

FCC FACT SHEET*

Promoting Broadcast Internet Innovation through ATSC 3.0

Declaratory Ruling and Notice of Proposed Rulemaking – MB Docket No. 20-145

Background: More than twenty years ago, during the transition from analog to digital broadcast television, the Commission adopted rules allowing digital television (DTV) licensees to provide ancillary or supplementary services on their excess spectrum capacity and to lease those rights to other entities. However, the potential for these data services has gone largely unrealized, and few broadcasters even provide such services. Today a new transition—the conversion of digital television from the first-generation technologies associated with the ATSC 1.0 standard to the next generation enabled by ATSC 3.0—is underway. Unlike the current standard, the ATSC 3.0 standard is Internet Protocol (IP) based and thus promises to expand the potential for broadcast spectrum capacity to support new services beyond traditional over-the-air video in ways that will complement the nation’s burgeoning 5G network. These new offerings can be referred to collectively as “Broadcast Internet” services. Broadcasters will not only be better able to serve the information and entertainment needs of their communities but may also have the opportunity to help address the digital divide and support the proliferation of new, IP-based consumer applications. Broadcasters may provide such services directly or indirectly, by entering into leasing arrangements with third parties to do so. We undertake this proceeding to ensure that our rules help to foster the introduction of new services and the efficient use of spectrum, while at the same time continuing to promote and preserve free, universally available, local broadcast television.

What the Declaratory Ruling Would Do:

- Remove regulatory uncertainty that could hinder the development of the new, innovative uses of broadcast spectrum that the ATSC 3.0 standard enables by clarifying that long-standing television station ownership rules do not apply to the lease of spectrum to provide Broadcast Internet services.

What the Notice of Proposed Rulemaking Would Do:

- Seek comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment of Broadcast Internet services as part of the transition to ATSC 3.0;
- Seek comment generally on potential uses of the new technological capability associated with ATSC 3.0 and any existing regulatory barriers to deployment; and
- Seek comment on whether any changes or clarifications are needed to the ancillary and supplementary service fee rules and/or the rules defining derogation of service and analogous services.

* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket No. 20-145, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 *et seq.*

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

In the Matter of
Promoting Broadcast Internet Innovation through
ATSC 3.0
MB Docket No. 20-145

DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING*

Adopted: [] Released: []

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission:

I. INTRODUCTION

1. The United States is transitioning to a new era of connectivity. From innovative 5G offerings to high-capacity fixed services and an entirely new generation of low-earth orbit satellites, providers from previously distinct sectors are competing like never before to offer high-speed Internet services through a mix of different technologies. The Commission has been executing on a plan to identify and remove the overhang of unnecessary government regulations that might otherwise hold back the introduction and growth of new competitive offerings. We want the marketplace—not outdated rules—to determine whether new services and technologies will succeed. Broadcasters, as well as a range of other entities, now have the potential to use broadcast spectrum to enter the converged market for connectivity in ways not possible only a few short years ago.

2. With this item, we take important steps to further unlock the potential of broadcast spectrum, empower innovation, and create significant value for broadcasters and the American public alike by removing the uncertainty cast by legacy regulations. More than twenty years ago, during the transition from analog to digital broadcast television, the Commission adopted rules allowing digital television (DTV) licensees to provide ancillary or supplementary services on their excess spectrum capacity and authorized licensees to enter into leases with other entities that would provide such services. Flash forward to today, and the conversion of digital television from the first-generation technologies associated with the ATSC 1.0 standard to the next-generation of ancillary services that will be enabled by ATSC 3.0 is now underway. This new technology promises to expand the universe of potential uses of

* This document has been circulated for tentative consideration by the Commission at its June 2020 open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 See infra para. 14.

2 ATSC 3.0 is the new TV transmission standard developed by Advanced Television Systems Committee as the world’s first Internet Protocol (IP)-based broadcast transmission platform, “which merges the capabilities of over- (continued....)

broadcast spectrum capacity for new and innovative services beyond traditional over-the-air video in ways that will complement the nation's burgeoning 5G network and usher in a new wave of innovation and opportunity. These new offerings over broadcast spectrum can be referred to collectively as "Broadcast Internet" services to distinguish them from traditional over-the-air video services. Broadcasters will not only be able to better serve the information and entertainment needs of their communities, but they will have the opportunity to play a part in addressing the digital divide and supporting the proliferation of new, IP-based consumer applications or voluntarily entering into arrangements to allow others to invest in achieving those goals. We undertake this proceeding to ensure that our rules help to foster the introduction of new services and the efficient use of spectrum.

3. By our Declaratory Ruling, we remove regulatory uncertainty that could hinder the development of the new, innovative uses of broadcast spectrum that the ATSC 3.0 standard enables. Specifically, we clarify that long-standing television station ownership restrictions do not apply to the lease of spectrum to provide Broadcast Internet services. This means that a broadcast television licensee can lease spectrum to another broadcaster (including one operating in the same geographic market) or to a third party for the provision of ancillary and supplementary services without triggering the Commission's attribution or ownership rules for television stations. Those television station rules, which identify the specific kinds of "cognizable interests" that allow a party to "own, operate or control" a television station or "otherwise provid[e] an attributable interest, . . . pursuant to [specified] criteria,"³ regulate traditional broadcast television service and therefore have no application to innovative Broadcast Internet services. By taking this step today, we help ensure that market forces, and not television station ownership rules that were written for different services, are brought to bear on and determine the success of the nascent Broadcast Internet segment. This step will also help ensure that broadcasters and other innovators have the flexibility to generate the scale—both locally and nationally—that may be necessary to support certain Broadcast Internet services without being subject to regulations unrelated to the provision of such services. For instance, a single entity could use this leasing mechanism to acquire the rights to offer Broadcast Internet services on multiple broadcast channels in the same market. And that same entity could put together a nationwide footprint for the provision of Broadcast Internet services. Combined, this can help create an even more attractive market for the deployment of competitive Broadcast Internet services.

4. As noted, the Commission last addressed these issues over twenty years ago, well before the ongoing transition to ATSC 3.0 dramatically increased the scope of innovative new services that can be provided and expanded the types of leasing arrangements that will help facilitate greater access to broadcast spectrum by third parties. Therefore, questions have been raised about the application of our prior ancillary services regime to these new offerings. Our decision today will help provide the stable and predictable regulatory environment that is critical if parties are to invest heavily in new Broadcast Internet services and thus aid in their proliferation.

5. In the accompanying Notice of Proposed Rulemaking (NPRM), we seek comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment of Broadcast Internet services as part of the transition to ATSC 3.0. As when the ancillary services rules were first adopted, the Commission seeks to promote and preserve free, universally available, local

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the-air broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for DTV service." *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, 9931, para. 1 (2017) (*Next Gen TV Report and Order*). This transmission standard allows broadcasters "to innovate, improve service, and use their spectrum more efficiently"; "to provide consumers with a more immersive and enjoyable television viewing experience on both home and mobile screens"; and "to offer enhanced public safety capabilities . . . and advanced accessibility options." *Id.*

³ See 47 CFR § 73.3555 notes 1-2.

broadcast television by providing a clear regulatory landscape that permits licensees the flexibility to succeed in a competitive market and incentivizes the most efficient use of prime spectrum.⁴ And given that the existing rules were adopted over twenty years ago, we believe it is appropriate at this time to reassess them in the context of the newest advanced broadcast television technology. To that end, in the NPRM we first seek comment generally on potential uses of the new technological capability from ATSC 3.0 and any existing regulatory barriers to deployment. We then consider specifically whether any changes or clarifications are needed to the ancillary and supplementary service fee rules and the rules defining derogation of service and analogous services. In so doing, we seek to encourage the robust usage of broadcast television spectrum capacity for the provision of Broadcast Internet services consistent with statutory directives.

II. BACKGROUND

6. *Commission Regulations Applicable to Ancillary and Supplementary Services.* Pursuant to section 336 of the Telecommunications Act of 1996 (the 1996 Act), Congress established the framework for licensing DTV spectrum to television broadcasters and permitted them to offer ancillary and supplementary services consistent with the public interest.⁵ Congress recognized that the transition from analog to digital broadcast technology would enable DTV licensees to provide new and innovative services, including various forms of data services, over their additional spectrum capacity and wanted to provide licensees with the flexibility necessary to utilize fully that new potential.⁶ Accordingly, section 336 directed the Commission to adopt regulations that would allow DTV licensees to make use of excess spectrum capacity, so long as the ancillary or supplementary services carried on DTV capacity do not derogate any advanced television services (i.e., free over-the-air broadcast service) that the Commission may require.⁷ Such ancillary or supplemental services are also subject to any Commission regulations that are applicable to analogous services.⁸ The statute also directed the Commission to impose a fee on ancillary or supplementary services for which the DTV licensee charges a subscription fee or receives compensation from a third party other than commercial advertisements used to support non-subscription broadcasting.⁹

7. The Commission adopted the initial rules governing the provision of ancillary or supplementary broadcast services in 1997 as part of the *DTV Fifth Report and Order*.¹⁰ Consistent with the Act, the rules obligate DTV licensees to “transmit at least one over-the-air video program signal at no

⁴ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Fifth Report and Order, 12 FCC Rcd 12809, 12811-12, paras. 5-6 (1997) (*DTV Fifth Report and Order*).

