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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 20-145; FCC 20-73; FRS 16851]

Promoting Broadcast Internet Innovation through ATSC 3.0

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment by television broadcasters of new, innovative ancillary and supplementary services, which we refer to as "Broadcast Internet," as part of the transition to ATSC 3.0. We first seek comment generally on potential uses of the new technological capability from ATSC 3.0 and any existing regulatory barriers to deployment. We then consider specifically whether any changes or clarifications are needed to the ancillary and supplementary service fee rules and the rules defining derogation of service and analogous services. A *Declaratory Ruling* relating to the broadcast ancillary and supplementary service rules is published elsewhere in this issue of the *Federal Register*.

DATES: Comments due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; reply comments due on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, by any of the following methods:

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554. Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact John Cobb, John.Cobb@fcc.gov of the Policy Division, Media Bureau, (202) 418-2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), MB Docket Nos. 20-145; FCC 20-73, adopted and released on June 9, 2020. A summary of the *Declaratory Ruling* adopted concurrently relating to the broadcast ancillary and supplementary service rules is published elsewhere in this issue of the *Federal Register*. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY-A257, Washington, DC, 20554. The full text of this document will also be available via ECFS (http://www.fcc.gov/cgb/ecfs/). (Documents will be available electronically in ASCII, Word, and/or Adobe Acrobat.) The complete text may be

purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. To request these documents in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

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

With this item, we take important steps to further unlock the potential of broadcast spectrum, empower innovation, and create significant value for broadcasters and the American public alike by removing the uncertainty cast by legacy regulations. More than twenty years ago, during the transition from analog to digital broadcast television, the Commission adopted rules allowing digital television (DTV) licensees to provide ancillary or supplementary services on their excess spectrum capacity and authorized licensees to enter into leases with other entities that would provide such services. Flash forward to today, and the conversion of digital

television from the first-generation technologies associated with the ATSC 1.0 standard to the next-generation of ancillary services that will be enabled by ATSC 3.0 is now underway. This new technology promises to expand the universe of potential uses of broadcast spectrum capacity for new and innovative services beyond traditional over-the-air video in ways that will complement the nation's burgeoning 5G network and usher in a new wave of innovation and opportunity. These new offerings over broadcast spectrum can be referred to collectively as "Broadcast Internet" services to distinguish them from traditional over-the-air video services. Broadcasters will not only be able to better serve the information and entertainment needs of their communities, but they will have the opportunity to play a part in addressing the digital divide and supporting the proliferation of new, IP-based consumer applications or voluntarily entering into arrangements to allow others to invest in achieving those goals. We undertake this proceeding to ensure that our rules help to foster the introduction of new services and the efficient use of spectrum.

In the *NPRM*, we seek comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment of Broadcast Internet services as part of the transition to ATSC 3.0. As when the ancillary services rules were first adopted, the Commission seeks to promote and preserve free, universally available, local broadcast television by providing a clear regulatory landscape that permits licensees the flexibility to succeed in a competitive market and incentivizes the most efficient use of prime spectrum. And given that the existing rules were adopted over twenty years ago, we believe it is appropriate at this time to reassess them in the context of the newest advanced broadcast television technology. To that end, in the *NPRM* we first seek comment generally on potential uses of the new technological capability from ATSC 3.0 and any existing regulatory barriers to deployment. We then consider

specifically whether any changes or clarifications are needed to the ancillary and supplementary service fee rules and the rules defining derogation of service and analogous services. In so doing, we seek to encourage the robust usage of broadcast television spectrum capacity for the provision of Broadcast Internet services consistent with statutory directives.

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

The Commission adopted the initial rules governing the provision of ancillary or supplementary broadcast services in 1997 as part of the *DTV Fifth Report and Order*. Consistent with the Act, the rules obligate DTV licensees to "transmit at least one over-the-air video

program signal at no direct charge to viewers on the DTV channel." This means that regardless of whatever other services a broadcaster may provide over its spectrum, it must continue to provide one free stream of programming to viewers. As long as DTV licensees satisfy that obligation, the rules permit them to "offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis" provided the services do not derogate the licensee's obligation to provide one free stream of programming to viewers and are subject to any regulations on services analogous to the ancillary or supplementary service. These rules reflect the Commission's intent to promote the public interest by maximizing "broadcasters' flexibility to provide a digital service to meet the audience's needs and desires."

