

Programming Children's

Report and Order adopted terminating proceeding regarding TV programming for children. Given the totality of video programming sources and their offerings for children, constitutional concerns regarding interference with licensee's programming discretion, and regulatory anomalies that often result from inflexible standards, the Commission did not adopt specific quantification rules. It did, however, continue to recognize the obligation of the b/cer to serve children.

-TV Programming for Children
Docket 19142

FCC 83-609

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Children's Television Programming and
Advertising Practices

Docket No. 19142
RM-1569
RM-3333

**REPORT AND ORDER
(PROCEEDING TERMINATED)**

(Adopted: December 22, 1983 Released: January 4, 1984)

**BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND
ISSUING A STATEMENT; COMMISSIONER PATRICK NOT
PARTICIPATING**

1. Now before the Commission for consideration are the comments filed in response to the *Notice of Proposed Rule Making* ("*Notice*") in the above-captioned proceeding concerning television programming for children.¹ The *Notice* is the most recent step in a thirteen year inquiry into television programming and advertising addressed to children.

History Of The Proceeding

2. In 1970, Action for Children's Television ("ACT") submitted a petition proposing a rule requiring commercial television broadcasters to provide, on a weekly basis, minimum amounts of age-specific programming for children. In 1971, we adopted our *First Notice of*

¹ 75 F.C.C. 2d 138 (1980), 45 Fed. Reg. 1976 (published January 9, 1980).

Inquiry to explore and define the fundamental issues in children's television.² A Children's Television Task Force ("Task Force") was setup at that time to help achieve these goals. We concluded the inquiry in 1974 with the issuance of a *Report and Policy Statement* ("*Policy Statement*").³ The *Policy Statement* specifically asked commercial television licensees to: (1) make a "meaningful effort" to increase the amount of programming for children; (2) air a "reasonable amount" of programming for children designed to educate and inform and not simply to entertain; (3) air informational programming separately targeted for both preschool and school-age children; and (4) air programming for children scheduled during weekdays as well as on weekends. Commercial television broadcasters also were expected to: (1) limit the amount of advertising in children's programming;⁴ (2) insure an adequate separation between program content and commercial messages; and (3) eliminate host-selling and tie-in practices.⁵

3. On appeal, the U.S. Court of Appeals affirmed the *Report and Policy Statement*.⁶ The Court held that the Commission's decision to provide policy guidelines and not to adopt specific regulations governing advertising and programming practices for children's television was a reasoned exercise of its broad discretion.

4. In 1978, the Commission re-established the Children's Television Task Force to inquire into the effectiveness of broadcast industry self-regulation under the *Report and Policy Statement*.⁷ The Task Force was to inquire into children's programming and advertising practices and investigate the impact of new technologies and alternative sources of programming on the availability of children's programming. The Task Force presented its report to the Commission on October 30, 1979. It concluded that broadcasters had not complied with the programming guidelines of the *Policy Statement* but, in general, had complied with the advertising guidelines.⁸

5. In coming to its conclusion concerning programming, the Task

² 28 F.C.C. 2d 368 (1971), 36 Fed. Reg. 1429 (published January 29, 1971).

³ 50 F.C.C. 2d 1 (1974), 39 Fed. Reg. 39396 (published November 6, 1974).

⁴ The broadcast industry adopted advertising restrictions that were endorsed by the Commission in the *Policy Statement*. Both the National Association of Broadcasters ("NAB") and the Association of Independent Television Stations ("INTV") planned a phased-in reduction that by January, 1976, would restrict advertisements to 9 minutes and thirty seconds on weekends and 12 minutes during the week.

⁵ The *Policy Statement* was reaffirmed on reconsideration. 55 F.C.C. 2d 691 (1975).

⁶ *Action for Children's Television v. F.C.C.*, 564 F.2d 458 (D.C. Cir. 1977).

⁷ *Second Notice of Inquiry* in Docket No 19142, 68 F.C.C. 2d 1344 (1978), 43 Fed. Reg. 37136 (published August 21, 1978).

⁸ A summary of the Task Force's conclusions and recommendations is contained in Appendix A, along with a summary of comments initially filed in response to the 1980 *Notice of Proposed Rulemaking*, 75 F.C.C. 2d 138 (1979), 45 Fed. Reg. 1976 (published January 9, 1980).

Force examined the amount of time commercial broadcasters devoted to children's programs during the 1973-74 broadcast season, the season prior to the *Policy Statement's* adoption, and the 1977-78 season, the most recent complete broadcast season at the time its report was written.⁹ This study revealed a 7.2% increase in the overall amount of time commercial broadcasters devoted to children's television programming. Although an increase was noted, the Task Force nonetheless determined that licensees had not complied with the guideline for overall amount of children's programs because: (1) the increase in the average per-station amount of time devoted to children's programs was due to the increased broadcast of syndicated programs carried on independent stations; (2) independent stations exist primarily in large markets; (3) network affiliates' time devoted to children's programs remained essentially the same between the two broadcast seasons; and (4) reliance on syndicated rather than local programming increased at both independent and network-affiliated stations. The Task Force also concluded that: (a) no significant increase had occurred in the number of educational and instructional programs aired for children; (b) licensees had not made an effort to air age-specific programs; and (c) the proportion of children's programs scheduled on the weekend had decreased somewhat but nearly half of children's programs were still shown on weekends.

6. In the opinion of the Task Force, the economic incentives of the advertiser-supported broadcasting system do not encourage the provision of specialized programming for children. Advertisers desire the largest possible audience of potential buyers for their advertised products, but young children have an influence on decisions to buy only a relatively few advertised products. Thus, the amount of money spent on children's advertising appears to be small relative to the amount spent advertising to adults. The Task Force believed that the small numbers of children and the limited appeal of the children's market to advertisers, combined with the small number of outlets in most markets, create incentives for the commercial television system to neglect the specific needs of the child audience.¹⁰

7. As a result of the Task Force Report, the Commission adopted the *Notice of Proposed Rule Making* herein. The *Notice* contained the following five options for possible Commission action:

- (1) Rescind the *Policy Statement* and find that commercial television broadcasters no longer have any specific obligation to serve the child audience. Instead, reliance would be placed on other program sources.

⁹ Television Programming for Children: A Report of the Children's Television Task Force, Federal Communications Commission, Vol. IV, October, 1979.

¹⁰ Television Programming for Children: A Report of the Children's Television Task Force, Federal Communications Commission, October 1979, Vol. II.

- (2) Because of concerns about the constitutional limits to Commission authority, maintain or modify the *Policy Statement*.
- (3) Adopt mandatory programming rules on an interim basis.
- (4) Adopt quantitative renewal processing guidelines for children's programming.
- (5) Increase the number of video outlets per market to increase the amount and diversity of programming serving children.

8. In response to the *Notice of Proposed Rule Making*, voluminous comments were filed in the summer of 1980. A broad range of interests made their views known and indicated their concerns. Broadcast associations, networks, licensees, advertising groups and program producers and distributors represented the broadcast industry. Public interest and media organizations, educational associations, religious groups and individuals represented non-industry views.

9. A thorough discussion of the comments filed in response to the *Notice of Proposed Rule Making* appears in Appendix A* of this document. Nevertheless, it is appropriate at this juncture to briefly discuss the commenters' rebuttal to the Task Force's conclusion that broadcasters had failed in making a meaningful effort to increase the amount of programming for children. By its own extensive study, the National Association of Broadcasters ("NAB") confirmed the data developed in the Task Force report. It disagreed, however, with the conclusion drawn from these results. NAB argued that the Task Force report, in fact, showed a significant increase in the amount of time devoted to children's programs in the top 52 markets which account for 66.6% of the total 2-11 year old population. Further, NAB noted that if public broadcasters were included, the average amount of time per week devoted to children's programs would increase from 11.23 hours to 15.09 hours. Thus, NAB, as well as the networks, argued that a substantial amount of programming is available to children.

Recent Proceedings

10. On March 28, 1983, the Commission reopened the children's television proceeding.¹¹ We sought to update the record to enable us better to resolve the important questions raised by the *Notice*. Therefore, we held an *en banc* meeting on April 28, 1983, to hear oral presentations from 24 participants and permitted the submission of additional written comments from interested parties.¹²

11. As in 1980, presentations (oral and written) were made on behalf of the broadcast industry, as well as non-broadcast interests.

¹¹ 48 Fed. Reg. 18860, published April 26, 1983.

¹² See Appendix B* for a listing of those who made oral presentations and Appendix C* for a listing of parties filing supplemental comments.

Commercial broadcasters continue to acknowledge their "public service obligation" to develop and present programs which serve the unique needs of the child audience. To support the proposition that such programming in fact has been and will continue to be aired, the networks and the National Association of Broadcasters exhibited videotapes of past and future programs of interest to children. Broadcasters continue to believe that responsible self-regulation and reliance upon marketplace forces are the most effective means of meeting their obligation to the child audience. According to ABC, the most important development that has occurred since comments were last submitted (1980) in this proceeding has been the steady progress of marketplace changes that continue to enhance the overall diversity and availability of children's programming. It is alleged that a veritable explosion is occurring in the use of various visual and audio devices to be used with or in addition to the home television receiver. Broadcasters submit that videocassettes and discs make available a wide range of programming directed to children. They assert that the playback and "time-shift" capability of this technology offers new and exciting possibilities for tailoring programming to the needs of children. In addition, these parties note that the number of children's features available on basic and pay cable services,¹³ as well as the number of children's programs offered by public broadcasting,¹⁴ has grown substantially in recent years.

12. Broadcasters also direct our attention to those Commission actions taken in the last two years that individually and cumulatively offer the opportunity for more and diverse children's and other specialized programming: 1) the authorization of a direct broadcast satellite ("DBS") service; 2) the authorization of a new low power television service; and 3) the further deregulation of the subscription television ("STV") service. The industry also notes that other technologies, such as Multipoint Distribution services, Satellite Master Antenna TV, Teletext and Videotext, undoubtedly will give rise to still more ways in which children receive programming. Therefore, the parties conclude that commercial television should not be viewed in isolation.

13. While there was some minor disagreement as to whether the *Policy Statement* should be clarified, phased-out or eliminated, the industry generally oppose a more expansive regulatory approach. The parties contend that rules are unnecessary because: (1) the

¹³ The Disney Channel, a pay cable service, which debuted earlier this year joined other children's programming initiatives such as Nickelodeon, Calliope and Carousel, offered by Warner Amex, USA Cable and Showtime, respectively.

¹⁴ CBS submits that it is in no sense an abdication of the responsibilities of commercial broadcasters to point out the special role of public television in this area. It argues that public stations were established to serve needs that may not be fully met by the commercial system.

youth audience has been well served by television;¹⁵ (2) there is no factual basis for the imposition of mandatory programming rules with respect to children's television;¹⁶ (3) the adoption of rules compelling the presentation of mandated amounts of particular types of programming at specified times would be arbitrary, as well as an infringement of the editorial discretion of broadcasters in violation of the first amendment and the Communications Act,¹⁷ and (4) more hours of children's television actually might mean less in the sense that increased quantity may precipitate a decrease in the quality of such programming.

14. ABC and Forward Communications suggest that we issue a general reaffirmation of the principles of the *Policy Statement*, clarify licensee obligations under the *Policy Statement* based upon a more realistic assessment of practical conditions and public interest needs, and adopt a regulatory program looking toward a gradual phase-out of the *Policy Statement* commensurate with marketplace developments. They contend that emphasis should be placed upon broad affirmative licensee responsibilities. The obligation to serve children should be coupled with a renewed emphasis on licensee discretion. They further recommend that *Policy Statement* language suggesting a special status for "educational" or "instructional" children's programming should be deleted. It is argued that entertainment-oriented features often can be highly effective in serving children. Further, certain family-oriented program material, not primarily designed for children, but nevertheless having special appeal to youthful viewers, should be recognized as reflective of a broadcaster's overall effort in this area. The Commission is also asked to discard the concept of subgroupings of the child audience. It is argued that broadcasters and the marketplace should be permitted to develop the appropriate mix of school-age, teenage and pre-school programming. ABC and Forward Communications Corporation recommend a gradual phase-out of the *Policy Statement* and a total reliance upon marketplace forces. The American Association of Advertising Agencies, Inc. ("AAAA"), submits that because industry self-regulation is proving itself a most effective means of serving the interests of children, there is no basis upon which to support either a

¹⁵ Most of these parties give a detailed description in their written comments updating their efforts in programming for children. They also argue that the Task Force survey seriously understated the children's programming available in the markets selected for study.

