2 hour, 13 in a series, etc.

Not eligible for staff decisions would be 15 minute programming, 1-hour specials, financing TV programs for public broadcasting.

Additionally, educational programming must be qualified by an outside source or, failing that, by the FCC staff.

List all over-regulatory requirements...

The children's TV provisions as presently constituted is a government edict rather than processing guidelines. In short, you have a government agency mandating a specific number of hours per week of government-approved programming at specific times and with government-dictated program series.

This is not only trashing editorial judgment and long-established licensee discretion but it is an affront to First Amendment freedom of speech and freedom of the press.

I can't support the over-regulatory rationale on either a Constitutional or FCC policy basis.

However, I remain committed to a flexible processing guideline.

With reasonable revision, I will concur with the three hour processing guideline. The only requirement is to count 15 minute, 1 hour specials, financing, etc., etc. and eliminating qualifying educational programs by outside sources or by the Commission, etc.