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April 11, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
Association for Maximum Service
Television, Inc.
MM Docket No. 87-268

Dear Mr. Caton:

The Association for Maximum Service Television, Inc. ("MSTV"), pursuant to Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(2), hereby notifies the Commission that on April 8, 1994, representatives of MSTV met with Chairman Reed Hundt and his Special Assistant, Ms. Merrill Spiegel. Appearing on behalf of MSTV were Mr. Edward Reilly, the Chairman of MSTV's Board of Directors, Mrs. Margita White, MSTV's President, and Mr. Jonathan Blake of Covington & Burling.

The matters discussed in this meeting included MSTV's mission and make-up, its concern about spectrum and interference issues generally, its role in advanced television matters and various allotment/assignment and flexibility issues. The views expressed on this last topic are reflected in MSTV's written submissions in the above-referenced docket and in the attached White Paper which was distributed at the meeting.

Please direct any questions concerning this matter

to the undersigned.

Respectfully submitted,

Jonathan D. Blake

Attorney for
Association for Maximum
Service Television, Inc.

Enclosure

cc: Chairman Reed Hundt (w/o enc.)
Ms. Merrill Spiegel (w/o enc.)
MM Docket File No. 87-268

MSTV WHITE PAPER

On Broadcaster Flexibility To Provide Additional Service Using New Technologies Within Existing Spectrum Allocation

Association for Maximum Service Television, Inc.
1776 Massachusetts Avenue, N.W.
Washington, D.C. 20036

April 4, 1994

MSTV WHITE PAPER
On Broadcaster Flexibility To Provide Additional Service Using New Technologies Within Existing Spectrum Allocation

Local television in this country has always been dynamic, and the public has benefitted from the flexibility broadcasters have had to experiment with and inaugurate new services. Some of these changes have been largely technical — the shift from black and white to color, the use of satellite feeds, and stereo sound, to name just three. Some have been more service oriented — second-language audio, closed captioning for the hearing impaired, and the explosion of electronic news gathering. But most innovations have had both service and technology components. Not all have succeeded, teletext being one example. These service innovations have been undertaken by the private sector, in the existing broadcast spectrum allocation, and their ultimate success being determined by the public and in the marketplace. The government has played an important facilitating role, setting broad technical and service standards.

The public has been well served by this process. Ninety-eight percent of American homes receive television service, exceeding even the percentage of homes receiving telephone service. Our system provides locally oriented service, without charge to the public, and is universally available. The local television system also has been the first among a variety of different media to introduce many new services and new technologies. The result is that all of our citizens have benefitted, not just those who can afford, and live in an area provided with, subscription services. That is why broadcasting is the information highway of the present and, upgraded, can and should be a key component of the superhighway of the future. As NTIA Director Larry Irving recently stated in testimony to Congress: "Broadcasters remain the principal source of free, universally available electronic information in the United States, and it is important to ensure full participation by that industry in the NII."

The country faces an explosion and convergence of new communications technologies and services. As in the past, broadcasters are leading the way, embracing digital compression and other technological innovations that are compatible with other services and the services they make possible. As in the past, broadcasters seek to pursue these opportunities within existing spectrum, without government financial support but with facilitating governmental regulatory action.

Also, as in the past, the FCC should protect, but also enhance, the most important public interest goal of all — that the citizens of our country have full access to free, local, universal over-the-air program service of high technical quality. This commitment would help resolve the troublesome debates that have been touched off by the contemporaneous development of new technologies and services. MSTV embraces this goal and believes that it drives the two policy positions endorsed by this White Paper.

I.

With the advent of digital compression, interactive technologies and other breakthroughs, local television stations can do more for their public than ever before. Thus, at the turn of this century, a television station may be providing four kinds of services on its ATV channel.

1. The station broadcasts a main channel of programming which for an NFL game provides full resolution video requiring the use of almost all of the technical capacity of the 6 MHz channel.
2. During news programs, when the highest resolution may be a waste of the digital resource, it may provide up to six channels of news

programming — the general news program and five more specialized in-depth newscasts focusing on financial news, international news, sports, etc. Three of these additional news program services are advertiser-supported and, therefore, available to the entire public, without charge.