The Commission initiated a separate proceeding to determine how best to assess and collect the statutorily required fee for ancillary or supplementary services. The statute directed the Commission to adopt a fee structure that would "recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and . . . avoid unjust enrichment through the method employed to permit such uses of that resources." It also specifically instructed the Commission to set the fee at a value that, "to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of [the Act] and the Commission's regulations thereunder." Ultimately, the Commission determined that a fee based on a percentage of the gross revenues generated by feeable ancillary or supplementary services was the best option to satisfy the statutory directive and achieve the goal of incentivizing innovation to maximize spectrum efficiency. The Commission set the fee at five percent of gross revenues received from any feeable ancillary or supplementary services.

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

Pursuant to section 336(e)(4) of the Act, the Commission originally adopted rules requiring all DTV licensees and permittees annually to file a form (currently Form 2100, Schedule G), reporting information about their use of the DTV bitstream to provide feeable ancillary and supplementary services. In 2017, as a part of the *Modernization of Media Regulation Initiative*, the Commission revised these filing requirements. The Commission concluded that requiring every DTV licensee to file the form was an unnecessary regulatory burden, as very few licensees offered any feeable service, and instead changed the rules to require only those licensees who had provided feeable ancillary or supplementary services during the applicable reporting period to file the form. As the Commission observed, at that time only a fraction of all television broadcast stations provided feeable ancillary or supplementary services despite expectations in the wake of the digital transition.

Next Generation Broadcast Standard (ATSC 3.0). ATSC 3.0 is the "Next Generation" broadcast television (Next Gen TV) transmission standard developed by the Advanced

Television Systems Committee as the world's first IP-based broadcast transmission platform, which "merges the capabilities of over-the-air broadcasting with the broadband viewing and information delivery methods of the Internet, using the same 6 MHz channels presently allocated for DTV service." As stated in the *Next Gen TV Report and Order*, the ATSC 3.0 standard will allow broadcasters to "offer exciting and innovative services," including superior reception, mobile viewing capabilities, enhanced public safety capabilities (such as advanced emergency alerting capable of waking up sleeping devices to warn consumers of imminent emergencies), enhanced accessibility features, localized and/or personalized content, interactive educational children's content, and other enhanced features. In 2017, the Commission authorized broadcasters to begin the transition to ATSC 3.0 voluntarily and established standards to minimize the impact on, and costs to, consumers and other industry stakeholders. The Media Bureau began accepting applications for Next Gen TV licenses on May 28, 2019. Earlier this year, the Commission adopted a Notice of Proposed Rulemaking seeking comment on proposed changes to the rules governing the use of distributed transmission systems (DTS) by broadcast television stations. Proponents of the changes assert that they will facilitate the use of new and innovative technologies that will improve traditional broadcast service and mobile reception of broadcast signals, as well as allow the more efficient use of broadcast spectrum, which they claim would enable broadcasters to exploit more fully the new capabilities resulting from ATSC 3.0.

ATSC 3.0 provides greater spectral capacity than the current digital broadcast television standard, allowing broadcasters to innovate, improve service, and use their spectrum more efficiently. Although today many broadcasters are focused solely on deploying traditional broadcast television services using the ATSC 3.0 standard, some broadcasters and third-party

groups are looking to the future and examining ways broadcasters can become part of the 5G ecosystem and provide myriad other services using the enhanced capabilities of ATSC 3.0 technologies. Specifically, these groups hope to utilize television spectrum to provide non-traditional broadcast video services such as video-on-demand or subscription video services and new, innovative non-broadcast services in such areas as the automotive industry, agriculture, distance learning, telehealth, public safety, utility automation, and the "Internet of Things" (IoT). Providing a regulatory environment to enable a thriving secondary market is key to unlocking the potential for such Broadcast Internet services via ATSC 3.0.

