

**Before the
FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

In the Matter of)	
)	
Ancillary or Supplementary Use of)	MM Docket No. 98-203
Digital Television Capacity by Noncommercial)	
Licensees)	
)	

REPLY COMMENTS OF UCC, *et al.*

The Office of Communication of the United Church of Christ, Inc., the Alliance for Community Media, the Benton Foundation, the Center for Media Education, Independent Television Service, Libraries for the Future, Media Access Project, Native American Public Telecommunications, Inc., and the Screen Actors Guild ("UCC, *et al.*") respectfully submit the following reply comments in the above referenced docket. This reply will primarily address the comments of America's Public Television Stations (APTS) and briefly address the comments of National Datacast, Inc. ("National Datacast"), the for-profit data subsidiary of the Public Broadcasting Service.

INTRODUCTION

UCC, *et al.* agree with APTS that noncommercial broadcasters have been at the forefront of developing innovative digital technologies that serve the public. UCC, *et al.* also recognize this is a capital-intensive undertaking, and that Congress has not provided adequate annual funding for public broadcasting to accomplish the task.

However, UCC, *et al.* and APTS disagree on one fundamental issue - whether the Commission may, under Section 399B of the Communications Act, permit noncommercial broadcasters to provide ancillary or supplementary services which include commercial advertisements. Neither APTS, nor any of the noncommercial broadcasters filing in this docket, have rebutted UCC, *et*

al.'s comprehensive showing that Congress, while intending to permit noncommercial broadcasters to engage in profit making ventures, drew the line at commercial advertisements.

In asking for this unprecedented relief, APTS and other public broadcasters are, in essence, saying - "trust us, we are public broadcasters." To be sure, the vast majority of noncommercial broadcasters are committed to providing a truly noncommercial service and many, if not most, have no interest in providing an advertiser-supported service. But rules prohibiting commercialization of public broadcasting are directed at those who would abuse the privilege of having a noncommercial television license. There is already widespread non-compliance with Section 399B, and no one would dispute that there are many more violations than those the Commission has identified and sanctioned. Even were it legal to grant the relief that APTS seeks, such action would change the very character of public broadcasting by encouraging those "bad actors" to push the line even farther towards a service that is barely distinguishable from commercial broadcasting. National Datacast's cryptic comments point in that direction - asking that the Commission denominate its advertiser-supported service as a primary, rather than an "ancillary or supplementary," service.

I. THE PLAIN LANGUAGE OF SECTION 399B, ITS LEGISLATIVE HISTORY AND SUBSEQUENT ACTIONS DEMONSTRATE CONVINCINGLY THAT CONGRESS HAS NOT AUTHORIZED THE FCC TO PERMIT NONCOMMERCIAL BROADCASTERS TO CARRY COMMERCIAL ADVERTISING.

UCC, *et al.*'s initial comments discuss, in great detail, Congress' express prohibition on noncommercial broadcasters' carriage of advertisements in Section 399B and why it prohibits the Commission from permitting noncommercial stations from carry advertising, even on subscription services. UCC, *et al.* Comments at 4-13. That section states mandates that "No public broadcast

station may make its facilities available to any person for the broadcasting of any advertisement."

47 USC §399B(b)(2). An advertisement is defined as

any message or other programming material which is broadcast or ***otherwise transmitted*** in exchange for any remuneration, and which is intended -

(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit:

(2) to express the views of any person with respect to any matter of public importance or interest; or

(3) to support or oppose candidates for political office.

47 USC §399B(a) (emphasis added).

Remarkably, APTS does not explicate the plain language prohibition of Section 399B(b)(2), saying only that

advertiser-supported non-broadcast services (including subscription television) are permissible under the clear language of Section 399B....APTS also believes that, in the digital context, Section 399B reaches only the basic broadcast service of a public television station, not any ancillary or supplementary service (whether broadcast or non-broadcast in nature).

APTS Comments at 24.

Instead of speaking to the relevant provisions, APTS limits its discussion to two different passages in Section 399B. The first is Section 399B(b)(1), which states that, with the exception of the ban on advertising in Section 399B(b)(2), "each public broadcast station shall be authorized to engage in the offering of services, facilities or products in exchange for remuneration." 47 USC §399B(b)(1). See APTS Comments at 13-14. The second passage is the last sentence of Section 399B(c), which reads in its entirety:

Any public broadcast station which engages in the activity specified in subsection (b)(1) may not use any funds distributed by the Corporation [for Public Broadcasting] under section 396(k) to defray any costs associated with such offering. ***Any such offering*** by a pub-

lic broadcast station shall not interfere with the provision of public telecommunications services by such station.

