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CASHING OUT CHILDREN’S TELEVISION

*Instead of providing children’s television,
should broadcasters simply be required to pay for it?*

Doug Lichtman

ABSTRACT

Under current rules, a television broadcaster is presumed to satisfy its obligation to air educational programming as long as it offers an average of three hours of self-described “educational” content each week. I propose replacing this toothless presumption with one under which a broadcaster would be deemed to satisfy the obligation only if the broadcaster donates, in cash, to a qualifying educational nonprofit, the aggregate economic value of three weekly hours of television airtime. The idea is to address an inconsistency that has undermined the traditional approach since its inception: the rules require broadcasters to air educational television because market forces would not otherwise create an adequate incentive for them to do so, but the same rules then rely on market forces to discipline broadcasters as they determine which programs are sufficiently “educational” in substance. My proposal, by contrast, would strip unmotivated broadcasters of creative control, cash them out, and move the money instead to motivated nonprofits. The burden placed on broadcasters would be the same as it is today; either way, the real cost to broadcasters is the lost opportunity to earn revenue on three hours of more profitable programming. But the value created would be substantially more. Broadcasters, in short, would no longer be told to provide educational television; they would simply be told to pay for it.

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* Professor of Law at the University of California, Los Angeles. He first puzzled about these issues back in 1998 when coauthoring the textbook *Telecommunications Law & Policy* alongside colleagues Stuart Benjamin & Howard Shelanski. For help in finally putting pen to paper twenty years later, sincere thanks to Tom Firey, Maan Sangid, and the editorial team at the Journal.

INTRODUCTION

Thirty years ago, Congress enacted aspirational legislation requiring that television broadcasters serve the “educational and informational needs” of children.¹ The statute offered few implementation details, vaguely instructing the Federal Communications Commission (FCC) to consider, during license renewal, the extent to which a broadcaster has met this goal through either general programming or “programming specifically designed to serve such needs.”² But the statute did articulate one very specific nuance: the statute empowered the Commission to look beyond a licensee’s own direct offerings and consider not only “any special nonbroadcast efforts by the licensee which enhance the educational and informational value” of their own programming, but also “any special efforts by the licensee to produce or support programming broadcast by another station . . . which is specifically designed to serve the educational and informational needs of children.”³

This portion of the statute has lain dormant for thirty years, in large part because the FCC promulgated rules early on that, as a practical matter, eliminated any incentive for broadcasters to even experiment with indirect initiatives. But the FCC has recently changed course. In July 2018, a then-pending Notice of Proposed Rulemaking called for comments on a possible “framework that [would] make the use of special sponsorship efforts and special non-broadcast efforts a more viable option for broadcasters in fulfilling their children’s programming obligations.”⁴ The Commission repeated that call one year later in a Further Notice of Rulemaking, officially extending the pending proceeding in an effort “to create a more robust record and to solicit industry proposals for a detailed framework for evaluating special sponsorship efforts.”⁵

I write here to offer such a proposal. Specifically, I propose that the Commission eliminate the existing and well-worn presumption that three hours of regularly scheduled “educational programming” is sufficient to meet federal standards and replace it with a presumption that a broadcaster’s obligation is met if the broadcaster donates, in cash, to a qualifying educational nonprofit, the aggregate economic value of three weekly hours of television airtime.

This would address a glaring inconsistency that has undermined the efficacy of the FCC’s approach since its inception: The FCC intervened in this market on the theory that unfettered market forces will not by themselves adequately incentivize broadcasters to provide worthwhile children’s programming,

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1. Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996–1000 (codified at 47 U.S.C. §§ 303a, 303b, 394).
 2. 47 U.S.C. § 303b(a)(2).
 3. See 47 U.S.C. §§ 303a (the obligation to consider compliance at renewal), 303b(1) (special nonbroadcast efforts), 303b(2) (other special efforts).
 4. 33 FCC Rcd. 7041 ¶ 44 (July 13, 2018).
 5. Children’s Television Programming Rules; Modernization of Media Regulation Initiative, 34 FCC Rcd. 5822 ¶ 75 (July 12, 2019).

but the FCC then structured its intervention so as to rely on market forces as the primary check on program quality. My proposal tolerates no such incongruity. Instead, it strips unmotivated broadcasters of creative control, cashes them out, and moves the resulting financial resources to motivated nonprofits like the Sesame Street Workshop and the Corporation for Public Broadcasting. The burden placed on broadcasters under my proposal would be the same as it is today; either way, the real cost to them is the lost opportunity to earn revenue on three hours of more profitable programming. But the value created could be substantially more. Broadcasters, in short, would no longer be told to provide educational television; they would simply be told to pay for it.

This Article proceeds in four short parts. Part I begins by revisiting the rationale for governmental intervention with respect to educational television. As I explain, the intuition underlying this regulatory regime is that market forces will not sufficiently motivate broadcasters to produce high-quality educational fare, and regulation must therefore fill the gap. In Part II, I briefly summarize the Commission's historical efforts along those lines. The problem, I argue, is that the FCC has never had the conviction to actually enforce meaningful substantive requirements. In Part III, I briefly summarize the current proceeding and articulate my responsive proposal. The key points are that my proposed presumption (1) would not increase the costs imposed on broadcasters; (2) would give creative control to motivated parties; and (3) could be implemented by the Federal Communications Commission without further Congressional action. Finally, I conclude by pointing out the larger and more general question lurking here: when should regulators stop imposing awkward behavioral obligations on regulated parties and instead simply require them to contribute to the relevant social effort by paying cold, hard cash?

