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FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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JUN 22 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

MM Docket No. 87-268

ORIGINAL
FILE

MSTV PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

The Association for Maximum Service Television, Inc. ("MSTV") petitions the Commission to reconsider the time periods established in its Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268 ("Second Report"), for broadcasters to apply for and construct HDTV facilities. The deadlines set forth in the Second Report require broadcasters in the initial pool of eligibles for HDTV channels (1) to apply for HDTV channels no later than two years after the latter of the adoption of a new Table of Allotments or the selection of an ATV broadcast transmission standard; and (2) to construct their HDTV stations within three years of the grant of their construction permit.

These deadlines run counter to what the Commission has stated previously as its primary objective in this proceeding: to ensure that the unique benefits of the universally available local broadcast system can be achieved and preserved in the advanced television environment. The harsh, rigid deadlines imposed by the Second Report ignore this vital objective in their disregard of the economic realities facing broadcasters in implementing HDTV, such as the penetration rate of HDTV receivers in the marketplace and their ability to obtain financing to build HDTV facilities. Instead, the two-year/three-year application/construction periods are driven by an effort to speed the implementation of HDTV by bypassing , normal marketplace forces and imposing on broadcasters an inequitable and dangerous share of the risk and financial burden

involved in bringing this new, and to some extent largely unknown, technology to fruition.

Moreover, the Commission's decision to impose these deadlines has no basis in the record. It is inconsistent with the views expressed by the great majority of commenters supporting a three-year application period and advocating that the Commission, instead of establishing a rigid construction period at this time, revisit this issue after several years when more is known regarding several critical factors such as the cost and development of HDTV receiver and television station equipment. An evaluation by Larry F. Darby, consulting economist, on broadcast HDTV implementation costs, burdens, and risks will be submitted to the Commission by MSTV upon its completion. Information in this report will support MSTV's position that the Second Report's unnecessarily restrictive application and construction deadlines may very well backfire, leading to delay in bringing HDTV to the public. Those application and construction deadlines will also impose on broadcasters a disproportionate amount of the risk in implementing HDTV, potentially to the benefit of competing distributors of video programming.

MSTV urges the Commission to reconsider these deadlines and to instead adopt a three-year application period and to declare now that at some definite point after the adoption of an ATV transmission standard when more information is available it will establish an appropriate construction deadline.

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MSTV PETITION FOR PARTIAL RECONSIDERATION

The Association for Maximum Service Television, Inc. ("MSTV") hereby petitions the Commission for partial reconsideration of the Second Report and Order/Further Notice of Proposed Rulemaking, FCC 92-174, adopted in the above-captioned docket on April 9, 1992 and released May 8, 1992 ("Second Report").^{1/} Specifically, MSTV requests that the Commission reconsider the application and construction deadlines set forth in the Second Report. Under these deadlines, existing broadcasters must apply for HDTV channels no later than two years after the latter of the adoption of a new Table of Allotments or the selection of an HDTV broadcast transmission standard; broadcasters must then construct their HDTV stations within three years of the grant of their construction permit. MSTV requests that the Commission instead adhere to its initial proposal of a three-year application period and set now a point in the relatively near

^{1/} MSTV has participated in this docket both as a signatory of Joint Broadcaster Comments filed in response to the prior notices of inquiry and proposed rulemaking in this proceeding, see Second Report at n.2, and through separate comments.

future, e.g., three years after the latter of the date an ATV standard is selected or channels assigned, by which it will establish appropriate construction deadlines.

I. Introduction

The Second Report notes that the Commission initially proposed to grant eligible broadcasters three years to apply for their HDTV transmission facility and two years to construct it. Notice of Proposed Rulemaking, 6 FCC Rcd. 7024, 7027 at ¶¶ 11-14 (1991) ("Notice"). The Notice tentatively concluded that three years to apply was "long enough to permit stations to arrange the necessary financing and to plan their ATV facilities, but not so long as to unduly compromise our desire to minimize delays in bringing ATV service to the public." Id. at ¶ 11. The two-year construction period was modeled on the existing NTSC construction period and was proposed in the "belief" that this period was "necessary" to ensure that assigned spectrum does not "lie fallow for an inordinate period of time." Id. at ¶ 14. The total of five years to apply and construct was based on "preliminary information," a CBS cost study, which "appears to indicate" that five years will permit broadcasters sufficient time to begin transmission "in the vast majority of cases." Id. The Notice cited the CBS study for the proposition that stations in the largest markets will "begin" building their HDTV facilities by "Year 1" and stations in the smallest markets will begin "actual construction" by "Year 5". Id. at n.33.