3. The other two specialized news services may be available on a subscription basis to the entire public but received only by those who pay the required fee.
4. During the broadcast day, unused bits in the digital bit stream being transmitted by broadcasters over their 6 MHz channels may be used to distribute medical history information among doctors' offices and hospitals; this service would be paid for by participants in the information network.

Broadcasters should have the flexibility to use their existing NTSC and future ATV channels for whatever services they believe the public desires (in other words, all four types of use described above), on the condition that they provide, without charge, at least one program service per channel that is intended for and available to the general public. Some have argued that the *Ashbacker* doctrine requires the Commission to open up the ATV channels and broadcasters' additional technical capacity to competing applicants or to subject them to auctions either completely or to the extent that broadcasters use their channels for more than a single programming service available to the general

public. Others have argued that it would be bad public policy to allow broadcasters to use their new capacity flexibility. This White Paper addresses these two points in turn.

II.

Before addressing the *Ashbacker* doctrine, we consider what the purpose of the ATV proceeding is and how it relates to the FCC's statutory authority and responsibility. The FCC's objective in its ATV proceeding has been to "enhance[ ] the current television broadcast system." *Memorandum Opinion and Order*, MM Docket No. 87-268, 7 FCC Rcd 6924 at n.1 (1992). Digital television and other technology breakthroughs have made HDTV possible but also facilitate other services as well. Accordingly, the Commission has recognized the need to provide flexibility in the use of these new technologies and the mix of services they make possible. Thus, the FCC concluded that "to attempt to define what is or is not ATV programming at this time might lead [the Commission] to inadvertently prohibit some sources and formats to programs on ATV channels that would be highly desirable to viewers." *Memorandum Opinion and Order*, MM Docket No. 87-268, 7 FCC Rcd 6924 at ¶ 77 (1992). The Commission has also recognized that "ancillary" uses of ATV channels may be in the public interest. *Id.* at ¶ 76. More recently, the FCC has stated its intention to consider fully the potential benefits of allowing broadcasters flexibility to provide additional services using new technologies. Letter of Chairman Reed E. Hundt to Honorable Edward J. Markey, Chairman, House Subcomm. on Telecommunications (March 11, 1994).

It is entirely lawful (and, as we will demonstrate in Section III of this White Paper, compellingly in the public interest) for the FCC to provide such flexibility. Thus, the Act gives the Commission broad authority to define the

permissible uses of spectrum, including broadcasters' existing NTSC channels and future ATV channels. The Communications Act invests the FCC with the power to regulate the use of radio spectrum in general and the issuance of broadcast licenses in particular. The FCC is also given express authority to "[c]lassify radio stations," "[p]rescribe the nature of service to be rendered by each class of licensed stations and each station within any class," and "[a]ssign bands of frequencies to the various classes of stations. . . ." 47 U.S.C. § 303(a), (b), (c).

The FCC is also charged under Title I of the Act "to make available, so far as possible, to all the people of the Untied States a rapid, efficient, Nation-wide . . . radio communication service." 47 U.S.C. § 151. The Act states that it is "the policy of the United States to encourage the provision of new technologies and services to the public", *id.* at § 157(a), and requires the FCC "generally [to] encourage the larger and more effective use of radio in the public interest." *Id.* at § 303(g).

The plain language of the Communications Act thus grants to the Commission significant powers that are subject only to the requirement that the agency take action consistent with the "public interest, convenience and necessity." Moreover, in exercising its rulemaking authority the Commission is permitted "to implement its view of the public-interest standard of the Act so long as that view is based on consideration of permissible factors and is otherwise reasonable." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981). Consequently, the Commission has the statutory authority to provide broadcasters with the flexibility to use digital and other new technologies, as long as that decision is based on a public interest rationale supported by an appropriate administrative record.

Ashbacker v. *FCC*, 326 U.S. 327 (1945), does not present an obstacle to the exercise of this authority to authorize broadcasters to respond to consumer demand by using the new technologies to provide services that are *in addition to* their basic main programming services. As the Court of Appeals for the D.C. Circuit has said, *Ashbacker* "merely held that the Commission must use the same set of procedures to process the applications of *all similarly situated persons* who come before it seeking the same license." *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987). *Ashbacker* presents no more of an obstacle here than it did in the FCC's decision to give an additional 5 MHz to each existing cellular licensee without permitting competing applications to be filed.

