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The FCC's Regulatory Overkill

By James H. Quello

President Clinton has summoned broadcasters to the White House for a Summit on Children's Television next Monday. I hope the president uses this highly visible event to set the stage for creating sensible, effective rules to implement the Children's Television Act.

The Federal Communications Commission, charged with developing the actual rules, has been trying to agree on "processing guidelines"—rules that would require broadcasters to air three hours of kids' educational programming per week. All four commissioners favor the concept of guidelines and a three-hour rule. But some of us believe that for the rules truly to be "guidelines," they must contain a reasonable degree of flexibility. The proposed rules the FCC is now considering are so rigid that they look more like government edicts than true guidelines. Indeed, taken in their entirety, these rules are as intrusive and overregulatory as anything I have witnessed in more than two decades at the FCC.

Content Control

In their present form, these "guidelines" would invite a legal challenge—and probably would be held unconstitutional. They dictate in such detail that they amount to a form of content control in which the FCC cannot legally engage.

For example, the draft rules would allow only regularly scheduled, half-hour programs to be counted for purposes of satisfying most of a broadcaster's three-hour children's programming requirement. This would severely constrain stations' ability to broadcast both programs shorter than 30 minutes and specials like President Clinton's hour-long talk with American schoolchildren—not because they aren't educational but simply because they don't fit the FCC-decreed format.

Television licensees would also have virtually no incentive to finance the broadcast of educational shows on local PBS stations. This would eliminate any realistic possibility that commercial broadcasters would contribute to the development of new noncommercial children's programs like "Sesame Street."

On top of these arbitrary rules are 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 pre-empted, and on what time of day it can be broadcast in order to qualify.

Taken in their entirety, these rules are as intrusive and overregulatory as anything I have witnessed in more than two decades at the FCC.

There is a new rule requiring all 1,444 television stations to file paperwork with the FCC every three months—even though the exact same paperwork must be made available on request at the TV station's local office.

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.

In fact, Congress seemed to have just the opposite in mind when it passed the act in 1990. The legislation itself does not require any prescribed number of hours or specific types of programming. Its champions in both the House and Senate explained that the criterion should be "a station's overall service to children" and that a broadcaster should have the "greatest possible flexibility in how it discharges its public service obligation to children." In so framing the Children's Television Act, its sponsors wisely sought to insulate both the act itself and the regulatory power of the FCC from legal challenges.

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 FCC's tastes, opinions and value judgments—rather than a neutral public interest. Such requirements must be closely scrutinized, lest they carry the commission too far in the direction of censorship. As the Supreme Court recently concluded, "The Commission may not impose upon licensees its private notions of what the public ought to hear."

The draft programming guideline rules ignore Congress's deliberate decision to allow stations flexibility and thereby avoid constitutional challenges. Instead, the draft rules virtually invite such a challenge.

What's going on here? A most worthy goal, children's educational and informational programming, is being cleverly manipulated to revive outdated and discarded "scarcity" theories of broadcast regulation. Scarcity justified regulation many years ago, when broadcast TV was the only show in town and a few stations were the only source of video programs.

Today, however, there is a superabundance of over-the-air broadcast outlets. Cable, with its 135 networks, reaches 98% of all television homes. Satellite services have grown rapidly, and VCRs are now in 83% of all American homes. To top it off, computers and the Internet are becoming an outlet of choice 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. Thus, it is increasingly difficult, logically and legally, to justify additional regulation of broadcasting, the only medium providing universal free service.

What to do? First, this controversial draft FCC order should be released right away in its entirety for public comment. Let's fully inform everyone of its contents.

Wake-Up Call

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 sensitivity to the First Amendment supporting it, since it calls for unprecedented government micromanagement of the nation's leading news and information medium. If adopted, these rules would set a precedent that could shackle broadcasting with the prospect of even more extensive content and structural regulation in the future. Public disclosure would serve as a nationwide wake-up call to what is potentially at stake for all communications media.

Many congressmen have, in good faith, signed a letter generally supporting three hours of children's programming. I cannot believe these congressmen would support the adoption of overly rigid rules that threaten to undermine the judicial sustainability of the act itself. A three-hour-per-week guideline for children's educational programming makes sense and is universally supported. But it must be flexible enough to allow broadcasters to do their job—and flexible enough to avoid censorship.

