MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 3, 1969

NOTE FOR THE FILE

Talked with William Duke in Senator Javits' office. Will meet with him on Thursday (2/5) at 10 a.m.

Advises that Nicholas Zapple is the chief staff guy on Communications Subcmte., Senate Commerce Cmte. (Democrat); Hse. side of Telecommunications "is a mess."

Tom Whitehead

from H.G.

NOTES ON KIDVID COMMERCIALS

Constitutional Considerations:

1. Children deserve a special protection from electronic commercial exploitation, and historically have been accorded such protection in other areas of law -
   (a) Ginsberg v. New York, 390 U.S. 629 (1968)
   (b) Jacobellis v. Ohio, 378 U.S. 184 (1964)

2. First Amendment objections to regulation intended to afford such protection are unpersuasive.
   (a) Not all speech is constitutionally protected. Roth v. U.S., 354 U.S. 476 (1957). Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
   (b) Commercial speech has received less rigorous protection than political speech. In analyzing commercial speech cases, the courts have manifested a willingness to protect speech in relation to its informational value and purpose. "Purely commercial" speech has very low First Amendment priorities since it is not associated with any of the interests the First Amendment seeks to protect (i.e., it does not affect the political process, provide information of public value or importance, contribute to the exchange of ideas, or act as a form of self-expression). The value of such speech

is then balanced against the conflicting social interest at issue in the case, and not infrequently the societal issue is found to outweigh the constitutional value of the speech. See for example:

(1) Valentine v. Christensen, 316 U.S. 52 (1942), where the Court upheld a New York law forbidding distribution of commercial leaflets in the street stating that - "...the Constitution imposes no ... restraint on government as respects purely commercial advertising."

(2) Breard v. Alexandria, 341 U.S. 622 (1951) where the Court upheld the constitutionality of a city ordinance prohibiting door to door solicitation of magazine subscriptions and rejected the argument that the ordinance abridged the freedom of the press. The Court noted the act of selling the magazines brought a commercial feature into the transaction; that the First Amendment was not an absolute, guaranteeing the right to speak or distribute wherever or whenever; but that other rights had to be considered. Balancing the individual's desire for privacy (protected by the ordinance)

against the publisher's right to solicit the distribution of publications door to door, the Court found that alternative distribution methods were available and the homeowners' rights thus superseded the salesman's.

(3) In Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) the Court upheld a prohibition (New Mexico law) of the broadcast of prices in optical commercials without considering or reaching First Amendment issues.

(4) But see, The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression, 39 George Washington Law Review 429 (1971) for an excellent analysis of these problems and cases and the expression of some contrary views.

(c) It's my feeling that the First Amendment would pose no barrier to the regulation of commercial content of children's television - and perhaps not even to the prohibition of advertising altogether from kidvid. Children are not part of the electorate or political process - individually as consumers they are not even part of the commercial decision making

process since they spend only their parent's money. Further it is questionable if young children have the powers of reason, discrimination, etc., that would enable rational decision making even if there were informational content in such ads which is doubtful. Additionally, kidvid ads are more analagous to the "purely commercial" category than the informational, in my opinion; but in either event, the societal interest in protecting children from commercial exploitation would seem to outweigh any First Amendment considerations given the nature of the speech.

(1) See H. Geller's memo - on the balancing of public interests and First Amendment interests after Red Lion at 20 R.R. 2d 381, 384.

(2) See also Banzhaf v. FCC 305 F.2d 1082 and the Tobacco case upholding the FCC's ban on cigarette advertising, where the Court found substantial scientific evidence (by agencies independent of FCC) that smoking was injurious to a substantial percentage of the population. However, the Court also warned the FCC not "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'"

Thus, a FCC regulatory decision limiting kidvid commercials should have strong 'public interest' arguments and offering of proof of injury to the extent possible to forestall adverse court review.

Policy Considerations:

1. Whether restrictive regulations on commercial content (or prohibition of commercials altogether) would exceed the statutory authority of the FCC, violate §326, or abridge traditional policies of reliance on the reasonableness of broadcasters good faith efforts.

