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Welcome to the 21st Century Classroom - Your Living Room: The FCC Requires Three Hours of Children's Educational and Informational Programming

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WELCOME TO THE 21ST CENTURY CLASSROOM—YOUR LIVING ROOM: THE FCC REQUIRES THREE HOURS OF CHILDREN’S EDUCATIONAL AND INFORMATIONAL PROGRAMMING

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I. INTRODUCTION

“IF we are to blame *Sesame Street* for anything, it is for the pretense that it is any ally of the classroom As a television show, and a good one, *Sesame Street* does not encourage children to love school or anything about school. It encourages them to love television.”¹

American children between two and seventeen years old watch more than three hours of television a day.² Estimates show that by the time a person is eighteen years old, he will have watched between 15,000 and 20,000 hours of television in his lifetime, but will have spent only 13,000 hours in the classroom.³ In August of 1996, the Federal Communications Commission (FCC) unanimously approved turning the living room into a second classroom.

1. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 144 (1985).

2. *See In re Policies and Rules Concerning Children's Television Programming*, 10 F.C.C.R. 6308, 6312 (1995) [hereinafter *Policies and Rules*].

3. *See id.* at 6312-13.

As of September 1, 1997, broadcast licensees are required to show at least three hours of educational and informational programs for children in order to guarantee license renewal.⁴ "This is the first time in history that the FCC has had a rule that actually requires a specific, quantified amount of anything."⁵ The new rules serve multiple purposes. First, they reinforce the public interest requirement: broadcasters must show matters of public interest in return for free use of the scarce airwaves. Second, these rules symbolize the concerns of parents, politicians, and broadcasters for the future of our children. Third, three hours that would normally be filled with "non-educational television" (entertainment?) will now be filled with child-friendly programs. Finally, these rules will hopefully result in a marketplace filled with quality children's programs, thus giving children the opportunity to become educated and informed by watching television.

Numerous studies support the thesis that educational television can benefit a child's development.⁶ For the purpose of this Comment, these studies will not be challenged; "whether or not *Sesame Street* teaches children their letters and numbers is entirely irrelevant."⁷ This Comment will argue that for all of the good intentions and possible educational benefits of the FCC rules, the consequences could be drastic should the rules achieve their desired effect. Instead of turning to their teachers or books, children will be turning on the "boob tube" for educational stimulation.⁸

Part II examines the Children's Television Act of 1990 (CTA), which was passed by Congress after traveling down a long and tortuous road. The CTA served notice to broadcasters that educational and informational television for children should be a priority. This Part ends with a summary of some of the problems with the CTA. Part III then looks at the FCC's response to the ineffectiveness of the CTA: a revitalized FCC proposed changes to the CTA, then took part in a summit that produced new rules for children's programming. In Part IV, the new rules passed by the FCC in August of 1996 are examined. Part V asks whether broadcasters will challenge the new rules. This Part examines the constitutional issues to be raised by broadcasters, should the matter go to court, and the subsequent responses by the FCC. This Part ends with the conclusion that the regulations would be upheld in court if challenged. Part VI ana-

4. See 61 Fed. Reg. 43,988 (1996).

5. *Family Values: FCC Chairman Discusses New Children's TV Education Mandates* (CNN television broadcast, Sept. 2, 1997).

6. See, e.g., BRIAN R. CLIFFORD ET AL., *TELEVISION AND CHILDREN: PROGRAM EVALUATION, COMPREHENSION, AND IMPACT* 91 (1995) ("This is one area of programming that clearly shows that children undoubtedly can learn from television.").

7. POSTMAN, *supra* note 1, at 144.

8. I shall assume that the desired effect of the FCC rules is to get children to watch more educational programs and less non-educational TV. As this Comment will explore, there is a question as to whether the FCC has or should have authority to effect the education of our children. Also, the "real" desired effect may have nothing to do with promoting children's television. Instead, the desired effect of these rules could simply be to punish broadcasters for all of the "bad" shows they aired during the Reagan years—a time when the FCC was not regulating broadcasters as much.

lyzes the new broadcast requirements and concludes that they will not present any more compliance problems to broadcasters than the CTA did. Part VII questions the potential effects of the regulations. While the FCC might think it is doing parents and children a favor by filling the market with better children's shows, it could be doing irreversible harm to our school systems. Finally, Part VIII offers a different approach to getting broadcasters involved in the educational process.

II. THE CHILDREN'S TELEVISION ACT OF 1990: THE FIRST STEP TOWARDS IMPROVING CHILDREN'S PROGRAMMING

With the passage of the Children's Television Act of 1990,⁹ Congress recognized for the first time that children are a special audience with special needs.¹⁰ Enacting a bill designed to regulate and improve children's programs proved to be tougher than expected. Once enacted, the bill did not produce the beneficial aspects for which its supporters had hoped.

A. THE ROAD TO CONGRESSIONAL ACTION

In 1974, the FCC published the *Children's Television Report and Policy Statement*,¹¹ which not only limited the number of commercials during children's programs, but also sought to impose standards for the quality of the programs.¹² The Reagan-appointed Commission of the early 1980s began to dilute the *1974 Policy*.¹³ By 1984, the FCC abandoned its policy regarding the amount of commercials run during children's programs.¹⁴ In its place, the FCC, led by Mark Fowler, turned children's television over to market forces.¹⁵

Children's television quickly became one giant commercial. The programs themselves featured toy manufacturers' latest creations as the stars.¹⁶ During these shows, the number of commercials doubled from what they were under the *1974 Policy*.¹⁷ Eighty percent of these commer-

9. Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303c (1994)).

10. See NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 10 (1995).

11. 50 F.C.C.2d 1 [hereinafter *1974 Policy*].

12. See *id.* Broadcasters could run 9.5 minutes of commercials per hour on Saturday and Sunday mornings and 12 minutes per hour at all other times.

13. See Patricia Aufderheide, *Reregulating Children's TV*, 42 *FED. COM. L.J.* 87, 93 (1989).

14. See *In re Children's Television Programming and Adver. Practices*, 96 F.C.C.2d 634 (1983). In fact, two years earlier, the District Court for the District of Columbia held the limitation on commercials to be in violation of the Sherman Antitrust Act. See *United States v. National Ass'n of Broad.*, 553 F. Supp. 621 (D.D.C. 1982). Nevertheless, the FCC did not abandon the policy until 1984.

15. See MINOW & LAMAY, *supra* note 10, at 20.

16. See *id.* at 54. *He-Man and the Masters of the Universe*, *Thundercats*, *Gobots*, *Transformers*, *GI Joe: A Real American Hero*, and other similar programs dominated children's television at this time. See *id.*

17. See *id.*

cials advertised "toys, cereals, candy, and fast-food restaurants."¹⁸

While the quality of children's programs dropped, so too did the number of shows designed for kids.¹⁹ The number of hours of children's television fell from eleven hours a week to four-and-a-half hours a week after Ronald Reagan took over the Oval Office and began appointing commissioners to the FCC.²⁰ Congress took note of the situation and attempted to pass legislation as early as 1983 that would require broadcasters to air educational programs aimed at children.²¹

Broadcasters made two arguments against this first attempt at the CTA. First, they argued it was not their fault that the availability and quality of children's shows plummeted to all-time lows. Instead, market pressures forced them to compete for valuable advertising dollars.²² Children simply do not constitute a large portion of the viewers that are attractive to advertisers, so not many shows were targeted at them.²³ Second, they argued that "[t]he nation's broadcasters do not need the government to be their programming partner."²⁴ The broadcasters cloaked themselves in the First Amendment rather than taking responsibility for the decline in children's programs.

Congress tried to pass the CTA again in 1988, only to have President Reagan veto it.²⁵ He too used the First Amendment and market force arguments in rejecting regulation of children's television.²⁶ Congress finally passed the CTA in 1990. However, it did so by overriding President George Bush's veto.²⁷ Apparently, public frustration reached such a fever pitch that Congressmen had to respond to their constituents' displeasure with the state of children's television by overriding the veto.