At the risk of violence to the First Amendment, we will not be doing children or their parents any favors by rushing ahead with an overregulatory exercise in micromanagement. Both President Clinton and leaders in Congress have declared that "the era of big government is over." Is that true for everyone but the FCC?

Mr. Quello is a commissioner of the Federal Communications Commission.

A Sensible Approach to Children's TV

By James H. Quello

President Clinton has summoned broadcasters to the White House for a July 29 "Summit on Children's Television."

I hope the president can use this highly visible event to set the stage for creating sensible, effective rules to implement the Children's Television Act.

The FCC, charged with developing the actual rules, has been trying to agree on "processing guidelines" -- rules that would require broadcasters to air three hours of kids' educational programming per week.

All four commissioners, including Chairman Reed Hundt, have stated publicly that we favor the concept of guidelines and a three-hour rule.

Some of us believe that for the rules to be truly "guidelines," they must contain a sensible and reasonable amount of flexibility. Currently these proposals are so rigid that they look more like government edicts than true guidelines.

In their present form, these inflexible guidelines would invite a challenge on First Amendment grounds -- and probably be invalidated as unconstitutional. By dictating in such detail, they would be a form of content control in which the FCC cannot, by statute, engage.

Meanwhile many congressmen have, in good faith, signed a letter generally supporting three hours of children's programming. I cannot believe these congressmen

would support the adoption of overly rigid rules that threaten to undermine the judicial sustainability of the Act itself.

Taken in their entirety, these rules are as intrusive and over regulatory as anything I have witnessed in over 21 years at the FCC!

For example, the draft rules would allow only regularly scheduled, half-hour length programming to be counted for purposes of satisfying most of a broadcaster's three-hour children's programming requirement.

As a practical matter, this severely constrains stations' ability to broadcast not only programs that are shorter in length than 30 minutes, 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, television licensees would have virtually no incentive to finance the broadcast of educational shows on local PBS stations.

This not only eliminates a promising non-governmental 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."

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 time of day it can and can't be broadcast.

There is a new rule requiring all 1,444 television stations to file paperwork with

the FCC every three months -- even though the exact same paperwork must be made available on request at the TV station's local office.

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.

In fact, Congress seemed to have just the opposite in mind when it passed the Act. Significantly, the legislation itself does not require any prescribed number of hours of specific types of programming.

The Act's champions in both House and Senate explained that the criterion should be "a station's overall service to children" and that a broadcasters should be afforded the "greatest possible flexibility in how it discharges its public service obligation to children."

In so framing the Children's Television Act, its sponsors were careful to insulate the Act itself, and the range of permissible Commission action thereunder, from successful court challenge and reversal. 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.

Such requirements must be closely scrutinized lest they carry the Commission too far in the direction of censorship.

The Supreme Court recently concluded that, "The Commission may not impose upon licensees its private notions of what the public ought to hear."

The draft programming guideline rules ignore the deliberate decision by 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.

What's going on here? A most worthy goal, children's educational and informational programming, is being cleverly manipulated to revive outdated and discarded "scarcity" theories of broadcast regulation.

Scarcity was a justification for regulation many 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, however, there is a superabundance of over-the-air broadcast outlets -- and cable's 135 program networks reach 98 percent of all television homes.

Additionally, there is rapid growth of DBS and MMDS, and there soon will be OVS. VCRs are now in 83 percent of all American homes. To top it off, computers and the Internet are becoming an outlet of choice 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.

What to do?

I believe this controversial draft FCC order should be released right away in its entirety for public comment. Let's 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.

If adopted, these rules would set a precedent that would shackle broadcasting with the prospect of even more extensive content and structural regulation in many other areas in the future.

Public disclosure would serve as a nationwide wake-up call to what is potentially at stake for all communications media.

A three-hour-per-week processing guideline for children's educational programming makes sense and is universally supported. But it must be flexible enough to allow broadcasters to do their job -- and flexible enough to avoid First Amendment charges of censorship.

At the risk of violence to the First Amendment, we will not be doing children or their parents any favors by rushing ahead with an over-regulatory exercise in micromanagement.

Finally, both President Clinton and the Congress have declared "The era of big government is over." Is it over for everyone but the FCC?

Mr. Quello is a commissioner of the Federal Communications Commission in Washington, D.C.