

if they can be relaxed. Advances in receiver design may have eliminated the need for at least some of the UHF taboos currently in effect.¹⁷ Laboratory testing of state-of-the-art NTSC receivers -- both UHF and highband VHF -- is needed to determine coverage and interference performance and thus the continuing need for some or all of the UHF taboos. Second, the likely interference and performance characteristics of the possible ATV systems need to be evaluated to determine if existing taboos or new taboos might be required by such systems.

The Commission should also oversee comprehensive spectrum studies that include a survey of all available spectrum and the suitability of using certain parts of the microwave band for ATV use.¹⁸ The spectrum location needs of the competing ATV technologies must also be tested, as must the feasibility of using noncontiguous

¹⁷ As the Notice suggests (par. 73, 75), the local oscillator radiation level of current receivers is believed sufficiently low to allow relaxation of the UHF taboo related to that receiver characteristic. We also agree with the suggestion that the other receiver characteristics, including picture and sound image rejection, cross modulation, intermodulation, and IF and half-IF beat products, should be reevaluated for their effects on the UHF allocation taboos.

It should be kept in mind, however, that even with a relaxation of the taboos, co- and first adjacent channel restrictions may make more spectrum allotments difficult.

¹⁸ However, as noted above, the educational purpose of the ITFS band should be preserved.

augmentation channels. A question of particular importance is whether VHF and UHF channels can be combined with spectrum in higher bands to transmit ATV signals.

Such a study should, at a minimum, ascertain (a) how much VHF and UHF spectrum is presently available in each market, assuming all present taboos and interference protections remain in place; (b) how much spectrum would be available after appropriate modification of taboos based on (i) state-of-the-art NTSC receivers; and (ii) the interference characteristics of the possible ATV technologies; and (c) how much spectrum is presently unused or unassigned in all higher bands, and the propagation characteristics of such bands.

V. The Commission Should Not Countenance Private Deals on Interference.

A. The Commission Lacks Authority Either to Abandon or Delegate to the Private Sector Its Statutory Duty to Regulate.

The Notice poses several questions concerning the desirability of private agreements to alter interference protections. (Notice, par. 110-113). We have grave doubts about both the wisdom and legality of the Commission's proposal to surrender its responsibility to control interference. Such an action -- if not an

outright abnegation of a statutory duty -- at best is an improper delegation to the private sector of a Congressionally-mandated responsibility.

It is a well-settled principle of American law that, absent Congressional authorization, an agency may not under any circumstances transfer to another entity any Congressionally-created powers or duties that are "primary and basic" to the implementation of the governing statute,¹⁹ particularly where the agency proposes to transfer such powers to private entities.²⁰

Interference regulation by the Commission is precisely such a "primary" function; it is the cardinal duty of the Commission. Indeed, the basis for the Commission's creation was Congress' desire to establish a centralized, public agency to handle interference and remove from the private sector the decisionmaking

¹⁹ E.g., Relco, Inc. v. Consumer Product Safety Commission, 391 F. Supp. 841, 845 (S.D. Tex. 1975) ("some functions are so primary and so basic to the implementation of the statute as to be nondelegable"). See generally 73 C.J.S., Public Administration Law and Procedure, Sec. 56.

²⁰ See, e.g., Sierra Club v. Seigler, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("[a]n agency may not delegate its public duties to private entities, . . . particularly private entities whose objectivity may be questioned on grounds of conflict of interest"); see also In re Application of North Jersey District Water Supply Commission, 417 A.2d 1095 (N.J. Super.), certification denied, 427 A.2d 559 (1980) (agency may not delegate authority to private person, since such person is not subject to public accountability).

process regarding broadcast and interference rights.²¹ The Commission itself has recently reemphasized in the most lucid terms that interference control is "a valid regulatory function of the highest order," "a valid, even essential, government function." Technical Regulations, 99 F.C.C. 2d 903, 905, 910 (1984). Such a function may not under any circumstances be given over to the private sector.²²

From its establishment, the Commission has broadly understood its duty to see that "the public interest" is served. In defining this term, the Commission, as well as Congress and Courts, have carefully balanced noncommercial values against a pure marketplace allocation of services -- which is the only outcome that could be effectuated by private agreements. See, e.g., Ashbacker Radio Corp. v. FCC, 326 U.S. 327

²¹ 47 U.S.C. Sec. 151; see generally Ginsberg, Regulation of Broadcasting, 11-12 (1975).

