Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
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Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service	)	MM Docket No. 87-268
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To: The Commission	)	

REPLY COMMENTS OF ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE ON FOURTH FURTHER NOTICE OF PROPOSED RULE MAKING

Marilyn Mohrman-Gillis
Vice President, Policy & Legal Affairs
Lonna Thompson
Director, Legal Affairs
Association of America's Public Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Paula A. Jameson
General Counsel
Gary P. Poon
Assistant General Counsel
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314

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The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") (collectively referred to as "Public Television") submit these reply comments ("Reply Comments") to the Commission's *Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry* released August 9, 1995 ("*Fourth Notice*") in the above-captioned proceeding.[1]

I. Introduction and Summary of Contents

In the Comments, Public Television set forth its vision of how digital advanced television ("ATV") will enhance the ability of noncommercial

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1 As with the Comments of Public Television filed on November 20, 1995 ("Comments"), Public Television generally supports the positions taken by a broad coalition of terrestrial broadcasting stations and networks ("Broadcasters") in their Reply Comments filed today ("Broadcasters' Reply Comments"). Because of its unique situation, however, Public Television has not joined in the Broadcasters' Reply Comments, but rather will indicate in these Reply Comments where Public Television endorses the Broadcasters' positions on specific issues.

stations to educate *all* Americans, how its pending legislative proposal would enable noncommercial stations to transition to digital ATV and fulfill their mission, and what regulatory relief the Commission could accord noncommercial stations in the context of the legislative proposal.[2]

Public television remains optimistic that its legislative proposal, which allows for the use of ATV spectrum to finance public broadcasting, will become law. However, the introduction of a public television funding bill has been delayed by the continued work on the telecommunications bill. This delay has exacerbated the timing difficulties confronting Public Television in addressing many of the important regulatory issues raised in the *Fourth Notice*. Since Public Television recognizes that the Commission intends to resolve the issues raised in this proceeding, Public Television suggests in these Reply Comments the regulatory support that the Commission has the authority to provide noncommercial stations *apart* from the legislative proposal.[3]

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2 Additionally, David B. Liroff, Vice President and Chief Technology Officer for WGBH Educational Foundation, testified at the Commission's December 12, 1995 *en banc* hearing on behalf of public television stations throughout the country. Mr. Liroff reaffirmed public television's unwavering commitment to bring HDTV to the American public and to use ATV's multi-channel capabilities to increase educational services to the public. He further testified that this ATV vision will be possible only with legislative relief and regulatory support.

3 In his oral testimony at the *en banc* hearing, Mr. Liroff outlined some of the types of regulatory relief that the Commission could accord noncommercial stations apart from the legislative proposal.

Specifically, Public Television urges the Commission to:[4]

- maintain the Commission's commitment to reserve ATV channels for noncommercial, educational use in whatever assignment plan is adopted
- clarify that licensees may use the ATV spectrum for ancillary uses and waive any spectrum fees imposed so long as the revenues generated support the licensee's public service
- relax or eliminate financial qualification requirements for noncommercial stations
- extend the six-year deadline or adopt a liberal waiver policy for noncommercial stations to complete construction of ATV facilities
- re-allocate noncommercial NTSC channels (or equivalent repacked channels within the primary broadcast spectrum) after the transition for the purpose of supporting the continuation of public television services in an ATV world
- continue must-carry requirements for both NTSC and ATV program services.

II. Commission's Regulatory Support Apart from the Legislative Proposal

Ideally, Congress would pass legislation to establish an independent trust fund for public broadcasting to replace Federal appropriations, to finance the transition to ATV, and to ensure the continuation of noncommercial, educational services to the public. Even apart from such legislation, Public

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4 As discussed in the Comments, Public Television supports the Commission's determination to limit eligibility to existing broadcasters and its tentative conclusion that this is not precluded by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) and its progeny ("*Ashbacker*"). Moreover, the Commission should assign the entire 6 MHz bandwidth to broadcasters. As the Broadcasters correctly observe in their Reply Comments, other commenters almost uniformly support HDTV, which requires the full 6 MHz, as the centerpiece of advanced television. *See, e.g.*, Comments of CBS, Inc, at 7-8; Comments of National Broadcasting Company, at 7-8; Comments of Capital Cities/ABC, Inc., at 7; Comments of Golden Orange Broadcasting, at 2.

