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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the Matter of	)	
Fees for Ancillary or Supplementary Uses of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996	)	MM Docket No. 97-247

To: The Commission

REPLY COMMENTS OF VALUEVISION INTERNATIONAL, INC.
AND HOME SHOPPING NETWORK, INC.

ValueVision International, Inc. ("ValueVision")[1/] and Home Shopping Network, Inc. ("HSN")[2/] respectfully submit these reply comments in the above-captioned proceeding.

Introduction and Summary

In their comments, the Office of Communication of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum, and the Media Access Project (collectively, "UCC, *et al.*") suggest that Section 201 of the Telecommunications

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1/ ValueVision is the third-largest televised shopping network. It provides televised shopping programming to over 17 million homes, through broadcasts by full and low power television stations as well as carriage agreements with cable systems.

2/ HSN sells a variety of consumer goods and services over two networks, delivered to approximately 70 million households via cable television systems, broadcast television stations, and satellite dish receivers.

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Act of 1996 (the "Act")[3] permits the Commission to charge digital television stations a fee if they broadcast televised shopping programming in return for compensation from a third party.[4] No other commenter has advanced such a view, and the Commission's Notice of Proposed Rulemaking did not suggest any such discrimination based on the content of free, over-the-air digital broadcasts.[5]

As set forth below, UCC, *et al.*'s view of the 1996 Act is plainly wrong. Congress imposed fees only on the use of DTV for "ancillary or supplementary" services. The language of the Act, its legislative history, and the Commission's prior interpretation of it make clear that this term was not intended to refer to traditional, over-the-air broadcasting formats such as televised shopping programming. In any event, even if televised shopping programming were an "ancillary or supplementary" service, it would fall within the Act's exception for commercial advertisements and thus would not be feeable. Finally, the Act did not intend to discourage television direct marketing programmers from implementing new technologies to facilitate televised shopping by their viewers. The incentive to invest in the development of an on-screen order mechanism for televised shopping products (which is currently being explored) would be significantly diminished if this traditional broadcast format were transformed into a feeable DTV service simply because the program replaces telephone orders with a more convenient procedure.

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[3] Act of February 8, 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 336(e)(1).

[4] Comments of UCC, *et al.* at 12-14 (May 4, 1998).

[5] *See Fees for Ancillary or Supplementary Use of Digital Television Spectrum, Notice of Proposed Rulemaking*, 12 FCC Rcd 22821 (1997) (hereinafter "*Notice*").

Such a result would be squarely at odds with the Act's goal of encouraging technological improvements and promoting competition, by handicapping DTV broadcasters as competitors with the burgeoning array of "e-commerce" services that will be offered over the Internet.

I. THE FEE MECHANISM OF SECTION 336(e)(1)(B) WAS NOT INTENDED TO APPLY TO TRADITIONAL OVER-THE-AIR BROADCASTING FORMATS SUCH AS TELEVISED SHOPPING PROGRAMMING.

Section 336(e)(1)(B) of the Communications Act, added by the 1996 Act, requires the Commission to assess and collect a fee for the offering of "ancillary or supplementary services" by digital television stations, where the licensee "directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party." 47 U.S.C. § 336(e)(1)(B).[6] Section 336 does not define the term "ancillary or supplementary services." However, the plain meaning of that term and the legislative history of the Act make clear that Congress did not intend it to include traditional free over-the-air broadcasting formats such as televised shopping programming. Such broadcast programming is neither "ancillary" nor "supplementary;" it is the essence of what the station broadcasts.[7]

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[6] As noted in part II below, "commercial advertisements" are exempt from this fee provision, provided that such advertisements are used "to support broadcasting for which a subscription fee is not required." 47 U.S.C. § 336(e)(1)(B).

[7] Interpreting "ancillary or supplementary services" so as to exclude what is contained in the over-the-air broadcast is also consistent with other provisions of the statute. Unless the broadcaster charges a fee, Section 336(e)(1)(B) permits the Commission to charge a fee for ancillary or supplementary DTV services only when "a third party" compensates the station for "transmitting material." If this statutory provision were interpreted to include the provision of traditional broadcast programming by networks or other program suppliers, it would result in arbitrarily disparate treatment between stations owned and operated by such networks and

Congress enacted Section 336(e)(1) against the backdrop of the Commission's then pending DTV proceedings. It was well aware of those proceedings, and in fact made specific reference to them in Section 336.[8] In the absence of contrary indication, "we assume that when a statute uses [a term of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

At the time of consideration of the 1996 Act, the Commission's DTV proceedings had begun to address what it characterized as "ancillary and supplementary" uses of DTV spectrum. In its *Fourth Further Notice*,[9] released six months before enactment of the 1996 Act (while Congress was considering the bill that was ultimately enacted), the Commission referred to such "ancillary and supplementary uses" as "uses other than free, over-the-air broadcasting."[10] The Commission also noted that Congress was then considering proposals "to require licensees to pay annual spectrum fees" for DTV service, which would only apply "where licensees charge the public for the *new services* provided on the [DTV] conversion channels."[11]

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stations merely affiliated with such "third parties," which typically provide stations with some form of affiliate compensation for broadcasting their programming. Such an interpretation of the statute should be rejected because it would "lead[] to absurd or futile results." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 121 (1988).

