

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

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

MEMORANDUM OPINION AND ORDER

Adopted: November 19, 1999

Released: November 24, 1999

By the Commission:

I. INTRODUCTION

1. In our *Report and Order* in this proceeding,¹ we implemented Section 201 of the Telecommunications Act of 1996 ("1996 Act") which adopted Section 336 of the Communications Act of 1934, requiring broadcast television licensees to pay a fee if they provide certain types of ancillary or supplementary services on their digital television ("DTV") bitstream. Based on the criteria set forth in Section 201, we adopted rules to require DTV licensees to pay a fee of five percent of the gross revenues received from the provision of such "feeable" ancillary or supplementary services. We also provided guidance on which services are subject to this fee and specifically concluded that home shopping, infomercial, and direct marketing services would not be feeable.

2. We have received two petitions asking us to reconsider aspects of the *Report and Order*. The National Association of Broadcasters and the Association for Maximum Service Television have filed a joint petition (the "NAB/MSTV Petition") asking us to set the fee at two percent of gross revenues rather than five percent. The Office of Communication Inc. of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project have filed a joint petition (the "UCC, *et al.* Petition") asking us to hold that home shopping, infomercials, and direct marketing services are subject to fees. We deny both petitions for reconsideration.

¹ *In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996*, MM Docket No. 97-247 (adopted Nov. 19, 1998).

II. BACKGROUND

3. Pursuant to the 1996 Act, the Commission has assigned each existing broadcast television station an additional channel to convert to digital technology. We are requiring broadcasters to provide on their DTV bitstream at least one over-the-air video program signal at no direct charge to viewers.² Aside from this requirement, we have given broadcasters great flexibility in the services they provide over their DTV bitstream. They may offer a wide range of ancillary or supplementary services such as computer software distribution, data transmission, teletext, interactive materials, aural messages, paging services, audio signals, and subscription video.³

4. The 1996 Act requires broadcasters to pay a fee to the U.S. Treasury to the extent they use their DTV bitstream 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 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).⁴

The 1996 Act directed the Commission to establish a program to assess and collect this fee based on the following three objectives:

- "to recover for the public a portion of the value of the public spectrum resource made available for such commercial use";
- "to avoid unjust enrichment through the method employed to permit such uses of that resource";
- to "recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to [the competitive bidding process]."⁵

5. In the *Report and Order*, we established a fee program that requires broadcasters to pay a fee of five percent of the gross revenues they receive from feeable ancillary or supplementary services offered on their DTV bitstream. We reasoned that this fee is consistent with the three objectives set forth in the Act. It also represented a reasonable fee in light of the record in the proceeding, in which some parties argued for a very low or nominal fee and others for a fee of more than ten percent.

² 47 C.F.R. § 73.624(b).

³ *Id.* at § 73.624(c).

⁴ 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).

⁵ *Id.* at § 336(e)(2).

III. THE NAB/MSTV PETITION

6. NAB/MSTV argue that we failed to consider two studies they submitted that they believe call for a fee of two percent of gross revenues rather than five percent. The first study, prepared by Jerry Hausman, purports to establish "the low and declining value of comparable spectrum," and also that digital ancillary or supplementary services "face significant business and technological uncertainty."⁶ The second study, prepared by Kent Anderson, describes several surveys of technology licensing fees in the private sector.⁷ According to NAB/MSTV, the two studies support a lower fee under the statutory criteria, one of which requires that the fee be designed to recover an amount that approximates, to the extent feasible, the revenues that would have been received had the spectrum on which these services are provided been licensed through an auction. The Association of Local Television Stations ("ALTV") submitted comments supporting the NAB/MSTV Petition.⁸ The National Cable Television Association ("NCTA") filed an opposition to the petition.⁹

7. Contrary to NAB/MSTV's suggestion, we did consider the two studies in reaching our decision in the *Report and Order*. Indeed, consistent with a recommendation in the Hausman Study, we declined to impose an upfront or hybrid fee on DTV licensees that provide feeable services.¹⁰ Although we rejected arguments based on the two studies to set the fee lower than five percent, we explained in paragraphs 28-29 of the *Report and Order* our reasons for doing so. We reaffirm this decision and amplify our reasons below.