I. THE NEED FOR REGULATION

Educational television can be an effective teaching tool. *Sesame Street* teaches preschoolers basic lessons in social interaction, language, and mathematics. *Barney & Friends* helps with colors, shapes, and imaginative play. *Mister Rogers' Neighborhood* famously taught a generation of youngsters that they make the world special just by being themselves. *Reading Rainbow* ironically used the medium of television to remind the next generation of the joy that can be found in a book. There really is no plausible debate on the question of whether television can educate and inform young people. As the FCC itself has repeatedly conceded, well-designed television absolutely can.

There is likewise little room for debate on the question of whether broadcast television offers unique advantages over other teaching media. This is not to imply that television should be preferred over more traditional teaching tools like textbooks and classrooms, nor that it should be preferred over competing audiovisual platforms like cable, DVDs, Netflix, and the internet. The point is simply that broadcast television has qualities that make it a promising

component of the larger educational ecosystem. Broadcast television is available for free, because it is funded by advertisers. It is convenient, because it reaches youngsters in their homes and is available at times, including very early in the morning, when parents' focus might be elsewhere by necessity. It is widely available, with ballpark 115 million homes having access to at least three over-the-air, advertiser-sponsored signals.⁶ Lastly, youngsters can access television content even when they are too young to read and, at that, can glean information that might be difficult to communicate exclusively through the written word at any age.

Educational broadcast television is obviously more important in some communities than others. Recent data suggest, for example, that while only 13 percent of all television households rely on over-the-air broadcast as opposed to cable or satellite, that percentage jumps to nearly 17 percent when the focus is narrowed to include only African American households and almost 21 percent when narrowed to only Hispanic.⁷ Wealth and income explain at least some of these statistics. The average monthly cost for basic cable television today clocks in at roughly \$24 per month.⁸ Netflix charges approximately \$9 per month for its basic streaming service,⁹ but to use that service families must also purchase sufficiently fast internet access, the cost of which varies considerably from community to community, but is approximately \$50 to \$60 per month throughout the country.¹⁰ For families with limited resources, then, educational broadcast television is a particularly important option.

Despite all this potential, however, three specific market failures combine to limit broadcasters' incentive to actually meet what seems like it should be robust market demand. The first problem is the classic externality associated with education. Individuals have a strong incentive to invest in their own education because increases in education are associated with increased monetary and nonmonetary gains. That said, individuals should invest in even more education than any self-interested rationale would suggest, because increases in education also benefit others. For instance, a more educated person might pay higher taxes or be more likely to engage in socially beneficial entrepreneurial activity. When making decisions relevant to their own education, however, individuals typically and understandably ignore benefits enjoyed by

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6. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 32 FCC Rcd. 568 ¶ 78 n.249 (Jan. 17, 2017).
 7. *The Nielson Total Audience Report: Q3 2018*, NIELSON, 15 (Mar. 19, 2019), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/q3-2018-total-audience-report.pdf> [<https://perma.cc/EC5L-X89S>].
 8. 32 FCC Rcd. 568, *supra* note 6, ¶ 67 Table III.A.4.
 9. *See Choose the Plan That's Right for You*, NETFLIX (last visited Sept. 5, 2019), www.netflix.com/signup/planform [<https://perma.cc/A87V-DZGJ>].
 10. *See Digital Divide: Broadband Pricing by State, Zip Code, and Income Level*, BROADBAND-NOW RESEARCH (last updated Feb. 2019), <https://broadbandnow.com/research/digital-divide-broadband-pricing-state-zip-income-2019> [<https://perma.cc/P5FP-NKJU>].

third parties and focus only on the benefits that they themselves garner. As a result, demand for education is significantly lower than what it would be were all the benefits of education actually considered. Demand for educational television is similarly inefficiently depressed.

The second problem is yet another widely recognized problem endemic to education: children have significant influence over their own educational choices but lack the longterm perspective necessary to thoughtfully balance costs and benefits. Youngsters, in short, are understandably drawn to video games and frivolity even in instances where their longterm self-interest would be better served spending time with more meaty materials. This is one common explanation for why grade school is mandatory throughout the United States. It is also a reason why demand for educational programming will always be systematically too low. Admittedly, parents can mitigate this distortion by encouraging their children to watch certain programs, but parental control suffers serious constraints in this context. Some television consumption takes place outside the home and hence outside a parent's sphere of influence. Likewise, some viewing happens in the home but at times when parents are at work or focused on other matters. And, even for television viewing that happens at home and fully within the sphere of parental influence, the reality is that it is hard for parents to know exactly which television programs teach which concepts and at what levels of sophistication. Again, the point here is that these challenges erode demand for, and hence undermine the incentive for broadcasters to provide, high-quality educational content.