¹⁶ CBS, as well as other parties, submit that throughout the week, television offers a wide variety of programs defined by the Commission as "children's programs," as well as many other programs recognized by parents, educators and critics as highly worthwhile for young audiences.

¹⁷ These parties also contend that expanded renewal reporting in the area of children's programming would not only fail to achieve any legitimate public interest objective, but it would directly undermine the basic regulatory purpose behind the current short form renewal application.

continuation of the *Policy Statement* or promulgation of additional policies or guidelines in this regard.¹⁸

15. Public television representatives do not address the question of regulating children's TV. Rather, they express their commitment to children's programming but submit that all broadcasting, not just the public sphere, is responsible for serving children. To improve the relationship between television and education, John Murray of Boys Town suggests the establishment of a National Endowment for Children's Telecommunications which would be largely supported by public and private philanthropy through a consortium of foundations, professional organizations and the broadcast industry.¹⁹

16. Generally, non-industry interests request that the Commission adopt rules relating to children's television programming and advertising practices, as well as establish license renewal guidelines. They would have the Commission require: (1) more programming designed for children; (2) the scheduling of children's programs throughout the week; (3) the presentation of programs designed for specific age groups of children;²⁰ and compliance with the advertising standards set forth in the 1974 *Policy Statement*. According to these organizations, the rationale for regulating children's television is fourfold: (1) industry "backsliding;" (2) the abolition of the NAB Code; (3) the adoption of the short-form renewal; and (4) *Policy Statement* standards which are too broad to be enforceable.

17. In challenging the concept of industry self-regulation, commenters assert there has been a decline in the amount and availability of programming for the child audience. Of particular concern to ACT is the lack of regularly scheduled weekday children's programs. Also, WATCH submits there has been an overall reduction in the diversity of shows for children. It also argues that the demise of "regulation by raised eyebrow" has removed the major incentive for broadcasters to serve children.

18. Commenters are quite concerned that the abolition of the NAB Code will result in overcommercialization during the broadcast of children's programs.²¹ They argue that the Commission took no regulatory action in regard to advertising standards for children

¹⁸ The AAAA submits that children have strong likes and dislikes and will not repudiate their favorite programs. In fact, it argues that most programs watched by children are not produced for them.

¹⁹ The National Education Association recommends the creation of a Temporary Commission on Children's Television to provide a forum for dialogue in a non-adversarial atmosphere.

²⁰ WATCH recommends that the Commission require each station to air 5 hours of programming per week for pre-school children and 2 ½ hours per week for elementary school age children.

²¹ In March 1982, the U.S. District Court for the District of Columbia found that certain provisions of the NAB Code could violate the Sherman Antitrust Act. A consent decree through which NAB agreed to stop enforcing all the challenged provisions was then entered (November 1982). *United States v. National*

because the broadcast industry adopted commercialization limits for children's television. Without this Code, it is submitted, overcommercialization again may appear. Therefore, commenters assert a rule limiting commercial material during children's programs should be adopted.

19. Public interest groups also argue that the "new" simplified renewal application is yet another reason for regulating children's programming. In March 1981, the Commission reduced the broadcast license renewal application (Form 303) from a document requesting, among other things, information on children's television, to a postcard format (simplified renewal application) consisting of five questions, none of which concern children's programming.²² Commenters argue that without industry-wide data comparable to that previously gathered by means of the renewal application, the Commission cannot monitor how well licensees and the marketplace serve children. Further, without this data, it is alleged, the public is without the necessary information to assist the Commission in ascertaining whether its licensees are meeting their public interest responsibilities.

20. Two commenting parties, Citizens Communications Center ("CCC") and WATCH are concerned particularly with what they consider to be vague standards governing children's programs. CCC asserts that the precise numerical standards used in rules are not nearly as important as the need for some consistently applied quantitative measure that would provide certainty and guidance to the industry and the public. CCC cites *FCC v. Pacifica Foundation*²³ as holding that the governmental interest in the well-being of its youth justifies restrictions on broadcasters' first amendment rights. It submits that the Commission's authority to establish and favor program categories has been upheld in the face of first amendment challenges.²⁴ CCC further asserts that the establishment of mandatory minimal percentages is not constitutionally suspect because it does not prohibit the broadcast of other programming by station licensees. Thus, it would provide the public with additional information rather than repressing existing sources. Any "chilling effect"

Association of Broadcasters, 536 F.Supp. 149 (D.D.C. 1982). Soon after this final judgment, NAB abolished the entire Code.

²² *Revision of Applications for Renewal of License*, 46 Fed. Reg. 26236, published May 11, 1981. Five percent of all license renewal applicants are randomly selected each renewal period and required to fill out an Audit Form (FCC Form 303-C) that contains questions on, among other things, children's programming and advertising practices.

²³ 438 U.S. 726 (1978).

²⁴ Cited in support of this position is *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975), in which the court upheld the Commission's decision to permit exemptions to the prime time access rule ("PTAR") for licensees choosing to offer network news, public affairs or children's programming in the PTAR time slots.

upon broadcasters' ability to provide other programming is seen as minimal. CCC also submits that the first amendment benefits to the public clearly outweigh the broadcaster's first amendment claims.

21. In reply comments, ABC argues that the request for mandatory standards regarding advertising for children goes beyond the established parameters of the current proceeding. It further asserts that the elimination of the NAB Code has not impaired the implementation of its own more vigorous children's television standards, and contends that expanded renewal reporting in the area of children's programming not only would fail to achieve any legitimate public interest objective, but would undermine the basic regulatory purpose behind the current short-form renewal application.

22. In reply to comments made by the broadcast industry, ACT argues that the responsibility for children's television programming rests squarely on the shoulders of each broadcast licensee. Therefore, relying on other sources of children's programming is contrary to the law and antithetical to the interests of children. Under the theory of "market" responsibility, maintains ACT, the fact that some stations serve children would act as a disincentive to any expansion of children's programming.²⁵ Furthermore, this approach would destroy licensee accountability to the public and to the Commission. ACT further argues that shifting responsibility for children's programming to public broadcasting would have an adverse effect on the diversity of children's programming. Nor, in ACT's view, should this responsibility be shifted to the new technologies. First, consumers would incur substantial costs (installation and monthly charges) to subscribe to these services. Second, because these new technologies are not subject to the public interest standard of the Communications Act, there is no guarantee that they will serve children. ACT argues that the question is not what kinds of children's programming are being offered, or how good such programs are, but rather how much time is allocated to children's programming, and when such programs are scheduled. ACT acknowledges that family programming may be appropriate for child viewers and be enjoyed by them. However, it contends that family programming is not designed specifically for children and thus does not necessarily meet their special needs.

Discussion

23. In attempting to resolve the issues in this proceeding it is appropriate that we turn first to the recommendations of the Children's Television Task Force. The Task Force, believing that

²⁵ Under the "market" theory, the *Policy Statement* would be applied on a market basis so that programming responsibility could be shared. Therefore, if one station in a market was providing children's programming, there would be no reason for all stations in that market to provide parallel programming.

greater attention to the needs of the child audience was desirable, focused on three broad options to improve the situation: 1) mandatory programming requirements, 2) increased governmental funding (or other incentives) for the production and distribution of such programming, and 3) increasing the number of video outlets so as to improve the commercial incentives for serving subgroups in the audience and to increase the available distribution paths for children's programming. The recommended mandatory programming requirement could be enforced either through a specific rule or through processing guidelines applied to the renewal of station licenses. The Report focused on the amount of programming available on a per station basis and found that amount inadequate. It reviewed briefly the jurisdictional and constitutional objections to the adoption of mandatory program requirements and found them not to preclude the adoption of requirements and it recommended that such requirements be adopted.²⁶

24. Our weighing of what we think are the relevant considerations in this proceeding lead us to believe that the recommended mandatory programming obligations are undesirable and should not be adopted. The other recommendations of the Task Force, relating to public funding for the production and distribution of informational and instructional children's programming and for the creation of additional video outlets and commercial funding mechanisms, we agree with fully. While issues relating to public funding are beyond our jurisdiction, we have moved aggressively to create new video outlets.²⁷

25. In reaching our decision in this matter it should be made clear at the outset that we recognize the special character of the child audience, including particularly the younger portion of that audience. Television programming is undoubtedly an influential factor in childhood development, and economic factors relating to the distribution of advertiser supported programming for children are likely to vary somewhat from those associated with the distribution of programming for adults. In these respects we are not in

²⁶ The Task Force believed that the advertising guidelines in the Policy Statement had been complied with and therefore recommended no changes in this area. Because of this, the Commission specifically stated in the *Notice of Proposed Rule Making* that policies regarding advertising were not in question in this proceeding. Accordingly, we regard requests for changes in these policies to be beyond the scope of this proceeding.

²⁷ The Task Force specifically urged a relaxation of the subscription television rules. The paucity of options for direct viewer payments for programs, it was suggested, limited audiences in expressing the intensity of their preferences for particular types of programs. This, it was believed, decreased the availability of programming for children. The Commission's *Third Report and Order in Docket 21502*, 47 Fed Reg. 30069 (1982) eliminated all of the subscription television restriction with which the Task Force had expressed concern.

fundamental disagreement with the findings of the Task Force and with the views of most of the commenting parties in this proceeding.

Availability of Children's Programming

26. In several important respects, however, we disagree with the predicate upon which the Task Force based its recommendations and on which many parties base arguments supporting mandatory programming requirements. The first of these disagreements relates to the issue of the actual availability of programming for the child audience. In particular, we find the Task Force conclusion erroneous for its failure to properly consider: (1) the growth in number of commercial stations and their increased receivability; (2) programming on noncommercial stations; (3) cable program services; and (4) child viewing of "family" oriented television. These failures undermine the conclusions drawn by the *Report*. The second disagreement concerns practical, legal and policy problems with our ability to adopt and enforce programming obligations.

27. With respect to the first of these concerns, the Task Force focused its attention on the amount and scheduling of children's programming by the average commercial station. Based on this focus, it found a need for a more aggressive regulatory stance to replace that previously followed. In our view, the Task Force's focus in this regard was too narrow. We must, of course, exercise our regulatory authority with respect to individual licensees. The objective of the Commission's involvement, however, is to assure that the telecommunications system as a whole is responsive to the needs of the public. It is therefore appropriate to look to that system as a whole in reviewing developments relating to the accessibility of programming for the child audience.

28. The data developed by the Task Force reveal a 7.2 percent increase, during the years studied (1973-74 and 1977-78), in the amount of time commercial broadcast stations, on average, devoted to children's programming.²⁸ Not focused on, however, was the fact that the total number of stations licensed was increasing. During the time since this docket was commenced, the total number of licensed commercial stations increased from 668 (1971) to 844 (1983), an increase of approximately 25 percent.²⁹ Moreover, the reach of these

²⁸ Task Force Report, Volume 4, p. 39. This increase, significantly, resulted largely from a 36 percent increase in the children's programming broadcast by independent stations. This is highly supportive of one basic thesis of the Task Force Report; namely, that the growth of alternative video outlets would result in market segmentation and a resultant greater attention to specific subgroups within the audience such as the child audience. There are now independent stations in 86 different markets serving 78 percent of all TV households.

²⁹ The changes that have taken place in the video marketplace over the course of the last decade are set forth in some detail in the Commission's *Tentative Decision and Request for Further Comment in BC Docket 82-345*, 48 Fed. Reg. 38020 (1983).

stations was being constantly increased through more efficient operations (increased power and antenna height), through reductions in the UHF handicap, and through increased cable television carriage. Summary data show the average television household now receives 9.8 signals, an increase of 3 (44 percent) since 1970. Thus, not only was the average output of children's programming per station increasing but the average number of stations accessible to the child viewer was increasing as well.

