

FCC FACT SHEET^{*}
Promoting Broadcast Internet Innovation through ATSC 3.0
Report and Order – MB Docket No. 20-145

Background: ATSC 3.0 — the “Next Generation” broadcast television standard, often referred to as Next Gen TV — allows more efficient use of spectrum than ATSC 1.0, the current digital broadcast television standard. The additional capacity will allow broadcasters to expand their traditional television offerings, as well as provide innovative ancillary and supplementary services—known as Broadcast Internet—that can complement the nation’s 5G wireless networks.

Last June, the Commission initiated a proceeding to encourage the provision of Broadcast Internet services. The Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) clarified that leasing 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. The NPRM sought comment on any rule changes needed to further promote regulatory certainty and greater investment in innovative Broadcast Internet services.

What the Report and Order Would Do:

- Adopt, with only minor changes, all tentative conclusions set forth in the NPRM.
 - Calculate ancillary and supplementary service fees based on the gross revenue received by the broadcaster rather than revenue received by a spectrum lessee, except to the extent the broadcaster has a stake in the lessee itself;
 - Exclude from gross revenue the value of “in-kind” facility improvements made or financed by third parties in order to transition a station to, or help a station fully utilize the benefits of, ATSC 3.0; and
 - Retain the existing standard for derogation of broadcast service but amend the rule to eliminate an outdated reference to analog television.
- Decline to adjust the 5% ancillary and supplementary service fee for commercial stations at this time.
- Recognize the unique public service mission of noncommercial educational (NCE) television stations by adopting a number of additional proposals designed to preserve and expand this essential mission through the provision of Broadcast Internet services.
 - Permit an NCE to use its spectrum primarily not only for free, over-the-air nonprofit, noncommercial, educational, television broadcasting, but also for nonprofit, noncommercial, educational (“primary”) ancillary and supplementary services; and
 - Adopt a reduced fee of 2.5% for NCEs on gross revenue generated by such “primary” ancillary and supplementary 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

REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. Earlier this year, the Commission initiated a proceeding to encourage the provision of new and innovative Broadcast Internet services enabled by ATSC 3.0 — the “Next Generation” broadcast television standard often referred to as Next Gen TV — that can complement the nation’s 5G wireless networks.1 In so doing, the Commission sought to eliminate uncertainty cast on such services by legacy regulations and to consider whether, and if so how, to update the Commission’s rules regarding ancillary and supplementary services, adopted over 20 years ago.2 With this item, we take additional steps to clarify and update the regulatory landscape in order to foster the efficient and robust use of broadcast spectrum capacity for the provision of Broadcast Internet services consistent with statutory directives.

2. In this Report and Order (Order), we adopt, with only minor changes, all of the tentative conclusions set forth in the NPRM. Specifically, we clarify the basis on which to calculate ancillary and supplementary service fees. We retain the existing standard of derogation of broadcast service, while amending the rule to eliminate an outdated reference to analog television. And, while we generally decline at this time to adjust the fee imposed on ancillary and supplementary services, we intend to revisit this issue at a future date to determine whether we should adjust the fee or the basis of the fee once the market for Broadcast Internet services develops.

* This document has been circulated for tentative consideration by the Commission at its December 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 Promoting Broadcast Internet Innovation through ATSC 3.0, MB Docket No. 20-145, Declaratory Ruling and Notice of Proposed Rulemaking, 35 FCC Rcd 5916 (2020) (Declaratory Ruling and NPRM); see also Consumer Technology Association (CTA) Comments at 3 (explaining that ATSC 3.0-compatible devices will be marketed as “NEXTGEN TV,” and urging the Commission to adopt this nomenclature to avoid consumer confusion). The Commission referred to these new ancillary offerings over broadcast spectrum as “Broadcast Internet” services to distinguish them from traditional over-the-air video services. See Declaratory Ruling, 35 FCC Rcd at 5917, para. 3. Throughout this item, we use the term “Broadcast Internet” as synonymous with “ancillary and supplementary” services.

2 NPRM, 35 FCC Rcd at 5926, para. 18.

3. Recognizing the unique educational public service mission of noncommercial educational television stations (NCEs) seeking to provide Broadcast Internet services, we also adopt a number of additional proposals designed to preserve and expand this essential mission. Notably, we find that an NCE television broadcast station may use its 6 MHz channel capacity primarily not only for its free, over-the-air nonprofit, noncommercial, educational, television broadcast service, as under our current interpretation of the rule, but also for any nonprofit, noncommercial, educational (“primary”) ancillary and supplementary services. We also adopt a reduced fee of 2.5% on gross revenue generated by such “primary” ancillary and supplementary services, as opposed to the 5% fee applied to ancillary and supplementary services generally. With these actions, this Order continues to lay the groundwork for broadcasters, and thereby the general public, to explore and benefit from the possibilities and opportunities that Broadcast Internet provides.

II. BACKGROUND

4. As we explained in the *NPRM*, the ATSC 3.0 IP-based standard offers greater effective spectral capacity than ATSC 1.0, the current digital broadcast television standard.³ The additional capacity will allow broadcasters to expand their traditional television offerings, including by offering higher quality video and audio and a wider range of programming choices. Broadcasters may also provide innovative non-traditional services, and the *NPRM* asked about the “types of Broadcast Internet services that are likely to be provided in the future.”⁴ Commenters describe a wide array of exciting possibilities. APTS/PBS explain that NCEs might expand and roll out offerings in “a variety of areas that further their public service missions, especially education, child development, public safety, national security, job training, and telehealth.”⁵ PMG describes a wide range of possible uses, including: (i) distance learning services, such as distributing subject- and classroom-specific lectures and reading materials to students, and broadcasting content to school buses during long rural commutes to make that time more enriching for students; (ii) trusted, encrypted, and curated distribution of health-related content to those unserved and underserved by high-speed Internet; (iii) emergency alerting services that allow more homes, vehicles, and first responders to gain access to life-saving information; (iv) expanded distribution of local and hyper-local news to audiences across a community; and (iv) software and cybersecurity updates to power smart cities, automobiles, and “Internet of Things” (IoT) products and applications.⁶ ONE Media explains that

[i]n addition to enhanced broadcast programming, the ATSC 3.0 standard enables use of television spectrum to communicate with devices over wide areas efficiently, expanding opportunities for distance learning, advanced emergency alerting and information functions, highly secure file delivery and authentication, 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, facilitating near-instantaneous needs for IoT devices and telemedicine or smart agriculture activities, and other innovative services yet to be conceived.⁷

5. In June 2020, we commenced this proceeding to ensure that our rules will help foster the development of innovative and efficient uses of broadcast spectrum like the ones described above. In the *Declaratory Ruling*, we clarified that the lease of excess broadcast television spectrum to a third party,

³ *Id.* at 5921, para. 12.

⁴ *Id.* at 5926, para. 19.

⁵ America’s Public Television Stations and the Public Broadcasting Service (APTS/PBS) Comments at 3 and Attachment 1.

⁶ Public Media Group (PMG) Comments at 2.

⁷ ONE Media 3.0, LLC (ONE Media) Comments at 2; *see also* ARK Multicasting, Inc. (ARK) Comments at 4-8 (observing that broadcasting is ideal for downloading large files).

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).⁸ We explained that regulatory clarity will 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, and that regulatory reform can ensure that market forces, rather than outdated rules, determine the success of the nascent Broadcast Internet industry.⁹ In the accompanying *NPRM*, we sought comment on any rule changes needed to further promote regulatory certainty and greater investment in innovative Broadcast Internet services.¹⁰

6. Specifically, the *NPRM* sought 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; on whether the amount and method of calculating the ancillary and supplementary services fee should be reconsidered given the new potential uses of excess spectrum capacity; and on whether the Commission should clarify or modify the rules prohibiting derogation of broadcast service and defining an analogous service.¹¹ The *NPRM* elicited 17 comments, 12 replies, and numerous ex parte filings from commenters representing companies and industry groups from the broadcast, cable, wireless, and consumer electronics industries, as well as non-profit groups and groups hoping to explore new Broadcast Internet opportunities. Commenters are largely supportive of the Commission's tentative conclusions, although as discussed below there is limited opposition to the proposal to exclude third party facility improvements from revenue calculations.¹² There is also disagreement regarding the proposal to clarify the derogation standard, both from parties who support a significant change and parties who oppose any change at all to the existing text.¹³ The record also reflects widespread skepticism about any Commission action that would go beyond the tentative conclusions, with two notable exceptions. First, NCEs and associated parties make a compelling case that substantial public benefits could accrue through the widespread deployment of Broadcast Internet over public television spectrum, justifying additional steps to encourage that deployment.¹⁴ Second, a large number of low power television (LPTV) station representatives and interested parties propose changes to the rules governing LPTV service, though the proposals are largely unrelated to Broadcast Internet services.¹⁵

III. DISCUSSION

A. Ancillary and Supplementary Service Fee

7. With one exception, discussed below,¹⁶ we decline at this time to adjust the fee program associated with ancillary and supplementary services. Rather, we will revisit the size and basis of the fee, as well as other relevant issues, when we have a better understanding of how the transition to ATSC 3.0 is

⁸ *NPRM*, 35 FCC Rcd at 5924, para. 15.

⁹ *Id.* at 5917, para. 3.

¹⁰ *Id.* at 5926-34, paras. 18-37.

¹¹ *See id.*

¹² *Infra* Section III.A.2.

¹³ *Infra* Sections III.C.1.

¹⁴ *Infra* Section III.B.

¹⁵ *Infra* Section III.D.1

¹⁶ As discussed in Section III.B.2, *infra*, with respect to NCE television stations, we will reduce to 2.5% the fee charged on revenues generated by ancillary and supplementary services that are nonprofit, noncommercial, and educational (i.e., "primary" NCE ancillary and supplementary services). We also take a number of additional actions to support NCE provision of Broadcast Internet.

progressing. We do, however, adopt our tentative conclusion that fees should be calculated based on the gross revenue received by the broadcaster rather than revenue received by a spectrum lessee. In addition, we will exclude from a broadcaster's gross revenue the value of any facility improvements made or financed by a third party in order to transition the broadcaster to, or allow it to fully utilize the benefits of, ATSC 3.0.¹⁷ Finally, we decline to adopt the proposal made by Public Knowledge et al. that we use the fees we collect for ancillary and supplementary services to fund a program to offset costs for consumers who upgrade their equipment as part of the transition to ATSC 3.0, and we decline to exempt from the ancillary and supplementary service fee, or otherwise change our fee for, ancillary and supplementary services that fall into certain classes of service.