B. THE CHILDREN'S TELEVISION ACT OF 1990: CONGRESS HITS BROADCASTERS WITH KID GLOVES

Congress enacted the CTA with two goals in mind: (1) reinstating the commercial restrictions of the *1974 Policy*; and (2) tying a broadcaster's license renewal to the quality of its children's programs. These goals were based in part on findings that state:

18. *Id.*

19. See Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters*, 45 DUKE L.J. 1089, 1110 (1996).

20. See MINOW & LAMAY, *supra* note 10, at 52.

21. See *id.* at 21.

22. See Reed Hundt & Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 15 (1996).

23. See *id.* Of course, the shows that were aimed at kids blatantly tried to sell them toys for thirty minutes, to the point of exploitation. See MINOW & LAMAY, *supra* note 10, at 21.

24. MINOW & LAMAY, *supra* note 10, at 21-22 (quoting John Abel, Senior Vice President for Research for the National Association of Broadcasters).

25. See *id.* at 21.

26. See *id.*

27. See *id.* President Bush invoked the same arguments made by his predecessor.

(1) it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them . . . ; (2) as part of their obligation to serve the public interest, television operators and licensees should provide programming that serves the special needs of children . . . ; [3] special safeguards are appropriate to protect children from overcommercialization on television.²⁸

Section 102(b) resurrected the commercial limitations of the *1974 Policy* that had been abandoned in 1984.²⁹ Broadcasters can run commercials during children's programs for no more than 10.5 minutes per hour on weekends and up to twelve minutes per hour during the week.³⁰

More important to the advocates of children's television regulation was the focus on better "quality" programs for kids.³¹ The CTA attempted in section 303b(a)(2) to remedy the lack of educational shows on television by hinging the broadcaster's license renewal on its ability to "serve[] the educational and informational needs of children."³² The FCC purported to consider compliance with the CTA as a factor in the renewal process. Licensees would have to comply with both the commercial restrictions and the quality of programming mandates aimed at serving children's needs.³³ Congress also authorized the FCC to consider in the renewal process "any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children"³⁴ and "any special efforts" made by the licensee and designed to serve children's needs.³⁵

C. THE ACT IN ACTION

The CTA "was hardly a great triumph."³⁶ Harry Geller, one of the drafters of the CTA, acknowledged the Act to be a "stopgap" measure, "insufficient in the battle against market forces."³⁷ Immediate concerns following the enactment of the CTA involved what "educational" actually meant, when these children's programs should be aired, and how much children's programming satisfied the licensee's renewal obligations.

The CTA provided no definition of "educational" or "informational." In order to serve the educational needs of children, a television station owner in New Orleans claimed the *G.I. Joe* cartoon was educational because it presented "[i]ssues of social consciousness and responsibility."³⁸

28. 47 U.S.C. § 303a(d) (1994).

29. See *supra* notes 9-11 and accompanying text for the effects of the abandonment.

30. See 47 U.S.C. § 303a(b).

31. See Aufderheide, *supra* note 13, at 99.

32. 47 U.S.C. § 303b(a)(2).

33. See *id.*

34. *Id.* § 303b(b)(1).

35. See *id.* § 303b(b)(2).

36. MINOW & LAMAY, *supra* note 10, at 55.

37. See *id.*

38. Diane A. Hayes, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COM. L.J. 293, 306 (1994).

The CTA encountered similar opposition from station owners everywhere.³⁹ Nowhere in the language of the CTA did it say that the programs had to give a lesson on nuclear fission. It simply stated that educational and informational programs must be shown.

Another problem centered on when exactly these programs should air. A study by the Center for Media Education revealed that nearly sixty percent of the educational shows for children were shown between 5:30 a.m. and 7:00 a.m.⁴⁰ Licensees appeared to have authority to show children's shows at a time when children were not watching television.⁴¹ This worked for broadcasters because in a market-driven system, the station owner would be best served if he let the least profitable shows kill off the least profitable time slots.⁴²

Finally, the CTA did not specify a minimum number of hours of children's programming that needed to be shown in order to satisfy license renewal requirements. It could be expected, therefore, that broadcasters would show a minimal amount of children's programming and use ignorance as an excuse when complaints were lodged against them. Add to that internal disputes among FCC commissioners as to what amount of educational programming would satisfy the CTA,⁴³ and the CTA was sapped of what little strength it had. The FCC wound up granting the renewal of licenses if the broadcaster showed thirty minutes a week or more of educational programming.⁴⁴

The CTA took "a small step in the right direction."⁴⁵ Nevertheless, there were loopholes that advocates of children's programming wanted closed.⁴⁶ The election of Bill Clinton as President of the United States, and his subsequent appointments to the Commission, signaled an end to the freedoms broadcasters had been given by the Reagan-Bush appointees, giving hope to advocates who wanted to see better children's shows.⁴⁷ Reed Hundt, the FCC Chairman appointed by President Clinton in 1993, planned on using his position to "goad broadcasters into improving TV."⁴⁸ Hundt specifically wanted to give the CTA some muscle in the hopes that the educational and informational needs of children

39. See *id.* at 306-08 (listing shows that were supposedly educational).

40. See *id.* at 306.

41. See MINOW & LAMAY, *supra* note 10, at 55.

42. Children's television advocates would argue that these shows were not profitable because they were shown at these times. If educational programs were shown in better time slots, the argument goes, then children would be more likely to watch, thus creating a large viewing audience attractive to advertisers.

43. See Hundt, *supra* note 19, at 1111-12.

44. See *id.* at 1112.

45. MINOW & LAMAY, *supra* note 10, at 10.

46. See Peggy Charen, *Victory at Last*, BROADCASTING & CABLE, Aug. 12, 1996, at 20.

47. During the 1980s, broadcasters were on their way to the full First Amendment protections afforded to the print media, highlighted by the repeal of the Fairness Doctrine in 1987. See Harry A. Jessell, *The Fall of the First*, BROADCASTING & CABLE, Aug. 12, 1996, at 12.

48. *Id.*

would be quantifiably served.⁴⁹

III. TIME TO RETHINK AND RETOOL THE CHILDREN'S TELEVISION ACT OF 1990

A. THE FCC "HUNDTS" FOR A SOLUTION

1. *Early Signs of a Change in Direction*

As new Chairman Reed Hundt stated in early 1996, "The time is ripe to question the public's 'deal' with the broadcasters and ask if a new scheme is required for the digital future."⁵⁰ The new Commission had already prepared a notice in April of 1995, which included many proposals intended to strengthen the CTA.⁵¹ Included in these were proposals improving the public's access to broadcaster's records regarding children's shows,⁵² defining what constitutes educational and informational shows,⁵³ and setting a minimum number of hours of children's programming that broadcasters must show to comply with the CTA.⁵⁴

2. *The Supreme Court's Inaction Spurs Action by the FCC*

In the eyes of Reed Hundt, the Supreme Court's decision not to grant certiorari in *Action for Children's Television v. Federal Communications Commission*⁵⁵ cleared the way for his proposal that broadcasters be required to show a minimum of three hours of educational television a week.⁵⁶ In *Action for Children's Television v. Federal Communications Commission (ACT III)*,⁵⁷ the Court of Appeals for the District of Columbia upheld FCC regulations that required the channeling of indecent broadcasts, allowing them only to be shown between 10:00 p.m. and 6:00 a.m.⁵⁸ Chairman Hundt felt that because the Supreme Court allowed kids to be protected from indecent programs, the decision indicated that "you can certainly take steps to promote educational TV."⁵⁹

Specifically, the court in *ACT III* held that the government has a compelling interest in protecting children from indecent programs⁶⁰ and that the FCC regulations satisfied the "least restrictive means" requirement for doing so.⁶¹ By agreeing that the FCC adopted the "least restrictive

49. See Hundt & Kornbluh, *supra* note 22, at 11-12.

50. *Id.* at 16.

51. Policies and Rules, 10 F.C.C.R. at 6308. Broadcasters had all but ignored the CTA until the FCC indicated that it was serious about children's programming. See MINOW & LAMAY, *supra* note 10, at 10-11.

