

ORIGINAL

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

RECEIVED

JAN 15 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: The Commission

**Petition for Reconsideration 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 petition for reconsideration of the Commission's decision in this proceeding. *Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, FCC 98-303 (released Nov. 19, 1998), 63 Fed. Reg. 69208 (Dec. 16, 1998)[hereinafter *Fee Decision*]. While the Commission correctly concluded that the services to which fees should apply are limited, and also properly determined that it has broad discretion under the Act in setting the fee level, it failed to consider the evidence

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 national non-profit association representing more than 330 of the nation's television stations in regulatory, legislative, and judicial proceedings.

No. of Copies rec'd 0+11
List ABCDE

submitted by Broadcasters that established the low and declining value of comparable spectrum, and its rationale for failing to consider that evidence is without foundation.

In response to the Commission's request for evidence supporting higher or lower fee levels,³ Broadcasters commissioned two studies by leading economists. One study by Professor Jerry Hausman of the Massachusetts Institute of Technology analyzed the history of the Commission's spectrum auctions. His conclusion – which is unrebutted in the record in this proceeding – was that the “[p]rices for spectrum auctioned by the FCC have been decreasing over time on a per MHz per population basis.”⁴ Further, Professor Hausman found that “the trend in auction results is down regardless of the use to which the spectrum will be put or the degree of uncertainty over the success of the technology.” *Hausman Statement* at 4.

With respect to the particular value of the spectrum that will be used for digital broadcast ancillary or supplementary services, Professor Hausman pointed out that digital ancillary services “are extremely difficult to value given that they are new and untested services.” *Id.* at 10. Because the Commission's auctions show that there is “a very large discount in auction results for services that face significant business and technological uncertainty,” *id.* at 8, there would be “an expected outcome of relatively low auction results for spectrum used for ancillary services.” *Id.* at 10. Thus, direct evidence submitted to the Commission demonstrated that the overall and continuing decline in spectrum values, and the discount that would be applied to spectrum for new

³ *Fees for Ancillary or Supplementary Use of Digital Television Spectrum (Notice of Proposed Rulemaking)* ¶ 27, 12 FCC Rcd 22821 (1997).

⁴ Statement of Professor Jerry A. Hausman at 3, Attachment A to the Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., MM Docket No. 97-247 (May 4, 1998) [hereinafter *Hausman Statement*].

services such as ancillary and supplementary services of digital television broadcasters, would lead to very low values for the spectrum used for such services.

The Commission, however, wholly ignored this most direct evidence of the value of the spectrum for which it was establishing a fee. In Paragraph 28 of the *Fee Decision*, the Commission rejected “the analogy to recent auction rates for non-broadcast spectrum.” Although the Commission agreed with Professor Hausman that the “auction values realized . . . in conducting a particular spectrum auction reflect factors that are individual to the particular spectrum being auctioned . . . [including] the anticipated demand for the telecommunications services provided using the particular spectrum and the technological uncertainty associated with the application,”⁵ it did not accept Professor Hausman’s conclusion that these factors were relevant to setting the fee for digital ancillary and supplementary services. Instead, the Commission apparently concluded that it should look to the values for *broadcast spectrum* which it believed have been increasing.⁶

The Commission fundamentally misapprehended the issue before it. It seems to have concluded that analogies to non-broadcast spectrum should be disregarded because it was dealing with the fees for services to be offered over broadcast channels. However, by definition,

⁵ *Fee Decision* ¶ 28.

⁶ Though off point, the Commission’s determination that the value of *broadcast spectrum* is increasing is also suspect. The sole authority cited for its conclusion is an article indicating a rise in the sale values of broadcast *stations*. That in itself demonstrates nothing about the inherent value of the spectrum that is used by those stations. A far more sophisticated economic analysis of the extent to which increased station values reflect an increase in spectrum value would be needed to support the Commission’s conclusion. But, as we demonstrate *infra*, even a better-supported conclusion about broadcast spectrum value would not be relevant to this proceeding, which deals only with non-broadcast spectrum uses.

subscription ancillary and supplementary services offered by digital television broadcasters will be *non-broadcast uses* of spectrum. In *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988), *recon. denied*, 4 FCC Rcd 4948 (1989), the Commission determined that services offered on a subscription basis are not broadcasting. “[B]roadcasting,’ as used in the Act, refers only to those signals which the sender intends to be received by the indeterminate public, as opposed to a specific addressee or addressees.” 2 FCC Rcd at 1004. As the Commission itself noted in the *Fee Decision*, its rules “specify that ‘any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary.’”⁷

Precisely because digital ancillary and supplementary services will be non-broadcast, the evidence from auctions of spectrum for non-broadcast uses provides the closest analog for determining the value of the spectrum which broadcasters may employ in offering such services.⁸ Thus, the Commission should not have disregarded the evidence from those auctions, and it should reconsider its decision, placing great weight on the declining value of spectrum used for non-broadcast services.⁹

⁷ *Fee Decision* ¶ 31, quoting 47 C.F.R. § 73.624(c).

⁸ The Commission’s apparent conclusion that it should focus on trends in the prices paid for broadcast stations as a measure of spectrum value is also incorrect because broadcasting – at least analog broadcasting – is an established business with costs and demand levels that can be predicted with some confidence. By contrast, new businesses that use parts of the digital spectrum but are ancillary to broadcasting have neither established demands nor costs. Thus, the prices paid for spectrum in other situations where the ultimate business use of the spectrum was uncertain and untested – such as the WCS auction – would be far more appropriate indicators of the value of digital ancillary spectrum.

⁹ In arguing that the Commission erred in disregarding evidence from recent spectrum
(continued...)

