

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

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

REPORT AND ORDER

Adopted: November 19, 1998

Released: November 19, 1998

By the Commission:

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I. INTRODUCTION

1. With this *Report & Order*, we establish a program for assessing and collecting fees for the provision of ancillary or supplementary services by commercial digital television ("DTV") licensees as required by the Telecommunications Act of 1996 ("1996 Act").¹ The rules promulgated pursuant to this *Report & Order* implement the criteria of the 1996 Act, establishing a fee of five percent of gross revenues received from certain ancillary or supplementary uses of the DTV bitstream. Consistent with the 1996 Act, the fee will be assessed on revenues from all ancillary or supplementary services for which the licensee receives compensation other than advertising revenues used to support broadcasting.

¹ Pub. L. No. 104-104, 110 Stat. 56 § 201 (1996), *codified at* 47 U.S.C. § 336.

II. BACKGROUND

2. The 1996 Act established the framework for licensing DTV spectrum to existing broadcasters, and permitted them to offer ancillary or supplementary services consistent with the public interest.² In the 1996 Act, Congress directed the Commission to require that any ancillary or supplementary services carried on DTV capacity: (1) must be consistent with the advanced television technology designated by the Commission ("the DTV Standard"); (2) must avoid derogating any advanced television services that the Commission may require; and (3) must, with specified exceptions, be subject to Commission regulations applicable to analogous services.³ Congress also gave the Commission discretion to prescribe

² 47 U.S.C. § 336

(a) COMMISSION ACTION.--- If the Commission determines to issue additional licenses for advanced television services, the Commission --

(1) should limit the initial eligibility for such licenses to persons that as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) CONTENTS OF REGULATIONS. -- In prescribing the regulations required by subsection (a), the Commission shall --

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

³ 47 U.S.C. § 336

(e) FEES

(1) SERVICES TO WHICH FEES APPLY -- If the regulations prescribed pursuant to subsection (a) permit a licensee to offer ancillary or supplementary services on a designated frequency --

(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) COLLECTION OF FEES.-- The program required by paragraph (1) shall--

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

such other regulations with respect to ancillary or supplementary services "as may be necessary for the protection of the public interest, convenience, and necessity."⁴ Moreover, Congress directed the Commission to establish a fee program for any ancillary or supplementary services for which the payment of a subscription fee is required to receive such services or for which the licensee receives any compensation from a third party other than commercial advertisements used to support non-subscription broadcasting (hereinafter referred to as "feeable ancillary or supplementary services").⁵

3. In a number of recent orders, the Commission adopted rules implementing the transition to DTV pursuant to the 1996 Act. In the *Fourth Report & Order*, we adopted the DTV Standard that supports the transmission of High Definition Television ("HDTV"), as well as allowing for the transmission of multiple programs of standard definition television ("SDTV") and non-video services.⁶ This Standard permits the provision of other services, including large amounts of data. For example, a DTV licensee will be able to transmit "telephone directories, stock market updates...computer software distribution, interactive education materials or virtually any other type of information."⁷ The DTV Standard "allows broadcasters to send video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another."⁸

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act and the Commission's regulations thereunder; and
(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

(3) TREATMENT OF REVENUES. --

(A) GENERAL RULE. -- Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code.

(B) RETENTION OF REVENUES. -- Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account and shall be deposited in such accounts on a quarterly basis.

(4) REPORT.-- Within 5 years after the date of enactment of the Telecommunications Act of 1996, the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

See also H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996) ("Subsection (d) requires the Commission to establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation fees apart from commercial advertisements are required in order to receive such services.").

⁴ 47 U.S.C. § 336(b)(5).

⁵ 47 U.S.C. § 336(e). See also H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996).

⁶ *Fourth Report & Order* in MM Docket No. 87-268, 11 FCC Rcd 17771 (1996) ("*Fourth Report & Order*").

⁷ *Id.*

⁸ *Id.* Equipment designed to comply with our technical standard requires an entire 6 MHz VHF or UHF broadcast channel for all modes of operation. The Standard also defines a digital bitstream carried within the 6 MHz channel. This bitstream has a usable payload capacity of nearly twenty million bits per second (20 Mbps). It is

4. In the *Fifth Report & Order*,⁹ we assigned the initial DTV licenses and established rules allowing broadcasters to use their DTV capacity to provide ancillary or supplementary services which "do not interfere with the required free service."¹⁰ We stated that the DTV licensees' ability to provide ancillary or supplementary services in addition to the mandated free television service "allow[s] the broadcasters flexibility to respond to the demands of their audience" for such services.¹¹ This flexibility "should encourage entrepreneurship and innovation"¹² and will give "broadcasters the opportunity to develop additional revenue streams from innovative digital services."¹³

5. As discussed above, the 1996 Act charged the Commission with establishing a means of assessing and collecting fees for feeable ancillary or supplementary services. Last December, we issued a *Notice of Proposed Rule Making* which sought comment on various issues relating to the establishment of a fee program in accordance with the 1996 Act.¹⁴ In the *Notice of Proposed Rule Making*, we invited comment on all aspects of the proposed fee program and proposed several methods of assessing such fees, including a fee based upon a percentage of revenues received from the ancillary or supplementary use of the digital bitstream, or a fee based upon a hybrid of a flat rate and a percentage of revenues.

III. ISSUE ANALYSIS

A. Goals

6. The 1996 Act sets forth general criteria the Commission must follow in assessing fees for ancillary or supplementary services carried on the DTV bitstream. First, the 1996 Act requires the Commission to establish a program which recovers "for the public a portion of the value of the public spectrum" made available for ancillary or supplementary use by DTV licensees.¹⁵ Second, the statute requires that the fee be designed "to avoid unjust enrichment" of broadcast licensees through the method used to permit digital use of the spectrum.¹⁶ These provisions recognize that existing DTV licensees received their licenses without charge, while providers of potentially competing services may have paid for the spectrum used

this nearly 20 Mbps payload bitstream, rather than the 6 MHz spectrum channel, that is subdivided to provide a flexible array of services.

⁹ *Fifth Report & Order* in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 12 FCC Rcd 12806 (1997) ("*Fifth Report & Order*").

¹⁰ *Fifth Report & Order* at ¶ 29.

¹¹ *Id.*

¹² *Id.* at ¶ 33.

¹³ *Id.*

¹⁴ *Notice of Proposed Rule Making* in MM Docket No. 97-248, 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, 12 FCC Rcd 22821 (1997) ("*Notice of Proposed Rule Making*").

¹⁵ 47 U.S.C. § 336(e)(2)(A)(i).