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

General Matters. As an initial matter, we invite comment on the types of Broadcast Internet services that are likely to be provided in the future using the ATSC 3.0 standard. Recently, television broadcasters have indicated that they will use their spectrum to provide

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

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

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

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

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

such challenges exist, what steps, if any, should the Commission take to facilitate the provision of such services by LPTV stations?

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

At the outset, we note that, as discussed above, the Commission is subject to certain statutory mandates for determining the fee for ancillary and supplementary services carried on the public spectrum. Specifically, the ancillary and supplementary services fee must be designed to: (1) Recover for the public a portion of the value of the public spectrum resource made available for ancillary or supplemental use by broadcasters; (2) avoid unjust enrichment of broadcasters through the method used to permit digital use of the spectrum; and (3) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed at auction. Also, the Commission is required by statute to adjust the ancillary and supplementary services

fee "from time to time" in order to ensure that these requirements continue to be met.

When the Commission last undertook an assessment of ancillary and supplementary service fees in 1998, it determined that it would assess fees on all revenue—both subscription and advertising revenue—from all ancillary and supplementary services for which viewers must pay subscription fees. In addition, as required by the 1996 Act, the Commission determined that fees must be assessed on ancillary and supplementary services for which the licensee directly or indirectly receives compensation from a third party in exchange for the transmission of material provided by the third party (other than for commercial advertisements used to support broadcasting for which a subscription fee is not required). The Commission noted that, pursuant to our rules, over-the-air video programming provided at no charge to viewers is not an ancillary or supplementary service. It reasoned, therefore, that this provision "applies to ancillary or supplementary services, consisting of material that does not originate with the licensee and that the viewer can receive without payment of a fee." These services may include data, audio, "or any other ancillary or supplementary services that may be established in the future." The Commission noted that it received very little comment on the types of non-subscription ancillary or supplementary services parties contemplated providing. Accordingly, it concluded that, in determining whether a non-subscription ancillary or supplementary service is feeable, "until we gain more experience, we will simply be guided by the statutory criteria as questions arise."

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

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

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

Are there any other issues we should consider with respect to the application of fees to

the provision of ancillary or supplementary services during the transition to ATSC 3.0? For example, in order to promote the provision of new services, should we apply the fee only to gross revenues above a certain threshold? If so, should such a threshold apply only to certain classes of stations, such as NCE stations? Similarly, should the fees be capped during license term and, if so, at what level? Should we revisit the Commission's prior decision to adopt a fixed percentage rate as opposed to a variable percentage rate based upon the type of service provided? Should we consider granting exemptions for certain classes of service from fees, such as telehealth, distance learning, public safety, or homeland security-related services, or services that promote access in rural areas? Would it be consistent with the statute to do so? Would such rule changes or exemptions be consistent with the Commission's statutory obligation to assess a fee that will recover some portion of the value of the spectrum for the public, prevent unjust enrichment, and approximate the revenue that would have been received through auction? We note that when the Commission initially implemented the program for assessing ancillary and supplementary fees, it observed that "[a]n overly complex fee program could be difficult for licensees to calculate and for the Commission to enforce and could create uncertainty that might undermine a DTV licensee's efficient planning of what services it will provide." Does this concern regarding complexity weigh against any changes to the ancillary and supplementary fee that differentiate among types of services? We invite comment generally on these issues.

We invite comment on how the ancillary and supplementary services fee should be calculated in instances where a broadcaster receives compensation from an unaffiliated third party, such as a spectrum lessee, in return for the airing of material provided by the third party. For example, the broadcaster could lease spectrum to a third party for a set fee or could agree to share in the proceeds generated by the service offered by the third party. We tentatively

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

Finally, we seek comment on whether we should consider any changes to the annual reporting requirement applicable to the provision of feeable ancillary or supplementary services. Currently, the Commission's rules require all commercial and noncommercial DTV licensees

and permittees that provided feeable ancillary or supplementary services during the applicable 12-month period to report each December 1: (1) A brief description of the feeable ancillary or supplementary services provided; (2) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and (3) the amount of bitstream used to provide feeable ancillary or supplementary services during the applicable period. Should the Commission make any changes to the information collected on the form or any other information collections related to the provision of ancillary and supplemental services?

