

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 92-174  
38379

In the Matter of )  
 )  
Advanced Television Systems )  
and Their Impact upon the )  
Existing Television Broadcast )  
Service )

MM Docket No. 87-268

SECOND REPORT AND ORDER/FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 9, 1992; Released: May 8, 1992

Comment Date: July 17, 1992

Reply Comment Date: August 17, 1992

By the Commission: Commissioner Duggan issuing a statement.

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## I. INTRODUCTION

1. This Second Report and Order/Further Notice of Proposed Rule Making (Order/FNPRM) decides a number of critical issues, and seeks further comment on others, affecting implementation of advanced television (ATV) service in this country.<sup>1</sup> It is the fifth in a series of Commission actions since 1987 developing and refining our regulatory approach to ATV and leading to selection of a terrestrial broadcast ATV system.<sup>2</sup> In November 1987, the Commission established the Advisory Committee on Advanced Television Service (Advisory Committee), comprised of industry leaders from diverse sectors, including the broadcast, cable, computer, and manufacturing industries. Testing of six proponent ATV systems began at the Advanced Television Test

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<sup>1</sup> ATV refers to any television technology that provides improved audio and video quality or enhances the current television broadcast system. The existing broadcasting system is referred to as NTSC, after the National Television Systems Committee, an industry group established in 1940 to develop technical standards for television broadcasts. The term "ATV" includes both High Definition Television (HDTV) and Enhanced Definition Television (EDTV). HDTV systems aim to offer approximately twice the vertical and horizontal resolution of NTSC receivers and to provide picture quality approaching that of 35 mm film and audio quality equal to that of compact discs. EDTV refers to systems that provide more limited improvements over NTSC.

We have previously determined that we would not adopt an EDTV standard, if at all, prior to reaching a decision on an HDTV standard. We have also decided that an HDTV system that transmits the increased information of an ATV signal in a separate 6 MHz channel will allow for ATV introduction in the most non-disruptive and efficient manner. First Report and Order, 5 FCC Rcd 5627, 5627-29 (1990) (First Order). HDTV systems transmitting in this manner would not be receivable on conventional NTSC television sets without add-on converters.

<sup>2</sup> Notice of Inquiry, 2 FCC Rcd 5125 (1987) (First Inquiry); Tentative Decision and Further Notice of Inquiry, 3 FCC Rcd 6520 (1988) (Second Inquiry); First Order, *supra*; and Notice of Proposed Rule Making, 6 FCC Rcd 7024 (1991) (Notice). For a fuller description of the history of this proceeding, see Second Inquiry, 3 FCC Rcd at 6521-6523 & n.15. See also Notice, 6 FCC Rcd at 7024.

We received 50 comments, six informal comments, 17 reply comments, and four informal reply comments in response to the Notice giving rise to our actions herein. Pleadings filed after the December 20, 1991 deadline for comments and the January 31, 1992 deadline for reply comments are treated respectively as informal comments and informal reply comments. We list the parties filing these pleadings, and the abbreviations we use for them, in Appendix C.

Center (Test Center) in July 1991 and is currently progressing.<sup>3</sup>

2. We reach numerous decisions herein, the most significant of which are the following:

- o We limit initial eligibility for ATV frequencies to existing broadcasters; however, we will allow others to apply for ATV allotments and licenses in communities where there are additional channels available.
- o We adopt a two-year deadline for broadcasters to apply initially for a paired ATV channel, and a three-year deadline for construction of an ATV facility once assigned.
- o We will consider all allotment issues and issue a draft Table of Allotments in June 1992.
- o We decide (a) to use vacant noncommercial reserved channels only when no feasible alternative exists for assigning ATV channels to existing

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<sup>3</sup> Although six systems are being tested, the Advisory Committee will defer consideration of the only EDTV system tested until after a recommendation has been made on an HDTV system. The Advisory Committee then will consider the EDTV system only at its discretion. The EDTV system is Advanced Compatible Television (ACTV) proposed by the Advanced Television Research Consortium (ATRC, which is composed of the David Sarnoff Research Center, North American Philips, Thomson Consumer Electronics, NBC, and Compression Labs). Letter from James E. Carnes, President and Chief Operating Officer, David Sarnoff Research Center to Richard E. Wiley, Advisory Committee Chairman (Mar. 2, 1992), Letter from Richard E. Wiley to James E. Carnes (Mar. 5, 1992), in Fifth Interim Report of the FCC Advisory Committee on Advanced Television Service (Mar. 24, 1992) (Fifth Interim Report), Appendix B. (For the convenience of interested parties, reports of the Advisory Committee and Commission staff and other unpublished documents to which we refer herein are listed in Appendix D. These documents have been made part of the docket and are available in the Commission's public reference room. Copies are also available, for a fee, from the Commission's independent copy contractor, Downtown Copy Center, 1114-21st Street NW, Washington, D.C., 20036, (202) 452-1422.)

The other five ATV systems being tested are: (1) Narrow MUSE, proposed by NHK; (2) DigiCipher, by the American Television Alliance (ATVA, which is composed of General Instrument Corp. and MIT); (3) Digital Spectrum Compatible HDTV (DSC-HDTV), by Zenith/American Telephone and Telegraph; (4) Advanced Digital-High Definition Television (AD-HDTV), by the ATRC; and (5) ATVA Progressive System, by ATVA. Narrow MUSE is an analog HDTV system, and the remaining four are digital HDTV systems. Fourth Interim Report of the FCC Advisory Committee on Advanced Television Service at 4 (Apr. 1, 1991) (Fourth Interim Report); Fifth Interim Report at 6-7 n.6. The Test Center is conducting objective testing of the systems. Subjective video tests are being conducted at the Advanced Television Evaluation Laboratory (ATEL) in Ottawa, Canada, and audio tests are being conducted by Westinghouse Science and Technology Center. Testing is expected to be completed by November 1992, with additional field testing to follow. Fifth Interim Report at 15-16.

broadcasters and (b) to leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel.

- o We maintain the secondary status of low-power television service stations vis-a-vis new ATV operations, but will also continue to permit displaced low-power service stations to file noncompetitive applications for another channel in the same community. We further conclude that low power service stations should be free to broadcast in either the ATV or NTSC mode, and we plan to initiate a proceeding to consider whether some low-power television service interference protection rules should be changed in an attempt to mitigate some of the effects of potential displacement.
- o We notify broadcasters that when ATV becomes and is designated as the prevalent medium, they will be required to "convert" to ATV, *i.e.*, surrender one of two broadcast channels and cease broadcasting in NTSC, and we conclude that we should set a firm date for conversion to ATV.
- o We conclude that we should adopt a 100 percent simulcasting requirement at the earliest appropriate point.
- o We will condition selection of an ATV system on a winning proponent's adoption of reasonable and nondiscriminatory patent licensing policies, but decline to take further action at this time.
- o We encourage the ongoing work of the Advisory Committee on compatibility issues and generally decline to take additional regulatory action on these issues at this time.
- o We direct the Advisory Committee to address new audio developments as well as proposals for flexible apportionment of audio and data in the selection of a system; the Committee is further requested to address any analogous calls for extensibility in an ATV system standard as they arise.<sup>4</sup>

3. We also seek comment on various issues, including:

- o A proposal to rank the class of parties initially eligible for ATV frequencies in the event of a spectrum shortfall as follows: (a) licensees and permittees with constructed facilities and program test authority, (b) permittees with unbuilt facilities, and (c) applicants;
- o A proposal to allow broadcasters a period of time to negotiate channel assignments prior to adoption of a Table of Allotments and, where broadcasters are unable to agree, to make channels available on a first-come, first-served basis;
- o A proposal to temporarily suspend the dual network rule to permit networks to give their affiliates a second feed for ATV;
- o A proposal to require low-power television service stations to convert to ATV at the point that full-service broadcast stations will be required to do so;
- o Our tentative conclusions that (a) we should establish a firm date for conversion to ATV that is 15 years from either selection of an ATV system or the date a Table of ATV Allotments is effective, whichever is

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<sup>4</sup> We will issue a codification of the ATV rules we adopt herein, with appropriate effective dates, at a later point in this proceeding.