29. Even this broader focus, which includes the totality of programming from all commercial stations however, is unduly narrow since it excludes from the product available to the child audience that which by almost any measure must be the most significant programming—that produced and distributed by the public broadcasting system. This system was created precisely for the purpose of supplementing the commercial broadcasting system and in specific recognition of the desirability of providing public support to increasing the availability of programming that might not be fully supported by commercial incentives. The public broadcasting system has recognized this mandate with respect to the broadcasting of children's programming and its successes in this field have been broadly recognized. The Corporation for Public Broadcasting has recently recognized children's programming as the number one priority in its Program Fund guidelines.³⁰ We do not expect the public broadcasting system to bear the sole responsibility for meeting the needs of the child television audience or its existence to provide an excuse for the failings of the commercial broadcasting system. But we do not believe it appropriate to exclude its output from consideration as a significant factor in measuring the extent to which the needs of this audience are being served. The Commission has reserved channels in its television broadcast table of allotments for the specific use of noncommercial broadcasting stations so that the public would have access to the kinds of informational, instructional, and cultural programming that these stations deliver. Today, almost 300 stations—more than a quarter of all the licensed television stations—are of the noncommercial variety. The Public Broadcasting System, during the 1982–83 season provided stations in the public broadcasting system, reaching over 90 percent of all television households, with some 2,050 hours of children's programming.³¹

We recognize, of course, that the Task Force itself was addressing a narrower time period but believe the broad trends involved are more clearly reflected in data covering the longer period.

³⁰ September 15, 1983, resolution of the Board of Directors of the Corporation for Public Broadcasting.

³¹ Status Report of Public Broadcasting 1980, Corporation for Public Broadcasting; Public Television Programming by Category (FY-1982) prepared by Research and Programming Services, Corporation for Public Broadcasting contracted project, 1983. See also, Nielsen Television Index, Special Analysis for Corporation for

30. An additional important component of the national children's television programming market consists of the programming available to the child audience from nonbroadcast sources, including in particular that programming available over the facilities of cable television systems. At the time this proceeding was commenced, cable television served a relatively limited segment of the population, and its function was almost entirely the retransmission of over-the-air television broadcast signals. Cable television now passes some 54 percent of all homes and cannot be avoided in any assessment of the accessibility of programming to the child audience. The most popular of the cable television delivered children's programming services, "Kidstime," reaches some 18 million subscribers or about 20 percent of all television households. Millions of households have access to other children's program services by cable as well, including "Nickelodeon," (14 million subscribers) and the recently inaugurated Disney Channel which already reaches over 300,000 subscribers. Some programming on the major pay cable television program services, such as Home Box Office, is also directed to the child audience.³²

31. In addition to excluding from its principal focus programming available from public television and from nonbroadcast sources, the Task Force also focused, in a definitional sense, on only a portion of the totality of programming that is viewed by and is responsive to the needs and interests of the child audience. That is, its concern was principally with that programming defined in the Commission's rules as children's programming.³³ This definition

Public Broadcasting, 1983. It is worth noting that when the reservation of channels for noncommercial stations was first proposed, a suggestion was made that, as an alternative, each commercial station should be forced to make a certain amount of time available "for educational purposes in the public interest as a sustaining feature." While refusing to accept the existence of educational stations as an excuse for commercial stations not complying with their obligations to the community, the Commission did reject this alternative proposal. The Commission both questioned the legal basis for such a rule and found it impractical stating: "A proper determination as to the appropriate amount of time to be set aside is subject to so many different and complex factors, difficult to determine in advance, that the possibility of such a rule is most questionable." *Sixth Report and Order in Dockets 8736 et al.*, 41 FCC 148, 163-4 (1952).

³² Satellite Services Report, National Cable Television Association, December, 1983. A recent description of some of the children's program services offered on cable television systems (as well as of programs available from commercial networks, public television, and from syndication) may be found in Aimee Dorr "A Guide to the Best TV Shows for Children," *TV Guide*, Dec. 17, 1983, p. 4.

³³ See *Memorandum Opinion and Order in Docket 19142*, 53 FCC 2d 161 (1975). For some purposes other definitions were used that had essentially the same thrust. A separate concern with the definition relates to exclusion of teenagers from the child category. Because of this exclusion, Altman Productions, Inc., claiming that a significant regulatory bias against teenage programming has been created, requests rulemaking to eliminate this bias. Others have raised similar concerns. Commissioner Washburn, for example, in his separate statement at the time the 1979 *Notice* was issued suggested that: "The teenage audience is of equal, if not

covers only programs "originally produced and broadcast primarily for a child audience twelve years old and under." Explicitly excluded from coverage are programs that might be appealing to children and significantly viewed by them but which were, when produced, intended for a broader audience as well.³⁴ This exclusion of what has been broadly referred to as "family" programming, clearly resulted in an unduly narrowed definition of the programming of interest and value to the child audience. While the necessity of defining the scope of the statistical studies undertaken required some definitional cutoffs, it seems clear that by using limitations that excluded programs such as "The Wonderful World of Disney,"³⁵ that relevant programming of value could not be fully comprehended by the study. The problem, however, is more than just a statistical anomaly. Such a definitional limitation serves to encourage the broadcasting of programming that is likely, given the dynamics of program selection within the household, to have not only a smaller total audience but a smaller child audience. Moreover, it suggests that positive values should be associated with programs, directed to the child audience, whatever the social utility of those programs, while programs specifically designed to bridge age levels and be shared by parents and children are of lesser value on the regulatory scale. We believe it is important to take into account, in assessing the state of children's programming, highly rated family shows that draw both larger child audiences and mixed parent/child audiences. These programs, because they encourage interaction, rather than isolation of children and parents, are a valuable part of the overall program mix.

32. In sum, we cannot conclude that statistical studies of the Task Force or of the other commenting parties in themselves make out a case for increased regulatory concern or involvement. Properly viewed, the adequacy of the programming to which children have access must be based on a consideration of the whole of the video distribution system. Viewing that system broadly and on an overall national basis, we find increases in the children's programming available from the average station, dramatic increases in the number of stations in operation, increases in the availability of these

greater importance than pre-schoolers and grade schoolers." 75 FCC 2d at 158. We have no doubt that the needs of the teenage audience are significant and that this and many other subgroups within the audience merit consideration. There are questions of degree involved, however, and those factors that warrant some special concern for the child audience, even within the existing definition, appear to decrease with age. Moreover, attempts to define audience segments more particularly for regulatory purposes seem to us likely either to unduly involve this agency in scheduling decisions or to result in such inclusive categorization that the whole effort would be meaningless. Thus, we are not disposed to grant the Altman Productions request.

³⁴ Task Force Report, Volume IV, p. 13.

³⁵ See statement of Commissioner Washburn, concurring in part and dissenting in part, to the *Notice of Proposed Rulemaking*, 75 FCC 2d at 158.

stations through cable carriage and improved station facilities, increased availability of noncommercial programming made possible through the growth of the public broadcasting system, and increased viewing options provided to substantial portions of the population by the operation of cable television systems. In short, there is no national failure of access to children's programming that requires an across-the-board, national quota for each and every licensee to meet. We do not mean to suggest that these developments have satisfied all the demands for programming associated with the child audience or that they satisfy all legitimate regulatory concerns. We do not, however, take the existence of an unsatisfied demand in some situations to be evidence of a national market failure in regards to the production and distribution of children's television programming. In any situation where resources are limited and there are alternative demands placed on those resources, even the most perfectly functioning market will leave demands unsatisfied. Here, however, there is ample evidence of the system as a whole moving to respond to the unmet needs of this audience.

Issues of Law and Policy.

33. In addition to having these concerns with the factual predicate on which the recommendations for mandatory programming requirements were based, we also believe there are far more significant legal and practical difficulties associated with such requirements than have been acknowledged by their proponents. Parties urging such requirements have generally presented it as content neutral in terms of program quality. The question of program quality, however, is integral to the public interest issues in this proceeding. Much of the discussion associated with this proceeding by the parties and indeed by the Commission itself has addressed the overall quantity and scheduling of programming created for children. Yet, in fact, much of the actual concern has only to do with the availability of "quality" children's programming, programming that through its educational, intellectual, or cultural content is mentally or developmentally uplifting to the child audience. In fact, nothing in the record of this proceeding suggests that regulation would be desirable merely to force the broadcast of programming more likely to attract children into the television viewing audience and away from other pursuits or that would result in existing child viewers devoting a greater amount of time to viewing television. Indeed, much of the discussion of the need for increased regulatory involvement is intertwined with a more general discussion of whether television viewing is not in itself destructive of healthy child development. Much of the discussion of methods for providing the child audience with greater access to programming specifically produced for that audience is closely juxtaposed with extraordinarily

harsh criticisms of much of the very programming that has been specifically designed to attract this audience.³⁶

34. Any analysis of the service received by the child audience that is entirely content neutral—which equates hours of television viewing with needs satisfaction—must conclude that this audience is well served. The inadequacy of this type of analysis leads us to conclude that the obligation broadcasters have to serve children cannot be rationally viewed as simply emphasizing a need to broadcast programming that appeals to or is produced for children. Certainly no structural or market failure can be found that warrants any special concern in this regard; children watch enough television, and no regulatory initiative need be introduced to get them to watch more. What is of special concern is that attention be paid to the developmental and emotional needs of children. Thus, we are not persuaded that efforts to adopt specific mandatory program hours obligations can achieve their intended objective in the absence of some control over or attention to the issue of quality. The Task Force itself, concludes, however, that the “fundamental issue of program quality cannot be addressed.” Rather it attempted to use the term “educational/instructive”³⁷ as a proxy for that type of programming which would be socially beneficial to the child audience. It has argued that such a categorization is no more suspect or objectional than other categorization schemes already in existence and used for other regulatory purposes, such as, “news,” “public affairs,” “documentary,” or “nonentertainment” programs.

35. We believe, however that an honest appraisal of the issue here under consideration suggests that the parallels are far from exact. In the categories now in use there is generally abundant room for argument with respect to programming on the fringes of the definition—for example, whether *Real People* is a documentary or

³⁶ The filings of ACT and other parties in the early stages of this proceeding found many programs “fostering stereotypes, prejudices and questionable social standards.” Weekend programs were found “more objectionable, violent, stereotyped and ad-ridden than family programs by far.” Comment summary, *Policy Statement*, 50 FCC 2d at 26 and 21. See also, for example, Peggy Charren, “Children’s TV: Sugar and Vice and Nothing Nice,” *Business and Society Review*, No. 22, summer 1977. This article references a Michigan State University study that identifies weekend children’s programming as “the most violent and most deceitful time block of programming on television.” In children’s programs, the article states: “Antisocial behavior patterns are often combined with racial and sexual stereotypes.” See also, *Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties*, National Institute of Mental Health, (1982).

³⁷ The *Policy Statement* focused on the terms “educational or informational” while also speaking in terms of “cultural development” and cultivating the mind. 50 FCC 2d at 5–6. There is no existing definition of “informational” programming in the Commission’s rules and the Task Force studies found no programs that it designated “educational”, although programs in the “instructional” category were found. Task Force Report, Volume 2, page 22, note 22.

entertainment program. But the basic objective of the category is generally not disputed. The arguments presented relate to the programs on the margin. Here, however, it seems relatively clear that any "quality" program—especially if it had some entertainment value and were capable of attracting a significant child audience—would satisfy the basic objective of a children's program requirement. The issue of definition relates not so much to the fringes of the category but to the basic purpose of the category itself.³⁸ There are, as has been noted elsewhere, programs that are basically entertainment and that are also intended to be shared with an adult audience that nevertheless "teach millions of children each week fundamental truths about human relations and about the essential character of the American people."³⁹ Both the Commission and the courts have

³⁸ Some evidence that issues relating to definitions and program quality are not simply part of a traditional "parade of horrors" brought out for rhetorical purposes only, may be gleaned from some contemporary experience in Australia. Regulatory authorities there, faced with the same kinds of concerns that are the subject of this docket but unconstrained by restrictions equivalent to the First Amendment and faced with far fewer broadcast outlets, have created a children's program review committee and are developing standards to directly respond to issues of program quality. The program criteria suggest, for example, that programs must be "easily understood and appreciated by children," "fulfill] some special need of children," and "contribute[] to the social, emotional or intellectual development of children." Australian Broadcasting Tribunal, *Notice of Proposed Determination of Children's Television Standards*, October 24, 1983. Although the words used in the Task Force Report recommendations and those in the Australian proposal are different, they would seem to be attempting to define the same types of programming. See also statement of Commissioner Washburn, concurring in part and dissenting in part, to *Notice of Proposed Rule Making*, 75 FCC 2d at 158: "The demarcation line between "instructional" and "entertainment" programming, in my judgment, is virtually impossible to draw." Justice Marshall, in his dissenting opinion in *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 615 (1981), in discussing the Commission's involvement with different types of program content, states "it is not immediately apparent, for example, why children's programming falls on the "nonentertainment side of the spectrum . . ."

