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SIMULCAST PAPER--EXECUTIVE SUMMARY

There are both legal and policy issues associated with the Commission's application of a simulcasting requirement to broadcasters' use of a second channel for advanced television.

Legal issues.

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Ashbacker.

A strict simulcast requirement makes it easier to justify giving the second channel to existing broadcasters only, for the first two years. To the extent that different programming is permitted on the second channel, it is more difficult to preclude other new applicants in the initial round.

On the other hand, the requirement that the second channel ultimately be returned to the Commission would seem to solve this problem. Existing broadcasters will end up with just what they started with--only one channel. Yet, as a practical matter, it may be more difficult to require the return of the second channel if the programming on it is different than that on the first channel; however, if the Commission announces in advance, as it has, that the second channel must be returned, it would seem to have the authority to enforce this policy.

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Moreover, the FCC has justified awarding the second channel initially to existing broadcasters only on several other public interest grounds, including the experience of existing broadcasters, the fact that existing broadcasters have considerable investment in the present system and the fact that broadcasters already have and will continue to invest in and take substantial business risks toward the development of advanced television. Finally, opening up the spectrum allotted to ATV to comparative processing would unduly delay ATV implementation.

First Amendment.

A simulcast requirement is a content-based regulation that would inhibit the program decisions of existing broadcasters' ATV operations only. It can only be justified under the First Amendment if it is the least restrictive means necessary to achieve the overriding public interest goals articulated by the Commission in promulgating the requirement. If there is a less restrictive alternative whereby the Commission's public interest goals can be achieved, that alternative should be preferred to the alternative that has greater impact on protected speech. If, for example, readily-available, inexpensive down-converters can provide broadcasters' ATV feed for NTSC-only viewers, a simulcast requirement may be seen as overly restrictive in First Amendment terms. Just as the Commission has found an A/B switch option less restrictive than mandatory carriage requirements for cable,

Self analysis

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there may be other, less restrictive alternatives to simulcast requirements that could achieve the public interest goal of protecting service to NTSC viewers throughout the transition to ATV.

As a simulcast requirement is a content-based regulation, such alternatives should be explored. These alternatives include not imposing a simulcast requirement now, but simply monitoring the marketplace to see how ATV equipment and programming develops and in fact whether a simulcast requirement is necessary at all.

Practical/policy issues.

A major policy goal for the Commission is prevention of the disenfranchisement of NTSC receiver owners, if broadcasters begin to devote their best program efforts to ATV development, at the expense of NTSC programming offerings. At least in the initial phases of ATV implementation, broadcasters most likely will continue to provide quality NTSC programming whether or not they are required to do so, because ATV receiver penetration will still be low. Initial ATV receiver purchasers will most likely keep their NTSC receivers as well, and program enhancements in ATV will drive ATV receiver penetration. Such enhancements could include the improved audio and video quality ATV will deliver,

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but also could comprise pre-released ATV programs, multiple-plays of ATV special productions, either on a pay or free basis, and perhaps some ATV-only programming.

If NTSC-only viewers were equipped with down-converters, a requirement that the ATV enhancements also be available to them through simulcasting would be less necessary. On the other hand, the availability of NTSC down-converters could retard the ultimate transition to ATV, especially as dual-mode receivers will be more expensive than ATV-only receivers.

To the extent that two different program channels, NTSC and ATV, develop, it will be more difficult to enforce the reversion of the second channel, as viewers will get used to having both channels. On the other hand, broadcasters will have to make significant investments in this new technology without the promise of additional revenues, particularly if they must provide the same programs at the same time on both channels. Some flexibility to experiment with the new technology could enable broadcasters to derive interim revenues, as well as to continue to improve ATV.

Other media.

Other video media, particularly to the extent that they retransmit broadcast signals, are reliant on the Commission's

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decisions regarding the broadcast ATV transmission standard and the extent of any simulcast requirement. There is no mandatory transmission standard for non-broadcast media and they are not required by law to retransmit broadcast signals; nevertheless, as the universal medium, broadcasting de facto sets a standard for other video media. Although the transmission standard chosen by the Commission will remain the same whether or not simulcasting is required, to the extent that the same programs are available on the ATV and NTSC channels, those media that retransmit broadcast signals will not have to carry both channels in order to satisfy their viewers.

Flexible definition of simulcasting.