- later, and (b) that we should review, in 1998, the propriety of the conversion date we will have set;
- o Our tentative conclusion that we should impose a 100 percent simulcasting requirement no later than four years after the ATV application/construction period has passed, and on proposals for affording broadcasters some initial flexibility, including a proposal to "phase in" a full simulcasting requirement in two stages;
  - o The merits of Advisory Committee findings concerning new developments in ATV technology, including its findings that these new developments are not sufficiently concrete to allow timely testing and do not merit further consideration in selection of an ATV system.

## II. ELIGIBILITY, ALLOTMENT AND ASSIGNMENT ISSUES

### A. Initial Eligibility

4. As we have previously stated, "broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available to the American public."<sup>5</sup> Unlike other countries, the United States has an established system of privately owned broadcast stations that have an obligation to serve the public interest and in furtherance of that objective transmit news, information and entertainment programs of a local, regional and national nature. As we have stated, therefore, initiating an ATV system within this existing framework "will uniquely benefit the public."<sup>6</sup> In addition, because over-the-air broadcasting reaches more than 98 percent of U.S. households, an ATV terrestrial broadcast system is the medium most likely to bring this technological advance to virtually all Americans. Consequently, it is the medium most likely to result in rapid penetration of ATV receivers and, hence, to contribute to higher sales volumes and eventually lower costs for these receivers. We thus believe that the television broadcast industry should be given the opportunity to implement ATV, and we develop a regulatory approach for this implementation herein. We underscore, however, that our approach does not preclude, and indeed attempts to facilitate, provision of ATV services by alternative media.<sup>7</sup> By permitting the broadcast industry to make the transition to ATV, we ensure that all competitors in the local video services market can compete on this new technological level and, hence, that the public continues to enjoy the benefits that flow from such competition.

5. ATV represents a major advance in television technology, not the start of a new and separate video service. The Notice proposed to permit existing broadcasters to keep pace with this important technological development by restricting initial eligibility for ATV frequencies to them.<sup>8</sup> Most parties commenting on this issue agree, several noting in particular

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<sup>5</sup> Second Inquiry, 3 FCC Rcd at 6525.

<sup>6</sup> Second Inquiry, 3 FCC Rcd at 6525.

<sup>7</sup> See infra Section VII.A, VII.B.

<sup>8</sup> Notice, 6 FCC Rcd at 7025; Second Inquiry, 3 FCC Rcd at 6537-38.

their concurring view that ATV is an enhancement of existing service and not a new video service and that additional spectrum is being used in this case to improve and expand services rather than to create a new class of service altogether.<sup>9</sup>

6. As we stated in the Notice, Ashbacker Radio Corp. V. FCC, 326 U.S. 327 (1945), requires us to give comparative consideration to all bona fide mutually exclusive applicants for a broadcast license. It does not, however, preclude our setting licensee eligibility standards.<sup>10</sup> Rather, the central issue is whether the nature and duration of any restriction on eligibility is in the public interest. As the Notice stated, and most commenting parties agree, existing broadcasters' continued involvement in ATV is the most practical, expeditious, and non-disruptive way to bring improved service to

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<sup>9</sup> See, e.g., Westinghouse Comments at 2; ATSC Comments at 3. But cf. Golden Orange Comments at 2 (while reasonable to treat ATV as an improvement to existing service, once implemented, ATV could become a new distinct medium with NTSC continuing as a separate medium for broadcast programming not requiring high resolution). We disagree with Polar's suggestion that exclusion of low-power service stations from initial eligibility means that we are launching a new service. Polar Comments at 2. See generally infra Section III.B (discussing participation of low-power television service stations in ATV).

<sup>10</sup> Notice, 6 FCC Rcd at 7025. See generally United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) (hearing requirement of 47 U.S.C. § 309 does not limit the Commission's power to promulgate rules setting license eligibility criteria). See also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 483 (1981) (block of cellular radio frequencies restricted to wireline carriers for a period of years), modified, 89 FCC 2d 48, 69-77 (1982) (further limiting duration of set aside), further modified in Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 194-98 (1984) (reaffirming set aside, but redefining end of set aside period in each cellular market), modified on other grounds, 101 FCC 2d 577 (1985); Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part and denied in part, 5 FCC Rcd 7094 (1990); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991), recon. granted in part and denied in part, 7 FCC Rcd 1808 (1992) (adopting rules giving a dispositive "pioneer's preference" for new or innovative communications service).

Because we decide to impose a simulcasting requirement infra Section V, NCTA's concerns about the wisdom and legality of adopting an eligibility restriction without an associated simulcast obligation are moot. NCTA Reply Comments at 4 n.2.

the American public.<sup>11</sup> Existing broadcasters possess the know-how and experience necessary to implement ATV swiftly and efficiently. They have invested considerable resources in the present system and represent a large pool of experienced talent. As initial participants in the transition to ATV, existing broadcasters will be making an appreciable capital investment in this new technology and will undertake the business risks associated with being in the forefront of such new developments. Indeed, the broadcast industry also has helped create and support the Advanced Television Test Center, investing resources and developing expertise in this new technology.

7. Moreover, the initial restriction will be for a period of two years only -- until initial assignments have been made.<sup>12</sup> Thus, the initial eligibility restriction will not indefinitely impede new entrants. Furthermore, after the initial ATV allotments and assignments are made, the table of ATV allotments may be expanded through the normal rule making process. Any additional channels would be open to all qualified parties.<sup>13</sup> Similarly, if a broadcaster failed to apply for and construct an ATV facility within the specified time, that broadcaster would lose initial eligibility for the assigned channel, which would then be open to competing applicants.<sup>14</sup> Finally, this eligibility restriction is, in the long-run, spectrally efficient. It enables us to award existing broadcasters an additional 6 MHz "conversion channel" on an interim basis, giving existing broadcasters the opportunity to move to ATV technology. At the time of conversion to ATV, we will be able to reclaim one of two 6 MHz channels --the "reversion channel"-- without abruptly disenfranchising television broadcast licensees. We thus find that limiting initial eligibility to existing broadcasters is in the public interest, and we adopt this restriction.

8. The Notice proposed to include the following in the class of existing broadcasters who would initially be eligible for ATV channels: (1) all full-service television broadcast station licensees, (2) permittees authorized as of the date of adoption of the Notice, and (3) all parties with applications for a construction permit on file as of the date of adoption of the Notice who are ultimately awarded full-service television broadcast station licenses.<sup>15</sup> The Notice also proposed various alternatives for assigning a channel where there is insufficient spectrum to accommodate all parties in a market, such as use of decisional criteria or a lottery pursuant

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11 Notice, 6 FCC Rcd at 7025. See, e.g., EIA/CEG Comments at 5.