As the Second Report concedes, those commenting voiced virtually unanimous support for the proposed three-year application period, provided that the Commission also demonstrated adequate flexibility in responding to the potential need for industry-wide and case-by-case extensions. Second Report at ¶ 20. See, e.g., Joint Broadcaster Comments at 16. Indeed, the only parties who criticized this proposal did so on the ground that it was too short a period. See Polar Comments at 4.

The overwhelming majority of those commenting strongly criticized the proposed two-year construction period. Second Report at ¶ 20. Many of these parties argued that it was inappropriate at this juncture in the development of HDTV to set any specific construction period. The Joint Broadcasters, for example, observed that the ability of broadcasters, both technically and economically, to construct HDTV facilities was largely dependent upon forces beyond their control, such as the development and manufacture of appropriate transmission and reception equipment, the production of HDTV programming, and the rate of penetration of HDTV receivers. Joint Broadcaster Comments at 16-18. Many others, including the Federal Trade Commission, found the two-year period in particular to be unduly short, raising the specter that it could well prove to be counterproductive, slowing rather than expediting the development of broadcast HDTV. Id. at 18; Comments of the Staff of the Bureau of

Economics of the Federal Trade Commission at i, 18-20 (filed January 31, 1992).

The Joint Broadcasters also noted that the factual premise of the five-year proposal, the "findings" of the CBS cost study, was based on a misreading of the study. The CBS study did not conclude that the smallest stations would begin "actual" construction within five years of the selection of an ATV standard. The study hypothesized, without any factual basis other than relative market size, that small market stations would initiate construction five years after major markets began construction. The study made no assumption whatsoever as to when major market stations would initiate construction. High Definition Television Transition Scenario For TV Stations: A CBS Work-In Progress at 4, 14-15 (February 20, 1991).

The Second Report, nevertheless, rejected the consensus view and adopted a five-year application/construction period, reducing the application stage to two years and granting only three years for construction. Id. at ¶ 21.

As to the initial proposal for a three-year application period, the Second Report concluded categorically:

"Upon further reflection, we do not believe that broadcasters 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." Id. at ¶ 22.^{2/}

The Second Report reasoned that the two-year period would provide "ample" notice to broadcasters because the ATV proceeding has been pending since 1987 and was, after all, initiated at the request of broadcasters. Moreover, it relied on the belief that those stations which succeed in obtaining a market-wide negotiated channel-pairing plan would "have explored potential implementation difficulties before agreeing" to such a plan and, therefore, "should not need an extended time for submitting an application for that channel." For those who fail to achieve such a negotiated solution, the two-year period should not impose an "undue" burden, or, indeed, any burden at all, because, the Second Notice found, those stations "will have an incentive under the first-come, first-served approach to apply for an ATV channel early." Finally, the Second Report found that the two-year period would "ensure that incumbents take advantage of their initial eligibility in a timely fashion and that ATV channels are opened up to new entrants within a reasonable time." Id.

By contrast, the construction period was lengthened by one year because "broadcasters will be in the vanguard of

^{2/} The Second Report established as the "trigger" for the two-year application period the latter of the date when an ATV system is selected and the date when a nationwide Table of Allotments is approved. Second Report at ¶ 25. MSTV supports this decision, provided that the date in question is interpreted to be a "final" date, i.e., the date at which all administrative and judicial appeals are concluded or foreclosed.

those implementing ATV technology" and will "need time to solve the unique problems that pioneering construction of an ATV facility may raise." Id. at ¶ 23.^{3/} The Second Report also declared that the Commission's existing policies towards extensions of time to construct would apply to HDTV facilities, including the fact that the failure to obtain financing would not be a cognizable basis for an extension except "under extraordinary circumstances".^{4/} Id. at ¶¶ 26-29. Significantly, the Second Report rejected the Joint Broadcasters' suggestion that receiver penetration should even be "a factor" in determining the appropriate application/construction time periods. The Second Report theorized that the availability of HDTV programming is "likely

^{3/} The Second Report also determined that the Commission would continue to apply its current definitions of "construction" and, in particular, found that achieving the capability to pass through a network or syndicated program HDTV signal would suffice to toll the three-year period. Second Report at ¶ 24. This finding is well-grounded in the economic realities of HDTV construction costs and returns facing local stations, see pp. 11-15 infra. While MSTV supports these definitions of "construction", this action does not sufficiently relieve the burden placed on broadcasters by rigid, premature application and construction deadlines.