8. We turn to the Anderson Study first. The Anderson Study describes several surveys of royalty rates used in licensing various technologies in the private sector. Although we did not cite the Anderson Study explicitly and our discussion of the issue was brief, the *Report and Order*, at ¶ 29, did reject arguments that we should set a lower fee based on analogies to copyright royalty rates. We declined to do so because the policy concerns and economic considerations involved in setting a fee for ancillary or supplementary services appear to be different from the considerations involved in negotiations over private licensing rights. We have

⁶ NAB/MSTV Petition at 2-3. See Statement of Jerry A. Hausman, MacDonald Professor of Economics, Massachusetts Institute of Technology (submitted as Attachment A to Comments of NAB/MSTV (filed May 4, 1998)) ("Hausman Study").

⁷ *Id.* at 5. See Kent P. Anderson, Ph.D., National Economic Research Associates, "Fee Alternatives for Ancillary or Supplementary Services by Digital Television Broadcasters" (submitted as Attachment B to Comments of NAB/MSTV (filed May 4, 1998)) ("Anderson Study").

⁸ Opposition and Response of the Association of Local Television Stations (filed Feb. 19, 1999) ("ALTV Opposition and Response").

⁹ NCTA Opposition to Petition for Reconsideration (filed Feb. 22, 1999) ("NCTA Opposition").

¹⁰ See *Report and Order* at ¶ 17 ("A fee based upon a percentage of gross revenues received would not involve upfront costs, such as those that would be incurred if we adopted a hybrid fee based on a flat fee coupled with a percentage of gross revenues, that could dissuade broadcasters from initiating new services."); Hausman Study at 14 (stating that "any significant upfront payment as part of a hybrid fee approach is likely to have a potentially large distortion on entry decision, which would significantly decrease consumer welfare").

more closely examined the Anderson Study and are not persuaded that we should alter our decision. Indeed, the Anderson Study itself acknowledges that "[e]ach licensing negotiation has unique characteristics, making it very difficult to demonstrate that the royalty observed for any one licensing agreement reasonably applies to another."¹¹ This statement confirms our reluctance in the *Report and Order* to directly base the fee required under Section 336(e) on analogies to private licensing arrangements.

9. Aside from this concern, the Anderson Study can actually be read to *support* a fee of five percent of gross revenues. The NAB/MSTV Petition, at 5, argues that the Anderson Study "found that licensing rates for unproven technologies without 'highly favorable economics' tended to be very low." But the full sentence in the Anderson Study that is cited to support this statement states: "For 'minor' innovations the range [of running royalty rates] is 1 to 5 percent, and for 'major' innovations it is 3 to 8 percent. Only in the case of innovations characterized as 'revolutionary' (i.e., suggesting highly favorable economics) do the rates rise to the 5 to 10 percent range."¹² The five percent fee we have established thus falls somewhere in the middle of these reported ranges and could even be characterized as falling within the range of royalty rates for "minor innovations." More generally, Anderson summarizes the overall results of his research as "show[ing] that some technologies earn royalties on the order of 2 to 3 percent or less, most earn royalties of 5 percent or less, and only those technologies with unusually favorable economics receive rates of more than 10 percent."¹³ Again, this places a five percent fee squarely in the average range, which we believe is reasonable. This is especially the case since we are not imposing an upfront or hybrid fee on DTV licensees. By comparison, a fair number of the royalty arrangements described in the Anderson Study appear to involve upfront payments in addition to royalty fees.¹⁴ Taking these upfront payments into account suggests that the five percent fee we have established may actually fall toward the low end of the total licensing payments (royalties plus upfront fees) surveyed in the Anderson Study.

10. We now turn to the Hausman Study. Based on an econometric study of the FCC's previous auctions, Hausman reports that prices for spectrum auctioned by the Commission have been decreasing over time on a per megahertz per population basis. He also posits that there will be significant sunk cost investments required to provide DTV ancillary or supplementary services, and also significant business and technological uncertainty facing these services. Hausman concludes that "the combination of overall declining auction results over time and the significant business and technological uncertainty with respect to sunk costs would lead to an expected outcome of relatively low auction results for spectrum used for ancillary services."¹⁵ Noting that the *Notice* had sought comment on setting the fee in the range of one to ten percent,

¹¹ Anderson Study at 2.