12 See infra Section II.E.

13 See infra Section II.B.

14 See infra Section II.E.

15 Notice, 6 FCC Rcd at 7025. For the sake of brevity, we sometimes refer to the class of those initially eligible for ATV frequencies as "existing broadcasters" or "existing NTSC licensees."

to 47 U.S.C. § 309 (i).<sup>16</sup> There does not appear to be substantial dispute regarding the composition of the class of initially eligible parties where there is sufficient spectrum to accommodate all of the groups within the class.<sup>17</sup> Several parties, however, argue for ranking among the groups in case of insufficient spectrum.<sup>18</sup> In affording priorities in the event of insufficient spectrum, we agree with those commenters who would rank eligible parties according to their degree of experience as NISC broadcasters. Such a rule would harmonize with our fundamental reason for initially restricting eligibility, to bring ATV to the public in the most expeditious and nondisruptive manner. It would do this by enabling those with relatively greater experience and expertise in broadcasting to deliver ATV service to the public first.

9. We thus propose to rank the eligible parties in the following order: (1) licensees and permittees with constructed facilities having program test authority,<sup>19</sup> (2) permittees, and (3) applicants. We do not propose, as Public Television suggests, to afford specific types of full-service broadcasters, such as noncommercial broadcasters, priority over other types in obtaining a second 6 MHz channel.<sup>20</sup> Determinations of whether the type of programming proposed by a licensee merits a special preference would be community-specific, depending on the community's existing services and its particular needs.<sup>21</sup> Making such determinations among the various licensees within a market would seriously impede the delivery of ATV service to the public in a timely fashion. In the case of insufficient spectrum to accommodate licensees

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<sup>16</sup> Notice, 6 FCC Rcd at 7029.

<sup>17</sup> See, e.g., Joint Broadcasters Comments at 12 & n.7. The one exception to this consensus is the argument that low-power service licensees should also be part of this class, which we deny *infra* Section III.B. Joint Broadcasters also ask that vacant allotments be paired with an ATV channel. We address the pairing of reserved noncommercial channels *infra*.

<sup>18</sup> See, e.g., Joint Broadcasters Comments at 8; Westinghouse Comments at 3; Public Television Comments at 21; ATSC Comments at 4.

<sup>19</sup> See generally Brunson Comments at 2; Balcones Comments at 2; Brooks Comments at 2 (arguing that, because no further Commission authorization required under 47 C.F.R. § 73.1620 for permittee with constructed facilities to begin program testing, grant of a license may be mere formality). To the extent Brunson, Balcones and Brooks may also be arguing that all permittees, regardless of the state of construction of their facilities, should be afforded equal status with licensees, we disagree for the reasons given in the text.

<sup>20</sup> Public Television Comments at iv-v, 20-22. We intend, however, to allot ATV channels for vacant noncommercial channels where this does not preclude present delivery of ATV service by an existing broadcaster. See *infra* Section III.A.

<sup>21</sup> Religious Broadcasting Network, 3 FCC Rcd 4085, 4102 (1988).

and permittees with constructed facilities, in our proposed first-ranked group, we would apply some other method of deciding who would be assigned an ATV channel.<sup>22</sup> We seek comment on this proposal.<sup>23</sup>

10. After initial assignments are made, we propose to assign ATV channels to (1) parties ultimately awarded a construction permit based on an allotment petition pending as of the date of the Notice, regardless of whether or not the permittee had filed the original allotment petition; (2) parties awarded waivers of the current freeze on television broadcast applications in major markets and who are subsequently awarded an NTSC authorization; and (3) any other parties authorized to construct NTSC facilities in the interim period after adoption of the Notice.<sup>24</sup> These parties, having just been awarded broadcast facilities, have relatively less experience than the initially eligible group of broadcasters, and thus are relatively less likely to have the expertise to help speed ATV implementation. We thus propose to award these parties ATV channels only after the initially eligible group of broadcasters receives assignments. We seek comment on this proposal.

11. We will award existing broadcasters an additional license for the ATV conversion channel, in lieu of treating the addition of an ATV channel as a major modification to the NTSC license. Broadcasters will be operating two distinct facilities having different characteristics and, in many cases, transmitting from different locations. Treating the ATV and NTSC channels as separately licensed facilities will therefore simplify enforcement and administration. Golden Orange believes that if stations must ultimately surrender one of their two channels, rather than merely surrendering the NTSC channel, the stations should be permitted to sell that channel at an earlier point to recoup the cost of converting to ATV.<sup>25</sup> However, there are likely to

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<sup>22</sup> We defer resolving this question, and the question whether to apply the methods proposed in the Notice (use of decisional criteria or a Section 309 (i) lottery), or some other alternative, until our subsequent Report and Order deciding whether to rank initial applicants, as here proposed.

<sup>23</sup> We plan to satisfy MST's request for a list of all proposed eligible parties and their respective transmitter locations in our next Notice of Proposed Rule Making in this proceeding, which will solicit comment on a proposed Table of ATV Allotments. MST Reply Comments at 5. See infra Section II.F. We will also address at that time whether and how to freeze the pool and locations of existing transmitters (see Joint Broadcasters Comments at 14), whether to impose a freeze for planning purposes on modifications of existing licenses (see MST Reply Comments at 5-6), and whether to delete commercial NTSC allotments for which no applications are pending (see dLR Comments at 2).

<sup>24</sup> Notice, 6 FCC Rcd at 7025-26 & n.22. See generally ATSC Comments at 2, 4; Joint Broadcasters Comments at 8, 12 n.7, 14, introduction 1-2. We will cease issuing new NTSC licenses once ATV assignments to existing broadcasters are made. See infra Section IV.A.

<sup>25</sup> Golden Orange Comments at 10.

be important broadcast and non-broadcast uses for surrendered spectrum.<sup>26</sup> Moreover, permitting the transfer of one channel of the pair to a third party for broadcasting purposes makes it impossible to recapture one 6 MHz channel and still leave existing television licensees with a broadcast outlet. Permitting such transfers could also threaten our goal of spectrum efficiency by possibly leading to widescale requests for relief from the requirement of surrender of one 6 MHz channel on the part of those who previously transferred one channel of the pair. We accordingly will not permit an NTSC license to be transferred independently of the associated ATV license, or vice versa.<sup>27</sup> We also decline to adopt suggestions that we permit use of the second channel for digital broadcast of multiple NTSC channels.<sup>28</sup> The reason we are awarding broadcasters a second channel is to permit them to move to an improved technology without service disruption. If a broadcaster chooses not to broadcast in ATV, there is no reason for awarding that broadcaster an additional license.

12. We also will not allow an applicant for an ATV construction permit to retain priority eligibility status if its NTSC license is not renewed or is revoked while its ATV application is pending. If either the broadcaster's NTSC or ATV license is revoked or not renewed, we will automatically revoke the remaining license.<sup>29</sup> In this way, we will insure that our goals in awarding broadcasters a second channel are preserved and that our goals in revoking or not renewing a license are not undermined. Permitting broadcasters to continue on their NTSC channel alone would also make the viewing public more reluctant to purchase an ATV receiver, for fear that they will be unable to receive maximum utility from their added equipment investment. Permitting broadcasters to continue transmitting their signals in ATV alone, in turn, jeopardizes our goal of graduating the transition to ATV so that consumers are not abruptly deprived of the use of their NTSC receivers. We therefore will not permit those initially eligible for ATV frequencies to retain either the NTSC or ATV license if one of them is revoked or not renewed.