Derogation of Service and Analogous Services. The 1996 Act and specifically section 336 thereof allow broadcasters flexibility to provide ancillary and supplementary services. But in authorizing broadcast television stations to provide ancillary or supplementary services on their DTV channels, Congress required that the provision of such services: (1) Must avoid derogating any advanced television services that the Commission may require; and (2) must be subject to Commission regulations applicable to analogous services. In furtherance of this statutory requirement, the Commission adopted § 73.624(c) of the rules, which permits broadcasters to offer ancillary and supplementary services so long as they "do not derogate the DTV broadcast stations' obligations under paragraph (b) of this section." 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. Accordingly, a station's service is not derogated so long as it continues to offer at least one free over-the-air SD video programming stream at least comparable in resolution to analog television programming pursuant to § 73.624(b). Furthermore, broadcasters are permitted to provide ancillary or supplementary services on their broadcast spectrum that are analogous to other regulated

services, but should they choose to do so, they are required to adhere to any rules specific to such type of service.

While the Commission adopted broad rules in furtherance of these statutory requirements in 1997, it has not revisited these rules since affirming them on reconsideration in 1998. In particular, the Commission has not conducted a recent examination of how these restrictions should be applied in the context of changes in the media and communications landscape, or in light of the capabilities offered by the ATSC 3.0 transmission standard as compared to the ATSC 1.0 standard. Accordingly, we seek comment below on whether the existing interpretation of what constitutes a derogation of service remains valid or whether any changes are warranted. Further, we seek comment on whether and, if so, how the Commission should provide greater clarity to broadcasters to determine when an offered service is "analogous" to a regulated service and thus would require compliance with parts of the Act and Commission rules beyond those governing broadcast services.

Derogation of Service. As discussed above, section 336(b) of the Act requires that the Commission "limit the broadcasting of ancillary or supplementary services…so as to avoid derogation of any advanced television services." We tentatively conclude that the determination of whether a broadcast station's signal has been derogated should continue to be evaluated by whether it provides at least one standard definition over-the-air video program signal at no direct charge to viewers that is at least comparable in resolution to analog television programming, as required by § 73.624(b). We seek comment on this tentative conclusion. We also tentatively conclude that we should amend the wording of § 73.624(b) to specifically define the precise resolution that is considered to be "at least comparable in resolution to analog television programming" as 480i. We seek comment on this proposal. What resolution does the broadcast

industry currently use for purposes of compliance with the Commission's existing "at least comparable in resolution to analog television programming" standard? We recognize that since adoption of these rules, broadcasters have begun providing a myriad of broadcast television programming offerings both in high definition (HD) and SD, often offering multiple streams (i.e., subchannels) of free, over-the-air, video programming. We seek comment on whether a broadcaster's replacement of an HD offering with an SD offering in order to deploy ancillary and supplementary services should be deemed a derogation of advanced television services under our rules. Are there any other modifications of the Commission's current derogation of service rule that we should consider in order to ensure that, as mandated by section 336 of the Act, broadcasters' ancillary and supplementary offerings are not being provided to the derogation of "advanced television services" (i.e., free over-the-air broadcast service)? How might any proposed rule modification, on balance, affect broadcasters' ability to deploy ancillary and supplementary services?

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

analog.