⁵ 47 U.S.C. § 336.

⁶ See S. Rep. No. 104-23, at 9 (1995) (“Advanced television, digital compression and other technological service innovations hold the potential to bring a variety of new services to consumers. Broadcasters seek to pursue these opportunities within existing broadcast radio spectrum . . . in a manner which will assure the continued availability of top quality broadcast service to all Americans.”); H.R. Rep. No. 104-204, at 116 (1995) (“[P]ermitting broadcasters more flexibility in using their spectrum assignments is consistent with the public policy goal of providing additional services to the public.”).

⁷ 47 U.S.C. § 336(a), (b)(2).

⁸ 47 U.S.C. § 336(b)(3).

⁹ 47 U.S.C. § 336(e). Specifically, the Act requires broadcasters to pay a fee to the U.S. Treasury to the extent they use their DTV spectrum to provide ancillary or supplementary services “(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 from transmitting material furnished by such a third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).” *Id.*

¹⁰ *DTV Fifth Report and Order*, 12 FCC Rcd at 12812, para. 7.

direct charge to viewers on the DTV channel.”¹¹ This means that regardless of whatever other services a broadcaster may provide over its spectrum, it must continue to provide one free stream of programming to viewers. As long as DTV licensees satisfy that obligation, the rules permit them to “offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis” provided the services do not derogate the licensee’s obligation to provide one free stream of programming to viewers and are subject to any regulations on services analogous to the ancillary or supplementary service.¹² These rules reflect the Commission’s intent to promote the public interest by maximizing “broadcasters’ flexibility to provide a digital service to meet the audience’s needs and desires.”¹³

8. The Commission initiated a separate proceeding to determine how best to assess and collect the statutorily required fee for ancillary or supplementary services.¹⁴ The statute directed the Commission to adopt a fee structure that would “recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and . . . avoid unjust enrichment through the method employed to permit such uses of that resources.”¹⁵ It also specifically instructed the Commission to set the fee at a value 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 [the Act] and the Commission’s regulations thereunder.”¹⁶ Ultimately, the Commission determined that a fee based on a percentage of the gross revenues generated by feeable ancillary or supplementary services was the best option to satisfy the statutory directive and achieve the

¹¹ 47 CFR § 73.624(b).

¹² 47 CFR § 73.624(c). The rules provide examples of the types of ancillary or supplementary services that DTV licensees may offer including, but not limited to “computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, subscription video, and any other services that do not derogate DTV broadcast stations’ obligations under paragraph (b) of this section. Such services may be provided on a broadcast, point-to-point or point-to-multipoint basis, provided, however that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary.” *Id.* Subsequently, in response to a petition for reconsideration, the Commission explicitly declined to limit the definition of ancillary or supplementary services to exclude mobile services, noting that ancillary or supplementary services would be subject to any regulations applicable to analogous services as required by the Act. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, 13 FCC Rcd 6860, 6868-69, paras. 25-26 (1998) (*DTV Order on Recon*).

¹³ *DTV Fifth Report and Order*, 12 FCC Rcd at 12809, para. 2.

¹⁴ *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, Notice of Proposed Rulemaking, 12 FCC Rcd 22821, 22821, para. 1 (1997) (*Ancillary Fees NPRM*). See *supra* note 8.

¹⁵ 47 U.S.C. § 336(e)(2).

¹⁶ 47 U.S.C. § 336(e)(2).

goal of incentivizing innovation to maximize spectrum efficiency.¹⁷ The Commission set the fee at five percent of gross revenues received from any feeable ancillary or supplementary services.¹⁸

9. Subsequently, the Commission clarified the ancillary or supplementary service rules as applied to noncommercial educational (NCE) television licensees.¹⁹ The Commission concluded that section 73.621 of the rules, which requires public NCE stations to provide a nonprofit and noncommercial broadcast service,²⁰ would apply to the provision of ancillary or supplementary services by NCE licensees.²¹ However, the Commission also decided to allow NCE licensees to offer subscription services on their excess capacity²² and to advertise on ancillary or supplementary services that do not constitute broadcasting.²³ Finally, the Commission concluded that section 336(e) of the Act does not exempt NCE licensees “from the requirement to pay fees on revenues generated by the remunerative use of their excess digital capacity, even when those revenues are used to support their mission-related activities.”²⁴

10. Pursuant to section 336(e)(4) of the Act, the Commission originally adopted rules requiring all DTV licensees and permittees annually to file a form (currently Form 2100, Schedule G), reporting information about their use of the DTV bitstream to provide feeable ancillary and

¹⁷ *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, Report and Order, 14 FCC Rcd 3259, 3264, para. 13 (1998) (*Ancillary Fees R&O*). In the *Ancillary Fees NPRM*, the Commission presented four options for the fee structure: “first, a fee akin to the amount that would have been received in an auction of the spectrum; second, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee’s DTV capacity; third a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity; and further, a fee based upon a hybrid of a flat rate and percentage of revenues.” *Ancillary Fees NPRM*, 12 FCC Rcd at 22826, para. 12.

¹⁸ *Ancillary Fees R&O*, 14 FCC Rcd at 3267, para. 20. The Commission considered and rejected commenters’ suggestions for a higher or lower percentage fee, finding that a five percent fee would 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 through auction, while at the same time, not being so high as to dissuade broadcasters from providing such services. *See id.* at 3266-69, paras. 18-30. The Commission additionally discussed the services on which the fee would be assessed, specifically noting that neither home shopping or other direct marketing programming, nor retransmission consent agreements would result in fees under these rules. *Id.* at 3271-72, paras. 39-42. In response to two petitions for reconsideration, the Commission subsequently affirmed these decisions. *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, Memorandum Opinion and Order, 14 FCC Rcd 19931, 19931, para. 2 (1999) (*Ancillary Fees MO&O*).

¹⁹ *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, MM Docket No. 98-203, Notice of Proposed Rulemaking, 14 FCC Rcd 537, 537, para. 2 (1998) (*NCE Ancillary Services NPRM*). This was in response to a Petition for Reconsideration of the *DTV Fifth Report and Order* from the Association of America’s Public Television Stations and the Public Broadcasting Service (AAPTSPBS), which asked the Commission to clarify that section 73.621 of the rules, which requires public NCE stations to provide a noncommercial service, does not apply to ancillary or supplementary DTV services, and to exempt NCE licensees from the fees assessed pursuant to Section 336(e). *See id.* at 542, 544, paras. 13, 18.

²⁰ 47 CFR § 73.621.

²¹ *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, MM Docket No. 98-203, Report and Order, 16 FCC Rcd 19042, 19048, para. 15 (2001) (*NCE Ancillary Services R&O*). The Commission declined to quantify the term “primarily” but defined it as a “substantial majority” of the broadcast spectrum capacity. *Id.*

²² *NCE Ancillary Services R&O*, 16 FCC Rcd at 19049, para. 18.

²³ *NCE Ancillary Services R&O*, 16 FCC Rcd at 19052, para. 27.

²⁴ *NCE Ancillary Services R&O*, 16 FCC Rcd at 19058, para. 40.

supplementary services.²⁵ In 2017, as a part of the *Modernization of Media Regulation Initiative*, the Commission revised these filing requirements.²⁶ The Commission concluded that requiring every DTV licensee to file the form was an unnecessary regulatory burden, as very few licensees offered any feeable service, and instead changed the rules to require only those licensees who had provided feeable ancillary or supplementary services during the applicable reporting period to file the form.²⁷ As the Commission observed, at that time only a fraction of all television broadcast stations provided feeable ancillary or supplementary services despite expectations in the wake of the digital transition.²⁸

11. *Next Generation Broadcast Standard (ATSC 3.0)*. ATSC 3.0 is the “Next Generation” broadcast television (Next Gen TV) transmission standard developed by the Advanced Television Systems Committee as the world’s first IP-based broadcast transmission platform, which “merges the capabilities of over-the-air broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for DTV service.”²⁹ As stated in the *Next Gen TV Report and Order*, the ATSC 3.0 standard will allow broadcasters to “offer exciting and innovative services,” including superior reception, mobile viewing capabilities, enhanced public safety capabilities (such as advanced emergency alerting capable of waking up sleeping devices to warn consumers of imminent emergencies), enhanced accessibility features, localized and/or personalized content, interactive educational children’s content, and other enhanced features.³⁰ In 2017, the Commission authorized broadcasters to begin the transition to ATSC 3.0 voluntarily and established standards to minimize the impact on, and costs to, consumers and other industry stakeholders.³¹ The Media Bureau began accepting applications for Next Gen TV licenses on May 28, 2019.³² Earlier this

²⁵ See *Ancillary Fees R&O*, 14 FCC Rcd at 3275, paras. 54-55. Form 2100, Schedule G was originally referred to as FCC Form 317 but was renamed with the introduction of the Licensing and Management System (LMS) in 2015. See *Amendment of Section 73.624(g) of the Commission’s Rules Regarding Submission of FCC Form 2100, Schedule G, Used to Report TV Stations’ Ancillary or Supplementary Services; Amendment of Section 73.3580 of the Commission’s Rules Regarding Public Notice of the Filing of Broadcast Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements of Section 73.3580*, MB Docket Nos. 17-264, 17-105, 05-6, Notice of Proposed Rulemaking, 32 FCC Rcd 8203, 8203, n.1 (2017).