8. The Telecommunications Act of 1996 (1996 Act) requires broadcasters to pay a fee to the United States Treasury to the extent they use their digital television (DTV) spectrum to provide ancillary and 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 for transmitting material furnished by such a third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).”¹⁸ The 1996 Act further provides that the ancillary and supplementary services fee program “shall (A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource” and “(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed” at auction.¹⁹ In addition, 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.²⁰

9. As a preliminary matter, we reaffirm that section 336 of the 1996 Act gives the Commission flexibility to determine the appropriate fee for ancillary and supplementary services within the parameters set forth in the statute. Section 336 directs the Commission to “establish a program to assess and collect ... an annual fee or other schedule or method of payment that promotes the objectives” described by the statute.²¹ Specifically, the statute requires that the fee program be designed to recover for the public some portion of the value of the spectrum, prevent the unjust enrichment of broadcasters providing ancillary and supplementary services, and approximate the revenues that would have been received had the spectrum on which the services are provided been licensed through an auction.²² As the Commission has observed, “the 1996 Act gives the Commission broad discretion in setting the amount of

¹⁷ We will exclude these improvements even if they are undertaken in exchange for the lease of spectrum used to provide ancillary or supplementary services, or in exchange for the use of an ancillary or supplementary service generally provided by the broadcaster in exchange for a subscription fee.

¹⁸ 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).

¹⁹ 47 U.S.C. § 336(e)(2)(A)-(B); *see also 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, 3267, para. 20 (1998) (*Ancillary Fees R&O*); *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, 19932, para. 4 (1999) (*Ancillary Fees MO&O*).

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

²¹ 47 U.S.C. § 336(e)(1).

²² *Id.* § 336(e)(2).

the fee for ancillary and supplementary services,” bounded by the criteria set forth in section 336(e).²³ Commenters who addressed this issue agree with this analysis.²⁴

1. Fee for Commercial Television Broadcast Stations

10. We conclude that we do not have sufficient information at this early stage in the ATSC 3.0 transition to evaluate fully whether a change to, much less elimination of, the current fee for feeable ancillary and supplementary services offered by commercial television stations would better reflect the directives of section 336(e). Accordingly, we retain the current fee of 5% for such stations and intend to reevaluate the fee once the marketplace for Broadcast Internet services has become more mature.²⁵

11. As the Commission previously has recognized, in considering how to calculate the appropriate ancillary and supplementary fee, we must balance potentially competing statutory goals: recover a portion of the value of the spectrum used for ancillary and supplementary services, avoid unjust enrichment, and approximate the revenue that would have been received had these services been licensed through an auction.²⁶ A fee that is too high could dissuade broadcasters from providing Broadcast Internet services and thereby reduce the potential benefits to consumers of such services and preclude the Commission from collecting fees approximating the amount that would have been recovered for the spectrum at auction. On the other hand, a fee that is too low may both fail to prevent the unjust enrichment of licensees and to recover for the public an amount approximating the amount that would have been recovered at auction.

12. In considering these statutory mandates, we conclude that it would be premature at this time to adjust the ancillary and supplementary service fee without knowing more about the kinds of Broadcast Internet services that will be provided and the economics thereof. The conversion to ATSC 3.0 is entirely voluntary, and commercial service has only recently commenced in a few television markets.²⁷ We cannot yet gauge the extent to which ATSC 3.0 will be deployed and adopted by consumers or which ATSC 3.0-based services and features will be offered as feeable Broadcast Internet services. Indeed, the Commission recently reached a similar conclusion when it first authorized the voluntary transmission to

²³ *Ancillary Fees MO&O*, 14 FCC Rcd at 19938, para. 16; *see also Ancillary Fees R&O*, 14 FCC Rcd at 3267-68, para. 22 (“The 1996 Act gives the Commission broad discretion in setting the amount of the fee for ancillary and supplementary services, relying upon the predictive judgment of the agency in that regard,” and in the absence of any “obvious or commonly accepted formula for setting a fee” that meets the criteria set forth in the statute, the Commission “must use its best judgment in balancing the relevant goals.”).

²⁴ One Media Comments at 1 (“Congress gave the Commission discretion to determine how to implement an ancillary and supplementary services fee program” and “Section 336 gives the Commission flexibility to establish ‘an annual fee or other schedule or method of payment’ to promote Section 336’s objectives.”); Spectrum Co., LLC (BitPath) Reply at 9 (noting that the “very general requirements [of section 336(e)(2)] leave much room for discretion”). While Public Knowledge et al. argue that the Commission cannot waive its requirement to collect a fee from broadcasters for ancillary and supplementary services, it agrees that section 336(e)(2) grants the Commission “some flexibility” in determining the rate of the fee. Public Knowledge, Consumer Reports, and the Open Technology Institute at New America (Public Knowledge et al.) Reply at 6-7.

²⁵ *Ancillary Fees R&O*, 14 FCC Rcd at 3264, 3267, paras. 13, 20 (determining that a fee set at 5% of the gross revenues generated by feeable ancillary and supplementary services best satisfies the statutory directives and incentivizes innovation to maximize spectral efficiency).

²⁶ *Ancillary Fees R&O*, 14 FCC Rcd at 3267, para. 21; 47 U.S.C. § 336(e)(2).

²⁷ *NPRM*, 35 FCC Rcd at 5930, para. 29. Stations are currently licensed to operate in ATSC 3.0 in the following markets: Phoenix, Salt Lake City, Las Vegas, Portland, Pittsburgh, Nashville, Dallas, Boise, Orlando, Los Angeles, Denver, and Santa Barbara, with additional markets expected to commence operations in 2020 and 2021. Commercial service has begun on a limited basis in some of these markets. *See* <https://www.atsc.org/nextgen-tv/deployments/>.

ATSC 3.0.²⁸ Accordingly, we reject commenters' suggestions that we reconsider the current 5% fee on broadcast commercial stations, at this time.²⁹ Instead, consistent with recommendations in the record, we believe it would be better to revisit the ancillary and supplementary service fee when the ATSC 3.0 marketplace has further developed.³⁰

2. Calculation of Gross Revenue

13. We adopt our tentative conclusion that fees should be calculated based on the gross revenue received by the broadcaster rather than revenue received by a spectrum lessee.³¹ As we stated in the *NPRM*, we find that to hold otherwise could subject a broadcaster to a fee payment in excess of the gross revenue it actually receives.³² All commenters who addressed this issue agree with this approach regarding the calculation of gross revenue.³³ As proposed in the *NPRM*, we also conclude that to the extent the licensee and the lessee are affiliated, we will attribute the gross revenue of the lessee to the licensee for purposes of calculating the ancillary and supplementary services fee, based on a share of gross revenue that is proportional to the licensee's stake in the lessee. Otherwise, as we noted in the

²⁸ *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, 9977, para. 92 (2017) (*Next Gen TV Report and Order*).

²⁹ For example, some commenters suggest that the Commission set the fee at 1.5% or at zero. *See* Edge Spectrum, Inc. (Edge Spectrum) Comments at 20 (supporting a fee of 1.5% for all stations to provide an incentive to broadcasters to explore opportunities to deploy ATSC 3.0); One Media Comments at 7 (contending that the Commission should delay imposition of a fee on new ancillary and supplementary services for five years after the launch of any service). In its comments, ARK Multicasting, Inc. (ARK) supports a 1.5% fee for all broadcasters during the early phases of ATSC 3.0. ARK Comments at 2. In reply comments, however, filed jointly with 19 other individuals and corporations, ARK et al. maintain instead that the Commission should set the fee at zero and reexamine annually whether a higher fee is warranted. ARK et al. Reply at 8. For the same reasons that we decline to change the fee program for commercial stations, we also decline to adopt BitPath's "offsetting" proposal. *See* BitPath Comments at 12 ("To the extent that the Commission retains the 5% gross revenue fee, it should allow licensees to offset 100% of capital and development costs against revenues.").

³⁰ *See, e.g.*, PMG Comments at 7 (contending that it is too soon to know how the ATSC 3.0 marketplace will develop, and thus now is not the appropriate time for the Commission to develop a revised fee structure for ATSC 3.0 services. Also arguing that "[t]o the maximum extent possible, the Commission should rely on free market economic principles that will encourage development of a robust array of innovative, new services for the television broadcast spectrum in a manner best suited to the needs of consumers."); *see also* American Television Alliance (ATVA) Comments at 4 (stating that the Commission should "engage in an economic analysis to help it consider the relevant statutory criteria"); NCTA Comments at 4 ("FCC should adhere to the statutory criteria in any reevaluation of the ancillary service fee, including by conducting an economic study of the auction value of the relevant spectrum"); Public Knowledge et al. Reply at 13-14 (noting that they support the proposals from NCTA and ATVA); CTIA – The Wireless Association (CTIA) Reply at 3 (stating that "the Commission should take this opportunity to revisit, in accordance with statutory requirements, its ancillary and supplementary services rules to ensure those fees are set to ensure regulatory parity and reflect broadcasters' evolving business ambitions" and "any reevaluation of the annual fee must be based on the statutory requirements, including an economic study of the auction value of the relevant spectrum").

³¹ *NPRM*, 35 FCC Rcd at 5930, para. 29. We invited comment in the *NPRM* on how the 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. *Id.* 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. *Id.*

³² *Id.* The ancillary and supplementary service fee is currently based on the licensee's gross revenue generated by feeable ancillary and supplementary services. 47 CFR § 73.624(g).

³³ One Media Comments at 8; Pearl TV (Pearl) Comments at 5.

NPRM, 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.³⁴

14. We also adopt our tentative conclusion to exclude from gross revenue the value of any “in-kind” facility improvements made or financed by third parties in order to transition a station to, or help them fully utilize the benefits of, ATSC 3.0, and revise our rules accordingly. We agree with Pearl that excluding the value of in-kind improvements from the gross revenue calculation will promote faster adoption of Broadcast Internet services.³⁵ Many stations may lack the funds and/or expertise to upgrade their transmission facilities to transition to ATSC 3.0.³⁶ We conclude that excluding the value of such in-kind facility improvements from the fee calculation may help promote faster adoption of ATSC 3.0 and greater use of spectrum for Broadcast Internet applications. We clarify that our decision applies only to facility improvements made in order to transition to, or fully utilize the benefits of, ATSC 3.0. We also clarify that we will exclude from gross revenue the value of such in-kind facility improvements provided not just by a spectrum lessee, but by any third-party, including a governmental entity.³⁷

15. We disagree with NCTA and Public Knowledge et al. that revising our rules to take this approach toward in-kind facility improvements is inconsistent with section 336.³⁸ As stated above, section 336 provides that, if the Commission permits a licensee to offer ancillary and supplementary services for which the payment of a subscription fee is required or for which the licensee directly or indirectly receives compensation in return for transmitting material furnished by such third party, the Commission must “establish ... an annual fee or other schedule or method of payment” that promotes the objectives described by the statute.³⁹ As BitPath notes, the statute gives the Commission discretion in developing this fee program; it does not direct us to make “all services [] feeable all the time.”⁴⁰ While revising our rule to exclude the value of in-kind facility improvements from gross revenue may reduce the collection of fees initially, as we noted in the *NPRM*, this approach is likely to result in greater fee collection over time as broadcasters derive greater gross revenue as a result of facilities upgrades.⁴¹ Contrary to the assertion of Public Knowledge et al., our approach will not allow broadcasters to evade paying fees on revenue from ancillary and supplementary services.⁴² It simply delays the collection of fees to enable broadcasters—who might otherwise be unable to do so—to establish the Broadcast Internet capability that will permit them to subsequently earn revenue and pay the associated fees. Accordingly, this approach is fundamentally different from proposals that would delay fee recovery from stations that already have sufficient access to capital to make the transition to ATSC 3.0.⁴³ Since these stations are in a position to make the transition without up-front assistance, many are likely to do so (and thus begin

³⁴ *NPRM*, 35 FCC Rcd at 5930, para. 29.