¹² *Id.* at 4-5.

¹³ *Id.* at 1.

¹⁴ For example, one of the surveys relied on by the Anderson Study states that "[s]ome 60% of licensees report paying Up Front Fees when licensing-in technology. This is usually done in conjunction with a running royalty. Of the 60% who do pay Up Front Fees, the median was between 3 and 10% of total anticipated royalty payments." Stephen Degnan and Corwin Horton, "A Survey of Licensed Royalties," 27 *Les Nouvelles: Journal of the Licensing Executives Society* 91, 93 (June 1992).

¹⁵ Hausman Statement at 8.

Hausman recommends "that the Commission initially begin with a fee toward the low end of the range."¹⁶

11. As an initial matter, we question a number of the underlying assertions made in the Hausman Study. Even assuming it is true that there is a downward trend in per megahertz, per population prices for the spectrum auctions the Commission has previously held, this does not necessarily mean that an auction of the spectrum used for DTV ancillary or supplementary services would follow this trend. As we stated in the *Report and Order*, at ¶ 28, the auction values realized by the Commission in conducting a particular spectrum auction reflect factors that are specific to the particular spectrum being auctioned. These factors include the anticipated demand for the telecommunications services provided using the particular spectrum and the technological uncertainty associated with the application.¹⁷ The *Report and Order* pointed to evidence that suggests that the broadcast spectrum that will be used to provide DTV ancillary or supplementary services could command higher prices than predicted by the trend described in the Hausman Study. In particular, we noted that the sales values of broadcast properties have increased sharply over the past several years, reflecting the increasing value of their spectrum licenses.¹⁸ The NAB/MSTV Petition faults the *Report and Order* for focusing on this evidence and for not placing greater weight on the value of *non*-broadcast spectrum because most ancillary or supplementary services will be *non*-broadcast in nature.¹⁹ But we think it is reasonable to expect that the prices investors pay for television stations reflect not only the anticipated profits from providing broadcast video programming on the station but also the projected profits from "non-broadcast" ancillary or supplementary services that they can now provide on the station's DTV bitstream. The recent sales prices for television stations thus shed some light on the value of the spectrum used to provide the ancillary or supplementary services. Indeed, Hausman himself has previously testified before Congress that station sale prices provide a reasonable proxy for the value of the spectrum they use.²⁰

12. In addition, we question the Hausman Study's assertions regarding the degree of uncertainty and sunk costs DTV licensees will face in providing ancillary or supplementary services.²¹ Whether or not they

¹⁶ *Id.* at 16.

¹⁷ We recognize, as ALTV points out, that auction bids are also influenced by the amount of the spectrum that is made available. ALTV Opposition and Response at 6. But we do not agree with ALTV that the record shows an "ever increasing" supply of auctionable spectrum. *Id.* The spectrum continues to be a scarce and valuable resource, particularly the broadcast spectrum DTV licensees will be using to provide ancillary or supplementary services.

¹⁸ *Report and Order* at ¶ 28, n. 52 (citing report that television station values increased about 30 percent between 1996 and 1997). See also *Broadcasting & Cable*, Feb. 3, 1998 at 32 (reporting that in 1997 TV stations were selling at an average of 14 times cash flow compared to previous trend of 10 to 11 times cash flow); *Broadcasting & Cable*, Feb. 15, 1999, at 33 (reporting high prices for TV station sales).

¹⁹ NAB/MSTV Petition at 3-4. See also ALTV Opposition and Response at 6.

²⁰ See Statement of Jerry Hausman, MacDonald Professor of Economics, Massachusetts Institute of Technology, in U.S. Senate, *Concurrent Resolution on the Budget for Fiscal Year 1997*, hearings before the Senate Committee on the Budget, Senate Hearing 104-487, March 14, 1996, at 225. See also Congressional Budget Office, *Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management* 63 (April 1997).