²⁶ *Amendment of Section 73.624(g) of the Commission’s Rules Regarding Submission of FCC Form 2100, Schedule G, Used to Report TV Stations’ Ancillary or Supplementary Services; Modernization of Media Regulation Initiative*, MB Docket Nos. 17-264, 17-105, Report and Order, 33 FCC Rcd 3702, 3702, para. 1 (2018) (*Schedule G Media Modernization R&O*).

²⁷ *Schedule G Media Modernization R&O*, 33 FCC Rcd at 3704-05, para. 6.

²⁸ *Schedule G Media Modernization R&O*, 33 FCC Rcd at 3704-05, para. 6. Based on a Commission staff review of FCC Form 2100, Schedule G (used to report television stations’ ancillary or supplementary services), only three stations reported providing feeable ancillary and supplementary services in the twelve-month period prior to September 30, 2019, and the Commission collected \$2,250 in fees from those revenues.

²⁹ *Next Gen TV Report and Order*, 32 FCC Rcd at 9931, para. 1.

³⁰ *Next Gen TV Report and Order*, 32 FCC Rcd at 9933, para. 4.

³¹ *Next Gen TV Report and Order*, 32 FCC Rcd at 9931, para. 2. The Commission determined in the *Next Gen TV Report and Order* that broadcasters deploying ATSC 3.0 generally must continue to deliver current-generation DTV service, using the ATSC 1.0 transmission standard to their viewers through local simulcasting. Specifically, the Commission required full power and Class A television stations deploying ATSC 3.0 service to simulcast the primary video programming stream of their ATSC 3.0 channels in an ATSC 1.0 format. See 47 CFR §§ 73.3801(b), 73.6029(b).

³² *Media Bureau Announces That it will Begin Accepting Next Generation Television (ATSC 3.0) License Applications in the Commission’s Licensing and Management System on May 28, 2019*, GN Docket No. 16-42, Public Notice, 34 FCC Rcd 3684 (MB 2019). According to NAB and Pearl TV, broadcasters intended to launch ATSC 3.0 service in 61 markets in 2020. Letter from Gerard J. Waldron, Counsel to Pearl TV, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1-2 (filed Sept. 9, 2019). However, it is unclear what the impact

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year, the Commission adopted a Notice of Proposed Rulemaking seeking comment on proposed changes to the rules governing the use of distributed transmission systems (DTS) by broadcast television stations.³³ Proponents of the changes assert that they will facilitate the use of new and innovative technologies that will improve traditional broadcast service and mobile reception of broadcast signals, as well as allow the more efficient use of broadcast spectrum, which they claim would enable broadcasters to exploit more fully the new capabilities resulting from ATSC 3.0.³⁴

12. ATSC 3.0 provides greater spectral capacity than the current digital broadcast television standard, allowing broadcasters to innovate, improve service, and use their spectrum more efficiently. Although today many broadcasters are focused solely on deploying traditional broadcast television services using the ATSC 3.0 standard, some broadcasters and third-party groups are looking to the future and examining ways broadcasters can become part of the 5G ecosystem and provide myriad other services using the enhanced capabilities of ATSC 3.0 technologies.³⁵ Specifically, these groups hope to utilize television spectrum to provide non-traditional broadcast video services such as video-on-demand or subscription video services and new, innovative non-broadcast services in such areas as the automotive industry, agriculture, distance learning, telehealth, public safety, utility automation, and the “Internet of Things” (IoT). Providing a regulatory environment to enable a thriving secondary market is key to unlocking the potential for such Broadcast Internet services via ATSC 3.0.

III. DECLARATORY RULING

13. The Communications Act and the Commission’s rules provide clear authority for the provision of ancillary and supplementary services by broadcast television stations, including through spectrum lease agreements,³⁶ yet few such services have been offered over the past two decades and none appear to have been offered extensively or systematically across the television industry.³⁷ Accordingly,

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of the recent novel coronavirus (COVID-19) will be on these plans. *See* Letter from Patrick McFadden, Associate General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142, at 1 (filed Jan. 27, 2020).

³³ *Rules Governing the Use of Distributed Transmission System Technologies; Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, MB Docket No. 20-74, GN Docket No. 16-142, Notice of Proposed Rulemaking, FCC 20-43, 2020 WL 1652714, at *1, para. 1 (Apr. 1, 2020) (*DTS NPRM*).

³⁴ *DTS NPRM* at *3, para. 7.

³⁵ *See, e.g.*, Letter from Jennifer Tatel, Counsel to Public Media Group, to Marlene H. Dortch, Secretary, FCC (Feb. 13, 2020) (discussing PMG’s “goals and plans to facilitate nationwide market transitions to ATSC 3.0 and to design and build single frequency networks”).

³⁶ *See* 47 U.S.C. § 336 (providing broadcasters flexibility in using their DTV spectrum); 47 CFR § 73.624(c) (providing that “DTV broadcast stations are permitted to offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary and supplementary basis”); *DTV Fifth Report and Order*, 12 FCC Rcd at 12834-35, para. 60 (noting the use of leasing arrangements in other contexts and stating that the Commission would be “receptive to the establishment of like arrangements in the DTV context”); *see also* 47 CFR § 73.646(d) (authorizing television licensees to lease their vertical blanking interval and visual signal telecommunications facilities to outside parties so long as they retain control over all material transmitted in a broadcast mode via the station’s facilities and remain responsible for all aspects of technical operation involving such telecommunications services).

³⁷ *See, e.g.*, *Communications Marketplace Report, The State of Mobile Wireless Competition, Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Marketplace for Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, Report, GN Docket No. 18-231, WT Docket No. 18-203, MB Docket No. 17-214, MB Docket No. 18-227, IB Docket No. 18-251, FCC 18-181, 2018 WL 6839365, para. 94, n.261 (2018) (finding that revenue from ancillary and supplementary services remains an insignificant portion of total station revenue, with nationwide revenue from these services totaling approximately \$200,000 in 2016 and \$25,000 in 2017); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, MB Docket No. 07-269, 27 FCC Rcd 8610, 8737-38, para. 284 (2012) (reporting on a business venture that leased digital television spectrum from

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the Commission has had little occasion to opine on these rules since their adoption over twenty years ago. With the advent of ATSC 3.0, however, broadcasters may be better positioned to realize the potential long envisioned by Congress and the Commission when they were granted the flexibility to use their spectrum in new and novel ways to benefit their local communities and the American people.³⁸ We expect that our clarification today will help promote increased investment in broadcast television stations, thereby enabling them to better serve their local markets.

14. As the Commission has noted, some licensees may find it useful to develop partnerships with other broadcasters or third parties to help make the most productive and efficient use of their spectrum, and the Commission has stated that it would “look with favor on such arrangements.”³⁹ In some cases, a broadcaster may lease a portion of its spectrum to a separate and unrelated entity that, instead of the broadcaster, would provide ancillary and supplementary services to the consumer.⁴⁰ Conversion of broadcast television to the ATSC 3.0 transmission standard has the potential to increase the attractiveness of ancillary and supplementary services and correspondingly the prevalence of spectrum leases to third parties (including other broadcasters) that can provide such services.⁴¹ As an IP-based standard designed for compatibility with wireless broadband networks, ATSC 3.0 broadcast signals can connect to 5G wireless networks to provide enhanced consumer experiences in ways that ATSC 1.0 cannot. Wireless networks are becoming more dynamic, relying on various spectrum bands for inbound and outbound data paths. Though ATSC 3.0 transmissions presently lack a return path, the technology is well positioned to support a host of next-generation applications, both on its own or as part of a hybrid wireless network. For example, third parties may wish to lease excess broadcast spectrum for such uses as supporting autonomous vehicle operation through system updates; pre-positioning popular content (e.g., movies or video games) to help reduce network congestion; distributing educational or job certification materials; providing supplemental information to telemedicine patients; issuing advanced emergency alerts for first responders and the public; and providing operational support for IoT devices and smart meters.⁴² We expect that these types of next-generation services will come to define Americans’ lives over the coming years and decades, and broadcast spectrum will be in a position to support their growth and proliferation. Furthermore, an ATSC 3.0 signal can offer broadband-speed

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local broadcasters); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189, 24 FCC Rcd 542, 598-600, paras. 114-18 (2009) (reporting the “modest” provision of ancillary and supplementary services, including services that used the digital television spectrum of local broadcasters to distribute digital content directly to home computers and other devices); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, 20 FCC Rcd 2755, 2807-08, paras. 84-86 (2005) (describing examples of spectrum leasing to provide ancillary and supplementary services).