The third challenge in this market is advertisers. Advertisers distort broadcaster incentives and do so in ways that are particularly problematic as applied to educational television. Simplifying a bit, advertisers choose the degree to which they will fund a program by considering the number of decisionmakers who will likely see a given advertisement, the number of decisionmakers who will then likely be influenced by that advertisement, and the extent to which that influence can ultimately lead to increased profits for the advertiser. Thus car companies are among the biggest advertisers on broadcast television, because there are many programs that attract large numbers of potential car buyers, those viewers can plausibly be influenced by an advertisement emphasizing some detail about a particular car, and that influence can generate substantial profits given the large amounts of money at stake. By the same token, companies that provide cellular telephone service spend considerable amounts on television advertising, again because there are many programs that attract large numbers of potential cell phone customers, television advertisements related to cellular service can influence behavior, and substantial monies are at stake.

But educational television scores poorly on these metrics. Children, after all, rarely have significant influence when it comes to their family's major purchasing decisions. And, while some parents might watch educational fare

alongside their children, the number of potential viewers in that category is modest at best. High-quality educational programs then exacerbate this problem by taking these small numbers of potential targets and segmenting them into even smaller groups. An entertainment program might plausibly attract a large number of children spread across many different age groups. By contrast, an educational program that appropriately engages a three-year-old child is unlikely to be appropriate for, let alone attractive to, their five-year-old or nine-year-old peers. The total available amount of advertiser funding for educational television is thus extremely small.¹¹

All that combines to make the basic case for government intervention in this market. Educational broadcast television is capable of serving the educational and informational needs of children. Its convenience, accessibility, and price tag are alluring. Yet, because of a combination of market forces, broadcasters are not motivated to provide educational content in meaningful forms and meaningful quantities. It is no surprise, then, that the government has endeavored to intervene.

II. THE GOVERNMENT'S TEPID RESPONSE

The Federal Communications Commission first took action in 1971 when, in response to a petition filed by the advocacy group Action for Children's Television, the Commission launched a Notice of Inquiry "to explore and define the fundamental issues in children's television."¹² That initial inquiry focused on two categories of possible regulation: (1) the FCC considered requiring broadcasters to air minimum amounts of age-specific programming each week; and (2) the FCC considered various proposed limitations on the types of commercial advertisements that would be allowed to air during children's programs.

While the Commission was engaged in its work, the National Association of Broadcasters (NAB) stepped in and proposed changes of its own. The NAB unilaterally announced, for example, that advertisements for breakfast cereals would be required to emphasize the importance of a balanced diet and that children "would not be directly encouraged to pressure their parents into buying advertised products."¹³ In meetings with the Commission, the NAB further agreed to limit the amount of advertising aired during each hour of children's programming and to take steps to separate the content of any children's program from the advertisements that might be run during, before, or after that program.¹⁴ Captain Kangaroo would no longer be allowed to subtly endorse Schwinn bicycles by telling viewers about his neighbor "the Schwinn

11. And problematic. Children might be particularly vulnerable to misleading advertisements, for example, and might have trouble differentiating content from promotion.

12. Children's Television Programming and Advertising Practices, 96 FCC 2d 634, ¶ 2 (1984).

13. *Action for Children's Television v. FCC*, 564 F.2d 458, 464 (D.C. Cir. 1977).

14. *Id.* at 465.

Bicycle Man” or by commenting, in character, that Schwinn bikes are the best bicycles in the world.

The Commission concluded its rulemaking process in 1974 and in essence announced that, for the time being at least, industry self-regulation was enough. The Commission refused to adopt any of the rules then under consideration, explaining that regulations of this sort implicate “a sensitive First Amendment area” and arguing that it was therefore “wise to avoid detailed governmental supervision of programming wherever possible.”¹⁵ The Commission did reaffirm that “television broadcasters, as trustees of a valuable public resource,”¹⁶ have an obligation to “further the educational and cultural development of America’s children.”¹⁷ But compliance with that obligation was left to “ad hoc” review, and the Commission expressed optimism that, because advertisers do have an interest in reaching children, “the commercial marketplace will continue to provide an incentive to carry” children’s fare.¹⁸ Further regulations regarding advertisements, meanwhile, were explicitly left to the Federal Trade Commission, which at the time was already in the midst of its own review of whether certain types of advertisements were impermissibly deceptive.

Four years later, the Commission restarted the rulemaking process, this time empowering a task force to evaluate the degree to which broadcasters were complying with the obligations that had been affirmed in the prior round. The task force reported back in 1979 and offered an unsurprisingly negative appraisal, recognizing, among other problems, that “the economic incentives of the advertiser-sponsored broadcasting system do not encourage the provision of specialized programming for children.”¹⁹ The Commission in response opened a second inquiry into possible regulatory reform and again set out to consider, among other possible interventions, whether broadcasters should be required to air minimum amounts of age-specific programming each week.

Nothing would change. In December 1983, just nine months after opening the docket item, the Commission announced, “[t]here is no national failure of access to children’s programming that requires an across-the-board, national quota for each and every licensee to meet.”²⁰ “[C]hildren watch enough television, and no regulatory initiative need be introduced to get them to watch more.”²¹ The Commission did once more pay lip service to broadcasters’ general obligation to educate and inform the nation’s youth, writing that “broadcasters’ public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of

15. Children’s Television Report and Policy Statement, 50 FCC 2d 1, ¶ 19 (1974).

16. *Id.* ¶ 16.