¹⁶ *Id.* at § 336(e)(2)(A)(ii).

to provide these services. Finally, the 1996 Act requires that the fee recover "for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered" in an auction.¹⁷ This requirement refers to the competitive bidding provisions of the Communications Act of 1934 ("Communications Act").¹⁸ As discussed fully below, the fee program established today is consistent with these criteria as set forth in the 1996 Act. In addition, consistent with our goal of promoting the efficient deployment of digital television, in implementing the statutorily mandated fee program, we seek to avoid dissuading broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services.

7. The 1996 Act also generally defines which ancillary or supplementary uses of the DTV bitstream are subject to a fee. Section 336(e)(1), adopted by the 1996 Act, requires a fee to be assessed upon any services "for which the payment of a subscription fee is required in order to receive such services" or "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting materials furnished by such third party." In the latter case, the 1996 Act specifically exempts from the fee any ancillary or supplementary service which relies for its revenues upon "commercial advertisements used to support broadcasting for which a subscription fee is not required."¹⁹ Thus, a fee must be assessed on any ancillary or supplementary service for which a subscription fee is required or for which the licensee receives any compensation for transmission of material other than commercial advertisements used to support broadcasting. These services previously have been defined as "feeable ancillary or supplementary services." We recognize, of course, that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or with other non-feeable ancillary or supplementary services. The fact that a feeable ancillary or supplementary service is being transmitted by the DTV licensee does not subject all simultaneously transmitted services to a fee.

8. In establishing fees for the ancillary or supplementary use of DTV capacity, we are cognizant of the administrative burdens which such fees could entail. In order to minimize these burdens both for broadcasters and for the Commission, the fee program we establish today is intended to be simple to understand, and calculable with readily available information. An overly complex fee program could be difficult for licensees to calculate and for the Commission to enforce and could create uncertainty that might undermine a DTV licensee's efficient planning of what services it will provide.

B. Basis of Fee

9. *Background.* In the *Notice of Proposed Rule Making* we set forth several fee options which we determined to be consistent with the guidelines of the 1996 Act. The options included a fee akin to the amount that would have been received in an auction of the spectrum, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee's DTV capacity, a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity, and a fee based upon a hybrid of a flat rate and a percentage of revenues.

10. In describing the various fee options in the *Notice of Proposed Rule Making*, we described what we determined to be the advantages and disadvantages of each. Briefly, we stated that while net revenues

¹⁷ *Id.* at § 336(e)(2)(B).

¹⁸ *Id.* at § 309(j)(3)(C).

¹⁹ *Id.* at § 336(e)(1)(B).

or incremental profits could serve as effective proxies for the value of DTV capacity used for feeable ancillary or supplementary services, the process of ascertaining the costs involved in calculation of net revenues or incremental profits would involve the burdensome apportionment of expenses between free television services and feeable ancillary or supplementary services and among ancillary or supplementary services. Another fee approach suggested was a combination of a flat dollar amount and a percentage of gross revenues, which would include a uniform means of preventing unjust enrichment but would also create an up-front cost, which could serve as a disincentive to broadcasters' provision of feeable ancillary or supplementary services.

11. In the *Notice of Proposed Rule Making*, we expressed our inclination to favor a fee program that incorporates gross revenues. Such a fee, we stated, would "foster our goal of creating a fee structure which does not dissuade broadcasters from offering feeable ancillary and supplementary services [and]...would be straightforward to assess and calculate."²⁰

12. *Comments*. Virtually all of the commenters supported a fee based upon gross revenues. The commenters agreed with our assessment that a fee based upon gross revenues could be the simplest to calculate and enforce.²¹ Commenters also agreed that a fee based upon gross revenues would satisfy the statutory criteria of preventing unjust enrichment, recovering for the public a portion of the value of the spectrum, and approximating, without exceeding, the amount which would have been received at auction.²² While acknowledging that a fee based upon gross revenues would be the simplest to assess, the only commenter to propose a fee basis other than gross revenues, ABC argued that a net revenue approach would more effectively promote entry into provision of new services and proposed that broadcasters be given the option of basing the fee on net revenues, as calculated by their own methodology.²³ In their reply comments, UCC, *et al.* argued that a fee based upon net revenues as calculated by broadcasters' own methodologies would be susceptible to manipulation.²⁴ NCTA also opposed a net revenue approach, pointing out that no other service has the "luxury" of free use of the spectrum until the service becomes profitable.²⁵

13. *Decision*. We will adopt a fee based upon a percentage of the gross revenues generated by feeable ancillary or supplementary services. We believe this approach is consistent with the 1996 Act, supported by sound economic principles, and grounded in simplicity. We also believe it will afford broadcasters flexibility in developing new and innovative DTV services. A gross revenues approach is consistent with the 1996 Act because it enables the Commission to assess a fee that recovers for the public a portion of

²⁰ *Notice of Proposed Rule Making* at ¶ 24.

²¹ Comments of National Association of Broadcasters and Association for Maximum Service Television ("NAB"). See also ABC, Inc. ("ABC"), Association of Local Television Stations, Inc., ("ALTV"), National Cable Television Association ("NCTA"), United Church of Christ, Benton Foundation, Center for Media Education, Civil Rights Forum, and Media Access Project ("UCC, *et al.*).

²² Comments of UCC, *et al.* at p. 7, ALTV at p. 3, Information Technology Industry Council ("ITIC") at p.6.

²³ Comments of ABC at p. 6.

²⁴ Reply Comments of UCC, *et al.* at p. 6.

²⁵ Comments of NCTA, at p. 3.

the value of the spectrum and prevents the unjust enrichment of broadcasters through the use of the DTV bitstream for feeable ancillary or supplementary services. While the amount recovered will be more a result of the percentage rate of the fee than of the nature of revenues on which the fee is based, commenters overwhelmingly support a fee based upon gross revenues as a means of achieving these important statutory goals.²⁶

14. We believe that a fee based upon gross revenues is consistent with the statutory directive that we assess a fee that "to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed" at auction.²⁷ As we stated in the *Notice of Proposed Rule Making*, and as we saw echoed in many comments,²⁸ it would be difficult if not impossible to determine the amount that would have been received at auction.²⁹ To the extent possible, however, we believe that a fee based upon gross revenues can function as a proxy for auction value.

15. The microeconomic theory supporting this determination is laid out in the *Notice of Proposed Rule Making*.³⁰ Briefly, economic theory indicates that gross revenues received from the ancillary or supplementary use of DTV capacity are related to the implicit value of that DTV capacity. The postulated relationship between gross revenues received from ancillary or supplementary services and the value of the bitstream used to provide those services was supported by a number of commenters, who found this economic rationale to be "theoretically sound."³¹

²⁶ See Comments of UCC, *et al.* at p. 7.