[8] Section 336(g)(1) defines "advanced television services" as "television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled 'Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service', MM Docket 87-268, adopted September 17, 1992, and successor proceedings." 47 U.S.C. § 336(g)(1).

[9] *Advanced Television Systems, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry*, 10 FCC Rcd 10540 (1995) ("*Fourth Further Notice*").

[10] *Id.* at 10544.

[11] *Id.* at 10544 n.23 (emphasis added).

Thus, during consideration of the 1996 Act, the Commission had coined the term "ancillary and supplementary services" to refer to these new kinds of services, outside the scope of free, over-the-air broadcasting. The Commission had also consistently recognized that televised shopping programming was a form of free over-the-air broadcasting that served important public interests.[12] When Congress passed the Act in 1996 and incorporated in Section 336 the terms "ancillary" and "supplementary services" used by the Commission in the DTV proceedings, it clearly understood that those terms were limited to new kinds of services and did not intend them to refer to traditional broadcast formats such as televised shopping programs.

The Commission's interpretation of Section 336(e)(1) subsequent to the Act's passage confirms this interpretation. In the *Fifth Report and Order*, the Commission once again defined the term "ancillary or supplementary services" -- by that time codified in the Act -- as "any service provided on the digital channel *other than free, over-the-air services.*"[13] The Commission's list of potential examples of ancillary or supplementary services does not include any such services: "subscription television programming, computer software distribution, data

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[12] In 1984, the Commission permitted the introduction of televised shopping formats by rescinding its prior policy prohibiting program-length commercials. *Revision of Programming and Commercialization Policies*, 98 FCC 2d 1075, 1102 (1984), *recons. denied*, 104 FCC 2d 357 (1986), *rev'd in part on other grounds*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). Nine years later, the Commission found that "the record clearly demonstrates that market forces have revealed a desire among a significant number of television viewers" for such programming. *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5321, 5326-27 (1993) (finding that televised shopping broadcast stations serve a wide variety of public interest needs and thus qualify as local commercial television stations for purposes of mandatory cable carriage).

[13] *Advanced Television Systems, Fifth Report and Order*, 12 FCC Rcd 12809, 12821 (1997) (emphasis added) (hereinafter "*Fifth Report and Order*").

transmissions, teletext, interactive services, audio signals, and any other services that do not interfere with the required free service."[14] In sum, the Commission proceedings to which the Act referred, the language of the Act, and the Commission's subsequent interpretation of it make clear that the term "ancillary or supplementary services" was not intended to include traditional formats (such as televised shopping) already provided by broadcasters as free, over-the-air NTSC service. UCC *et al.* provide no showing to the contrary.[15]

II. EVEN IF TELEVISED SHOPPING PROGRAMMING WERE AN ANCILLARY OR SUPPLEMENTARY SERVICE, IT WOULD FALL WITHIN THE ACT'S EXCEPTION FOR COMMERCIAL ADVERTISEMENTS.

"Ancillary or supplementary services" are not feeable under Section 336(e)(1)(B) if they involve "commercial advertisements used to support broadcasting for which a subscription fee is not required." 47 U.S.C. § 336(e)(1)(B). The Commission has long recognized that televised shopping programming is a form of commercial advertising, payment for which is obviously "used to support broadcasting." It was in fact the Commission's 1984 lifting of the limits on commercial advertising that led to the introduction of televised shopping formats, as the Commission recognized in its 1993 decision to extend must carry obligations to televised

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[14] *Id.*

[15] UCC, *et al.* suggest (at 13 & n.8) that television direct marketing and other similar arrangements are feeable because the Commission stated that "feeable ancillary or supplementary services may be offered simultaneously with other services," *Notice*, 12 FCC Rcd 22821, ¶ 8. But televised shopping programming is not offered "simultaneously" with broadcast programming; it *is* the broadcast programming. Moreover, the Commission's statement was not an effort to define feeable services; it was simply an acknowledgment that some of such services (*e.g.*, data transmission) may be offered simultaneously with traditional broadcast services.

shopping stations.[16] Similarly, in its decision that same year to reexamine its lifting of commercial limits,[17] the Commission viewed televised shopping as a form of "program length commercials."[18] Thus, the Commission's previous treatment of televised shopping programming establishes that such programming has been treated as commercial advertising, and should be exempt from fees under Section 336(e)(1). This interpretation is also consistent with the First Amendment. It ensures that the Commission does not impose substantial fees based upon the licensee's choice of programming.[19] The Commission has already recognized the important First Amendment considerations counseling against discrimination in regulatory treatment based on the provision of televised shopping programming.[20]

16/ *See* note 12 *supra*.