17. *Id.* ¶ 18.

18. *Id.* ¶ 19.

19. See 96 FCC 2d 634, *supra* note 12, ¶ 6 (summarizing the Task Force Report).

20. *Id.* ¶ 32.

21. *Id.* ¶ 34.

the child audience.”²² But those words were patently empty because the Commission once more opted not to promulgate specific rules about content or pedagogy. As a practical matter, educational television was again left to some combination of market forces and broadcaster discretion.

Seven years later, Congress enacted the Children’s Television Act of 1990.²³ The new law addressed a handful of issues, but its primary purpose was to require that the Federal Communications Commission consider “in its review of any application for renewal of a . . . television broadcast license . . . the extent to which the licensee . . . has served the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”²⁴ Congress left the details of the newly-required review to the Commission, but Congress did specify that, in pursuing that work, the Commission could consider not only the licensee’s program offerings but also “special nonbroadcast efforts by the licensee which enhance the educational and informational value” of the licensee’s programming and “special efforts by the licensee to produce or support programming broadcast by another station in the licensee’s marketplace which is specifically designed to serve the educational and informational needs of children.”²⁵

The Commission implemented the statute in the months that followed but once more showed little enthusiasm. It declined to adopt any quantitative requirement as to the amount of programming a given licensee would be required to air.²⁶ It announced that broadcasters would be free to “select the age groups they can most effectively serve” rather than being constrained by any age-specific guidelines.²⁷ And it even rejected a proposal that would have obligated broadcasters to assess the needs of children in their viewing areas and then use that information to guide programming decisions.²⁸ Most importantly, the Commission powerfully signaled its disinterest by highlighting, as examples of meritorious children’s programming, the situational comedy “Saved by the Bell” and the cartoon “The Smurfs,” describing the former as an educational program that addresses “topical problems and conflicts faced by teens” and the latter as a vehicle by which to teach “prosocial behavior.”²⁹ Unsurprisingly, the next year, one broadcaster asserted in its renewal application that it

22. *Id.* ¶ 43 (quoting Petition of Action for Children’s Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children’s programming and the Establishment of a Weekly 14-Hour Quota of Children’s Television Programs, 50 FCC 3d 1 ¶ 17 (1974)).

23. Children’s Television Act of 1990, Pub. L. No. 101-437, *supra* note 1.

24. 47 U.S.C. § 303b(a)(2).

25. 47 U.S.C. § 303b(1)–(2).

26. Policies and Rules Concerning Children’s Television Programming, 6 FCC Rcd. 2111, ¶ 24 (1991).

27. *Id.* ¶ 18.

28. *Id.* ¶ 22.

29. *Id.* ¶ 26.

met its obligation to air educational programming in part by airing the television program "Leave it to Beaver." That broadcaster specifically highlighted (in shorthand notes) an episode where "Eddie misunderstands Wally's help to girlfriend, Cindy, and confronts Wally with his first. Communication and trust are shown in this episode."³⁰

But the Commission's rules would not stabilize there. In 1993, at the urging of President Clinton,³¹ the Federal Communications Commission issued yet another Notice of Inquiry on Children's Television and, three years later, promulgated the regulations that would turn out to govern the market for more than two decades. Those new regulations aimed to accomplish three goals. First, the rules attempted to better define the types of programs that would qualify as educational fare. As the Commission explained, existing "imprecision in defining the scope of a broadcaster's obligation under the Children's Television Act" had made it possible for some broadcasters to claim to have satisfied their obligations "with shows that, by any reasonable benchmark, cannot be said to be 'specifically designed' to education and inform children."³² The Commission thus articulated a variety of objective considerations, in essence announcing a strong preference for programs that are regularly scheduled weekly programs of at least 30 minutes in length, aired between 7:00 a.m. and 10:00 p.m.

Second, because "parents and others frequently lack timely access to information about the availability of [educational] programming in their communities,"³³ the Commission adopted a variety of public information initiatives designed to increase awareness of educational content. The new rules required that broadcasters identify educational and informational programs to firms that publish television program guides, as well as on various official, public forms. The idea was two-fold: make it easier for interested parties to find relevant educational programming, and make it easier for community leaders to evaluate broadcaster compliance and complain as need be.³⁴

Third and finally, the new rules aimed to give broadcasters increased certainty that, if they offered programs that met the various objective guidelines and if they also cooperated with the Commission's informational initiatives, their efforts would be deemed sufficient come renewal time. Thus, the Commission adopted a "processing guideline" under which a broadcaster's compliance would be given rubber-stamp "staff level" approval so long as the broadcaster

30. See Harry F. Waters, *On Kid TV, Ploys R Us*, NEWSWEEK NOV. 30, 1992, at 88.

31. See, e.g., Ellen Edwards, *No Tantrums at Hearings on Kids' TV*, THE WASHINGTON POST June 29, 1994, at D1 ("This is a Clinton commission," said one advocate, "and a lot of his constituency is interested in this issue.").