³⁵ Pearl Comments at 5. One Media also supports excluding the value of in-kind contributions from the calculation of gross revenue. One Media Comments at 8.

³⁶ *NPRM*, 35 FCC Rcd at 5930, para. 29.

³⁷ See PMG Comments at 8 (contending that no fee should be applied to state government appropriations to a statewide public broadcasting licensee that are designated to build out a state network to deploy distance education and emergency alerting capabilities).

³⁸ NCTA Comments at 5; Public Knowledge et al. Reply at 11.

³⁹ 47 U.S.C. § 336(e)(1)(B).

⁴⁰ BitPath Reply at 9.

⁴¹ *NPRM*, 35 FCC Rcd at 5930, para. 29.

⁴² Public Knowledge et al. Reply at 13 (“If the FCC were to exclude in-kind infrastructure costs from its fee calculation, it would encourage broadcasters to enter into deals with third parties to provide access to their spectrum in exchange for the infrastructure build-out rather than any monetary fee.”).

⁴³ *Supra* note 29.

offering feeable services and paying fees), whether or not their transition costs are recoverable. By contrast, stations that must rely on third parties in order to make the transition at all may never be in a position to pay any fees if they are not encouraged to reach agreements with those third parties. Accordingly, we find that our approach will better ensure that we ultimately recover a portion of the value of the spectrum used for Broadcast Internet services, avoid unjust enrichment, and approximate the revenue that would have been derived had these services been licensed through an auction, consistent with our mandate under section 336(e) of the 1996 Act.⁴⁴

3. ATSC 3.0 Consumer Equipment

16. We decline to adopt the proposal made by Public Knowledge et al. that we use the fees collected from ancillary and supplementary services to fund a program offsetting costs for consumers who upgrade their consumer premises equipment as part of the ATSC 3.0 transition.⁴⁵ These commenters note that ATSC 3.0 is not compatible with current television devices and contend that, because consumers will have to replace their television sets or purchase converter devices to receive ATSC 3.0 signals, the transition to ATSC 3.0 “will create high consumer costs, similar to those faced by consumers during the DTV transition.”⁴⁶ Thus, they maintain we should act now, to develop a program to offset ATSC 3.0 transition costs for consumers. Public Knowledge, et al. point to section 336(e)(3)(B) of the 1996 Act as our authority to establish such a program. That provision states that “the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the [fee collection] program required by this section *and regulating and supervising advanced television services.*”⁴⁷ Public Knowledge, et al. argue that the concluding clause “must allow the FCC to use the revenue collected for some additional purpose,” and that purpose could be a consumer offset program.⁴⁸ We reject this view. The proposed program would not retain a portion of revenue proceeds for the “salaries and expenses account of the Commission” for the “regulation and supervision” of advanced television services; rather, it would redirect the entire revenue stream away from the Treasury and toward consumers to subsidize their electronics purchases.⁴⁹ We disagree that the language of section 336(e)(3)(B) should be interpreted to authorize the creation of such an equipment subsidy program. Furthermore, we do not find the analogy to

⁴⁴ 47 U.S.C. § 336(e)(2)(A)-(B); *see also supra* para. 8.

⁴⁵ Public Knowledge et al. Comments at 7-13; *see also* Didja, Inc. (Didja) Reply at 7 (asserting that the Commission should prioritize the use of fees to assist the public to access 3.0 signals, help local stations, and encourage more local channels). NAB, One Media, BitPath, and ARK disagree that fees should be used to subsidize consumer ATSC 3.0 equipment. National Association of Broadcasters (NAB) Reply at 2, 6-7; One Media Reply at 3; BitPath Reply at 11-12; ARK Reply at 7-8.

⁴⁶ Public Knowledge et al. Comments at 7. These commenters further argue that “[o]ff-setting these costs is an essential component to promoting the innovation promised by the ATSC 3.0 standard. After all, consumers need actual access to the new services promised by ATSC 3.0 in order to benefit from their existence.” *Id.*

⁴⁷ 47 U.S.C. § 336(e)(3)(B) (*emphasis added*).

⁴⁸ Public Knowledge et al. Comments at 11-12. The commenters also argue that, to the extent this authority is insufficiently clear, the Commission could create the proposed program by “invoking its ancillary jurisdiction.” *Id.* at 12-16. We decline to do so. In light of the statutory requirement to deposit “all proceeds [from the fee program] in the Treasury” except for certain amounts for the “salaries and expenses” account of the Commission, we do not believe diverting such proceeds for an equipment subsidy program would be “not inconsistent with th[e] Act” as required by Section 4(i), and thus reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.

⁴⁹ Even if we possessed sufficient legal authority to establish such a program, we also note that the transition to ATSC 3.0 is voluntary and still in its early stages; therefore, we find it is premature to consider such a program at this time. *See* NAB Reply at 6 (urging the Commission “not to further explore this proposal that would tax broadcasters based on services that do not yet exist to subsidize the purchase of consumer equipment that is not yet necessary”).

the DTV transition to be probative as the equipment subsidy program that existed at that time was explicitly mandated by Congress and implemented by a different agency.⁵⁰ Finally, we note that, unlike in the DTV transition where there was a hard cut-off date for analog programming, the Commission in this case has required broadcasters to simulcast their programming in ATSC 1.0 and ATSC 3.0 indefinitely.⁵¹

4. Classes of Ancillary and Supplementary Services

17. We decline to grant fee exemptions for certain classes of Broadband Internet service, such as telehealth, distance learning, public safety, or homeland security-related services, or for services that promote Internet access in rural areas.⁵² Although, according to the record, such services are currently beginning to be provided by, or are in development by, NCE stations,⁵³ we believe it is premature to take any such action given the nascent state of the market for these ATSC 3.0 services. As discussed further below, we take action in this Order to encourage the development of “primary” NCE ancillary and supplementary services (those used for nonprofit, noncommercial, educational purposes), by reducing the fee associated with such services.⁵⁴ At the same time, we conclude that we do not have a sufficient basis at this time to support changing our fee approach for any other type of ancillary and supplementary service that are not considered “primary.” Among other things, we lack information regarding how such services are likely to be provided, whether they will be revenue generating, whether there will be sufficient demand to support the provision of such services, or whether our current fee for ancillary and supplementary services will dissuade broadcasters from offering such services. For similar reasons, we also decline at this time to exempt from fees, or adopt a lower fee for, services that promote Internet access in rural areas.⁵⁵ We will continue to monitor the transition to ATSC 3.0, including the provision of Broadcast Internet services such as telehealth, public safety, and homeland security-related services, as well as services that provide Internet access in rural areas, and may reconsider this issue in the future.

B. NCE Television Stations

18. NCE television stations play an important role in providing nonprofit, noncommercial, and education services to communities nationwide, and the Commission is committed to supporting their enthusiastic embrace of the possibilities that Next Gen TV provides.⁵⁶ Accordingly, we adopt, in part, the

⁵⁰ Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 110-459, § 3005.

⁵¹ In the *Next Gen TV Report and Order*, the Commission stated that it would favor requests for waiver of the obligation to provide ATSC 1.0 simulcast service if the station can demonstrate both that: (1) it has “no viable local simulcasting partner” in its market; and (2) it will “make reasonable efforts to preserve 1.0 service to existing viewers in its community of license and/or otherwise minimize the impact on such viewers (for example, by providing free or low cost ATSC 3.0 converters to viewers).” *Next Gen TV Report and Order*, 32 FCC Rcd at 9953, para. 46; *see also Next Gen TV Order on Reconsideration*, 35 FCC Rcd at 6801-02, paras. 18-19 (2020) (clarifying that, while the Commission will not require applicants for waiver of the local simulcasting obligation to provide free or low cost ATSC 3.0 converters, it “would look favorably” on applicants that choose to do so and particularly those who choose to provide affected households with one free converter at no cost).

⁵² *NPRM*, 35 FCC Rcd at 5929-30, para. 28; PMG Comments at 7 (supporting fee exemptions for any broadcaster delivering Broadcast Internet services and applications that provide a broad public interest benefit, such as distance learning, telehealth, public safety, etc.); *see also* Public Media Venture Group (PMVG) Comments at 3 (supporting exempting public television stations from fees for services that are non-commercial in nature of otherwise advance the public interest).

⁵³ PMG Comments at 7; *see also* APTS/PBS Comments at 6-7 and Attachment 1 (describing the datacasting services currently being offered by, and services in development by, public television stations).

⁵⁴ *Infra* Section III.B.2.

⁵⁵ *NPRM*, 35 FCC Rcd at 5929-30, para. 28.

⁵⁶ *See generally* APTS/PBS Comments.

commenter proposal to reinterpret section 73.621 of our rules, which will allow NCEs to provide a wider range of services that align with their core mission. While, as discussed above,⁵⁷ we generally decline to adjust the fee associated with ancillary and supplementary services, to the extent that NCE television stations offer feeable ancillary and supplementary services that are nonprofit, noncommercial, and educational, we adopt a reduced fee based on 2.5% of gross revenues generated by such “primary” ancillary and supplementary services. We also clarify that when an NCE television station provides “donor exclusive” ancillary and supplementary services that are nominal in value in return for contributions to the licensee, we will not treat such contributions as “subscription fees” under section 336 of the 1996 Act or section 73.621 of our rules.

1. NCE Ancillary and Supplementary Services

19. We conclude that an NCE television licensee may provide Broadcast Internet services, provided that the substantial majority of its 6 MHz channel capacity is dedicated to a combination of free, over-the-air nonprofit, noncommercial, educational, television broadcast service and any nonprofit, noncommercial, educational (or “primary”) Broadcast Internet services it chooses to provide.⁵⁸ In this regard, we modify the 2001 *NCE Ancillary Services Report and Order*’s interpretation of section 73.621,⁵⁹ which held that a substantial majority of an NCE television licensee’s digital capacity must be dedicated to nonprofit, noncommercial, educational broadcast service, limiting ancillary and supplementary services to an NCE television licensee’s excess capacity.⁶⁰ In so doing, we seek to

⁵⁷ *Supra* Section III.A.