^{4/} Broadcasters can take little solace in the Commission's statement that "our existing policies regarding extensions of time will afford broadcasters adequate flexibility to cope with unforeseen implementation problems." Second Report at ¶ 26. These extension policies, based on fact-specific, indefinite criteria, will in no way reduce the uncertainty and risk involved in broadcasters' transition to HDTV under rigid, premature application and construction deadlines. For example, the tenuous hope for a possible extension of these deadlines at some unknown point in the future will be of no assistance to broadcasters as they endeavor to obtain financing for the large capital expenditures that will be involved in implementing HDTV.

to be a major factor driving ATV receiver penetration" and concluded that "[u]nless broadcast stations are transmitting ATV programs, such programming is unlikely to be available in sufficient quantity to stimulate receiver sales." Id. at ¶ 30.

II. It Is Essential That The Commission Defer Adoption Of A Specific Application/Construction Time Period.

A. Adoption of a Rigid Three-to-Five-Year Application/Construction Period is Likely to Undercut the Goals Of Fostering the Competitive Viability of the Local Broadcast System and Maximizing Efficient Spectrum Usage.

Before analyzing the extent to which the application/construction periods adopted in the Second Report further the Commission's goals in this proceeding, it is necessary to clarify just what those goals are. For it appears that the Second Report in general, and the construction/application period determination in particular, may be grounded in a subtle but significant and unfortunate shift in the Commission's objectives.

As the Commission has noted, this proceeding was initiated by a petition filed by MSTV and 57 other broadcast organizations. Tentative Decision and Further Notice of Inquiry, 3 FCC Rcd. 6520, ¶ 6 (1988) ("Tentative Decision"). The Broadcaster Petition noted the imminent introduction of HDTV and its potential to obsolete this country's existing local television broadcast system. In paraphrasing the Petition, the Commission stated that

[T]he emergence of these new advanced television systems places traditional local television service at an historic crossroads. Without the opportunity to improve off-air television picture and sound quality in some manner, the industry claims that the television broadcast service could be shut out of the video marketplace to such an extent that it could be relegated to a second-class service, with serious implications for the future of off-air television service to the public.

Notice of Inquiry, 2 FCC Rcd. 5125, ¶ 2 (1987).

In response, then, to the fear that HDTV would obsolete the local broadcast system, the Commission inaugurated this proceeding "to consider the technical and public policy issues surrounding the use of advanced television technologies by television broadcast licensees." Id. at ¶ 3. The Commission expressed its "initial view" that "in the event we authorize some form of advanced television system, we do so in a way that makes its benefits available to all viewers. Consequently, it would be desirable to consider options which give all television licensees an opportunity to provide improved service." Id.

After receiving comment on the initial NOI, the Commission issued the Tentative Decision which contained what remains the definitive declaration of the Commission's objectives in pursuing broadcast HDTV:

[W]e conclude that broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available to the American public. Unlike many other countries, the United States has a strong and independent system of privately-owned and operated broadcast stations that transmit local and regional news, information, and

entertainment as well as national and international programs. Therefore, initiating an advanced television system within the existing framework of local broadcasting will uniquely benefit the public and may be necessary to preserve the benefits of the existing system. Also, we believe that the benefits of these new technological developments will be made available to the public in the quickest and most efficacious manner if existing broadcasters are permitted to implement ATV.

Tentative Decision at ¶ 39.

The primary goal outlined in the Tentative Decision was, then, to ensure that the unique benefits of the universally available local broadcast system can be achieved and preserved in the advanced television environment. While the Commission was "also" hopeful that the benefits of HDTV would be made available most rapidly if existing broadcasters are permitted to implement it, the Commission properly concluded that the overriding objective was to "preserve" for the advanced television marketplace the unique benefits, including enhanced competition, provided by the local broadcast system in the home video marketplace.