Broadcasters also submitted a study of trends in licensing fees for new technologies.¹⁰ This study found that licensing rates for unproven technologies without “highly favorable economics” tended to be very low. *Anderson Statement* at 4. This was in line with Professor Hausman’s conclusion that auction revenues for services with unproven technologies or uncertain demand were low. Since both factors fully apply to ancillary and supplementary uses of digital television channels, these studies provided strong support for the Commission to set a low initial fee, or else risk discouraging efforts to develop new and innovative uses for digital spectrum.

Again, however, the *Fee Decision* did not indicate that the Commission even considered the *Anderson Statement*. Paragraph 29 of the *Fee Decision* briefly discusses and dismisses evidence of copyright royalty rates, but the Commission did not even mention the technology licensing rates set out in the *Anderson Statement*. Reasoned decisionmaking requires the Commission to at least evaluate the record evidence presented to it.¹¹ Its failure to even consider

⁹ (...continued)
auctions, Broadcasters are not suggesting that the Commission use an auction-based formula to set fees for subscription ancillary DTV uses. As reflected in our comments, Broadcasters agree with the Commission’s tentative conclusion in the *Notice of Proposed Rulemaking* that a purely auction-based fee would be impractical. Broadcasters Comments at 8-9. Nonetheless, the trend in spectrum values shown in the *Hausman Statement* is relevant in determining the appropriate revenue percentage to charge broadcasters to achieve the statutory goal of “recovering for the public an amount that, to the extent feasible, equals *but does not exceed* . . . the amount that would have been recovered” in an auction. 47 U.S.C. § 336(e)(2)(A)(ii)(emphasis added).

¹⁰ Kent P. Anderson, *Fee Alternatives for Ancillary or Supplementary Services Offered by Digital Television Broadcasters: What can be Learned From Licensing Rates for Technology in the Private Sector?*, Attachment B to the Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc., MM Docket No. 97-247 (May 4, 1998) [hereinafter *Anderson Statement*].

¹¹ *See Motor Vehicle Manufacturers Assn. v. State Farm Mutual Insurance Co.*, 463 U.S. (continued...)

the *Anderson Statement* and its implications for the proper rate to be set for fees for ancillary or supplementary uses of digital channels requires the Commission to reconsider its decision.

The Commission argues in Paragraph 22 of the *Fee Decision* that it has broad discretion to set the level of fees for ancillary or supplementary uses. It reiterates that point as a reason for dismissing evidence of rates for other types of licenses. *E.g.*, *Fee Decision* at ¶¶ 22,27. While it may be true that the Telecommunications Act vested broad discretion in the Commission in setting fees, it is also true that the Commission’s exercise of its discretion here, as in any other area, must be based on some articulated analysis of the facts and law at issue. “At some point . . . the Commission must do more than ask us to defer to its ‘more or less intuitive model’ and ‘collective instinct’ to sustain” a rule. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1458 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

In the *Fee Decision*, the Commission gave weight to a factor – the value of spectrum for analog broadcasting – that was irrelevant, and ignored evidence of the value of spectrum for nascent services like the ones that DTV licensees might offer on an ancillary or supplementary basis. At the same time, however, it justified its decision to impose a relatively high fee on the ground that it “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.” *Fee Decision* ¶ 24. Since the Commission refused to even examine the results of

¹¹ (...continued)
29, 43 (1983); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998); *Competitive Enterprise Institute v. NHTSA*, 45 F.3d 481 (D.C. Cir. 1995) (upholding decision where agency had considered studies submitted with comments).

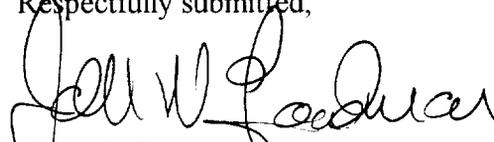
comparable spectrum auctions or other indicators of value, how can it have rationally reached this conclusion?

The Commission, therefore, should take another look at the proper fee to be set for ancillary or supplementary uses of digital television channels. As the Commission notes, it will reexamine the fee it sets after actual service begins. *Fee Decision* ¶ 52. Because the economic evidence now available shows that the value of spectrum used for nascent and untried services is very low, the Commission should set an initial fee of two percent of gross revenues.

Another reason for doing so is to encourage innovative uses of digital television technology. Adopting a fee that is too high now will discourage the development of new ancillary and supplementary services. Both the Anderson and Hausman statements demonstrated that developing new types of services would strongly benefit the public. Between the risks of setting a fee so high that it discourages innovation, or setting it somewhat lower than the optimum, the Commission should make an initial choice that promotes the efficient use of digital spectrum. When it has evidence of the services that are provided and the revenues that licensees are obtaining from ancillary and supplementary services, it can then make an informed decision about whether a higher fee level is appropriate.

For the foregoing reasons, Broadcasters request that the Commission reconsider its decision setting fees for ancillary and supplementary uses of digital television channels, and set a fee of two percent of gross revenues.

Respectfully submitted,

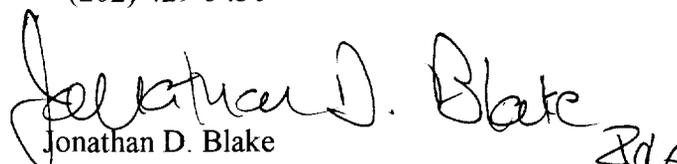


Henry L. Baumann
Jack N. Goodman

Mark R. Fratrick, Ph.D.
NAB Research & Planning

NATIONAL ASSOCIATION
OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Victor Tawil
Senior Vice President
ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.
1776 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 861-0344



Jonathan D. Blake *Jd6*
Mary Newcomer Williams
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20007
(202) 662-6000
Attorney for MSTV

January 15, 1999