Ashbacker does not alter the FCC's authority under the Communications Act to establish substantive eligibility criteria for applicants and dismiss ineligible applicants without a hearing. *See United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956); *Hispanic Information & Telecommunications Network, Inc.* v. *FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (FCC not required to conduct a comparative hearing between local and nonlocal applicants for ITFS station where it previously decided under its rulemaking authority to give preference to local applicants). Nor does *Ashbacker* in any way undercut the Commission's legal authority to determine what type of services can be offered on a licensed station.

In its ATV proceeding, the FCC has determined that it is not creating a wholly new service and that, for convincing public interest reasons, it should restrict initial eligibility for ATV channels to existing broadcasters. *Ashbacker* in no way undermines the FCC's rulemaking authority to adopt these eligibility restrictions, nor does it present a bar to the FCC finding, based on its expertise

and comments submitted by interested parties, that it would be in the public interest to give broadcasters flexibility in using their channels. The key issue is whether the Commission has a reasoned, public interest basis, supportable by an appropriate record, for the finding that broadcasters should have first crack at the ATV channels and should be able to use them for additional services. Section III examines the compelling basis for that finding.

III.

Far from interfering with the public's free, over-the-air local television service, the flexibility we seek will enhance it.

1.
Flexibility Will Enhance The Benefit Of Broadcasting's Service To The Public.

The four categories of the new services we illustrated above are obviously in the public interest; they are made possible by television's new technologies; and they are a natural and desirable outgrowth of, and complement to, broadcasting's existing basic service to the public. For example, the in-depth news services described in (2) and (3) above, are at least as related to the main program service as is teletext or second channel audio. Surely it is reasonable and desirable for the FCC to enable broadcasters to use part of their new capability to provide additional services to the people and communities they serve. And surely the public is entitled to have its program service evolve and grow, as new technologies make possible additional services that can be implemented within television's existing spectrum allocation. It cannot possibly be in the public interest to strait-jacket viewers' TV services to what a 40-year-old technology made possible — a single channel of NTSC programming. As Chairman Hundt has recently stated, the "goal of maximizing competition and

service to the public is best met by a process that can react to changing circumstances." Letter of Chairman Reed E. Hundt to Honorable Edward J. Markey, at 3 (March 11, 1994).

2.
There Is FCC Precedent Supporting Flexible Use.

The FCC has repeatedly allowed broadcasters to make ancillary uses of NTSC channels so long as there was no observable degradation to any portion of the visual or aural signals. This includes use of the vertical blanking interval, subsidiary communication authorizations, and second audio programming. *See* 47 C.F.R. §§ 73.682(a)(23), 73.646. In addition, the FCC has previously authorized FM subsidiary communications services, *see* 47 C.F.R. § 73.295, and ancillary use of DBS frequencies to stimulate the development of new services. *See U.S. Broadcasting Co.*, 1 FCC Rcd 977 (1986), *recon. denied*, 2 FCC Rcd 3642 (1987). Similar examples can be cited in non-broadcast services.

3.
The Other Services Flexibility Would Make Possible May Be Critical To The Successful Implementation Of Broadcast ATV.

There is significant uncertainty as to consumer demand for HDTV, especially given that ATV receivers may cost up to $5000 initially. Broadcasters will have to make capital expenditures of $1.5 to $12 million or more per station to be able to provide an ATV service that, at the outset, no one will be capable of receiving. Also, for many years, no enhanced advertising revenues can be expected from ATV programming. But if the public is able also to receive new services on ATV receivers, they may stimulate consumer interest in ATV receivers, may speed the availability of ATV programming and may enable broadcasters to generate some supplemental revenue streams to offset,

though only partially, the heavy expenditures that the inauguration of ATV will entail. These outcomes would assist the FCC's strategy of using broadcasters (at their risk and their expense) to propel ATV implementation nationwide.