²⁷ 47 U.S.C. § 336(e)(2)(B).

²⁸ See Comments of NAB at p. 8, UCC, *et al.* at p. 8.

²⁹ *Notice of Proposed Rule Making* at ¶ 15. In the *Notice*, we stated that:

spectrum auctions that have been held to date, such as those conducted for licenses to provide personal communications services, took place in circumstances so different from those in which a fee is to be assessed for the ancillary or supplementary use of DTV capacity that they are not necessarily applicable. Depending upon a variety of technological and regulatory factors, including what services are authorized, auctioned spectrum may be usable either for more or fewer kinds of services than those authorized on the DTV spectrum. Moreover, the process of assessing a fee for feeable ancillary or supplementary use of DTV capacity involves setting a fee for the use of the assigned spectrum for any number of services at different times. The relative market demand among services may change month-to-month, day-to-day, or hour-by-hour. In addition, different types of services may require different amounts of capacity. For example, at any given instant HDTV may require the entire 20 Mbps payload capacity while standard definition television programming requires far less capacity. Moreover, a licensee providing free, advertiser-supported programming on its DTV channel, whether in the form of HDTV or multiple SDTV streams, is exempt from the statute's fee requirement. Thus, it is difficult to identify market transactions that involve the transfer of spectrum usage rights equivalent to the capacity which DTV licensees may use to provide feeable ancillary or supplementary services.

³⁰ *Notice of Proposed Rule Making* at ¶¶ 17-20.

³¹ Comments of ALTV at p. 3. See also Comments of ABC at p. 2 and NCTA at p. 5.

16. In determining the basis of the fee, we sought not only to comply with the criteria set forth in the Act, but also to foster the important goal that the fee program be simple to comply with and to enforce. As discussed above, a fee program based upon net revenues or incremental profits would have entailed burdensome accounting by the licensees and enforcement and auditing by the Commission. Using gross revenues as the basis of the fee will minimize the accounting and auditing required, permitting licensees to calculate the fee based upon readily available information.³² It will also make the Commission's administration of the fee program much more efficient, and impose considerably fewer paperwork and compliance burdens on licensees. Several commenters supported the Commission's conclusion that a fee based upon gross revenues would be the most easily calculable and enforceable of the options proposed.³³

17. Finally, a gross revenues approach will serve the public interest goal of giving broadcasters flexibility to develop new uses of the DTV bitstream. In the *Notice of Proposed Rule Making*, we stated our intention to establish a fee program which allows broadcasters the flexibility to provide new services and made clear that it is not our intention to dissuade broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services. Commenters generally supported this goal³⁴ and, given the costs of implementing and enforcing a program based on net revenues, agreed that a fee based upon a percentage of gross revenues would be the least likely to discourage the development of new uses of broadcast spectrum.³⁵ Accordingly, we reject the net revenues approach. A fee based upon a percentage of gross revenues received would not involve up-front costs, such as those that would be incurred if we adopted a hybrid fee based on a flat fee coupled with a percentage of gross revenues, that could dissuade broadcasters from initiating new services. In addition, the uniform application of a fee based upon gross revenues to all feeable ancillary or supplementary services (as opposed to a varying fee based on the type of service provided) will minimize the potential of the fee program to affect broadcasters' choice of one service over another. Finally, the percentage rate of the fee, not the revenues on which the fee is based, will ultimately affect broadcasters' decisions as to whether or not to offer feeable ancillary or supplementary services at all.

C. Percentage of Revenues

18. *Background.* As we stated in the *Notice of Proposed Rule Making*, the percentage rate of the

³² See *Report & Order*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1995, FCC 95-227, MD Docket No. 95-3, 10 FCC Rcd 13512 at ¶ 134 (1995). ("[W]e have decided to adopt a gross revenues methodology for assessing [fees]... Properly administered, a gross revenues methodology will ease administrative burdens of carriers in calculating fee payments, provide reliable and verifiable information upon which to calculate the fee and equitably distribute the fee requirement in a competitively neutral manner. A revenue based methodology avoids the calculation problems inherent in [other methodologies] and permits the assessment of fees without any need to rely upon assumptions and projections.").

³³ Comments of NAB at p. 12, and UCC, *et al.* at p. 7. As we seek to minimize the complexity of the fee program, we decline to adopt ABC's proposal that we permit licensees to choose whether to use a net revenues or gross revenues approach. Such an approach would make fee collection more burdensome for the Commission, as would permitting the licensee to devise its own methodology to determine net revenues, as it might require case-by-case Commission review of such methodologies as part of the fee collection process.

³⁴ See generally Comments of NAB. *But see* Reply Comments of UCC, *et al.*, at p. 14, NCTA at p. 4.

³⁵ See, *e.g.* Comments of Business Software Alliance ("BSA") at p. 3.

fee must reflect the statutory requirements that the fee recover a portion of the value of the spectrum used for these services, avoid unjust enrichment, and approximate the revenue that would have been received had these services been licensed through an auction. The *Notice of Proposed Rule Making* also indicated our disinclination to set the percentage rate so high that it would dissuade broadcasters from providing feeable ancillary or supplementary services.

19. *Comments.* Commenters advocated percentages for the fee that ranged from less than one percent³⁶ to more than ten percent.³⁷ Those commenters who proposed a low fee -- two percent or less of gross revenues -- based their proposal on the declining auction values of the nonbroadcast spectrum,³⁸ and on the possibility that a higher fee would discourage broadcasters from offering innovative services.³⁹ Commenters proposing a high fee -- ten percent or more -- argued that such a fee would be consistent with other government licensing fees,⁴⁰ and would be necessary to prevent unjust enrichment, as required by the 1996 Act.⁴¹

20. *Decision.* We will set the fee for feeable ancillary or supplementary services provided on the DTV bitstream at five percent of gross revenues received from these services. We believe that a fee of five percent of gross revenues fulfills our statutory obligations to impose a fee which recovers for the public some portion of the value of the spectrum, prevents the unjust enrichment of broadcasters providing feeable ancillary or supplementary services, and approximates, to the extent possible, the revenues that would have been received had the spectrum on which these services are provided been licensed through an auction. We also believe that a five percent fee will not dissuade broadcasters from using their DTV capacity to provide new and innovative services that can greatly benefit consumers.