⁵⁸ 47 CFR § 73.621(a), (e), (j). An NCE television licensee may provide Broadcast Internet services that are *not* nonprofit, noncommercial, and educational—including commercial services—on the licensee’s excess (i.e., non-primary) capacity. Such services will be subject to the standard fee of 5% of gross revenues. We note that an NCE licensee, like all other television broadcasters, must broadcast at least one free over-the-air video programming stream, and its Broadcast Internet services must not derogate this service. 47 CFR § 73.624(b), (b)(1), (c); *see also* 47 U.S.C. § 336(b). During the transition period to ATSC 3.0 service, we are affording NCE television broadcasters significant flexibility to determine the best mix of services for their communities. However, as during the DTV transition, our expectation remains that the fundamental use of the DTV license will be for the provision of free, over-the-air television service. *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, 12820, para. 28 (1997) (*DTV Fifth Report and Order*); *see also id.* at 12820, para. 27 (noting the Commission’s “overarching goal” to “promote the success of a free, local television service using digital technology”). We do not decide at this time the separate, broader issue of how much spectral capacity a broadcast television station (commercial or NCE) must use *after* the ATSC 3.0 transition period for the provision of its free over-the-air television service. As discussed in Section III.C, *infra*, we will consider this issue in a future proceeding, such as when we decide it is the appropriate time to consider eliminating the ATSC 1.0 simulcasting requirement. *Next Gen TV Report and Order*, 32 FCC Rcd at 9938, para. 14.

⁵⁹ Section 73.621 of the rules, 47 CFR § 73.621, provides in pertinent part:

“(a) ... noncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service. * * *

“(e) Each station shall furnish a nonprofit and noncommercial broadcast service.... * * *

“(j) With respect to the provision of advanced television services, the requirements of this section will apply to the entire digital bitstream of noncommercial educational television stations, including the provision of ancillary or supplementary services.” 47 CFR § 73.621(a), (e), (j).

⁶⁰ *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd 19042, 19048, para. 15 (2001) (*NCE Ancillary Services Report and Order*). We do not modify the application of section 73.621 to an NCE licensee’s free, over-the-air television broadcast service, but only as it applies to an NCE licensee’s Broadcast Internet services, pursuant to section 73.621(j).

preserve the nonprofit, noncommercial, educational nature of an NCE television licensee's service to its community, while affording such NCE licensees increased flexibility to provide "primary" services that are not traditional broadcasting. Although we decline to define what constitutes a "substantial majority" of the NCE's digital bitstream at this time, we expect to seek comment in a future proceeding on whether it is appropriate to revise section 73.621(j) regarding the amount of its 6 MHz channel capacity that an NCE television licensee must devote to "primary" uses, the scope of those primary uses, and any other related matters.⁶¹

20. As an initial matter, we adopt our unopposed tentative conclusion that NCE television licensees are allowed to provide Broadcast Internet services.⁶² Indeed, the 2001 *NCE Ancillary Services Report and Order* sought to clarify not *whether* NCEs could offer ancillary and supplementary services, but "the *manner* in which [NCE] television licensees may use their excess [DTV] capacity for remunerative purposes."⁶³ The 2001 *NCE Ancillary Services Report and Order* amended section 73.621 of the rules "to clarify that the [s]ection's requirements apply to the entire digital bitstream of NCE [television] licensees, including the provision of ancillary or supplementary services,"⁶⁴ in order to "preserve the noncommercial educational nature of public broadcasting, while allowing NCE [television] licensees some flexibility in remunerative use of their spectrum."⁶⁵ The Commission concluded at the time that this balance required NCE television licensees to "use their entire digital capacity *primarily* for a nonprofit, noncommercial, educational broadcast service."⁶⁶ The Commission "declin[ed] to quantify the term 'primarily,'" but "consider[ed] it to mean a '*substantial majority*' of [the NCE television licensee's] entire digital capacity."⁶⁷

21. In light of the significant advances offered by ATSC 3.0, particularly with respect to increased capacity,⁶⁸ we clarify that section 73.621 allows NCE television licensees to count as part of the

⁶¹ In addition, until we address this issue in this future proceeding, we will consider waiver requests as necessary to allow public safety or other Broadcast Internet uses that are nonprofit and noncommercial, but may not be educational in nature, to be applied to the "substantial majority" portion of an NCE licensee's spectrum dedicated for "primary" purposes.

⁶² The *NPRM* sought comment on whether there are any potential regulatory limitations on the ability of public television stations to provide Broadcast Internet services. *NPRM*, 35 FCC Rcd at 5927, para. 21. The *NPRM* noted that section 399B of the Communications Act, 47 U.S.C. § 399B, 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. Observing also that the 2001 *NCE Ancillary Services Report and Order* determined that the section 399B ban on advertising does not apply to ancillary and supplementary services, the *NPRM* tentatively concluded that NCE television licensees are thus allowed to offer Broadcast Internet services. *Id.*; see also *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19052, para. 27 (concluding 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'"). Section 399B, however, does not permit public broadcast stations to make their facilities "available to any person for the broadcasting of any advertisement." *Id.* § 399B(a)(2).

⁶³ *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19042, para. 1 (emphasis added).

⁶⁴ *Id.* at 19048, para. 15. This decision was codified at 47 CFR § 73.621(j).

⁶⁵ *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19049, para. 17.

⁶⁶ *Id.* at 19048, para. 15 (emphasis added).

⁶⁷ *Id.* (emphasis added).

⁶⁸ PMVG Comments at 11 ("With advances in compression technology, an NCE broadcaster today can transmit the maximum amount of video that was possible on a single channel in 2001 using a fraction of an ATSC 3.0 bitstream. This is due to two factors. First, ATSC 3.0 provides nearly one-third more delivery capacity than ATSC 1.0: approximately 25 megabits per second for ATSC 3.0 compared to 19.4 megabits per second for ATSC 1.0. Second, the HEVC encoding that is part of the current ATSC 3.0 platform is up to four times as efficient for audio/visual

(continued....)

“primary” use of their spectrum not just “nonprofit, noncommercial, educational, broadcast service,” but also ancillary and supplementary services that are nonprofit, noncommercial, and educational in nature.⁶⁹ Specifically, we conclude that section 73.621(j) permits an NCE television licensee to count nonprofit, noncommercial, and educational ancillary and supplementary services, together with its free, over-the-air nonprofit, noncommercial, educational television broadcast service, as “primary” services that fall within section 73.621(a).⁷⁰ Section 73.621(j) states that section 73.621 “will apply to the entire digital bitstream of noncommercial educational television stations, including the provision of ancillary or supplementary services.”⁷¹ We recognize that the 2001 *NCE Ancillary Services Report and Order*, which adopted section 73.621(j), interpreted this provision to mean that NCE television licensees are required to use their entire digital capacity “primarily” for their free, over-the-air television nonprofit, noncommercial, educational broadcast service and that ancillary and supplementary services do not qualify as a “primary” use.⁷² We reject this interpretation of section 73.621(j) of our rules as unnecessarily narrow. Rather, we agree with APTS/PBS and PMVG that it is reasonable to afford greater flexibility to NCE television licensees to provide Broadcast Internet services that are nonprofit, noncommercial, and educational in nature as a “primary” use, and that there is a wide potential variety of such services.⁷³ Accordingly, we interpret the language of section 73.621(j) providing that the requirements of section 73.621 will apply to the entire digital bitstream of NCE television stations, “including the provision of ancillary or supplementary services,” to broaden the scope of section 73.621(a) such that NCE television stations have the flexibility to make “primary” use of their “entire digital bitstream” through provision of not only a nonprofit, noncommercial, educational television broadcast service, but also any nonprofit, noncommercial, and educational ancillary and supplementary services it chooses to provide.

22. Although we adopt the NCE proposal to reinterpret our rules to permit “primary” ancillary and supplementary services, we decline to “pre-approve” specific services that could be considered primary. APTS/PBS and PMVG ask us essentially to create a “safe harbor” for Broadcast Internet services by identifying specific services that will qualify as “primary” uses under section

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content. In other words, when used for video programming, an ATSC 3.0 signal is capable of delivering as much content as it would take five ATSC 1.0 signals to accomplish.”)

⁶⁹ APTS/PBS Comments at iv (stating that “the Commission should recognize that a variety of datacasting and other innovative encrypted uses that are not traditional broadcasting but that ‘serve the educational needs of the community’ or further the ‘advancement of educational programs’ are clearly counted among the ‘primary’ purposes ... as permitted by the plain language of the rule”); PMVG Comments at 3 (“The Commission also should recognize that there are many ways NCE stations can use their spectrum for educational use beyond just traditional broadcasting and provide clarity on the types of services that qualify as educational.”); *see also* 47 CFR § 73.621(a).

⁷⁰ 47 CFR § 73.621(a); *supra* note 59.

⁷¹ 47 CFR § 73.621(j).

⁷² *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19048, para. 15 (requiring “that NCE licensees use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service”).

⁷³ *See, e.g.*, APTS/PBS Comments at iii, 4; PMVG Comments at 20; *see also supra* para. 4. APTS/PBS maintains that any ancillary or supplementary service that “‘serve[s] the educational needs of the community’ or furthers the ‘advancement of educational programs’” should be considered “primary.” APTS/PBS Comments at iv (*emphasis added*). We reject this view because it would permit *for-profit, commercial* educational services (or *non-educational* television broadcasts) to be counted among the “primary” uses of an NCE’s spectrum. Instead, consistent with the requirements in section 73.621(a) that the station qualify as “noncommercial educational” and is licensed “only to [a] nonprofit educational organization,” the rule requires that all “primary” uses, whether broadcast television or Broadcast Internet, must be nonprofit, noncommercial, *and* educational. We find this reading best preserves the nonprofit, noncommercial, and educational nature of public broadcasting. We note that our decision today applies only to the application of section 73.621(a) to the provision of ancillary and supplementary services pursuant to section 73.621(j); it does not change an NCE television licensee’s broadcast and other obligations under section 73.621(a).

73.621(a).⁷⁴ Given the nascent state of the Broadcast Internet market, we find that it would be premature to classify such services in this manner. Instead, consistent with our precedent in applying section 73.621(a) to broadcast programming, we will defer to the judgment of the broadcaster when evaluating whether a given Broadcast Internet service is educational unless such categorization appears to be arbitrary or unreasonable.⁷⁵

23. We also decline, at this time, to adopt the NCE television broadcasters' proposal to redefine the term "primarily," as used in section 73.621(a), to mean a "simple majority" instead of a "substantial majority," which is the definition adopted by the Commission in the 2001 *NCE Ancillary Services Report and Order*.⁷⁶ We disagree with APTS/PBS that there is a plain or common meaning of the term "primarily," and instead find that the term is ambiguous.⁷⁷ In light of this ambiguity, the Commission previously determined that "primarily" means "substantial majority." This definition was not challenged at the time, and we are not persuaded by the arguments in the record that present circumstances warrant reconsideration of this earlier decision. Moreover, we find that our decision to include certain Broadcast Internet services as part of the "primary" use of their spectrum affords NCE television licensees substantial additional flexibility in light of the enhanced capabilities made possible by

⁷⁴ APTS/PBS Comments at 3, Attachment 1; PMVG Comments at 13-14. These commenters identify a range of proposed Broadcast Internet services, including a number that do not, on their face, appear to be "educational" in nature. APTS/PBS provides a list of ancillary and supplementary services currently offered by public television stations that focuses on "a variety of areas that further their public service missions, especially education, child development, public safety, national security, job training, and telehealth." APTS/PBS Comments at 3 and Attachment 1. PMVG asks us "to clarify that a service satisfies the 'used primarily' requirement if it is either (a) a traditional over-the-air nonprofit and noncommercial video broadcast service; or (b) an ancillary or supplementary service that (i) involves content or services provided by the licensee itself or in cooperation with an educational, governmental, or non-profit organization that does not constitute an advertisement under Section 399(a) of the Communications Act or (ii) involves the provision of services to bridge the digital divide in underserved areas." PMVG Comments at 14.

