

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Report and Order on Children's Television Programming Rules

I am concurring with the Report and Order today to end a contentious impasse at the FCC. For some time I have believed that three hours of children's programming per week is a reasonable number, but I was -- and still am -- concerned with establishing a precedent for future First Amendment incursions.

I was particularly upset when I read the initial draft of the Report and Order. It represented an FCC exercise in overregulatory micromanagement that I could not accept, and a heritage that I refused to leave.

Not so this new Report and Order. The most overreaching features of the original draft are gone, and I find enough flexibility in the rules to permit my concurrence in their adoption.

Are the rules as flexible as I personally would like them to be? No. For example, I would have preferred that the definition of "core" programming include programs that are not regularly scheduled on a weekly basis, as well as programs that are less than thirty minutes in length. Collectively, the elements of the way we define the "core" programming obligation could actually disincite the broadcast of diverse types of children's programming.

But the shortcomings in what this version does contain are, in my judgment, counterbalanced by what this version does not contain. This Report and Order, unlike the prior draft, no longer contains language that would overturn current broadcast law, enshrine even more processing guidelines as the wave of the future, and establish a premise for fastening other types of outdated regulatory regalia on broadcasting. Nor does it contain the more teeth-grindingly intrusive features of the original set of rules, like independent program advisory committees. And, unlike the draft rules, the rules we adopt today are apparently flexible enough for broadcasters to deal with. All of this enables me to concur in adopting this Report and Order.

And I am pleased to do so in order to put this chapter of Commission history behind us. To be sure, the child audience stands to benefit from the result of our efforts today. So do we, to the extent we have come to a more acute realization of the need to reason and be reasonable in the course of our efforts.

So the child audience gains, and we hopefully will all gain as well. Now, what have broadcasters gained? They have, undoubtedly, had a troublesome issue resolved in a satisfactory way. But any short-term relief is, in my judgment, appropriately seasoned

by perceiving the possible price of what they have bought.

Broadcasters have dodged what otherwise would have been, in my judgment, a catastrophic First Amendment bullet. But my pleasure is tempered by what is embodied in statements like this one, taken from paragraph 154 of today's Report and Order: "It is entirely consistent with the First Amendment to ask trustees of the public airwaves to pursue reasonable, viewpoint-neutral measures designed to increase the likelihood that children will grow into adults capable of fully participating in our deliberative democracy."

I have no quarrel with this statement insofar as the Children's Television Act embodies it as the will of the Congress and our action today carries out Congress' intent. But the logic of this statement could be used by future Commissions to apply similar quantitative programming requirements to other types of programming under the public trusteeship standard, even without Congressional direction. For example, if we accept this statement at face value we could also require public airwave trustees to present stipulated amounts of news, or public affairs, or political broadcasting. For purposes of today's decision, the statement is what the lawyers call dicta; but tomorrow it could be the basis for yet another program quantification rule.

So while I agree that today is a day to feel a sense of relief, even of accomplishment, it may also be a day for some sober reflection. For while we have taken a step forward in eliminating an obstructive FCC impasse with this item, it could open the door for future objectionable First Amendment incursions against broadcast speech.