21. As we stated in the *Notice of Proposed Rule Making*, we must carefully balance potentially competing requirements and goals in establishing a percentage rate of the fee. On the one hand, a fee set too high might dissuade broadcasters from providing feeable ancillary or supplementary services, and could therefore reduce the benefits that consumers receive from efficient deployment of DTV capacity.⁴² On the other hand, a fee set too low might not prevent the unjust enrichment of DTV licensees as required by the 1996 Act and might not recover an amount approximating the amount that would have been recovered at auction, although it could recover for the public a "portion of the value" of the spectrum.⁴³

22. We believe that a fee of five percent of gross revenues best serves our goals and the requirements of the statute. The 1996 Act gives the Commission broad discretion in setting the amount of the fee for

³⁶ Comments of ABC at p. 15, ALTV at p. 17.

³⁷ Comments of UCC, *et al.* at p. 8. *See also* Reply Comments of NCTA at p. 7.

³⁸ Comments of NAB at p.15, ABC at p. 12, ALTV at p. 9. *See also* paragraph 28 *infra*.

³⁹ Comments of NAB at p. 13, ABC at p. 12, ALTV at p. 12.

⁴⁰ Comments of UCC, *et al.* at p. 9, NCTA at p. 9.

⁴¹ *Id.*

⁴² *Notice of Proposed Rule Making* at ¶ 27.

⁴³ *Id.*

ancillary or supplementary services, relying upon the predictive judgment of the agency in that regard.⁴⁴ In addition, no commenter has pointed to any obvious or commonly accepted formula for setting a fee in these circumstances. Therefore, the Commission must use its best judgment in balancing the relevant goals.

23. The five percent fee satisfies the statutory mandate that the fee be high enough to prevent the unjust enrichment of the licensees and to recover compensation for the DTV capacity used by the licensees. This statutory mandate was reiterated by several commenters.⁴⁵ We take seriously the intent of the 1996 Act that broadcasters providing feeable ancillary or supplementary services on the DTV bitstream be required to pay more than a nominal fee. We believe that a five percent fee is appropriate.

24. A fee set at five percent of gross revenues also satisfies the statutory requirement that the fee recover "an amount that, to the extent feasible, equals but does not exceed" the amount that would have been recovered at auction.⁴⁶ Looking at this mandate through the prism of economic theory, the reference to auctions invokes a system designed to foster the efficient allocation of resources and suggests that we should set a fee that fosters efficient resource allocation. The efficient allocation of the resource of DTV bitstream will allow the marketplace to provide those feeable ancillary or supplementary services demanded by consumers.⁴⁷ A fee based on gross revenues will allow such efficient allocation so that it meets the statutory requirement.

25. Our goal of not discouraging broadcasters from providing feeable ancillary or supplementary services is also consistent with the statutory mandate that the fee established recover a portion of the value of the spectrum. As at least one commenter pointed out, a high fee will not necessarily generate significant revenue, as licensees are less likely to develop ancillary or supplementary uses of their DTV capacity if such fees are imposed.⁴⁸

26. In setting the fee at five percent of gross revenues, we are taking account of the costs broadcasters will incur in the development of digital ancillary or supplementary services. While we note the comments of NCTA stating that a fee set too low would unfairly subsidize broadcasters, we are conscious of the financial burdens faced by digital television broadcasters in the coming years.⁴⁹ As will be discussed at greater length in paragraphs 51-52 below, we anticipate that the fee assessment program established here will be reviewed and possibly adjusted within the five year period prescribed by the 1996 Act, and that such review will take into account the actual costs of the development of digital ancillary or supplementary services.

⁴⁴ See generally, *FCC v. National Citizens Comm. for Broadcasting (NCCB)*, 436 U.S. 775, 813-14 (1978) (where factual determinations are "primarily of a judgmental or predictive nature," . . . complete factual support in the record for the Commission's judgment or prediction is not possible or required.).

⁴⁵ *Id.*

⁴⁶ 47 U.S.C. § 336(e)(2)(B).

⁴⁷ *Fifth Report and Order* at ¶ 28.

⁴⁸ Comments of ALTV at p. 12, BSA at p. 3, ITIC at p. 6.

⁴⁹ See Reply Comments of ABC at p. 6.

27. Commenters advocating a higher fee have argued that fees for the ancillary or supplementary use of the DTV bitstream are analogous to mineral and oil royalty rates, which range from 12 to over 17 percent. However, we do not see federal mineral and oil rights as directly analogous to the DTV bitstream for the purposes of the fee established here. As reflected in the economic rationales outlined in the *Notice of Proposed Rule Making*,⁵⁰ the policy and economic considerations in setting DTV ancillary and supplementary fees are quite distinct from the considerations that would be relevant for leasing resources such as minerals or oil. The economic analysis detailed in the *Notice* specifically addresses the efficient allocation of DTV spectrum between free, over-the-air television service and feeable ancillary services, not the general issue of royalty rates. That economic analysis also addresses the unjust enrichment which may result from the provision of comparable services by competitors, such as multichannel video service providers and other competing service providers, which have incurred sunk costs that do not accrue to DTV licensees.

28. We also reject the analogy to recent auction rates for non-broadcast spectrum made by some commenters. These commenters have argued that we should set the fee at a rate lower than five percent based upon analyses they have submitted that purport to demonstrate that the value of non-broadcast spectrum available at auction has been declining in recent months.⁵¹ These commenters argue that these studies demonstrate that the fees for the ancillary or supplementary use of the broadcast spectrum should be set very low, as the fees should recover approximately the amount which would have been received at an auction of the spectrum. We disagree with this argument. The auction values realized by the Commission in conducting a particular spectrum auction reflect factors that are specific to the particular spectrum being auctioned. These factors include the anticipated demand for the telecommunications services provided using the particular spectrum and the technological uncertainty associated with the application. In contrast to the non-broadcast spectrum, we believe that the value of broadcast spectrum has been increasing, rather than decreasing. An indication of that trend is that the sale values of broadcast television and radio properties have increased sharply over the past several years, reflecting the increasing value of their spectrum licenses.⁵²

29. In arguing for very low fees, some commenters have drawn an analogy to copyright royalty rates, which are very low, rather than royalties for mining and oil, which are higher. As we stated above, in the discussion of the comparability of royalty rates for natural resource properties, we believe that the policy concerns and economic considerations of our analysis here are quite distinct from the considerations of privately-contracting parties negotiating copyright royalty rates.

30. Based upon the foregoing, we determine that a fee set at five percent of gross revenues received from the ancillary or supplementary use of the DTV bitstream will best satisfy the requirements of the 1996 Act and will not discourage the provision of these new services by DTV licensees.