²¹ The Anderson Study, at 1, also mentions this argument, stating that the "risk associated with future profits in the provision of ancillary services seems high given the newness of the technology and the total lack of broadcaster experience in the provision of these services" and that the "economics of ancillary services" are not "unusually

choose to provide ancillary or supplementary services, DTV licensees will need to invest in DTV facilities in order to provide a free, over-the-air digital broadcast service. Given this, it would appear that the incremental or marginal cost of providing any feeable ancillary or supplementary services may not be as significant as Hausman and NAB/MSTV suggest. The most substantial costs incurred by broadcasters, such as transmitters and towers, will be sunk or fixed costs that are already incurred in connection with the provision of nonfeeable services, thus minimizing the additional investment required to provide feeable services. We consequently agree with NCTA that the risk associated with offering ancillary or supplementary services will be diminished by the fact that DTV licensees will be providing nonfeeable broadcast services.²²

13. We also think Hausman and NAB/MSTV overstate the level of uncertainty broadcasters face in developing ancillary or supplementary services. We fully recognize developing and implementing these services will entail challenges and risks. But broadcasters are not venturing into completely uncharted territory. They have been authorized to provide ancillary services on parts of their analog signals for years, although these services have been limited due to the lack of capacity on analog channels.²³ Broadcasters have also become increasingly involved over the years in developing and selling programming carried on cable networks, and they can translate this experience into providing subscription programming over their DTV bitstream should that appear profitable to them.²⁴ More recently, a number of broadcasters have invested in internet-related companies, suggesting that the internet's interactive and datacasting applications, which potentially could also be offered over the DTV bitstream, may prove profitable.²⁵ There are risks, to be sure,

favorable."

²² NCTA Opposition at 4; NCTA Comments at 11 (filed May 4, 1998).

²³ See *Report and Order* in MM Docket No. 84-168, 101 FCC 2d 973, ¶ 10 (1985); *Report and Order* in MM Docket No. 95-42, 11 FCC Rcd 7799 (1996); 47 C.F.R. § 73.646. We note that a recent NAB report regarding ancillary services provided on FM station subcarriers states that "FM subcarriers provide an opportunity for growth, and this has never been more true than today, with the explosion of data transmission services and new, innovative subcarrier technologies now becoming available." David Layer and Mark Fratrick, "FM Subcarrier Market Report/Technology Guide" (NAB 1997). Although this statement concerns FM broadcast stations, DTV should provide similar or even greater opportunities, especially given the fact that it offers much greater capacity to provide ancillary or supplementary services than FM subcarriers.

²⁴ For example, the Walt Disney Company, owner of the ABC broadcast network and licensee of a number of broadcast television stations, owns a number of cable network programming services, including ESPN, the Disney Channel, A&E, and Lifetime. A number of non-network television station owners have similarly developed cable channel offerings. For instance, Allbritton Communications Company programs News Channel 8, an all-news channel offered on cable systems in the Washington, DC, market.

²⁵ In 1997, for example, Disney formed the Buena Vista Internet Group to coordinate the company's wide-ranging internet initiatives, which include an investment in Infoseek, a web browser, and the creation of the Go Network, an internet portal. According to Disney's 1998 annual report, the Buena Vista Internet Group's "ambitious goal is to make The Walt Disney Company a prominent force in the new media of the 21st century." See <http://disney.go.com/investors/annual98/new.htm>. NBC recently announced the creation of a new company called NBC Internet (NBCi) that will merge its internet assets with its interests in Xoom.com and Snap.com. *Communications Daily*, May 11, 1999. See also Felicity Barringer, "Market Place," *The New York Times*, May 31, 1999, at C2 (stating that the Tribune Company, owner of 17 television stations and several newspapers, has created Tribune Interactive, a business unit which combines the web sites of all of Tribune's media properties).

but knowledgeable people inside and outside broadcasting confidently anticipate innovative *and* gainful pursuits over the DTV bitstream.²⁶

