

ORIGINAL

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

In the Matter of)
)
Fees for Ancillary or Supplementary)
Use of Digital Television Spectrum)
Pursuant to Section 336(e)(1))
of the Telecommunications Act of 1996)

MM Docket No. 97-247

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FEDERAL COMMUNICATIONS COMMISSION
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**Reply Comments of the
National Association of Broadcasters and
the Association for Maximum Service Television, Inc.**

The National Association of Broadcasters ("NAB")¹ and the Association for Maximum Service Television, Inc. ("MSTV")² [hereinafter collectively "Broadcasters"] submit this brief reply to the comments received on the Commission's *Notice of Proposed Rulemaking* ("Notice"). In Broadcasters' initial comments, we pointed out that the Commission's stated intention to adopt a fee program that would encourage the development of innovative services on digital television channels comported with Congress' goals in providing for flexible spectrum use on DTV channels. We warned the Commission that its tentative definition of a "feeable" service was both inconsistent with Congressional intent and would engender efforts to impose fees on

¹ NAB is a non-profit, incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

² MSTV is a non-profit membership organization representing more than 330 of the nation's television stations in regulatory, legislative, and judicial proceedings.

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services that should not be subject to such obligations. Broadcasters agreed with the Commission's tentative conclusion that a fee based on gross revenues would be the least intrusive and most easily administered fee program, but proposed that the imposition of any fee be deferred two years from the initiation of a new ancillary service in order to allow broadcasters to experiment with new services without facing immediate fee payment obligations. Finally, Broadcasters proposed that the Commission establish a fee of two percent of gross revenues based on an analysis of royalty payments for patents and other intellectual property rights.

While many comments of broadcasters and others were submitted that proposed different fee levels or ways in which a fee program should be administered, only two sets of comments strongly differed with the Commission's overall policy direction and Broadcasters' basic recommendations. The comments of the National Cable Television Association ("NCTA") and of the United Church of Christ, *et al.* ("UCC") rest on fundamentally incorrect assumptions. Their recommendations for a fee program for digital broadcast ancillary services should be rejected.

NCTA argues that the fees for ancillary and supplementary digital services should be set high in order to avoid giving broadcasters a competitive advantage over other providers of similar services. It was indeed Congress' objective to ensure that if broadcasters provided a service for which competing providers had acquired spectrum at auction, they should pay a fee to bring them as close as possible to competitive equality. However, the *Notice* (§§ 15-16) recognized that it would be futile to try to derive a precise dollar value for spectrum used for ancillary and supplementary services based on past auctions. First, no one is certain what specific ancillary and supplementary services may be offered on digital television channels.

making it impossible to determine which auctions would provide the appropriate benchmarks. Second, unlike previous spectrum auctions, the spectrum used for ancillary and supplementary digital services will almost certainly be used only opportunistically and episodically. Therefore, it is impossible to determine how many bits will be used at any given time for "feeable" services. NCTA in fact does not refer the Commission to any evidence that would suggest a high fee level in order to reflect spectrum prices for spectrum used for comparable services (indeed NCTA has no idea what such comparable services might be). Thus, NCTA's argument in favor of high fees may reflect its desire to discourage the offering of competitive services by broadcasters more than any legitimate fear of unwarranted federal subsidies.

It is particularly striking that NCTA should base its arguments on "comparability" for competing services when the spectrum the cable industry uses for CARS facilities, satellite program distribution, and other functions was obtained free of charge. Because the spectrum cable uses was not acquired at auction, it is hard to imagine how cable operators would be unfairly disadvantaged by broadcasters' provision of ancillary and supplementary services over spectrum for which broadcasters *will* pay. Further, while NCTA points to the fact that cable companies must pay franchise fees of up to five percent (NCTA Comments at 5), it fails to note that at the same time that Congress authorized flexible spectrum use for digital television broadcasters, it barred franchise authorities from imposing fees on non-cable services. Telecommunications Act of 1996, Pub. L. No. 104-104, § 303(b); 47 U.S.C. § 542(b). Contrary to the impression left by NCTA's Comments, therefore, the imposition of any fees on broadcasters' digital ancillary and supplementary services could not create a competitive disadvantage for cable operators wishing to provide similar services.