D. Services on Which Fee is to be Assessed

31. In establishing a fee assessment program, we must determine which services are subject to the fee. The fee program established today applies only to ancillary or supplementary services. While it

⁵⁰ *Notice of Proposed Rule Making* at ¶¶ 17-20.

⁵¹ Comments of NAB at p.15, ABC at p. 12, ALTV at p. 9.

⁵² *Broadcasting and Cable*, April 6, 1998 at pp 80, 82. (television station values increased about 30% between 1996 and 1997; radio station values increased about 10% during the same period)

specifically refers to ancillary or supplementary services, Section 336 does not define these services. Consistent with the 1996 Act and Commission precedent, our rules specify that ancillary or supplementary services "include, but are not limited to computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [or] subscription video."⁵³ Our rules also specify that "any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary."⁵⁴

32. Pursuant to the 1996 Act, not all ancillary or supplementary services are feeable. We determine that all revenue from subscription services will be subject to a fee. In addition, as required by the statute, ancillary or supplementary services for which the licensee directly or indirectly receives compensation from a third party in exchange for the transmission of material provided by the third party, other than commercial advertisements used to support broadcasting, will be subject to a fee.

33. Commenters provided very little guidance as to what services DTV licensees will provide. With this *Report & Order*, we resolve several questions raised by commenters regarding particular types of services, and set out general principles that may be used to determine whether other non-subscription ancillary or supplementary services are subject to fees.

Viewer-paid subscription services

34. As discussed above, the 1996 Act requires the Commission to establish a fee program for any ancillary or supplementary services "for which the payment of a subscription fee is required in order to receive such services."⁵⁵ The legislative history of the 1996 Act indicates that the statute requires that a fee be assessed on "any ancillary or supplementary service if subscription fees or any other compensation fees apart from commercial advertisements are required in order to receive such services."⁵⁶

35. Commenters did not dispute that services supported entirely by subscription fees should be subject to fees, but argued over whether services which received both subscription fees and advertising revenues should be subject to fees on both revenue streams. In its comments, NAB argued that if advertising is sold on subscription services, the fee should be assessed only on subscription revenues.⁵⁷ This is consistent with what NAB calls "the appropriate test" for whether a service should be subject to a fee -- whether subscription or other non-advertising payment is necessary to receive the service.⁵⁸ Others

⁵³ 47 C.F.R. § 73.624(c).

⁵⁴ *Id.* The definition of what is an "ancillary or supplementary" service is a matter that also has potential consequences for the Commission's cable television mandatory television broadcast signal carriage rules. *Notice of Proposed Rule Making* in CS Docket No. 98-120, FCC 98-153, ¶ 72 (released July 10, 1998). Although the issues are related, the present proceeding only involves the "feeable" services subcategory. The decisions made herein are not intended to be directly transferable to the mandatory carriage context.

⁵⁵ 47 U.S.C. § 336(e)(1)(A).

⁵⁶ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 160 (1996). *See also Notice of Proposed Rule Making* at ¶ 8

⁵⁷ Comments of NAB at p.7.

⁵⁸ Comments of NAB at ii.

asserted that fees should be assessed on all revenues for services for which a subscription fee is required to receive the service.⁵⁹

36. Consistent with the 1996 Act, we will assess fees on all revenue -- both subscription and advertising revenue -- from all ancillary or supplementary services for which viewers must pay subscription fees to receive. Though some commenters argued that advertising revenues from subscription services should not be subject to the fee,⁶⁰ we disagree. First, Section 336(e)(1)(A) makes clear that those services for which "the payment of a subscription fee is required in order to receive such services"⁶¹ are feeable. The exclusion in Section 336(e)(1)(B) for "commercial advertisements used to support broadcasting for which a subscription fee is not required"⁶² does not support NAB's position. Advertising revenues from services that cannot be received without payment of subscription fees do not fit within this exemption. We therefore decline to allow DTV licensees to exclude from gross revenues subject to a fee advertising revenues received from services for which a subscription fee is also required. We believe that such an approach would not be consistent with the statute and would unduly complicate the fee program.

Non-Subscription Ancillary or Supplementary Services for which Licensee Receives Compensation from a Third-Party

37. The 1996 Act directs that fees be assessed on ancillary or supplementary services "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than for commercial advertisements used to support broadcasting for which a subscription fee is not required.)"⁶³ Our rules state that over-the-air video programming provided at no charge to viewers is not an ancillary or supplementary service. This provision therefore applies to ancillary or supplementary services, consisting of material which does not originate with the licensee, which the viewer can receive without payment of a fee. These ancillary or supplementary services may include data, audio, or any other ancillary or supplementary services that may be established in the future.

38. We received very little comment on the types of non-subscription ancillary or supplementary services parties contemplate providing, or on the appropriate fee structure for such services. Accordingly, in determining whether a non-subscription ancillary or supplementary service is feeable, until we gain more experience, we will simply be guided by the statutory criteria as questions arise.

Home shopping and other direct marketing programming

39. In their comments, UCC, *et al.* argued that the statute requires fees to be imposed when broadcasters receive payments from sales on home shopping channels, infomercial and direct marketing

⁵⁹ See Generally Comments of UCC, *et al.*

⁶⁰ Comments of NAB at p.7.

⁶¹ 47 U.S.C. § 336(e)(1)(A).

⁶² 47 U.S.C. § 336(e)(1)(B).

⁶³ *Id.*

programming.⁶⁴

40. We will not impose fees on revenues received from home shopping, infomercial or direct marketing programming. The purpose of this proceeding is not to exact fees from existing broadcasters for existing services but, rather, to design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream. We agree with the commenters who argued that home shopping and infomercials are commercial advertisements, excluded by statute from the scope of ancillary and supplementary services as they are video services received by viewers with out a fee.⁶⁵ We therefore find that home shopping channels and infomercials are free, over-the-air television services, supported by commercial advertisements, and not subject to a fee.