13. We recognize, however, that permitting an unpaired ATV channel to broadcast during the transition to full ATV conversion implicates another objective, that of spectrum efficiency, by permitting the recapture of the

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<sup>26</sup> See infra Section IV.A.

<sup>27</sup> Notice, 6 FCC Rcd at 7026. See also EIA/ATV Committee Reply Comments at ii, 5. We also will not permit noncommercial stations to sell their ATV licenses on a non-reserved basis, even if the proceeds are used only to improve their NTSC operations or facility. Golden Orange Comments at 8-9. As Public Television stresses, sale of reserved channels to alleviate short-term economic difficulties would deprive future generations of the benefits of public television and defeat the purpose of the reserve. Public Television Reply Comments at 1-3. Moreover, sale of a licensee's second channel may deprive the broadcaster of a means of making the transition to ATV.

<sup>28</sup> Blonder Comments at 1-2.

<sup>29</sup> Notice, 6 FCC Rcd at 7027.

NTSC reversion channel.<sup>30</sup> Thus, we will consider permitting the voluntary surrender of an NTSC channel by a broadcaster awarded a corresponding ATV channel on a case-by-case basis, considering in particular whether ATV receiver penetration in the affected community demonstrates that consumers largely will not be prematurely deprived of the use of their NTSC receivers.

#### B. Unrestricted Eligibility

14. As stated in the Notice, once ATV allotments for initially eligible parties are made, there is no reason to continue limiting eligibility for ATV frequencies.<sup>31</sup> Therefore, after an allotment table is adopted, we will permit any qualified party to file a petition for rulemaking to modify the ATV allotment table to add new ATV frequencies where they are technically feasible. In addition, we will permit any qualified applicant, not just existing broadcasters, to apply for an ATV frequency when an NTSC licensee fails to apply for and construct an ATV facility or to apply within the required time. As EIA/CEG suggests, open eligibility at such point will provide an additional impetus to ATV implementation.<sup>32</sup> Existing broadcasters who fail to apply or construct in the initial priority stage will be allowed to apply for any channels which subsequently remain available on the same basis as any other qualified parties and will be given no special priority.

15. Beyond pairing ATV channels to those awarded NTSC authorizations in the interim period prior to the time initial ATV assignments are made, we decline to establish any new priorities for eligibility once initial ATV allotments are made. We have restricted initial eligibility to the group we conclude most likely to implement ATV quickly. We are reluctant to expand our restriction to include others who, while offering valuable services in other respects, do not appear as a class likely to spur ATV implementation in the same fashion. We thus decline requests to afford low power and translator service or noncommercial interests priority status at such point. After the time for applying for an ATV channel has passed -- two years after the date adoption of an ATV standard or of a Final Table of ATV Allotments becomes effective, whichever is later -- eligibility will be completely unrestricted.<sup>33</sup> An additional eligibility restriction imposed at this stage would only narrow unnecessarily the group of potentially ready, willing and able entrants who may seek to apply for and deliver ATV service to the public

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<sup>30</sup> We will of course permit a party awarded an ATV license not associated with an NTSC channel pair to broadcast only on its assigned ATV channel. Its broadcast helps bring new entrants into the field, enhancing diversity, and helps spur ATV implementation by expanding the ATV broadcast outlets available to the public.

<sup>31</sup> Notice, 6 FCC Rod at 7026. See also Joint Broadcasters Comments at 13.

<sup>32</sup> EIA/CEG Comments at 7.

<sup>33</sup> See infra Section II.E.

xpeditiously.<sup>34</sup>

16. In addition, ATV licenses will be subject to competing applications filed during the appropriate renewal window. As proposed in the Notice, we will issue ATV licenses for periods concurrent with the license of the associated NTSC station (if any). License periods for all ATV licenses, whether or not associated with an NTSC channel, will be determined in accordance with 47 C.F.R. § 73.1020.

### C. Television Multiple Ownership Rules

17. As the Notice proposed, we will suspend application of the television multiple ownership rules, 47 C.F.R. § 73.3555, for ATV stations on a limited basis.<sup>35</sup> Most parties commenting on the issue agree that such suspension is necessary.<sup>36</sup> We thus will permit existing licensees that are awarded an additional ATV channel to hold both their NTSC and ATV licenses, even though their signals overlap, and to permit group owners to hold both NTSC and paired ATV channels, even though nationwide ceilings may be exceeded, until such time as existing licensees are required to convert to ATV service exclusively.<sup>37</sup> Our decision to establish a "use or lose" application/construction deadline should eliminate the potential for anticompetitive construction delays which FTC hypothesizes could develop from lifting the rules.<sup>38</sup> Since a broadcaster must complete construction of its ATV facility within a specified time or forfeit its right to use the channel, a broadcaster will be unable to prevent others from being awarded the channel while the broadcaster itself delays construction of an ATV station. Limited suspension of the multiple ownership rules is an essential component of our regulatory approach to ATV implementation, and we therefore adopt it.<sup>39</sup>

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<sup>34</sup> See, e.g., CBA Reply at 4; Polar Comments at 3; Polar Reply at 6; Public Television Comments at 16 n.13.

<sup>35</sup> Notice, 6 FCC Rcd at 7026. These rules prohibit the award of licenses for TV broadcast stations that result in an applicant directly or indirectly owning, operating or controlling (1) two TV stations with overlapping grade B contours, (2) more than 14 television stations, or 12 stations which are not minority-controlled, and (3) TV stations which have an aggregate national audience reach exceeding 30 percent, or which reach exceeds 25 percent and are not minority-controlled.

<sup>36</sup> See, e.g., Joint Broadcaster Comments at 13 n. 18.

<sup>37</sup> The acquisition or award of an ATV channel that is not part of an ATV/NTSC pair, however, would still be subject to the multiple ownership rules.

<sup>38</sup> See infra Section II.E; FTC Reply Comments at 13-15.

<sup>39</sup> We note that the Commission is statutorily prohibited from expanding any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and policies established

#### D. Network Rules

18. CapCities requests suspension of the dual network rule,<sup>40</sup> which prohibits a network from simultaneously operating more than one network of television stations in identical or overlapping geographic areas.<sup>41</sup> According to CapCities, suspension would permit a network to operate both an NTSC and ATV network during the transition to ATV. CapCities also asks that any suspension allow a network to affiliate with a new ATV station if its NTSC affiliate fails to be awarded an ATV facility.

19. Temporary suspension of the dual network prohibition would appear to facilitate a smooth transition to ATV. In light of our simulcast requirements,<sup>42</sup> broadcasters will be airing much of the same programming on their ATV and NTSC channels. During the transition to ATV, the networks will necessarily have to program their affiliates' two stations. Moreover, the networks are likely to be an early source of ATV programming on which existing affiliates will want to rely. Permitting the networks to supply their affiliates with ATV programming thus is likely to contribute to expeditious delivery of ATV programming to the public. We therefore propose to suspend the dual network prohibition to permit networks to give their affiliates a second feed for ATV. We seek comment on this proposal.<sup>43</sup> We also seek comment on whether the suspension should extend to circumstances where a network's two feeds (ATV and NTSC) go to different licensees in a market,<sup>44</sup> and if so, if any additional regulatory steps would be required in such case.

