

recording in an analog form. Reliance on these converters would cement the cable industry's role as gatekeeper and impede the penetration of ATV sets for over-the-air reception of free television. Moreover, the use of incompatible technologies by cable and broadcast media would make the receiving and playback of programs from a digital VCR difficult (if not technically impossible), confusing and expensive.

Alternatively, if cable system and broadcast ATV transmissions were compatible, ATV sets could easily receive and display programming from multiple-service providers. This would speed ATV set penetration and the recovery of the NTSC spectrum. Thus, we urge the Commission to pursue maximum commonality between the cable and broadcast industries in the areas of modulation, transport, packetization structures, and compression protocols.^{47/}

D. THE COMMISSION SHOULD NOT REGULATE RETRANSMISSION CONSENT NEGOTIATIONS WITH RESPECT TO CABLE SIGNAL.

NCTA argues that the Commission should adopt regulations that would restrict broadcasters in negotiating for retransmission consent of their digital signals. NCTA's argument is based on its belief that broadcasters have superior bargaining power "which would result in cable operators having no choice but to concede to demands for carriage of digital broadcast services as the price for gaining carriage of major market network affiliates." There is no factual basis for NCTA's bargaining

^{47/} As discussed in NAB's comments in this proceeding, the FCC has rightly noted the value of a universal digital standard for ATV providers. See Comments of NAB, at 8-10. EIA also recognizes this value: "[w]idespread acceptance of a single standard will facilitate the deployment of ATV by minimizing the equipment that consumers will have to lease or buy to enjoy ATV programming . . . [and spare them] the complexity, confusion and expense of choosing the correct mix of service and equipment." Comments of EIA, at 11. To secure these advantages of a single transmission standard, NAB advocates that the Commission mandate cable's adoption of the ATV transmission standard approved for digital broadcasting.

power argument, and, even if it were true, it would not constitute a sound basis in either law or public policy for the relief NCTA seeks.

The most reliable benchmark of relative bargaining power between broadcast stations and MSO's is the experience of the first round of retransmission consent negotiations in 1993. Before bargaining began, many broadcasters were optimistic that they would succeed in negotiating for cash compensation for retransmission consent. They were all beaten back by cable companies that took the virtually uniform position that they would not pay cash. While a few fortunate and large diversified broadcast companies were able to obtain carriage of new cable program channels in consideration for retransmission consent, most broadcasters received little in return.

Cable is today, and will be for the foreseeable future, the gatekeeper controlling access to major segments of the video audience in every local market in this country. As the Commission recently concluded in its assessment of competition in the market for delivery of video programming, cable systems account for 91% of overall multichannel video programming distributor subscribership and enjoy market power in the vast majority of local markets. The Commission also found that cable basic tier subscribership experienced its largest increase in 1994 since 1990 and achieved a year-end penetration level of 65.2% of homes passed. This penetration gives cable a lock on the mass audience broadcasters must reach as a matter of their economic survival and explains why the bargaining power advantage in retransmission consent negotiations clearly rests with cable.

To give NCTA's position any force, these facts would have to be turned on their head. Even assuming, for the sake of argument, that broadcasters did enjoy

superior bargaining power in negotiating with MSO's, that advantage would not translate into a need for regulation. "Bargaining power" does not equate to "market power" in the antitrust sense, and, in the absence of such market power, there is no rationale for government intervention in marketplace negotiations. Regardless of the popularity of its particular program offerings, no broadcast station today has the ability, in the face of enormous competition from other program suppliers and shrinking audience shares, to impose its retransmission consent "will" on a cable operator. As noted above, the results of the 1993 round of retransmission consent negotiations demonstrate that cable extracted more value from the bargain than broadcasters.