³⁸ See, e.g., Letter from Jerald N. Fritz, Executive Vice President, Strategic and Legal Affairs, ONE Media 3.0, LLC, to Marlene Dortch, Secretary, FCC, GN Docket No. 16-142 et al. (Oct. 29, 2018) at 1-2 (asserting that the ATSC 3.0 standard “has enormous flexibility to provide video and other data services in ways that dwarf the current over-the-air broadcast and 4G distribution platforms”) (ONE Media *Ex Parte*).

³⁹ *DTV Fifth Report and Order*, 12 FCC Rcd at 12834-35, para. 60.

⁴⁰ The Commission intended its rules for ancillary and supplementary services to enable broadcasters “to experiment with innovative offerings and different service packages as they continue to provide at least one free program service and meet their public-interest obligations.” *DTV Fifth Report and Order*, 12 FCC Rcd at 12822, para. 33.

⁴¹ Unlike certain wireless licensees, who are permitted to transfer *de facto* control of their spectrum to lessees subject to prior Commission approval and other conditions, we note that a TV station licensee entering into a spectrum “lease” for the provision of ancillary and supplementary services must maintain control of the technical operations involving its licensed frequencies. Compare 47 CFR §§ 1.9030, 1.9035 (*de facto* transfer leasing for wireless carriers) with 47 CFR § 73.624(c)(2) (providing that in “all arrangements entered into with outside parties affecting service operation, . . . the licensee or permittee is also responsible for all aspects of technical operation”).

⁴² See, e.g., ONE Media *Ex Parte* at 1-2.

downloads, which may help reduce consumer costs for Internet services, and its propagation characteristics make it well suited for underserved rural communities.⁴³ In addition, the nature of ATSC 3.0 transmissions, as compared to ATSC 1.0, could lead to novel and creative leasing arrangements that could involve multiple, short-term spectrum users, arrangements that were not feasible when the Commission last issued guidance on these issues more than twenty years ago.

15. In issuing this declaratory ruling, we seek to clarify the regulatory treatment of such leasing arrangements and to remove any uncertainty that might chill the introduction of new and innovative services under ATSC 3.0.⁴⁴ Specifically, we clarify that the lease of excess broadcast television spectrum to a third party, including another broadcaster, for the provision of ancillary and supplementary services does not result in attribution under our broadcast television station ownership rules or for any other requirements related to television station attribution (e.g., filing ownership reports). That is, our attribution rules do not confer a “cognizable interest” solely by the existence of a lease agreement to provide ancillary and supplementary services over the station’s spectrum.⁴⁵ The Commission’s broadcast television station attribution rules seek to identify interests that confer influence or control such that those interests should be counted for purposes of the media ownership limits.⁴⁶ Influence or control over programming, personnel, and finances is considered in making an attribution determination.⁴⁷ The Commission’s media ownership limits are intended to promote viewpoint diversity, localism, and competition in broadcast services,⁴⁸ yet ancillary and supplementary services are defined to exclude broadcast services.⁴⁹ We thus find no basis to deem a lease pertaining to such non-broadcast services as implicating our media ownership limits.

⁴³ See *Unlicensed White Space Device Operations in the Television Bands*, ET Docket No. 20-36, Notice of Proposed Rulemaking, FCC 20-17, 2020 WL 1041558, at *1, para. 1 (Mar. 2, 2020) (stating that “[t]his region of the spectrum has excellent propagation characteristics that make it particularly attractive for delivering communications services over long distances, coping with variations in terrain, as well as providing coverage into and within buildings”).

⁴⁴ Section 554(e) of the Administrative Procedure Act authorizes the Commission to issue a declaratory ruling to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e). Moreover, section 1.2 of our rules provides that “[t]he Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” 47 CFR § 1.2.

⁴⁵ In other words, such a lease does not, by itself, allow the lessee to “own, operate or control” the lessor station or “otherwise provide[] [the lessee with] an attributable interest” in the lessor station to trigger the Commission’s broadcast television station attribution rules where no attribution between the lessor station and the lessee otherwise arises from any Commission rules, including those set out in the Notes to section 73.3555. See 47 CFR § 73.3555 and Notes.

⁴⁶ See *id.*; see also *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 F.C.C. 2d 997 para. 2 (1984) (identifying those interests that confer the requisite “degree of influence or control over the licensee and its facilities”).

⁴⁷ See, e.g., *KHNL/KGMB License Subsidiary, LLC*, Memorandum Opinion and Order, 33 FCC Rcd 12785, 12790, para. 13 (2018) (noting that the Commission “looks to whether the entity in question establishes the policies governing station programming, personnel, and finances” in determining “who holds operational control of the station”).

⁴⁸ *Report and Order and Notice of Proposed Rulemaking—2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, ¶ 8 (2003).

⁴⁹ Ancillary and supplementary services are, by definition, ancillary and supplemental to the licensee’s continued provision of free broadcast television service on its remaining spectrum. See 47 CFR § 73.624(b) (requiring licensees to provide at least one free over-the-air signal) and (c) (providing that “any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary”). Pursuant to our existing broadcast attribution rules and policies, the licensee must continue to retain control over programming, personnel, and finances with respect to its core service.

16. This ruling applies regardless of whether the station is broadcasting in ATSC 1.0 or 3.0 and only in those circumstances where the lessee uses the spectrum for services that qualify as ancillary and supplementary under section 73.624(c) of the Commission's rules, which is the limited focus of our action today.⁵⁰ Consistent with our rules, licensees entering into such leases still bear the responsibility to retain ultimate control over their spectrum and to ensure compliance with our broadcast regulations.⁵¹ Also consistent with existing Commission rules and policies, the term of any spectrum lease should be for no greater than the duration of the station's broadcast license, with renewal of the leasing arrangement permitted. Furthermore, the broadcaster must continue to provide at least one over-the-air video program signal at no charge to viewers in accordance with section 73.624(b) of the Commission's rules⁵² and remain in compliance with all other applicable Commission rules. By extension, the broadcaster is responsible for any misuse of its spectrum by a lessee in violation of applicable statutes or Commission rules.⁵³

17. By this declaratory ruling, we seek to provide additional clarity in order to encourage the investment in and deployment of potentially beneficial Broadcast Internet services and to eliminate any possibility of unnecessary regulatory obstructions, either real or perceived. The Commission's rules for ancillary and supplementary services were intended to afford broadcasters the flexibility to use spectrum capacity in entrepreneurial and innovative ways.⁵⁴ In recognizing "the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services,"⁵⁵ the Commission has chosen "to impose few restrictions on broadcasters and to allow them to make decisions that will further their ability to respond to the marketplace."⁵⁶ As the industry transitions to a next-generation broadcast television standard, we seek to ensure that our rules help facilitate innovative arrangements that can result in the efficient use of spectrum.⁵⁷ In doing so, it is our hope that the marketplace, not rules designed for different services, will ultimately decide which Broadcast Internet services are developed and supported.

⁵⁰ A service will not qualify as ancillary or supplementary under the rule if it derogates the broadcast station's obligations to transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel. The service may be provided on a broadcast, point-to-point, or point-to-multipoint basis, but video broadcast signals provided at no direct charge to viewers shall not be considered ancillary or supplementary. 47 CFR § 73.624(c).

⁵¹ This obligation is consistent with the requirement in section 73.624(c)(2) that "[i]n all arrangements entered into with outside parties affecting service operation, the DTV licensee or permittee must retain control over all material transmitted in a broadcast mode via the station's facilities" and "is also responsible for all aspects of technical operation involving such telecommunications services." 47 CFR § 73.624(c)(2).

⁵² 47 CFR § 73.624(b).

⁵³ See *DTV Fifth Report and Order*, 12 FCC Rcd at 12834-35, para. 60 (emphasizing that a broadcast licensee entering into a lease or other partnership "remains responsible for ensuring the fulfillment of all obligations incumbent upon a broadcast licensee").

⁵⁴ See 47 CFR § 73.624(c) (providing that ancillary and supplementary services can be "of any nature, consistent with the public interest, convenience, and necessity"); see also *DTV Fifth Report and Order*, 12 FCC Rcd at 12812, 12820-23, paras. 7, 27-36 (explaining that "the flexibility [authorized under the rules] should encourage entrepreneurship and innovation").

⁵⁵ *DTV Fifth Report and Order*, 12 FCC Rcd at 12820-21, para. 29.

⁵⁶ See *id.* at 12812, para. 7.