³⁹ Statement of Commissioner Washburn, concurring in part and dissenting in part, to *Notice of Proposed Rulemaking*, 75 FCC 2d at 158. The point here, that the real public interest in children's programming involves attracting the child audience to programming that imparts a public interest or pro social message can be accomplished with adult or family programming as well or better than with specifically child programming, may be illustrated with an example. The Task Force Report states that, in the programming data being reviewed, it found the children's program with the highest child viewing, the *Scooby Doo-Dynomutt Show*, was seen by only half as many children as *Happy Days*, an adult program. Thus, for regulatory purposes licensees would receive no credit for *Happy Days*. Yet, it is reported that when the Fonz, the central *Happy Days* character, obtained a library card, many child viewers did likewise. Similarly, an "instructional" child's program with the ability to garner only a modest audience might have less public value than a higher audience appeal child's "entertainment" program with a social message embedded in it.

recognized that "judgments concerning the suitability of particular types of programs for children are highly subjective."⁴⁰

36. Because of concerns with problems of this type, we have believed, with only the rarest of exceptions, that selection of programming is a matter that should be decided by station licensees and by the audience through its viewing pattern voting. Program quota systems have been viewed historically as fundamentally in conflict with the statutory scheme of broadcast regulation. The question of whether certain socially desirable objectives in the broadcasting field might be achieved by such fixed program quotas is one that was presented to the legislature as the methodology of broadcast regulation was initially being considered. And the question of whether such programming requirements would be consistent with the system of broadcast regulation actually adopted has arisen periodically since, with in each instance a negative response. As radio broadcasting legislation was first being looked at, Congress considered and rejected proposals to allocate certain percentages of station time or a certain percentage of stations to particular types of programming. H.R. 7357, submitted prior to passage of the Radio Act of 1927, included a provision requiring stations to comply with programming priorities based on subject matter.⁴¹ As the Supreme Court has noted:

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."⁴²

37. Based on the same type of concern, if not this precise legislative history, calls for programming requirements or quotas of one type or another have been repeatedly rejected. Their rejection at times in the past when only a small percentage of the stations now in operation had been licensed, raises significant questions as to how a change in the basic answer could now be justified. As noted above, the Commission rejected specific educational programming quotas when the television station table of assignments was adopted.

38. None of the Commission's or the courts' seminal statements concerning regulatory involvement in station programming went so far as to apply specific program quotas. Neither the 1929 Federal Radio Commission decision in *Great Lakes Broadcasting Co.*,⁴³ which discussed the expectation that licensees provide a balanced program

⁴⁰ *National Association of Independent Television Program Producers and Directors v. FCC*, 516 F. 2d 539, note 21 (1975). The Court goes on it state that "A precise definition is probably unattainable, and, indeed undesirable. No one can set boundaries to the fantasy of a child's world." p. 539.

⁴¹ H.R. 7357, 68th Cong., 1st Sess., § 1(B) (1924).

⁴² (footnote omitted). *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 597 (1981).

⁴³ 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds* 37 F. 2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

schedule designed to serve all substantial groups in their communities, nor the famous 1946 "Blue Book," nor the 1960 program statement with its fourteen program categories, including the first specific reference to programming for children, found it either desirable from a policy perspective or acceptable from a legal perspective to define by hours, schedule, and type any particular programming that should be broadcast to fulfill the public obligations of licensees.⁴⁴ Virtually every decision has focused on the tension between the statutory requirement that stations operate and be regulated in the public interest and the clear intention of the statute that the field of broadcasting is to be one of free competition, that licensees are to be accorded maximum editorial discretion, and that the Commission is given no supervisory control over programming and is prohibited from engaging in program censorship.⁴⁵ The somewhat nebulous nature of the obligations imposed were found, in each case, necessary to accommodate the conflicting requirements of promoting programming diversity and avoiding unnecessary restrictions on licensee discretion.

39. Numerous judicial opinions have also noted that serious First Amendment concerns are raised by such requirements. The courts have had occasion to speak to the issue several times in recent years. In 1978 the Commission refused to adopt quantitative program standards for television broadcasters involved in comparative renewal hearings. The argument was made that the absence of precise, i.e. quantitative, standards raised First Amendment problems. The Court of Appeals responded, stating:

As to petitioners' First Amendment claims, their approach would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission. The Act provides broadcasters with broad programming discretion and prohibits the Commission from exercising the power of censorship.⁴⁶

⁴⁴ FCC, "Public Service Responsibility of Broadcast Licensees," (1946); *En Banc Programming Inquiry*, 44 FCC 2303 (1960).

⁴⁵ See also, separate statements of Commissioners Ferris, Washburn, Fogarty, and Brown to *Notice of Proposed Rule Making*, 75 FCC 2d 138, 153, 156, 165, 168 (1979).

⁴⁶ *National Black Media Coalition v. FCC*, 44 RR 2d 547, 551 (D.C. 1978). See also the statement of the Second Circuit Court of Appeals in *National Association of Independent Television Producers and Distributors v. FCC*, 516 F 2d 526, 536 (2nd Cir. 1975), concerning exceptions to the prime time access rules for network distributed children's programs, that "it may be that *mandatory* programming by the Commission even in categories would raise serious First Amendment questions." This statement was echoed by the District of Columbia Circuit of Appeals in its recent decision in the radio deregulation proceeding. *Office of Communications of the United Church of Christ v. FCC*, 707 F. 2d 1413, 1430 (D.C. Cir. 1983). In its "format" regulation decision, *WNCN Listeners Guild v. FCC*, 610 F. 2d 838, 850-51 (D.C. Cir. 1979), the Court stated, "There would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance [or] dictated programming choices. . ."

40. Decisions refusing to adopt mandatory hour or percentage requirements have recognized not just the Constitutional fragility of such requirements but a practical policy component as well. In recent efforts to reform various policies relating to the regulation of radio broadcasting, the Commission noted that it "has not in the past, and will not in the future[,] focus on the total number of minutes or percentage of broadcast time devoted to issue oriented programming," and that "the number of minutes or percentage of broadcasting time devoted to such programming is largely irrelevant." *Memorandum Opinion and Order in BC Docket 79-219*, 87 FCC 2d 797, 809, 819 (1981) The Court of Appeals noted the logic of stressing the importance of factors besides quantity in its review of our decision, acknowledging that quantity alone may not be a measure of whether particular issues are being addressed in a meaningful fashion.⁴⁷

41. More specifically with respect to the issue of children's programming, the Court of Appeals has acknowledged that rigid scheduling and quantity requirements would "not make sense from a policy standpoint." In a statement with which we agree, the Court stated that it failed to see the logic in policies that imply that a regular schedule of cartoons would satisfy the public interest when a more limited schedule of educational specials would not.⁴⁸ This raises again the issue of program quality. If it is assumed that station licensees will provide children's programming only involuntarily, then there is no logical way to disassociate quantity and quality. At a given cost, a specific regulatory requirement to respond to the needs and interests of children could be responded to either by the broadcasting of a limited number of more costly programs (more costly either in terms of production cost or lost audience) or a larger number of less costly programs. Although from the point of view of the station enterprise both approaches are equal in cost, rules that require or reward quantity create a strong bias to follow the "more programs lower cost" approach. Were there only a single broadcast outlet involved in each market, this conceivably might be a sensible course from a regulatory perspective. However, it does not appear to be a public interest maximizing approach where more outlets are involved. Proponents of mandatory requirements urge, however, that with mandatory time requirements at least some programming would be available and, having to provide that programming,

These decision harken back to the Supreme Court's opinion in *FCC v. Sanders Brothers*, 309 U.S. 470 (1940) stating that the Communication's Act "does not assay to regulate the bussiness of the licensee. The Commission is given no supervisory control over programs. . ."

⁴⁷ *Office of Communication of the United Church of Christ v. FCC*, 707 F. 2d 1413, 1433 (D.C. Cir. 1983).

⁴⁸ *Washington Association for Television and Children v. FCC*, 712 F. 2d 677, 684 (D.C. Cir. 1983).

stations would then have an incentive to make their best efforts to produce attractive programming. While we agree that stations would attempt to maximize their returns within the constraints imposed, the hypothetical example posed by the Court of Appeals—regularly scheduled cartoons receiving more credit than less frequently scheduled better quality programs—would still seem to be the likely result.

42. A practical concern of another type has been recognized as well. Rigid obligations relating to specific types of programming run contrary to efforts at specialization. As the Children's Television Task Force has suggested, such specialization as is made possible by the development of more programming outlets provides the surest long run chance of providing better service to all segments of society, including children. No sophisticated survey is required to observe that such specialization is occurring. During weekday mornings, independent (as well as public) stations in many markets compete for the child audience. Network affiliated stations concentrate on news and public affairs. On weekends, when network stations target the child audience, the independent (and the public) stations do not. As predicted, market segmentation leads to station specialization better serving the needs of the entire viewing public. Program quotas, in the absence of an extraordinarily complicated allocation mechanism, would work fundamentally against efforts to align commercial incentives with quality service to the child audience.⁴⁹ Regulations running against the grain of station specialization would reduce market incentives for the production of programming for specialized audiences. They would also place the Commission in a position of having to involve itself with specific choices among preferred types of programming. We do not feel, for instance, that we should declare that children's programming in the 7:00–8:00 a.m. hour is inherently preferable to that time being used for news programs.⁵⁰

⁴⁹ Commercial broadcasting is guided by both regulatory and commercial requirements. The fundamentally commercial nature of the commercial broadcasting system, however, can only be ignored at great risk. It would be possible, as many have suggested, to correct advertising problems associated with the child audience through commercial time limitations or prohibitions, to correct scheduling problems through time of day requirements, to address age needs through program divisions, to respond to existing or regulation created failures of commercial incentives through program quotas, and to respond to general concerns over "quality" through cleverly crafted definitions or *ad hoc* reviews. The net result, however, would be a fundamental change in our broadcasting systems from one of licensee editorial discretion to one involving detailed agency oversight.

⁵⁰ The statutory and public interest basis for permitting, if not encouraging such segmentation and specialization, was recognized most recently by the District of Columbia Circuit Court of Appeals decision upholding the Commission's radio deregulation proceeding. *Office of Communication of the United Church of Christ v. FCC*, 707 F. 2d 1413 (D.C. Cir. 1983). The District of Columbia Circuit Court of Appeals opinion rejecting the Commission's policy statement in the "format" case

43. We thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast. Recognizing that a balance must be reached, we believe this balance is best struck through a continued stress on the general licensee obligations emphasized by the Commission in its 1974 Children's Television Policy Statement and through the general requirement that stations provide programming responsive to the needs and interests of the communities they serve.⁵¹ We continue to believe "that the broadcasters' public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience."⁵² The record reflects that the child audience is a unique one that warrants special programming attention from licensees.

44. We do not believe it desirable, however, to mandate programming quotas or impose more specific program or scheduling requirements nor do we interpret the Policy Statement as imposing such obligations. In 1975, we stated that because "the considerations as to what constitutes a 'reasonable amount' may vary, according to service area demographics, existing children's programming, market size, network affiliation or independent status, prior commitments to locally-produced programs, and the availability of television, etc. we believe it is desirable to avoid rules which are unnecessarily broad and inflexible."⁵³ We continue to believe that this is true. It mirrors precisely the rationale set forth in the *En Banc Programming Inquiry* in 1960 as to why program quotas in other areas were not being adopted.⁵⁴

45. We are acutely aware of the difficulties inherent in enforcing an unquantified general obligation to the child audience such as that described in the *Policy Statement* and of the charge made in the Task

had previously recognized in that context that "[n]o public interest issue is raised if . . . there is an adequate substitute in the service area for the format being abandoned. . . ." *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 851 (1979), *reversed on appeal FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1979).

