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FCC: The Federal Children Commission?

***In two reports, FCC suggests broad, non-spectrum-based, jurisdiction —
Statutory support may be lacking, but it's all about the kids***

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In two separate reports issued in August and September, the Genachowski Commission has provided a glimpse into the possible regulatory approach (in its broadest sense) that the agency may undertake in the coming months and years. Unfortunately, the view from here is not particularly heartening.

The Commission was ordered by Congress to prepare the reports – one relating to parental controls on video and audio programming from virtually any source, the other about a private service providing audio programming on some school buses. Had it been left to its own devices, the FCC might not have bothered with either of these. But Congress gave the order, and the FCC has obeyed. And how.

The parental controls report is an eye-popping 87 pages long, providing a comprehensive overview of just about anything you might ever have wanted to know about parental controls. From the V-chip for over-the-air broadcasting to far more esoteric mechanisms available for MVPD service and even Internet access, the report attempts to provide the “assessment of the current state of the marketplace” which Congress asked for.

The good news is that the marketplace appears to be responding to the perceived need for effective, user-friendly parental controls. In addition to the governmentally-required (and therefore already ubiquitous) V-chip, the report identifies multiple alternatives – including at least one described itself as an “Advanced Foul Language Filtering Technology” (or “AFLFT”) – currently available in the marketplace, all capable of providing some level of parental control over the programming content available to children from over-the-air TV and/or MVPD sources. There are also a wide range of rating systems and services available to assist parents in familiarizing themselves with the particulars of incoming programming. Ditto on the wireless side: an impressive array of

blocking, filtering, control devices and technology designed to put the parent in the driver's seat.

The report even canvasses the options for controlling (or at least monitoring) the content of video games, DVD's and video-cassette recordings. And it's at that point that you start to wonder exactly where the FCC may be going with this inquiry. Does the FCC have jurisdiction to regulate video games, DVD's or VCR's? And while some parents may be concerned about the content available for those media, what can, or should, the FCC do about it? After all, the Commission's primary concern is the regulation of spectrum – you know, the basic “traffic cop of the airwaves” role. Since when did it assume (or was it formally given) the substantially different role of Federal Nanny?

To be sure, Congress asked the FCC to prepare the report, and the FCC may be excused if, in doing its duty, it ranged somewhat far afield of its normal responsibilities. But the bottom line the FCC reaches in its parental control report is that the agency needs more information, so it will be issuing its own Notice of Inquiry in the foreseeable future. And that NOI will apparently ask for essentially the same information that the Commission's initial NOI (issued last March in response to Congress's direction in the Child Safe Viewing Act) – including information about video games, DVD's, VCR's and the rest.

In other words, the FCC is taking the ball and running with it.

This is doubly troublesome. First, as noted, much of the inquiry appears to be well outside of the FCC's expertise, experience and jurisdiction. While the broad “public interest” standard in the Communications Act might arguably justify some FCC consideration of non-technical matters, it seems more than a stretch to conclude that that “public interest” standard authorizes the FCC to weigh in on video games or DVD content controls.

And second, what purpose will the further inquiry serve? After all, the FCC's March, 2009 NOI was extremely broad. It appears (from the FCC's ECFS site, at least) to have attracted more than 10,000 comments, including most if not all of the heavy-hitters in the parental control arena. Why does the Commission expect that it will get more or better information if it, in effect, re-issues its initial NOI a second time? And if the FCC's knowledge base is no better off after the second NOI, how can the Commission justify the dedication of its scarce resources to such a project?

Also, consider that, in the upcoming NOI, the Commission plans to “determine the pace of innovation in parental control technologies, whether it is proceeding at a pace consistent with other consumer technologies . . . , and whether evolving needs of parents, caregivers and children are being satisfied in a timely manner.” With all due respect,

how does one “determine the pace of innovation”, or what the “evolving needs of parents”, etc., might be, or whether those “evolving needs” are being satisfied at all, much less in a “timely manner” (and, of course, what is a “timely manner”)? It all sounds very nice and helpful, but how could any of those questions ever be answered and what does any of that have to do with the regulation of spectrum?