⁵⁷ *Id.* at 12823, para. 34 (concluding that "[i]t would be contrary to the public interest to handicap broadcasters in providing these [ancillary and supplementary] services and to deprive consumers of the opportunity to purchase the services they desire").

IV. NOTICE OF PROPOSED RULEMAKING

18. With this NPRM, we seek comment on any rule changes that would create even more certainty and promote greater investment in innovative Broadcast Internet services. We therefore seek comment on three topics related to the provision of ancillary or supplementary services by broadcast television licensees, either on their own or in conjunction with a third party, to aid the Commission in determining whether and how to modify or clarify its rules to promote the deployment of Broadcast Internet services that can complement the 5G network as a part of the transition to ATSC 3.0. First, we seek comment on a number of general matters concerning the potential uses and applications of excess broadcast spectrum capacity resulting from the transition to ATSC 3.0. Second, we seek comment on whether the amount and method of calculating the ancillary services fee should be reconsidered given the new potential uses of excess spectrum capacity. Finally, we ask whether the Commission should clarify the rules prohibiting derogation of broadcast service and defining an analogous service.

A. General Matters

19. As an initial matter, we invite comment on the types of Broadcast Internet services that are likely to be provided in the future using the ATSC 3.0 standard. Recently, television broadcasters have indicated that they will use their spectrum to provide innovative services in such areas as automotive transportation, agriculture, distance learning, telehealth, public safety, utility automation, and IoT devices.⁵⁸ Given the wide and likely expanding range of services that could rely on Broadcast Internet spectrum, are there rule changes we should consider to help promote such services? In addition, we invite comment on when television broadcasters anticipate such services might be introduced into the marketplace. Further, to what extent will Broadcast Internet services be utilized as a complement to our nation's 5G network? Are Broadcast Internet services likely to be offered in urban areas of the country as well as in rural and underserved areas?

20. We seek comment generally on the steps the Commission should take to promote innovation, experimentation, and greater use of broadcast television spectrum to provide ancillary and supplementary services. In addition to today's declaratory ruling, are there additional steps we should take, in light of changes to the marketplace, that could encourage or facilitate the ability of broadcast licensees to enter into partnerships or leasing arrangements for the provision of ancillary and supplementary services that would allow them or others to utilize broadcast spectrum more efficiently and to its fullest extent? For instance, should we consider revisions to our broadcast licensing rules to allow for partnerships or leasing arrangements beyond those that are the subject of clarification in today's declaratory ruling (e.g., leases more closely resembling those used by wireless licensees)?⁵⁹ To this end, are there any rules applicable to mobile or fixed wireless services that could be considered useful models for the purposes of encouraging Broadcast Internet services?⁶⁰ In addition, what regulatory, technical, or

⁵⁸ See, e.g., ONE Media *Ex Parte* at 1-2 ("Use cases for these new services include: offloading large data files (including video) needed by carriers to cache programming directly on user devices, dramatically improving efficient distribution of data to autonomous driving vehicles, and facilitating near-instantaneous needs for IoT devices and telemedicine activities.").

⁵⁹ We seek comment herein only on changes to our rules and policies regarding leases of or agreements regarding excess capacity for the provision of ancillary and supplementary services (i.e., services other than traditional broadcast TV). We do not intend, in this proceeding, to consider changes to our rules and policies regarding any other forms of broadcast leases or agreements (local marketing agreements, joint sales agreements, shared services agreements, etc.).

⁶⁰ Notably, the Commission has previously declined to extend to broadcast licensees the formal leasing regime applicable to certain wireless licensees, and commenters seeking a different course in this proceeding should explain any circumstances or developments that would support such a change. See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20644, n.188 (2003); *Promoting Efficient*

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other barriers exist that might impede the introduction of Broadcast Internet services? For example, do the existing technical rules regarding ancillary and supplemental services restrict the types of services that could be offered, either by a station directly or in partnership with a third party? To the extent such barriers exist, what steps, if any, should the Commission take to eliminate them?

21. We seek comment more specifically on whether there are any potential regulatory limitations on the ability of public television stations to provide Broadcast Internet services. For example, section 399B of the Communications Act⁶¹ permits public stations to provide facilities and services in exchange for remuneration provided those uses do not interfere with the stations' provision of public telecommunications services.⁶² Section 399B, however, does not permit public broadcast stations to make their facilities "available to any person for the broadcasting of any advertisement."⁶³ In 2001, however, the Commission concluded that the section 399B ban on advertising applies to all broadcast programming streams provided by NCE licensees but does not apply to ancillary or supplementary services on their DTV channels, such as subscription services or data transmission services, to the extent that such services do not constitute "broadcasting."⁶⁴ We tentatively conclude that the Commission's 2001 determination regarding section 399B permits NCE broadcasters to offer Broadcast Internet services. We seek comment on the kinds of Broadcast Internet services NCE licensees are likely to provide. How are these stations planning to take advantage of the opportunities afforded by the transition from ATSC 1.0 to ATSC 3.0? Are there any regulatory or other impediments to the provision of ancillary and supplementary services by NCE stations?

22. We also seek comment on the provision of Broadcast Internet services by low power (LPTV) television stations. Are LPTV broadcasters likely to offer Broadcast Internet services? If so, what kinds of services are these broadcasters likely to provide? Do LPTV stations face unique challenges in the provision of Broadcast Internet services and, if so, what are they? If such challenges exist, what steps, if any, should the Commission take to facilitate the provision of such services by LPTV stations?

B. Ancillary and Supplementary Service Fee

23. As noted above, the 1996 Act requires broadcasters to pay a fee to the U.S. Treasury to the extent they use their DTV spectrum to provide ancillary or supplementary services "(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 from transmitting material furnished by such a third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required)."⁶⁵ Below we seek comment on whether we should clarify or modify the rules applicable to the provision of feeable ancillary and supplementary services, such as the amount and method of calculating the fee or the reporting requirements, given the new potential uses of spectrum capacity to provide ancillary and supplementary offerings through ATSC 3.0 technologies, including innovative services that were not contemplated when the Commission first implemented the rules over two decades ago.

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Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, Notice of Proposed Rulemaking, 15 FCC Rcd 24203, 24227, para. 69 (2000).

⁶¹ 47 U.S.C. § 399B.

⁶² Section 399B also requires that public stations engaged in revenue generating activities comply with accounting procedures designed to separately identify these commercial revenues and costs, and it prohibits Corporation for Public Broadcasting funds from being used to defray any costs associated with these activities. 47 U.S.C. § 399B.

⁶³ 47 U.S.C. § 399B(a)(2).

⁶⁴ See *NCE Ancillary Services R&O*, 16 FCC Rcd at 19052, para. 27.

⁶⁵ Section 201 of the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56, 108-09 (1996), *codified at* 47 U.S.C. § 336(e)(1).

24. At the outset, we note that, as discussed above, the Commission is subject to certain statutory mandates for determining the fee for ancillary and supplementary services carried on the public spectrum. Specifically, the ancillary and supplementary services fee must be designed to: (1) recover for the public a portion of the value of the public spectrum resource made available for ancillary or supplemental use by broadcasters; (2) avoid unjust enrichment of broadcasters through the method used to permit digital use of the spectrum; and (3) 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 at auction.⁶⁶ Also, the Commission is required by statute to adjust the ancillary and supplementary services fee “from time to time” in order to ensure that these requirements continue to be met.⁶⁷

25. When the Commission last undertook an assessment of ancillary and supplementary service fees in 1998, it determined that it would assess fees on all revenue—both subscription and advertising revenue—from all ancillary and supplementary services for which viewers must pay subscription fees.⁶⁸ In addition, as required by the 1996 Act, the Commission determined that fees must be assessed on ancillary and 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 for commercial advertisements used to support broadcasting for which a subscription fee is not required).⁶⁹ The Commission noted that, pursuant to our rules, over-the-air video programming provided at no charge to viewers is not an ancillary or supplementary service. It reasoned, therefore, that this provision “applies to ancillary or supplementary services, consisting of material that does not originate with the licensee and that the viewer can receive without payment of a fee.”⁷⁰ These services may include data, audio, “or any other ancillary or supplementary services that may be established in the future.”⁷¹ The Commission noted that it received very little comment on the types of non-subscription ancillary or supplementary services parties contemplated providing.⁷² Accordingly, it concluded that, 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.”⁷³

26. Given the passage of time since the implementation of the ancillary and supplementary fee program over two decades ago and the technological developments since then that will enable the provision of new and innovative ancillary or supplementary services on the public spectrum, we seek comment on whether we should clarify or modify our rules for assessing fees on such services. In the ATSC 3.0 proceeding, some commenters suggested that a higher fee might be warranted to ensure

⁶⁶ 47 U.S.C. § 336(e)(2)(A)-(B); *see also Ancillary Fees R&O*, 14 FCC Rcd at 3267, para. 20; *Ancillary Fees MO&O*, 14 FCC Rcd at 19931.