14. Aside from the questions we have about some of the Hausman Study's underlying assertions, we have a more fundamental objection to the conclusion NAB/MSTV seek to draw from it. In particular, neither NAB/MSTV nor Hausman provides a persuasive basis to conclude that Hausman's assertions, even taken at face value, require us to set the fee at two percent rather than five percent of gross revenues. The Hausman Study seems to acknowledge this in that it has no firm recommendation on the level of the fee, only suggesting that the FCC initially set the fee "toward the low end of the range" and that the Commission "might consider" initially setting the fee at one percent or less.²⁷ For its part, the NAB/MSTV Petition argues that the studies it has submitted "provide[] strong support for the Commission to set a low initial fee" and concludes that the fee should be two percent of gross revenues, yet it provides no rationale why a "low fee" necessarily means a fee of two percent as opposed to five percent.²⁸

15. We continue to think that a fee of five percent of gross revenues is reasonable in light of the criteria set forth in Section 336(e). A central theme underlying NAB/MSTV's arguments and the studies they have submitted is that we should set the fee so as not "to discourage the development of new ancillary and supplementary services" and to "promote[] the efficient use of digital spectrum."²⁹ We agree that this is a worthy goal and, indeed, Section 1 of the Communications Act states that one of the Act's purposes is to promote an "efficient" radio communication service.³⁰ But this general policy cannot trump the specific statutory criteria set forth in Section 336(e)(2) for establishing the fee, none of which require that the fee be designed to maximize efficiency.³¹ Indeed, taken to its logical conclusion, the goal of maximizing efficiency

²⁶ We offer three examples of optimistic projections: (1) In a speech at the recent NAB convention, Larry Ellison, the chairman and CEO of Oracle Corporation, described how interactive TV technology developed by Oracle enables broadcasters and other mass media providers to target their advertising more effectively and to offer video-on-demand, e-commerce, distance learning, Web access, and email. His speech stressed that these services provided broadcasters opportunities for generating additional revenue. See http://www.nab.org/conventions/nab99/daily/tue_bn_ellison.asp. (2) Gary Arlen, the president of Arlen Communications, a research firm specializing in new media applications, has stated that DTV creates an "immense" opportunity for broadcasters and that a "fully implemented DTV initiative could generate 30% to 50% in additional revenue for broadcasters from multicast video and data transmission." Comments of UCC, *et al.*, Attachment at 2 (filed May 4, 1998). (3) In its 1998 annual report, Gannett Co., Inc. states that the "use of DTV technology opens television to the world of the Internet. Digital television can support interactive TV and digital services simultaneously with TV programming. By using the data transmission capability, broadcast stations will be able to send electronic newspapers, program schedules or virtually any other type of information." See <http://www.gannett.com/annual/ar98/broad.htm>.

²⁷ Hausman Study at 16.

²⁸ NAB/MSTV Petition at 5, 7-8.

²⁹ NAB/MSTV Petition at 7. See Hausman Study at 3 ("If a fee based on gross revenues is used, the initial fee percentage should be very low so that entry is not discouraged too much.").

³⁰ 47 U.S.C. § 151.

³¹ NCTA Opposition at 5.

and encouraging ancillary or supplementary services would mean that the fee should be set at zero or some nominal percentage rate as this would eliminate any influence the fee would have on a DTV licensee's decision to provide ancillary or supplementary services as opposed to nonfeeable broadcast video programming. But clearly this is not what Congress intended. A fee system that raised no or only nominal revenue from licensees that provide "feeable" ancillary or supplementary services would (quite literally) make Congress's enactment of Section 336(e) all for naught.

16. In the end, implementing Section 336(e) is not, to paraphrase one of the parties, an exact science.³² NAB/MSTV acknowledge that the Commission has "broad discretion under the Act in setting the fee level."³³ In exercising this discretion, we have sought to promote the efficient use of the spectrum and the development of innovative ancillary or supplementary services by DTV licensees. But this discretion is bounded by Section 336(e), which requires us to design the fee not only to approximate the revenue that would have been received had these services been licensed through an auction, but also to recover a portion of the value of the spectrum used for these services and avoid "unjust enrichment" of DTV licensees who have been given the exclusive right to apply for DTV channels without having to bid for them at an auction. Weighing these factors and the comments submitted in the proceeding -- some of which argued for a fee of less than one percent while others argued for a fee of over ten percent -- we established a fee of five percent of gross revenues generated from feeable ancillary or supplementary services. The amount raised by this fee will vary with the gross revenues from these services, *i.e.*, with the willingness of consumers to pay for such services. As a consequence, if the consumer value for these services is low, the fee payment will be small. Given this, and the record in this proceeding and the criteria set forth in Section 336(e), we continue to believe this is a reasonable fee and consistent with the statute, and therefore deny the NAB/MSTV Petition.