   (a) First, imposition of detailed regulations would be a marked departure from the generally, salutary principle of licensee freedom and responsibility demarcated in Commission En Banc Programming Inquiry, 20 RR 1901 (1960). However, that statement, after noting the statutory and constitutional restraints on the FCC, also commented on certain "exceptions" and "affirmative responsibilities" under which the FCC could exercise its authority to ensure service in the public interest. "The major elements usually necessary to meet the public needs and desires of the community ... have included ..." the Commission

noted, programs for children. Thus, the argument that restrictive proposals deviate from the "wise" policy of licensee freedom has a pleasant rhetorical ring but, in fact, the Commission's policy has not been one of freedom, but of suggested guidelines, strong suggestions and clear hints. Restrictions could be justified without changing one iota of policy. You might check out a memorandum prepared for the General Counsel's office some time ago by Larry Secrest on the Commission's legal authority in this regard.

(b) Second, the prohibition on censorship [47 U.S.C. §326 (1964)] can be read as a statutory restatement of the constitutional right of free speech as understood in 1934. "Censorship" and "affirmative responsibility" can be distinguished, however, and there is sufficient precedent to justify a restrictive approach as already noted.

2. Whether the economic result of restrictive regulations would impair the quality/quantity of children's programming or even raise questions of solvency for marginal stations?

(a) See Alan Pearce's study, "The Economics of Network Children's Programming" which was prepared several years ago - perhaps there has been an update.

(b) Obviously there must be some correlation between supportive revenues and the nature of the programming. Balancing this is the public interest requirement of service. Broadcasters are required to furnish a certain amount of news, public service, etc., which is not fully self sustaining (i.e., news budgets allegedly exceed revenues from advertising on news programs) · Perhaps children's programming should be viewed similarly. There is certainly no requirement that the FCC adopt rules to insure the maximum profitability of children's programming, and as long as it is reasonably profitable or even just barely self-sustaining, that might arguably be sufficient.

3. Whether there is sufficient empirical evidence of a need for protective regulation?

(a) This question as noted is important with respect to the constitutional and policy issues. In reviewing regulation, the Courts examine whether the Commission has adequately identified and described a public injury or interest, demonstrated the existence of a credible threat or injury, and finally whether the requlations adopted are reasonably designed to remedy or regulate the perceived injury. Unfortunately, I'm not familiar with the existence or probity of any studies or evidence in this area.

(b) It may be, however, that since children are involved, and if the issues in question are demonstrably not subject or conducive to empirical quantification or scientific method, that the courts would except a justification less rigorous than in the cigarette case.

Policy Suggestions:

1. Reduce commercial time allowed on children's programming to x amount, or alternatively to a self sustaining, non-profit level and require x number of hours in appropriate time periods per week - Sat/Sun A.M. and 4-6 weekdays or whatever. This reduction of time would not cause any significant revenue losses, since the price of remaining time would likely increase making up part of the difference, at lease - also, children oriented advertisers will remain on T.V. since kidvid is still their best media outlet. Since young children don't read or buy newspapers, etc., there would be no shift of advertising dollars to print media as happened with cigarette advertising.

2. Require grouping of commercials at natural program breaks. This will reduce interruptions and constant

commercial bombardment and will coincide with prohibition of host selling (see below). There is precedence for this rule in 76.225(a)(5) requiring bunching of commercial announcements on ~~pay~~ cable channels.

3. Forbid host selling or the identification of any program performer, including cartoon characters, with the delivery of any commercial message.

4. Forbid any interconnection or relationship between program content and commercial content or objectives of the sponsor.

5. Forbid demonstrably harmful classes of commercials as per the cigarette ruling model. The Banzhaff standard, as noted, was a pretty high standard of demonstrated injury, however. It might be possible with drugs; however, a difficult question would be whether children's vitamins would be classified as a drug.

6. Establish a "reasonable child" standard, vice "reasonable man" standard to judge whether particular commercials are false or misleading.

Further Suggestions:

I have avoided commenting on regulation of program content and have confined discussion to commercials. I recommend that you avoid detailed regulatory specification of program content also. First, entertainment content is a different category of speech than commercial, and thus may raise stronger First Amendment concerns (although the need to protect children would remain a strong counter argument which could probably justify general guidelines at least). Second, such regulations would involve the Commission in constant hassles reviewing program content. The kind of problems the courts have had defining "obscenity" would be transferred to the Commission in attempting to define "violence", for example. Third, application of detailed standards to children could become the "camel's nose under the tent" for other program categories as well. Although the Commission thought its application of the fairness doctrine in the cigarette ruling was "unique", others succeeded in applying it to other product commercials opening a real pandora's box for the FCC. Commission decisions of such scope and magniture frequently obtain a life of their own and have subsequent impact in expanding governmental involvement in content not perceived or intended when adopted.