A flexible definition of "simulcasting" should solve some of the problems with early program availability and probably will be mandated by the basic differences between NTSC and ATV formats e.g., aspect ratio. Time shifting within a day or other, longer period, may provide an attractive vehicle and spur ATV receiver penetration. To the extent that there is not a 100% simulcast requirement, multiple-plays at different times of ATV productions, as well as pre-release, also could stimulate audience demand. Exempting commercials and programs of under a specified length from any simulcast requirement also might make implementation of ATV easier for broadcasters.

Conclusion.

In sum, simulcasting the programming on both NTSC and ATV channels will protect NTSC viewers during the transition to ATV until such time as ATV becomes the only authorized over-the-air transmission standard for television. On the other hand, the opportunity to provide enhanced advanced television offerings that differ in some way, whether pre-released or otherwise time shifted multiple airings, pay-per-view of exclusive made-for ATV programming, may stimulate ATV receiver penetration sooner and also may assist broadcasters in deriving an additional revenue stream from ATV transmission. The Commission could reserve the option to revisit its tentative decision to require 100% simulcasting until such time as it is in a position to survey the marketplace and see how ATV is developing. Alternatively, it could announce a timetable for NTSC/ATV simulcasting now, giving viewers and the industry alike certainty as to when they will need to invest in this new technology and what they can expect in the way of programming during the transition.

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Introduction.

In the Second Report and Order and Further Notice of Proposed Rulemaking in Mass Media Docket 87-268 (Notice), the Commission states that will require 100% simulcasting of NTSC and ATV programming "at the earliest appropriate point," articulating three reasons therefor:

1. Protection of service to NTSC viewers;
2. Minimal reliance on the ATV channel as a separately-programmed service will facilitate reclamation of the reversion channel at the earliest possible opportunity; and
3. 100% simulcasting is expected to give impetus to ATV receiver penetration by eliminating the need for dual-mode receivers.

The Commission tentatively concludes that a 100% simulcasting requirement should be imposed four years after the five-year application/construction period. It seeks comments as to whether it should phase in the simulcasting requirement, that is, require simulcast of 50% of each day's programming to start two years after the five-year period, with a 100% simulcast requirement to commence another two years thereafter. The Commission also seeks comments on alternative simulcasting

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schedules, including an earlier adoption of a 100% simulcasting requirement, if this were technically feasible. Comment is also sought on whether broadcasters would, regardless of technical feasibility, need "some reprieve" from a 100% simulcast requirement, even after the initial application/construction period, to explore the creative potential of ATV, attract viewers to ATV and assure their ability to recoup their investment in ATV implementation.

Additionally, the Commission seeks comment on utilizing a flexible definition of simulcasting in order to afford broadcasters flexibility in developing ATV technology, including:

- A. Requiring that the same programming overall be broadcast in both ATV and NTSC, but permitting time shifting, either within the same 24 hour period or otherwise.

- B. Defining "the same program" as "consisting of the same underlying material," but allowing variances in content, recognizing the different characteristics of ATV and NTSC, including different aspect ratios, angles, numbers of cameras or commentary (e.g., in connection with different camera angles).

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- C. Excluding commercials and promotions from any simulcast requirement.
- D. Excluding programs below some minimum length from any simulcast requirement, e.g., applying it only to programs of more than 15 minutes or some other length in duration.
- E. Finally, the Commission asks whether the phase in proposed above would be necessary, should it adopt a flexible definition of "same program," including the above elements.

The Commission also concludes that the ATV channel must be used from the outset to deliver ATV programming, including programs produced in film and converted directly to ATV, programs originally produced on tape in ATV, and programs produced live in ATV. The Commission does not envision permitting on the ATV channel up-converted NTSC programs that are different from the NTSC programs delivered on the NTSC channel, although presumably delivery of the same NTSC programs, up-converted, would meet any simulcasting requirement.

The Commission seeks comment from electronics manufacturers on the relationship between any simulcast requirement and the rate of ATV receiver penetration, as well as the availability and

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cost of up-conversion equipment, down-conversion equipment for home use and dual-mode receivers. The Commission is particularly interested in the effect of the various simulcast alternatives on consumer interest in ATV and ATV receiver penetration. Finally, comment is sought from programmers on a timetable for availability of ATV-capable programming.

There are two separate, but interrelated issues raised in connection with the simulcast options. The definition of simulcasting, i.e., how flexibly broadcasters may program while still meeting the definition of simulcasting, and the extent of and timetable for simulcasting. These are related in that to the extent that a flexible definition for simulcasting is embraced, an earlier-imposed, higher percentage of simulcast programming requirement probably becomes more feasible and less onerous for broadcasters.

Discussion.

Definition of simulcasting.