III. LIMITATION OF INITIAL ELIGIBILITY TO BROADCASTERS

A. ASSIGNING 6 MHZ CHANNELS TO PROVIDERS OF THE PUBLIC'S FREE TELEVISION SERVICE IS MANDATORY FOR HDTV OPTION.

The Fourth NPRM reached the tentative conclusion that the Commission is "not precluded by Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), from limiting initial eligibility to incumbent broadcasters, even if [it] permit[s] flexible use of the digital system and especially since the broadcasters' 'analog' operations will be shut down and one of the channels will be relinquished." Fourth NPRM, at 13. This has been broadcasters' consistent position;^{48/} and we advance it now in response to the few commenters that question this reasoning.^{49/} We join in their desire to assure that the transition to digital will produce public benefits. For the reasons described above (p. 1),

^{48/} See Joint Comments at 16 (citing Joint Broadcaster Comments, MM Docket 87-268 (November 30, 1988), at 7-10; Joint Broadcaster Comments, MM Docket No. 87-268 (December 20, 1991), at 12-13.

^{49/} See Comments of Home Box Office, at 8; Comments of GI, at 8; Comments of Seniors' Advocate, at 3; Comments of MAP, at 8-13; Comments of the Alliance for Community Media, at 21-25.

we believe it will. However, their proposals to open the licensing of ATV channels to all comers would seriously cripple the chances for these benefits to be realized on a nationwide basis by all Americans.

The comments of MAP suggest that 6 MHz may not be necessary for digital television service, and narrower SDTV channels could be created and assigned for broadcasters to transmit ATV. The MAP proposal would jettison this country's world-leading Grand Alliance transmission technology, permanently deprive the public of the opportunity for broadcast HDTV, and delay for years the introduction of any digital television services by broadcasters. The Grand Alliance transmission system, which is based on 6 MHz channels, is the result of almost 10 years of public and private sector work, including system development, laboratory testing and field testing. The Advisory Committee's final recommendation to the FCC concludes that the Grand Alliance not only fulfills the requirements for the U.S. ATV broadcasting standard but is "superior to any known alternative system." Revising the standard to specify narrower channels across the board would be a daunting task. New prototype hardware would have to be developed, lab tested and field tested to determine the real-world feasibility of this approach. Such activity would add years (and millions of dollars) to the development of ATV and might stall such development altogether. It would also postpone the availability for auction of reclaimed television spectrum for the foreseeable future.

Most importantly, the assignment of narrower channels would deny the public the opportunity to choose whether or not HDTV is to be its preferred video service -- a choice that MAP has stated it believes consumers, not the government, should be permitted to make. If the Commission were to adopt the "condominium" approach to ATV channel allotments MAP advocates, the public would be permanently

deprived of the opportunity to choose HDTV over other digital television applications, because no licensee would have access to the full six megahertz required for HDTV. MAP simply cannot have it both ways. If broadcasters are not given the opportunity to implement HDTV using their six megahertz transition channels, free, over-the-air broadcast television, will be forever relegated to second-class digital television service, trailing what broadcasting's competitors now offer and will deliver in the future.^{50/} Because the public's free, local service can only survive if it does transition to digital, the MAP proposal could even lead to the ultimate demise of free, over-the-air broadcasting entirely by imposing an irremediable competitive disadvantage.

To the extent that MAP's or any other proposal would require auctioning the transitional digital broadcast channels, it should be rejected. The disastrous effects auctioning the ATV spectrum would have on the development of ATV were discussed both in oral presentations made at the Commission's En Banc Hearing on Digital Television, on December 12, 1995, and in associated written statements.^{51/} Because an auction approach cannot be implemented under the Commission's current legal authority,

^{50/} In this regard, the situation in this country is entirely different from the one that exists in the United Kingdom, where the "condominium" approach to digital spectrum is under serious consideration by the government. In the U.K., cable penetration stands at 4% of television households, in contrast to 66% in the U.S. (Source: European Cable Communications Association, December 31, 1994) Thus, U.K. broadcasters will be able to continue to compete effectively without the ability to offer true high definition quality pictures and CD quality sound. Moreover, the European continent already enjoys higher quality pictures using their 8 MHz channels and its policy toward HDTV implementation has been widely regarded as a failure.

^{51/} See, e.g., Statement of Ralph W. Gabbard, on behalf of the National Association of Broadcasters (November 28, 1995), at 18-19. See also Remarks of Edward T. Reilly at the MSTV Ninth Annual ATV UPDATE (November 9, 1995). These effects include preventing the insertion of an ATV channel for every existing NTSC channel in the broadcast spectrum, irreparably disrupting the public's NTSC service through interference, and precluding the efficient repacking of the NTSC spectrum when the transition is complete.

it is beyond the scope of this proceeding and will not be addressed in these reply comments, beyond stating our opposition thereto.