Television believes that the Commission presently has the authority to provide noncommercial stations substantial assistance in transitioning to ATV and achieving their educational mission. In the event the legislative proposal is not passed by Congress before the Commission adopts its final rules in this proceeding, Public Television urges the Commission to take the steps set forth in these Reply Comments and give noncommercial stations the added flexibility in the transition to ATV.[5] As one commenter stated:

> PBS member stations and other noncommercial stations are recognized as technology leaders in TV broadcasting. Likewise, their viewers are often "early adopters" of new video technology. Early conversion to ATV by these stations would serve the public interest by causing commercial stations to convert earlier than might otherwise occur. *Consequently, we support U.S. Government action that would mitigate financial problems faced by noncommercial stations in converting to ATV technology, and would lead to conversion as early as possible.*[6]

The regulatory support that the Commission presently has the authority to grant is discussed below.

A. Reserve ATV Channels for Noncommercial Educational Use

As Public Television has urged in prior filings in this proceeding, the Commission should, in whatever assignment plan is adopted, continue the

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5 It is possible that, as the legislative proposal is being considered by Congress, additional issues may arise and Public Television may supplement these Reply Comments at the appropriate juncture.

6 Comments of General Instruments Corporation, at 17 (emphasis added). *See also* Comments of Media Access Project, at 20, n. 16 (supporting regulatory means to fund public broadcasting); Comments of Tony P. Nopl (stating "[p]erhaps HDTV should be granted, in the first instance, to non-profit, public television stations").

existing noncommercial reserve for ATV channels.[7] The Commission has had a long-standing policy of reserving channels for noncommercial, educational use since it set aside 242 NTSC channels to foster the growth of a "valuable complement to commercial programming" in 1952.[8] In so doing, the Commission recognized that noncommercial stations would require more time than their commercial counterparts to undergo the "actual process of formulating plans and of enacting necessary legislation or of making adequate financing available" and otherwise prepare for the operation of a television facility.[9]

In this proceeding, the Commission reaffirmed this sound policy of creating a noncommercial reserve in assigning ATV channels, stating:

> We agree with Public Television that, regardless of the assignment methodology ultimately adopted, we should take an additional measure on behalf of noncommercial interests: creation of a noncommercial reserve. Such a reserve will ensure that ATV channels created for vacant NTSC noncommercial allotments are available only to qualified noncommercial parties. It will also

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7 *See, e.g.*, Public Television Comments in MM Docket 87-268, dated December 20, 1991.

8 *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, at ¶ 38 (1952) ("*Sixth Report and Order*"). In this connection, it is mystifying that one commenter continues to believe that noncommercial stations do not offer a "serious alternative" to commercial television, *see* Comments of Fairness & Accuracy In Reporting ("FAIR"), when in fact the majority of Americans believe otherwise. *See, e.g.*, Statistical Research, Inc., *1990 Public Television National Image Survey* (September 28, 1990) (finding that viewers assigned a higher rating of "overall satisfaction" to public television than to commercial networks).

9 *Sixth Report and Order*, 41 F.C.C. 148, at ¶¶ 41, 43. Since 1952, the Commission has consistently protected these channel reservations, resisting efforts by commercial broadcasters to de-reserve them. *See* Public Television Comments dated December 20, 1991, at 4, n.1. These actions reflect the "high allocation priority" the Commission has placed on the reservation of channels to further the "policy of providing all possible encouragement and assistance for the development of educational television." *See Channel Assignment in Medford, Oregon*, 3 F.C.C.2d 860, *recon. denied*, 8 R.R.2d 1531 (1966); *UHF Channel Assignments*, 7 R.R.2d 1704, 1708 (1966).

ensure that noncommercial entities do not face renewal challenges from commercial applicants.[10]

As discussed in earlier filings, the optimal way for the Commission to reserve noncommercial ATV channels is with a paired Table of Allotments and Assignments.[11] The need to reserve ATV channels for noncommercial, educational use is critically important now. Public Television's current funding situation closely parallels the funding problems facing educational television in 1952, and the Commission's original rationale for creating a noncommercial reserve—allowing noncommercial applicants more time to construct facilities and making it easier for them to raise funds—applies with equal force today.[12] This is especially true if the legislative proposal is not adopted by Congress, and Public Television is forced to find alternative solutions to ensure funding.