The FCC proposes to define "same program" as "one which has its basis the same underlying material." Such a definition would permit variances to accommodate the different characteristics of ATV versus NTSC, such as different aspect ratios, angles, or numbers of cameras or commentary in connection with different

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camera angles. "Program" might also be defined to exclude commercials and promos. Programs of some minimum length also might be excluded. The Commission suggests that such definitional flexibility could alleviate concerns that a simulcasting requirement would raise First Amendment problems or have a chilling effect on program content.

A certain amount of flexibility, within the "definition of same underlying program," would appear to be both necessary and desirable to accommodate basic differences in NTSC and ATV. If editing techniques such as panning and scanning or letter-boxing are required to transfer the same underlying program material from one aspect ratio to another, it would be difficult to consider these materials "different programs." As a practical matter, the less rigid the definition, the less onerous compliance with a simulcast requirement is likely to be for broadcasters.

The Commission also suggests permitting time-shifting of ATV and NTSC programs within the definition of "same program." Viewers would have an opportunity to receive the same program on both channels, but they would be able to see it at different times. As the Commission recognizes, it will be up to broadcasters to "explore the creative potential of the ATV mode and attract viewers to ATV." As we have seen with the proliferation of home satellite dishes, especially in areas that

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already can receive the major broadcast signals off the air and those that are cabled, consumers are willing to invest in high-end receiving capability to enjoy otherwise-unavailable programs. It is not clear that the difference between NTSC and ATV quality alone will spur ATV receiver penetration: to the extent that ATV is permitted to bring, if not diverse program offerings, at least novel viewing modes to over-the-air television, ATV receiver penetration may be stimulated. On the other hand, this assertion may draw into question the Commission's initially assigning ATV channels to existing broadcasters only.

Within the rubric of time shifting, broadcasters may wish to pre-release ATV productions, perhaps on a pay-per-view basis, as well as to provide multiple plays at different times of ATV programs. To the extent that the Commission recognizes such flexibility within its definition of simulcast, a higher required level of simulcasting might be acceptable sooner. In order to develop the ATV as the new, and eventually sole, television broadcast service, not just because the initial investment in ATV transmission equipment (not to mention ATV programming and/or production equipment) will be costly without producing revenues, but also because the value ATV will add to television is unknown as yet and must be explored, flexibility as to the definition of simulcasting should be considered by the Commission, consistent with the public interest goal of preserving NTSC service for remaining NTSC receivers.

Simulcasting options.

There are various options that the Commission might consider in addressing the simulcast issue, however flexible the definition of simulcasting adopted.

- A. 100% simulcasting requirement could be adopted earlier than four years after the five-year application/construction period.
- B. The 100% simulcasting requirement could be phased in on a 50% basis every two years during the four years after the five-year application/construction period, as the Notice suggests.
- C. The Commission could defer a decision on when to set a timetable for 100% simulcasting and review the state of the industry after the five-year application/construction period, considering the level of ATV receiver penetration and the development of ATV programming at the time.
- D. Finally, the Commission could defer its decision on whether to adopt a 100% simulcasting requirement until after the five-year application/construction period, or even until some later date, and assess the state of the

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industry at that time, including factors such as ATV set penetration, the development of ATV programming, the need of broadcasters to recoup investment in advanced television and, indeed, consumer reaction to the ATV environment that exists at that time, (for example, all licensees may be simulcasting anyway, even though there is no requirement; or, consumers may be purchasing sets in markets where ATV broadcasters are providing diverse, as opposed to simulcast, program offerings).

There is something to be said for the Commission allowing the industry and itself to have some real-world experience with the transition to ATV technology before imposing rigid requirements whose affect on the proliferation of advanced television can not be predicted. On the other hand, the Commission has stated: "ATV represents a major advance in television technology, not the start of a new and separate video service." The basis for the Commission's decision to grant additional spectrum to existing broadcasters only was to facilitate the transition from NTSC to a new, incompatible ATV technology, by permitting the broadcast industry to keep pace and compete with other video providers on this new technological playing field.

By authorizing two channels, the Commission states that its goal is not to create a new programming service, but to achieve and orderly transmission to an improved technology, while continuing NTSC service along with ATV introduction in order to protect consumer investment in existing NTSC equipment, so consumers are not forced to purchase new ATV receivers in order to continue to enjoy high-quality over-the-air television programming. Once ATV becomes the prevalent medium, broadcasters will be required to convert entirely to ATV and surrender one of their two channels. Allowing the provision of different programming for ATV viewers could prematurely disenfranchise the NTSC viewing public. Broadcasters might be incented to divert resources from NTSC programming to the new ATV programming, providing NTSC with increasingly inferior quality programming throughout the transition period and perhaps forcing NTSC viewers to purchase more NTSC equipment, i.e., down-converters, in order receive ATV programming. The Commission is fearful that the ready availability of low cost down-converters will inhibit the conversion to full ATV implementation.