47 USC §399B(c). (emphasis added) See APTS Comments at 21.

APTS is simply wrong. Neither of those passages gives the Commission the authority to permit noncommercial broadcasters to transmit commercials over their digital TV bitstreams. UCC, *et al.* agree with APTS that Section 399B(b)(1) was Congress' "recogni[tion] that providing public television stations with additional revenue sources to support their mission-related activities is in the public interest." See APTS Comments at 13. But what is more important is what APTS omitted: that provision expressly precluded public broadcasters from obtaining those "additional revenue[s]" from the sale of commercial advertising. It stated that public TV stations are authorized to engage in profit making activities "[e]xcept as provided in [Section 399(b)(2)]...." 47 USC §399B(b)(1).

Section 399B(2)(c) is similarly limited. While APTS views noncommercial broadcasters' discretion to operate profit making ventures to be constrained only by that section's prohibition against "interference with the provision of public telecommunications services by [a] station," that prohibition, too, modifies only the phrase "activity specified in subsection (b)(1)." Section 399B(b)(2) stands alone as an unmodified prohibition on noncommercial broadcasters "mak[ing] its facilities available to any person for the broadcasting of any advertisement."

While APTS concludes that "it is th[e] single basic [analog] broadcast service that Congress **presumably** sought to insulate from advertising and the pressures to maximize audience size that accompany it, APTS Comments at 24 (emphasis added), there is nothing in the plain language or legislative history of Section 399B or Section 336 that lends any credence to that interpretation.

See *UCC et al. Comments* at 6-9. As *UCC, et al.* has demonstrated, Congress has on a number of occasions declined to permit noncommercial broadcasters to conduct advertiser supported services. And, even when a Congressionally-created task force conducted a study of the issue and recommended legislation to modify the blanket ban on advertising, Congress declined to do so. *UCC, et al. Comments* at 9-13. More recently, Congress passed up yet another opportunity to give express authority to noncommercial TV stations to carry commercials when as part of the 1996 Telecommunications Act.

II. THE COMMISSION HAS NOT EXPLICITLY PERMITTED NONCOMMERCIAL BROADCASTERS TO CARRY COMMERCIALS UNDER SECTION 399B.

In the face of unequivocal and express Congressional rejection of advertiser-supported public broadcasting, APTS seeks support from a series of 1980's-era decisions in which the Commission, *inter alia*, permitted broadcasters to use their analog Vertical Blanking Interval ("VBI") for remunerative services. *APTS Comments* at 22-25, *citing, inter alia, Transmission of Teletext by TV Stations*, 48 Fed. Reg. 27054 (1983); *Shared Use of Broadcast Auxiliary Facilities*, 93 FCC2d 579, 578 (1983); *Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters*, 49 Fed. Reg. 18100 (1984).

In these decisions, APTS states, "***the Commission did not even suggest that such services would be subject to the advertising ban of Section 399B.***" *APTS Comments* at 25 n. 47. (emphasis added)

It is worthwhile to take note of how carefully and artistically APTS has phrased its argument to evade its flaws. The simple fact is that in not one of these decisions did the Commission ever squarely address the issue of whether Section 399B(b)(2) prohibits advertiser supported ser-

vices on the VBI. Each decision that APTS cites is very precise, and quite clearly avoids any such an analysis, instead permitting noncommercial broadcasters to engage in services for "remuneration" or on a "for-profit basis," but always specifying that the activity must be **consistent with Section 399B**. Transmission of commercial advertising is never mentioned. For example, in the *Broadcast Auxiliary Facilities* decision, the Commission said that:

We are of the opinion that broadcast licensees should be permitted to offer the excess capacity of their auxiliary facilities to others on a for-profit basis. Several factors lead us to this conclusion. First, it clearly reflects the intent of Congress in its recent decision to permit noncommercial broadcast stations to offer their facilities to others for remuneration.

Shared Use of Broadcast Auxiliary Facilities, 93 FCC2d 570, 578 (1983). [footnote citing 47 USC §399B(b)(1) omitted].

The *Teletext* decision reads similarly:

This action [authorizing public broadcasters to engage in profit-making teletext services] also reflects recent shifts in policy toward public broadcasting that have been enacted by Congress. It is clear from the Public Broadcasting Amendments Act of 1981 that Congress does intend, and expect, public television stations to provide more of their own support****We believe that authorization of profit oriented teletext service by public broadcasters is consistent with the applicable statutory requirements and authorizations.

