

profitable to produce and air the non-educational children's programming.

In addition, the market for advertising time in children's programming is obviously more shallow than for more generic fare.²²⁴ Simply put, six year olds do not buy Lexus luxury sedans.²²⁵ The universe of potential advertisers is necessarily smaller for children's programming. This again works as a serious disincentive for airing more (or better) children's programming.

Chairman Hundt's reforms certainly will do no harm. However, there is reason to question whether they will do much good in the long term. As the adage goes, one can lead a horse to water, but you cannot make it drink. As hard as the Commission tries to force commercial broadcasters to fulfill their legal and moral responsibilities to their youngest viewers, it remains doubtful that the commercial television broadcasters will significantly improve the quality of the service they provide to the nation's children.²²⁶

²²⁴ See In the Matter of Children's Television Programming and Advertising Practices, 75 FCC 2d 138, 142-45 (1979); see also Winer, supra note __, at 280-81.

²²⁵ See Children's Programming and Advertising Practices, 96 FCC Rcd 634, 636 (1983); Fowler & Brenner, supra note __, at 253-54; see also N. Minow, supra note __, at 202-03; Krattenmaker & Powe, Regulating Broadcast Programming, supra note __, at 82-83; C. Sunstein, Democracy, supra note __, at 65-66.

²²⁶ Indeed, the commercial broadcasters' fierce opposition to Chairman Hundt's modest proposals bespeaks a strong hostility toward quantitative and qualitative standards for educational children's programming, and bodes poorly for future compliance efforts if the Commission ultimately adopts such standards. See Comments of the NAB, MM Docket No. 93-48, at __ (June 7, 1993).

Even if direct command and control measures of the sort Chairman Hundt has proposed are unlikely to succeed in a larger sense, other regulatory options exist, and deserve the Commission's careful consideration.

Were the Commission writing upon a blank slate, perhaps the best solution to the problem of providing access to educational children's programming would be to charge commercial broadcasters some sort of spectrum royalty. The monies generated from this fee then could be used to subsidize directly those entities that actually wish to produce and air high quality educational programming for children.²²⁷ In fact, a number of commentators have offered proposals under which broadcasters would pay some sort of spectrum fee in lieu of performing some (or perhaps all) of their traditional "public interest" duties.²²⁸

Were the Commission to adopt such an approach with respect to children's programming issues, broadcasters would pay a fee in exchange for avoiding responsibility for providing educational children's programming. The revenues generated from this fee then could be used to support the efforts of the nation's public broadcasters -- the only broadcasters who have shown a consistent interest in creating and airing high quality children's

²²⁷ See Geller & Lampert, supra note __, at 11-17; Fowler & Brenner, supra note __, at 233-55; see also N. Minow, supra note __, at 157-61; Hazlett, supra note __, at 171-75.

²²⁸ See Geller & Lampert, Charging for Spectrum Use 12-21 (1989); Fowler & Brenner, supra note __, at 247-55; see also N. Minow, supra note __, at 157-61; H.R. 13015, The Communications Act of 1978, 95th Cong., 2d Sess. §§ ____.

educational programming -- to provide such programming.²²⁹ Such an approach plainly would provide more children's programming, more efficiently, than the command and control approach advocated by Chairman Hundt.²³⁰

A system of spectrum royalties would free broadcasters from undertaking a task for which they obviously have very little interest. At the same time, it would guarantee a steady supply of high quality educational children's programming.

Politics is the art of the possible, and a spectrum fee approach would probably require congressional authorization. Given the current political climate, it is doubtful that such

²²⁹ C. Sunstein, Democracy, supra note ____, at 84; Noll, Peck & McGowan, supra note ____, at 241; see N. Minow, supra note ____, at 43-45 ("Programming that is regarded as serving a national purpose, such as children's programs, should be directly financed and made available at no cost [on] public TV stations."). The Corporation for Public Broadcasting and the public broadcasting stations across this nation do the yeoman's burden of providing educational children's programming, a fact that the Commission itself acknowledged in 1983. See Children's Programming and Advertising, 96 FCC 2d 634, 645 (1983). Only public broadcasting stations provide Mr. Rogers, Sesame Street, and Electric Company; moreover, they also provide programming that enriches the curriculum of many public schools, including materials on math, the sciences, geography, and foreign languages. Significantly, the NAB has urged greater support of public broadcasting as a potential response to the perceived shortage of children's educational programming. See Comments of the NAB, MM Docket No. 93-48, at 14-15; see also Smolla, supra note ____, at 24-25; N. Minow, supra note ____, at 101.

²³⁰ Indeed, public television stations are virtually the only stations that provide regularly scheduled children's programming in the early morning and late afternoon hours. Commercial broadcasters have reserved these time periods -- the time periods that most children are apt to be watching television -- for news programming, talk shows, and syndicated re-runs of former prime-time shows. See N. Minow, supra note ____, at 37-39. Obviously, it is more profitable for them to air this programming than an equivalent of "Sesame Street." See id. at 4-8.

authorization could be obtained. In the meantime, children will continue to enjoy a steady diet of "Muppet Babies" and "Power Rangers." Fashioning a sound public policy under these circumstances may therefore require continued reliance on the clunky command and control model, because it is the only option immediately available to the Commission.

The Commission also should consider adopting an approach that places greater direct reliance on America's public television stations. To be sure, contemporary political developments augur strongly against any sort of renewed political commitment to improving the nation's public television service -- at least at the congressional level.²³¹ Notwithstanding Congress' lack of commitment to maintaining the nation's public television service,²³² the Commission could, with the help of

²³¹ In the current session of Congress, Speaker of the House Newt Gingrich has repeatedly called for the complete abolition of the Corporation for Public Broadcasting. Shales, "The Misguided Missile Aimed at Public TV," The Washington Post, February 27, 1995, at § B, p. 1; Berger, "We Interrupt this Program," The New York Times, January 29, 1995, § 2, p. 1; Staff Editorial, "Public Broadcasting, Public Funds," The Washington Post, January 19, 1995, § A, p. 24. He has also advocated the sale by auction of the spectrum public television stations use to broadcast their programming, arguing that cable now offers viewers sufficient programming diversity.

²³² Initiatives aimed at eliminating the public broadcasting system are terribly shortsighted; our country would be immeasurably poorer were we to lose our public television broadcasting service. Although cable currently passes by 97% of the nation's households, only 60% of Americans actually have access to cable programming. see Cable Competition Report, 9 FCC Rcd 7492 (1994). Given that 40% of our nation's households do not have access to cable, sole reliance on cable channels to provide educational children's programming seems misguided. In fact, it seems quite likely that the households most in need of access to educational programming -- those in poor urban and rural areas -- would be the least likely to have the financial

the commercial broadcasting community, adopt and implement a program that would create strong incentives for the private sector to commit new resources to public television in general and educational children's programming in particular -- without resort to a new congressional enactment.

The Commission's current proposal suggests that broadcasters should be permitted to satisfy their educational children's programming requirement at least in part by sponsoring such programming on other stations.²³³ This proposal could be revised to encourage partnerships between local public broadcasters and local commercial broadcasters.

If commercial broadcasters prefer to show "Sally Jesse Rafael" and "Geraldo," they should be permitted to do so, provided that parents and children have access to educational programming through public television.²³⁴ Of course, broadcasters cannot be released completely from any obligation to provide educational children's programming; as the Commission has noted, the Children's Television Act presupposes that every licensee will air some educational children's programming.²³⁵

wherewithal to subscribe to cable services. See generally Comments of the Children's Defense Fund/Black Community Crusade for Children, MM Docket No. 93-48, at 3-5 (Oct. 16, 1995).

²³³ See Children's Programming, 10 FCC Rcd at 6346-48.

²³⁴ See generally Noll, Peck & McGowan, supra note __, at 211-29.

²³⁵ See Children's Programming, 10 FCC Rcd at 6348; but see Comments of the Office of Communication, United Church of Christ, MM Docket No. 93-48, at 2-11 (Oct. 16, 1995) (arguing that the Commission's sponsorship proposal would further marginalize educational children's programming).

Rather than releasing commercial television broadcasters from their responsibilities under the Act, this proposal would merely provide them with greater flexibility in meeting their obligations to the nation's youth.²³⁶

Public television broadcasters have the technical expertise to produce educational programming, and possess a genuine desire to educate the nation's young through their programming. Moreover, because public broadcasters are not subject to the economic pressures that commercial broadcasters face, they are much freer to pursue public goods through their broadcasting schedule.²³⁷ A regulatory response that relies on these strengths seems more likely to be effective.²³⁸

Commercial broadcasters have emphasized the importance of public broadcasters in meeting the programming needs of children.²³⁹ It is time that they did more than clap politely from the sidelines. Moreover, there is a strong consensus within the academic community that public broadcasting holds the key to ensuring that parents and children have access to educational

²³⁶ See N. Minow, supra note ___, at 202-03.

²³⁷ Chairman Hundt himself has recognized that commercial pressures, rather than evil intent, in large part explain the paucity of educational children's programming on commercial broadcast television stations. See Address by Chairman Reed E. Hundt to the National Press Club, Washington, D.C., at 7 (July 28, 1995) ("[I]t takes serious time, money, and commitment to program children's educational television. It's easier and more profitable to do almost anything else.").

²³⁸ See C. Sunstein, Democracy, supra note ___, at 85.

²³⁹ See Comments of the NAB, MM Docket No. 93-48, at 14-15 (Oct. 16, 1995); see also Smolla, supra note ___, at 24-26.

children's programming.²⁴⁰ Rather than ignore public television's role, the Commission should fashion policies that encourage commercial broadcasters to support public television's efforts to meet the educational programming needs of children, through direct financial support of such programming (i.e., sponsorship) and by providing public broadcasters with in-kind services and technical support.

IV. Conclusion

Children's educational programming is something that everyone nominally supports -- no one believes that it is something that we can do without as a nation. Furthermore, the market plainly has failed to provide such programming on a consistent basis, at least insofar as commercial broadcasters are concerned. Chairman Hundt's proposals represent a good faith attempt to improve the performance of commercial broadcasters.²⁴¹ If nothing else, the mere existence of the

²⁴⁰ Indeed, this is one of the few instances in which Professor Sunstein, Professor Powe, and Dean Krattenmaker share common ground. See C. Sunstein, Democracy, supra note ___, at 84-85; Krattenmaker & Powe, Regulating Broadcast Programming, supra note ___, at 81-84. Moreover, Chairman Minow also endorses a regulatory response that relies on the strength of the public broadcasting system. See N. Minow, supra note ___, at 157-61, 202-03.

²⁴¹ See generally Fiss, supra note ___, at 788 ("the state must put on the agenda issues that are systemically ignored and slighted and allow us to hear voices and viewpoints that would otherwise be silenced or muffled").

rulemaking docket is likely to make commercial broadcasters more self-conscious about their programming selections.²⁴²

However, there is little reason to believe that the proposals, standing alone, will significantly improve parents' program choices on free, over-the-air commercial television stations. Similar attempts to bring around reluctant broadcasters have failed, and these proposals are unlikely to alter the Commission's track record.

Regardless of the merits of the particular proposals, they should be deemed constitutional. The First Amendment claims of broadcasters have been vastly overstated, and both the academy and the Commission should examine the nature of these claims more closely. Incident to this project, the Commission's legal authority to promote certain types of programming should be placed on a firmer basis than the current Red Lion scarcity rationale. Continued sole reliance on Red Lion is virtually certain to lead to a significant reduction in the Commission's powers to regulate broadcasters.

Finally, the Commission should consider its ability to encourage partnerships between commercial and public broadcasters as an alternative to a command and control regime. If commercial television broadcasters are willing to provide significant

²⁴² This effect may be the most significant result of Chairman Hundt's efforts. If broadcasters improve their efforts voluntarily in response to the specter of command and control government regulation, then the Chairman will have achieved his policy objectives. At the risk of being cynical, the Chairman's main goal in championing this cause through the use of the Commission's rule making apparatus may well be to effect change through a "velvet" revolution.

financial and technical support to the public television system's efforts to educate the young on a voluntary basis, the Commission probably should permit commercial television broadcasters to continue bundling and selling mass audiences without significant new regulatory burdens.

Chairman Hundt has gone into the dense woods of the children's programming debate, and has dragged the commercial broadcasters with him -- albeit unwillingly. Although the odds of ultimate success seem rather low, his initiative raises a critically important issue and has inspired spirited public debate. The nation is the better for it; our children are the better for it. He is to be congratulated for his efforts to ensure that there is something for children to watch on commercial broadcast television stations that is actually worth watching. So, into the woods we must go, broadcasters, bureaucrats, and the concerned public. The cause is a worthy one; the game worth the candle:

Careful the things you say, children will listen.
Careful the things you do, children will see.
And learn.

Children may not obey, but children will listen.
Children will look to you for which way to turn,
To learn what to be.

. . . .

Careful the tale you tell.
That is the spell.
Children will listen.²⁴³

²⁴³ S. Sondheim, "Children Will Listen," supra note __, at 20.