⁷⁵ See *Way of the Cross of Utah, Inc.*, Memorandum Opinion and Order, 101 FCC 2d 1368, 1372, n.5 (1985) (citing Guidelines, 43 Fed. Reg. at 30844-45); *id.* (citing Notice of Inquiry in Docket No. 78-164, 43 Fed. Reg. 30842, 30845 (1978) (stating "[a]s in all matters relating to programming, we will defer to the judgment of the broadcaster unless his categorization appears to be arbitrary or unreasonable.")). Similarly, to the extent it becomes necessary to determine whether a given Broadcast Internet service is "nonprofit and noncommercial," we will apply our broadcast programming precedent.

⁷⁶ *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19048, para. 15; see also APTS/PBS Comments at iv (stating that "a simple majority – rather than a substantial majority – of a public TV station's capacity should be the baseline requirement for the three enumerated 'primary' purposes in Section 73.621 (*i.e.*, to serve the educational needs of the community, for the advancement of educational programs, and to furnish a nonprofit and noncommercial television broadcast service)); *id.* at 5 (seeking to redefine the meaning of the word "primarily" in 47 CFR § 73.621(a)); see also PMVG at 3 (asserting that "the FCC should clarify that—at least in the context of ATSC 3.0—the term 'primarily' requires NCE stations to allocate a simple majority, but not a substantial majority, of their spectrum for educational use").

⁷⁷ APTS/PBS Comments at 5 (claiming the term "primarily" is "commonly understood as a simple majority"). APTS/PBS also contends "that the Commission itself has explained that 'primarily' means 'more than half' when evaluating this language in the past." *Id.* (citing *Applications of WQED Pittsburgh and Cornerstone Television Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 202, 224, para. 43 (1999)). This additional guidance, however, was subsequently vacated on reconsideration. *Applications of WQED Pittsburgh and Cornerstone Television Inc.*, Order on Reconsideration, 15 FCC Rcd 2534, 2535, para. 2 (2000). We note that the Merriam-Webster online dictionary defines "primarily" as "for the most part; chiefly." Merriam-Webster, *primarily*, <https://www.merriam-webster.com/dictionary/primarily> (last visited Oct. 7, 2020). Webster's New World Dictionary defines it as "mainly; principally." David B. Guralnik, General Editor, Webster's New World Dictionary 592 (2nd Concise ed. 1982). Thus, while "primarily" could be used to mean a "simple majority," that is far from the "common" understanding.

the ATSC 3.0 standard. As these services reach the market, we will have additional context upon which to evaluate whether any changes to the definition of “primarily” are warranted. Accordingly, we defer examination of this issue and any other related matters until the Broadcast Internet marketplace matures.⁷⁸

2. Fee for NCE Primary Ancillary and Supplementary Services

24. While we generally decline to adjust the fee associated with ancillary and supplementary services,⁷⁹ to the extent that NCE television stations offer feeable ancillary and supplementary services that are nonprofit, noncommercial, and educational, we adopt a reduced fee of 2.5% on gross revenues generated by such “primary” services.⁸⁰ As discussed above, section 73.621 of our rules provides that NCE stations must “be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service,” and extends this requirement to all services provided via the station’s digital bitstream.⁸¹ Given the benefit of the “distinctive content of public broadcast programming” provided by NCEs,⁸² and the fact that the auction value of spectrum that must be “primarily” used for such services is likely lower than that of spectrum used for services without such restrictions, we believe this lower fee is appropriate.

25. Although we decline at this time to exempt NCE television stations entirely from all fees on ancillary and supplementary service revenues devoted to the station’s nonprofit activities as APTS/PBS suggest,⁸³ we believe that the reduction we adopt is an appropriate incremental and balanced approach. While some commenters suggest that we make no change to the 5% fee under any circumstances, and others asked us to eliminate it entirely, we find that a fee of 2.5% for “primary” NCE ancillary and supplementary services that are feeable under the statute appropriately recognizes the public service mission of public television stations without creating a significant disparity with the 5% fee applied to other ancillary and supplementary services offered by NCE and commercial television stations. While we decline to adjust the 5% fee generally, choosing instead to wait until the ATSC 3.0 marketplace further develops and after a further review is conducted,⁸⁴ we believe a different approach is warranted for NCE stations. We seek to support the ability of public television stations to provide and expand their nonprofit, noncommercial, educational services and engage in new and innovative educational efforts

⁷⁸ *Infra* note 116. We will also consider waiver requests, as necessary, to allow public safety or other Broadcast Internet uses that are nonprofit and noncommercial, but may not be educational in nature, to be applied to the “substantial majority” portion of an NCE licensee’s spectrum committed to “primary” purposes.

⁷⁹ *Supra* Section III.A.

⁸⁰ *Infra* Appendix A (also correcting a typo in 73.624(g)).

⁸¹ *Supra* Section III.B.1 (discussing 47 CFR § 73.621(a), (j)).

⁸² *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1202 (9th Cir. 2013) (en banc), *cert. denied*, 134 S.Ct. 2874 (2014)

⁸³ APTS/PBS Comments at 9-10 (arguing that we should exempt NCE educational licensees from all ancillary and supplementary service fees for services that are “primary” under our rules, or if the revenues from such services are used to support the licensees’ “noncommercial public service missions”); *see also* PMVG Comments at 3, 8 (asserting that the Commission should excuse public television stations from fees on services that are “non-commercial in nature or otherwise advance the public interest,” and that public television stations’ use of spectrum to support their educational mission and otherwise serve the public interest, even if it generates revenue, is a noncommercial purpose that should not be subject to a fee); *Didja Reply* at 2 (agreeing that public television stations “deserve special consideration” for paying fees on educational services). PMVG also asserts that, aside from the policy argument, the 1996 Act should be read to prohibit the Commission from imposing fees on “noncommercial” services. PMVG Comments at 18-19. PMVG misreads the 1996 Act in finding such a limitation. *See supra* Section III.A.

⁸⁴ *See supra* para. 12.

using ATSC 3.0 technology.⁸⁵ NCE nonprofit, noncommercial, educational services, provided by the nonprofit, education-focused licensees of NCE stations, uniquely advance the public interest and therefore should be treated differently under our fee program than other ancillary and supplementary services that are provided by NCE and commercial broadcast stations.⁸⁶ Given this, our approach appropriately reduces the fees on any revenue generated by such “primary” NCE ancillary and supplementary services, thereby permitting the nonprofit, education-focused licensees of NCE television stations to retain a larger percentage of any such revenue, providing more funds to support the core educational public service missions of such stations.

26. We find that our approach is consistent with section 336 of the 1996 Act. As discussed above, the language of section 336 gives the Commission wide discretion to select the appropriate fee for feeable ancillary and supplementary services.⁸⁷ Thus, we conclude that we have discretion under the statute to establish a fee for NCE primary ancillary and supplementary services that is lower than the fee for other ancillary and supplementary services, including those provided by commercial stations. Section 336(e)(1) directs the Commission to establish “a program to assess and collect” ancillary and supplementary fees⁸⁸ that, pursuant to section 336(e)(2), recover “a portion of the value of the public spectrum,” “avoid unjust enrichment,” and, eventually, recover an amount approximately equivalent to the spectrum’s value at auction.⁸⁹ Section 336 does not require the Commission to levy fees in direct proportion to the amount of spectrum held by each licensee. Adjusting our program of fees to impose a reduced fee of 2.5% for NCE stations’ “primary” ancillary and supplementary services will not undermine the Commission’s ability to recover for the public a portion of the value of the spectrum made available for ancillary and supplementary uses. Furthermore, a reduced fee on the nonprofit, noncommercial, educational ancillary and supplementary services offered by NCEs will not create a danger of unjust enrichment. Any additional “primary” NCE Broadcast Internet services offered as a result of these lower fees will, by their nature, redound to the public’s benefit more than to the benefit of the nonprofit educational organization licensees of the NCE stations.

27. Finally, we conclude that a 2.5% fee is consistent with our directive under section 336(e)(2)(B) to recover for the public an amount that would have been recovered “had such services been licensed” pursuant to an auction. The reduced fee of 2.5% will apply only to feeable ancillary and supplementary services that qualify as “primary” NCE services under section 73.621 of our rules, which means they must be nonprofit, noncommercial, and educational in nature. If spectrum restricted in this manner were offered for auction, we expect that bidders would offer a more modest amount of money for the right to build facilities that are restricted to providing services that are “primarily” nonprofit, noncommercial, and educational as opposed to spectrum designated for commercial use.⁹⁰ In other

⁸⁵ We note that Public Knowledge et al. contend that the Commission is prohibited from setting a fee of zero for any licensee. Public Knowledge et al. Comments at 4-6. Because we will continue to collect ancillary and supplementary fees from every licensee, both commercial and noncommercial, we need not address Public Knowledge et al.’s argument.

⁸⁶ See, e.g., *Noncommercial Educational Station Fundraising for Third-Party Non-Profit Organizations*, MB Docket No. 12-106, Report and Order, 32 FCC Rcd 3411, 3416-3421 (2017) (*NCE Fundraising Order*) (explaining the importance, to Congress and the Commission, of not “compromising [NCEs’] noncommercial nature and the valuable program service they provide to the public,” “alter[ing] the unique noncommercial, educational nature of public broadcasting” or “further erod[ing] the distinction between NCE stations and their commercial counterparts”).

⁸⁷ *Supra* Section III.A.

⁸⁸ 47 U.S.C. § 336(e)(1).

⁸⁹ *Id.* § 336(e)(2).

⁹⁰ Our analysis is consistent with the analysis the Commission applied to section 336(e)(2)(B) in the *NCE Ancillary Services Report and Order*. *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19059, para 41 (stating that

(continued....)

words, the requirements imposed on the use of the NCE station spectrum make this spectrum inherently less valuable at auction than spectrum without such use restrictions.⁹¹ Given the benefits to the public of an accelerated rollout of NCE primary Broadcast Internet services, we find it is appropriate to adopt this reduced fee even though it may overstate the auction value of spectrum so restricted. We are directed not only to “collect an amount that ... equals but does not exceed” the auction value of the spectrum, but also to recover a “portion of the value of the public spectrum resource” while avoiding unjust enrichment. While we find 2.5% to be appropriate at this time, we intend to monitor the development of the NCE Broadcast Internet marketplace and may adjust the fee if conditions warrant.