#### E. Application and Construction Periods

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to administer such rules of the Federal Communications Commission as set forth at Section 73.3555(c) of Title 47 of the Code of Federal Regulations." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 797 (1991). Section 73.3555(c) prohibits ownership of a broadcast station and a daily newspaper in the same market. This prohibition on its face does not apply to limited suspension of the broadcast/newspaper cross-ownership rule. Moreover, there is no indication that Congress intended to preclude grandfathered television/newspaper combinations from participating on the same basis as all other television licensees in the transition to ATV.

<sup>40</sup> CapCities Comments at 2.

<sup>41</sup> 47 C.F.R. § 73.658(g).

<sup>42</sup> See infra Section V.

<sup>43</sup> We also emphasize that any such suspension would be transitional only and would be expressly limited to permitting networks to provide an ATV feed.

<sup>44</sup> This situation might occur during the ATV transition, for example, if a network's NTSC affiliate fails to apply for, to be awarded, or somehow forfeits the right to interim use of, a second ATV conversion channel.

20. The Notice proposed that existing broadcasters would have the right to apply for a particular ATV frequency on a priority basis for three years from the time that an ATV allotment table is adopted. We also proposed to apply a two-year restriction on the time within which a broadcaster must construct a new ATV facility or forfeit its construction permit, analogous to the two-year period applicable today.<sup>45</sup> Commenters are divided on these proposals. Most parties agree that a three-year application period is reasonable.<sup>46</sup> Many, however, urge either deferring or extending the time period for construction.<sup>47</sup>

21. We believe it is critical to our goal of bringing ATV to the American public quickly that we establish definite application and construction deadlines and that we give parties notice of such deadlines at this early stage.<sup>48</sup> We are concerned that without such a specific timetable, some parties may unduly delay construction while waiting for others to take the lead, to the detriment of our goal of expeditious ATV implementation.<sup>49</sup> We are also unpersuaded that deferral of a decision on such deadlines will enable us to obtain the information which some parties believe is essential to this decision, and which we now lack. For example, although lack of revenue forecasts is given as a reason to defer decision, no party convinces us that such data will become available within a reasonable period of time.<sup>50</sup> Moreover, even if such forecasts were negative, such data would not necessarily lead us to extend our application and construction periods, as

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<sup>45</sup> Notice, 6 FCC Rcd at 7027.

<sup>46</sup> See, e.g., Joint Broadcasters at introduction 2, 16; MST Reply Comments at 6-7; Westinghouse Comments at 4; Zenith Reply Comments at 2. But see Polar Comments at 4.

<sup>47</sup> See, e.g., Joint Broadcasters Comments at introduction 2, 16; Westinghouse Comments at 4; MST Reply Comments at 6-7; ATSC Comments at 3; Fleet Call Reply Comments at 4-5 (all arguing for deferral); Golden Orange Comments at 4 (advocating doubling periods); FTC Reply Comments at 17 (arguing for longer period).

<sup>48</sup> See generally EIA/ATV Committee Reply Comments at 6.

<sup>49</sup> See generally FTC Reply Comments at 15-16 (describing "excess inertia" or market failure in which a technological advance never receives consumer acceptance, a phenomenon generally characterized by a small installed base of equipment and a new technology that is more expensive than the old). Although the FTC appears to be more concerned that parties may construct prematurely, as opposed to unduly delaying construction, our understanding of the industry we regulate leads us to reach a different conclusion. Cf. Joint Broadcasters Comments at 16 (citing example of DBS, where we initially allowed six years for construction and where, ten years later, the first DBS system is not yet launched).

<sup>50</sup> MST Reply Comments at 8-9.

opposed, for example, to opening eligibility to others financially better able to sustain ATV operations. Our decision today will give all broadcasters ample notice of the time periods that will apply. Those broadcasters who do not apply and construct within this time (and who fail to obtain an extension of time) will lose their initial eligibility for an ATV frequency. These broadcasters may apply at a later time for an ATV channel on an equal basis with other applicants. Accordingly, we find it unnecessary to defer our decision on application and construction deadlines or extend them beyond the total five-year period proposed.<sup>51</sup>

22. Nevertheless, we believe that we should make an adjustment to the relative lengths of the application and construction periods from those which we proposed. Upon further reflection, we do not believe that broadcasters will need a full three-year application period to arrange their financing and plan their facilities from the time an order selecting an ATV system becomes effective. Rather, we conclude that a two-year application period will be sufficient. As Island observes, this proceeding has been pending since 1987, at the initiation of a broadcast industry group.<sup>52</sup> With adoption of this decision, broadcasters will have ample notice of the precise deadlines applicable to them before the application period begins to run. Broadcasters obtaining an assignment as a result of negotiations with other parties in the market,<sup>53</sup> having explored potential implementation difficulties before agreeing to a pairing plan, should not need an extended time for submitting an application for that channel. Moreover, broadcasters who are unable to reach a negotiated settlement will have an incentive under the first-come, first-served approach to apply for an ATV channel early.<sup>54</sup> Accordingly, adopting a two-year application period should not impose an undue burden on existing broadcasters. Moreover, a two-year period will further ensure that incumbent broadcasters take advantage of their initial eligibility priority in a timely fashion and that ATV channels are opened up to new entrants within a reasonable period of time.

23. At the same time, we recognize that broadcasters will be in the

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<sup>51</sup> Moreover, should we decide to adopt one of the current proposals not to impose a simulcasting requirement until some time after the initial application/construction period has elapsed, this would give broadcasters an incentive to apply and construct substantially before the deadlines we impose have run. See *infra* Section V. By commencing operations early, broadcasters would have an opportunity to experiment with this new mode of transmission, to enjoy full flexibility regarding ATV programming, and to garner any additional revenues which different ATV programming may generate, before simulcasting restrictions become applicable. These same incentives would operate regardless of the particular methodology we adopt for assigning channels.

<sup>52</sup> Island Comments at 2-3; Island Reply at 6.

<sup>53</sup> For a discussion of our proposed channel assignment approach, see Section II.F *infra*.

<sup>54</sup> See *infra* Section II.F.

vanguard of those implementing ATV technology. As a result, the necessary equipment for transmission and production will have to be newly developed. Licensees will need time to solve the unique problems that pioneering construction of an ATV facility may raise.<sup>55</sup> Accordingly, we will permit broadcasters an additional year from that proposed, for a total of three years, for construction of an ATV facility. In light of the modification we make to the application period, this additional year for construction will not delay the ultimate availability of ATV service to the public.

24. We also clarify that we intend to apply our existing definition of "construction" in this context.<sup>56</sup> Thus, a broadcaster will be deemed to have constructed an ATV facility if it has the capability of emitting ATV signals, regardless of the source of these signals (e.g., local origination, pass-through of a network signal, or other signal). Studies of the cost of ATV broadcast implementation indicate that studio conversion costs are likely to be substantial.<sup>57</sup> By leaving the timing of full studio conversion more to the broadcaster's judgment, broadcasters will be able to "phase-in" full ATV implementation as their individual circumstances and markets permit. At the same time, requiring transmission capability by a date certain ensures that valuable spectrum will not lie fallow and that the benefits of technological advances will be made available to the public promptly.