4.
Broadcasters Have Been In The Forefront In Facilitating the New Technologies.

Broadcasters have played a leading role in the emergence of the new technologies. The FCC's ATV proceeding was initiated at the request eight years ago of 57 broadcast organizations. Broadcasters sponsored the earliest HDTV demonstrations in this country; advocated the preservation of spectrum already allocated for television station service so that it could be used for ATV purposes; supported with expertise, personnel and other resources the broad and determined efforts of the FCC's Advisory Committee on ATV; created and funded the unmatched facilities and staff of the Advanced Television Test Center; and worked cooperatively with proponents and others, and now the Grand Alliance, to craft the best possible ATV for all Americans. Tens of millions of broadcast industry dollars and their best experts have been brought to bear on the ATV and related technology issues. Similar efforts and expenditures will be invested in developing services to meet new public needs.

For these reasons among others, the FCC chose to make ATV channels available first to existing broadcasting licensees. The same reasons support allowing broadcasters to develop innovative services with their new capacity, all of which would use only spectrum that is already allocated to broadcasting.

5.
Flexible Use Will Allow Broadcasters To Compete On A More Equal Footing With Other Video Providers.

Broadcasters, confined to a single channel of programming, have faced severe financial challenges over the past ten years. One-third of the nation's UHF stations lost money last year and public television is under financial strain. Cable continues to grow, telephone companies are entering the cable business, and computers and communications services converge in a multimedia world. Broadcasters who serve all the public without charge must be allowed to use appropriate tools, which they have helped to develop, to compete effectively and continue to enhance their core service in this new environment. This is especially the case given that other video entertainment providers — cable, DBS, wireless cable, video dialtone — have broad flexibility to transmit multiple programming options. Broadcasters should be given similar flexibility, although they will not be able to provide as many programming choices as cable, video dialtone, DBS, wireless cable and other video providers.

6.
Flexible Use Will Allow Broadcasting Services To Play An Important Role In The Information Superhighway.

While the information superhighway has to date focused primarily on the telephone, computer and cable industries, broadcasters can play an important and unique role in implementing this initiative. Broadcasters offer a wealth of experience in serving the public, and their stations constitute an unmatched infrastructure that is already in place and capable of being upgraded by application of the new technologies and services that broadcasters have pioneered and are prepared to continue to pioneer. This magnificent existing

infrastructure, in which the public also has an imbedded stake represented by its $50 billion investment in current television receivers, is far more efficient than the alternatives. While costs of up to $500 billion are mentioned to reach every American home by fiber optic, the over-the-air broadcast system can deliver broad-band digital services to virtually every home for a fraction of that cost, while continuing to deliver free television service to the public. Broadcasters' reach and cost advantages will be especially critical in achieving the goal of universal coverage and may provide the primary, and perhaps the sole means of bringing the benefits of the information superhighway to smaller communities and less affluent consumers.

* * *

Some argue that the FCC is now auctioning new spectrum and it should, therefore, exact a price for broadcasters' use of its spectrum. But, in fact, broadcasters do not seek to use frequencies outside their existing spectrum allocation to implement these new services. Broadcasters' access to a second channel is to enable them to upgrade from NTSC to digital new technology without disenfranchising their viewers. Since, as a legal matter, *Ashbacker* does not apply, payments are not called for as a substitute for the competing application process. Moreover, as a matter of public policy, the assessment of fees could slow the ATV transition by inhibiting broadcasters' ability to provide new services and innovation. As it is now expected that broadcasters will have to turn back their NTSC or ATV channels once that transition substantially has taken place, the time to consider exacting a price for additional spectrum capability is if and when broadcasters wish to retain both sets of channels.

Still others argue that since some providers of services that would be competitive with the new services offered by television stations will have to pay

auction fees, broadcasters should have to make payments as well. But cable operators received their spectrum free, as do wireless cable and DBS operators. Initial cellular operators received their spectrum without engaging in auctions or paying fees. It is true that perhaps half of existing cellular businesses (by population) bought cellular licenses in the post-licensing after-market. But, similarly almost all existing broadcasters, except those very few who received their grants in initial comparative hearings, also paid for their spectrum when they purchased their stations.

The fact is that there are no competitors in services (2) and (3) above who paid for their spectrum in auctions. Only if broadcasters use their frequencies to enter the PCS business would this be the case. Such a possibility is so remote and faces so many practical problems that it seems unnecessary to address at this time. Far more timely and material is the challenge of launching these infant new technologies and services, not worrying about whether they will be too successful. Flexibility is a key ingredient to launching services that will serve consumer needs.