IV. THE UCC, *et al.* PETITION

17. In the *Report and Order*, at ¶ 40, we decided not to impose fees on revenues received from home shopping, infomercial or direct marketing services. We reasoned that

[t]he purpose of this proceeding is not to exact fees from existing broadcasters for existing services but, rather, to design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream. We agree with the commenters who argued that home shopping and infomercials are commercial advertisements, excluded by statute from the scope of ancillary and supplementary services as they are video services received by viewers without a fee. [Footnote omitted.] We therefore find that home shopping channels and infomercials are free, over-the-air television services, supported by commercial advertisements, and not subject to a fee.

18. UCC, *et al.* ask the Commission to reconsider this decision. They interpret the 1996 Act as requiring us to impose fees on home shopping, infomercial, and direct marketing services. NAB, MSTV, ALTV, and Home Shopping Network ("HSN") and ValueVision International ("ValueVision") have opposed

³² NCTA Opposition at 3.

³³ NAB/MSTV Petition at 1.

UCC, *et al.*'s petition for reconsideration and argue that the Commission was correct in concluding that these services are not subject to fees.³⁴

19. UCC, *et al.* interpret the *Report and Order* as basing this conclusion on two rationales: (1) that home shopping, infomercials, and direct marketing services are "existing" services, and therefore grandfathered from the fee requirements in the Act; and (2) that these services are "commercial advertisements" rather than programming services, and consequently fall within Section 336(e)(1)(B), which exempts from fees "commercial advertisements used to support broadcasting for which a subscription fee is not required." As to the first rationale, UCC, *et al.* argue that the 1996 Act does not give the Commission authority to grandfather existing services from the new statutory fee requirements. As to the second rationale, UCC, *et al.* maintain that it is arbitrary and capricious to categorize home shopping and similar services as "commercial advertisements" exempt under Section 336(e)(1)(B) because Congress, the Commission, and the broadcast industry have consistently characterized these services as *programming* not as commercial advertisements.

20. We think UCC, *et al.* have misconstrued the *Report and Order* on these points. Our decision was not intended to grandfather existing services. Nor was it based on whether home shopping and similar services should be categorized as "commercial advertisements" or "programming." We recognize that the *Report and Order*, at ¶ 40, may have been unclear on this point in that it referred to these services as "commercial advertisements." But we did not intend this characterization to be the basis for our decision not to impose fees on these services. Rather, we based this decision on what we see as a threshold criterion in the statute: only *ancillary or supplementary* services are subject to fees under the Act. Because traditional home shopping, infomercial and direct marketing services are free, over-the-air, video services and therefore do not qualify as ancillary or supplementary services as we have defined that term in our rules,³⁵ they are not subject to fees.³⁶ Or, as we put it in the *Report and Order*, at ¶ 40, these services are "excluded by statute from the scope of ancillary and supplementary services as they are video services received by viewers without a fee." We take this opportunity to elaborate on this reasoning.

21. Section 336(e)(1), which defines the "services to which fees apply," speaks only in terms of "ancillary or supplementary services" in delineating in subsections (A) and (B) the two types of such services that are subject to fees.³⁷ In doing so, it necessarily excludes from the fees requirement services that are not

³⁴ Opposition to Petition for Reconsideration of NAB and MSTV (filed Feb. 22, 1999); Opposition and Response of ALTV (filed Feb. 19, 1999); Opposition of Home Shopping Network and ValueVision International (filed Feb. 22, 1999). UCC, *et al.* filed a reply to these oppositions.

³⁵ 47 C.F.R. § 73.624(c).

³⁶ See Opposition and Response of ALTV at 5; Opposition of HSN and Valuevision at 2-5.