17/ *Limitations on Commercial Time on Television Broadcast Stations*, 8 FCC Rcd 7277 (1993).

18/ *Id.* at 7277 n.7.

19/ *See, e.g., Turner Broad. Sys. v. FCC,* 512 U.S. 622, 641-42 (1994) ("[T]he First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.") (citations omitted).

20/ *See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5321, 5329 (1993) (noting that it would raise serious constitutional questions to base eligibility for must carry "upon [the stations'] programming decisions").

III. THE COMMISSION SHOULD NOT DISCOURAGE THE DEVELOPMENT OF ON-SCREEN TELEVISED SHOPPING PROGRAMMING BY TREATING SUCH PROGRAMMING AS A FEEABLE SERVICE.

As shown above, it is clear that the fee provisions of Section 336(e)(1) were not intended to apply to traditional televised shopping programming, in which viewers purchase products by calling a telephone number identified during the broadcast. New technologies may provide viewers with alternative means of purchasing televised shopping products. In their comments, however, UCC, *et al.* suggest that televised shopping programming would be subject to fees in situations where a DTV viewer purchases the very same product based on the very same broadcast, if the viewer clicks on a special icon displayed on the television screen, instead of placing an order by telephone.[21]

The inclusion of this on-screen order feature does not change the fundamental nature of televised shopping programming as a free, over-the-air broadcasting format, and not a feeable "ancillary or supplementary" service. Allowing viewers to place their televised shopping orders on-screen (rather than having to do so by telephone) would simply add a convenience that would be integrated directly into the television broadcast. In this respect, it differs significantly from wholly unrelated "interactive services" (such as data transmission) that may be subject to fees under Section 336.[22]

Imposing fees on the broadcast of televised shopping programming that offers viewers this on-screen order feature would also be inconsistent with other provisions of the

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[21] Comments of UCC, *et al.* at 13-14.

[22] *See* pages 5-6 *supra*, quoting 12 FCC Rcd at 12821.

Communications Act. Section 7 of the Act states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. The 1996 Act itself is designed to "promote competition" and "encourage the rapid deployment of new telecommunications technologies."[23] To this end, Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[24] Imposing fees whenever telephone orders are replaced with on-screen orders would thwart these legislative purposes by discouraging televised shopping programmers from investing in new and innovative technology. It would also thereby fail to "promote competition" by DTV broadcasters to the growing use of Internet services for the sale of products through "e-commerce."[25] Because provisions of a statute should be interpreted so as to avoid such inconsistencies, *see Fawn Mining Corp. v. Hudson*, 80 F.3d 519, 522-23 (D.C. Cir. 1996), Section 336 should not be read so as to make traditional televised shopping services feeable simply because televised shopping programmers can develop a way to replace telephone with on-screen orders.

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[23] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (preamble of Act).

[24] Act § 706(a).

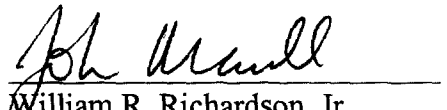
[25] A 1997 Morgan Stanley report estimates that Internet retail sales could reach $115 billion in five to eight years -- the period of time roughly equivalent to the presently contemplated DTV transition. *See* U.S. Dep't of Commerce, *The Emerging Digital Economy Report*, April 1998, ch. 5, at 4 (http://www.ecommerce.gov/danc5.htm).

Conclusion

For the reasons set forth above, ValueVision and HSN urge the Commission to reject the invitation of UCC *et al.* to impose fees for the continued broadcast of free, over-the-air televised shopping formats by DTV stations.

Respectfully submitted,

VALUEVISION INTERNATIONAL, INC.



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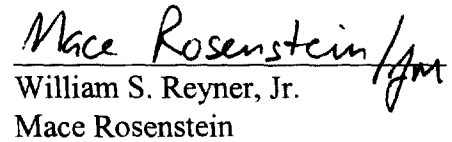

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August 3, 1998

CERTIFICATE OF SERVICE

I, John Maull, hereby certify that a true copy of the foregoing Reply Comments has been served upon the following via first-class, postage prepaid, United States mail this 3rd day of August, 1998:

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