52. See Policies and Rules, 10 F.C.C.R. at 6310.

53. See *id.* at 6311.

54. See *id.*

55. 116 S. Ct. 701 (1996).

56. See Christopher Stern, *Supreme Court Leaves Indecency Safe Harbor Intact*, BROADCASTING & CABLE, Jan. 15, 1996, at 10.

57. 58 F.3d 654 (D.C. Cir. 1995).

58. See *id.* at 656.

59. Stern, *supra* note 56, at 10.

60. See *ACT III*, 58 F.3d at 661.

61. See *id.* at 667.

means" to protect children, the court upheld the definition of children, which included anyone seventeen and under, and also permitted a safe harbor for showing indecent programs.⁶² Broadcasters may show indecent shows between 10:00 p.m. and 6:00 a.m.—hours children are not likely to be watching television.⁶³

While Hundt seemed optimistic about the possibility of setting a three hour requirement for children's programming, others felt that there were no legal grounds for believing that approval of indecency regulation would necessarily support Hundt's proposal.⁶⁴ Timothy Dyk, a First Amendment lawyer, stated, "It's pretty clear that the decision [denying certiorari to *ACT III*] does not tell us what the law is in other areas of regulation."⁶⁵

B. LET'S MAKE A DEAL

Summer 1996. The presidential campaign is in full force. In what appears to be election-year politics, President Clinton met with broadcasters, children's television advocates, FCC officials, and various other politicians in an attempt to push through Reed Hundt's proposal for improving children's television.⁶⁶

The process took off in March of 1996 when Ralph Gabbard, president of Gray Communications Systems, sent the FCC a proposal for new rules that included quantitative requirements for children's programming.⁶⁷ Gabbard, taking a position contrary to most other broadcasters, sent another proposal to Reed Hundt on July 24 in hopes of "bridging the gap" between the parties involved.⁶⁸ Gabbard based his proposal upon the proposed rules set forth by Hundt and fellow commissioner Susan Ness in April 1995, but Gabbard's version was more "broadcaster friendly" as it allowed for more flexibility in program selection.⁶⁹ This exchange set the wheels in motion for a summit on children's television at the White House.⁷⁰

The parties to the summit went through marathon negotiations in hopes of striking a deal that satisfied the FCC, broadcasters, and proponents of quality children's shows.⁷¹ The parties finally struck a deal and sent it to the FCC for approval on July 29, 1996.⁷² According to President

62. *See id.* at 665.

63. *See id.*

64. *See* Stern, *supra* note 56, at 10.

65. *Id.*

66. *See* Chris McConnell, *Burning the Midnight Oil Over Kids TV*, BROADCASTING & CABLE, Aug. 5, 1996, at 8.

67. *See* Chris McConnell, *For Ralph Gabbard, Compromise Was Key*, BROADCASTING & CABLE, Aug. 5, 1996, at 9.

68. *See id.*

69. *See id.*

70. *See* McConnell, *supra* note 66, at 9.

71. *See id.*

72. *See* Chris McConnell, *Kids TV Accord Reached*, BROADCASTING & CABLE, Aug. 5, 1996, at 5.

Clinton, "this proposal fulfills the promise of the Children's Television Act—that television should serve the educational and informational needs of our young people, I urge the FCC to adopt this proposal."⁷³ The FCC approved the regulations by a unanimous vote on August 8, 1996,⁷⁴ and the regulations went into effect on September 1, 1997.⁷⁵

IV. THE FCC TELLS BROADCASTERS HOW TO GET TO SESAME STREET, OR AT LEAST THE BROADCASTING EQUIVALENT

A. AN INTRODUCTION TO THE NEW RULES

Obviously thrilled with the new regulations, Chairman Hundt proclaimed, "[f]or the first time, we'll have an ongoing dialogue on children's TV."⁷⁶ Fellow commissioner Susan Ness added that, "[t]oday's ruling reinvigorates [the] public interest compact" between society and broadcasters.⁷⁷ By implementing the new rules, the FCC "[took] action to strengthen its enforcement of the Children's Television Act of 1990."⁷⁸ As with the CTA, these rules focus on requiring broadcasters to satisfy the needs of children in order to have their licenses renewed. The CTA did not tell the licensee what specific actions were required in the area of children's broadcasting; the new rules make it much clearer. Nevertheless, for a more complete understanding of the importance of these new regulations, an in-depth analysis of them is required.

B. MEET THE REQUIREMENTS: IT'S NOT A NEW SHOW, IT'S WHAT BROADCASTERS MUST DO TO KEEP THEIR LICENSES

The new rules purport to modify and refine the CTA in the following three key areas. First, the new rules will allow the public to become better informed about the shows licensees choose to fulfill their requirement of serving the educational and informational needs of children.⁷⁹ Next, the new rules define what constitutes a program that is "specifically designed" to educate and inform children" so that licensees will know which types of programs satisfy the licensing requirements.⁸⁰ These shows make up what is known as "core programming."⁸¹ Finally, the new rules contain a processing guideline that sets the minimum requirement at three hours per week of children's programming.⁸² However, the FCC

73. *Id.*

74. See Chris McConnell, *Law of the Land: Three Hours of Kids TV*, BROADCASTING & CABLE, Aug. 12, 1996, at 11.

75. See 47 C.F.R. § 73.671 (1996).

76. Jane Hall, *Differing on Lesson Plan for Kids' TV*, L.A. TIMES, Aug. 15, 1996, at F1.

77. McConnell, *supra* note 74, at 11. The compact exists because of the broadcasters free "use of valuable public airwaves." *Id.*

78. 61 Fed. Reg. 43,981 (1996).

79. See *id.* at 43,982.

80. See *id.* This provision of the new rules does what section 303b of the CTA did not; it removes the possibility that a *G.I. Joe* cartoon can qualify as an educational program.

81. 61 Fed. Reg. at 43,982.

82. See *id.* at 43,988.

also established procedures that may allow a broadcaster who does not comply with the three-hour requirement to still have its license renewed.⁸³

1. *Public Information Initiatives*

This section of the new rules is designed to enhance "parents' knowledge of children's educational programming."⁸⁴ This was the first provision of the new rules to go into effect on January 2, 1997. Under this rule, broadcasters must now identify core programs at the beginning of each program.⁸⁵ Broadcasters are free to choose any method of identification that they wish.⁸⁶

Broadcasters must also prepare children's programming reports quarterly, filing them with the FCC at the end of the year for the next three years.⁸⁷ The first reports are due on January 10, 1998.⁸⁸ The licensee must keep these reports separate from other reports that it makes so that the public can easily inspect them.⁸⁹ In the reports, the broadcaster must give a brief explanation of how each program meets the definition of core programming.⁹⁰

2. *Definition of Programming "Specifically Designed" to Serve Children's Educational and Informational Needs*⁹¹

"[E]ducational and informational television programming is any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs."⁹² The new regulations further delineate six additional criteria that must be met beginning September 1, 1997, in order for a show to qualify as core programming.

a. *Significant Purpose*

The significant purpose of the program must be to further the educational and informational needs of children sixteen years old and under.⁹³ The show must be specifically designed to serve these needs. An entertainment show with a "wrap-around" message does not qualify as serving the significant purpose.⁹⁴ Most important for broadcasters, the FCC

83. *See id.*

84. *Id.* at 43,983.

85. *See* McConnell, *supra* note 74, at 11.

86. *See* 61 Fed. Reg. at 43,983.

87. *See id.* at 43,984.

88. *See* McConnell, *supra* note 74, at 11. The FCC will provide standardized reporting forms.

89. *See* 61 Fed. Reg. at 43,984.

90. *See id.*

91. *See id.* at 43,985.

92. 47 C.F.R. § 73.671.

93. *See* 61 Fed. Reg. at 43,985.