⁵¹ *En Banc Programming Inquiry*, 44 FCC 2303 (1960).

⁵² *Report and Policy Statement in Docket 19142*, 50 FCC 2d 1 (1974); See also, *Washington Association for Television and Children*, 712 F.2d 677 (D.C. Cir. 1983).

⁵³ *Memorandum Opinion and Order*, 55 FCC 2d 691, 693 (1975). cont.

⁵⁴ "It is emphasized that these standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcast service in the public service. Rather, they should be considered as indicia of the types and areas of service which, on the basis of experience, have usually been accepted by the broadcasters as more or less included in the practical definition of community needs and interests." 44 FCC 2303, 2313 (1960).

Force Report and by others that such a policy is "unenforceable by either the Commission or the public."⁵⁵ Enforcement difficulties are created by a host of factors: (1) by the desirability of judging licensees on their overall programming record and not on one segment of that record alone; (2) by the desirability of taking into account the availability of programming from other sources; (3) by the need to account for the individual financial positions of newer and smaller market stations; (4) by issues associated with programming quality as opposed to quantity; (5) and by the constraints imposed by the First Amendment and Section 326 of the Communications Act. To the extent those who argue that the obligations imposed are unenforceable are simply stating that the Commission has a heavy burden to meet before it substitutes its judgment for that of a licensee, we believe that is as it should be. That has been the requirement since prior to 1934. Broadcasters, however, should not be misled into believing that no enforceable obligations remain. The bedrock obligation of every broadcaster to be responsive to the needs and interests of its community, including the specialized needs of children in that community, remains. Until such time as the Commission's role in station programming has been totally eliminated, those obligations will have to be enforced by the Commission and the Commission's performance in that regard will be subject to review by the Court of Appeals. This result is, we believe, entirely consistent with what the Supreme Court has described as "the Commission's duty to chart a workable 'middle course' to preserve 'essentially private broadcast journalism' held only broadly accountable to 'public interest standards.'"⁵⁶

46. In summary, we do not wish this decision to be an endorsement of a "raised eyebrow" approach to regulation. No cryptic message will be found between the lines of this decision. Simply put, we find no basis in the record to apply a national mandatory quota for children's programming. But, there is a continuing duty, under the public interest standard, on each licensee to examine the program needs of the child part of the audience and to be ready to demonstrate at renewal time its attention to those needs. This duty is part of the public interest requirement that a licensee consider the needs of all significant elements of its community. A licensee may consider what other children's program service is available in its market in executing its response to those needs. But a licensee who fails to consider those needs, in light of its particular market situation, will find no refuge in this order.

47. *Regulatory Flexibility Analysis:*

⁵⁵ Task Force Report, p. 92.

⁵⁶ *FCC v. WNCN Listeners Guild*, 450 U.S. 582, note 32, quoting from *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 120 (1973).

I. *Need for and Purposes of the Rule*

The Commission has decided not to adopt new requirements regarding programming for children. Given the totality of video programming sources and their offerings for children, constitutional concerns regarding interference with the exercise of a licensee's programming discretion, and regulatory anomalies that often result from inflexible standards, the Commission concluded that specific quantification rules are undesirable.

II. *Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. *Issues raised:*

Commercial broadcasters, while recognizing their obligation to program for children, argued that establishing quantitative guidelines for children's programs would be arbitrary.

A few broadcasters recommended a clarification of licensee obligations under the *Policy Statement* or a gradual phase-out of the *Policy Statement* commensurate with marketplace developments.

Public interest organizations argued that self-regulation will not result in sufficient children's television and therefore suggested adopting rules requiring a minimum amount of children's programming and/or quantitative renewal processing guidelines for children's programming.

B. *Assessment*

The record reveals that a variety of existing communications services provide quantity and quality in children's programming. Furthermore, it appears that new services can be expected to provide new outlets in the future which will add to that diversity. In view of the present state of the marketplace, the Commission believes that specific quantification rules are undesirable.

The Commission also concluded that there was no value in substituting our judgment for that of the licensee in deciding what amount or type of programming for the child audience is needed. The licensee is in a better position to determine the interests and needs of the particular children in its audience.

C. *Changes made as a result of such comment:*

In response to those comments concerned about children's program offerings and our recognition of the important role of television in a child's life, we have continued to recognize the obligation of broadcasters to serve this portion of the audience. In response to opposition to the adoption of rules or renewal guidelines, we rejected the options proposing mandatory programming rules or renewal processing guidelines.

III. *Significant alternatives considered and rejected*

The *Notice* proposed rescinding or modifying the *Policy Statement*, adopting mandatory programming rules and children's programming license renewal processing guidelines, and increasing the number of video outlets.

The Commission concluded that the number of video outlets, both advertiser-supported and pay, currently available will provide diversity in children's programs without the necessity of adopting specific quantification rules or renewal guidelines. The Commission also reached this decision because of its constitutional concerns and recognition that regulatory anomalies often result from inflexible standards. Because of Commission actions recently taken that

authorize new technological communications services, the Commission found no need to take any action to increase the number of video outlets.

48. Authority for adoption of the action taken herein is contained in Section 303 of the Communications Act of 1934, as amended.

49. IT IS FURTHER ORDERED, that the petition to amend FCC Form 303 filed January 24, 1979, by Altman Productions, Inc., IS DISMISSED.

50. IT IS FURTHER ORDERED, that the proceedings concerning this *Report and Order* ARE TERMINATED.

51. For further information concerning this proceeding, contact Freda Lippert Thyden, Mass Media Bureau, (202)632-7792 and Brian Fontes, Mass Media Bureau, (202)632-6302.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

* Appendices A, B, and C - may be seen in
FCC Dockets Branch,
Room 236,
1919 M Street, N.W.,
Washington, D.C. 20554.

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

In Re: Children's Television Programming Practices Report and
Order in Docket No. 19142.

Requiem

I wish I had the eloquence of Mark Antony for this eulogy. Our federal children's television policy commitment deserves no less at this, its interment. Make no mistake - this is a funeral and my colleagues have here written the epitaph of the FCC's involvement in children's television.

To the casual observer, the course chosen by my colleagues—adopting a “modified” children's television programming policy—may appear a reasonable exercise of administrative discretion. For reasons detailed below this action was not only unreasonable, but an abrogation of this agency's responsibility to unique and vulnerable beneficiaries of the FCC's public interest charter.

I dissent to this *Report and Order* for three basic reasons. First, it changes the FCC's preexisting children's programming policy without fully explaining why those changes are in the public interest, in violation of elementary principles of administrative law.¹ Second, the majority's finding that there is sufficient programming to meet

¹ See Section A, *infra*.

children's needs is arbitrary, because it is based on little more than conclusory assertions about the current conditions of the children's programming marketplace. In fact, record evidence strongly suggests that children's programs of the nature specified in the *Children's Television Policy Statement*² are in short supply in many markets when children are likely to be watching.³ Third, the legal and policy concerns advanced in opposition to a children's programming guideline are without foundation.⁴

Because the carriage of programming designed specifically to enhance the education of children by commercial television licensees is strongly in the public interest,⁵ and because the record demonstrates this interest is not now being adequately met, the Commission should have adopted a flexible processing guideline to encourage the broadcast of such programming throughout the week, when most children's television viewing occurs.⁶ The majority's failure to take appropriate remedial action reflects a serious error in judgment, if not also an abuse of discretion.

A. Legal Inadequacies

Administrative agencies have broad discretion in informal rule-making proceedings and the scope of judicial review is relatively narrow. The courts simply require the agency's decision to be rational, supported by the record, based on a consideration of the relevant factors, and not arbitrary, capricious or an abuse of discretion.⁷ However, when an agency changes its policy, it must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."⁸ In these circumstances, the courts will closely scrutinize the analytical and factual bases for the choices made, and the agency "must provide sufficient analysis and explanation of the grounds for its decision."⁹

Judged against these standards, this *Report and Order* falls short in at least three particulars. First, the majority's finding that the video system as a whole—commercial broadcasters, public broadcasters and cable operators—is adequately serving the unique needs of children is arbitrary and unsupported by the record. With regard to

² *Children's Television Report and Policy Statement*, 50 FCC 2d 1 (1974) (*Policy Statement*).

³ See Section B, *infra*.

⁴ See Section C, *infra*.

⁵ See *Policy Statement*, 50 FCC 2d at 5-7.

⁶ My concept of a guideline is further discussed *infra*, Section C.

⁷ *Telocator Network of America v. FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982).

⁸ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

⁹ *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).

the availability of children's television in the system as a whole, my analysis is outlined *infra* Section B.

Second, the majority has changed important parts of its children's television policy without providing a reasoned justification. Assuming *arguendo* it was entitled to take the action it took on this record, the majority is still legally obligated to state that the *Policy Statement* is being changed, and to supply a reasoned analysis of how and why it is being changed.

The 1974 *Policy Statement* specified, *inter alia*, that the Commission expected: children's programs to be scheduled throughout the week, not just on weekends; the development and airing of more educational and instructional programs; and the presentation of programs directed at specific age groups of children, including preschoolers.¹⁰ The *Report and Order* apparently eliminates these requirements, with little or no supporting analysis or justification.¹¹ For example, one can only speculate as to the majority's reasons for dropping the requirement that licensees air age-specific programming, despite the Commission's prior stated conviction that such programming is necessary to serve children adequately. Equally inscrutable is the majority's rationale for abandoning the scheduling guidelines outlined in the 1974 *Policy Statement*. With regard to the now-defunct duty to air programming specially designed for children, including informational and instructional programming, the majority's reasoning, while no model of clarity, is apparently that such obligations are superfluous because a child can benefit equally, if not more, from general audience programs. *See Report and Order* note 39 and accompanying text. Curiously, however, the majority recognizes that children remain a "unique" segment of the audience. *See Report and Order* para. 43. That being the case, it is illogical for the majority to have concluded that the unique needs of children can be fulfilled without at least some programming by each licensee geared to children's special cognitive abilities and experiences¹²— and the majority furnishes no rationale to justify its position. As a

¹⁰ *See Policy Statement*, 50 FCC 2d at 5-7.

¹¹ The degree to which the *Report and Order* repudiates the *Policy Statement* is not clearly stated in the *Order*. However, its radical evisceration of the *Policy Statement* can be gleaned from the majority's position that children can benefit equally if not more from family-oriented or adult programming, and from the fact that if the majority had meant to continue these obligations, it would have reaffirmed the requirements articulated in the *Policy Statement*. Furthermore, bench colloquy preceeding the adoption of this *Report and Order* made plain that requirements respecting educational and age-specific programming as well as scheduling are being deliberately dropped.

¹² For a description of the literature discussing the cognitive levels of children of different age groups and the benefits derived by children who watch programming geared to their stages of development, *see generally Television Programming for Children: A Report of the Children's Television Task Force* (FCC 1979) (*Task Force Report*), Vol. 5, Wartella, at 11-37, 50; Vol. 1, at 19-21.

matter of fundamental fairness, the general public and FCC licensees have a right to know the unarticulated reasons for these policy shifts, as well as the right to know precisely what duty to children remains and how it can be satisfied.¹³

Turning to what is left of a broadcaster's duty to children, one is again confronted with riddles. The *Report and Order* recites that commercial television licensees have a duty to devote "special programming attention" to the child audience. See para 43. With all due respect, this recitation is nothing more than a fig leaf to clothe the nakedness of the new policy. The *Report and Order* does not flesh out what broadcasters must do to comply. The barrenness of the vestigial children's obligation becomes quickly evident, however, when one reviews what a broadcaster need *not* do under the terms of the *Report and Order*. Licensees need not air programs designed to meet children's unique needs. Nor are they obliged to air programming geared to specific age groups, or children's programs that are informational or educational. Apparently, broadcasters will be found responsive to unique needs of children as long as they air programming that children watch, whatever that may be. In sum, while a broadcaster has a "special" duty to children, see *Report and Order* para. 43, nothing special is required to fulfill it!¹⁴ Moreover, broadcasters may take local marketplace conditions into account in determining how (or whether) to meet their "duty" to children, see para. 46, a freedom not now enjoyed by licensees for television audiences as a whole.¹⁵ Thus my colleagues have, in effect, "deregulated" television—but only as far as children are concerned.