We seek comment on whether the Commission should provide additional guidance regarding the factors or other approaches it will use to determine whether an ancillary or supplementary service is sufficiently "analogous" to another service. What are some examples of services that broadcasters may be looking to offer to consumers that could be deemed "analogous" to services currently regulated by the Commission? As a general matter, what information should the Commission consider when determining whether an ancillary or supplementary service being offered is analogous to another regulated service? Should we adopt a presumptive standard by which any service that has certain specific characteristics is deemed to be analogous to another Commission service? What characteristics would be indicative of a service that should be considered to meet such a presumptive standard? Alternatively, are there certain circumstances in which a broadcaster should be presumptively deemed not to be offering an analogous service? For example, what if the broadcaster or a third-party spectrum lessee is not offering the entire, end-to-end, service to the consumer or customer? What if the broadcast spectrum is only being used for wireless off-load for existing broadband providers (e.g., airing large bit-rate video programming), one-way data distribution services (e.g., consumer device software updates), or as part of spectrum that must be aggregated across more than one broadcaster in order to provide a viable service? Can an input to another service be regulated as an "analogous service"? Should any affirmative finding by the Commission be required? If so, what should be the process for obtaining such approval and what information should be provided by broadcasters to demonstrate that the presumptive standard has been met?

Further, in the event that an ancillary or supplementary service is analogous to a service permitted elsewhere in the Commission's rules, but is only provided by a third party lessee or the

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

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

Paperwork Reduction Act. This document may result in new or revised information

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

Ex Parte Rules—Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. Memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or

arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with section 1.1206(b) of the rules. In proceedings governed by section 1.49(f) of the rules or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

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

Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.U.S. Postal Service first-class, Express, and Priority mail must

be addressed to 445 12th Street, SW, Washington, DC 20554. Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice*, DA 20-304 (March 19, 2020). https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy. During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

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

Need for, and Objectives of, the Proposed Rules. With this item, we take important steps to help further unlock the potential of broadcast spectrum, empower innovation, and create significant value for broadcasters and the American public alike by removing the uncertainty cast by legacy regulations. More than twenty years ago, during the transition from analog to digital

broadcast television, the Commission adopted rules allowing digital television (DTV) licensees to provide ancillary or supplementary services on their excess spectrum capacity and authorized licensees to enter into leases with other entities that would provide such services. Flash forward to today, and the conversion of digital television from the first-generation technologies associated with the ATSC 1.0 standard to the next-generation of ancillary services that will be enabled by ATSC 3.0 is now underway. This new technology promises to expand the universe of potential uses of broadcast spectrum capacity for new and innovative services beyond traditional over-the-air video in ways that will complement the nation's burgeoning 5G network and usher in a new wave of innovation and opportunity. These new offerings over broadcast spectrum can be referred to collectively as "Broadcast Internet" services to distinguish them from traditional over-the-air video services. Broadcasters will not only be able to better serve the information and entertainment needs of their communities, but they will have the opportunity to play a part in addressing the digital divide and supporting the proliferation of new, IP-based consumer applications or voluntarily entering into arrangements to allow others to invest in achieving those goals. We undertake this proceeding to ensure that our rules help to foster the introduction of new services and the efficient use of spectrum.

By this *NPRM*, we seek comment on the extent to which we should clarify or modify our existing rules in order to further promote the deployment of Broadcast Internet services as part of the transition to ATSC 3.0. As when the ancillary services rules were first adopted, the Commission seeks to promote and preserve free, universally available, local broadcast television by providing a clear regulatory landscape that permits licensees the flexibility to succeed in a competitive market and incentivizes the most efficient use of prime spectrum. And given that the existing rules were adopted over twenty years ago, we believe it is appropriate at this time to

reassess them in the context of the newest advanced broadcast television technology.

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

directives.

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

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply. 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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

Television Broadcasting. This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound." These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. 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. 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. Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,374. Of this total, 1,282 stations (or 94.2%) had revenues of $41.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388. 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.

We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations 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.

There are also 387 Class A stations. 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. 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.

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

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

associated with the provision of feeable ancillary or supplementary services, we will take all appropriate steps to minimize the burden on broadcast licensees.

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

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

F*ederal Rules that May Duplicate, Overlap or Conflict With the Proposed Rule*. None.

IT IS ORDERED that, pursuant to the authority found in sections 1, 4(i), 4(j), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), and 336, this Notice of Proposed Rulemaking in MB Docket No. 20-145 IS ADOPTED. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking in MB Docket No. 20-145, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer,

Office of the Secretary.

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