⁶⁷ 47 U.S.C. § 336(e)(2)(C); *see also Ancillary Fees R&O*, 14 FCC Rcd at 3274-75, para. 51.

⁶⁸ *See Ancillary Fees R&O*, 14 FCC Rcd at 3271, para. 36; 47 CFR § 73.624(g)(1)(i).

⁶⁹ *See Ancillary Fees R&O*, 14 FCC Rcd at 3270, para. 32; 47 CFR § 73.624(g)(1)(ii). The Commission determined that a retransmission consent agreement does not constitute the payment of compensation by a third party to a licensee in exchange for the transmission of material provided by that third party. *See 1998 Ancillary Fees R&O*, 14 FCC Rcd at 3272, para. 42 (concluding that 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.”).

⁷⁰ *Ancillary Fees R&O*, 14 FCC Rcd at 3271, para. 37.

⁷¹ *Id.*

⁷² *Id.* at para. 38.

⁷³ *Id.*

compliance with the statutory directives in section 336(e)(2)(A) through (B),⁷⁴ while others asserted that the fee should be reduced to ensure that it does not impede innovation by Next Gen TV broadcasters.⁷⁵ In the *Next Gen TV Report and Order*, the Commission concluded that it would be premature to adjust the fee associated with ancillary services in part because it was not clear from the record in that proceeding which ATSC 3.0-based services and features would be “ancillary services” or which such services will be feeable.⁷⁶

27. With the possibility of providing new, innovative ancillary and supplementary services that were not necessarily envisioned at the time the fee rules were established, is it appropriate at this time to adjust the fee associated with ancillary and supplementary services? Should we consider adjustments to either the basis of the fee or the percentage of the fee? Are there any circumstances under which it would be appropriate to set the fee at zero?⁷⁷ What changes, if any, would ensure that the fee promotes the provision of innovative ancillary and supplementary services offered by ATSC 3.0 transmission while complying with statutory requirements (e.g., recovering some portion of the value of the spectrum for the public, preventing unjust enrichment, recovering for the public an amount that equals the amount that would have been recovered at auction)?⁷⁸ And how, if at all, should we account for changes in the communications and media landscape? What would be the costs and benefits of adjusting the ancillary services fee? Commenters advocating in favor of modifying the fee should describe with specificity the kinds of ancillary services broadcasters are likely to offer in ATSC 3.0 and the benefits that would accrue from any proposed change in fee structure. Alternatively, is it still premature to change the fee rules now? Should we allow the ATSC 3.0 marketplace to develop further before considering changes?

28. Are there any other issues we should consider with respect to the application of fees to the provision of ancillary or supplementary services during the transition to ATSC 3.0? For example, in order to promote the provision of new services, should we apply the fee only to gross revenues above a certain threshold? If so, should such a threshold apply only to certain classes of stations, such as NCE stations? Similarly, should the fees be capped during license term and, if so, at what level? Should we revisit the Commission’s prior decision to adopt a fixed percentage rate as opposed to a variable percentage rate based upon the type of service provided?⁷⁹ Should we consider granting exemptions for certain classes of service from fees, such as telehealth, distance learning, public safety, or homeland security-related services, or services that promote access in rural areas? Would it be consistent with the statute to do so? Would such rule changes or exemptions be consistent with the Commission’s statutory obligation to assess a fee that will recover some portion of the value of the spectrum for the public, prevent unjust enrichment, and approximate the revenue that would have been received through auction?

⁷⁴ As noted above, the Commission is required to set the ancillary services fee so as to (1) recover for the public a portion of the value of the public spectrum made available for ancillary or supplemental use by broadcasters, (2) avoid unjust enrichment of broadcasters, and (3) recover for the public an amount that equals the amount that would have been recovered at auction. 47 U.S.C. § 336(e)(2)(A)-(B). *See supra* para. 22.

⁷⁵ *See Next Gen TV Report and Order*, 32 FCC Rcd at 9976-77, para. 91 and nn.273-74.

⁷⁶ *Id.* at 9977, para. 92. Moreover, the Commission noted that, compared to other revenue sources, ancillary and supplementary services remain an insignificant portion of total station revenues. *Id.*

⁷⁷ Commenters claiming that a fee of zero would be appropriate should address Commission precedent on this issue. *Ancillary Fees MO&O*, 14 FCC Rcd at 19937-38, para. 15.

⁷⁸ *See, e.g., Ancillary Fees R&O*, 14 FCC Rcd at 3267, paras. 20-21 (balancing statutory requirements with the goal of ensuring that the fee will not be so high as to dissuade broadcasters from providing feeable ancillary or supplementary services that can greatly benefit consumers).

⁷⁹ *See Ancillary Fees R&O*, 14 FCC Rcd at 3274, paras. 49-50 (finding that “a varying fee rate could have the effect of dissuading licensees from providing particular services,” could “create an incentive for a licensee to provide the service with a lower fee rate over a service subject to a higher fee,” and “would be difficult to adhere to and enforce”).

We note that when the Commission initially implemented the program for assessing ancillary and supplementary fees, it observed that “[a]n 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.”⁸⁰ Does this concern regarding complexity weigh against any changes to the ancillary and supplementary fee that differentiate among types of services? We invite comment generally on these issues.

29. We invite comment on how the ancillary and supplementary services fee should be calculated in instances where a broadcaster receives compensation from an unaffiliated third party, such as a spectrum lessee, in return for the airing of material provided by the third party. For example, the broadcaster could lease spectrum to a third party for a set fee, or could agree to share in the proceeds generated by the service offered by the third party. We tentatively conclude that, in each instance, the fees should be calculated based on the gross revenue received by the broadcaster, without regard to the gross revenue of the spectrum lessee. Indeed, to hold otherwise could subject the broadcaster to a fee payment in excess of the actual gross revenue it received. We seek comment on this tentative conclusion. To the extent the licensee and the lessee are affiliated (e.g., commonly owned or controlled), we believe that the gross revenues of the lessee should be attributed to the licensee for purposes of calculating the ancillary and supplementary services fee. Otherwise, the licensee (or its parent company) could create a subsidiary for the sole purpose of evading the fee while retaining all of the financial benefit of the arrangement. We seek comment on these issues. We also invite comment on whether the calculation of fees should include the value of any “in-kind” improvements made by an unaffiliated spectrum lessee to the licensee’s facilities to facilitate the provision of services.⁸¹ While such facility improvements could reasonably be considered a form of indirect compensation that may otherwise be subject to the ancillary and supplementary services fee, we tentatively conclude that the value of such improvements should be excluded from the gross revenue calculation. The transition to ATSC 3.0 is voluntary and many stations may lack the funds and/or expertise to upgrade their transmission facilities. Excluding the value of in-kind improvements from the fee calculation may help promote faster adoption of ATSC 3.0 and greater use of spectrum for Broadcast Internet applications. Over time, this could result in greater fee collection as broadcasters derive greater gross revenues as a result of the facilities upgrade. We invite comment on these issues.

30. Finally, we seek comment on whether we should consider any changes to the annual reporting requirement applicable to the provision of feeable ancillary or supplementary services. Currently, the Commission’s rules require all commercial and noncommercial DTV licensees and permittees that provided feeable ancillary or supplementary services during the applicable 12-month period to report each December 1: (1) a brief description of the feeable ancillary or supplementary services provided; (2) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and (3) the amount of bitstream used to provide feeable ancillary or supplementary services during the applicable period.⁸² Should the Commission make any changes to the information collected on the form or any other information collections related to the provision of ancillary and supplemental services?

C. Derogation of Service and Analogous Services

31. The 1996 Act and specifically section 336 thereof allow broadcasters flexibility to provide ancillary and supplementary services.⁸³ But in authorizing broadcast television stations to

⁸⁰ *Ancillary Fees R&O*, 14 FCC Rcd at 3263, para. 8.

⁸¹ The payment of such upgrades by an affiliated entity is properly considered an expenditure of the parent company, not a source of indirect revenue for the licensee.

⁸² 47 CFR § 73.624(g)(2)(i)(A)-(C).