25. We underscore that the ATV application/construction time period will begin to run from the date that a Report and Order adopting a Table of Allotments or selecting an ATV system becomes effective, whichever is later. We expect that many of the asserted uncertainties regarding ATV construction that are raised today will be clarified at the point an ATV system is actually selected. However, we note that for each individual applicant, the

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<sup>55</sup> Implementation Subcommittee Fifth Interim Report to the FCC Advisory Committee on Advanced Television Service (Implementation Fifth Interim Report) at 7-8 in Fifth Interim Report, Appendix I (noting that, although a two-year construction period is reasonable in the abstract, "[f]ew, if any, stations will achieve the minimum implementation time" in practice).

<sup>56</sup> See generally FCC Form 302. We believe that the more liberal definition suggested by Working Party 1 of the Implementation Subcommittee (IS/WP1) would not be feasible to administer and would not serve our goal of speedy implementation of ATV. Implementation Fifth Interim Report at 4. IS/WP1 advocates use of various indicia of a licensee's good faith intent to build, such as executed contracts for syndicated programming of ATV quality, and, to the extent they require capital expenditure, believes that these actions "should be taken as indicia of irrevocable commitment to ATV implementation, warranting extension of any fixed construction deadline the Commission may set." Implementation Fifth Interim Report, *supra*, Attachment A at 6-7.

<sup>57</sup> See, e.g., A CBS Work-in-Progress (Oct. 23, 1990, Preliminary Results) (CBS Study), at Figure 4 in Implementation Fourth Interim Report to the FCC Advisory Committee on Advanced Television Service (IS-0017) (Mar. 7, 1991).

construction period will begin to run from the actual time that a construction permit is awarded. In this way, we may appropriately compensate for time needed for application processing by Commission staff.<sup>58</sup> Moreover, we can ensure that those who are awarded frequencies at a relatively early point also complete construction at a commensurately early date.

26. Finally, not only are we allowing an additional year for construction beyond that currently permitted in our rules,<sup>59</sup> but our existing policies regarding extensions of time will afford broadcasters adequate flexibility to cope with unforeseen implementation problems. Our rules permit extensions of time to construct where (1) construction is complete and testing is underway; (2) substantial progress in construction has been made; or (3) reasons clearly beyond the permittee's control have prevented progress in construction, but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.<sup>60</sup> We will apply these rules to grant extensions in appropriate circumstances.<sup>61</sup>

27. For example, some speculate that local zoning problems, pendency of FAA, FCC or other necessary government approvals, or litigation directly affecting our ATV rules will unavoidably delay ATV construction.<sup>62</sup> Our existing rules, however, would provide relief in such circumstances.<sup>63</sup>

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<sup>58</sup> The Advisory Committee suggests that we process applications from large markets first. Fifth Interim Report at 12. We will, however, defer this issue until we have reached a decision on an allotment/assignment methodology. See infra Section II.F.

<sup>59</sup> 47 C.F.R. § 73.3598.

<sup>60</sup> 47 C.F.R. § 73.3534.

<sup>61</sup> We also intend to adhere to our existing policies defining "substantial" progress in construction. See 47 C.F.R. § 73.3534(b)(2). Substantial progress in construction has been interpreted to require sustained progress in the construction of a station. Although there is no maximum number of extensions allowed, demonstrable progress must occur during each extension period. Benko Broadcasting Company, 5 FCC Rod 1301. As the indicia of substantial progress in construction stated in the rule suggest, substantial progress requires that a permittee demonstrate a firm commitment to construct. See, e.g., Metrovision, Inc., 3 FCC Rod 598 (Vid. Serv. Div. 1988) (extension denied where the only indication of recent progress in construction was equipment orders upon which deposits never had been paid).

<sup>62</sup> See generally Weiss Comments at 3-4 & n.2.

<sup>63</sup> See, e.g., Weiss Comments at 3-4 & n.2. Our rule, 47 C.F.R. § 73.3534(b)(3), specifically provides for an extension in the case of delay caused by unavoidable zoning problems. See also Letter from Video Services Division to Housatonic Broadcasting Company, Inc. (Aug. 4, 1988) (Housatonic Letter) (construction permit reinstated after permittee demonstrated difficulties it faced in locating a new site after Federal Aviation

Similarly, some hypothesize that transmission and production equipment may not be available in a timely fashion. Our existing rules again would permit appropriate extensions.<sup>64</sup> If unavoidable difficulties occur in locating an appropriate ATV transmitter site, our existing rules also provide sufficient relief.<sup>65</sup> With respect to publicly-funded stations, we note that government budgetary processes can present uncontrollable circumstances specifically justifying an extension in our rules.<sup>66</sup> This policy thus provides sufficient flexibility for public television stations that may experience delays in obtaining government appropriations to transition to ATV.<sup>67</sup>

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Administration and zoning approval problems made original site unavailable). We thus do not believe it necessary to take additional action to ensure that local governments do not block reasonable construction of new towers, as St. Clair suggests. St. Clair Comments at 2.

<sup>64</sup> See, e.g., Fleet Call Reply Comments at 5; Westinghouse Comments at 4; Joint Broadcasters Comments at introduction 2, 16; Polar Comments at 4; Golden Orange Comments at 3; Weiss Comments at 3-5. 47 C.F.R. § 73.3534 (b) (2) specifically states that a permittee's demonstration that equipment is on order is one indicia of substantial progress in construction. So long as a permittee's efforts at construction have been sustained, an equipment purchase order for which timely delivery is impossible normally is sufficient grounds for the extension of a construction permit. Compare Benko Broadcasting Company, supra (grant of extension warranted where original transmitter had to be returned to the manufacturer because modification application specified different equipment), with Golden Eagle Communications, Inc., 6 FCC Rcd 5127 (1991), recon. denied, 7 FCC Rcd 1752 (upholding denial of fifth extension request in spite of permittee's deposit with equipment suppliers where permittee failed to demonstrate sustained efforts at construction or circumstances beyond its control).

<sup>65</sup> Polar Comments at 4; Weiss Comments at 4-5; St. Clair Comments at 1-3; Joint Broadcaster Comments at 19-21 n.13 (citing difficulties faced by licensees located at World Trade Center in New York City); see also IS/WP2 Report at 7-10. See, e.g., Housatonic Letter, supra; F.B.C. Inc., 3 FCC Rcd 4595 (M.M. Bur. 1988) (extension granted where permittee promptly made efforts to obtain a new site, even though these efforts did not include the actual purchase or lease of alternative sites); Letter From Roy J. Stewart, FCC Mass Media Bureau Chief, to Southwest MultiMedia Corp. (Sept. 21, 1990) (construction permit extended and assignment granted, where, inter alia, tower lease terminated and permittee had negotiated another lease and ordered transmitter). But cf. New Orleans Channel 20, Inc., 100 FCC 2d 1401 (M.M. Bur. 1985), rev. denied, 104 FCC 2d 304, 313 (1986), aff'd, 830 F.2d 361 (D.C. Cir. 1987) (extension request denied after determination that the permittee's change in transmitter site was based merely on the business consideration that competition had developed from the addition of independent UHF station at the original site).

<sup>66</sup> 47 C.F.R. § 73.3534 (b) (3).

<sup>67</sup> Joint Broadcasters Comments at 23; Public Television Comments at 25.

