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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Advanced Television Systems and Their Impact on the Existing Television Broadcast Service	)	MM Docket No. 87-268
	)	
	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Brenda L. Fox
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037
(202) 857-2611

Daniel L. Brenner
Loretta P. Polk
1724 Massachusetts Avenue, N.W
Washington, D.C. 20036
(202) 775-3664

Counsel for National
Cable Television
Association, Inc.

February 8, 1993

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SUMMARY

For important policy, legal and practical reasons, the Commission should adopt rules and policies which carefully restrict the use of ATV channels for ancillary and other alternative uses and which prohibit uses unrelated to HDTV broadcasting services.

The Commission has stated that ATV represents a new technology, not the start of a new and separate video service. Accordingly, Commission decisions in this on-going proceeding have been designed to foster the rapid, efficient and successful development and implementation of this new technology. Decisions regarding the permissible uses of the ATV channel, particularly during the early stages of ATV development, should be guided by these same goals. Broad rules or flexible policies regarding permissible uses would divert attention from the important goals set by the Commission and would raise serious questions about whether this is a new service rather than a new technology.

Under the Commission's regulatory scheme for the early development of ATV, existing broadcasters will be awarded all licenses for ATV conversion channels. The special knowledge and experience of existing broadcasters is the stated basis for circumventing the generally required comparative hearing process.

This legal rationale would be seriously jeopardized under Ashbacker and related cases if broadcasters are allowed to engage in ancillary or other alternative uses of the ATV channel which have very little, if anything, to do with why broadcasters have been awarded special eligibility status.

There are important practical considerations to be weighed before ancillary or alternative uses are permitted. Until the ATV standard best suited for the primary purpose of the ATV channel is selected, too much emphasis on ancillary uses might inappropriately influence the development and choice of an ATV system. Also, it is important that technical and practical questions regarding the ATV channels be worked out before the issue is further complicated by regulations which permit ancillary uses.

Finally, the success of the ATV service depends on consumer investment in expensive receiver equipment. The Commission should adopt rules and policies which encourage broadcasters to offer enough hours of television programming in order to justify and encourage the public investment in HDTV receivers. A reasonable minimum operating requirement is one important way for the Commission to help ensure the success of ATV.

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Reply Comments of
The National Cable Television Association, Inc.

The National Cable Television Association, Inc. ("NCTA") hereby submits its Reply Comments on the Commission's Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, released October 16, 1992 ("Third Report and Order" or "Third Further Notice"), in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving approximately 90 percent of the nation's more than 56 million cable households. Its members also include cable programmers, cable equipment manufacturers and others affiliated with the cable television industry.

I. INTRODUCTION

In its Third Further Notice, as part of its on-going proceedings in MM Docket No. 87-268, the Commission invites comments on several issues regarding the development and implementation of advanced television service ("ATV" or "HDTV") by the terrestrial broadcast industry. In response to this invitation and in response to the initial comments filed by interested parties,[1/] NCTA submits its views on three related issues. First, should ATV channels be used for ancillary purposes? Second, should other uses made possible by future technological advances be permitted on ATV channels? Third, should minimum operating hours be required on ATV channels?

II. THE USE OF ATV CHANNELS FOR ANCILLARY AND OTHER ALTERNATIVE USES SHOULD BE CAREFULLY RESTRICTED AND USES UNRELATED TO HDTV BROADCASTING SERVICES SHOULD BE PROHIBITED

The Commission seeks comment on whether and under what circumstances the ATV conversion channels should be made available for ancillary uses similar to existing NTSC ancillary uses, such as use of the vertical blanking interval, subsidiary communication authorizations and second audio programming. Third Further Notice at paras. 7 and 77. It is envisioned that excess data capacity could be put to ancillary use on a non-interfering basis during ATV transmission, or at times when ATV channels might otherwise be

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1/ Although it did not submit initial comments in response to the Third Further Notice, NCTA finds it necessary to do so now in view of the broad liberties taken by some commenters with regard to the scope of the Commission's inquiry.

non-operational, such as during late night hours. A related question raised by the Commission is whether future advances that are compatible with the selected ATV standard should be permitted on the ATV conversion channel. Id. at paras. 7 and 59.

Of course, an important reason for allowing ancillary uses and other uses made possible by future developments would be to maximize the use of valuable and limited frequency spectrum. NCTA supports this important goal. However, there are important policy, legal and practical considerations that must be taken into account before any decision is made regarding this issue.

A. THE FAILURE TO CAREFULLY RESTRICT ANCILLARY AND OTHER ALTERNATIVE USES WILL UNDERMINE THE COMMISSION'S POLICY OBJECTIVES

Throughout these proceedings, the Commission has stressed that "ATV represents a major advance in television technology, not the start of a new and separate video service." Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd. 3340, 3342 (1992) ("Second Report and Order"). Commission decisions have been designed to foster the rapid, efficient and successful development and implementation of this new technology. For example, the Commission decided to limit initial eligibility for ATV licenses to existing broadcast stations because it found the operators of these stations to be specially qualified to further these Commission goals. Id. at 3343. Also, the Commission adopted a 100 percent simulcasting requirement and declined to allow broadcasters to use their ATV channels for subscription services because it

would "encourage use of the ATV channel as a separate service" and because it would undermine the Commission's goals "to permit the viewing public to make a non-disruptive transition to ATV and allow the reclamation of the second channel after that transition is complete." Third Report and Order at para. 75. These same goals should guide the Commission's decision on the issue of ancillary or other alternative uses of the ATV channel.

As a preliminary matter, it is important to remember that the evolution and design of the ATV service up to this time has been the result of attempts to develop a new technology to bring enhanced television to over-the-air broadcast viewers. The valuable frequency spectrum to be devoted to this effort was not selected to be used for application to businesses or to households for non-television programming purposes. If a primary purpose of ATV had been such data transmissions, the entire system could have been designed in a more efficient manner better suited to such data transmissions. Rather, the design to date has been aimed at producing the best enhanced over-the-air television service that can be viewed on receivers affordable to the general public.

Some of the proposals for possible future uses of the ATV channels involve services that are at odds with the carefully planned direction of ATV to date. Should the Commission and the broadcast industry decide to change this direction, the development of ATV up to this point should be revisited. It would be a disservice to the public to introduce a new use of frequency spectrum which from the start is based on inappropriate technological and frequency spectrum choices.

Broadcasters should not be allowed to use ATV channels for purposes other than those directly related to HDTV television service, particularly not during the developmental stages of ATV. A decision to allow alternative uses would divert attention from the important goals which the Commission has set for ATV and would raise serious questions about whether this is a new service rather than a new technology. These concerns are true particularly of any alternate use which would interfere with the provision of the primary HDTV television service, including uses which would be inconsistent with the offering of HDTV television service on a 24-hour basis.

In its Comments, The National Association of Broadcasters ("NAB") has argued that alternative uses should be allowed because income from such use will help finance the transition to ATV.[2/] See Comments of NAB at 6-8, MM

2/ NAB expresses concern that broadcasters are experiencing financial difficulties and, accordingly, should be permitted to attract revenues from whatever sources might be available. The broadcasters' apparent interest in securing revenues is easily understood, but those business concerns are not relevant here. The Commission is providing the industry with an opportunity to keep pace with new technological developments. If individual broadcasters are not interested in investing in that future -- or are unable to do so financially -- the Commission should make the HDTV opportunity available to others who may be better positioned or more willing to risk an investment in the future. That some broadcasters may be encountering financial difficulties may be attributable to many things. As more and more broadcasters appear willing to enter the business (broadcast station totals increased from 1494 stations licensed as of Jan. 31, 1992, to 1509 stations licensed as of Dec. 31, 1992), those already in place can hardly complain that business isn't all that they had expected. Broadcast spectrum, be it for NTSC or HDTV use, is a federal handout worth billions of dollars. Conservative estimates of the marketplace value of television and radio broadcast spectrum have been set at $11.5 billion, not including spectrum yet to be assigned for HDTV. See NTIA, U.S. Spectrum Management Policy: Agenda for the Future 91 (Feb. 1991). The price tag for HDTV spectrum has been said to be at least $1 billion. See Davis, "Back Channel: FCC to Grant Owner of

(continued...)

Docket No. 87-268 (January 7, 1993). In the early years of ATV, when home penetration is low due to the high cost of home receivers and the limited amount of HDTV programming, it will undoubtedly be easier and more lucrative to market alternative services to companies that can afford the required receiving equipment and prices charged for the services offered. However, the successful implementation of these new services will weaken the incentives for broadcasters to fully and rapidly develop their required HDTV television service.

Increasingly it is becoming clear that at least some broadcaster interest in pursuing HDTV has little to do with HDTV itself. Rather these broadcasters are looking for opportunities to secure additional spectrum for a number of purposes, only one of which is HDTV. While they cannot be faulted for wanting to grab up more spectrum to better position themselves in the upcoming world of multimedia, that is not the purpose behind the Commission's decision to grant them new spectrum. That spectrum allocation is for the specific and limited goal of moving broadcast technology from the NTSC to HDTV format. This process was set in motion at a time when all HDTV proponents

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2/ (...continued)
Every TV Station Another License Free," Wall St. J., Mar. 18, 1992, at 1.

It is not necessarily the case, moreover, that broadcasters are having financial difficulties. Cash flow margins for the industry are reputed to run in the 30% to 40% range, an enviable level for most any business. See, West, "DESALES STREET," Broadcasting, Jan. 25, 1993, at 134.

were, in fact, analog systems. It would be inappropriate to now position HDTV as little more than a tag along activity to data transmission services.[3/]

The Commission's rules should be designed to guard against this possibility by prohibiting non-program related ancillary uses or other alternative uses that may be developed in the future. Even if other limited ancillary uses are permitted, it is important that such use not be inconsistent with the maximum development of HDTV television programming. Especially during the nine years before 100 percent simulcasting is required, and beyond that time if a significant minimum operating requirement is not adopted, broadcasters should not be allowed to offer any secondary services unless such services can be offered in a non-interfering manner even at times when the ATV channel might be otherwise non-operational. Broadcasters are to be given the new channel assignments because of their broadcast expertise to facilitate the speedy development of HDTV as a broadcast service. If the channels are to be used for other purposes they should be assigned to entities with expertise in those businesses.

Several Commenters, including NAB and The Association for Maximum Service Television, Inc. ("MSTV"), have urged the Commission to adopt a flexible policy regarding the permissible alternative uses of ATV. See, e.g., Comments of NAB at 4-5, and Comments of MSTV at 1-5, MM Docket No. 87-268 (Jan. 7, 1993). A flexible policy during the early development of ATV could undermine the chances for a rapid and successful transition to ATV. The

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3/ See, e.g., West, "NAB Board Sees Future And It's Digital," Broadcasting, Jan. 25, 1993, at 112 (reporting on discussions at joint board meeting of National Association of Broadcasters).

Commission has already indicated that it will periodically review its decisions with respect to this evolving technology. Such periodic reviews should make it unnecessary for the Commission to adopt a flexible ancillary or alternative use policy at this early stage in the development of ATV.

B. ALLOWING BROADCASTERS TO ENGAGE IN ANCILLARY OR OTHER ALTERNATIVE USES UNRELATED TO HDTV BROADCASTING SERVICES UNDERMINES THE LEGAL UNDERPINNINGS OF THE ATV PROCESS

Aside from policy considerations, there are important legal problems in allowing broadcasters to develop and engage in ancillary or other alternative uses. To the extent that ATV channels are allowed to be used to provide non-HDTV television service -- whether such service is labelled as ancillary, secondary or alternative[4/] -- rather than to provide an improvement in technology, the legal basis for giving away valuable spectrum to broadcasters as a limited class without the comparative process required under the Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), becomes extremely questionable.[5/]

4/ MST argues that differentiating primary from ancillary uses at this point in time would be premature. Comments of MST at 5-6, MM Docket No. 87-268 (Jan. 7, 1993). Its suggestion, however, leads to the inevitable conclusion that all possible uses of the spectrum are primary uses. Once any use aside from broadcasting becomes a primary use, then the rationale for giving away the spectrum to existing broadcasters is illusory.

5/ The Commission has previously dismissed the "Ashbacker" issue as moot, citing adoption of simulcasting obligations. See Second Report and Order at 3342, n. 10. Whatever the legal significance of that determination, permitting broadcasters to engage in non-HDTV/non-simulcast services would be inconsistent with that assumption.

Under Ashbacker, the Commission is required to hold a comparative hearing when considering bona fide, mutually exclusive applications for a broadcast license. Id. at 333. The Commission does have the authority to set threshold eligibility standards, provided the eligibility rules are designed to further the public interest. See United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). The Commission has formulated a public interest rationale for initially granting the ATV spectrum only to existing broadcasters who are said to possess special knowledge and experience. That is, to foster a rapid, non-disruptive transition from NTSC to ATV television broadcasting that does not disenfranchise NTSC viewers. But this rationale is seriously jeopardized if broadcasters are allowed to engage in ancillary or other alternative uses of the ATV channel which have very little, if anything, to do with why special eligibility status has been given to broadcasters or with the primary justification for giving away valuable frequency spectrum in the first place.

Furthermore, under the D.C. Circuit Court's decision in Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991), any departure from the requirement that bona fide, mutually exclusive applications be considered in a comparative hearing must be based on "truly compelling grounds that are special to the particular proceeding." Id. at 452. A decision to allow broadcasters to engage in ancillary or other alternative uses of the ATV channels cannot be reconciled with the Commission's stated basis for granting ATV licenses only to existing broadcasters.

The Commission should carefully limit the use of the ATV channel so as not to jeopardize the legal integrity of the ATV scheme it has adopted.[6/] Otherwise, the Commission's approach to ATV is imperilled because a broad rule allowing such use or a flexible policy regarding this issue will categorically alter the rationale for the entire scheme, and because the knowledge and experience which made broadcasters specially qualified to develop a new technology would no longer apply.

C. IMPORTANT PRACTICAL CONSIDERATIONS SHOULD BE WEIGHED PRIOR TO ALLOWING ANY FORM OF ANCILLARY OR ALTERNATIVE USES OF THE ATV CHANNEL

There are important practical considerations to study before a decision is made regarding the ancillary or other alternative uses of the ATV channel. An HDTV system has yet to be selected. The selection of an HDTV system should be motivated by goals that have already been announced and which have driven the already complicated technical and regulatory proceedings up to this point. While it is interesting, and in some ways necessary, to consider other uses of the spectrum, practical problems are created if competing goals are introduced and encouraged at this point. Not only would this divert the focus

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6/ As previously noted by NCTA, the legal integrity of the ATV scheme may already be in jeopardy. See Comments of NCTA at 14-16, MM Docket No. 87-268 (July 17, 1992). Specifically, the failure to impose more stringent simulcasting requirements than those adopted in the Third Report and Order as an essential component of the transition from NTSC to ATV detracts from the rationale for granting ATV spectrum to existing broadcasters.

from the primary purpose of the ATV channel, but it might inappropriately influence the development and choice of an HDTV system.

There are many secondary factors which need to be considered and developed as this new technology is introduced. Several of these factors are of primary concern to the cable industry. For example, how will the maximized use of the ATV channel spectrum impact a cable system's ability to distribute programming? What part of the spectrum will remain available to handle necessary communications between the cable system headend and individual subscribers, including conditional access control and other communications indigenous to cable system operations?

If the primary purpose of the ATV channel is to enhance off-air television broadcast services, and if cable operators will be asked to promote the distribution of these channels on cable systems, then it is important that technical and practical questions regarding the new channels be worked out before the issue is further complicated by regulations which permit ancillary or other alternative uses which may be made possible by as yet undetermined technological advances.[7/] A decision at this point regarding ancillary and alternative uses would be harmfully premature. Given the significant resources that the cable industry has invested in the development of a broadcast-compatible

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7/ Policies regarding cable carriage of HDTV services have not been addressed by the Commission. The mandatory carriage provisions of the new Cable Act (Cable Television Consumer Protection and Competition Act of 1992) do not specify how the new channels are to be treated. In any event as broadcasters look to use the new channels for non-video programming purposes, they eliminate any arguable public policy basis for warranting cable carriage.

HDTV standard, NCTA has an interest in seeing that the public interest rationale and legal underpinnings of the Commission's ATV process are sustained. Indeed, the cable industry's participation in this process has been premised on the understanding that the HDTV service adopted by the Commission is designed to facilitate a smooth and expeditious transition from NTSC to HDTV. In so doing, the industry has been willing to commit to this process, to make some compromises, and perhaps forego its own more rapid deployment of HDTV, in order to see the development of a standard that meets the needs of broadcasters and ensures their role as video providers in this new technology. A change in focus towards ancillary or other alternative uses of the ATV spectrum, especially during the early years, will delay the transition and alter the premises upon which the industry's participation was based.

III. A SIGNIFICANT MINIMUM HOURS OPERATING REQUIREMENT SHOULD BE ESTABLISHED FOR ATV CHANNELS

The success of the HDTV television service requires that the Commission establish minimum hours during which HDTV television programming must be made available to over-the-air viewers. At least initially, the cost to the consumer of buying a HDTV television receiver will be quite high. Third Report and Order at para. 49. It is imperative that enough hours of HDTV programming be available to justify and encourage the public investment in HDTV receivers.

Under the current rules, after 36 months of operation, broadcast stations are required to transmit programming for at least two hours each day

and at least 28 hours each week. 47 C.F.R. § 73.1740 (a)(2). This minimum requirement is not high enough to justify and encourage the purchase of HDTV receivers. The Commission should establish a higher minimum schedule to help ensure the success of HDTV. In addition, the Commission should require that operation of the ATV channel as a broadcast television service mirror the operating schedule of the broadcaster's NTSC station. HDTV will not become a reality if individual broadcasters are given the flexibility to keep HDTV programming to a minimum while focusing on other business uses of the spectrum that suggest opportunities for some near term financial rewards to the broadcaster. A broadcaster who is unable to meet the minimum HDTV programming requirement should be required to relinquish its license so that another entity can provide increased service to the public.[8/]

A higher minimum hours requirement might not be needed if the FCC had adopted a different definition of simulcasting. In its Third Report and Order the Commission defined simulcasting as "the broadcast on the NTSC channel, within 24 hours, of the same basic material as that broadcast on the ATV channel, with the exclusion of commercials and promotions." Id. at para 72. This definition requires that ATV material be broadcast on the NTSC channel, but not the converse. Id. at para. 73. Under this definition and in the absence of a minimum operating schedule requirement, there is technically no reason why a broadcaster need show more than one minute of programming on the ATV conversion channel. The Commission's determination that 100% simulcasting be

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8/ Of course, waivers of the rule could always be granted in appropriate cases.

achieved by a date certain is rendered virtually meaningless under this definition. If the definition of simulcasting were revised to require the broadcast of identical programming schedules, the public would be far better served: Such a programming requirement would ensure that NTSC viewers are not disenfranchised while protecting and encouraging investments in HDTV receiver equipment.

Finally, the Commission should not adopt policies that discourage broadcasters from offering maximum programming services to the public. Therefore, regardless of whether the Commission adopts a minimum operating requirement, the Commission should adopt a rule prohibiting broadcasters from offering ancillary or other alternative services that utilize an amount of data capacity that makes it impossible for HDTV television programming to be offered on a 24-hour basis. Otherwise, broadcasters will have no incentive to maximize service to the public and to provide programming to viewers even during certain lower viewing hours.

IV. CONCLUSION

For the foregoing reasons, the Commission should carefully restrict the use of ATV channels for ancillary and other alternative uses and should prohibit uses unrelated to HDTV broadcasting services. Also, a minimum hours

operating requirement should be established that will help ensure that the public receives the maximum benefit from the new ATV conversion channels.

Respectfully submitted,

NATIONAL CABLE TELEVISION
ASSOCIATION, INC.

By _____

Brenda L. Fox
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037
(202) 857-2611

By _____

Daniel L. Brenner
Loretta P. Polk
1724 Massachusetts Avenue, N.W.
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(202) 775-3664

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