32. Policies and Rules Concerning Children's Television Programing, 11 FCC Rcd. 10660 (Aug. 8, 1996) ¶ 2.

33. *Id.*

34. *Id.* ¶ 3.

had, during the prior licensing period, aired an average of three hours of programming each week where the programming met the objective requirements outlined above and was identified by the broadcaster as having “as a significant purpose” the goal of educating and informing children.³⁵ Renewal applications that fell short of these requirements would be referred to the full Commission where the broadcaster would “have the full opportunity to demonstrate compliance” in other ways.³⁶ But the risk associated with full Commission review had its predictable impact, and thus the availability of the rubber-stamp “processing guideline” in practice meant that nearly every broadcaster chose to meet the objective standards rather than risk more serious Commission inquiry. As a result, the provisions related to “special non-broadcast efforts” and “special efforts by the licensee to produce or support programming broadcast by another station” became dead letter.³⁷ Money spent in those categories would only matter for broadcasters willing to take the risk of full Commission review; few, if any, were.³⁸

The important takeaway from this entire history is that the Commission’s rules have never seriously constrained broadcasters. The rules have never addressed content. The rules have never endorsed any specific pedagogy. Instead, the FCC has consistently relied on the “good faith judgments of broadcasters” and threatened to evaluate programs “only as a last resort.”³⁹ No wonder Commissioner O’Rielly launched the current proceeding by complaining that there was no educational television worth watching.⁴⁰ For all its rounds of regulatory process, the Commission has never seriously required any.

III. THE CURRENT PROCEEDING

All that set the stage for the current reform effort. The Commission’s work since 2018 has been primarily framed as a response to the changing and ever-expanding media landscape. The Commission has recognized that children lucky enough to have access to cable, satellite, Netflix and YouTube might no longer need the educational content that broadcasters have historically been pressured to provide.⁴¹ The Commission has hesitated to make significant changes to the rules, however, because the Commission at the same time understands that some children lack access to these newer media platforms

35. *Id.* ¶¶ 115–34.

36. *Id.* ¶ 120.

37. 33 FCC Rcd. 7041, *supra* note 4, ¶ 9.

38. *Id.* ¶ 44.

39. 11 FCC Rcd. 10660, *supra* note 32, ¶ 4.

40. Michael O’Rielly, *It’s Time to Reexamine the FCC’s Kid Vid Requirements*, FCC.gov (Jan. 26, 2018, 10:30 AM), <http://https://www.fcc.gov/news-events/blog/2018/01/26/its-time-reexamine-fccs-kid-vid-requirements> [<https://perma.cc/V2FU-MJA2>].

41. *See, e.g.*, 11 FCC Rcd. 10660, *supra* note 32, ¶¶ 16–17.

and hence still rely on broadcast content.⁴² In fact, those children might need the government's help even more than did their peers thirty years ago. After all, educational television has always faced the challenge that the audience for educational fare is too small for advertisers to fund. As the number of families relying on broadcast drops, that problem grows more acute.

Under rules adopted in July 2019, then, the status quo was largely maintained. Broadcasters are still required to air programs that are specifically designed to educate and inform children, and broadcasters are still able to qualify for rubber-stamp approval come renewal time simply by showing that they have, on average, aired a specified number of hours of programming each week. Moreover, the law still does not specifically articulate any educational outcomes by which programs will be judged and still does not endorse any particular pedagogical approach that should be used when new programs are being developed.

And the process could have ended right there. But the Commission kept the proceeding open for one specific purpose: soliciting comments on a possible "framework that would make the use of special sponsorship efforts a more viable option for broadcasters" in fulfilling their children's programming obligations.⁴³ This is where I hope to join the fight. The modest changes implemented so far have little chance of meaningfully improving the quality of educational broadcast television because they repeat the mistakes of the past. Under the new rules, after all, market forces are still being asked to discipline broadcasters even though the entire regulatory regime is built on the realization that market forces will never adequately incentivize educational fare.

A framework for non-broadcast efforts, by contrast, could be materially new. It could redefine broadcasters' role as paying for children's television rather than providing it. It could fund motivated educators to design, evaluate, and improve educational fare rather than leaving that work to disinterested broadcasters. And it could do all of that without in any way increasing the costs imposed on broadcasters. Specifically, broadcasters could still enjoy rubber-stamp approval and still contribute only the economic value of three hours of airtime each week. And all of these possibilities exist right now, without any need for Congressional action, and without significantly changing the way the Commission understands its role.

Let me start, then, by restating my proposal explicitly. I propose that the Commission eliminate the longstanding presumption that three weekly hours of self-described educational programming is sufficient to meet federal

42. See, e.g., 34 FCC Rcd. 5822, *supra* note 5, ¶ 19 ("Nevertheless, while it is clear that the media landscape has evolved dramatically since the children's programming rules were adopted, we recognize that not all children, particularly children in minority and low-income households, have access to the wealth of children's educational programming available on non-broadcast platforms.").