³⁷ Section 336(e)(1) states:

SERVICES TO WHICH FEES APPLY.--If the regulations prescribed pursuant to subsection (1) permit a licensee to offer ancillary or supplementary services on a designated frequency--
(A) for which the payment of a subscription fee is required in order to receive such services, or (B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to

"ancillary or supplementary" to begin with. Although the Act does not define the phrase "ancillary or supplementary services," the Commission did so in implementing Section 336 in its DTV rulemaking proceeding.³⁸ In that proceeding, we adopted Section 73.624(c) of our rules, which provides an illustrative list of ancillary or supplementary services: Brad BB they include, but are 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" to "transmit at least one over-the-air video program signal at no direct charge to viewers."³⁹ Section 73.624(c) goes on to state "that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary."⁴⁰

22. Traditional home shopping, infomercial, or direct marketing services are video broadcast signals and are offered at no direct charge to viewers. As such, they fall outside the scope of our definition of "ancillary or supplementary services," and therefore are not subject to fees under Section 336(e)(1) of the Act. We think this is consistent with Congress's intent in enacting Section 336(e)(1). To be sure, we adopted our definition of "ancillary or supplementary services" after enactment of the 1996 Act. But as HSN and ValueVision state, "the Act's specific instruction that fees were to be assessed only on 'ancillary and supplementary' digital services was arrived at in the context of the Commission's contemporaneous consideration of [its then pending DTV rulemaking proceeding], in which the Commission repeatedly and consistently made clear that 'ancillary and supplementary' services are separate and distinct from existing, traditional over-the-air broadcast services."⁴¹ We believe Congress drew the same distinction in enacting Section 336, excluding free, over-the-air broadcast video programming service from fees. Traditional home shopping, infomercials, and direct marketing services have long been a free, over-the-air broadcast service, or, in Section 73.624(c)'s rubric, a "video broadcast signal provided at no direct charge to viewers." It follows that in enacting Section 336 Congress did not intend to include these existing services within the phrase "ancillary or supplementary services" and subject them to fees.⁴²

support broadcasting for which a subscription fee is not required),
the Commission shall establish a program to assess and collect from the licensee for such designated
frequency an annual fee or other schedule or method of payment

47 U.S.C. § 336(e)(1).

³⁸ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809 (1997) ("*DTV Fifth Report and Order*").

³⁹ 47 C.F.R. § 73.624(b) & (c). *See DTV Fifth Report and Order*, 12 FCC Rcd at 12820-23.

⁴⁰ *Id.* at § 73.624(c). *See DTV Fifth Report and Order*, 12 FCC Rcd at 12821.

⁴¹ Opposition of HSN and ValueVision at 2-3, *citing Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry* in MM Docket No. 87-268, 10 FCC Rcd 10540, 10544 (1995) (seeking comment on extent to which FCC should permit DTV licensees to provide "ancillary and supplementary uses" and drawing a distinction between such services and "free, over-the-air broadcasting").

⁴² We take this opportunity to clarify the statement in the *Report and Order*, at ¶ 40, that the "purpose of this proceeding is not to exact fees from existing broadcasters for existing services but, rather, to design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream." UCC, *et al.* interpret this statement to mean that we are grandfathering "existing" services. That was not our intent. Rather, we used the term "existing services" to mean traditional, free, over-the-air, broadcast video programming. It is this service,

23. Further evidence of this can be found in Section 336(b)(3), which states, among other things, that "no ancillary or supplementary service shall have any rights to carriage under section 614 or 615," *i.e.*, the statutory "must carry" rights broadcast television stations have to be carried on cable systems in their local area.⁴³ If a free, over-the-air home shopping broadcast service is considered an "ancillary or supplementary service," stations carrying such programming would be rendered ineligible for must carry rights under Section 336(b)(3). We do not think Congress could have intended such a result given that, in Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), it directed the FCC to determine whether home shopping stations served the public interest and were entitled to must carry rights.⁴⁴ It would make little sense for Congress to charge us with this duty, and then four years later preclude home shopping stations from must carry rights under Section 336(b)(3) without a mention, either in the 1996 Act or its legislative history, of Section 4(g) of the 1992 Cable Act. A basic principal of statutory construction is to seek to construe statutory provisions so that they are consistent with each other.⁴⁵ We think the most reasonable way to square Section 336 and Section 4(g) of the 1992 Cable Act is not to treat traditional home shopping, infomercials, and direct marketing services as ancillary or supplementary services.