28. In reaching our decision, we are not constrained by the Commission’s previous decision to apply to NCE licensees the same fee for ancillary and supplementary services that we apply to commercial licensees.⁹² Instead, we conclude that advances in technology and the associated new offerings anticipated by NCE stations suggest a different approach is currently warranted when assessing the appropriate fee for NCE “primary” ancillary and supplementary services. Public television stations are already experimenting with ancillary and supplementary services that advance the public interest.⁹³ Applying a reduced fee for “primary” NCE services will give NCE licensees both an additional incentive to pursue the expensive transition to ATSC 3.0 and additional resources to devote to their core mission. We find that the 2.5% rate for “primary” ancillary and supplementary services is sufficient to meet our obligations under section 336 of the 1996 Act and will advance our goals of promoting Broadcast Internet services and supporting the mission of NCE television stations to provide nonprofit, noncommercial, educational services.

29. We note that this limited change does not excuse NCEs from their obligation to file an “Annual DTV Ancillary/Supplementary Services Report” whenever they receive feeable ancillary and supplementary services revenue.⁹⁴ We expect that, in this report, NCE filers will clearly identify any services that are nonprofit, noncommercial, and educational and therefore qualify for the reduced fee.⁹⁵

3. Donor Contributions to NCE Television Stations

30. As requested by PMVG and unopposed by other commenters,⁹⁶ we clarify that, when an NCE television station provides “donor exclusive” ancillary and supplementary services that are nominal in value in return for contributions to the licensee, we will not treat such contributions as “subscription

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section 336(e)(2)(B) “refers to the amount of money that would have been recovered if spectrum had been made available for these kinds of ancillary or supplementary services and had been licensed pursuant to auction”).

⁹¹ We agree with BitPath that, in considering among other things the appropriate level of the fee, the Commission should consider the auction value of the spectrum in the context of the ancillary and supplementary services being provided, not merely the auction value of the spectrum in the abstract. BitPath Reply at 10 (maintaining that, to assess the value of the spectrum, the question is “how much would be paid at auction for rights to build facilities to provide a 500 kbps push-only data service pursuant to the broadcast rules, including the technical rules, while meeting attendant public service obligations, including providing a free over-the-air locally-oriented television service”).

⁹² *NCE Ancillary Services Report and Order*, 16 FCC Rcd at 19058-59, para 40.

⁹³ See, e.g., APTS/PBS Comments at 3 and Attach. 1.

⁹⁴ FCC Form 2100, Schedule G.

⁹⁵ We dismiss as moot NTCA’s proposal for a detailed reporting and audit system, which they suggest should apply if we waived all fees for certain Broadcast Internet services. NTCA – The Rural Broadband Association (NTCA) Comments at 3.

⁹⁶ PMVG Comments at 17.

fees” under section 336 of the 1996 Act or section 73.621 of our rules.⁹⁷ For example, PMVG notes that stations may provide donor households with exclusive links to supplemental content, such as extended interviews or reference materials relevant to public affairs programming, or stations could offer donor households enhanced viewing experiences, such as the opportunity to view a local orchestra performance in 4K definition with immersive sound.⁹⁸ We will not treat such donor exclusive services as feeable as long as the ancillary and supplementary service provided in return is comparable in terms of value to the kinds of small gifts (e.g., coffee mugs, tote bags) that NCE stations often give donors in return for contributions. We agree with PMVG that the type of limited content offerings described above are comparable to the traditional donor gifts provided by NCE stations and should not be treated as ancillary and supplementary services provided in return for a subscription fee.⁹⁹ We also agree that, unlike programming provided in return for a subscription fee, the value of such content offerings made in return for a donation is likely minimal as compared to the value of the donation. In addition, unlike a subscription fee, the donation is made voluntarily and not pursuant to a subscription agreement. We intend to monitor the provision of “donor exclusive” services, however, and we may reconsider our decision in the future if such donor services appear to be comparable to subscription-based services.

C. Derogation & Analogous Services

31. We adopt our tentative conclusion that 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 least comparable in resolution to analog television programming.”¹⁰⁰ We also adopt our tentative conclusion to amend the wording of section 73.624(b) to define the precise resolution that is considered to be “at least comparable in resolution to analog television programming” as 480i, with a slight modification.¹⁰¹ Based on the record, we decline to adopt two other proposals on which we sought comment in the *NPRM*—a presumption that Broadcast Internet services are not analogous to any other service regulated by the Commission and a de minimis service threshold under which ancillary and supplementary services might be exempted from the need to comply with the regulations applicable to an analogous service otherwise regulated by the Commission.

32. As discussed in the *NPRM*, section 336 of the 1996 Act allows broadcasters the flexibility to provide ancillary and supplementary services on their DTV channels.¹⁰² In authorizing such services, Congress directed the Commission to adopt rules ensuring that broadcasters providing ancillary and supplementary services: (1) avoid derogating any advanced television services that the Commission may require; and (2) are subject to Commission regulations applicable to analogous services.¹⁰³ In furtherance of these statutory requirements, the Commission adopted section 73.624(c) of the rules, which

⁹⁷ 47 U.S.C. § 336(e)(1)(A) (describing a fee for services “for which the payment of a subscription fee is required in order to receive such services”); 47 CFR § 73.624(g)(1) (“All ancillary or supplementary services for which payment of a subscription fee or charge is required in order to receive the service are feeable.”).

⁹⁸ PMVG Comments at 18.

⁹⁹ *Id.*

¹⁰⁰ *NPRM*, 35 FCC Rcd at 5932, para. 33 (citing 47 CFR § 73.624(b), (c)).

¹⁰¹ 47 CFR § 73.624(b). The number “480” identifies a vertical resolution of 480 lines, and the “i” signifies an interlaced resolution. *NPRM*, 35 FCC Rcd at 5932, para. 33 and n.96.

¹⁰² *NPRM*, 35 FCC Rcd at 5931, para. 31. 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 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).

¹⁰³ 47 U.S.C. § 336(b)(2), (3).

permits broadcasters to offer ancillary and supplementary services provided they “do not derogate the DTV broadcast stations’ obligations under paragraph (b) of this section.”¹⁰⁴ 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.¹⁰⁵ The Commission also adopted rules codifying that broadcasters are permitted to provide ancillary and supplementary services on their broadcast spectrum that are analogous to other regulated services. If they choose to do so, however, they are required to adhere to any rules specific to such type of service.¹⁰⁶

1. Derogation of Service

33. *Derogation of Service Standard.* We adopt our tentative conclusion that 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 least comparable in resolution to analog television programming.”¹⁰⁷ As acknowledged both in this

¹⁰⁴ 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.* 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 1996 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 Reconsideration*).

¹⁰⁵ 47 CFR § 73.624(b); *see also DTV Fifth Report and Order*, 12 FCC Rcd at 12823, para. 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.”). The Commission declined to require broadcasters provide HD signals. *Id.* at 12826-27, paras. 40-44. Section 336(b)(2) of the 1996 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).

¹⁰⁶ 47 CFR § 73.624(c)(1).

¹⁰⁷ *NPRM*, 35 FCC Rcd at 5932, para. 33 (citing 47 CFR § 73.624(b)-(c)). NAB and BitPath support maintaining the Commission’s current definition of derogation under section 73.624(b). NAB Comments at 3-5; BitPath Reply at 12-13 (contending that any proposal to increase the minimum derogation standard is outside the scope of the *NPRM* and “unsupported” by the realities of the broadcast marketplace in which broadcasters already exceed the FCC’s existing minimum service requirements); Letter from Patrick McFadden, Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-145 at 1 (filed Aug. 6, 2020). These parties also argue that an increase to the minimum service standard beyond a single standard definition stream runs contrary to the Commission’s conclusions in the recent *Next Gen TV Order on Reconsideration*. NAB Comments at 3-5; BitPath Reply at 12 (citing *Next Gen TV Order*, 32 FCC Rcd at 9944, para. 27, *aff’d Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, GN Docket No. 16-142, Second Report and Order and Order on Reconsideration, 35 FCC Rcd 6793, 6817-19, paras. 50-52 (2020) (*Next Gen TV Order on Reconsideration*)); *see also* Pearl Comments at 5-6 (agreeing that the requirement should not be higher than standard definition). In contrast, NTA, Didja, Public Knowledge et al., ATVA, and NCTA all support modifying the minimum threshold for what should be considered derogation of a broadcaster’s signal to better represent the realities of the marketplace or viewer expectations, uphold the language of the 1996 Act and Congress’ intent for broadcasters to provide “advanced television services,” and represent the efficiencies provided by the ATSC 3.0 standard. National Translator Association (NTA) Comments at 4-5; NCTA Comments at 6; Public Knowledge et al. Comments at 17-19, Reply at 15-18); Letter from Michael Calabrese, Open Technology Institute at New America, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-145 at 2 (filed June 2, 2020); Didja Reply at 3; ATVA Comments at 3 (estimating that a television station transmitting in ATSC 1.0 needs 20% of its 6-MHz channel to transmit a single SD signal, whereas one transmitting in ATSC 3.0 needs to use as little as 8% of its 6-MHz channel to do the same).

proceeding and by the Commission in the *Next Gen TV Report and Order*, the ATSC 3.0 standard will provide expanded capacity for broadcasters to offer not only HD programming, but also other enhanced television resolutions such as 4K and 8K more efficiently.¹⁰⁸ However, as noted by NAB and BitPath, in light of the ATSC 3.0 local simulcasting requirement, requiring broadcasters to provide a higher resolution above SD at this early stage of ATSC 3.0 deployment could jeopardize their ability to preserve both primary and secondary ATSC 1.0 signals as stations convert to ATSC 3.0.¹⁰⁹ Moreover, we agree with NAB, Pearl, and BitPath that current marketplace forces are sufficient to incentivize broadcasters to maintain their existing standards of service for viewers, which notably may include HD programming streams.¹¹⁰

34. Next, we deny requests from several commenters that we prohibit broadcasters from transitioning a signal from HD to SD in order to provide an ancillary and supplementary service.¹¹¹ Earlier this year, the Commission rejected NCTA's proposal to require that ATSC 1.0 signals be simulcast in HD.¹¹² While we agree with NCTA that transitioning an ATSC 1.0 signal from HD to SD to facilitate the deployment of ancillary and supplementary services is different than transitioning a signal from HD to SD in order to comply with the ATSC 1.0 simulcast requirement,¹¹³ we reiterate that there is no obligation that broadcasters provide an HD signal, even if they have chosen to do so in the past. Imposing such a signal quality requirement remains inappropriate, for the same reasons it did six months ago – broadcasters have strong market incentives to maintain HD service, and a decision not to do so would be in response to competitive marketplace conditions.¹¹⁴ We therefore “decline to substitute our own judgment for that of local television stations that best know their communities’ needs,”¹¹⁵ but will continue to monitor broadcasters’ deployment of ATSC 3.0 services and evaluate the need for changes to our derogation standard as part of a planned future proceeding.¹¹⁶

¹⁰⁸ See *supra* Section II; *Next Gen TV Order*, 32 FCC Rcd at 9931, 9933, paras. 1, 4 (noting how the ATSC 3.0 standard will allow broadcasters to innovate, improve service, and use their spectrum more efficiently).

¹⁰⁹ See NAB Comments at 3-5; BitPath Reply at 12.