B. Allow Noncommercial Stations to Use ATV Spectrum for Ancillary Uses And Waive or Substantially Reduce Any Spectrum Fees

In its Comments, Public Television urged the Commission to facilitate noncommercial stations' ability to make full use of the ATV channel by providing ancillary and supplementary services.[13] Flexible use of the ATV

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10 *Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making*, 7 FCC Rcd 6924 (1992) ("*Third Report and Order*"), at ¶ 13.

11 *See Petition for Partial Reconsideration of Association of America's, Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Services in MM Docket No. 87-268*, December 14, 1992. Should the Commission adopt any other mechanism for assigning ATV channels, such as its proposed first come first serve procedure, the Commission should reserve channels for noncommercial use at the time it adopts the ATV Table to ensure that the noncommercial reservation policy is effectively implemented.

12 *See* Media Access Project, at 3 ("Of particular importance here is the fact that capacity for non-commercial uses was reserved at an early point in the development of the medium.").

13 Public Television's Comments at 20-22. Currently, the Commission permits ancillary uses on the NTSC channel, such as vertical blanking interval ("VBI"), subsidiary

channel will serve the public interest by helping to "spur development" of new technologies,[14] and providing greater opportunities for noncommercial stations to enhance their public service to their respective communities. A noncommercial station could, for example, utilize digital transmission to distribute program-related course materials, textbooks, student and teacher guides, computer software and content areas of the World Wide Web as part of the station's instructional programming.

As Public Television noted in its Comments, these ancillary and supplementary uses of the ATV channel can also generate further revenue for public television. While the revenue from these uses will not replace federal appropriations, it can serve as a source of much needed funds. Accordingly, Public Television urges the Commission to permit public television stations to engage in ancillary and supplemental uses, without regard to the educational content, to generate revenue to support stations' non-profit services.

Moreover, to the extent it imposes spectrum fees for revenue-generating ancillary services, the Commission should waive or substantially reduce any such fees assessed on noncommercial stations, as long as the revenues generated are used to support noncommercial operations. Requiring public television stations to pay fees would reduce the efficiency of this source of funding, while waiving or reducing the spectrum fees would be

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communication authorizations ("SCA") and second audio programming ("SAP"), so long as there is no observable degradation to any portion of the video or audio signal. *See* 47 C.F.R. §§ 73.682(a)(23)(ii), 73.646 (1994).

14 *Third Report and Order*, at ¶ 77.

consistent with the exemption of noncommercial stations from the payment of annual regulatory fees and filing fees.[15]

The flexibility to use the excess capacity of the ATV channel to generate revenue, without a fee, would be particularly important in the absence of adequate funding legislation. With reduced or no federal funding, public television stations will need maximum flexibility in obtaining alternative sources of funding to remain in operation and to transition to ATV.

C. Relax or Eliminate Financial Qualification Requirements for Noncommercial Stations

As Public Television has urged in its comments and previous filings in this proceeding, the Commission should continue its well-established policy,[16] and relax or eliminate any requirement that noncommercial stations demonstrate their financial qualifications when applying for an ATV channel.[17] The justification for such flexibility, which is squarely within the Commission's authority, is discussed in detail in Public Television's previous comments. Because of their non-profit, educational mission and the reliance upon sources of public funding not totally within their control, public television stations have traditionally struggled to maintain sufficient revenue to support their services. Today, public television stations face multiple crises: the assured reduction and threatened elimination of critical

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15 *See* Public Television Comments, at 22.