⁸³ In general, the 1996 Act seeks “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new

provide ancillary or supplementary services on their DTV channels, Congress required that the provision of such services: (1) must avoid derogating any advanced television services that the Commission may require; and (2) must be subject to Commission regulations applicable to analogous services.⁸⁴ In furtherance of this statutory requirement, the Commission adopted section 73.624(c) of the rules, which permits broadcasters to offer ancillary and supplementary services so long as they “do not derogate the DTV broadcast stations’ obligations under paragraph (b) of this section.”⁸⁵ Section 73.624(b) of the rules, in turn, requires that each DTV broadcast licensee transmit at least one standard definition (SD) over-the-air video program signal on its digital channel at no charge to viewers that is at least comparable in resolution to analog television programming.⁸⁶ Accordingly, a station’s service is not derogated so long as it continues to offer at least one free over-the-air SD video programming stream at least comparable in resolution to analog television programming pursuant to section 73.624(b).⁸⁷ Furthermore, broadcasters are permitted to provide ancillary or supplementary services on their broadcast spectrum that are analogous to other regulated services, but should they choose to do so, they are required to adhere to any rules specific to such type of service.⁸⁸

32. While the Commission adopted broad rules in furtherance of these statutory requirements in 1997, it has not revisited these rules since affirming them on reconsideration in 1998.⁸⁹ In particular, the Commission has not conducted a recent examination of how these restrictions should be applied in the context of changes in the media and communications landscape, or in light of the capabilities offered by the ATSC 3.0 transmission standard as compared to the ATSC 1.0 standard. Accordingly, we seek comment below on whether the existing interpretation of what constitutes a derogation of service remains valid or whether any changes are warranted. Further, we seek comment on whether and, if so, how the Commission should provide greater clarity to broadcasters to determine when an offered service is “analogous” to a regulated service and thus would require compliance with parts of the Act and Commission rules beyond those governing broadcast services.

33. *Derogation of Service.* As discussed above, section 336(b) of the Act requires that the Commission “limit the broadcasting of ancillary or supplementary services...so as to avoid derogation of any advanced television services.”⁹⁰ We tentatively conclude that the determination of whether a broadcast station’s signal has been derogated should continue to be evaluated by whether it provides at least one standard definition over-the-air video program signal at no direct charge to viewers that is at

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telecommunications technologies.” Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996). More specifically, the 1996 Act gives the Commission discretion to determine, in the public interest, whether to permit broadcasters to offer ancillary and supplementary services. 47 U.S.C. § 336(a).

⁸⁴ 47 U.S.C. §§ 336(b)(2) and (3).

⁸⁵ 47 CFR § 73.624(c).

⁸⁶ 47 CFR § 73.624(b). The Commission declined to require broadcasters provide HD signals. *See DTV Fifth Report and Order*, 12 FCC Rcd at 12826-27, para. 40-44. Section 336(b)(2) of the Act states that derogation of high-definition television signals is only prohibited to the extent that the Commission requires that broadcasters air high-definition signals. 47 U.S.C. § 336(b)(2).

⁸⁷ *DTV Fifth Report and Order* 12 FCC Rcd at 12820-23, paras. 27 (“Thus, we will allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services that do not derogate the mandated free, over-the-air program service.”).

⁸⁸ 47 CFR § 73.624(c)(1).

⁸⁹ 47 CFR §§ 73.624(b) (prohibiting derogation of service); and 73.624(c)(1) (requiring application of existing regulations to analogous services). *See DTV Fifth Report and Order*, 12 FCC Rcd at 12820-23, paras. 27-36, *aff’d DTV Order on Recon.*, 13 FCC at 6867-68, paras. 25-28.

⁹⁰ 47 U.S.C. § 336(b)(2).

least comparable in resolution to analog television programming, as required by section 73.624(b).⁹¹ We seek comment on this tentative conclusion. We also tentatively conclude that we should amend the wording of section 73.624(b) to specifically define the precise resolution that is considered to be “at least comparable in resolution to analog television programming” as 480i.⁹² We seek comment on this proposal. What resolution does the broadcast industry currently use for purposes of compliance with the Commission’s existing “at least comparable in resolution to analog television programming” standard? We recognize that since adoption of these rules, broadcasters have begun providing a myriad of broadcast television programming offerings both in high definition (HD) and SD, often offering multiple streams (i.e., subchannels) of free, over-the-air, video programming. Are there any other modifications of the Commission’s current derogation of service rule that we should consider in order to ensure that, as mandated by section 336 of the Act, broadcasters’ ancillary and supplementary offerings are not being provided to the derogation of “advanced television services” (i.e., free over-the-air broadcast service)? How might any proposed rule modification, on balance, affect broadcasters’ ability to deploy ancillary and supplementary services?⁹³

34. *Standard for Evaluating Analogous Services.* As stated above, section 336(b) of the Act outlines the Commission’s authority to permit the provision of ancillary or supplementary services by DTV licensees in order to ensure parity among regulated entities and prevent unjust enrichment.⁹⁴ While the Commission’s rules provide examples of the types of services that might be offered, there is no specific guidance on how licensees or the Commission should determine whether a non-broadcast service being offered by a DTV licensee is “analogous” to another regulated service and therefore subject to regulation under those rules. To date, the Commission has provided little guidance beyond that offered in the rule when it was initially adopted. At that time, the Commission referenced, and largely just extended, the prior approach applicable to the provision of ancillary and supplementary services by television station licensees broadcasting in analog.⁹⁵

35. We seek comment on whether the Commission should provide additional guidance regarding the factors or other approaches it will use to determine whether an ancillary or supplementary service is sufficiently “analogous” to another service. What are some examples of services that broadcasters may be looking to offer to consumers that could be deemed “analogous” to services currently regulated by the Commission? As a general matter, what information should the Commission consider when determining whether an ancillary or supplementary service being offered is analogous to another regulated service? Should we adopt a presumptive standard by which any service that has certain specific characteristics is deemed to be analogous to another Commission service? What characteristics would be indicative of a service that should be considered to meet such a presumptive standard? Alternatively, are there certain circumstances in which a broadcaster should be presumptively deemed *not* to be offering an analogous service? For example, what if the broadcaster or a third-party spectrum lessee is not offering the entire, end-to-end, service to the consumer or customer? What if the

⁹¹ See 47 CFR § 73.624(c).

⁹² 47 CFR § 73.624(b). 480 identifies a vertical resolution of 480 lines, and the ‘i’ identifies it as an interlaced resolution.

⁹³ We note that under the Commission’s ATSC 3.0 rules, a Next Generation Television Station that is currently broadcasting in HD is not required to continue to provide HD service on its ATSC 1.0 simulcast signal. *Next Gen TV Report and Order*, 32 FCC Rcd at 9944-45, paras. 27-28.

⁹⁴ 47 U.S.C. § 336(b); see *DTV Order on Recon.*, 13 FCC Rcd at 6867, paras. 26-27.

⁹⁵ See *DTV Fifth Report and Order*, 12 FCC Rcd at 12823, para. 35. Broadcasters that desired to offer ancillary and supplementary services that were analogous to other regulated services were required to apply to the Commission for the appropriate authorization and comply with all policies and rules applicable to the particular service. *Id.* (citing *Digital Data Transmission Within the Video Portion of Television Broadcast Station Transmissions*, Report and Order, MM Docket No. 95-42, 11 FCC Rcd 7799, 7806, para. 17 (1996)).

broadcast spectrum is only being used for wireless off-load for existing broadband providers (e.g., airing large bit-rate video programming), one-way data distribution services (e.g., consumer device software updates), or as part of spectrum that must be aggregated across more than one broadcaster in order to provide a viable service? Can an input to another service be regulated as an “analogous service”? Should any affirmative finding by the Commission be required? If so, what should be the process for obtaining such approval and what information should be provided by broadcasters to demonstrate that the presumptive standard has been met?

36. Further, in the event that an ancillary or supplementary service is analogous to a service permitted elsewhere in the Commission’s rules, but is only provided by a third party lessee or the television station for a very short period of time—on a discrete basis (e.g., only an hour per day) and/or on an aggregated basis (e.g., no more than 48 hours collectively in a month or a year)—should the Commission’s analogous services rule apply nonetheless?⁹⁶ Stated differently, should an analogous service always be subject to the applicable analogous service’s rules regardless of the circumstances, or should the Commission permit some flexibility or “de minimis” operation if the broadcaster or its third-party spectrum lessee only offers the service on a discrete or aggregated basis? Should we adopt a “de minimis” service threshold that exempts DTV licensees that provide analogous services from needing to apply for a license or authorization that may otherwise be required under the analogous services rules? Would this be consistent with the statute that seeks to ensure parity among service providers? If so, what would an appropriate “de minimis” service threshold be for such an exemption? Specifically, what would be the appropriate discrete and/or aggregated time limits? Would such flexibility benefit and promote broadcasters’ efforts to offer Broadcast Internet services, and, if so, how? In order to promote the offering of ancillary and supplementary services, should the Commission consider waiving, on a case-by-case or other basis, certain regulations that would apply to analogous services? Are there certain rules that are applicable to other regulated service providers that may not be feasible for broadcasters to comply with?

37. Are there other actions the Commission can take to provide broadcasters with greater guidance and clarity as to whether a service they are seeking to offer would be deemed an analogous service? Are there any other issues we should consider with regard to the analogous services provision in light of advancements in broadcasting and the capabilities of the ATSC 3.0 standard?

V. PROCEDURAL MATTERS

38. *Initial Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁹⁷ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to this NPRM. The IRFA is set forth in the Appendix.

39. *Paperwork Reduction Act.* This document may result in new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501 through 3520). If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the Commission will seek specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

⁹⁶ *See* 47 CFR § 74.631 (permitting television pickup stations to be operated in conjunction with other television broadcast stations provided the transmissions by the TV Pickup station are under the control of the licensee and that such operation shall not exceed a total of 10 days in any 30-day period).