On the other hand, those who purchase ATV receivers early on probably will retain their NTSC sets as well; or they will purchase integrated receivers, so that they can continue to receive NTSC as well as ATV. Such individuals probably would be better served by more diverse, as opposed to simulcast, ATV

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program offerings. Indeed, the ready availability of inexpensive down-converters would seem to diminish the likelihood of NTSC viewer disenfranchisement.

It also could be argued that permitting broadcasters to program the ATV channel independently of the NTSC channel might jeopardize the goal of fostering expeditious transition to ATV and promoting spectrum efficiency. That is, broadcasters might be incentivized to delay the ultimate transition to ATV, so that they could continue to operate two program channels indefinitely. Simulcasting will hasten the freeing up of the reversion spectrum, as well.

Abandoning the simulcast approach or so loosely defining simulcasting as to permit highly differentiated programming on the ATV channel for an indeterminate time may undermine the legal rationale for giving ATV channels to existing broadcasters only, as opposed to allocating them on a comparative basis, as the Ashbacker ruling suggests may be required. The underlying premise for awarding broadcasters the second channel on an interim basis is to enable them to transition from a single NTSC channel to a single ATV channel while continuing to meet their obligation to serve viewers. New ATV programming could presumably be provided by any qualified broadcast licensee, making it difficult to sustain preferential treatment for incumbent licensees. Existing broadcasters themselves might

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prefer a simulcast requirement, preferring not to risk audience fragmentation that could result from addetical, different program channels.

On the other hand, if ATV channels were initially awarded to new applicants, as opposed to existing broadcasters, NTSC viewers might well be immediately disenfranchised. The Commission could not require existing broadcasters to continue to broadcast in NTSC only, while fostering ATV development by its new ATV licensees. Existing broadcasters might well choose to convert to ATV immediately, as well, in order to be prepared for the all-ATV world the Commission envisions in the future. As it is, existing broadcasters are being given the opportunity to invest substantial sums in a new, untried technology and begin broadcasting in a new format without any assurance that viewers will purchase receivers to watch it, and, indeed, that there will be any additional revenues derived therefrom. Broadcasters have indicated that they are eager to avail themselves of this opportunity and take this chance; indeed, those that are not simply need not apply for a second channel, but presumably could continue NTSC broadcasting on their original channel, and convert to ATV at the date specified by the Commission.

It is unknown now whether consumers will purchase ATV receivers based upon the enhanced picture and sound quality it can provide, or whether the promise of enhanced overall program

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offerings will be necessary to provide an added incentive. At some point during the transition, broadcasters will have divert some of their resources to ATV programming at the expense of NTSC, until and unless they figure out how to derive additional revenues from ATV. Nevertheless, as the Commission has emphasized, the obligation to serve NTSC viewers should not be sacrificed to ATV development.

On the other hand, there may be legal perils associated with a strict program-related requirement, unless it can be shown to be the least restrictive means to achieve an otherwise unachievable public interest goal. The Commission historically has avoided regulations affecting program content on account of its First Amendment sensitivity. Content-based regulations must be limited to the minimum necessary to achieve over-riding public interest goals. Imposing a 100% simulcast requirement must be shown to be the least restrictive means necessary to achieve the goals outlined by the Commission and paraphrased on page 1 above.

If the Commission rules that it will not permit broadcasters to retain the second program channel beyond a date certain, that ruling should be enforceable with or without requiring total redundancy on both channels during the transition. And the fact that dual-channel operation is only temporary should alleviate concerns under Ashbacker. The channels allotted to ATV will be available to other applicants shortly after the initial

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assignment period of two years. And, the Commission has articulated several reasons why it believes limiting initial eligibility to existing broadcasters only will be in the public interest:

- (1) existing broadcasters have the know how and experience to implement ATV;
- (2) existing broadcasters have invested considerable resources in the present system;
- (3) existing broadcasters will be making considerable additional capital investments in ATV and will be taking substantial business risks in ATV development; and
- (4) the broadcast industry is currently investing substantial resources in the Advanced Television Test Center to develop and perfect the new technology.

In short, if the Commission strictly adheres to its promise that the second channel must be returned as a date certain, the Ashbacker concern will be diminished, if not eliminated. The Commission already has found that the allocation of ATV channels to existing broadcasters only is in the public interest because it is the means most likely spur the development of ATV.

As the Commission has recognized as well, broadcasters ought to be able to experiment creatively with advanced television, both in order to fund their initial investment in ATV and to maximize the medium's transmission capabilities. To the extent that broadcasters are permitted to provide the value-added suited uniquely to ATV, receiver penetration will likely be stimulated and additional advertising revenues available. Pay-per-view or other types of subscription operation may be appropriate for certain ATV productions, such as sporting events. Those revenues may well be necessary to fund dual-channel operation and maintain service to both NTSC and ATV viewers.

To the extent that there is a simulcasting requirement, broadcasters are likely to continue to purchase programming produced in NTSC and upconvert it. It will be expensive initially for program producers to produce new programming in ATV, and broadcasters are unlikely to order two productions of the same program in two formats without any hope of deriving additional revenues therefrom. The opportunity to diverge at least a small amount from their NTSC program lineup might give broadcasters an incentive to begin to order ATV programs. The initial two-year period prior to the 100% simulcasting requirement might be sufficient to prime the ATV production pump (ATV programming could be down converted to NTSC when the 100%

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simulcast requirement began). On the other hand, a policy of granting waivers from the 100% simulcasting for some ATV programming might be considered.

Another possible means of producing additional revenues would be for broadcasters to be permitted to use for ancillary purposes excess data capacity that is not required for ATV transmission but otherwise would remain fallow in the ATV channel, both during non-operation time (such as overnight) and during ATV transmission on a non-interfering basis. There is precedent for permitting non-interfering ancillary uses in the NTSC service, e.g., SAP, SCA, VBI. This ancillary use would not affect any simulcast requirement one way or another, and it would maximize use of the spectrum.

Thus, it may be premature to determine whether a simulcast requirement will be necessary, or even desirable, in the transition to ATV. Initially, when ATV receiver penetration is low, NTSC program offerings are not likely to suffer in relation to ATV. Even as ATV penetration increases, broadcasters still will be likely to produce programming that is largely nonpictorial in nature, e.g., news and public affairs, in NTSC until their studio production facilities have been completely converted. Such programming is considered to be part of each

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licensee's public interest obligation and is likely to be up-converted and simulcast whether there is a specific obligation or not.

Indeed, so little is known about how ATV will develop that it may be premature to impose (in advance) a content-based regulation. The Commission always has the option of addressing the issue as ATV develops. Even after the initial 5-year period, implementation will barely have begun, and shortly thereafter, the Commission will begin to have some concrete evidence on which to base a decision as to whether and when a simulcast requirement should be imposed. Receiver availability and penetration information will be more than hypothetical; the amount and type of ATV-produced programming will begin to be known.

Rather than locking into a regulatory scenario for the future now that is necessarily largely based on hypothesis, the Commission can avoid potentially costly miscalculation simply by withholding judgment until there is some basis on which to judge. Nothing will have been lost. If broadcasters appear to be abandoning NTSC prematurely, a strict simulcast requirement can be imposed. If opportunity for ATV program diversity appears

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necessary to spur ATV receiver penetration, or to fund broadcasters' efforts to develop ATV, a lower or more flexible (or even no) simulcast standard can be considered instead.

On the other hand announcing how it will treat the simulcasting issue in advance will give all members of the industry a measure of predictability regarding the transition to ATV. Although the Commission regulates non-broadcast video media to a far lesser extent than television, and although the current proceeding is designed to set a transmission standard that is only mandatory for broadcasters, other video media are reliant upon the broadcast environment for their own survival and success. Many of them retransmit broadcast programming, for example. For this reason, the Commission might wish to take them into account in any decision it makes on whether broadcaster must simulcast ATV and NTSC programs.

The cable industry has cooperated in the development of a broadcast-compatible ATV standard, even though such a standard may not represent the optimal, or most efficient, or most readily available approach for cable transmission. Cable's cooperation in this process -- and its willingness to forgo its own development of HDTV technology -- has been premised on the Commission's proposal that there be a smooth and expeditious

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transition from NTSC broadcasting to HDTV. Abandonment of a simulcast approach may, for reasons stated above, delay and disrupt the transition.

Conclusion.

While the Commission has tentatively concluded to require simulcasting of ATV and NTSC programming, as the above discussion indicates, there are countervailing factors on both sides of the issue that the Commission may wish to consider as it proceeds with its deliberations.