Transmission of Teletext by TV Stations, 48 FR 27054 ¶¶50-51. *Accord*, *Use of Subcarrier Frequencies in the Aural Baseband of Television Transmitters*, Notice of Proposed Rulemaking, 48 FR 37475 ¶15 ("The general intent of Section 399B is clearly to permit public broadcasters to pursue commercial ventures on a broad front in order that they might provide an increasing contribution to their own support in the face of declining federal financial backing").¹

¹The strongest support that APTS can find for its argument that the Commission has permitted advertiser-supported ancillary services on noncommercial stations is the Commission's vague statement that public television stations "are permitted the same discretion with respect to services and technical systems as commercial stations." *Transmission of Teletext by TV Stations*, 48 FR 27054 ¶50. Read in conjunction with the remainder of the relevant holding, discussed above, this state-

The cases APTS sights are distinguishable for another reason - it would be arbitrary and capricious for the Commission to apply decisions that affect a minuscule slice of analog capacity used only for text and data services, to digital TV services that could use perhaps as much as 80% of the bitstream at any one time,² for services that would include text, data, broadband and most importantly, video services.³

III. THE COMMISSION SHOULD PERMIT NO MORE THAN 50% OF A PUBLIC BROADCASTERS DIGITAL TV CAPACITY TO BE USED FOR REMUNERATIVE SERVICES AT ANY PARTICULAR TIME.

APTS is evasive about its members' plans to engage in advertiser supported ancillary or supplementary services, claiming that "it is unclear whether and to what extent public television stations will in fact provide any ancillary or supplementary services that would involve advertiser-supported broadcasting." APTS Comments at 25.⁴ It is equally ambiguous about how much of its digital capacity its members plan to commit to subscription and other remunerative services

ment cannot be interpreted to give express permission for noncommercial broadcasters to transmit commercials under Section 399B(b)(2). Moreover, while the text of the regulations adopted in that proceeding as 47 CFR §73.646(c) stated that "the kinds of services teletext may be used to provide include, but are not limited to, advertiser-supported consumer information, subscription data services and business-oriented information," *id.* at Appendix B, the Commission specifically deleted that very language just two years later when it permitted new services on the VBI. *Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, 101 FCC2d at 973, 986 (1985).

²This assumes that a broadcaster can use 20% of its bitstream, approximately 4 Megabits per second, to provide one free, over-the-air signal of similar quality to today's analog picture. With improvements in compression technology, a broadcaster may be able to transmit such a picture using even less of its capacity in the future.

³National Datacast's emphasis on the fact that it provides for-profit data as opposed to video programming services appears as if it believes that at the very least, noncommercial broadcasters cannot provide advertiser-supported video programming. National Datacast Comments at 1.

⁴Whether APTS members plan to provide advertiser-supported services is of course irrelevant to the question of whether the Commission has the authority to permit them to do so.

at any particular time, avoiding the Commission's request for comment on how it should implement Section 73.621 of the Commission's rules, which states that noncommercial stations "will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community." 47 CFR §73.621(a); see *NPRM* at ¶132.⁵

The Commission should not leave this matter unresolved, because that would essentially delegate the outcome to a private negotiation among APTS and its members. Instead, it should draw a bright line and find that a noncommercial broadcaster "primarily" serves the educational needs of a community when it provides free, not-for-profit over-the-air services over 50% or more of its digital TV capacity at any one time. This will give public broadcasters the broad opportunity to develop revenue enhancing services as Congress intended, while ensuring that the fundamental noncommercial educational character of public broadcasting is not compromised.

IV. UNDER NO CIRCUMSTANCES CAN THE COMMISSION PERMIT ADVERTISING ON NONCOMMERCIAL BROADCASTERS FREE OVER-THE-AIR SERVICES.

UCC, et al. will not restate here their extensive explanation as to why the Commission's proposal to extend its flawed *Subscription Video* decision to permit noncommercial broadcasters to provide advertiser-supported subscription services is wrong as a matter of law. *UCC, et al. Comments* at 6-8. However, even assuming *arguendo* that the Commission could ever permit such advertiser-supported subscription services over public broadcast stations, it may not, for the

⁵Tellingly, the Commission makes no reference to the other requirements for licensing non-commercial educational stations set forth in the rule, *i.e.*, "for the advancement of educational programs; **and to furnish a nonprofit and noncommercial television broadcast service.**" 47 CFR §73.621(a) (emphasis added).

reasons discussed at length in UCC, *et al.*'s Comments at 4-13, permit such services on noncommercial stations' free over-the-air services.

The comments of National Datacast are, at best, unclear, but they appear to ask the Commission to do just that by declaring that its advertiser-supported for-profit data services are not "ancillary or supplementary." National Datacast Comments at 4.

The Commission should reject National Datacast's request out-of-hand. Even the most generous reading of the law and FCC jurisprudence does not permit the conclusion that public broadcasters transmit advertiser-supported data as a primary free over-the-air television service.

CONCLUSION

The Commission is authorized to give public broadcasters great latitude in the provision of ancillary or supplementary digital TV services, but they are required to draw the line at advertiser-supported services. The Commission should therefore permit noncommercial broadcasters to provide remunerative ancillary or supplementary services over their digital TV spectrum, as long as

- a majority of their digital TV capacity is dedicated at any one time to free over-the-air service;

and

- those services are not used for the carriage of commercial advertisements.

Respectfully submitted,

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