24. We do not agree with UCC, *et al.*'s suggestion that our decision not to apply fees to home shopping, infomercials and direct marketing services means any service provided without charge to the viewer is exempt from fees regardless of whether a third party compensates a broadcaster for carriage. Nor do we agree with UCC, *et al.*'s argument that our decision effectively nullifies Section 336(e)(1)(B), which requires us to impose fees on ancillary or supplementary services "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required)." Our decision today does not exempt, for example, payments made to a DTV licensee by a stock broker to transmit stock quote data to the broker's clients even though the clients pay no direct fee for this service. This clearly would be an "ancillary or supplementary service" that is feeable under Section 336(e)(1)(B).

25. But where, as here, the service is a video broadcast signal provided at no direct charge to viewers, it is not feeable, even though the broadcaster may be receiving compensation from a third party to carry the service. As HSN and ValueVision point out, to hold otherwise would mean that "all the affiliates of the ABC,

not ancillary or supplementary services, that broadcasters have predominantly provided over their existing analog channels given the technical constraints of analog technology. The advent of DTV, however, gives broadcasters much greater technical capability to provide ancillary or supplementary services. It was in this sense that we used the term "existing" services to distinguish between traditional, free, broadcast video programming, which is not feeable, and ancillary or supplementary services that may be subject to fees.

⁴³ 47 U.S.C. § 336(b)(3).

⁴⁴ Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified at* 47 U.S.C. § 614(g). In 1993, the Commission issued a *Report and Order* in MM Docket No. 93-8, 8 FCC Rcd 5321, finding that home shopping stations served the public interest and were entitled to must carry status. There is a pending petition for reconsideration of this decision filed by the Center for the Study of Commercialism.

⁴⁵ *See United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39, 43 (3rd Cir. 1993); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979).

CBS and NBC broadcast television networks arguably would be subject to fees for their free, over-the-air broadcast services because they receive compensation from their networks for airing network programming."⁴⁶ These are video broadcast signals provided to viewers at no direct charge, and therefore are not ancillary or supplementary services and are not subject to fees. We consequently deny UCC, *et al.*'s Petition.

26. We make one final note. Our decision in the *Report and Order*, like our decision today, applies only to traditional home shopping, infomercials, direct marketing and similar services with no interactive or "clickable" elements and which can entail viewers purchasing products by calling a telephone number identified during the broadcast. We recognize that it may be possible in the future for these purchases to be made via an interactive system provided by the licensee on its DTV bitstream. For example, a DTV viewer may be able to purchase a product shown on a home shopping program by clicking a special icon displayed on the screen and transmitting a purchase order via the licensee's DTV bitstream.⁴⁷ In reply comments submitted in the initial round of comments of this proceeding, ValueVision and HSN stated that such an interactive purchase order system was being explored and argued that revenues generated from this sort of system should be exempt from fees.⁴⁸ Because such services are only at a nascent stage and the particular circumstances are unclear at this point, we decline to decide whether they would constitute an ancillary or supplementary service subject to a fee under Section 336(e)(1)(B).

V. ADMINISTRATIVE MATTERS

27. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose no new or modified reporting and record-keeping requirements or burdens on the public. In addition, the Final Regulatory Flexibility Act Analysis set forth in the *Report and Order* in this proceeding remains unchanged.

28. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority granted by 47 U.S.C. §§ 4(i), 303, 336(e), and 47 C.F.R. § 1.429, the Petition for Reconsideration filed jointly by the National Association of Broadcasters and the Association for Maximum Service Television, and the Petition for Reconsideration

⁴⁶ Opposition of HSN and ValueVision at 5.

⁴⁷ See Comments of UCC, *et al.* at 13-14 (filed May 4, 1998).

⁴⁸ Reply Comments of ValueVision and HSN at 2, 8-9 (filed Aug. 3, 1998).

filed jointly by the Office of Communication Inc. of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and Media Access Project, are both hereby DENIED.

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary