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Please include the following document into MM Dkt. 87-268 as "Draft Documents of IS/WP1 including simulcasting drafts of 7/31/92 meeting and minutes of 7/20/92 meeting".

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**ORIGINAL
FILE**

**MINUTES OF IMPLEMENTATION SUBCOMMITTEE/WORKING PARTY I
POLICY AND REGULATION**

Preliminary Draft: Subject to Member Review and Approval

87 268

Meeting of Monday, July 20, 1992
National Economic Research Associates, Inc.
Washington, D.C.

Summary: There was no news on the effects of call signs. The group reviewed the latest version of the outline of simulcasting issues. The structure of the outline was modified to reflect several additional points, and to provide the most acceptable presentation of the issues. Brenda will make a further revision of the outline, which will be discussed at the next meeting.

Chairman Charles Jackson called the meeting to order at 2:10 p.m. Those who attended the meeting were:

Jeff Krauss	Consultant/General Instruments
Molly Pauker	Fox
Mark W. Johnson	CBS
Brenda Fox	DL&A
Stephanie Stinger	FCC
Colt Whittall	AT&T
Kirsten Pehrsson	NERA
Charles Heuer	Zenith
Jennifer Jones	FCC
Robin Karlov	NAB

Call Signs. Chairman Jackson asked if any of the members had gotten feedback from their co-workers regarding the effects of call signs. They had not.

Approval of Minutes. The Minutes from the prior meeting were accepted.

Simulcasting Issues. There was a continued discussion of simulcasting issues. The group reviewed a revised outline of simulcasting issues distributed by Chairman Jackson. There was some dispute over the proper characterization of the Ashbacker consideration. It was pointed out that the group had previously had little luck in coming to resolution on the Ashbacker issue as it related to HDTV. It was agreed that a more broad discussion of the Ashbacker issue would be appropriate, but that the issue did need to be addressed in some manner within the paper. There was also discussion of whether pure simulcasting was part of a "deal" that the FCC had promised to garner support for the HDTV plan, or whether it was one alternative.

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The approach that was agreed upon was to segregate arguments into those that support the notion that pure simulcasting is required to satisfy Ashbacker requirements, and those that support the notion that it is not. It was also suggested that "conclusion-oriented" language be eliminated from the paper.

There was also discussion about the "content-based" versus "content-neutral" regulations. It was suggested that the outline segregate arguments that show that simulcasting does have First Amendment implications, and those that do not. It was suggested that the outline segregate FCC policy goals into arguments that an FCC goal is to encourage investment in ATV, and those that another FCC goal is prompt implementation of ATV. It was also suggested that a third discussion of the FCC's goal to encourage investment by alternative media be included.

Molly Pauker raised a concern in Para. 64 of the Notice that could, in effect, set a production standard. There was discussion that there is still some confusion about the exact definition of HDTV programming. It was pointed out that all HDTV programming can be down-converted to NTSC, except perhaps for pay-per-view.

Chairman Jackson raised the question of the definition of a "new service." There was a discussion of the transition from the original FM band to the current one as a "new service," and how that situation related to HDTV. It was pointed out that with HDTV, unlike radio, there are differences in the programming being transmitted over the newer technology.

There were revisions to the discussion of timing of implementation. It was decided that a third option would be added to the two already in the outline.

Molly Pauker provided an outline in which she had added additional points. They will be incorporated into the next draft.

Additional comments on the outline should be sent by facsimile to Brenda Fox as soon as possible. She will prepare a revision to be discussed at the next meeting.

There will be another opportunity for comments after the next meeting, for those who may be absent.

Charles Heuer raised a discussion about the feasibility of requiring that down-converters be required either to be provided by broadcasters or be purchased by consumers. He felt that the cost, at an estimated \$200 apiece, may well be prohibitive. His estimate (assuming two down-converters per household and 75 million households) was a total cost of \$30 billion. It was debated whether two down-converters per household would be necessary. The discussion of down-conversion as an alternative to simulcasting will be included in the final document.

Business from the floor. There was no business from the floor.

Next meeting. The next meeting is scheduled for July 31st at 2:00 at NERA.

The meeting was adjourned at 3:55 p.m.

D R A F T

Outline of Simulcasting Issues

I. Legal Issues

A. Simulcasting vis-a-vis Ashbacker.

1. Simulcasting is not required to satisfy Ashbacker.
 - a. Ashbacker does not preclude the FCC from setting licensee eligibility standards: FCC has said that initially only full power licensees, authorized permittees and parties with applications for construction permits as of a date certain will qualify on the grounds that this is the most practical, expeditious and non-disruptive way to bring about ATV.
 - b. Existing licensees are experienced, have considerable investment in the present system, have and will continue to invest in and take substantial business risks towards developing ATV.
 - (1) Eligibility restrictions are temporary --for the first two years only.
 - (2) A comparative process would impede the introduction of ATV.
 - (3) Broadcast licensees provide a service to the public which should be sustained; by restricting eligibility initially to full power broadcaster licensees (including authorized permittees and parties with application for construction permits as of a date certain) the FCC can ensure the continuation of that service to the public.
 - c. The eligibility restriction is spectrally efficient; once the transition to ATV has been accomplished, the FCC will reclaim one of the two 6 MHz channels without abruptly disenfranchising licensees or NTSC viewers.
 - d. The eligibility restrictions outlined by the FCC are sufficient to meet the demands of Ashbacker and the presence or absence of simulcasting is of no consequence to the adequacy of the FCC's licensing scheme or adherence to the precepts of Ashbacker.

2. Simulcasting is required to satisfy Ashbacker.

- a. A strict simulcast requirement is integral to the Commission's public interest rationale for awarding the second channel initially to existing broadcasters only: to bring about a transition from NTSC to ATV that will not disenfranchise NTSC viewers. Permitting broadcasters to utilize the second channel as a new programming service, even in the initial stages of operation, renders it more difficult to justify closing out other applicants (especially others with broadcast experience) and undercuts the theory that ATV is a new technology and not a new program service.
- b. The eligibility rationale is weak, at best -- there is no basis for granting a preference to parties that are not currently in full operation while disqualifying broadcast licensees of other services that are fully operational -- and cannot survive, absent having simulcasting which is an integral part of the ATV licensing preference scheme.

B. Simulcasting and First Amendment Issues.

1. A simulcast requirement would have First Amendment implications.

- a. A simulcast requirement would inhibit broadcaster program decisions and, because of its effect on the exercise of free speech, can only be justified if it is the least restrictive means necessary to achieve the overriding public interest goals underlying the requirement.
- b. Less restrictive alternatives that would protect the public interest goal of protecting service to NTSC viewers are available; namely, the likely availability of low cost, readily available down-converters which would permit NTSC-viewer access to ATV programming.
- c. It has not been demonstrated that, absent a simulcasting requirement, the harm feared, disenfranchisement of NTSC viewers, would be likely to occur --i.e., it is just as likely that broadcasters would generally simulcast NTSC and ATV programming.

- d. Mandated simulcasting will have a chilling effect on the development of creative ATV programming and deprive early ATV receiver purchasers of potential program choices.
2. A simulcast requirement would not have First Amendment implications.
- a. A simulcast requirement would not affect the programming decisions of broadcast licensees; each licensee would remain free to provide whatever content he/she deems appropriate, provided only that the same programming be provided on both the NTSC and ATV channels.
 - b. Requiring simulcasting is consistent with the Commission's conditional grant of the spectrum to facilitate the transition and the determination that ATV is a new technology and not a new and separate video service.
 - c. Simulcasting will permit realization of the FCC's spectrum efficiency goal and avoid involving the FCC in prohibited content decisions when it comes time to reclaim one of the two 6 MHz channels. (The absence of simulcast programming will make effectuation of this policy more difficult, especially as consumers become accustomed to receiving both NTSC and ATV as separate program services.)
 - d. The availability of low-cost down-converters is not an adequate substitute for simulcasting as a means for assuring the continued utility of the public's investment in NTSC receivers and VCR's.
 - 1) Depending upon consumers to purchase even low-cost down-converters would mean that NTSC viewers who choose not to purchase (or cannot afford to purchase) the new equipment would be "abruptly deprived of the use of their NTSC receivers" which is precisely what the Commission is seeking to avoid by its "goal of graduating the transition to ATV."
 - 2) Purchases of down-converters would mean further consumer investments in the very technology (NTSC) the FCC is seeking to phase out in favor of ATV.
 - 3) Requiring broadcasters to incur the costs of down-converters would be poor public policy.

- a) It would involve a major investment in the old NTSC technology.
- b) The enormous costs involved would act as a major deterrent to ATV development and could foreclose the participation of virtually all present broadcasters from investing in ATV.
- c) Such a requirement would have the effect of discouraging current broadcasters from seeking ATV licenses; ATV licenses would be rendered attractive only to those applicants not burdened by existing NTSC audiences.

II. Practical/Policy Issues.

- A. One of the FCC's goals is to introduce ATV without disenfranchising NTSC viewers during the transition to an all ATV world.
 - 1. A simulcasting requirement is not necessary to achieve this goal.
 - a. If NTSC viewers are equipped with down-converters, a requirement that ATV enhancements also be available to them through simulcasting would be less necessary.
 - b. At least in the initial phases of ATV implementation when ATV receiver penetration is low, broadcasters most likely will continue to provide quality NTSC programming whether or not they are required to do so. (PS/WP-3 estimates that even by year 10 ATV will only have achieved penetration rates of 36-56% of NTSC households.)
 - c. Program producers are not likely to produce product in two formats -- up-conversion and down-conversion will be the most economical way for broadcasters to deliver programs in both modes, whether or not there is a simulcasting requirement.
 - d. The Commission's declaration of a firm conversion deadline has put broadcasters and the public on notice that NTSC will cease as of a date certain.

2. A simulcasting requirement is necessary to achieve this goal.
 - a. Non-simulcast programming will mean that NTSC viewers will not have access to ATV programming even in a non-ATV format.
 - 1) Where the ATV programming is different and inaccessible to NTSC viewers, it cannot be said that the ATV service is not a new and separate video service, thereby undercutting the policy basis for the FCC's announced licensing policy.
 - 2) Where the programming is different and inaccessible to NTSC viewers it cannot be said that the consumer investment in NTSC equipment has been protected, even if that equipment has not been rendered technically obsolete.
 - b. Absent simulcast requirements, broadcasters may begin to devote their best program efforts (or, at least, significant portions of their limited resources) to ATV development, at the expense of NTSC programming.
- B. One of the FCC's goals is to expedite introduction of ATV service.
 1. FCC policies that would encourage consumer investment in ATV receivers.
 - a. ATV receiver purchases may be stimulated by the availability of ATV-specific programming, pre-released ATV programs (which may later be made available to NTSC viewers), and multiple-plays of ATV special productions (either on a pay or free basis).
 - b. Even made-for-ATV programming could be simulcast on NTSC and ATV receiver purchases may be stimulated simply by the availability of ATV's improved audio and video quality and new aspect ratio, much the way the introduction of "color" stimulated new receiver sales despite the availability of the same programming in black and white.
 - c. ATV receiver purchases may not be stimulated where programming is simulcast to NTSC viewers and the perceived differences in quality are deemed too insignificant to warrant investment in new, expensive receivers.
 2. FCC policies that would encourage broadcaster investment in ATV programming and transmission facilities.

- a. Broadcasters will have to make significant investments in ATV without any guarantee of additional revenues; allowing flexibility to experiment in programming and marketing of that programming could enable them to derive interim revenues that will facilitate their being able to continue to provide quality NTSC service while developing ATV services.
 - b. Strict simulcast rules and limitations on how ATV services may be marketed may discourage broadcaster willingness to invest in ATV.
 - c. Simulcasting would permit both ATV and NTSC viewers to enjoy the fruits of ATV programming investments and continuing broadcaster investments in NTSC programming would become increasingly unnecessary.
 - d. Especially during the early years of the transition to ATV program producers are likely to produce product in both ATV and NTSC formats in order to assure that their product is highly marketable; the presence of simulcast rules will add further impetus to that likely scenario.
- C. FCC policies implementing ATV must take into consideration the implications of broadcast ATV for alternative media and marketplace realities.
1. Legislative proposals adopted by both houses of Congress would impose "must carry" obligations on cable television systems for carriage of NTSC programming and call for new carriage requirements once ATV broadcast standards are in place; whatever the legality of carriage requirements - generally, in the absence of a simulcasting requirement there would be no justification for requiring additional channel capacity for carriage of a new broadcast service (especially where capacity limitations would dictate that other programming be dropped to make room for the ATV service).
 2. The FCC is seeking a change in technology from NTSC to ATV and its policies need to push in that direction; if however, the benefits offered by ATV are not sufficient to generate broadcaster investment or consumer acceptance in a simulcast environment the issue may need to be re-visited.
 3. Procedurally the FCC is intending to treat a broadcaster's NTSC and ATV licenses as one or "in tandem"; if the programming is not simulcast, a petition

to deny one station would likely not apply to the second and that could cause significant complications for the licensing process.

D. Definition of Simulcasting.

- 1. Simulcasting should be defined to permit differentiated programming.**
 - a. To the extent there is not a 100% simulcast requirement, multiple-plays at different times of ATV productions, as well as pre-release, could stimulate audience demand.
 - 1) Allowance for multiple plays of ATV productions, especially during the introductory phase of ATV service, would permit broadcasters to better maximize use of their investments in new programming and allow for greater distribution of the limited supply of made-for-ATV product.
 - 2) Pre-release material may be made available because of the expected limited ATV audience and might not be available to broadcasters operating in a fully simulcast environment.
 - b. Time shifting within a day or other, longer period, may provide an attractive vehicle and spur ATV receiver penetration.
 - c. Exempting programs of under a specified length from any simulcast requirement might make implementation of ATV easier for broadcasters.
 - d. Pay-per-view of exclusive made-for-ATV programming may stimulate ATV receiver penetration and assist broadcasters in deriving an additional revenue stream from ATV transmissions.
 - 1) FCC rules permit broadcasters to operate in a subscription mode.
 - 2) Of the various kinds of "ATV specific" programming, pay-per-view is the only one which could not be simulcast to NTSC receivers, although NTSC displays could be accomplished via a decoding down-converter.
- 2. Simulcasting should not be defined to permit differentiated programming.**
 - a. By definition the term simulcast means to broadcast programs over two channels simultaneously (e.g., AM/FM radio broadcasts and simultaneous broadcasts of concerts on TV/FM).

- b. Efforts to define simulcasting to accommodate broadcaster interests in experimenting with new programming formats and differentiated programming would likely embroil the FCC in prohibited content-related regulations (efforts to identify and draw lines between the specific types of programming or marketing techniques that would or would not constitute "simulcasting" would involve content-based evaluations).
 - c. Permitting differentiated programming runs counter to the FCC's determination that the ATC license is not a license to provide a new video program service and seriously undercuts the rationale for license eligibility. (The relationship of "simulcasting versus differentiated programming" to satisfying Ashbacker has been discussed above.)
 - d. As a practical matter broadcasters may need to down-convert ATV programming for NTSC distribution in order to reach an audience of sufficient size to support investment in ATV programming.
3. Simulcasting should be defined in a way to permit flexibility in the identification of "same programming."
- a. The FCC should have no difficulty in defining simulcasting in a way that will accommodate differences inherent in the two transmission formats; namely, changes in aspect ratios, camera angles, numbers of cameras used, adoption of pan and scan editing techniques and other elements of what is otherwise identical programming.
 - b. Exempting commercials and promotional announcements (and permitting substitutions of different commercials or announcements) may encourage broadcaster investment in ATV without undercutting the policies underlying simulcasting.
 - c. A simulcasting requirement should not preclude use of excess data capacity not required for ATV transmission for ancillary purposes, including revenue-generating purposes, on a non-interfering basis (similar to use of the SAP, SCA and VBI on NTSC transmissions).

E. Timing on Implementing Simulcasting.

1. It is too soon to adopt rules on simulcasting.
 - a. Initially, when ATV receiver penetration is low, NTSC programming is not likely to suffer; even as penetration increases, broadcasters will likely rely on upconverted NTSC programming to meet public interest obligations and rules are not needed to protect the embedded consumer investment in NTSC at the outset.
 - a. Too little is known about how ATV will develop to adopt rules that could impede acceptance of ATV; waiting until the FCC can amass data on receiver availability and penetration and the amount and type of ATV-produced programming will enable more realistic assessments on the need for rules.
 - c. It will be expensive for program producers and broadcasters to convert their studio facilities to ATV production mode -- some flexibility from a strict simulcasting requirement will make this more likely to happen sooner.
2. Rules on simulcasting must be in place from the outset and should take effect immediately.
 - a. Withholding application of the simulcast requirement until four years after the introduction of the ATV service (or during a phase-in period) will promote the development of ATV as a new programming service, rather than as a new technology.
 - b. Broadcasters need to know from the outset exactly what the FCC is expecting of them; consumers need to know what programming will be available during the transition to ATV; and other media that retransmit broadcast programming need to know what programming will be available in each format.
 - c. The costs associated with down-converting HDTV programming to NTSC is minimal, especially for material produced on film; during the early years

most material will likely be produced in both formats in order to serve a broader consumer market.

- d. Broadcasters are being awarded free spectrum in order to make the transition to ATV; a simulcasting requirement will ensure the continuing welfare of the NTSC viewers that there are obligated to serve.
3. Rules on simulcasting must be in place from the outset, but should take effect at a predetermined later date.
4. No decision on simulcasting should be made at this time.

DRAFT

Two-level Outline of Simulcasting Issues

I. Legal Issues

A. Simulcasting vis-a-vis Ashbacker.

1. Simulcasting is not required to satisfy Ashbacker.
2. Simulcasting is required to satisfy Ashbacker.

B. Simulcasting and First Amendment issues.

1. A simulcast requirement would have First Amendment implications.
2. A simulcast requirement would not have First Amendment implications.

II. Practical/Policy Issues.

A. One of FCC's goals is to introduce ATV without disenfranchising NTSC viewers during the transition to an all ATV world.

1. A simulcasting requirement is not necessary to achieve this goal.
2. A simulcasting requirement is necessary to achieve this goal.

B. One of the FCC's goals is to expedite introduction of ATV service.

1. FCC policies that would encourage consumer investment in ATV receivers.
2. FCC policies that would encourage broadcaster investment in ATV programming and transmission facilities.

C. FCC policies implementing ATV must take into consideration the implications of broadcast ATV for alternative media and marketplace realities.

1. Legislative proposals adopted by both houses of Congress would impose "must carry" obligations on cable television systems for carriage of NTSC programming and call for new carriage requirements once ATV broadcast standards are in place. . . .

2. The FCC is seeking a change in technology from NTSC to ATV and its policies need to push in that direction; . . .
3. Procedurally the FCC is intending to treat a broadcaster's NTSC and ATV licenses as one or "in tandem"; . . .

D. Definition of Simulcasting.

1. Simulcasting should be defined to permit differentiated programming.
2. Simulcasting should not be defined to permit differentiated programming.
3. Simulcasting should be defined in a way to permit flexibility in the identification of "same programming."

E. Timing on Implementing Simulcasting.

1. It is too soon to adopt rules on simulcasting.
2. Rules on simulcasting must be in place from the outset and should take effect immediately.
3. Rules on simulcasting must be in place from the outset, but should take effect at a predetermined later date.
4. No decision on simulcasting should be made at this time.