Retransmission Consent Agreements

41. Commenters raised the issue of whether in-kind consideration, in the form of retransmission consent agreements, constitutes compensation from a third party for the purposes of the 1996 Act. In their comments, UCC, *et al.* argued that "compensation" should include the in-kind compensation received by broadcasters in retransmission consent agreements with cable system operators.⁶⁶ Several reply commenters asserted that retransmission consent agreements are not compensation by cable operators in return for carriage of ancillary or supplementary services.⁶⁷

42. We do not believe that a retransmission consent agreement constitutes the payment of compensation by a third party to a licensee in exchange for the transmission of material provided by that third party. A retransmission consent agreement involves in-kind consideration given to a licensee by a cable system operator for carriage of the licensee's programming on the cable system. It is not compensation given to the licensee for carriage of programming provided by a third party on that licensee's frequency.⁶⁸

Noncommercial Licensees

43. In the *Notice of Proposed Rule Making* we sought comment on the question of whether noncommercial television licensees should be exempt from fees or subject to lower fees. This argument was raised initially in the Petition for Reconsideration of the *Fifth Report & Order* filed by the Association of America's Public Television Stations and the Public Broadcasting Service.⁶⁹ Petitioners further sought a determination as to whether they might offer feeable ancillary or supplementary services on their DTV capacity as a source of funding for their public television operations. Because we have not yet determined whether or to what extent noncommercial licensees may provide revenue-generating

⁶⁴ Comments of UCC, *et al.* at p. 13.

⁶⁵ Reply Comments of ALTV at p. 8.

⁶⁶ Comments of UCC, *et al.* at p. 14.

⁶⁷ Reply Comments of NAB at p. 5, ALTV at p. 9, ABC at p. 8.

⁶⁸ 47 U.S.C. § 336(e)(1)(B).

⁶⁹ Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service in MM Docket No. 87-268 filed June 13, 1997, p. 28, n. 29.

ancillary or supplementary services, it is premature to determine whether such services would be subject to a fee and whether that fee should be lower than that paid by commercial broadcasters. We have today initiated a proceeding in which we will build a record on noncommercial licensees' remunerative use of the DTV bitstream and whether and in what circumstances such uses would be subject to fees.⁷⁰ We will address the comments received on this issue in that proceeding.

E. Commencement of Fee Assessment

44. Some commenters asked that we delay imposing a fee on ancillary or supplementary services and proposed several different plans for such delay. NAB argued that a two-year delay in the imposition of the fee would ameliorate any detrimental effect on innovation that might result from a fee based upon gross revenues.⁷¹ Cox argued that the Commission should postpone the establishment of a fee program for five years until additional market information on which the fee might be based is available.⁷² In response, UCC, et al. and NCTA argued that a delay in the imposition of a fee is contrary to Congressional intent to recover a portion of the value of the spectrum and to avoid unjust enrichment.⁷³

45. We will not delay the imposition of fees for ancillary or supplementary services. Even assuming, *arguendo*, that we have authority to impose such a delay, a delay in the imposition of a fee would not serve the public interest. In addition, a delay in the imposition of a fee would result in unjust enrichment during the time the broadcasters were providing feeable ancillary or supplementary services but were not paying a fee. A delayed fee would not effectively recover the value of the spectrum. The fee program established today is designed to minimize any detrimental effect the fee might have on the development of new and innovative services. A delay in the imposition of a fee would therefore be superfluous. Indeed, with a revenue based approach, as opposed to a flat fee, licensees will not have to commence paying a fee until they begin to collect revenues.

F. Other Issues

Cap on the Amount of the Fee

46. Fox argued in its Comments that the Commission should cap the aggregate payments made by any broadcaster for feeable services.⁷⁴ Fox maintained that the statute and the legislative history demonstrate Congressional intent to establish an upper bound on the amount broadcasters should be required to pay, limiting the fee to the amount they would have been required to pay in the auction process. The statutory provision referenced by Fox is the provision which states that the fee shall recover

⁷⁰ *Notice of Proposed Rule Making*, In the Matter of Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees, MM Docket No. 98-203, FCC No. 98-304 (Adopted November 19, 1998).

⁷¹ Comments of NAB at p. 13.

⁷² See generally Comments of Cox Broadcasting, Inc., Paxson Communications Corporation and Media General ("Cox, et al.").

⁷³ Reply Comments of UCC, et al. at p. 16 and NCTA at p. 2.

⁷⁴ See Generally Comments of Fox Television Stations.

an amount that "equals but does not exceed" the amount that would have been recovered at auction.⁷⁵

47. The statutory provision cited by Fox does not require us to establish a cap on the fee amount. As discussed in paragraph 15 above, gross revenues from feeable ancillary or supplementary services are related to the implicit value of the DTV spectrum used to provide such services. As gross revenues are a reasonable proxy for the auction value, putting a cap on the fee amount would not make sense. In order to fulfill its mandate to capture a portion of the value of the spectrum used for feeable ancillary or supplementary services, the Commission should collect a percentage fee on the ongoing revenues realized by the broadcaster over the useful life of the application. Services that have a longer useful life or generate higher periodic revenues then have a correspondingly greater economic value, which will then be reflected in the higher total fees collected by the Commission. If the Commission were to establish an upper limit on the total fees that it collected, then the theoretical linkage established in our analysis would no longer hold, and the Commission would fail to satisfy its mandate from Congress.

48. We also decline to adopt Fox's proposal as it would unduly complicate the implementation and enforcement of the fee assessment program. As we stated in the Notice of Proposed Rule Making, we aim to establish a program that is simple to comply with and to enforce. Establishing a cap on the amount of the fee might involve a calculation that takes into account the size of a station, the market it serves, the amount of feeable ancillary or supplementary services provided, and numerous other factors which would certainly complicate the establishment and enforcement of the fee assessment program. It would be difficult, if not impossible, to determine on a license by license basis what the auction value of that spectrum should be and thus where a cap should be placed. Thus, ease of administration of the fee program would be compromised by a cap on the total amount of fee payments.

Variable Fee Rate Depending Upon the Type of Service

49. We sought comment as to whether the percentage rate of the fee should vary with the type of service provided.⁷⁶ In their comments, NAB argued that the Commission should not take into account preferences for one type of service over another in setting the fee. They argued that varying the level of the fee depending upon the service could discourage new services and would exceed the Commission's authority.

50. The percentage rate of the fee will be fixed at five percent, for all services subject to a fee. We agree that a varying fee rate could have the effect of dissuading licensees from providing particular services. To the extent that the fee is set lower for one service than for another, it would create an incentive for a licensee to provide the service with a lower fee rate over a service subject to a higher fee. As we wish to establish a fee program that does not affect broadcasters' decisions to provide one service over another, other than the mandated free, over-the-air television service, we will not establish a fee which varies based upon the type of services provided. In addition, a varying fee rate would be difficult to adhere to and to enforce, in contravention of our goal of a fee program that is simple to comply with and administer.

Review of Fee Assessment Program

51. The 1996 Act requires us to adjust the fee "from time to time in order to continue to comply with

⁷⁵ 47 U.S.C. § 336(e)(2)(B).