16 *See, e.g., KQED, Inc.*, 5 FCC Rcd 1784, 1785 (1990) ("Under Commission policy, a noncommercial applicant may certify that its application is contingent on a grant from NTIA or other appropriate source."); *Alabama Citizens for Responsive Public TV, Inc.* 69 F.C.C.2d 1061, 1073 (1978) ("[U]nder established Commission policy, only a reasonable—not a stringent—showing of financial qualification is required for non-commercial educational applicants.").

17 *See, e.g.*, Public Television Comments in MM Docket No. 87-286, dated January 7, 1993, at 11.

federal funds for operation and construction of facilities coupled with the necessity to construct and operate ATV facilities to remain viable in an ATV world.

Relaxing or eliminating the financial showing upon application for an ATV channel is a critical way in which the Commission can support and encourage the transition of public television stations to ATV with or without legislation from Congress.

D. Extend the Six-Year Deadline or Adopt a Liberal Waiver Policy for Noncommercial Stations to Complete Construction of ATV Facilities

As the Commission has recognized, the transition to ATV will be costly and particularly challenging for noncommercial stations.[18] This is especially true if federal support continues to diminish and the legislative proposal is not adopted. For these reasons, Public Television urges, and the Broadcasters and several other commenters support,[19] a less demanding timetable or a liberal waiver policy for noncommercial stations to complete construction of their ATV facilities.

Allowing noncommercial stations maximum flexibility in completing construction would be consistent with the Commission's policy of reserving spectrum for noncommercial, educational use, which, as discussed above, is intended to allow noncommercial stations more time to raise funds,

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18 *Fourth Notice*, at 26-28. *See also* Broadcasters' Comments, at 14.

19 *See* Broadcasters' Comments, at 14-15; Comments of Electronic Industries Association, at 21 (supporting "special consideration" for noncommercial stations); Comments of Thomas C. Smith, at 8 (urging "special consideration" for public television stations); Comments of Golden Orange Broadcasting Co., Inc., at 6 (supporting waiver of time limits while "good faith progress" is being made). *Cf.* Comments of New World Television Incorporated, at 9 (noting the need to protect licensees that are prevented from ATV broadcasts for technical or other non-financial reasons "beyond their control").

construct facilities and place them in operation. And, it would be consistent with the Commission's policy of substantially relaxing, or even waiving, any showing of financial qualification for noncommercial applicants.

Public Television emphasizes that, contrary to the suggestion of one commenter,[20] extending the six-year construction deadline would not delay the Commission's ability to reclaim and repack commercial spectrum. As Public Television explained in the Comments,[21] noncommercial stations that are given an extension of the six-year construction deadline would not be relieved of the obligation to complete construction and begin operating their facilities *prior* to the ultimate conversion deadline.

E. Re-allocate the Noncommercial NTSC Channels For Revenue-Generating Purposes

An important element of Public Television's proposed legislation is allowing public television stations to retain their NTSC channels (or equivalent repacked 6 MHz channels) at the end of the transition period to use for revenue generating purposes. *Apart* from the legislation, the Commission can establish rules to utilize the noncommercial NTSC channels, after the transition, to support the continued provision of noncommercial educational services to the American public. As the Commission recognizes, Public Television faces a series of critical challenges: the certain decrease and the predicted end of annual federal appropriations with no current assurance of an adequate substitute source of funding; steady reductions in the federal grant program that has provided critical support for

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20 Comments of The Digital HDTV Grand Alliance, at 16.

21 Public Television Comments, at 29.

the construction of public television facilities;[22] and the need to make a substantial capital investment to transition to ATV.

Since 1952, when it reserved channels for noncommercial educational services, the Commission has continually recognized that federal intervention, by way of favorable regulatory policies, has been needed to ensure that a portion of the television spectrum is used to deliver noncommercial educational services to the public. Similar intervention is needed now—this time in the creative use of the FCC's broad authority to allocate spectrum to further the public interest. Specifically, Public Television urges the Commission to re-allocate the NTSC channels (or equivalent repacked channels), which are currently reserved to provide noncommercial educational services, for the purpose of supporting the continuation of public television services in an ATV world. Such action is fully within the Commission's broad powers under Sections 303 and 4(i).