43. *Id.* ¶ 75.

standards and replace it with a presumption that a broadcaster's obligation is met if that broadcaster donates, in cash, to a qualifying educational nonprofit, the aggregate economic value of three weekly hours of television airtime. Qualifying donations would need to bind the recipient to use the money "to produce or support programming broadcast by another station in the licensee's marketplace which is specifically designed to serve the educational and informational needs of children,"⁴⁴ which is exactly the language that Congress wrote thirty years ago when it suggested the Commission consider cash contributions in the first place.

My use of a presumption is perhaps the first detail worth explaining. Up until now, federal law has allowed broadcasters to meet their obligations in cash rather than in kind. But broadcasters have never been motivated to do so because there has been no rubber-stamp process by which to prove that a given set of financial commitments was sufficient to pass regulatory muster. A broadcaster that aired its own educational programming, by contrast, could trigger rubber-stamp review simply by airing the right number of hours of content, at the right times, in the right formats, even if the programming itself was of embarrassingly low quality. But a broadcaster that opted to deploy financial resources was not eligible for rubber-stamp review and thus had no choice but to take the risk of justifying its expenditures before the full Commission. I propose to solve this problem by replacing the existing, objective, rubber-stamp path based on direct broadcast efforts with a new, comparably objective, rubber-stamp path based on direct financial contributions. Broadcasters would opt into the new program for the very same reasons they have historically opted to meet the three-hour guideline: compliance would be the safest path toward renewal.

This ties to my bigger thematic point: my proposal would in effect recast each broadcaster's "public trustee" obligation as an obligation to pay for educational fare rather than provide it. This is intentional. Over the long run, payments like these will help make plain exactly how much money is being spent on educational television, and that information in turn will allow for a more meaningful conversation about whether that number is inappropriately low, inappropriately high, and whether those dollars might be better spent on textbooks, teacher salaries, or other educational inputs. It might well turn out, for example, that upon seeing exactly how much money is flowing in this part of the educational ecosystem, voters will decide that this implicit tax should be expanded to apply to cable providers and Netflix. It might turn out that voters will decide that these monies should instead be folded into local school budgets. Voters might even decide that this money is well spent as-is because, once created, a high-quality television program can be viewed again and again by a large number of geographically dispersed children, thereby generating

44. 47 U.S.C. § 303b(2), *supra* note 3.

tremendous value per dollar invested. Regardless, by articulating the requirement as an obligation to pay, the FCC can finally make explicit a set of numbers that have long been hidden from the public's view.

Reframing the public trustee obligation as an obligation to pay, rather than an obligation to provide, also has a more immediate consequence: it opens the door to possible concentration of resources. In other settings, the Commission justifiably demands that broadcasters each themselves air some specific programming of interest. During election years, for example, the Commission has historically pressured ABC, NBC, CBS and FOX to each redundantly and simultaneously air the Presidential debates. The idea is that, by forcing every broadcaster to simultaneously air these events, the Commission eliminates what might otherwise be attractive, competing options and thus increases viewership for the debates themselves.⁴⁵ Similarly, for many years, when a broadcaster attacked "the honesty, character, integrity or like personal qualities of an identified person or group," that broadcaster was required to offer the attacked person or group "a reasonable opportunity to respond over the licensee's facilities."⁴⁶ The idea this time was that the most likely way to reach the viewers of the original content was to air a response on the same channel.

No plausible story along these lines has even been invoked to explain children's television, however. The FCC has never forced broadcasters to air their children's programs simultaneously, for example, although it might have been an interesting experiment to declare (say) Tuesday nights to be "education nights" and simply not allow broadcasters to air dramas, comedies, or indeed anything other than educational television on that one evening each week. Similarly, the Commission never took the position that viewers need to watch educational programs on particular channels. Quite the opposite, the Commission has long facilitated the hunt for appropriate programs across the dial, specifically by requiring broadcasters to label their educational programs on screen, to identify their educational programs to firms that publish television guides, and to list their educational programs on various public documents. Besides, if each broadcaster is offering only three hours of educational programming each week, and if each specific hour will target one age range but not another, no single channel can plausibly be all things to all viewers anyway. Families that rely on broadcast for educational fare have no choice but to consider multiple broadcasters' offerings.

How does all this relate to the concentration of resources? Up until now, even though there was never a policy justification for it, every broadcaster was nevertheless pressured to fund and air its own programs. That meant that

45. See William E. Kennard, Op-Ed, *Fox and NBC Renege on a Debt*, THE NEW YORK TIMES Oct. 3, 2000, at A27 (castigating NBC for breaking with this norm in 2000 to show a baseball game, and FOX to show the science fiction program *Dark Angel*).

46. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–74 (1969) (discussing the then-applicable rule).

production budgets were spread thin. But more importantly it meant that most of the money invested in children's television was actually spent to functionally purchase airtime. Think of it this way: the real cost felt by broadcasters as they comply with the existing rules is the opportunity cost associated with airing children's television rather than more profitable fare. Thus, by requiring every broadcaster to air its own shows, the existing rules in essence take the pot of money that broadcasters are required to allocate to educational television and spend most of it on time, rather than content. Remove the obligation to directly air educational programs, however, and suddenly spending can be intentionally rebalanced. Some nonprofits might decide that the best approach is indeed to spend most of the money to purchase minutes of airtime. But others might decide instead to reallocate scarce resources, buying less time and investing correspondingly more in development and production. My proposal opens the door to these possible tradeoffs.