⁹⁷ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

40. *Ex Parte Rules—Permit-But-Disclose.* This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with section 1.1206(b) of the rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

41. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
 - Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S.
 - Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.
 - Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, DA 20-304 (March 19, 2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.

- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

42. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

43. *Availability of Documents.* Comments and reply comments will be publicly available online via ECFS.⁹⁸ These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

44. *Additional Information.* For additional information on this proceeding, contact John Cobb, John.Cobb@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

VI. ORDERING CLAUSES

45. **IT IS ORDERED** that, pursuant to sections 1, 4(i), 4(j), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 336, and section 1.2 of the Commission's Rules, 47 CFR § 1.2, this *Declaratory Ruling* in MB Docket No. 20-145 **IS ADOPTED**.

46. **IT IS FURTHER ORDERED** that, pursuant to section 1.103 of the Commission's rules, 47 CFR § 1.103, this *Declaratory Ruling* **SHALL BE EFFECTIVE** upon release.

47. **IT IS FURTHER ORDERED** that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 336, this Notice of Proposed Rulemaking in MB Docket No. 20-145 **IS ADOPTED**.

48. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking in MB Docket No. 20-145, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁸ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. With this item, we take important steps to help further unlock the potential of broadcast spectrum, empower innovation, and create significant value for broadcasters and the American public alike by removing the uncertainty cast by legacy regulations. More than twenty years ago, during the transition from analog to digital broadcast television, the Commission adopted rules allowing digital television (DTV) licensees to provide ancillary or supplementary services on their excess spectrum capacity and authorized licensees to enter into leases with other entities that would provide such services.⁴ Flash forward to today, and the conversion of digital television from the first-generation technologies associated with the ATSC 1.0 standard to the next-generation of ancillary services that will be enabled by ATSC 3.0⁵ is now underway. This new technology promises to expand the universe of potential uses of broadcast spectrum capacity for new and innovative services beyond traditional over-the-air video in ways that will complement the nation's burgeoning 5G network and usher in a new wave of innovation and opportunity. These new offerings over broadcast spectrum can be referred to collectively as "Broadcast Internet" services to distinguish them from traditional over-the-air video services. Broadcasters will not only be able to better serve the information and entertainment needs of their communities, but they will have the opportunity to play a part in addressing the digital divide and supporting the proliferation of new, IP-based consumer applications or voluntarily entering into arrangements to allow others to invest in achieving those goals. We undertake this proceeding to ensure that our rules help to foster the introduction of new services and the efficient use of spectrum.

3. By this NPRM, we seek comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment of Broadcast Internet services as part of the

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 47 CFR § 73.624.

⁵ ATSC 3.0 is the new TV transmission standard developed by Advanced Television Systems Committee as the world's first Internet Protocol (IP)-based broadcast transmission platform, "which merges the capabilities of over-the-air broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for DTV service." *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, GN Docket No. 16-142, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, 9931, para. 1 (2017) (*Next Gen TV Report and Order*). This transmission standard allows broadcasters "to innovate, improve service, and use their spectrum more efficiently"; "to provide consumers with a more immersive and enjoyable television viewing experience on both home and mobile screens"; and "to offer enhanced public safety capabilities . . . and advanced accessibility options."

transition to ATSC 3.0. As when the ancillary services rules were first adopted, the Commission seeks to promote and preserve free, universally available, local broadcast television by providing a clear regulatory landscape that permits licensees the flexibility to succeed in a competitive market and incentivizes the most efficient use of prime spectrum. And given that the existing rules were adopted over twenty years ago, we believe it is appropriate at this time to reassess them in the context of the newest advanced broadcast television technology.

4. To that end, in this NPRM we first seek comment on potential uses of the new technological capability from ATSC 3.0 in such areas as the automotive industry, agriculture, distance learning, telehealth, public safety, utility automation, and the “Internet of Things” (IoT). We intend to identify and minimize any existing regulatory, technical, or other barriers that might impede the introduction of these Broadcast Internet services. We then consider whether any changes or clarifications are needed to the ancillary and supplementary service fee rules and the rules defining derogation of service and analogous services. Specifically, we ask whether we should clarify or modify the rules applicable to the provision of feeable ancillary and supplementary services, such as the amount and method of calculating the fee or the reporting requirements, given the new potential uses of spectrum capacity to provide ancillary and supplementary offerings through ATSC 3.0 technologies, including innovative services that were not contemplated when the Commission first implemented the rules over two decades ago. With regard to the rules defining derogation of service we tentatively conclude that the determination of whether a broadcast station’s signal has been derogated should continue to be evaluated by whether it provides at least one standard definition over-the-air video program signal at no direct charge to viewers, as required by the rules. Further, with regard to the rules defining analogous services, we seek comment on whether the Commission should provide additional guidance regarding the factors or other approaches it will use to determine whether an ancillary or supplementary service is sufficiently “analogous to another service.” We seek comment on any other rule changes we should consider to provide greater regulatory clarity to television broadcasters. In so doing, we seek to encourage the robust usage of broadcast television spectrum capacity for the provision of Broadcast Internet services consistent with statutory directives.

B. Legal Basis

5. The proposed action is authorized pursuant to sections 1, 4(i), 4(j), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), and 336.

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

6. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁶ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸ 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 SBA.⁹ Below, we provide a

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 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 Small Business Administration 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.” 5 U.S.C. § 601(3).

⁹ 15 U.S.C. § 632.

description of such small entities, as well as an estimate of the number of such small entities, where feasible.

7. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”¹⁰ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹¹ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.¹² The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of less than \$25 million, 25 had annual receipts ranging from \$25 million to \$49,999,999, and 70 had annual receipts of \$50 million or more.¹³ Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

8. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374.¹⁴ Of this total, 1,282 stations (or 94.2%) had revenues of \$41.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388.¹⁵ The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

9. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations¹⁶ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an 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 television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

10. There are also 387 Class A stations.¹⁷ Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size

¹⁰ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017>.

¹¹ *Id.*

¹² 13 CFR § 121.201 (2012) (NAICS Code 515120).

¹³ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (Jan. 8, 2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

¹⁴ Press Release, FCC, Broadcast Station Totals as of December 31, 2019 (Jan. 3, 2020), <https://docs.fcc.gov/public/attachments/DOC-361678A1.pdf>.

¹⁵ *Id.*

¹⁶ “[Business 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 CFR § 121.103(a)(1).

¹⁷ *See supra* note 42 (discussing broadcast station totals as of December 31, 2019).

standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations.¹⁸ Given the nature of these services as secondary and in some cases purely a “fill-in” service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

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

11. It is our intent to promote and preserve free, universally available, local broadcast television by permitting licensees the freedom to succeed in a competitive market, as well as to incentivize the most efficient use of prime spectrum. We do not anticipate this NPRM leading to any new reporting, recordkeeping, or other compliance requirements. Rather, it should decrease already existing regulatory burdens on broadcast television licensees as the goal of this proceeding is to reduce regulatory uncertainty and eliminate outdated rules that could hinder the development of the new, innovative uses of broadcast spectrum that the ATSC 3.0 standard enables.

12. However, we do seek comment on whether we should consider any changes to the annual reporting requirement applicable to the provision of feeable ancillary or supplementary services. Currently, the Commission’s rules require all commercial and noncommercial DTV licensees and permittees that provided feeable ancillary or supplementary services during the applicable 12-month period to report each December 1: (1) a brief description of the feeable ancillary or supplementary services provided; (2) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and (3) the amount of bitstream used to provide feeable ancillary or supplementary services during the applicable period.¹⁹ If after the record develops we determine that there is a need for any additional reporting requirements associated with the provision of feeable ancillary or supplementary services, we will take all appropriate steps to minimize the burden on broadcast licensees.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standard; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.²⁰

14. Through this NPRM, the Commission seeks to minimize the regulatory burden associated with the provision of ancillary or supplementary services by broadcast television licensees, the majority of which are classified as small entities. The existing rules governing the provision of ancillary or supplementary broadcast services, found in section 73.624, apply consistently to all broadcast licensees to ensure that the provision of new and innovative services does not result in a derogation of the free, universally available, local broadcast television service for which the license is granted. These minimum service standards must apply to all licensees, including small entities. The Declaratory Ruling we issue today removes regulatory uncertainty that could hinder the development of the new, innovative uses of broadcast spectrum that the ATSC 3.0 standard enables. Consistent with this action, any final rule the Commission adopts in response to this NPRM will reduce regulatory barriers in our existing regulations restricting broadcasters from using the full potential of ATSC 3.0 technologies and therefore should not result in any increased regulatory burden or negative economic impact for any broadcast licensees.

¹⁸ *Id.*

¹⁹ 47 CFR § 73.624(g)(2)(i)(A)-(C).

²⁰ 5 U.S.C. § 603(c).

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

15. None.