28. We thus believe that this policy on extensions affords sufficient relief to parties in unforeseen and uncontrollable circumstances. Given this policy, and the additional flexibility created by our continuing to limit the construction requirement to the ability to emit an ATV signal alone, we conclude that it is unnecessary either to extend the total time allowed for application or construction, or to undertake additional regulatory initiatives, to provide reasonable and equitable relief in extenuating circumstances.<sup>68</sup> On the other hand, given the many unknown factors likely to be part of early ATV implementation, we do not believe it advisable, as Island advocates, to employ a more stringent standard than we now apply to broadcasters.<sup>69</sup>

29. Our present rules generally do not permit an extension for inability to obtain financing.<sup>70</sup> Contrary to the views of some commenters, we see no reason to modify this rule for initial ATV implementation or to defer our decision on construction periods based on concerns about future ability to obtain financing.<sup>71</sup> Adequate financing is critical to prompt construction. One reason we are assigning ATV channels to existing broadcasters is our belief that they are the group most likely to have the incentive and the

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<sup>68</sup> See, e.g., Golden Orange Comments at 4, 13 (advocating longer period); St. Clair Comments at 3 (advocating that Commission establish rules ensuring that landlords do not profit from increased demand for transmitter space, and that the government formulate a special policy for transmitter sites located on government land); Joint Broadcasters Comments at 21, 39 (urging that we mandate ATV capability in all or a segment of receivers and make cable carriage mandatory); Weiss Comments at 6-7 (advocating sliding scale so that those who apply earliest get longer period to build, while those who apply later get shorter construction times).

<sup>69</sup> Island Comments at 4; Island Reply Comments at 4 (arguing for a strict standard such as that expressed in 47 C.F.R. § 22.43(b) of the cellular radio service rules). Cf. Telemundo Comments at 10 (arguing that a stricter standard should be applied to extension requests for full-power and IPTV construction permits).

<sup>70</sup> Revision of FCC Form 301, 50 RR 2d 381 (1981). See L.E.O. Broadcasting, Inc., 2 FCC Rcd 1810 (Vid. Serv. Div. 1987) (extension request denied because permittee had not taken all possible steps to obtain alternative financing and complete construction, even though permittee's loss of financing was caused by the collapse of its bank). But cf. Horseshoe Bay Centex Broadcasting Co., 5 FCC Rcd 7125 (1990) (extension granted where committed financing from a bank was rescinded as a direct result of lending restrictions imposed by the FDIC during a state-wide recession, and diligent efforts were made to obtain alternative financing and to begin construction).

<sup>71</sup> See, e.g., MST Reply Comments at summary 1, 6-9. See also Polar Comments at 4.

sources to implement ATV in an expeditious fashion.<sup>72</sup> A broadcaster's inability to obtain adequate capital, therefore, will only be considered relevant under extraordinary circumstances.

30. We also decline to make ATV receiver penetration a factor in granting construction permit extensions or extending application/construction time beyond five years.<sup>73</sup> The availability of ATV programming to the public is likely to be a major factor driving ATV receiver penetration.<sup>74</sup> Unless broadcast stations are transmitting ATV programs, such programming is unlikely to be available in sufficient quantity to stimulate receiver sales. We therefore believe that broadcast transmission is likely to be a precondition for substantial receiver penetration. Thus, we cannot allow receiver penetration levels to be a factor justifying a failure to construct an ATV station in a timely fashion or moving us to extend generally the application/construction time period.<sup>75</sup>

#### F. Allotment/Assignment Issues

31. For the past several years, the Commission's Staff has been examining various approaches and methodologies for developing allotments for ATV.<sup>76</sup> These efforts have been used to support the Commission's preliminary positions regarding retention of reserved channels for noncommercial stations and full accommodation of existing TV stations.<sup>77</sup> These studies also have

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<sup>72</sup> See supra Section II.A.

<sup>73</sup> Joint Broadcaster Comments at 22.

<sup>74</sup> EIA/CEG Comments at 5; ATSC Comments at 6; Philips Comments at iii.

<sup>75</sup> Cf. FTC Reply Comments at 16-17 (while advocating longer construction period, acknowledging that construction deadline might solve problems of "excess inertia," i.e., where a new technology never achieves consumer acceptance). See also discussion on projected receiver penetration infra notes 156, 164.

<sup>76</sup> See "Memorandum of Understanding," (dated Nov. 14, 1990) between the FCC, the Advisory Committee and the ATV testing laboratories (Test Center and CableLabs). Under this agreement, the FCC assumed the responsibility for ensuring that channels are available for ATV service in a timely manner. The FCC also agreed to "take all necessary steps, including the development of analytic tools, to prepare an allotment table and/or assignment plan for ATV channels."

<sup>77</sup> See Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands, OET Technical Memorandum FCC/OET TM88-1 (Aug. 1988) (1988 OET Study); Analyses of UHF TV Receiver Interference Immunities Concerning Advanced Television, OET Technical Memorandum FCC/OET TM88-2 (Aug. 1988); and Interim Report: Further Studies on the Availability of Spectrum for Advanced Television, OET Technical Memorandum FCC/OET TM89-1 (Dec. 1989) (1989 OET Study).

provided guidance on critical spectrum parameters to ATV system designers have aided the Advisory Committee's work in this area.

32. In the Notice, we sought comment on general spectrum matters and two main alternatives for the initial assignment of ATV channels, including a proposal to assign channels on a first-come, first-served basis, and a proposal to also permit private negotiations among licensees for particular channels.<sup>78</sup> Most commenting parties endorse an allotment/assignment approach that matches specific ATV channels with existing NTSC allotments.<sup>79</sup> Broadcasters generally believe it is essential that ATV channels be assigned by the time an ATV standard is selected and that existing sites be taken into account in the assignment process.<sup>80</sup> Parties disagreed, however, on the approach to be used to pair specific NTSC and ATV channels within a community.<sup>81</sup> Most parties support a policy permitting pre- or post-assignment negotiations among licensees in a given community as an extension of the Commission's normal allotment and assignment processes.<sup>82</sup> The Joint Broadcasters also oppose an approach in which ATV channels would first be allotted to communities and then made available for broadcasters on a first-come, first-served basis.<sup>83</sup> EIA, on the other hand, supports such a first-come, first-served procedure, stating that it would be the most expeditious means for implementing ATV.<sup>84</sup>

33. The Advisory Committee has recommended that we adopt an ATV allotment/assignment scheme contemporaneously with adoption of an ATV standard, consider a site-specific assignment plan in order to promote co-location of ATV and NTSC antenna sites, and clearly define our methodology for making ATV assignments as expeditiously as possible.<sup>85</sup>

34. We share the concerns of commenting parties that it is essential that an allotment/assignment process be in place at the time the ATV standard is adopted, and that the allotment and assignment methodology be defined as rapidly as possible. We intend to address all allotment matters related to

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78 Notice, 6 FCC Rcd at 7027-29.

79 See, e.g., Joint Broadcaster Comments at introduction 1, 3-4, 5.

80 Id. at introduction 1, 4 & n. 1, 6-7.

81 Compare Tribune Reply Comments at 2-4 (advocating replication of existing NTSC coverage area) with Paramount Reply at 1 (advocating equalizing disparities between UHF and VHF stations).