⁷⁶ *Notice of Proposed Rule Making* at ¶ 28.

the requirements of" the statute and to "report to the Congress on the implementation of the program" within five years of the enactment of the 1996 Act.⁷⁷

52. The program established here concerns services which are not yet available to consumers. Once digital television licensees have implemented ancillary or supplementary services, the Commission and the licensees will have a better concept of what these services might include and of the profit-making capacity of these services. We therefore intend to review the fee assessment program established herein by the time of our mandated report to Congress. Also, we may adjust our fee program as necessary to continue to comply with the requirements of the statute.

IV. COLLECTION OF FEES

53. The 1996 Act requires that the Commission "establish a program to assess and collect ... an annual fee or other schedule or method of payment that promotes the objectives described" above and that the fee "be adjusted by the Commission from time to time in order to continue to comply with [these] requirements."⁷⁸ The statute requires that "all proceeds obtained pursuant to the regulations required by this subsection ... be deposited in the Treasury."⁷⁹ In addition, the 1996 Act requires that "within 5 years after the date of enactment of the [1996 Act]... the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program."⁸⁰ Commenters did not address the collection of fees pursuant to this program.

54. In order that the Commission fulfill its statutory obligation to report to Congress on the program established here, and in order that the Commission have the information necessary to adjust the fee program as appropriate consistent with the use of the spectrum, as discussed in paragraphs 51-52 above, we will require all commercial DTV licensees to report to the Commission on their use of the DTV bitstream. Each DTV licensee will be required to file a new FCC form annually on December 1.

55. Pursuant to a Public Notice to be issued as soon as possible, the Mass Media Bureau will issue a new reporting form, to be filed by each DTV licensee on December 1 of each year. Beginning on December 1, 1999 all licensees will annually file the new reporting form electronically with the Mass Media Bureau. For the report filed December 1, 1999 only, licensees are to report on services provided from the effective date of this *Report & Order* through September 30, 1999.

56. In filing licensees will report whether they provided ancillary or supplementary services in the twelve-month period ending on the preceding September 30. Licensees will further report, for the applicable period: 1) a brief description of the services provided; 2) which services were feeable ancillary or supplementary services; 3) whether any ancillary or supplementary services provided were not subject to a fee; 4) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and 5) the amount of bitstream used to provide ancillary or supplementary services

⁷⁷ 47 U.S.C. § 336(e)(1)(B).

⁷⁸ 47 U.S.C. § 336(e)(2)(C).

⁷⁹ 47 U.S.C. § 336(e)(3)(A).

⁸⁰ 47 U.S.C. § 336(e)(4).

during the applicable period. The licensee's signature on the form will certify under penalty of perjury the accuracy of the information reported. Failure to file the form regardless of revenues from ancillary or supplementary services or provision of such services may result in appropriate sanctions.

57. If a licensee has provided feeable ancillary or supplementary services at any point during any twelve-month period ending on September 30, the licensee must additionally annually file the FCC's standard remittance form (Form 159) on the subsequent December 1. Licensees will certify the amount of gross revenues received from feeable ancillary or supplementary services for the applicable twelve-month period and will remit the payment of the required fee. For revenues reported December 1, 1999 only, licensees are to certify revenues received from feeable ancillary or supplementary services provided from the effective date of this *Report & Order* through September 30, 1999 and remit payment of the required fee for that period.

58. The instructions for Form 159 will be amended by Public Notice to require DTV licensees to specify the amount of gross revenues received from feeable ancillary or supplementary services and the fees due. Pursuant to this *Report & Order*, Section 1 of the Commission's rules is amended to specify that licensees file Form 159 annually. The instructions for Form 159 will be amended to require commercial DTV licensees providing feeable ancillary or supplementary services to annually file Form 159 on December 1 and to specify on line 19A the call sign by which they are registered with the Commission; on line 20A the payment type code; on line 23A the amount of gross revenues received from feeable ancillary or supplementary services; on line 22A the fee which they remit with Form 159, in the amount of five percent of the amount specified on line 23A; and on line 24A the facility identification number assigned to them by the Commission. The licensee's signature on line 27 certifies under penalty of perjury the accuracy of the information reported on Form 159.

59. The Mass Media Bureau will issue a Public Notice amending the Advice Reference Guide for FCC Form 159, and the Mass Media Services Fee Filing Guide. The Commission delegates authority to the Office of the Managing Director to specify by Public Notice procedures for filing and processing the fees required by this *Report & Order*. The Commission reserves the right to audit each licensee's records which support the calculation of the amount specified on line 23A of Form 159. Each licensee, therefore, is required to retain such records for three years from the date of remittance of fees pursuant to this *Report & Order*.

60. While we do not here include automatic confidentiality for information submitted pursuant to this *Report & Order*, submission of the required reporting form, and/or remittance of fee payment may be accompanied by a request for confidentiality pursuant to 47 C.F.R. § 0.459.

V. CONCLUSION

61. By this *Report & Order* and the accompanying rule, we establish a program to assess a fee of five percent of gross revenues received from the provision of feeable ancillary and supplementary services as defined herein.

VI. ADMINISTRATIVE MATTERS

62. *Paperwork Reduction Act of 1995 Analysis.* The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting

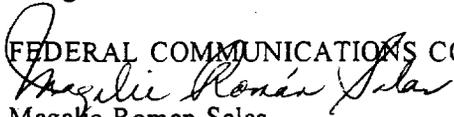
and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

63. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 303, 336 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 336 and 403, Part 73 of the Commission's Rules IS AMENDED as set forth in Appendix C, below

64. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix C SHALL BE EFFECTIVE the later of either thirty days after publication in the Federal Register, or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, or as soon thereafter as may be approved by the Office of Management and Budget.

65. A Final Regulatory Flexibility Analysis (FRFA), see 5 U.S.C. § 604, is contained in Appendix A. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report & Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

66. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),⁸¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making*⁸²is Report & Order. The Commission sought written public comment on the proposals in the *Notice of Proposed Rule Making*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁸³

A. Need for, and Objectives of, the Report and Order: The 1996 Act directed the Commission to adopt regulations allowing licensees to use a portion of the DTV spectrum to provide feeable ancillary or supplementary services and to establish a program to assess and collect a fee for these services. In the *Fifth Report & Order* we established rules permitting broadcasters to offer feeable ancillary or supplementary services on the DTV spectrum. As directed by Congress, in this proceeding we adopt a program for assessing and collecting a fee for the feeable ancillary or supplementary use of the DTV spectrum.

B. Summary of Significant Issues Raised by Public Comments In Response to the IRFA: No comments were received specifically in response to the IRFA attached to the *Notice of Proposed Rule Making*.

C. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

1. Definition of a "Small Business"

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 4 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." As discussed below, the SBA defines a television broadcast station that has no more than \$10.5 million in annual receipts as a small business.⁸⁴

⁸¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁸² *Notice of Proposed Rule Making*, at p. 16.

⁸³ See 5 U.S.C. § 604.

⁸⁴ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 483.

2. Issues in Applying the Definition of a "Small Business"

Our estimates, below, reflect our best judgments based on the data available to us. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 C.F.R. § 121.104(d)(1). The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

3. Estimates Based on Census Data

The rules adopted in this *Report and Order* will apply to commercial DTV licensees. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.⁸⁵ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.⁸⁶ Included in this industry are commercial, religious, educational, and other television stations.⁸⁷

⁸⁵ *Id.*

⁸⁶ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

⁸⁷ *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as:

Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television

Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.⁸⁸ Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.⁸⁹

There were 1,509 television stations operating in the nation in 1992.⁹⁰ That number has remained fairly constant as indicated by the approximately 1,583 operating television broadcasting stations in the nation as of September 1998.⁹¹ For 1992, the (approximately 77%) number of television stations that produced less than \$10.0 million in revenue, and we estimate that was approximately 1,155 establishments.⁹² Thus, the rules adopted here may affect approximately 1,583 television stations; approximately 77%, or 1,219 of those stations are considered small businesses.⁹³ These estimates may overstate the number of small entities because the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance

Requirements: The *Report & Order* adopts modifications to existing reporting and recordkeeping requirements. The fee program established here will require licensees annually to file a new reporting form to be issued later. Licensees will be required to report whether they provided ancillary or supplementary services, the ancillary or supplementary services provided, the services provided which are subject to a fee, gross revenues received from all feeable ancillary and supplementary services, and the amount of bitstream used to provide ancillary or supplementary services. Licensees providing services subject to a fee will additionally be required annually to file FCC Form 159 in remittance of the fee. So that the Commission may audit licensees' records supporting the calculation of the fees due, each licensee will be required to retain such records for three years from the date of remittance of fees.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities,

and Significant Alternatives Considered: This Report and Order establishes a program for assessing and collecting fees for the ancillary or supplementary use of the digital television spectrum. In the Notice of Proposed Rule Making, a variety of alternatives were proposed and we additionally sought comment on

broadcasting and which produce taped television program materials.

⁸⁸ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

⁸⁹ *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs)).

⁹⁰ FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 53, Appendix A-9.

⁹¹ FCC News Release, Broadcast Station Totals as of September 30, 1998 (released October 19, 1998).

⁹² The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

⁹³ We use the 77 percent figure of TV stations operating at less than \$10 million for 1992 and apply it to the 1998 total of 1583 TV stations to arrive at stations categorized as small businesses.

whether any of the proposed approaches would have a significant economic impact on any class of small licensee or permittee. We considered all alternatives presented in the comments. The rules adopted here are required to implement provisions of the 1996 Act. These proposed rules and policies may affect broadcast television licensees, some of which are small businesses. The Commission believes that the rules adopted here are necessary to the recovery of a portion of the value of the public spectrum and to promote the development of innovative uses of the DTV capacity.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed

Rules: Adoption of this *Report and Order* will necessitate the revision of section 47 C.F.R. § 73.624 to add a new section 73.624(g).

Report to Congress: The Commission will send a copy of the *Report & Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report & Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report & Order* and FRFA (or summaries thereof) will also be published in the Federal Register. See 5 U.S.C. § 604(b)

APPENDIX B**LIST OF COMMENTERS**

ABC, Inc.
Association of America's Public Television Stations, et al.
Association of Local Television Stations, Inc.
Cox Broadcasting, Inc., Paxson Communications Corporation and Media General
Fox Television Stations, Inc.
Information Technology Industry Council
National Association of Broadcasters and Association for Maximum Service Television
National Cable Television Association
National Datacast, Inc.
Thomas C. Smith
United Church of Christ, Benton Foundation, Center for Media Education, Civil Rights Forum, and
Media Access Project

LIST OF REPLY COMMENTERS

ABC, Inc.
Association of America's Public Television Stations and The Public Broadcasting Service
Association of Local Television Stations, Inc.
Business Software Alliance
National Association of Broadcasters, et al.
National Cable Television Association
United Church of Christ, Benton Foundation, Center for Media Education, Civil Rights Forum and
Media Access Project
Curators of the University of Missouri
Valuevision International, Inc. and Home Shopping Network, Inc.

APPENDIX C**Rule Changes**

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. Section 73.624 is revised by adding a new section 73.624(g) as follows:

§ 73.624 Digital Television Broadcast Stations

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(g) (1) Commercial DTV licensees must annually remit a fee of five percent of the gross revenues derived from all ancillary or supplementary services, as defined by paragraph (b) hereof, which are *feeable*, as defined in paragraphs (i) - (ii) hereof.

(i) All ancillary or supplementary services for which payment of a subscription fee or charge is required in order to receive the service are feeable. The fee required by this provision shall be imposed on any and all revenues from such services, including revenues derived from subscription fees and from any commercial advertisements transmitted on the service.

(ii) Any ancillary or supplementary service for which no payment is required from consumers in order to receive the service is feeable if the DTV licensee directly or indirectly receives compensation from a third party in return for the transmission of material provided by that third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required). The fee required by this provision shall be imposed on any and all revenues from such services, other than revenues received from a third party in return for the transmission of commercial advertisements used to support broadcasting for which a subscription fee is not required.

(g)(2) Payment of Fees

(i) Each December 1, all commercial DTV licensees will electronically report whether they provided ancillary or supplementary services in the twelve-month period ending on the preceding September 30. Licensees will further report, for the applicable period: 1) a brief description of the services provided; 2) which services were feeable ancillary or supplementary services; 3) whether any ancillary or supplementary services provided were not subject to a fee; 4) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and 5) the amount of bitstream used to provide ancillary or supplementary services during the applicable period. Licensees will certify under penalty of perjury the accuracy of the information reported. Failure to file regardless of revenues from ancillary or supplementary services or provision of such services may result in appropriate sanctions.

(ii) If a commercial DTV licensee has provided feeable ancillary or supplementary services at any point during a twelve-month period ending on September 30, the licensee must additionally file the FCC's standard remittance form (Form 159) on the subsequent December 1. Licensees will certify the amount of gross revenues received from feeable ancillary or supplementary services for the applicable twelve-month period and will remit the payment of the required fee.

(iii) The Commission reserves the right to audit each licensee's records which support the calculation of the amount specified on line 23A of Form 159. Each licensee, therefore, is required to retain such records for three years from the date of remittance of fees.

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