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Power To The Parents Redux

It's still all about the kids

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If you're looking for a good example of your tax dollars being spent – spent, yes, but *not* necessarily being put to work – you should check out the Notice of Inquiry (NOI) issued by the Commission on October 23. Entitled “Empowering Parents and Protecting Children in an Evolving Media Landscape”, it reads like a cross between an undergraduate course in child psychology and a weekend program on “modern parenting” that might be offered at the local community center.

While no one can fault the Good Intentions presumably underlying the NOI – after all, Looking Out For The Kids ranks right up there with apple pie, the flag and motherhood in the pantheon of unassailable motivations – the NOI is grossly flawed in numerous ways. It lacks legislative authority, raises the specter of unconstitutionality, largely duplicates an inquiry just completed by the Commission, inserts the FCC into a regulatory area which other, presumably more competent, agencies are already working, and asks questions which are unanswerable.

If this is how the Genachowski Commission plans to deploy its resources, we'd all better fasten our seatbelts – it could be a bumpy night.

In last month's *Memo to Clients* we reported on the FCC's report to Congress relative to parental controls on video and audio programming (regardless of source). The preparation of that report was ordered by Congress, which is the boss of the FCC, so the Commission had no choice but to invite and review public comments and prepare the report.

But as we noted last month, in its report the Commission mentioned that it planned to issue its own NOI following up on its 87-page magnum opus to Congress. Little did we know that that NOI would be released within two months of the report to Congress.

The stated goal of the NOI is to “develop a record that will help [the Commission] answer the question of how to empower parents to help their children take advantage of

these opportunities [presented by technological developments], while at the same time protecting children from the risks inherent in use of these platforms.” Bear in mind, just last March the Commission issued an inquiry into essentially the same questions relating to “advanced blocking technologies and existing parental empowerment tools” and looking to “improve or enhance the ability of a parent to protect his or her child”. And the Commission managed to generate nearly 100 pages of report in response. While the NOI supposedly “picks up where the [earlier report] left off”, it’s difficult to imagine exactly what more the Commission expects to learn that it did not already learn in response to the broad inquiry it posed last March (which resulted in the report to Congress).

But before delving into such practical questions, let’s focus on a more fundamental threshold question: where does the Commission think it gets the authority to sprawl itself out into the area of child-raising? After all, the FCC is not a free-wheeling operation that can take up any subject matter it chooses. Rather, it’s a federal agency whose range of activities is strictly limited by Congress and the Constitution. Before an agency can act at all, it must first determine whether it has the necessary authority to take the action, and it should always be mindful of whether the Constitution permits it to take the action.

And yet, in the NOI, the Commission makes no such determination. To the contrary, it isn’t until Page 3 of the NOI that the FCC acknowledges any concern about such niggling details. And there it merely asks commenters to “discuss whether the Commission has the statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment”. (On the third-from-the-last page of the NOI, the Commission circles back around to the questions of statutory and Constitutional authority. Again, though, it declines to offer its own analysis, but instead simply asks for suggestions as to where the Commission might look for such authority.)

It’s not like the Commission is putting the cart before the horse here; it’s more like the Commission has started pulling the cart down the road while it asks passersby whether they happen to have seen a horse anywhere nearby.

And as to the Constitution – it does not appear to be much of a concern to the Commission. The NOI refers repeatedly to the risks or threats posed by (among other things) “inappropriate content”, which includes “offensive language” and “hate speech”, as if the Commission (or any governmental agency, for that matter) could regulate “inappropriate content” for being, well, “inappropriate”. Maybe we missed something back in Constitutional Law 101, but it’s news to us that the government might be able to regulate speech simply by characterizing that speech as inappropriate. There is, of course, a set of well-established constitutional standards for defining “obscenity”. But beyond that, the government’s ability to regulate speech is far less clear.

That's especially so when the trigger for such regulation is the dramatically imprecise concept of "inappropriate" – and when that concept is used in connection with child-raising. It is difficult to imagine a subject more private and less susceptible to definition (much less control) by a federal agency than that which may be deemed "appropriate" for children. Perhaps *the* paramount privilege and responsibility of parenthood is the task of instilling one's children with standards and values of the parents' choosing. Does the First Amendment countenance governmental intrusion into the ultra-private realm of child-raising in the name of controlling the "inappropriate"? We doubt it, and the NOI provides no analysis to support the contrary position.

Still, the Commission plunges deeply into the inner sanctum of the family, even going so far as to ask about "household media rules", by which it means rules which parents establish to govern their own children's media use.

Putting aside the threshold question of statutory and Constitutional authority, we should also note – as the Commission itself does – that "other federal agencies are addressing some of the same issues" presented in the NOI. But if that's the case, why should the FCC feel the need to weigh in? It is, after all, the Federal *Communications* Commission, not the Federal Child-Raising-and-Protecting Commission. Of course, if other agencies with more direct interest in this area – say, the Department of Education, or maybe the Department of Health and Human Services, for two – call on the FCC for input relative to areas within the FCC's particular area of expertise, the FCC should assist. But it's unclear why the FCC believes that it can or should be in the forefront of any such effort.

The NOI consists of 25 single-spaced pages chock-a-block full of questions along the following lines:

- What is "the level of awareness among parents, teachers, and children of the benefits of electronic media"?
- "Is there a sufficient amount of cognitive/intellectual children's programming available today?"
- "What options are there to protect [certain] children from the risks of exposure to electronic media?"
- Is there "a minimum level of media literacy that parents, teachers, and children must have to ensure that children can participate effectively in modern society and enjoy the benefits of electronic media while avoiding the potential harms"? (Note that responding to this particular question will be complicated by the fact that the

NOI fails to define (a) “media literacy” or (b) “effective participation in modern society”.)

We could go on, but you presumably get the point: these are not questions which are likely to generate any seriously useful answers.

Oh, and in case the questions posed by the Commission weren’t general enough, the NOI also invites comments to “ask and answer any other questions that this NOI fails to raise which they believe would help inform [the FCC’s] inquiry.” Talk about open-ended!

The deadlines for comments and replies have not yet been set – they depend on when the NOI is published in the Federal Register. Since the Commission’s inquiry last March attracted more than 10,000 comments, we may see the same here. On the other hand, since that last inquiry covered largely the same turf as the NOI, maybe not; but in view of the vastness of the questions posed, the NOI may attract more. We’ll have to wait and see.

While perhaps well-intentioned, the NOI is reminiscent of the presentation made by Professor Harold Hill to the parents in River City, Iowa. Hill (the central character in *The Music Man*) wanted to convince the town’s parents that a serious problem existed among the town’s youth, a problem for which he, conveniently enough, had the solution. Was there really a problem? Probably not, but you never know. Did Hill have the solution to the possibly non-existent problem? He managed to convince the parents that he did. The analogy to the NOI is tempting, but it isn’t perfect. Perhaps there is indeed some trouble in our River City – but that would be trouble with a “T”, and that rhymes with “FCC” and that stands for . . . well, you know the tune.