UCC argues that the Commission incorrectly views avoiding disincentives to the provision of digital ancillary and supplementary services as one of its goals in this proceeding. It argues that the sole policy objective Congress established was the avoidance of "unjust enrichment" by broadcasters. UCC Comments at 2-3. Its cramped reading of the Telecommunications Act belies Congress' policy goals. Had Congress wished to discourage or prevent broadcasters from flexible use of digital television channels, it would not have enacted Section 336 of the Communications Act which specifically requires the Commission to authorize such services. As the Commission has also long recognized, the public interest strongly favors innovative uses of already assigned spectrum to provide additional services more efficiently without the need for allocation of new spectrum.³ Thus, the policy set forth in the *Notice* of encouraging the development of ancillary and supplementary uses of digital television channels – consistent with their primary use for free, over-the-air television service – is fully in line with Congress' intent.

UCC's punitive view of the fee requirement leads it to propose an extraordinarily excessive definition of a "feeable" service. UCC (Comments at 3, 12-15) proposes that virtually any revenue broadcasters receive, other than direct payments for advertising time, be deemed to be revenues subject to fees. Nothing in the statute or legislative history supports such an expansive definition of a "feeable" service, and UCC provides no policy justification for such a radical transformation of broadcasters' permitted business transactions.

³ See, e.g., *Subsidiary Communications Authorizations*, 54 RR 2d 1519, 1523 (1983). A recent example is the introduction of wireless telephone service by Nextel which uses frequencies originally allocated for taxi dispatch service. Following UCC's rationale, the Commission should have either barred Nextel from providing such service or imposed new conditions or fees on Nextel. The Commission chose to do neither, recognizing the public benefits from increased competition in the wireless telephone market.

UCC's proposal entirely ignores the clear language in the House Report on the Telecommunications Act which defines a "feeable" service as one for which "compensation fees apart from advertising *are required in order to receive such services.*" H. REP. NO. 204, 104th Cong., 1st Sess. 117 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 85 (emphasis added). Thus, in order for a service to be subject to fees, it must not only be supported by non-advertising revenue, but the receipt of that revenue must be required as a condition of the viewer obtaining the service in the first place. Thus, UCC's proposal that per-inquiry and other payments for advertising dependent on viewer response – such as income from home shopping services – should be subject to fees must be rejected because those payments are not conditions of access to television service.

Similarly, UCC ignores the fact that fees are only to be applied to ancillary and supplementary *services*, not – as UCC would have it – any income broadcasters derive from sources UCC apparently finds objectionable. Payments for retransmission consent, for example, relate to broadcasters' primary service and cannot under the statute be deemed to be subject to fees intended only for additional services. Instead, the Commission should impose fees only on receipts from ancillary and supplementary digital services that are obtainable only by subscription or other payment.

Finally, both UCC (Comments at 8-9) and NCTA (Comments at 9) point to royalty rates for extraction rights on federal lands as a model for the Commission to follow in setting a fee for digital ancillary and supplementary services. The analogy to mineral and grazing rights is inapposite to ancillary and supplementary services. First, mineral or other extraction rights that relate to non-renewable resources present a very different economic picture than spectrum usage which does not deplete a public resource. A better analogy are the royalties for various kinds of

intellectual property which were discussed in the Anderson study submitted with Broadcasters' initial comments.

Further, mineral or other extraction royalties, as well as payments for operating concessions on Federal land, typically involve established industries whose success and cost structure can be predicted with confidence. By contrast, the offering of ancillary and supplementary services over digital television channels is highly speculative, and no one can assume which services- if any - may prove to be successful or what the costs associated with such services may be. In those sorts of situations, as the Hausman and Anderson studies submitted with Broadcasters' initial comments demonstrated, royalty payments tend to be low.

The Commission should therefore reject NCTA's and UCC's calls for high fees that would discourage digital broadcasters from offering new and innovative services. Instead, the Commission should adopt a fee program that encourages innovation by deferring fee obligations for two years after a broadcaster commences offering a service and thereafter setting fees at a low

level commensurate with the speculative and risky nature of ancillary and supplementary services.

Respectfully submitted,



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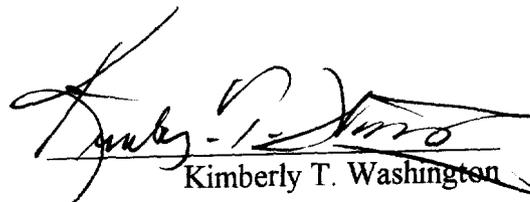
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Certificate of Service

I, Kimberly T. Washington, hereby certify that a copy of the foregoing "Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television Inc.," was sent this 3rd day of August via first class mail, postage prepaid to:

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