**B. THE COMMISSION HAS THE AUTHORITY
TO RESTRICT INITIAL ELIGIBILITY.**

The Commission should continue to rest assured of its authority to assign the transitional ATV channels preliminarily to existing broadcasters. The Communications Act gives the Commission broad authority to define permissible uses of the spectrum. Under Section 309 of the Act, as applied by the Supreme Court in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Commission may set licensee eligibility standards and dismiss ineligible applicants without hearings. It may also, under 47 U.S.C. § 316, modify existing licenses as the public interest requires. The plain language of the Communications Act thus grants the Commission significant powers to act consistently with the "public interest, convenience and necessity." 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 does not impede the exercise of this authority to license existing broadcasters to upgrade the public's free broadcasting service by using new

technologies to respond to public demand.^{52/} 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).^{53/} Moreover, once licenses have been assigned, Ashbacker does nothing to undercut the Commission's legal authority to determine what type of services can be offered on a licensed station.

The Commission has a reasoned, public interest basis, supportable by an appropriate record, to find that transitional ATV channels should be assigned initially to existing broadcasters and that technological possibilities and public demand should drive the content of the ATV service. Licensed broadcasters are in the unique position to assure a smooth and unbroken terrestrial broadcast transition to ATV. As envisioned by the channel-by-channel allotment/assignment plan, this transition can achieve the most efficient use of the spectrum, *i.e.*, the most new service to the public, the least disenfranchisement of current viewers, and the smallest amount of interference to existing service. Providing the initial eligibility for incumbent broadcasters will ensure that the public has a chance to view HDTV and other ATV applications and to shape the free broadcast service it desires.

^{52/} Title I of the Communications Act charges the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide...radio communications 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).

^{53/} See also 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 non-local applicants for ITFS station where it previously decided under its rulemaking authority to give preference to local applicants).

The possibility that the ATV channel could be used for HDTV broadcasts, multiple SDTV broadcasts or other uses in no way detracts from the vision of ATV as an enhanced replacement for today's television service. The critical point here is that the ATV channel replaces the NTSC channel. One commenter suggests that the ATV transitional channel constitutes a new, rather than an upgraded, service because broadcasters will not immediately evacuate the NTSC spectrum and because digital technology provides expanded opportunities and formats for broadcast television.^{54/} The sole purpose of allowing ATV to replace NTSC over a period of time, during which broadcasters will absorb the many added costs of running two broadcast stations instead of one, is to maintain service for those viewers who are slower to purchase ATV sets. Any transition strategy that orchestrated a leap to ATV without such safeguards for consumers would face immediate, and justified, complaint that it had disserved the public interest. Program offerings on the transitional channel are likely to duplicate, in higher quality, NTSC programming much of the time. The fact that other, primarily free broadcast services (and possibly some ancillary subscription services that will augment or support that free programming and for which broadcasters will pay competitive fees to offer) also will be available to the public is an important component of the enhancements in which broadcasters and the public are investing. Consistent with this view, the Commission repeatedly has allowed broadcasters to make ancillary uses of NTSC channels, so long as there was no observable degradation to any portion of the

^{54/} See Comments of MAP, at 8-13.

visual or aural signal.^{55/} A contrary view of Ashbacker that would make continuity of the free over-the-air broadcasting service contingent on the suppression of service enhancements, would not serve the public interest and is contrary to what the law requires.

CONCLUSION

The broad areas of substantial agreement among the commenters describe the course the Commission should take in assigning 6 MHz transitional channels to existing broadcasters for the roll-out of ATV and in fostering the rapid exposure of ATV's benefits to the entire public. Cable carriage of ATV broadcast material is critical to the Commission's goals. Without such carriage, the majority of the public will not be assured access to their local broadcast programming and the transition to digital television broadcasting will be delayed or stymied. The policies underlying the Communications Act support the application of must carry rules to the ATV channel's

^{55/} 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.

broadcast offerings. Neither Ashbacker nor any other legal doctrine prevents the Commission from making the channel assignments to existing broadcasters.

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