94. *See id.* "Wrap-around" messages are those messages put at the beginning or ending of a show in an attempt to serve an educational or informational need. *See id.*

will rely on the good faith judgment of the broadcasters in determining whether the significant purpose of the program is to serve educational and informational needs.⁹⁵

b. Educational and Informational Objective and Target Child Audience Specified in Writing

The FCC requires licensees to put in writing the educational and informational objectives that they believe each core program meets.⁹⁶ Through enactment of this requirement, the FCC hopes to encourage broadcasters to devote more attention to the quality of their children's programming.⁹⁷

c. Times Core Programming May Be Aired

Broadcasters must air their core programs between 7:00 a.m. and 10:00 p.m. in order to count them towards the three hour requirement.⁹⁸ The FCC reached this determination using studies that looked at children's television viewing patterns. For example, there are four times as many young children watching television at 7:00 a.m. than at 6:00 a.m.⁹⁹

d. Regularly Scheduled

A core program must be aired regularly to qualify, which means, at the least, on a weekly basis.¹⁰⁰ Airing a core program at least once a week allows the show to develop a loyal audience and better reinforces educational themes.¹⁰¹ Also, weekly shows can be anticipated and more easily located by children.¹⁰² Non-weekly specials like ABC's *Afterschool Specials* will not count toward meeting the minimum number of hours.¹⁰³

e. Substantial Length

A core program must be "at least 30 minutes in length."¹⁰⁴ The FCC explains that since the dominant programming format is divided into thirty-minute segments, the thirty-minute requirement should not burden the broadcaster.¹⁰⁵ A thirty-minute show tends to allow more educa-

95. *See id.* The FCC will rely on public oversight in making sure broadcasters comply. *See id.*

96. *See id.* at 43,986.

97. *See id.*

98. *See* 47 C.F.R. § 73.671(c)(2). The FCC states that the children's programming viewing hours do not need to be consistent with the indecency safe harbor. *See* 61 Fed. Reg. 43,987. The indecency safe harbor is between 10:00 p.m. and 6:00 a.m. *See ACT III*, 58 F.3d at 665.

99. *See* 61 Fed. Reg. at 43,986.

100. *See id.* at 43,987.

101. *See id.*

102. *See id.*

103. *See id.*

104. 47 C.F.R. § 73.671(c)(4).

105. 61 Fed. Reg. at 43,987.

tional and informational messages to be presented.¹⁰⁶ The FCC does not believe that children's short attention spans will detract from the benefits of a thirty-minute core program.¹⁰⁷

f. Identified as Educational and Informational

As mentioned earlier, a program must be identified at its beginning as a core program. This requirement will not only make the public more aware of what is a core program, it will make broadcasters more accountable for their choice of educational and informational shows.¹⁰⁸

3. Processing Guidelines

These guidelines answer the question broadcasters most frequently ask: how do I keep my license? A broadcaster has two options for complying with the new rules when renewing its license: (1) it may check a box on the renewal application indicating that it has aired three hours of core programming, and provide appropriate information substantiating such compliance; or (2) in the event that the broadcaster does not air three hours of core programming, it may show that it has aired a package of programs that demonstrate a commitment to educational and informational programming.¹⁰⁹

"Broadcasters not meeting either option can still make a case for license renewal to the full commission."¹¹⁰ A broadcaster can still keep its license if it can convince the FCC of its commitment to children's programming. This could be demonstrated by sponsoring core programs on other local stations or taking part in non-broadcast efforts to serve children's educational and informational needs.¹¹¹ The FCC believes that three hours a week is reasonable and that the new guidelines offer more clarity than the CTA.¹¹²

V. THE FCC PLEASES PARENTS AND POLITICIANS, BUT CAN IT PLEASE THE UNITED STATES SUPREME COURT?

In the eyes of a cynic, the adoption of the children's programming requirements could be viewed as "a savvy political move in an election year," but it could also be seen as a "justified response to a public that was mad as hell and wasn't going to take it anymore."¹¹³ Whatever the real reason for the adoption of the new rules (e.g., to win an election, to

106. Compare this to the 60-second public service announcements placed in between shows, or the popular *Schoolhouse Rock* cartoon featured on ABC, which lasts a few minutes.

107. See 61 Fed. Reg. at 43,987.

108. See *id.* at 43,988.

109. See *id.*

110. McConnell, *supra* note 74, at 11.

111. See 61 Fed. Reg. at 43,988.

112. See *id.* at 43,988-89.

113. Daniel S. Moore, *Scrambling for FCC Approval*, VARIETY, Dec. 9-15, 1996, at 45.

help kids get smarter, or to penalize broadcasters for not serving the public interest), the debate may ultimately shift to whether or not the rules can survive a challenge in court.¹¹⁴

A. NOW BATTING FOR THE BROADCASTERS . . .

Before the new rules can be reviewed by the District Court of the District of Columbia, or by the Supreme Court for that matter, some broadcaster must first challenge them. During the summit meeting, the National Association of Broadcasters agreed not to challenge the new regulations in court if the FCC adopted rules that offered broadcasters some flexibility.¹¹⁵ Therefore, a challenge looks unlikely. Several other factors, besides not wanting to go back on their word, could also persuade broadcasters to leave these rules unchallenged.

"I don't want to be fighting kids," said Ralph Gabbard, who helped draft the new rules.¹¹⁶ Other broadcasters echoed the same sentiments.¹¹⁷ "[K]ids are right up there with God, mother, and apple pie."¹¹⁸ Even if broadcasters think that the rules make for bad policy, they would face an uphill battle in the public relations arena by challenging rules meant to benefit children.¹¹⁹ There would not be much sympathy for a licensee challenging these rules, even if he cried that his First Amendment rights were being violated. Besides not wanting to fight kids in court, broadcasters also have other considerations that may determine whether or not they challenge the rules. They might accept these rules as a *quid pro quo*. "By acquiescing on the content issue, they know they get other things from the government."¹²⁰

Broadcasters want a second channel for high density television (HDTV) free of charge. They want must-carry rules,¹²¹ easy license renewal, and limits on competition for their licenses.¹²² As long as broadcasters are kept happy on other fronts, they might be willing to go

114. Reed Hundt feels this is an open and shut case for the courts. "It is constitutional to mandate that a reasonable amount of time on the public airwaves be used to provide education for our children." Hundt, *supra* note 19, at 1117.

115. See McConnell, *supra* note 66, at 9. Although the regulations were adopted in a form that appears to give broadcasters flexibility, a challenge may occur depending on how they are applied.

116. McConnell, *supra* note 67, at 9.

117. See *id.*

118. Jessell, *supra* note 47, at 13.

119. See *id.*

120. *Id.*

121. See *id.* Must-carry rules refer to rules requiring local cable systems to carry broadcast signals. The Supreme Court decided the standard of review for the regulations in *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 662 (1994) [hereinafter *Turner I*], and then remanded the case for application of the standard. Recently, the Supreme Court ruled that the must carry rules are constitutionally permissible. See *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 117 S. Ct. 1174 (1997) [hereinafter *Turner II*].

122. CBS agreed to the new children's regulations in return for approval of its \$5.4 billion sale to Westinghouse. See Brian Lowry, *Year in Review/1996*, L.A. TIMES, Dec. 29, 1996, at 3.

peacefully along with the new rules. However, broadcasting is a business, and if these rules affect the bottom line, a challenge might follow.¹²³

B. THE FCC WON THE BATTLE, BUT CAN IT WIN THE WAR?

Early reports indicate that not all broadcasters are pleased with the rules. A study by the National Association of Television Program Executives claims that fifty-six percent of the station representatives surveyed believe that the new rules are in violation of their First Amendment rights.¹²⁴ Because broadcasters fear that future regulations might either dictate what specific programs they should air or require a specific number of hours of another type of programming, broadcasters may move to challenge the current rules before the dam breaks.¹²⁵

If broadcasters had their way, they could challenge the rules as "just another arbitrary, paternalistic, big-government standard."¹²⁶ However, that argument might not work in court. Instead, they will have to turn to the Constitution.

In her dissenting opinion in *Turner I*, the case in which cable operators challenged FCC regulations requiring them to carry broadcast stations, Justice O'Connor questioned the very issue at hand: can children's programming requirements, aimed at educating and informing children, withstand a constitutional challenge should some broadcaster come forward?¹²⁷ The following is a discussion of the major issues that the courts, the FCC, and broadcasters will be forced to deal with should a challenge ensue.