MSTV submits that this ranking of priorities is the only appropriate reconciliation of the Commission's twin statutory objectives under Section 307(b) of the Communications Act to oversee the "fair, efficient and equitable distribution of radio service" throughout the country and under Section 303(g) to "generally encourage the

larger and more effective use of radio in the public interest".

The Second Report appears, however, to depart from these bedrock principles. Thus the Second Report expressly rejects the notion that the economics of HDTV implementation for local broadcasters are even relevant. The Second Report declares that the economics of HDTV, including most importantly the degree to which HDTV receivers have penetrated the marketplace, will not even be considered in imposing spectrum-use requirements upon broadcasters and further warns that stations' ability to obtain financing to construct their facilities will not be considered a valid basis for extending the time to construct. Why? Because broadcasters "will" be "in the vanguard" of those implementing HDTV because broadcast HDTV programming service will be "necessary" to "stimulate" HDTV receiver sales.

These statements taken together, and in the context of the harsh and precipitous application/construction period adopted in the Second Report, amount to a declaration that broadcast stations are to be used as a tool for federal industrial policy to promote the introduction of HDTV generally, even at the potential cost of the loss of universal broadcast service. To the extent this is so, and to the extent that this new objective is the basis for the decision to adopt a rigid three-to-five-year application/construction period, MSTV believes that it is inconsistent with both the

Commission's previously stated objectives in this proceeding and its statutory mandate and should be reconsidered. The goals in this proceeding should continue to be the preservation of the benefits of the local broadcast system and the promotion of efficient use of the spectrum, not the potential sacrifice of broadcast service in the interest of promoting a speculative new technology.

B. There Is No Basis In The Record Or Sound Policy For A Three-To-Five-Year Application/Construction Period.

Regardless of the Commission's goals in this proceeding, the three-to-five year application/construction period should be rejected as being without basis in the record or in sound policy. As noted above, the commenting broadcast parties were unanimous in their support for the three-year application period and there were virtually no credible contrary views.^{5/}

^{5/} This applies a fortiori to the proposed "first-come-first-served" lottery procedure for assigning channels which could essentially eliminate the application period. Second Report at ¶ 35. MSTV believes that while the vast majority of HDTV channels allotted to each market will have very similar total coverage areas and overall perceived value, stations may perceive differences in the value to them of different channels, e.g., because that channel could be more easily and efficiently co-located with their existing facility. Those stations may well feel compelled to apply for a specific channel immediately after the Table of Allotments is issued. This would reduce the total implementation period for those stations to three years, not five, and force them to construct at the time when equipment is at its most expensive and audiences at their lowest. This substantially raises the risk of failure and/or waiver of their rights to proceed, in either case slowing the introduction of HDTV.

As to the two-year construction period, the Joint Broadcaster Comments noted the extent to which such critical factors as the widespread availability of transmission equipment, the availability of programming, and receiver set penetration would influence both the capability and feasibility of broadcast HDTV implementation.^{6/} Crucial to the Joint Broadcasters' views was the conclusion that unduly severe application and construction deadlines could actually inhibit the development of both broadcast HDTV and HDTV in general.

In support of these views, MSTV will submit an evaluation of these issues being prepared by Larry F. Darby, Ph.D., a consulting economist and principal of Darby Associates. Over the past twelve months, Darby Associates has advised MSTV on the subjects of broadcast HDTV implementation capital costs for broadcast stations in various sized markets, and the externalities for complementary and competitive sectors created by requiring broadcast television licensees to implement HDTV first among all video distribution media.

^{6/} The only party expressly supporting the two-year construction period was LPTV licensee Island Broadcasting. Island Comments at 2-3. Island's rather transparent reasoning is that a short application/construction period will force at least some broadcasters to abandon HDTV. While Island is correct as to the effect of a technically or economically unrealistic application/construction period, such an approach would be inconsistent with the fundamental underlying premise of this proceeding that the entire existing broadcast system be permitted to upgrade to HDTV.

As to the capital costs to implement broadcast HDTV, it is apparent from broadcasters' experience and the information Darby Associates has gathered that the risks of investing in broadcast HDTV are substantial. Not only will the costs likely be substantial in absolute terms, they will be substantial relative to stations' revenues for most stations. The degree to which stations can attract audiences for their HDTV service would be affected substantially by the extent of receiver penetration.

Smaller market stations would, absent the Commission's application/construction deadlines, likely seek to construct HDTV facilities later than larger markets and thereby benefit through lower prices from potential economies of scale in the manufacture of HDTV transmission and production equipment. Nevertheless, those stations will still bear a substantially higher per viewer cost. At the very least, then, there is strong evidence of the inappropriateness of the uniform timelines established in the Second Report.

In assessing whether it is appropriate to impose rigid application and construction deadlines on broadcasters at this point, it is useful to examine the players who have a primary stake in the implementation of HDTV. Three principal, complementary industry sectors will require substantial investment to implement HDTV: 1) equipment; 2) programming; and 3) distribution. Receiver penetration will play a crucial role, and investment in any one sector, such as distribution,

by driving receiver penetration, produces substantial "external" benefits for the other two sectors which the investing party cannot recoup.

Given the high degree of uncertainty as to the appropriate timing of HDTV investment by broadcast stations, prematurely rigorous requirements as to the timing of broadcast HDTV investment could force some stations to forego investment they might otherwise have made, while forcing others to make unduly risky investments that might even undercut their ability to sustain their existing NTSC service. In addition, because of the substantial nature of the "externalities" presented in HDTV implementation, these premature investment deadlines would constitute nothing less than substantial "risk-shifting" to broadcasters from equipment manufacturers, programmers and other video distributors which could well foster in those sectors a "go-slow" or "wait-and-see" approach to HDTV investment. The analysis being prepared by Darby Associates which MSTV will submit upon its completion will address these issues in greater detail. MSTV submits, then, that whatever the appropriate goals of this proceeding, the three-to-five year

application/ construction deadline is likely to be counterproductive.^{2/}

^{2/} Moreover, the other reasons cited in the Second Report for the decision to shorten the application period are on their face either irrelevant or wrong. Thus, for example, the facts that broadcasters will somehow have been on "notice" of the introduction of HDTV since 1987 and, indeed, "instigated" this proceeding are simply inapposite to the question of how long licensees should have to apply for their HDTV channels after the ATV standard is selected and/or HDTV channels are distributed. What is relevant is how a particular deadline will impact the Commission's goals of ensuring that the broadcast system has the opportunity to participate in this new technology, of expediting the introduction of new technologies and of ensuring that the spectrum is used efficiently. As the Joint Broadcasters and others have noted, the concern in setting both application and construction deadlines is whether the deadlines will be counterproductive and actually impair the speed at which broadcast HDTV is implemented.

Similarly inapposite is the fact that those broadcasters who succeed in achieving market-wide negotiated channel-pairing plans will have "explored implementation difficulties" during those negotiations. Exploring implementation difficulties is not, needless to say, the same thing as solving them. In any event, assuming the development of an optimal Table of Allotments, the principal HDTV "implementation difficulties" facing broadcasters will not be channel-specific but industry-wide. The only channel-specific "implementation difficulty" would appear to be site availability and suitability. In all but a handful of the largest and most congested markets, there will be an excess of suitable HDTV channels which can be located virtually anywhere in the market. In the congested markets, site availability could indeed be a problem. It is for this very reason, of course, that the broadcast industry has pressed so vigorously and persistently for a channel-pairing plan which optimizes HDTV channel selection from existing broadcast transmission sites.

The reliance upon the fact that a "use it or lose it requirement" may drastically curtail the application period for those markets unable to reach a negotiated solution is even more curious. First, the Commission has yet to adopt a "use it or lose it" requirement. Second Report at ¶ 21-22. Second, the decision to adopt a "use it or lose it" scheme rests in large part upon the same considerations that are at

(continued...)

III. Conclusion

For the foregoing reasons, MSTV urges the Commission to reconsider the application/construction periods adopted in the Second Report. Instead, as proposed by the Joint Broadcasters, the Commission should generally require broadcasters in the initial pool of eligibles to apply for an HDTV channel within three years, and declare now that at some definite point -- such as three years after the adoption of an ATV transmission standard at which time real world experience

^{2/}(...continued)

issue with respect to determining the length of the application period. As MSTV and other broadcasters have argued, and will comment upon again in response to the Further Notice, the "use it or lose it" proposal is defective because it could constrict the application period.

in implementing HDTV will be available -- it will establish appropriate construction deadlines.

Respectfully submitted,

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