82 EIA/CEG Comments at iii, 6; ATSC Comments at 4-5; Westinghouse Comments at 3-4.

83 See generally Joint Broadcasters Comments at 11.

84 See, e.g., EIA/CEG Comments at iii, 7-8.

85 Fifth Interim Report at 12.

the introduction of ATV in a separate Further Notice of Proposed Rule Making in June of this year. This action will set forth proposed technical and policy principles and scientific and engineering concepts to be used in the allotment of ATV channels. A draft Table of Allotments based on these principles and concepts will also be included. We are aware that the Advisory Committee has also undertaken work in the allotment and assignment areas. At an informal meeting with FCC staff on February 5, 1992, representatives of the Advisory Committee and other interested parties indicated that preliminary results from this work are expected this Spring. To the extent that this work becomes available, we will give it due consideration in developing our allotment and assignment proposals.<sup>86</sup>

35. We continue to believe that negotiations among broadcasters should be an integral part of the ATV assignment process. Such an approach will ensure the most expeditious and efficient implementation of ATV service to the public. Accordingly, we have developed the following revised proposal for the initial assignment of ATV channels. This proposal will ensure that assignment and licensing procedures are in place at the time the Commission adopts an ATV standard. Under this proposal, at the time the Commission issues a Further Notice proposing the Final Table of Allotments,<sup>87</sup> broadcasters would have a fixed period of time to negotiate with each other and submit plans for pairing NTSC and ATV channels either nationwide or on a market-by-market basis.<sup>88</sup> Both commercial and noncommercial stations would be permitted to participate in this negotiation.<sup>89</sup> Once the period for such industry negotiations ends, if there are markets remaining where broadcasters are unable to agree on a pairing plan, the channels in those markets would be assigned on a first-come,

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<sup>86</sup> See generally Ex Parte Letter from Julian L. Shepard, Vice President and General Counsel, MSTV, to Donna R. Searcy, Secretary, FCC (Feb. 6, 1992).

<sup>87</sup> The Final Table of Allotments will be developed after comments on the June 1992 draft Table have been received and analyzed.

<sup>88</sup> To the extent possible, we would take into account any negotiated agreements made nationwide or within markets based on the sample Table of Allotments in preparing a proposal for the Final Table of Allotments/Assignments.

<sup>89</sup> Public Television is concerned that financially strapped noncommercial stations would be unable to refuse lucrative offers to trade their assignments. Public Television Comments at 18-19. This concern, however, appears to be directed to post-assignment negotiations, in which a station could exchange a valuable entitlement to a channel, and not to the pre-assignment negotiations we are here proposing, in which no party yet has any rights to particular channels. We also observe that we currently permit commercial-noncommercial intraband channel exchanges where the proceeds, if any, are used by the noncommercial licensee in the operation of its station. Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations, 59 RR 2d 1455, 1464 (1986), on recon., 3 FCC Rcd 2517 (1988), aff'd sub nom. Rainbow Broadcasting Co. v. FCC, 949 F. 2d 405 (D.C. Cir. 1991).

first served basis. In the case of simultaneously filed applications, we would apply a "random ranking" procedure, so that the top-ranked applicant would be granted its first choice, and the next-ranked applicant its highest choice that would not conflict with the first-ranked applicant, and so on. We do not agree with Joint Broadcasters that such a first-come approach would result in a "stampede" of applications, since broadcasters in many markets may reach negotiated settlements among themselves.<sup>90</sup> In addition, our selection of a three-year construction period, which will begin to run from the time a construction permit is awarded, should help ensure that broadcasters do not file for an ATV allotment until they are ready to construct. We seek comment on this proposed approach.<sup>91</sup>

### III. SPECTRUM ISSUES

#### A. Noncommercial Allotments

36. As the Notice stated, our spectrum planning with respect to the broadcast industry has traditionally taken into account the important role noncommercial stations play in providing quality programming to the public and the financial constraints they face in building and running their stations. Technical studies indicate that we can continue this tradition within an ATV allotment scheme. Accordingly, in the Notice we proposed that we would use vacant noncommercial reserved channels only as a last resort, to permit present delivery of ATV service, and moreover, would pair vacant noncommercial

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<sup>90</sup> A first-come approach is also not inconsistent with the two-year application period which we will apply.

<sup>91</sup> Our reluctance to propose a specific pairing of ATV and NTSC channels stems from several considerations. If, on a market-by-market basis, we were to attempt to match the existing NTSC stations with the pool of feasible ATV channels on an equivalent service basis, we believe that we would encounter a significant number of cases in which an acceptable degree of equivalency simply does not exist. The presence of existing stations causes significant variations in the size and shape of both NTSC and prospective ATV service; it is this variability which would frustrate, we believe, a simple matching scheme. Further, we note that relying on the principle of existing service would require that a licensee with the smallest existing NTSC service be paired with the least attractive ATV channel. We are concerned whether all such licensees would be satisfied with such an arrangement. From a broader perspective, we believe that licensees will have their own reasons for preferring certain ATV channels and that these will vary from market to market. For example, one broadcaster may favor a particular ATV channel because it is close in frequency to its existing NTSC channel. Another broadcaster may desire a certain ATV channel because it may offer better coverage at the location where it intends to construct its ATV facility. A third broadcaster, currently operating in the VHF band, may prefer an ATV channel in the UHF band so that it would operate from a common antenna with other broadcasters. It is doubtful that this Commission could fashion a simple and efficient method which would automatically lead to the right outcome in each market.

Allotments with an ATV channel except where that would preclude present delivery of ATV service.<sup>92</sup>

37. Most parties commenting on the issue favor preserving the noncommercial reserve, with some noting that given the budgetary constraints confronting noncommercial stations, many such stations would require more time than their commercial counterparts to commence operations.<sup>93</sup> Most of those commenting on the issue also favor pairing ATV channels with vacant noncommercial allotments,<sup>94</sup> observing the unique role that public television plays in American broadcasting,<sup>95</sup> the difficulties noncommercial interests have in competing with commercial interests for spectrum, and the importance of such reservations in maintaining the ranks of stations dedicated to public television service.<sup>96</sup> Based on these comments, we conclude that we will use vacant noncommercial allotments for ATV only where there is no feasible alternative for assigning an ATV channel to an existing broadcaster. Similarly, we will leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel.<sup>97</sup> We will in no event use a vacant VHF channel allotment reserved for noncommercial purposes for commercial ATV.<sup>98</sup> Moreover, only as a last resort will we delete a reserved channel, or use for commercial purposes an ATV channel that would otherwise be paired with a vacant noncommercial allotment, where that channel or allotment would be necessary to provide first noncommercial full-service Grade B coverage to a community.<sup>99</sup> As Public Television suggests, if it is impossible to pair an ATV channel with a vacant noncommercial allotment, we will protect the vacant allotment with both NTSC and ATV separation requirements, provided that ATV spacing is, as

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<sup>92</sup> See 1989 OET Study, *supra*. See also Notice, 6 FCC Rcd at 7029-30.

<sup>93</sup> Joint Broadcasters Comments at introduction 4, 4; Public Television Comments at iii, 9-11.

<sup>94</sup> Joint Broadcaster Comments at 9-10.

<sup>95</sup> ATSC Comments at 5.

<sup>96</sup> Public Television Comments at iii, 2, 13-14 & n.11.

<sup>97</sup> In both cases, we would conduct such an evaluation of feasible alternatives on a case-by-case basis, including consideration of other practicable engineering solutions. Cf. Joint Broadcasters Comments at 9; Public Television Comments at iii, 9.

<sup>98</sup> See P.L. No. 101-515, the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1991 (102 Stat. 2136-37, Nov. 5, 1990) (no funds appropriated to the FCC may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations).

<sup>99</sup> Joint Broadcasters Comments at 9 n.4; Public Television Comments at iii, 9-11.