²² We note that the language of the Communications Act indicates that Congress did not intend a delegation of interference questions to private parties. Section 307(b) directs the Commission to provide a communications service that is "fair" and "equitable" as well as "efficient." Plainly, in regard to interference, market mechanisms can only ensure the latter. In addition, Section 5(c)(1) of the Act, 47 U.S.C. Sec. 155(c)(1), establishes with precision the circumstances and procedures for delegation of duties within the agency. These terms do not provide for a delegation outside of the Commission of statutorily imposed functions.

(1945); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

We urge the Commission not to turn its back on those carefully developed public interest standards that it has thus far protected so long and so well. For reasons of both policy and law, the Commission must not hand interference issues over to private interests.

B. In Any Event, Public Television Must Not Be Subject to Private Regulation of Interference.

Under no circumstances should a marketplace method of interference control be applied to public broadcasting. The Government supports public television because it provides services not provided by market mechanisms and serves those viewers whose needs are not reflected in a marketplace allocation of spectrum. To allow public television service areas and viewers to be exchanged for dollars would be inconsistent with longstanding Congressional and Commission policies.

Since the beginning of television, both Congress and the Commission have envisioned a noncommercial, alternative service available to the entire country and have sought to insulate such a service from the impact of pure marketplace competition. Congress enacted the Public Broadcasting Act in 1967 explicitly to ensure a service that "will constitute an expression of diversity and excellence, and which will constitute a source of

alternative telecommunications services for all the citizens of the Nation." 47 U.S.C. Sec. 396(a)(5). And -- to give just one example -- the Commission very deliberately reserved both UHF and VHF channels for noncommercial use when studying the overall issue of television allocations in 1952, emphasizing that "because educational institutions require more time to prepare for television than commercial interests," special protections were necessary to ensure their very existence. Sixth Report and Order on Television Assignments, 41 F.C.C. 148, 159 (1952).²³

²³ The Senate Appropriations Committee very recently made the following observations, in the context of proposed UHF-VHF swaps:

Since the 1950's, the Congress has been deeply involved in ensuring that public broadcasting has adequate channel assignments for a nationwide system. Today, there are over 300 public television stations, with some 120 on the VHF band. These stations are public broadcasting's birthright. . . . There is also a major concern about the fate of Government funding for the entire public broadcasting system once a few stations swap and receive huge sums of money. The risks of grave consequences to the public broadcasting system from interband swaps are too great to permit a short-term gain for only a few.

S. Rep. No. 182, 100th Cong., 1st Sess., 77.

The same reasons to protect against the "sale" of VHF reservations apply to the sale of protected service contours. Such sales degrade public television service,
[Footnote continued on next page]

Public Television submits that the Commission's proposal to delegate interference regulation threatens both existing and future public television service. The proposal is particularly troubling in conjunction with the advent of ATV. This new technology is full of special promise for educational, arts, and cultural programming. Yet the financial fragility of noncommercial broadcasting entities will handicap them in a marketplace determination of interference rights such as the Commission proposes.

We therefore urge the Commission in the strongest possible terms to reject an approach to interference protection that would depend on private agreement. Such an approach is generally inconsistent with the Commission's mandate to provide broadcasting service to all Americans, and specifically offends the goals of a public broadcasting system.

VI. Conclusion

The Commission must ensure through its regulatory policies that terrestrial broadcasting is able to offer an ATV service of quality comparable to that of its competitors. The American people would lose something

[Footnote continued from previous page]
and undermine the goal of making non-commercial service available throughout the nation.

essential if their free, universal and locally-differentiated communications service were forced into eventual oblivion. Broadcasting, particularly public broadcasting, deserves to share in the best the future can offer.

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DATE: November 18, 1987