Moreover, Public Television believes that the Commission, consistent with *Ashbacker*, can limit the eligibility for those re-allocated channels to a single entity, such as a trust fund corporation established for the purpose of supporting public television station services. Alternatively, it could allocate the spectrum to the class of existing public television licensees to generate revenue in support of their services or to a newly defined class of applicants

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22 Matching grants by the Public Telecommunications Funding Program ("PTFP"), currently administered by the National Telecommunications and Information Administration, have provided an important portion of public television's capital costs for equipment. As noted in the Comments, at 9 and 28, PTFP funding levels have declined in recent years and, more significantly, the future of PTFP is uncertain in terms of legislative appropriations.

that would receive the spectrum under the condition that it be used to support the services provided by public television stations.[23]

This re-allocation of NTSC spectrum can be done in a manner that is consistent with the Commission's goals of repacking contiguous broadcast spectrum. After the transition and giveback of the NTSC channels, the Commission could designate an equivalent 6 MHz channel for each noncommercial NTSC channel from within the primary broadcast band. Alternatively, the Commission could designate a portion of the contiguous repacked NTSC spectrum to be used to support public television.

While the proposal to use NTSC spectrum to fund public television fits broadly within the Commission's question in the *Fourth Notice* as to how it can support public television's transition to ATV, the Commission may wish to issue a further notice to specifically address Public Television's proposal to re-allocate the reserved NTSC spectrum. In either event, Public Television urges the Commission to fully explore the potential public interest benefits of using noncommercial NTSC spectrum to support continued noncommercial educational services to the American public.

F. Continue Must Carry Requirements for both NTSC and ATV Program Services

As discussed in Public Television's Comments, Section 615 of the Cable Act requires that cable operators carry, subject to certain restrictions, the "signals" of qualified noncommercial stations.[24] The plain meaning of

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23 *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989). *Cf. Mobil Satellite Services*, 6 FCC Rcd 4900 (1991); 7 FCC Rcd 266 (1992).

24 42 U.S.C. § 535 (Supp. 1995).

Section 615 requires the carriage of both the ATV and NTSC signals during the transition period.[25]

Requiring that cable operators carry both ATV and NTSC signals not only furthers the important governmental interests that underlie the 1992 Cable Act[26]—it is also critical to the successful and speedy transition to ATV broadcast services. Assured access by the two-thirds of the television households that are dependent upon cable to ATV/HDTV broadcast services will facilitate the broadcasters' ability to make the investments required for ATV construction and program production, permit broad public acceptance of ATV/HDTV, advance the penetration of reasonably priced ATV sets in the marketplace and ultimately facilitate the transition to ATV.[27] Without such access, the Commission's goal of promoting an efficient transition and recovering and repacking spectrum would be frustrated.

III. Conclusion

In the event that the legislative proposal is not passed by Congress prior to the Commission's final rulemaking in this proceeding, Public

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25 Public Television fully embraces and incorporates by reference the Broadcasters' Reply Comments regarding cable carriage.

26 In *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), the Supreme Court determined that Congress' articulated interests for adopting must carry rules—preserving the benefits of free, over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming—were important government interests sufficient to support the constitutionality of the must carry rules. The three-judge district court recently determined, in a 2-1 decision, that there was substantial evidence in the record to support Congress' judgment that must carry protection would serve these interests. *Turner Broadcasting v. Federal Communications Commission*, No. 92-2247 (D.D.C. Dec. 12, 1995), *appeal filed*, No. 95-992 (U.S. Dec. 21, 1995).

27 Facilitating the Commission's ability to recover and repack commercial spectrum is yet another important or substantial governmental interest, wholly unrelated to the suppression of free expression, that should pass the intermediate level of scrutiny under the First Amendment.

Television urges that the Commission adopt the requested policies and rules to assure the ability of noncommercial stations to continue serving their communities and to facilitate their transition to ATV.

Respectfully submitted,

Marilyn Mohrman-Gillis
Vice President, Policy & Legal Affairs
Lonna Thompson
Director, Legal Affairs
Association of America's Public
Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

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