¹³ In addition, nowhere does the majority address a central issue throughout this proceeding—whether commercial broadcasters have complied with the 1974 *Policy Statement*. The Children's Television Task Force found, based on comprehensive research, that self-regulation had failed. See *Task Force Report* Vol. 1. Given these results and the FCC's longstanding concern with the performance of commercial licensees in this area, the majority was obligated to confront the Task Force's findings squarely. Instead, it remains mute on that subject as well.

The majority's failure to retain the *Policy Statement* in its present form is not, in and of itself, disturbing because that document was ineffective at increasing or improving children's programming fare. What is extremely troubling (because of the record of overall commercial broadcaster performance developed in this proceeding), however, is the majority's failure to substitute policies calculated to ensure that the children of this country have an ample supply of programming designed for them on a regular basis.

¹⁴ My colleagues note that "any 'quality' program—especially if it had some entertainment value and were capable of attracting a significant child audience" would meet the children's programming objective, see para. 35, but the FCC has never evaluated, and is not now proposing to evaluate, the quality of a licensee's programming.

¹⁵ See generally *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, FCC 83-313, rel. Aug. 4, 1983, 48 Fed. Reg. 37239 (Aug. 17, 1983) (Notice of Proposed Rulemaking).

The final arbitrariness of the *Report and Order* is that it imposes a special children's programming obligation on commercial television licensees at all. If, as the majority maintains, the system as a whole is meeting the needs of children, *Report and Order* para. 32, there is no basis for imposing a special children's programming duty, however diluted, on any part of the system. On the other hand, if there is a need to retain such a duty for part of the system, it must be for commercial broadcasters, since neither public broadcasters or cable operators had a special duty to children under the *Policy Statement*, or otherwise. But since commercial licensee self regulation under the *Policy Statement* was found by the FCC's Children's Television Task Force to be ineffective,¹⁶ it makes no sense to sanction self regulation of an even weaker children's programming duty, especially since the majority recognizes that economic incentives continue to work against the airing of children's programs by commercial television licensees.

The majority cannot sustain its inconsistent approach: either children's needs are being fulfilled by commercial broadcasters voluntarily, in which case it was unnecessary to retain any special duty to children, or they are not, in which case remedial action was required.¹⁷ The *Report and Order* irrationally chooses neither path.

B. Availability of Children's Television Programming

1. Findings of the Task Force

This agency has found that the public interest is strongly furthered when programming designed to meet children's unique needs (especially educational and informational programming) is widely available for both preschoolers and school age children.¹⁸ The most comprehensive study of children's programming on commercial television in this proceeding found that commercial licensees are not advancing these objectives under a system of self regulation.¹⁹ That

¹⁶ See *infra* notes 19-22 and accompanying text.

¹⁷ The only conceivable explanation for the action taken is that progress is being made but since the system is not working perfectly, continued monitoring is necessary. However, the majority has not proffered this rationale for retaining a duty and, in any event, it has failed to make the case that widespread progress has occurred. See *infra* Section B.

¹⁸ See *Policy Statement*, 50 FCC 2d at 5-7.

¹⁹ That study was performed by the FCC's Children's Television Task Force. See *generally Task Force Report, supra*. The most current data available to the Task Force involved the 1977-78 season. More recent studies have been conducted by industry representatives and others, including the House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance. Because these studies vary in methodology and focus, it is extremely difficult to construct a reliable and detailed picture of what is presently available for children on commercial television. However, although these studies portray only a crude picture of industry performance since 1978, they do suggest: (1) a decline in the amount of children's programming on the average commercial station (see

study indicated that children's programming on commercial television stations has not appreciably increased since the *Policy Statement* was promulgated; that the amount of educational and age-specific programming on commercial stations has remained static; and that while most children's television viewing occurs during the week, nearly half of the children's programming on commercial stations is aired on the weekends.²⁰ The Task Force found that market failure in the commercial television industry is essentially responsible for the condition.²¹ The Task Force concluded that the child audience has limited influence in an advertiser-supported medium and that, absent regulation or a fundamental structural change in television, the needs of children will remain largely unsatisfied.²²

2. Majority's Findings

The *Report and Order* adopts the Task Force's conclusion that the commercial incentives of the advertiser-supported television system are not conducive to meeting children's special programming needs (see para. 25). Nonetheless, the *Report and Order* finds "no national failure of access to children's programming," but instead, "ample evidence of the system as a whole moving to respond to the unmet needs of this audience." See para 32.

The conclusion that children on the whole are receiving adequate television service does not hold up under close scrutiny. To attest to the abundance of children's programming available to the children of this country, the majority points in general terms to increases on an overall national basis in the amount of children's programming carried by the average commercial station, to the dramatic growth in the number of commercial television outlets and to the existence of alternative programming sources like noncommercial and cable

note 28 *infra*); (2) a decline in the number of commercial stations airing regularly scheduled weekday children's programs (see note 29 *infra*: F. Earle Barcus, *Weekday, Daytime Commercial Television Programming for Children* (Action for Children's Television 1981); a 1982 study by CBS submitted during the 1983 House of Representatives Hearing on Children and Television, (see note 35 *infra* at 157-160), does not provide meaningful information to the contrary because it includes programming aired on public television); and (3) a decline in the amount of educational programming on the average commercial station (see Oct. 5, 1983 study by U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection, and Finance, "Summary of Children's Programming on Commercial Television," submitted for record of Joint Hearing on the Potential of Television in Educating Children, which indicated that the average commercial television station devotes 61.38 minutes (or 0.77%) of its air time to children's educational and informational programming per week).

²⁰ See *Children's Television Programming and Advertising Practices* 75 FCC 2d 138, 142-44 (1979) (*Notice of Proposed Rulemaking*).

²¹ See *id.* at 144-45; *Task Force Report* Vol. 1, at 29-35, 41-44, 76.

²² See *Task Force Report* Vol. 1 at 29-35, 41-44, 76.

television—and criticizes the Task Force for having ignored these factors.²³ Far from amounting to “ample evidence” that the system is working, these factors simply underscore the continuing weakness of the system in meeting the needs of children.

(a). *Commercial television.* As an initial matter, it is inconceivable that the majority relies heavily on the commercial television system to furnish children’s programming when both it and the Commission’s own Task Force have found that commercial incentives run counter to commercial broadcasters meeting that objective.

Moreover, the mere fact that the number of commercial signals available to the average viewer has grown does not indicate that there has been a commensurate increase in access to children’s programming.²⁴ There is no inexorable correlation between an increase in the number of signals and the existence of such programs.²⁵ And since the FCC has not bothered to monitor the commercial television industry’s performance since the 1979 Task Force Report was prepared, the majority can cite no evidence (per station or per market) to bolster its claim that the amount of children’s programming available on commercial television has increased in the interim.²⁶ Indeed, the most current industry study submitted for the record indicates, in stark contrast, that the number of hours a week of children’s programs carried by commercial stations licensed to the average television market was almost the same in the 1981–82 season as it was before the 1974 *Policy Statement* was issued, although the number of stations has increased in the interim.²⁷ The study further suggests that the average number of hours a week aired in 1981–82 per commercial station is lower than the average aired in 1977–78.²⁸ As for regularly

²³ The *Report and Order* also faults the Task Force for excluding family-oriented programming in its assessment of the children’s programming marketplace. For a discussion of why this exclusion was proper, see *infra* note 61.

²⁴ Indeed, 22 percent of all television households still do not have access to independent commercial television stations, see *Report and Order*, para. 42, which assertedly provide substantial children’s programming during the week when network affiliates do not. *Id.* at note 28.

²⁵ The criticism that the Task Force failed to account for the growth of commercial television in assessing the availability of children’s programming is without merit. During the time frame studied, 1974–1978, the number of commercial television stations increased just 3 percent. (According to official statistics, the number of on-air commercial stations increased from 706 in 1974 to 728 in 1978. See *47th Annual Report/1981 Fiscal Year/Federal Communications Commission* p. 96.) Adjusting the average number of hours broadcast in 1977–78 to reflect this increase in the number of stations could not materially have altered the Task Force’s conclusions with regard to broadcasters’ compliance with the *Policy Statement*.

²⁶ See *Report and Order* para. 32.

²⁷ See *NBC Further Analysis Of Children’s Programming Available In 52 Markets Studied By The FCC Children’s Task Force*, Table 2, filed November 1, 1983.

²⁸ See *id.* Tables 2 and 3. According to these data, 3.2 commercial television stations

scheduled programming on commercial stations, there are studies in the record that suggest reverses exist in that area as well.²⁹

Apparently recognizing that it is hazardous to rely exclusively upon contribution of the commercial television system, the majority places great stock in the existence of alternative children's programming sources, especially noncommercial and cable television.³⁰ But my colleagues are on thin ice here as well. As this Commission has previously recognized, "[t]hese alternatives offer a potential solution only in the long run"³¹ because they are not now universally available—unlike commercial television. To this day, only the over-the-air commercial television system has the capacity to provide multiple channels of programming to virtually all the people of this country. For the foreseeable future, commercial television will continue to have unparalleled access and resources to reach young viewers. Therefore, sub-par performance by these licensees with respect to the child audience cannot be overlooked on the grounds that alternative outlets will make up the difference.³²

(b). *Cable Television.* Granting that the Commission should not blind itself to the growth of alternative services in crafting its regulatory policies, the fact remains that a majority of the homes in this country—fully 60 percent—do not have cable television.³³ Of the forty percent who do subscribe to cable television, an unknown but

were licensed to the average market in 1977-78, providing a total of 36 hours a week of children's programming (for a weekly per-station average of 11.2 hours). In 1981-82, according to this study, 3.5 commercial stations were licensed to the average market, providing a total of 35 hours a week of programming (or 10 hours per station).

²⁹ See Testimony of John Claster, President, Romper Room Enterprises, Oct. 16, 1980 and Apr. 28 1983. Claster's 1980 survey of commercial stations in the top 50 markets indicated roughly half of all stations carried regularly scheduled educational programs. According to Claster, in 1983, only 35% of the stations in the top 20 markets carried such programming.

³⁰ Here again, the majority is critical of the Task Force for limiting its purview to over-the-air commercial television. This criticism is unjustified given that the primary mission of the Task Force was to assess the commercial television industry's compliance with the *Policy Statement* and to determine whether additional actions were necessary to assure compliance by *these licensees* with previously established duties. (In reopening the record in 1978, the FCC's stated objective was to determine "whether self-regulation has been effective, whether our present children's programming and advertising policies are sufficient, and whether additional actions by the Commission are necessary to ensure licensee compliance with our guidelines." *Second Notice of Inquiry*, 68 FCC 2d 1344, 1352 (1978).)

³¹ *Notice of Proposed Rulemaking, supra*, 75 FCC 2d at 147.

³² Even the majority acknowledges that the FCC has previously rejected the view that the existence of noncommercial stations should be allowed to excuse commercial licensees' community obligations. See *Report and Order* note 31; *Sixth Report and Order*, 41 FCC 148, 163-64 (1952).

³³ Arbitron puts July 1983 penetration at 35 percent nationally. *Communications Daily*, Aug. 3, 1983 at 4. A.C. Nielsen estimates July 1983 penetration at 39.3 percent nationally. *Broadcasting*, Sept. 5, 1983 at 90.

lesser percentage have access to children's programming services cited by the majority, and the *Report and Order* is conspicuously silent as to what that percentage is.³⁴

(c). *Public Television.* Public television has shown us the excellence possible in children's television. However, it is inappropriate for public television to be regarded as the "children's programming channel" as some have suggested. First, public broadcasting is subject to severe financial constraints and has suffered funding difficulties. As a result, it is producing fewer new programs or new episodes of existing shows.³⁵ Second, it not fair to expect public television to be the super-programmer for our youth. Public television has other viewer constituencies to serve. Third, like adults, children are entitled to a viewing choice. Consigning them to a single channel deprives them of the diversity of ideas and information that is central to federal broadcasting policy. And fully 10 percent of all television households do not have access to the public broadcast system.³⁶ Finally, by relying on non-commercial broadcasters to carry a substantial part of the children's programming responsibilities of the television system, the majority implicitly relegates these broadcasters to second-class citizens who are not entitled to the significant legal and policy sensitivity accorded by the majority to their commercial broadcaster bretheren.³⁷

3. Conclusion

In sum, the majority errs in concluding that no regulatory response is called for on this record. The FCC previously affirmed its "unmistakable" intent to monitor commercial television licensees' compliance with the *Policy Statement*, and "to take further action, including the adoption of specific rules, to deal with any problems that the industry's self-regulatory effort does not meet."³⁸ This *Report and Order*, while sidestepping the issue of whether self-regulation by commercial licensees has been effective, concludes that

³⁴ When questioned at the Commission meeting about what percentage of cable subscribers have access to the new children's programming services, the staff and majority were unable to do more than *speculate* that two-thirds of cable subscribers (or about 27 percent of all television households) have such programming available to them. Even ignoring the public policy implications of requiring children to pay for access to programming, this ignorance is a sad commentary on the basis for the majority's conclusion that cable television is helping to meet the needs of children.

³⁵ "Children and Television," Hearing before the Subcommittee on Telecommunications, Consumer Protection, and Finance, Committee on Energy and Commerce, House of Representatives, 98th Cong., 1st Sess., Mar. 16, 1983, Testimony of Bruce Christensen, President, National Ass'n of Public Television Stations at 38, 44 (U.S. Government Printing Office, Serial No. 98-3).

³⁶ See *Report and Order* para. 29 and note 31.

³⁷ See *Report and Order* at para. 33 et. seq.

³⁸ *Second Notice of Inquiry*, 68 FCC 2d 1344, 1347 (1978).

no remedial action is required, and, in fact, that further relaxation of FCC policy is in order. I emphatically disagree with this conclusion. Based on the evidence submitted in this proceeding, it cannot be said that the commercial television industry as a whole is adequately serving the unique needs of children previously identified by the Commission in the 1974 *Policy Statement*,³⁹ or that the performance of commercial broadcasters will improve absent more stringent regulation, because of the recognized economic incentives inherent in the system. Nor, for the reasons outlined above, can it persuasively be argued that public and cable television suffice to bridge commercial television's shortfall. In short, the *Report and Order's* conclusion that there is "ample evidence of the system as a whole moving to respond" to the needs of children appears premised on little more than the rosy optimism of reluctant regulators.

C. *The Appropriateness of a Children's Programming Guideline*

The majority has failed to demonstrate that either the video distribution system "as a whole" or the commercial television industry by itself is meeting the television viewing needs of children previously identified by the FCC. It was therefore incumbent upon the majority to decide what additional steps should be taken to remedy this condition. In my judgment, a processing guideline applicable to all commercial licensees would have been a rational administrative response.

1. *Mechanics of the Guideline*

Based on the record developed in this proceeding, the Commission should have adopted a flexible children's programming processing guideline designed to increase the supply of programs that enhance the education of children⁴⁰ and retained it until it is shown that this

³⁹ Even the majority does not make any such overarching contention. Indeed, it cannot, because it has made no factual findings about the current availability, nature and source of children's programming, either nationwide or within individual markets. Compare *Deregulation of Radio (Notice of Proposed Rulemaking)*, 73 FCC 2d 457, 484-490 (1979) (describing fundamental structural changes in radio which have led to improved service to narrow audiences in particular markets, contrasting that condition with more limited growth of television whose economics encourage licensees to provide broad, common denominator programming). The majority does not find a fundamental nationwide transformation of the television marketplace has occurred since 1979 which would lead to improved service to narrow audiences such as children. See also discussion re Specialization *Infra*. Section C. 3(c) p. 24.

⁴⁰ See generally H.R. 4097 "Children's Television Education Act of 1983," 98th Cong., 1st Sess., 129 Cong. Rec. E4793-94 (daily ed. Oct. 5, 1983) (requiring every television broadcast station to air each Monday through Friday for a minimum of one hour a day programming specifically designed to enhance the education of children). While I fully endorse H.R. 4097's approach in principle, as indicated above, I prefer a processing guideline to a fixed rule because of the flexibility a

need can be satisfied without government intervention.⁴¹ No one has persuasively argued in this proceeding that there is an ample amount of educational programming geared to the unique needs of children.⁴² Yet, as the Task Force and others have found, such programming is extremely beneficial to them.⁴³

Such a guideline would not present insurmountable legal or practical problems,⁴⁴ and would be consistent with the FCC's previous view that "the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the 'public interest'."⁴⁵ Like existing guidelines for nonentertainment, public affairs and local programming, a children's educational programming guideline would simply express an initial benchmark of acceptable performance. The staff could be given delegated authority to determine whether commercial television licensees filing the long form renewal application conformed to the guideline.⁴⁶ If a licensee proposed programming for the next

guideline affords the FCC to deal with particular facts and circumstances.

Specifying the number of hours in a guideline is no easy task and might be best left to an FCC advisory committee which could present recommendations to the Commission *en banc* for final consideration. However, I would initially be inclined to favor a guideline that required each station to air a minimum of five hours of educational programming designed specifically for children during the week (Monday through Friday) at times when children are likely to be watching (*i.e.*, 7 a.m. to 8 p.m.) Obviously, any number chosen is perforce arbitrary, but this amount seems neither unreasonable nor burdensome. One network previously satisfied it voluntarily, and it is likely that the other networks would be able to do so as well. In addition, many of the independent stations already program substantial amounts of programming for children, albeit not all of it educational in nature.

⁴¹ The FCC could commit to revisit the matter after a fixed period of time, as it did when it promulgated the *Policy Statement*, so that its regulatory intervention were no broader than necessary.

⁴² Indeed, the Task Force found evidence of a substantial unmet demand for educational programs. See *Notice of Proposed Rulemaking, supra*, 75 FCC 2d at 145-46.

⁴³ See note 68 *infra*.

⁴⁴ The majority's legal and policy analysis centers on the legality and feasibility of mandatory programming rules and does not separately consider program processing guidelines (an alternative outlined in the *Notice of Proposed Rulemaking*). Although certain issues are unquestionably common to guidelines and rules - *e.g.*, program definitions, the appropriateness of age-specific requirements - processing guidelines are far easier to justify on legal and policy grounds because of their inherent flexibility and capacity for case-by-case consideration. In its apparent zeal to withdraw from the children's programming arena, the majority has focussed its attention on programming rules and has unwisely overlooked a less intrusive regulatory option.

⁴⁵ *Policy Statement*, 50 FCC 2d at 5.

⁴⁶ To educate the FCC and the general public about all licensees' performance under the processing guideline, every licensee could be required annually to place in its public file relevant information about children's programming carried during a designated composite week.

license term that fell below the Commission's guideline without a satisfactory explanation, its application could be sent to the Commission for a determination of whether the renewal application should be granted. Similarly, if the licensee's programming during the prior term⁴⁷ fell below the processing guideline without a reasonable explanation, the Commission *en banc* could consider the renewal application.

2. *Legality of a Guideline*

The consistency of such a guideline with the Communications Act and the First Amendment has never been squarely ruled upon, but it seems clear that a children's programming guideline would pass legal muster. It is hornbook law that the Commission's authority to promulgate rules, guidelines and policies is extremely broad,⁴⁸ and that this expansive regulatory charter empowers the FCC to promulgate content-related requirements.⁴⁹ Whether to adopt quantitative guidelines is a policy judgment within the FCC's discretion.⁵⁰ The Commission's authority to adopt general guidelines governing children's television programming has previously been upheld,⁵¹ as has its power to single out such programming as a preferred category.⁵² In short, nothing in the Communications Act expressly prevents the Commission from promulgating a guideline for children's programming so long as it rationally furthers the public interest.⁵³

⁴⁷ As the FCC did when it promulgated the *Policy Statement*, it could wait a reasonable period of time before reviewing a licensee's performance under the educational processing guideline.

⁴⁸ See 47 U.S.C. §§ 154(i), 303(r); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-20 (1943).

⁴⁹ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1967) (*Red Lion*).

⁵⁰ *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978). The legislative history of the Radio Act of 1927 rejecting a detailed scheme of fixed program quotas, cited by the majority, can hardly be deemed persuasive authority for the proposition that a children's programming processing guideline would exceed our statutory authority. Congress granted the FCC a broad public interest mandate—which the Supreme Court has characterized as “not niggardly but expansive”—to respond to continuing changes in this dynamic industry. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 220 (1943). The FCC's expansive public interest mandate is sufficiently broad to support a processing guideline promulgated to advance a compelling public need. Indeed, while the Commission's historical bias against program guidelines (discussed by the *Report and Order*) is well known, we recently observed that “this is not to say that we may not impose such standards or that they would be unlawful or unwise in every case. . . .” *Deregulation of Radio*, (*Memorandum Opinion and Order*) 84 FCC 2d 968, 1055 (1981).

⁵¹ *Action for Children's Television v. FCC*, 564 F.2d 458, 479-80 (D.C. Cir. 1977) (*ACT*).

⁵² *National Ass'n of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 538 (2d Cir. 1975) (*NAITPD*).

⁵³ Furthermore, such a guideline would not impermissibly infringe upon broadcast-

A processing guideline designed to insure that commercial television licensees provide programming to enhance the education of children would rationally further the public interest. The Commission's prior emphasis on airing educational and informational programming designed for children was premised on the view that the proper functioning of a free society depends on an educated citizenry, and that television, by airing educational programs, can do

ers' First Amendment rights. A children's programming processing guideline would constitute a minimal intrusion into a broadcaster's discretion. As with existing processing guidelines for news and public affairs, *see, e.g.*, 47 C.F.R. § 0.283(a)(7), no specific programs would be dictated, and broadcasters would be accorded wide discretion in satisfying the guideline. Judicial approval of the children's programming exemption to the prime time access rule demonstrates that the FCC can legitimately prefer certain categories of programming over others consistent with the First Amendment, *see NAITPD*, 516 F.2d at 536-38, and that the FCC's preexisting children's programming definition was not impermissibly vague, *id.* at 539-40.

The majority properly notes that broadcasters are entitled to substantial editorial discretion, but fails to acknowledge that this discretion may be tempered to protect the "paramount" rights of viewers and listeners to "suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." *See Red Lion*, 395 U.S. at 390; *accord CBS, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981). *Red Lion* made clear that because broadcasting is a medium not open to all, licensees can be required to air certain categories of programming to further the public's interest in an uninhibited marketplace of ideas. *Red Lion*, 395 U.S. at 389-92. This Commission has previously embraced a broad construction of *Red Lion*, indicating that "the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues." *Policy Statement*, 50 FCC 2d at 5. (As a point of interest, it is worth noting that *Red Lion* is conspicuous by its absence in the *Report and Order*. The doctrine it espouses has apparently fallen out of favor with this Commission majority.)

The generalized public right of suitable access established in *Red Lion* supports the notion that children in particular have a right to receive programming suitable to their needs and that this right may be furthered by an affirmative duty to air children's programming as proposed above. This conclusion is buttressed by previous Supreme Court rulings recognizing that children are a unique group entitled to special legal protections. *See Prince v. Massachusetts*, 321 U.S. 158 (1943); *Ginsburg v. New York*, 390 U.S. 629 (1968); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). If society's interest in protecting children is sufficient to validate an FCC ruling which effectively restricts a licensee's right to program certain adult-oriented material during substantial portions of the day, (*see Pacifica, supra*, 438 U.S. at 748-50), it should certainly be weighty enough to uphold a guideline designed to encourage the broadcast of programs beneficial to children. Because of their immaturity, children are innately incapable of expressing their programming needs and interests or influencing programming as purchasers of advertised goods and services. The guideline proposed above, which accords broadcasters wide discretion in program selection and scheduling, would protect the legitimate interests of this unique audience consistent with prior First Amendment case law. (The dictum in *NAITPD* cited by the majority to the effect that a mandatory programming requirement might raise serious First Amendment questions is not fatal to this conclusion since that issue was not before the court. Indeed, a later decision indicated that "the Commission may well have adequate authority to act in this area, and even perhaps to the extent [of promulgating mandatory rules]." *See ACT*, 564 F.2d at 480.)

much to prepare children to participate in the nation's democratic process.⁵⁴ A similar position was recently expressed by a National Science Board report, which recommended that television play a greater role in the educational process.⁵⁵ In 1974, when the Commission made its position plain, it expressed special concern about the amount of time devoted by licensees to educational children's programs, noting that none of the networks carried a single informational program on Saturday and that only one network carried an educational program during the week. Various industry representatives filing comments dispute the Task Force's contention that licensees have not complied with the *Policy Statement* in this regard, but none has persuasively documented that licensees are presently airing more than the amount of educational programming aired before the *Policy Statement*—or even the same amount.

Nevertheless, the majority jettisons even a general requirement that children's educational programming be aired. Its action (or inaction) on this score is due to perceived policy and legal difficulties that would result from *any* quantified duty to air programs designed especially for children.⁵⁶ To be sure, any content-related requirement ought to raise our sensitivities. But the objections conjured up by the *Report and Order* are overblown.

3. The Majority's Policy Objections

The principal policy objections advanced by the majority are that: (a) the real concern with regard to children's television is over program quality, which a quantitative guideline is ill-suited to remedy; (b) it is virtually impossible to frame an appropriate programming definition; (c) a quantitative guideline would impede programming specialization.

(a). *Quality versus Quantity*. As for the first point, contrary to the majority's assertion, the real issue presented is whether the FCC should require broadcasters to be responsive to the unique needs of children. By transforming the debate into one centering on the quality of children's programs, the majority attempts to sidestep the issue. The FCC has never served as the arbiter of program quality. But that has not prevented it from specifying categories of public

⁵⁴ *Policy Statement*, 50 FCC 2d at 5-6. More recently, the Commission indicated that issue responsive programming is the single programming species that best promotes the paramount goal of fostering an informed citizenry. See *Deregulation of Radio*, 84 FCC 2d 968, 977, 982 (1981). Requiring a broadcaster to provide programming that enhances the education of children is consistent with, if not compelled by, the foregoing goal.

⁵⁵ See National Science Board, *Educating Americans for the 21st Century* (National Science Foundation 1983).

⁵⁶ As demonstrated *supra*, pp. 17-20, the legal obstacles posed by a guideline are not insurmountable.

interest programming that must be aired by broadcasters (e.g., news, public affairs) while leaving the selection of particular programs to the good faith discretion of licensees. This approach has permitted the FCC to observe the "delicate balance" between preserving a licensee's journalistic discretion and protecting the public interest.⁵⁷

My proposal for children's educational programming guideline would continue this approach. Clearly, a quantitative guideline does not guarantee that only qualitatively superior children's programs will be broadcast; however, an educational programming guideline, at a minimum, is likely to increase children's access to programs found beneficial to them.⁵⁸ Therefore, the fact that it does not assure a "perfect outcome" should not prevent its adoption.⁵⁹

(b). *Definitional Problems.* It is also argued that a guideline keyed to programs designed for children is inappropriate because the purpose to be served—"can be accomplished with adult or family programming as well or better than with specifically child programming"⁶⁰ According to the majority, this conclusion is buttressed by the fact that children watch these shows more often than children's programs. There are two responses to this argument. First, just because children may, on occasion, incidentally benefit from adult programming does not diminish the record evidence in this proceeding that they have immature viewing capabilities; therefore, they are entitled to programs geared to their needs.⁶¹

⁵⁷ See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973).

⁵⁸ The contention that a guideline would encourage broadcasters to favor cheap "filler" programs at the expense of costlier but qualitatively superior programs is theoretically possible but not necessarily true. An equally plausible theory is that if all broadcasters were held specifically accountable for providing some programming to enhance the educational needs of children, each would have an incentive to provide the most attractive programming to garner the largest audience share.

⁵⁹ The majority maintains that rigid scheduling and programming requirements would be illogical, citing dictum in *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 684 (D.C. Cir. 1983) (*WATCH*). However, its characterization of *WATCH* is inaccurate and, thus, reliance on it misplaced. *WATCH* observed that a requirement that could be satisfied by a regularly scheduled half-hour cartoon each week but not by three hours of educational specials would "not make sense from a policy standpoint." I agree. The guideline proposed here, however, would not suffer that infirmity because it would require an aggregate amount of weekly educational programming but leave licensees broad scheduling discretion. Under my proposal, the fact that the children's programming aired by a licensee consisted of weekly "specials" would not automatically foreclose it from satisfying the guideline.

⁶⁰ See *Report and Order* note 39 and accompanying text.

⁶¹ The *Policy Statement*, in recognizing the uniqueness of children's viewing needs, stated: "[B]ecause of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." *Policy Statement*, 50 FCC 2d at 5. The FCC reaffirmed the view that a child has unique

Second, children watch adult programs more often than children's programs because most child viewing occurs during the week when fewer children's programs are aired. There is simply nothing else for them to watch. And even if children sometimes prefer adult programs to shows intended for them, that does not mean that they should not be given a choice. For many children, that choice is often lacking.

(c) *Specialization.* The argument that a guideline would discourage station specialization⁶², contrary to the hopes of the Task Force, is similarly without foundation. A requirement that each station devote a modest amount of time to children's programs throughout the broadcast week would not alter a licensee's freedom to air more than the specified minimum in an attempt to attract a larger children's following. In any event, genuine children's programming specialization will not exist (outside the largest markets having numerous outlets) until the video and radio markets generally begin to resemble each other in terms of number of outlets. Only then would economic theory suggest that a guideline would discourage specialization for children. That day has not arrived. In 1979, the Task Force found that the number of television outlets in many markets was far too limited to create a climate in which specialized children's stations would emerge.⁶³ It therefore recommended a

viewing needs when it later defined children's programming as "programs originally produced and broadcast primarily for a child audience twelve years old and under." See *Memorandum Opinion and Order*, 53 FCC 2d 161, 162 (1975).

The majority now approves a broader approach to children's programming, finding the Commission's previous focus unduly narrow because it excludes adult programs watched by and beneficial to many children and programs designed to promote family television viewing. However, this analysis ignores the substantial body of research confirming the unique characteristics of the child audience, the utility of programming especially designed for children of different ages, especially preschoolers, and the social benefits derived by children who watch programs designed for them. See generally *Task Force Report*, Vol. 5, Wartella, at 11-37, 50; *Task Force Report*, Vol. 1, at 19-21. Family-oriented programming is undoubtedly valuable, but not being designed with the special requirements of children in mind, cannot address their special developmental needs. See *Notice of Proposed Rulemaking*, 75 FCC 2d at 144, 144 note 24, 146. Requiring broadcasters to air programming designed for children does not reflect a judgment that family programming is undesirable; it merely recognizes that custom tailored children's programming (as previously defined) is essential if a child's unique viewing needs are to be met.

⁶² Specialization, as the FCC has used the term, occurs when there are so many competing outlets in a market that economic incentives encourage stations to seek out and meet specialized audience needs. See generally *Deregulation of Radio*, 73 FCC 2d at 484, 489-90. In *Deregulation of Radio*, such specialization by radio stations was approved based on finding that the radio industry had undergone a fundamental structural change. See *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1420 (D.C. Cir. 1983).

⁶³ See *Task Force Report*, Vol. 1, at 32-40. The Task Force recognized that independent stations provide substantial amounts of children's programming, especially in large markets, but recommended retention of a quantitative

mandatory programming requirement, as an interim measure, which would be lifted when the number of television programming outlets had substantially increased.⁶⁴ The growth of television stations has been relatively modest since the *Task Force Report* was published⁶⁵ and the majority cites no empirical evidence showing that fundamental, nationwide structural change and corresponding specialization in children's programming, as envisioned by the Task Force, have taken place. Until such change and specialization occur, the existence of a processing guideline should have little, if any, effect on specialization in most markets.

D. Conclusion

Throughout its involvement with the issue of children's television, the FCC has recognized the tremendous potential television holds for the children of this country and has attempted to require commercial television broadcasters, as fiduciaries of a great public resource, to provide the benefits inherent in this medium to this unique audience segment. The majority's essential muteness on these points underscores an unprecedented indifference to children's rights to responsive programming on commercial television.

There are more than 30 million children in this country between the ages of two and twelve.⁶⁶ The average child watches many hours of television each week,⁶⁷ and probably spends more time in front of a television set than in the classroom. Thus, television has assumed a central, pervasive role in the lives of children.

Television has tremendous potential for enhancing a child's development.⁶⁸ Ten years ago in the *Children's Television Policy*

guideline until the advent of a "significant structural change in the industry" prompted the development of stations that specialized in children's fare. *See id.* at 79. The majority cites to the division of programming responsibility between independents and network affiliates (adverted to by the Task Force in 1979) as evidence of the fact that specialization is occurring. However, in 1979 the Task Force found such "specialization" insufficient to meet the needs of most children, and the majority cites no evidence showing that even such limited specialization is more prevalent in 1983 than it was in 1979.

⁶⁴ *See Task Force Report*, Vol. 1, at 75-79.

⁶⁵ Between 1979 and 1982, the number of on-air television stations grew from 1008 to 1079, or roughly nine percent. *See Broadcasting/Cablecasting Yearbook 1980*, p. A-2 (Broadcasting Publications, Inc. 1980); *Broadcasting/Cablecasting Yearbook 1983*, p. A-2 (Broadcasting Publications, Inc. 1983).

⁶⁶ U.S. Department of Commerce, Bureau of the Census, *1980 General Population Statistics*.

⁶⁷ *1982 Nielsen Report on Television*, "Weekly Viewing Activity for Women, Men, Teens and Children," pp.8-9 (Nielsen Media Research 1982).

⁶⁸ Educational programming yields considerable learning benefits, especially for preschoolers, whose limited reading capacity restricts the range of educational resources available to them. *See Task Force Report*, Vol. 1 at 19-21. For example, research on the impact of *Sesame Street* indicates that preschoolers' cognitive skills improved markedly by watching the program. *See Gerald S. Lesser, Children and Television: Lessons from Sesame Street* (Random House 1974).

Statement, this Commission appreciated the rich potential of television for America's children when it instructed commercial broadcasters to increase the amount of educational and informational programming designed for children. More recently, in issuing the Notice of Proposed Rulemaking in this proceeding, the Commission continued to recognize that "television programming has an enormous potential for enriching the lives of children" which "is still largely unrealized."⁶⁹ Unfortunately, despite these findings and policies, the *Report and Order* adopted by this Commission majority scarcely acknowledges the potential commercial television holds for the youth of this country. At a time when the educational training and fitness of children are subject to increasing criticism,⁷⁰ this indifference is unfortunate, if not outrageous.⁷¹

In conclusion, the majority has dishonored our most treasured national asset—children. It has set the notion of enforceable children's programming obligations on a flaming pyre, adrift from federal concern, in the hope that the concept will be consumed in its entirety and never return to the FCC's shores. I dissent.

Children can also develop positive social attitudes, see *Task Force Report, supra*, Vol. 1 at 21, and can become motivated to learn about their environment by watching television. See Remarks of Honorable Timothy E. Wirth regarding "Children's Television Act of 1983," 129 Cong. Rec. E4793 (daily ed. Oct. 5, 1983). Television is an extremely cost-effective teaching tool. National Science Board, *Educating Americans for the 21st Century* 106 (National Science Board Commission on Precollege Education in Mathematics, Science and Technology 1983). Unfortunately, according to the most current information in the record, only a small fraction of the children's programming aired on commercial television is educational or instructional. See *Notice of Proposed Rulemaking*, 75 FCC 2d at 143 (1979); *Task Force Report supra*, Vol. 3, "The Amount of Children's Instructional Programs Aired During the 1973-74 and 1977-78 Television Seasons," at 6, 11-12.

⁶⁹ *Notice of Proposed Rulemaking, supra*, 75 FCC at 152.

⁷⁰ See National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (U.S. Government Printing Office 1983).

⁷¹ The majority concludes with the exhortation that broadcasters who ignore their duty to children will find "no refuge in this Order." See para. 46. In reality, it is the children of this country interested in improved television programming for whom the *Report and Order* will provide no refuge.