My approach offers yet another substantial advantage, and it is frankly the advantage I find most enticing: it allows broadcasters to hand over key pedagogical and content decisions to parties with the knowledge and commitment to actually make the most of whatever resources society chooses to devote to children's educational television. The regulatory regime historically has been built on an irreconcilable tension: on the one hand, the Commission recognizes that broadcasters lack a financial incentive to invest in high-quality educational fare and hence must be pressured to offer these programs; on the other hand, the Commission has steadfastly refused to impose on broadcasters any rules about quality, pedagogy, or substance, maintaining that the market will provide proper incentives. The fox, in short, has been forced to guard the educational hen house, but the details have been graciously left to the fox's "good faith" judgments. The historical evidence is already enough to definitively reject this approach. Broadcasters have been "complying" with the FCC's most extensive children's television rules since 1996, yet the industry has not in all that time developed anything remotely resembling a comprehensive plan for creating and evaluating educational programming. Contrast this with the thoughtful approach adopted by the nonprofit Sesame Street Workshop, where content, teaching styles, and format are constantly being studied, evaluated, and changed.⁴⁷

My proposal thus shifts control away from half-hearted broadcasters and toward motivated educators, and it does so without asking the Commission

47. The research conducted on, by, and for the Sesame Street Workshop is breathtaking, and the comparison between what broadcasters do on the one hand, and what that one nonprofit does on the other, is simultaneously revealing, depressing, and damning. See Comments of Sesame Workshop, as filed in the Matter of Children's Television Programming Rules, Modernization of Media Regulation Initiative, MB Docket No. 18-202, MB Docket No. 17-105 at 3-5 (September 24, 2018) (summarizing some of the research and calling on the FCC to similarly take seriously the science of children's television).

to itself become the Department of Education. This is why I propose that rubber-stamp approval be awarded in any instance where a broadcaster has made the appropriate financial grants, rather than proposing that each broadcaster contribute money to some federal fund that would then evaluate and pick proposals. The idea of creating a federal fund would not be crazy. The real Department of Education, for example, from time to time makes grants to support the creation of educational television.⁴⁸ And, separately, since 1967, Congress has empowered the Corporation for Public Broadcasting to allocate hundreds of millions of dollars every year to support the production and distribution of programming that “addresses the needs of underserved audiences, especially children and minorities.”⁴⁹ But my proposal takes seriously the FCC’s long-articulated reluctance to intervene too directly in what it describes as a “sensitive First Amendment area.”⁵⁰ Thus, under my proposal, educational decisionmaking would remain as decentralized as ever. Instead of picking programs, broadcasters would pick grant recipients, and thus the Commission’s rubber-stamp rule would continue to be a purely objective checklist.

As to the size of the check that each broadcaster would need to write, much depends on whether the Commission is willing to eliminate the existing rubber-stamp review. If not, no broadcaster will be willing to pay in cash any more than what that specific broadcaster would otherwise have to pay to satisfy the Commission’s existing rule. Financial obligations as a result would need to be tailored to each station’s unique economics. The key factors would be the costs that particular station would otherwise incur to produce or purchase qualifying educational content, and the opportunity cost that particular station suffers when it devotes an hour to low-revenue educational material rather than to its specific, presumably higher-revenue, next-best option. These numbers would obviously be difficult for the Commission to calculate, and errors in the calculations would be exploited by broadcasters. If the FCC inadvertently understates costs, the relevant broadcaster will opt for the non-broadcast option. If the FCC inadvertently overstates costs, the broadcaster will instead air its own programs.

I therefore favor removing the existing rubber-stamp pathway entirely, thereby making room for imperfect calculations. A broadcaster’s average profitability per hour could be combined with reasonable estimates as to the

48. See, e.g., Press Release, U.S. Department of Education, U.S. Department of Education Announces \$25 Million for Science and Literacy-Themed Television and Digital Media (Sept. 3, 2015), <https://www.ed.gov/news/press-releases/us-department-education-announces-25-million-science-and-literacy-themed-television-and-digital-media> [<https://perma.cc/WEB3-EGCA>].

49. *Diversity*, Corp. for Pub. Broad. (last visited Apr. 8, 2020), <http://www.cpb.org/diverseaudiences> [<https://perma.cc/YH83-NKYV>]. For detailed information about the Corporation’s mission, budget and programs, see <http://www.cpb.org> [<https://perma.cc/A3S5-GG6Q>].

50. 50 FCC 2d 1, *supra* note 15, ¶ 19.

costs of producing content to create a plausible, but not perfect, estimate. Broadcasters would then typically opt to pay that imperfect measure anyway, because the alternative (offering their own content and having it reviewed on the merits by the full Commission) would be significantly more risky. Removing the existing “processing guideline” thus makes it easier for the Commission to implement the nonbroadcast approach. And leaving broadcasters with an option to directly air programming in this scenario serves as a safety net in case the default economic analysis is wildly inappropriate for some specific broadcaster.