1. *Are Broadcasters Content With Content Regulation?*

The first challenge may be on grounds that these regulations unconstitutionally regulate content.

a. Choosing the Standard of Review

The level of scrutiny that courts will use to review broadcast regulations depends on whether the regulations are content-neutral or content-based. Content-neutral regulations "confer benefits or impose burdens on speech *without* reference to the ideas expressed . . ."¹²⁸ On the other

123. See Jessell, *supra* note 47, at 13.

124. See Steve Brennan, *NATPE Study Unearths a Rift Regarding Kids TV*, HOLLYWOOD REPORTER, Nov. 8, 1996, at 6.

125. Reed Hundt has indicated that the children's programming regulations may just be the first of several rules to reinforce the "public interest" compact between broadcasters and society. See Jessell, *supra* note 47, at 12.

126. Wayne Leighton, *Leave it to Beaver? No, Leave it to the Government*, U.S. NEWSWIRE, Sept. 5, 1996.

127. "The interests in public affairs programming and educational programming seem somewhat weightier [than local news], though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech. We have never held that the Government could impose educational content requirements on, say, newsstands, bookstores, or movie theaters . . ." *Turner I*, 512 U.S. at 681 (O'Connor, J., dissenting).

128. *Id.* at 643 (emphasis added).

hand, content-based regulations treat speech differently based on the views and ideas expressed.¹²⁹

If regulations are deemed content-neutral, they will be upheld if: (1) the government is within its constitutional power; (2) the regulations further an important or substantial governmental interest; (3) the interest does not relate to the suppression of free speech or expression; and (4) any restriction on alleged First Amendment freedoms does not exceed what is necessary to further the important interest.¹³⁰ The regulations need not be the least restrictive means for advancing the interest.¹³¹

In contrast, content-based regulations will be upheld only after the most exacting degree of scrutiny has been applied to them.¹³² The regulations must "promote a compelling interest" and must be the "least restrictive means to further the articulated interest" in order to avoid a First Amendment violation.¹³³

To determine which standard would apply to the children's programming regulations, the courts would have to decide whether the FCC adopted the regulations because it agrees with the message conveyed by the speech in question.¹³⁴ Broadcasters can make a strong argument that the FCC simply favors educational and informational television over the programs broadcasters have been targeting for kids (i.e., violent cartoons that are extended commercials). As the Court has held, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to" strict scrutiny.¹³⁵

The FCC may cite *Turner I* for the proposition that regulations are content-neutral if they still leave the broadcaster with the ultimate discretion on specific programming choices.¹³⁶ If that is the case, then perhaps the children's programming requirements should be reviewed under the less stringent content-neutral standard. After all, the FCC is not telling broadcasters to show a particular program. The FCC is merely requiring broadcasters to air programs that are educational and informational because of the public interest requirements. The broadcaster retains the ultimate right to choose shows to satisfy this requirement.

Unfortunately for the FCC, *Turner I* turned in part on the fact that the cable must-carry rules do not impose any sort of requirement on the types of stations or programs the cable operator decides to carry.¹³⁷

129. *See id.*

130. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

131. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1988).

132. *See Turner I*, 512 U.S. at 642.

133. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989).

134. *See Turner I*, 512 U.S. at 642.

135. *Id.*

136. *See id.* at 643-44. In *Turner I*, the Court held that laws requiring cable programmers to carry broadcast stations were content-neutral because the statute did not favor any particular speech. Instead, the law was enacted to maintain access to free television for the 40% of Americans without cable. *See id.* at 646.

137. *See id.* at 644.

Cable operators need to carry a minimum number of broadcast channels, regardless of type (e.g., religious, independent, network affiliate) or programming.¹³⁸ In contrast, licensees must show a minimum of three hours of children's programming that are designed to educate and inform children. A broadcaster who does not meet the children's programming requirements¹³⁹ can be penalized with the loss of its license. Further, the must-carry rules were not enacted "to favor programming of a particular subject matter . . ."¹⁴⁰ There is no question that the children's programming rules favor certain types of programming over others. As a result, the new regulation will be analyzed under strict scrutiny.

b. Applying Strict Scrutiny

The first prong of the strict scrutiny test requires the FCC to prove that the regulations promote a compelling interest.¹⁴¹ The compelling interest served by the three-hour core programming requirement is identified by the FCC as "helping to educate and inform our children" so that society benefits in the long run.¹⁴²

The Supreme Court has continually found a compelling interest when it comes to helping children. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling."¹⁴³ The Court has upheld statutes and regulations meant to "protect the welfare of children."¹⁴⁴ These include regulations limiting indecency on the radio¹⁴⁵ and banning the sale of pornographic magazines to anyone under seventeen years old.¹⁴⁶ However, these cases involved upholding measures that *shield* children from certain things. The new FCC rules will do the opposite. They will require that core programs be *supplied* to children for at least three hours a week on each broadcast station.

Regardless of how the FCC goes about helping children, whether by keeping "bad" things away from them or by supplying them with "good" things, the fundamental interest in the well-being of our children "justif[ies] special treatment" of broadcast laws and regulations by the

138. *See id.*

139. The show must be specifically designed to satisfy the intellectual/cognitive or social/emotional needs of the child. *See* 61 Fed. Reg. 43,985 (1996).

140. *Turner I*, 512 U.S. at 646.

141. *See Sable*, 492 U.S. at 126.

142. *See* 61 Fed. Reg. at 43,982. As stated by the Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . ." The means to achieve this goal are laid out in the section of the rules that defines a core program.

143. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

144. *Turner I*, 512 U.S. at 640 (quoting *Prince*, 321 U.S. at 165).

145. *See Federal Communications Comm'n v. Pacifica*, 438 U.S. 726 (1978). In this case, the Supreme Court upheld regulations that limited the use of the "seven dirty words."

146. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

courts.¹⁴⁷ No court will hold that these regulations do not serve a compelling interest.

Having shown a compelling interest, the FCC must show that it has satisfied this interest in the least restrictive manner. The FCC requires that core programs be shown between 7:00 a.m. and 10:00 p.m. and be aimed at children under the age of sixteen years old.¹⁴⁸ This flexibility will more than likely satisfy the least restrictive means requirement in light of the decision in *ACT III*.¹⁴⁹ In that case, the D.C. Circuit approved a safe harbor period for the broadcasting of indecent programming, running from 10:00 p.m. to 6:00 a.m. daily.¹⁵⁰ Based on this decision, there is no reason to think that the time constraints for airing children's programming would be deemed too restrictive. The FCC should have no problem defending against a claim that the rules unconstitutionally regulate on the basis of content. As a matter of policy, however, a problem may arise if the compelling interest in helping children is merely a disguise for some other agenda.

FCC Chairman Reed Hundt has announced that the children's programming regulations might be the first of many regulations aimed at broadcasters.¹⁵¹ Hundt wants to do more than just give kids more educational and informational television; he wants to improve television as a whole.¹⁵² To begin this new era of better television, the FCC has strategically chosen children's regulations as the starting point for the war against broadcasters. Since it believes that no broadcaster will challenge the rules, and feels confident that no court would strike the rules down if the rules are challenged, the FCC is using children as political pawns. Hundt probably knows that the health and safety of children is a compelling interest. It is also a sure way to gain support for television regulations. While the FCC may succeed in this, its first attempt at reinvigorating the public interest compact—picking regulations that are aimed at helping children to launch a broader attack—can be a dangerous proposition. The danger, to be explored later, is the effect of the rules on our school system.

2. *The Public Interest*

The children's programming regulations hang on the 1969 Supreme Court decision in *Red Lion Broadcasting Co. v. Federal Communications Commission*.¹⁵³ The Supreme Court explained in *Red Lion* that broad-

147. *Pacifica*, 438 F.3d at 749.

148. See 61 Fed. Reg. at 43,985-87.

149. See *supra* note 57 and accompanying text.

150. See *supra* notes 57-58 and accompanying text.

151. See Jessell, *supra* note 47, at 12.

152. See *id.* Recently, Hundt announced that he intends to resign as Chairman of the FCC as soon as a replacement can be found. The replacement could be named by the end of 1997. See *The Hundt Resignation: Reed Hundt and the FCC 1993-97*, ELECTRONIC MEDIA, June 2, 1997, at 46. We will not know if the new Chairman shares Hundt's view until he or she is chosen.

153. 395 U.S. 367 (1969). See Jessell, *supra* note 47, at 13.

casters are subject to regulations because licensees, who have access to scarce airwaves at no cost, must "give suitable time and attention to matters of great public concern."¹⁵⁴ While the actual regulations that the *Red Lion* court allowed the FCC to impose on broadcasters have since been abandoned,¹⁵⁵ the public interest requirement upholding them still remains. In this light, the FCC feels that the children's programming requirements are in the public interest and would be declared as such by a reviewing court. On the other hand, broadcasters claim that the public interest should be determined by the public, i.e., by what the public demands via the marketplace.

In the 1980s, the FCC allowed the marketplace to determine what was in the public's interest.¹⁵⁶ If the public wanted daytime talk shows about drug-smuggling Nazi transvestites, that is what they got. If children wanted action cartoons, there would be plenty of them. The current FCC commissioners argue that this is contrary to the spirit of the public interest that the Supreme Court has continually echoed.¹⁵⁷ Broadcast regulations have been approved by the Court in order to "serve the public's First Amendment interest in receiving additional views on public issues."¹⁵⁸

Because "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"¹⁵⁹ and because the viewers at issue here are children, the FCC believes that serving the public interest is of the utmost importance.¹⁶⁰ Children do not have the power to influence the market. They are at the mercy of the broadcaster's—and advertiser's—will. The FCC would like broadcasters to do what is in the public's best interest, which means airing educational and informational programs for children.

Scholars argue that with the public interest, "the First Amendment should promote a public capable of engaging in public debate on public issues"¹⁶¹ Given that children are going to grow up and become the leaders of our country some day, many believe that showing children quality television at a young age can only help prepare them for this future challenge.¹⁶² In 1981, the Supreme Court in *C.B.S., Inc. v. Federal*

154. *Red Lion*, 395 U.S. at 394.

155. The FCC abandoned the Fairness Doctrine in 1987. See Jessell, *supra* note 47, at 12.

156. See MINOW & LAMAY, *supra* note 10, at 20.

157. See, e.g., *C.B.S., Inc. v. Federal Communications Comm'n*, 453 U.S. 367, 396 (1981) (upholding the right of access requirements for political candidates because it furthers the public's right to information in the political process).

158. *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 379 (1984).

159. *Red Lion*, 395 U.S. at 390.

160. See MINOW & LAMAY, *supra* note 10, at 14. "[E]veryone everywhere, even in 1995, can agree on one precept: the public interest requires us to put our children first." *Id.*

161. Hundt, *supra* note 19, at 1117 (citing Alexander Meiklejohn as the founder of this theory).

162. See *id.*

*Communications Commission*¹⁶³ upheld a statute that created a limited right of television access for federal political candidates so that they could "make their views known"¹⁶⁴ to the public.¹⁶⁵ The Court ruled that the public need to receive campaign information justified TV access rights, because this would lead to the "effective operation of the democratic process."¹⁶⁶

Certainly, if the government was so concerned with informing adults on important issues, there can be no doubt that children must be treated with as much, if not more, care. The question then becomes how we go about helping children prepare to engage in the democratic process. Promoting children's television programming as a means of preparation might not be the wisest move.

3. *Scarcity and Broadcasters*

In *Red Lion*, the Supreme Court allowed the FCC to impose broadcast regulations on licensees because of both the scarcity of the airwaves and the scarcity of licenses available to potential broadcasters.¹⁶⁷ Not everyone can broadcast over the airwaves because there is simply not enough frequency space available to allow this.¹⁶⁸ In turn, not everybody who applies for a license can get one. Because of this dual scarcity, the Court held that licensed broadcasters can be told what to do, within limits. Broadcasters can be required to give time to matters of public concern that might not otherwise be covered.¹⁶⁹

Twenty-five years after *Red Lion*, the Supreme Court noted in *Turner I* that the scarcity rationale for broadcast regulation has been heavily criticized, but the Court declined to question the rationale's validity.¹⁷⁰ Still, proponents of the First Amendment feel that the scarcity rationale of *Red Lion* could be overturned on the right set of facts.¹⁷¹ Broadcasters argue that cable television, satellite dishes, VCRs, and other sources of programming make the scarcity argument seem less persuasive. While there may be a scarcity of public airwaves and licenses, broadcasters believe that there is not a scarcity of quality children's programming.

Broadcasters point to the Public Broadcasting Service (PBS), which, in conjunction with the Children's Television Workshop, has been commended for its hours and hours of educational programs, including *Sesame Street* and *The Electric Company*.¹⁷² Furthermore, unlike when *Red Lion* was decided, sixty-five percent of all television households today

163. 453 U.S. 367 (1981).

164. *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976).

165. *See C.B.S.*, 453 U.S. at 396.

166. *Id.*

167. *Red Lion*, 395 U.S. at 388, 394.

168. *See id.* at 389.

169. *See id.* at 394.

170. *See Turner I*, 512 U.S. at 638.

171. *See Jessell*, *supra* note 47, at 13.

172. *See BARRIE GUNTER & JILL L. MCALEER, CHILDREN AND TELEVISION: THE ONE EYED MONSTER?* 124 (1990).

have cable television.¹⁷³ That means 62.2 million houses can tune into Nickelodeon (which specializes in children's television), the Discovery Channel, the History Channel, and other outlets that air educational and informational programs. Throw in the wide variety of educational videos available, and children and their parents have numerous educational outlets via the television.¹⁷⁴

Nevertheless, the Supreme Court seems intent on upholding the scarcity rationale because of the "physical limitations of the electromagnetic spectrum."¹⁷⁵ Since only a select number of lucky people can acquire licenses, the Court believes it is justified in requiring broadcasters to air programs that deserve attention. Quality programs for kids are just the kind of shows that the Court in *Red Lion* may have envisioned deserving attention.

4. Pervasiveness

In the landmark *Pacifica*¹⁷⁶ decision, the Court adopted additional rationales for regulating the broadcast media. The Court first held that television broadcasts are pervasive in the lives of Americans.¹⁷⁷ Second, broadcasts are also very accessible to children. Because of these two special features of the broadcast media, the Court held that broadcasters should be subject to regulation.¹⁷⁸ The FCC appears to believe that these two rationales are additional justifications for requiring three hours per week of children's programming.

In the official report for the new rules, the FCC acknowledged television's pervasiveness and accessibility. Nearly all children in the United States "have access to [broadcast] television and spend considerable time watching it."¹⁷⁹ This leads the FCC to believe that it is constitutionally permitted to require three hours per week of educational programming.¹⁸⁰ However, the pervasiveness rationale has been used in the past exclusively in the context of keeping things away from children.¹⁸¹ The pervasiveness argument is being used here to provide kids with educational programs, not to keep indecent programs from them.

The FCC can rely on the Court's statement in *Pacifica* that the indecent language present in George Carlin's routine "could have enlarged a child's vocabulary in an instant."¹⁸² Rather than avoiding exposure of children to one of the "seven dirty words," the new regulations will theo-

173. See T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA* 392 (4th ed. 1996).

174. See Scott R. Flick and Lauren Lynch Flick, *Stations Face Regs for Kids' Programming*, NAT'L L.J., Jan. 20, 1997, at B14.

175. *Turner I*, 512 U.S. at 639 (emphasis added).

176. *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1977).

177. See *id.* at 748.

178. See *id.* at 749.

179. 61 Fed. Reg. 43,982 (1996).

180. See generally *id.*

181. See cases cited *supra* note 144-46.

182. *Pacifica*, 438 U.S. at 749.

retically expose children to new words with more redeeming social value. Chairman Hundt believes that the pervasive nature of television can help society achieve the goal of making our children more educated and informed.¹⁸³

For the Court to accept this goal of the new rules, it must first accept "the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character"¹⁸⁴ The Court must also accept television as a means for improving the minds of children. Such a belief is plausible. Studies show that children do learn while watching educational programs.¹⁸⁵ Given that television is pervasive and accessible to children, regulations will be upheld whether they keep indecent programs away from kids, or provide educational programs for them. The key element seems to be that children are involved.

C. THE REGULATIONS ARE SAFE AT HOME

When in doubt, hide behind children. While this attitude would not go over well in most emergencies, it works wonders when the FCC is trying to pass broadcast regulations. The FCC managed to force licensees to broadcast three hours of something they might not want to show. How did the FCC accomplish this? It simply disguised the regulations in children's garb. Thanks to this disguise, the programming regulations are probably safe for the time being.

As stated earlier, no one wants to challenge rules that help children. Even if a licensee decided that the new rules were too harsh, its chances in court appear slim. The content-based regulations serve a compelling interest. They are aimed at "protecting the physical and emotional well-being of youth"¹⁸⁶ Broadcasters would have a difficult time convincing five Supreme Court justices that regulations "aimed" at ensuring that kids grow up to be responsible citizens are not compelling.

The public interest compact has been strengthened during Chairman Hundt's tenure at the FCC. While broadcasters have the right to show almost anything they choose, the public interest doctrine still requires the presentation of certain matters. The Court would most likely agree with Chairman Hundt that the compact allows for a minimum of three hours of children's programming per week.

In *Turner I*, the Court flatly declined to question the validity of the scarcity rationale as a justification for regulating the broadcast media.¹⁸⁷ The pervasiveness and accessibility of broadcasts to children, reasons used by the Court in *Pacifica* to regulate indecency,¹⁸⁸ may be taken to

183. See Hundt & Kornbluh, *supra* note 22, at 17.

184. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973). Note that the Court did not mention television in its assertion that certain cultural activities can be beneficial.

185. See CLIFFORD ET AL., *supra* note 6, at 204.

186. *New York v. Ferber*, 458 U.S. 747, 757 (1982).

187. See *Turner I*, 512 U.S. at 638.

188. See *supra* notes 178-80 and accompanying text.

their next logical step. They will be arguments used to support regulations that hope to provide children with useful television.

VI. CRITICAL ANALYSIS OF THE RULES

One must look at the new regulations in the light in which they evolved—hours and hours of wheeling and dealing to forge a compromise that makes all involved parties happy. It would be unwise to think that this type of summit would produce strict programming requirements that would push the First Amendment to its limits. With that in mind, the regulations must be evaluated for their practical effect.

A. INFORMING THE PUBLIC

The first goal of the new rules is to inform parents about the core programming that broadcasters will air.¹⁸⁹ Parents will now have better access to information and reports about the shows. This is a very tenuous goal. Arguably, parents who would take actions, such as calling their local network affiliate to get information about a show, are those parents who are least dependent on television as a source of educating their children and who take the time to help their kids develop educational skills by other means. Of course, parents who are advocates may call because they want to help out other parents who either do not have or do not make the time to monitor what their kids watch. To that end, there are numerous watchdog groups who can better serve that purpose.

A better plan might entail having broadcasters provide information to the public regarding ways that kids—and parents—can become *less* dependent on television. Children can become less dependent on television if they are involved in other educational activities. Ideally, parents, and not broadcasters, should encourage such activities. However, some parents do not provide encouragement, and some children would not listen to their parents and would watch TV anyway. Broadcasters can play a role in helping children understand what television really is and ought to be.

As Neil Postman correctly observes, there has yet to be a worthwhile discussion about why we watch television, what we learn from it, and how television directs culture.¹⁹⁰ Requiring broadcasters to take part in some sort of discussion about how to watch television seems like a fair alternative to insisting that they become surrogate parents and educators. Broadcasters should be willing to provide information that helps us to understand what television “really is” if it would mean a return to them airing more profitable programs instead of more educational programs.

189. See *supra* part IV.B.1.

190. See POSTMAN, *supra* note 1, at 160.

B. DEFINING CORE PROGRAMS

The flexibility given to broadcasters in determining what is educational and informational indicates that not much is expected from them. Licensees will be allowed to rely on their good faith belief that a program serves the needs of children.¹⁹¹ Better yet, the judgment of the licensee will only be an issue if someone complains about a questionable "educational and informational" show.¹⁹²

The vagueness of the rules took no one by surprise. The network executives do not plan on having to change much with their programming.¹⁹³ Even Peggy Charren, founder of Action for Children's Television and one of the most vocal supporters of the rules, feels that these types of rules were to be expected.¹⁹⁴ Nevertheless, she feels that they are satisfactory.¹⁹⁵ "The last thing you want is for the FCC to be saying yes and no to a particular program."¹⁹⁶ Why not, if the FCC is so serious about children's television? Had the FCC given itself more authority to question certain programs, then one might be convinced that the FCC really does care about the state of television for children. With such a lax standard, the FCC looks as if it has ulterior motives for enacting these requirements.

The only potentially troubling aspect of core program identification for a broadcaster might be the requirement that it specify the educational objective that the program will satisfy. This requirement pushes the licensee closer to the role of a teacher who plans a class curriculum. The FCC recognized this, and yet chose not to require broadcasters to consult with educators when identifying the purpose of each core program, as one proposed rule required.¹⁹⁷ Still, networks have in fact hired educational advisors, psychologists, and other experts to help develop shows.¹⁹⁸ This should worry not only parents, but also those in charge of formally educating our children.

C. PROCESSING GUIDELINES

The requirement of three hours of core programming a week formally legitimizes what parents and educators have been claiming for years: it is television's fault that our kids are performing miserably in school, not ours.¹⁹⁹ Broadcasters are now being told by the FCC to clean up the

191. See 61 Fed. Reg. 43,985 (1996).

192. Parents can voice their opinions about programs by dialing 1-800-CALL-FCC. See *Family Values*, *supra* note 5.

193. See *id.*

194. See *id.*

195. See *id.*

196. Diane Holloway, *Kids Educational TV Shows Get Labels Today*, AUSTIN AM. STATESMAN, Jan. 4, 1997, at A1.

197. See 61 Fed. Reg. 43,985-86 (1996).

198. See Joe Schlosser, *Syndication's FCC Learning Curve: Producers Struggle with Commission's Definition of Educational*, BROADCASTING & CABLE, July 28, 1997, at 44.

199. Congress acknowledged that "children in the United States are lagging behind those in other countries in fundamental intellectual skills, including reading, writing, math-

mess they "caused." It is already bad enough that "television has by its power to control the time, attention and cognitive habits of our youth gained the power to control their education."²⁰⁰ Now the FCC is requiring broadcasters to do so for three hours a week. Parents and teachers will now expect broadcasters to bail them out if they fail to provide adequate means of learning. This is not what the FCC expected the regulations to do, and it is not what we should expect the FCC to be doing.

As a practical matter, this process should not pose many difficulties for broadcasters. All of the networks have assembled teams of consultants and created enough new educational shows.²⁰¹ Even if a licensee falls short of the three hour requirement, the rules allow it a second chance to satisfy the renewal guidelines.²⁰² Perhaps all this would entail is a couple of public service announcements thrown in between some cartoons.

The end result of the negotiations²⁰³ was rules that will not jeopardize any licenses. There is simply too much flexibility given to the broadcaster to indicate that the FCC really intended to make educational programming a serious priority. Nevertheless, broadcasters have gone to some lengths to make sure that their Saturday morning line-ups are an extension of the classroom.

VII. A BRAND NEW FORM OF HOME SCHOOLING

Children's programs have been airing on each broadcast station for at least three hours a week since September 1997.²⁰⁴ Are kids rushing to the TV set to see these shows? As one executive stated, "[m]y fear is when you call [a program] educational, . . . you will go overboard, and kids don't watch it."²⁰⁵ However, what if children do gravitate towards educational programs, to the point that the TV becomes the first place they turn to learn about photosynthesis? That might be worse than if kids simply continue to watch "junk" television.

"Our vote today is the most important vote for the children and education ever cast at the commission."²⁰⁶ When did the FCC get authority to make decisions affecting the education of our children? The answer is that it does not have the authority. Nevertheless, it established rules that

ematics, science and geography." Television Act of 1990, 47 U.S.C. § 303a (1994). Studies indicate that watching too much "junk" television can have negative effects on schoolwork. See GEORGE COMSTOCK & HAEJUNG PARK, *TELEVISION AND THE AMERICAN CHILD* 86 (1991) ("There is no question that the amount of time spent viewing television by American children and teenagers is negatively associated with their academic performance.").

200. POSTMAN, *supra* note 1, at 145.

201. See Peter Kaplan, *FCC-Mandated Kids TV Hits Airwaves Tomorrow; Is It Educational? Will Children Tune In?*, WASH. TIMES, Aug. 29, 1997, at A1.

202. See 61 Fed. Reg. 43,989 (1996).

203. See *supra* notes 67-75 and accompanying text.

204. See Jane Hall, *Trying to Make the Grade/Flexible Definitions of Kids Educational Shows*, L.A. TIMES, Sept. 3, 1997, at B61.

205. Michael I. Rudell, *The FCC's Rule on Programming for Children*, N.Y. L.J., Aug. 23, 1996, at 3.

206. Reed Hundt, Statement on the Adoption of Children's Education Television Order, H.R. Doc. No. 93-98 (1996).

will affect the educational process. Unfortunately, the FCC might not have thought the regulations through, focusing instead on the big picture—getting even with broadcasters. The little picture may consist of television playing a bigger role in the formal education of our children at the expense of our school systems. This is a result that the FCC did not likely intend. The regulations, once in action, could shift the focus of educating our children from the classroom to the living room. This monumental occurrence should not come about as a result of FCC regulation, if it should even come about at all.

These rules put broadcasters in a role designed for parents and teachers: ensuring that kids watch quality TV and ensuring that kids develop intellectual/cognitive and emotional/social skills. Broadcasters, like teachers creating a curriculum, must put in writing what educational objective they are satisfying. Broadcasters have hired consultants to assist them in this, including teachers, child psychologists, pediatricians, and police officers.²⁰⁷ Apparently, these consultants would rather share their knowledge with broadcasters than with school superintendents or principals.

The difference between indecency regulations and core programming requirements is structural. Whereas the FCC felt compelled to step in and keep indecency from children because no other institution was created to specifically do that, our educational system was created specifically for what broadcasters are now being asked to do—develop our children's educational and informational skills. While the history of broadcast regulations makes it clear that broadcasters must meet "the demands of the public interest,"²⁰⁸ it is hard to believe that satisfying these demands must entail supplanting the role of one of society's major institutions.

Arguably, the FCC and the courts have a duty to step in and help parents keep harmful concepts from their kids because nobody else has been assigned that job. In the instant case, broadcasters can argue that society has already assigned the job of educating children to our school system. Teachers, not broadcasters, are expected by everyone to educate our children. "We can hardly expect those who want to make good television shows to concern themselves with what the classroom is for."²⁰⁹

The ultimate irony would be if the FCC regulations worked. That is, each licensee showed three hours of quality children's programming, and the children watched them to their little hearts' content. I contend that the rules are merely symbolic—that the FCC did not necessarily hope to see educational programs "succeed."²¹⁰ The negotiations were a goodwill

207. See Kaplan, *supra* note 203, at A1.

208. *Red Lion Broad. Co. v. Federal Communications Comm'n*, 395 U.S. 367, 379 (1969).

209. POSTMAN, *supra* note 1, at 143.

210. As evidence of how serious the FCC is in seeing these shows succeed, the Big Three networks (ABC, CBS, and NBC) got final approval from the FCC on July 11, 1997, allowing them to preempt children's educational programming for live sporting events. See

gesture to parents. The summit made politicians and broadcasters look like heroes while appeasing children's television advocates. The rules purposefully avoided anything controversial. Unfortunately, these programs may succeed. In that case, the FCC could be to blame if a major shift in the education of our children occurs.

Parents may encourage kids to watch these creative new educational programs—even parents who generally disapprove of television. Educators will incorporate television into the classroom, or worse, incorporate the classroom into your living room. Educators now have the benefit of a decidedly larger marketplace of educational television that can be used, or exploited, for supplemental teaching. The fear expressed by one television executive that kids will not watch something educational could be supplanted by something even greater. The new fear might be that teachers will tell little Johnny to go home and watch *Bill Nye the Science Guy* for a better understanding of chemical reactions.²¹¹ The notion that television and education can go hand in hand is fundamentally flawed.

The idea of learning by watching educational television shows is in stark contrast to the idea of learning in the classroom. In the classroom, a child interacts with classmates and teachers. But a child cannot talk to the TV or ask it questions. Attending school is required by law; watching television is not. If a child acts up in the classroom, he can be punished. Television offers no such discipline.²¹²

VIII. CONCLUSION

The solution to the problems with television and children lies in educating our children *about* television, not *by* television. Before we give broadcasters the green light to start teaching our kids their ABCs, and before we give parents and educators an excuse to let this happen, we should first explore what television means to our culture. Does TV exist merely for entertainment? Should we expect television to teach us about matters that are in the public interest? Do people take television seriously? Can people distinguish between television and reality, or are the two treated as one in the same? These are issues that must be discussed before we give broadcasters a mandate to take part in such an important endeavor as educating our kids.

The only major English-speaking country in the world that does not offer "media education" in its primary and secondary schools is the United States.²¹³ Now, it might be asking too much of our schools to require them to teach children about television. "Our schools have not yet even got around to examining the role of the printed word in shaping

Christopher Stern, *FCC Says Networks Can Preempt Kidvid*, VARIETY, July 21-27, 1997, at 20.

211. This is what John Merrow, former high school English teacher and one-time vice president of the Learning Channel calls "assigned viewing," which he used and strongly encourages. See MINOW & LAMAY, *supra* note 10, at 139.

212. See POSTMAN, *supra* note 1, at 143.

213. See MINOW & LAMAY, *supra* note 10, at 138.

our culture.”²¹⁴ However, this is where the FCC enters the picture. Rather than having broadcasters’ licenses depend on them showing three hours of educational programming a week, broadcasters should be asked to take part in a media education program in conjunction with our schools. As mentioned earlier, if this could mean a return to showing their most profitable programs, broadcasters should be willing to take part in this public service.

Would this mean that no educational programs would be available? Of course not. Successful educational shows, like *Beakman’s World*, *Where in the World is Carmen Sandiego?*, and *Bill Nye the Science Guy* will still be available, along with some new popular shows that might emerge in the future.²¹⁵ However, the effects of these shows in the educational process will hopefully be minimized.²¹⁶

If nothing is done, and broadcasters air their mandatory three hours of educational television a week, what Professor Neil Postman most feared may come true. He fears that Aldous Huxley’s vision of the future, as expressed in *A Brave New World*, will become reality: “people will come to love their oppression, to adore the technologies that undo their capacity to think.”²¹⁷ “Huxley feared that what we love will ruin us.”²¹⁸ What we love is television. Authorizing broadcasters to take part in the formal education of children and hoping that television can succeed in this task may very well ruin us for good.

214. POSTMAN, *supra* note 1, at 162.

215. Children’s television advocates would have us believe that children’s shows are not popular because of some conspiracy against them by broadcasters, and that the popular children’s shows are merely exceptions to the rule. These successful shows are exceptions to the general rule that most shows, even sexually charged adult shows like Fox’s *Models Inc.* and CBS’s *Central Park West*, fail. Educational shows fail just like any other show—because they simply do not catch on, not because they are “educational.”

216. Kids should not expect to see lovable creatures in the classroom, or dazzling special effects. Producers of educational programs that use such measures in hopes of both entertaining and educating children are not concerned about the impact it has on children’s expectations in the classroom. They are only concerned about making a popular television show. Media education will hopefully be able to explain this concept to children so that they do not seem bored or disenchanted in the classroom when it does not look like television.

217. POSTMAN, *supra* note 1, at vii.

218. *Id.* at viii.