¹¹⁰ NAB Comments at 3-5; BitPath Reply at 12; Pearl Comments at 5-6; see also *Next Gen TV Order on Reconsideration*, 35 FCC Rcd at 6817-19, paras. 50-52 (rendering a similar decision not to require the continued provision of multicast streams).

¹¹¹ See e.g., ATVA Comments at 4 (“[W]hen a nonbroadcasting service consumes such a large portion of the broadcast spectrum, it necessarily ‘derogates’ broadcasting under any reasonable definition of the word (including, but not limited to, situations in which the broadcaster ceases to broadcast/simulcast in high-definition format).”); NCTA Comments at 6 (“Congress’s prohibition on broadcast signal derogation means that ‘ancillary and supplementary’ services must remain just that: ancillary and supplementary to the main purpose for which broadcasters were granted rights to use the spectrum.”). Didja and ATVA also recommend that the Commission amend its derogation standard to require broadcasters that provide ancillary and supplementary services to air at least one HD signal. Didja Comment at 3; ATVA Comments at 4. Didja goes on to propose that if broadcasters do not have at least one HD signal, they may instead provide a minimum number of multiple SD signals. Didja Reply at 3. NTA suggests that instead of considering resolution as a basis for whether derogation has occurred, the Commission should also consider looking at the quantity of a station’s channel being used for broadcast, versus non-broadcast ancillary uses. NTA Comments at 5.

¹¹² *Next Gen TV Order on Reconsideration*, 35 FCC Rcd at 6817-19, paras. 48-52.

¹¹³ NCTA Reply at 5-6.

¹¹⁴ *Next Gen TV Order on Reconsideration*, 35 FCC Rcd at 6818, para. 50.

¹¹⁵ *Id.*

¹¹⁶ In the Spring of 2022, the Commission expects to open a proceeding to evaluate the sunset of certain ATSC 3.0 technical provisions. *Id.* at 6812-19, paras. 39-47. Separately, the Commission has stated that it will consider as part of a future proceeding the continued necessity of the ATSC 1.0 simulcasting requirement, which does not sunset. *Next Gen TV Report and Order*, 32 FCC Rcd at 9938, para. 14. As part of a future proceeding, based on the

(continued....)

35. *Definition of a Standard Definition Signal.* Notwithstanding our decision to maintain the existing derogation standard, we adopt our tentative conclusion to modernize section 73.624(b) so that a standard definition signal is defined as one that has a resolution of at least 480i (vertical resolution of 480 lines, interlaced), as supported by multiple broadcast commenters.¹¹⁷ Despite NAB's suggestion to the contrary, the record provides no evidence that clarifying and modernizing the definition of a "standard definition signal" will place an increased burden on broadcasters.¹¹⁸ Rather, this change will merely remove an outdated reference to analog television and codify what is universally accepted as the digital resolution of a standard definition broadcast signal.¹¹⁹ While, as pointed out by BitPath, the 480i resolution standard was adopted over 20 years ago,¹²⁰ it is universally utilized by television sets today for displaying standard definition programming.¹²¹ Continued reliance on an obsolete analog broadcasting standard would be an outdated method by which to determine what is an acceptable digital standard definition signal. Further, we conclude that this rule update is fully consistent with the broad initiative the Commission has undertaken the past four years to modernize its rules by removing outdated references that no longer reflect the current media marketplace.

2. Analogous Services Analysis

36. In light of the limited record on this topic and the present lack of clarity concerning the precise Broadcast Internet services that broadcasters may offer, we find it is premature to adopt a presumption that certain Broadcast Internet services are or are not analogous to any other service regulated by the Commission.¹²² For the same reasons, we decline to adopt a de minimis service threshold under which ancillary and supplementary services might be exempted from the need to comply with the regulations of an analogous service otherwise regulated by the Commission.¹²³

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development of the ATSC 3.0 marketplace, we expect likewise to determine whether to reevaluate our derogation standard. While we have elected to maintain our current derogation standard at this time, we continue to "expect that the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service." *DTV Fifth Report and Order*, 12 FCC Rcd at 12823, paras. 28.

¹¹⁷ Pearl and ARK agree with our tentative conclusion. See Pearl Comments at 4, n.11; ARK Comments at 25. In contrast, NAB and BitPath do not support amending the definition of a standard definition signal. While they question the utility of modifying the definition, they provide no alternative and identify no potential negative consequences of the modification. See BitPath Reply at 13; NAB Comments at 3-4; Letter from Patrick McFadden, Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-145, at 1 (filed Oct. 5, 2020).

¹¹⁸ NAB Comments at 4 (arguing the proposal is unnecessary and counterproductive in a proceeding where the FCC seeks to remove regulatory barriers to innovation).

¹¹⁹ Full power television stations completed their transition to digital broadcasting in 2009, followed by Class A television stations in 2015. LPTV and TV translator stations are required to cease analog operation and will be solely permitted to operate in digital starting by 11:59 p.m. local time on July 13, 2021. 47 CFR § 74.731(m); see also *Media Bureau Reminds Low Power Television and Television Translator Stations of July 13, 2021, Digital Transition Date*, Public Notice, 35 FCC Rcd 6977 (MB 2020).

¹²⁰ BitPath Comments at 13 (questioning the use of 480i as the basis for defining a standard definition signal and arguing that the standard is itself an outdated reference "to a certain pixel count specified in a 1996 technical standard").

¹²¹ See Advanced Television Systems Committee, A/53: ATSC Digital Television Standard, Parts 1 - 6, 2007, Part 4 at 11 and 15 (Jan. 3, 2007), https://www.atsc.org/wp-content/uploads/2015/03/a_53-Part-1-6-2007-1.pdf (setting 480 lines of resolution as the smallest permissible resolution value); Advanced Television Systems, ATSC Standard: Video – HEVC (A/341), 6.2.1 Legacy SD Video at 7-8 (Feb. 14, 2019), <https://www.atsc.org/wp-content/uploads/2017/05/A341-2019-Video-HEVC-1.pdf>.

¹²² *NPRM*, 35 FCC Rcd at 5933, para. 35.

¹²³ *Id.* at 5933, para. 36.

37. In reaching both of these conclusions, we agree with NCTA and CTIA that, at this initial stage in the development of Broadcast Internet services, the Commission should continue to evaluate whether or not a service is analogous to other regulated services on a case-by-case basis.¹²⁴ While we do not foreclose adopting specific indicia of whether a service is or is not likely to be found to be analogous at some future point, we must first gain a better understanding of how Broadcast Internet services ultimately evolve in the marketplace. While, as argued by PMG, it may in fact end up being the case that Broadcast Internet services will be provided only on a one-way, one-to-many basis, as is the case with traditional video broadcast services,¹²⁵ without knowing the precise services broadcasters will offer we cannot universally conclude that such services are inherently not analogous to any other service regulated by the Commission.¹²⁶ We also agree with commenters that it is premature to adopt a presumptive or de minimis threshold under which ancillary and supplementary services otherwise akin to other regulated services would be found not to be analogous.¹²⁷

38. Though we decline to adopt additional rules at this time, we recognize that broadcasters may continue to seek clarification from the Commission, from time to time, about whether a particular service would be analogous to another, or whether specific broadcast rules would apply. Finally, we will continue to monitor the marketplace and provide any necessary clarification in the future once both broadcasters and the Commission know the type of Broadcast Internet services that may be deployed and offered to consumers.

D. Other Proposals

1. Low Power Television

39. We decline to adopt any of the proposals by low power television and translator (LPTV) station representatives and others to change our LPTV service rules in this proceeding. In addition to seeking comments on the ancillary and supplementary service fee and derogation of service issues, the *NPRM* generally sought comment on the provision of Broadcast Internet services by LPTV stations and what steps, if any, the Commission should take to facilitate the provision of such services by LPTV stations.¹²⁸ In response, LPTV groups and interested parties, such as ARK, ATBA, Edge Spectrum, Evoca, NRB, NTA, Spectrum Evolution, and One Ministries, proposed a wide range of changes to the rules governing LPTV service.¹²⁹ Among other things, these proposals include: equalizing LPTV

¹²⁴ NCTA Comments at 7; CTIA Reply at 4 (urging the Commission to “continue to assess use cases that ATSC 3.0 enables over broadcast spectrum as they evolve to ensure a consistent regulatory framework across analogous services”).

¹²⁵ PMG Comments at 8.

¹²⁶ Pearl also requests that the Commission “clarify broadly that broadcast television regulations do not apply to broadcast internet services.” Pearl Comments at 3-4. For the same reasons discussed above, we are unable to conclude on a blanket basis, as requested by Pearl, that *all* broadcast television rules do not apply to Broadcast Internet services. Pearl Comments at 6-7 (citing *Declaratory Ruling*, 35 FCC Rcd at 5925-26, para. 15). While as a general matter we envision that many broadcast television rules (such as those related to children’s television or indecency, and, as discussed by Pearl, our rules on attribution) would not apply to Broadcast Internet services, others (such as technical rules governing station operations) may still be applicable. We note that our analysis in the *Declaratory Ruling* was conducted solely in the context of evaluating our media ownership and attribution rules and the applicability of those rules to the leasing of excess broadcast television spectrum to a third party, including another broadcaster, for the provision of ancillary and supplementary services.

¹²⁷ NCTA maintains that the plain language of section 336(b) of the 1996 Act does not permit a de minimis exemption, and no commenters disagree. NCTA Comments at 7.

¹²⁸ *NPRM*, 35 FCC Rcd at 5927, para. 22.

¹²⁹ See generally Comments of ARK, One Ministries, Inc. (One Ministries), the Advanced Television Broadcasting Alliance (ATBA), Edge Spectrum, National Religious Broadcasters (NRB), NTA, Spectrum Evolution, Inc. (Spectrum Evolution), and Edge Networks, Inc. (Evoca).

interference protection with that of full power and Class A TV stations (essentially eliminating LPTV's secondary status);¹³⁰ creating a path for certain LPTV stations to attain primary status;¹³¹ lifting certain restrictions on LPTV service;¹³² granting blanket construction permit extensions for LPTV stations seeking to build ATSC 3.0 facilities;¹³³ changing aspects of the interference rules;¹³⁴ and changing aspects of the Commission's distributed transmission systems (DTS) rules.¹³⁵

40. We find that all of these proposals, many of which call for sweeping changes to the nature of LPTV service or translator service specifically, are insufficiently related to Broadcast Internet and are thus beyond the scope of this proceeding. We note, however, that all LPTV stations transitioning to digital service are eligible to request a one-time, six-month extension of their construction permit,¹³⁶ and that we will continue to consider requests to extend LPTV licenses on a case-by-case basis.¹³⁷

¹³⁰ ARK Comments at 16; ESI Comments at 18; *see also* NRB Comments at 2 (seeking "some degree of interference protection to ATSC 3.0 LPTV stations").

¹³¹ One Ministries Comments (seeking a new application filing window to allow LPTV stations to convert to Class A TV stations, and thus receive primary status); Evoca Comments at 5 (seeking "a new class of LPTV 'internet broadcaster' that has the rights of a full-power license").