Which enables us to segue nicely into the second report, about school bus programming. For reasons known only to Congress, in the Omnibus Appropriations Act of 2009 – the 2,200 page behemoth which provided for funding for the operation of the whole U.S. government – the folks on the Hill included a single paragraph ordering the FCC to issue a report on “commercial proposals for broadcasting radio or television programs for reception onboard specially-equipped school buses operated by, or under contract with, local public educational agencies.” At least that order specifically referred to “broadcasting” programs.

Ah, but when the FCC investigated, it found only one service that even began to fit within the scope of Congress’s directive. And that service – dubbed “BusRadio” – does *not* involve use of any broadcast frequencies. (The service equips school buses in participating jurisdictions with computers to which the service uploads, locally, audio programming prepared and distributed by the service at its headquarters facilities. The distribution is accomplished by secure Internet link and unlicensed wireless LAN. In other words, this is a closed circuit operation that does not involve “broadcasting” at all.)

So, as it turned out, the accurate answer to Congress’s request was: “there is no such service presently in operation or publicly proposed”. The Commission could have wrapped things up in, what, one page, maybe two. And indeed, by footnote 4 on page 2 of the report, the FCC acknowledges that no “broadcasting” is involved here. But does the Commission stop there, as it could and should? No. Instead, it says that BusRadio is the only service that “otherwise satisfies the description of services targeted” by Congress’s direction. By casually invoking the term “otherwise”, the Commission inexplicably allows itself to pretend that a core element of Congress’s direction, *i.e.*, the concept of “broadcasting”, may be ignored.

And then, for another 23 single-spaced pages, the Commission referees a series of charges and counter-charges between BusRadio (and its supporters) and various opponents of BusRadio (and their supporters). Not that the Commission has any particular reason, or authority, to do so. But apparently it believes that its longstanding “concern with the potential impact of media content on children” is warrant enough. The results provide high irony at times. For example, in a discussion of BusRadio’s “Content Guidelines”, the FCC – possibly with a straight face – criticizes BusRadio by observing that “it is unclear under BusRadio’s Content Guidelines precisely what types of ‘swear

words’ or ‘sexual innuendo’ BusRadio would edit out of its programming.” Paging Mr. Kettle, you have a call on Line One from Mr. Pot.

The FCC’s conclusions in the BusRadio report are largely inconsequential, mainly because the Commission recognizes up front that the BusRadio service is a matter to be addressed by the local school jurisdictions which may or may not choose to engage that service. But the take-away message of this report is unmistakably similar to that of the parental control report.

And that message appears to be that this Commission will happily throw itself into any discussion relating in virtually any way to the welfare of children. Whether or not the subject at hand has anything to do with any particular regulated service over which the FCC has control, it makes no difference. If it has to do with kids, count on the FCC to jump in with both feet – as if it’s the Federal Children Commission, not the Federal Communications Commission.

This paternalistic approach to kids may be heartwarming to some, but to others it reflects an inappropriate and unnecessary effort to inject the government into the role of surrogate parent for our nation’s children. It should be clear beyond argument that the myriad decisions involved in the process of raising a child vary from family to family, from parent to parent. That process is as personal a process as can be imagined. It is most certainly not one into which a federal agency with, at most, tenuous connection to child-raising should feel free to barge.

Interestingly, two days after the BusRadio report was released, Commissioner Baker – speaking in a different context – articulated a separate reason why the Commission should think twice about asserting jurisdiction over, or even simply inquiring into, areas which are outside the metes and bounds of the FCC’s statutory authority. In Commissioner Baker’s words, “If we seek information well beyond that needed to support our identified goals—and especially when we seek information about matters clearly beyond the scope of our statutory authority—we needlessly send signals to the market that can create regulatory uncertainty. When regulatory uncertainty skews business decisions to invest and innovate, it is consumers who suffer in the end. As policy makers, we must be particularly sensitive to this dynamic in the current economic environment.”

Despite Baker’s admirably stated restraint, it appears that the Commission may be inclined to view its authority as expanded beyond the language of the Communications Act. If that holds true, the next several years will prove to be interesting, and likely challenging, for broadcasters.