Another issue that needs to be addressed is whether all the funds transferred under my proposed mechanism would need to be used to support educational television as opposed to supporting other educational efforts. From a public policy perspective, strong arguments can be made in favor of at least considering redirecting some of the money toward textbooks and teachers’ salaries. But, on this, I favor the more conservative course. After all, the Children’s Television Act itself references only expenditures that are tightly tied to broadcast, with the statute specifically pointing to expenditures that “support programming broadcast by another station” and expenditures that “enhance the educational and informational value” of a broadcaster’s own programming.⁵¹ This leaves room for some nontelevision efforts, but it does not plausibly authorize a completely freewheeling program of educational investments. I thus opt for an approach that can be implemented right away, without further Congressional action. A more aggressive implementation might someday be attractive, but there is no reason to allow the perfect to delay the implementation of the potentially very good.

A harder question is whether monies spent on broadcast should be strictly limited such that every penny from a given broadcaster must ultimately benefit viewers within that broadcaster’s geographic area. Historically, a broadcaster’s educational programming has, by definition, been made available to that broadcaster’s own geographic audience. But, because different programs serve different demographics, the benefits have not necessarily been distributed evenly within that group. A broadcaster that focused on preschool programming benefited the youngest members of its community while ignoring teens, whereas a broadcaster that focused on afterschool specials benefited local teens while ignoring toddlers. Emulating these outcomes would be the safest approach for a financial program, although there is no slam-dunk policy rationale favoring it. Indeed, if the goal is to maximize educational impact, a better approach would be to focus resources where they are needed most, moving money away from affluent communities where broadcast is already comparatively unimportant and toward communities that lag in terms of their access to cable, satellite, high-speed internet, and the like. That said, the more

51. See 47 U.S.C. § 303b(1), *supra* note 3, (articulating these constraints).

my proposal mirrors existing patterns and practices, the more likely it is to be deemed palatable by the Commission and by relevant stakeholders. For now, I therefore favor a rule that directs monies back into the broadcaster's own community, recognizing that nonprofits will still have flexibility to focus on serving the subsets of each community that need the programs most, and that programs produced for one community can easily be shared with other communities and also made available over the internet, on DVD, and in public libraries.

Relatedly, the rules implementing my proposed approach should include provisions that forbid advertising during timeslots that are purchased using these monies. Broadcasters today have an incentive to account for advertising revenue when deciding what types of educational programs to air. For instance, because there is no obligation to serve all youngsters in the community, a broadcaster can favor programs that at the margin are more attractive to advertisers, even if those programs are not the educational programs the community most needs. This is especially problematic in light of the evidence suggesting that low-income families in particular rely on educational broadcast content. Low-income households will often be unattractive advertising targets, which means that broadcasters under the existing rules have an incentive to ignore the very families that need broadcast most. Banning advertisements during children's television would have solved this problem years ago, but the Commission never took that step, presumably for fear that the lost revenue would reduce program quality. Here, because the financial approach promises greater funding and because programming decisions would be made by more motivated providers, a ban on advertising can work. Broadcasters should not be allowed to undermine the educational purpose of these rules by offering cheaper airtime to nonprofits that are willing to produce advertiser-friendly content or target advertiser-friendly constituencies.

Finally, the FCC has tentatively concluded that broadcasters must air at least some educational programming even if they also participate generously in nonbroadcast efforts.⁵² The Commission reached this conclusion because the Children's Television Act states that the Commission may consider nonbroadcast efforts "in addition to" the licensee's own programming.⁵³ But requiring that the FCC consider a broadcaster's own programming is not the same as requiring that there actually be such programming. A basketball coach might consider a recruit's shooting range, defensive intuition, and experience, and yet, consistent with that, in the end pick a player who has no experience but compensates with a particularly great jump shot. Here, too, consideration does not seem to imply necessity. And, if I am right that special sponsorship efforts offer a wide range of advantages over the traditional broadcast approach, there

52. 34 FCC Rcd. 5822, *supra* note 5, ¶ 82.

53. 47 U.S.C. § 303b(1), *supra* note 3.

is no reason to squander resources by forcing broadcasters to keep one foot in the regulatory grave.

CONCLUSION

I have focused in this Article on a specific application of what I submit is a broader principle. Many regulations are perceived by the relevant regulated party as tantamount to a tax and hence many regulations could be reformulated as explicit taxes without increasing the regulated party's burden. For me, that raises the question of when regulations should be reframed in cash rather than in kind, allowing regulated parties to fund socially desirable activity rather than themselves directly participating in it.

Educational television obligations might be a particularly easy example through which to champion this idea. Congress already empowered the Commission to make a change like this when it authorized the FCC to consider "special efforts by the licensee to produce or support programming broadcast by another station . . ."⁵⁴ The move to cash is particularly attractive here given how much easier it is to define an amount of money as opposed to a quality of programming. And the entire experiment presents low risk given how little the existing regulations have achieved to date.

But the bigger question warrants further attention. Where a regulated party is today being asked to provide a service directly despite market incentives to the contrary, it is at least worth considering whether instead the law ought to cash that party out and use the resulting monies to purchase the service from a more motivated provider.

54. 47 U.S.C. § 303b(2), *supra* note 3.