¹³² ARK Comments at 20-21; ATBA Comments at 2-3, 6; ESI Comments at 15-16 (asking the Commission to eliminate two rules: (1) the rule restricting LPTV stations from moving more than 30 miles and (2) the rule restricting LPTV stations from building or moving within 75 miles of a Top 100 DMA); *see also* Evoca Comments at 4 (asking the Commission to allow LPTV stations "in underserved areas to increase their power closer to their full-power cousins").

¹³³ ARK Comments at 18-19; ATBA Comments at 3-5, 6; ESI Comments at 11-14.

¹³⁴ ESI Comments at 19 (contending that ATSC 3.0 LPTV stations should not have to accept any interference from new broadcast stations choosing to build an ATSC 1.0 facility).

¹³⁵ ARK Comments at 20; ATBA Comments at 2-3; ESI Comments at 16-17.

¹³⁶ 47 CFR § 74.788(c)(1). Any such request must be filed no later than March 13, 2021. 47 CFR § 74.788(c)(3) (setting the extension request deadline four months prior to the transition deadline, which is now July 13, 2021); *see also Media Bureau Reminds Low Power Television and Television Translator Stations of July 13, 2021, Digital Transition Date*, Public Notice, 35 FCC Rcd 6977 (MB 2020).

¹³⁷ We note that the Commission intended that the LPTV exemption from the local simulcasting requirement would help ensure that analog LPTV/translator stations and stations that have been displaced due to the post-incentive auction repacking process were not forced to build both an ATSC 1.0 and an ATSC 3.0 facility. *Next Gen TV Report and Order*, 32 FCC Rcd at 9951, para. 44. We also note that under section 312(g) of the Communications Act of 1934, as amended (Act), if a station fails to transmit a broadcast signal for any consecutive 12-month period its license automatically expires at the end of that period. 47 U.S.C. § 312(g). However, under that section a licensee may request an extension of its license if doing so would "promote equity and fairness." *Id.* The Commission has exercised its discretion under section 312(g) to extend or reinstate a station's expired license "to promote equity and fairness" only in limited circumstances where a station's failure to transmit a broadcast signal is due to compelling circumstances that were beyond the licensee's control. *See, e.g., Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578, 6580 (MB 2007) (reinstating license where silence necessitated by licensee's compliance with court order); *V.I. Stereo Communications*, Memorandum Opinion and Order, 21 FCC Rcd 14259, 14262 (2006) (reinstating license where silence due to destruction of towers in hurricanes). The Commission has stated that it would consider extensions in cases where stations were forced to remain dark for more than 12 months by the repack process. *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6807, para. 585 (2014); *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, MB Docket No. 16-306, GN Docket No. 12-268, Public Notice, 32 FCC Rcd 858, 873-74, para. 49 (IATF/MB 2017) (stating that displaced LPTV stations that remain silent for more than one year may request an extension or reinstatement of license where the station can demonstrate that its silence is the result of compelling reasons beyond the station's control including facts that relate to the post-auction transition process). The Media Bureau will continue to consider such relief for LPTV stations impacted by the repack.

Finally, we note that the proposals to allow LPTV stations to use DTS and to protect LPTV stations from full power DTS service are presently being considered in the DTS proceeding.¹³⁸

2. Retransmission Consent

41. *MVPD Carriage of Broadcast Internet Services.* We likewise decline to interpret our retransmission consent rules in the context of this proceeding. NCTA asks us to clarify that a broadcaster's use of retransmission consent to negotiate for carriage of Broadcast Internet services provided by a consortium of non-commonly owned broadcasters in the same market is prohibited by the bar on joint or coordinated retransmission consent negotiations.¹³⁹ NAB opposes this proposal as premature, urging us "to reject, now for the third time, NCTA's efforts to impose restraints on negotiations in the absence of any demonstration of real world market failure."¹⁴⁰ We decline to address this issue, finding it beyond the scope of this proceeding.¹⁴¹

42. *Retransmission Consent Agreements Including Ancillary and Supplementary Services.* We also reject NTCA's proposal that we exempt broadcasters from all ancillary and supplementary service fees if they provide ancillary and supplementary services at no additional charge to unaffiliated MVPDs with which they have an existing retransmission consent agreement.¹⁴² No commenters addressed this proposal. We note that ancillary and supplementary services that are solely being offered free of charge do not generate revenue and, therefore, are not subject to the ancillary and supplementary services fee.

IV. PROCEDURAL MATTERS

43. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹⁴³ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Order. The FRFA is set forth in Appendix B.

44. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

45. *Congressional Review Act.* [The Commission will submit this draft *Report and Order* to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is "major" or "non-major" under the Congressional

¹³⁸ See *Rules Governing the Use of Distributed Transmission System Technologies; Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, MB Docket 20-74 and GN Docket 16-142, Notice of Proposed Rulemaking, 35 FCC Rcd 3330 (2020).

¹³⁹ NCTA Comments at 2-3. NCTA points to section 325 of the Act, which generally prohibits same-market television broadcast stations from "coordinating negotiations or negotiating on a joint basis" for retransmission consent unless the stations are under common *de jure* control. 47 U.S.C. § 325(b)(3)(C)(iv).

¹⁴⁰ NAB Reply at 4. Although we note that NCTA's request is more narrowly focused than NAB suggests, we nonetheless agree that retransmission consent issues are not relevant to this proceeding.

¹⁴¹ We note that the *NPRM* indicated that changes to our rules and policies regarding retransmission consent agreements are beyond the scope to this proceeding. *NPRM*, 35 FCC Rcd at 5927, n.63 (rejecting NCTA's request that the *NPRM* seek comment "on the relationship between the provision of ancillary and supplementary services and other Commission rules and statutory obligations, including retransmission consent").

¹⁴² See NTCA Comments at 8.

¹⁴³ 5 U.S.C. § 603. The RFA, 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).

Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of this Report & Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

46. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained 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, the Report and Order **IS ADOPTED**.

47. **IT IS FURTHER ORDERED** that the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A, effective as of 30 days after the date of publication of a summary in the Federal Register.

48. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

49. **IT IS FURTHER ORDERED** that the Commission will send a copy of the Report and Order in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA).

50. **IT IS FURTHER ORDERED** that should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20-145 **SHALL BE TERMINATED** and its docket closed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

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

PART 73 – RADIO BROADCAST SERVICES

1. The authority for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

2. Amend § 73.624 to read as follows:

§ 73.624 Digital Television Broadcast Stations.

(b) DTV broadcast station permittees or licensees must transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel. Until such time as a DTV station permittee or licensee ceases analog transmissions and returns that spectrum to the Commission, and except as provided in paragraph (b)(1) of this section, at any time that a DTV broadcast station permittee or licensee transmits a video program signal on its analog television channel, it must also transmit at least one over-the-air video program signal on the DTV channel. The DTV service that is provided pursuant to this paragraph must **have a resolution of at least 480i (vertical resolution of 480 lines, interlaced)**. ~~be at least comparable in resolution to the analog television station programming transmitted to viewers on the analog channel.~~

(g) Commercial ~~and noncommercial~~ DTV licensees and permittees, and low power television, TV translator and Class A television stations DTV licensees and permittees, must annually remit a fee of five percent of the gross revenues derived from all ancillary and supplementary services, as defined by paragraph (b) of this section, which are feeable, as defined in paragraphs (g)(1)(i) ~~and~~ through (iii) of this section. **Noncommercial DTV licensees and permittees must annually remit a fee of five percent of the gross revenues derived from all ancillary and supplementary services, as defined by paragraph (b) of this section, which are feeable, as defined in paragraphs (g)(1)(i) through (iii) of this section, except that such licensees and permittees must annually remit a fee of two and one half percent of the gross revenues from such ancillary or supplementary services which are nonprofit, noncommercial, and educational.**

(iii) Notwithstanding (g)(1)(i) and (ii) of this section, facility improvements made or financed by third parties in order to transition a licensee or permittee's station to, or help them fully utilize the benefits of, ATSC 3.0 shall not be considered feeable revenue.

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)* in this proceeding.² The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. We received no comments specifically directed toward the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objective of, the Report and Order

2. 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. We undertook this proceeding to ensure that our rules, most over 20 years old, will help foster the introduction of new Broadcast Internet services and the efficient use of existing television broadcast spectrum under the new ATSC 3.0 standard. In this Report and Order, we therefore conclude that ancillary and supplementary (A&S) fees should be calculated based on the gross revenue received by the broadcaster, without regard to the gross revenue of an unaffiliated third party, such as a spectrum lessee; exclude the value of certain third-party-funded facility improvements from the revenue calculation; retain the existing standard of derogation of broadcast service, but amend the wording of the rules to eliminate the outdated reference to analog television; and reaffirm that noncommercial educational television broadcast stations (NCEs) may offer Broadcast Internet services. We also interpret the application of section 73.621 of our rules to permit noncommercial educational stations (NCEs) to devote more of their spectrum to Broadcast Internet; lower the ancillary and supplementary service fee for certain NCE services; and clarify the circumstances under which NCEs may offer limited Broadcast Internet services to donors without transforming those donations into feeable ancillary and supplementary service revenue. With these changes, we seek to encourage the robust usage of broadcast television spectrum capacity for the provision of Broadcast Internet services consistent with statutory directives.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. There were no comments filed in response to the IRFA.

C. Response to comments by the Chief Counsel for Advocacy of the Small Business Administration

4. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.⁴

5. The Chief Counsel did not comment in response to the proposed rules in this proceeding.

¹ 5 U.S.C. § 603. The RFA, 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 *NPRM*, 35 FCC Rcd at 5937-41, Appendix B.

³ 5 U.S.C. § 604.

⁴ 5 U.S.C. § 604(a)(3).

D. Description and Estimate of the Number of Small Entities to Which 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.⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷ 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.⁸ Below, we provide a 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.”⁹ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹⁰ 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.¹¹ 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.¹² 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 1,374.¹³ 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

⁵ 5 U.S.C. § 603(b)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 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.”

⁸ 15 U.S.C. § 632.

⁹ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=515120&search=2017>.

¹⁰ *Id.*

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

¹² 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.

¹³ Press Release, FCC, Broadcast Station Totals as of December 31, 2019 (Jan. 3, 2020), <https://docs.fcc.gov/public/attachments/DOC-361678A1.pdf>.

(NCE) television stations to be 388.¹⁴ 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) affiliations¹⁵ 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.¹⁶ Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations.¹⁷ 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.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

11. This Report and Order imposes no new reporting, recordkeeping, or compliance requirements.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

12. The RFA requires an agency to describe any significant alternatives that it has considered in developing its 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 an reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”¹⁸

13. Our rules will not impose a negative economic impact on any parties, and by clarifying the range of feeable revenue may allow small broadcast entities transitioning to ATSC 3.0 to experience positive economic impacts. NCE television stations in particular, both large and small, will experience positive benefits from the decisions made in this item.

G. Report to Congress

14. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.¹⁹ In addition, the Commission

¹⁴ *Id.*

¹⁵ “[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).

¹⁶ *Supra* note 156 (discussing broadcast station totals as of December 31, 2019).

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

¹⁹ 5 U.S.C. § 801(a)(1)(A).

will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.