

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

In the Matter of)
)
Ancillary or Supplementary Use of) MM Docket No. 98-203
Digital Television Capacity by Noncommercial)
Licensees)
)

REPORT AND ORDER

Adopted: October 11, 2001

Released: October 17, 2001

By the Commission: Chairman Powell issuing a statement; Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. With this *Report and Order*, we clarify the manner in which noncommercial educational ("NCE") television licensees may use their excess digital television ("DTV") capacity for remunerative purposes. Among other things, we amend Section 73.621 of our rules to apply to the entire digital bitstream, including ancillary or supplementary services, thereby requiring NCE licensees to use their digital capacity primarily for a noncommercial, nonprofit, educational broadcast service. We also amend Sections 73.642 and 73.644 of our rules to clarify that NCE licenses may offer subscription services on their excess digital capacity. We determine that Section 399B of the Communications Act of 1934, as amended, the provision restricting

advertising by NCE licensees, continues to apply to all broadcasting by NCE licensees, but does not apply to nonbroadcast services, such as subscription services provided on their DTV channels. Finally, we amend Section 73.624(g) of our rules to apply to NCE licensees the program for assessing and collecting fees upon feeable ancillary or supplementary services provided on their DTV capacity that we have established for commercial licensees, as required by the Telecommunications Act of 1996 ("1996 Act").¹

II. BACKGROUND

2. The 1996 Act provided that initial eligibility for any advanced television licenses that we issue should be limited to existing broadcasters, conditioned upon the requirement that "either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation."² In our *Fifth Report and Order* in the DTV proceeding, we adopted rules to implement the statute, providing a specific transition process to digital technology for all existing television broadcasters.³ Among other things, we established standards for license eligibility, a transition and construction schedule, and a requirement that broadcasters continue to provide one free over-the-air video programming service.⁴ We also adopted rules permitting DTV licensees, without distinguishing between commercial and noncommercial licensees, to use their DTV capacity to provide ancillary or supplementary services, provided that these services do not derogate the free digital television service.

3. In their Petition for Reconsideration of the *Fifth Report and Order*, the Association of America's Public Television Stations and the Public Broadcasting Service (AAPTS/PBS) requested clarification of public television stations' authority to use excess capacity on DTV channels for commercial purposes. As neither Section 336 nor our DTV rules distinguishes between commercial and noncommercial stations, AAPTS/PBS argued that both are intended to allow public stations to offer ancillary or supplementary

¹ *Report and Order* in MM Docket No. 97-247, 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, 14 FCC Rcd 3259, 3272-73 (1998) ("*DTV Fees Report and Order*"), *Memorandum Opinion and Order on Reconsideration*, FCC 99-362 (released November 24, 1999) (*see n. 11, infra*). Pub.L. No. 104-104, 110 Stat. 56 § 201 (1996), *codified* at 47 U.S.C. § 336.

² 47 U.S.C. 336(c).

³ *Fifth Report and Order* in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 12 FCC Rcd 12809 (1997) ("*Fifth Report and Order*"). We subsequently adopted a Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order in the DTV proceeding, *Reconsideration of Fifth Report and Order* in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 13 FCC Rcd. 6860 (1998) ("*Reconsideration of Fifth Report and Order*"), and a Second Memorandum Opinion and Order of the Fifth and Sixth Report and Orders in the DTV proceeding, *Second Reconsideration of the Fifth and Sixth Report and Orders* in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 14 FCC Rcd. 1348 (1998) ("*Second Reconsideration of the Fifth and Sixth Report and Orders*"). We address the ancillary and supplementary use of DTV by noncommercial licensees in this proceeding.

⁴ The digital spectrum provides capacity for a number of standard definition channels on the spectrum allotted to each DTV broadcaster. *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd at 12820-23.

services for revenue-generating purposes.⁵ In opposing this request in part, Media Access Project and other public interest parties ("MAP")⁶ jointly argued that, while public television stations should be able to provide some revenue-generating ancillary or supplementary services, these services must be consistent with the noncommercial nature of public television as set forth in Section 399B of the Communications Act, the provision restricting advertising by these stations.

4. This request for clarification made by AAPTS/PBS raised significant issues regarding the service and funding opportunities made available to NCE stations as a result of the transition to digital transmission. In recognition of the importance of this issue to the future of public television as it enters the digital age, in the Notice of Proposed Rulemaking in MM Docket No. 98-203 ("*NPRM*") in this proceeding,⁷ we sought further comment on the AAPTS/PBS petition in order to establish a more complete record on the issues it raised.

5. In their Petition AAPTS/PBS also requested that we exempt public television licensees from any fee assessed in connection with use of digital spectrum for ancillary or supplementary services to the extent revenues from those service are used to support the licensee's mission-related activities.⁸ Section 336(e) of the 1996 Act, which requires DTV licensees receiving fees or certain other compensation for ancillary or supplementary services provided on the DTV spectrum to return a portion of that revenue to the public, charged us with establishing a means of assessing and collecting fees for those ancillary or supplementary services.⁹

6. In a Notice of Proposed Rule Making in MM Docket No. 97-247 ("*DTV Fees Proceeding*"),¹⁰ we sought comment on AAPTS/PBS's request for such an exemption and subsequently determined that AAPTS/PBS's request should be considered in this proceeding.¹¹ In the *DTV Fees Report and Order* we established a program for assessing and collecting fees for certain ancillary or supplementary services

⁵ Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service in MM Docket No. 87-268, 26-27, filed June 13, 1997 ("*AAPTS/PBS Petition for Reconsideration*").

⁶ Media Access Project filed jointly with the Center for Media Education, the Consumer Federation of America, the Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters.

⁷ *Notice of Proposed Rulemaking* in MM Docket No. 98-203, In the Matter of Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees, 14 FCC Rcd 537 (rel. Nov. 23, 1998) ("*NPRM*").

⁸ AAPTS/PBS Petition for Reconsideration at p. 28, n. 29.

⁹ 47 U.S.C. at § 336(e)(1)(A)-(B). *See also* H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996).

¹⁰ *Notice of Proposed Rule Making* in MM Docket No. 97-247, 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, 12 FCC Rcd 22821 (1997) ("*DTV Fees Proceeding*").

¹¹ *Report and Order* in MM Docket No. 97-247, 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, 14 FCC Rcd 3259, 3272-73 (1998) ("*DTV Fees Report and Order*"). We subsequently adopted a *Memorandum Opinion and Order on Reconsideration* in MM Docket No. 97-247, 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, FCC 99-362 (released November 24, 1999) ("*Reconsideration of DTV Fees Report and Order*").

provided by commercial licensees on their DTV capacity. In the *NPRM* in this proceeding, MM Docket No. 98-203, we sought additional comment regarding an exemption for noncommercial licensees in light of the comments received on this issue in the *DTV Fees Proceeding*. We also sought comment on tentative proposals set forth in the *NPRM*.

III. ISSUE ANALYSIS

A. Application of Section 73.621 of the Commission's Rules to Entire Digital Bitstream of NCE Licensees

7. *Background.* The Communications Act defines a "noncommercial educational broadcast station" and "public broadcast station" as a television or radio broadcast station that is eligible under the FCC's rules to be licensed as "a noncommercial educational radio or television broadcast station which is owned and operated by a public agency or nonprofit private foundation, cooperation, or association" or "is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes."¹² In 1981, Congress amended the Communications Act to give public broadcasters more flexibility to generate funds for their operations.¹³ As amended, Section 399B of the Act permits public stations to provide facilities and services in exchange for remuneration as long as those uses do not interfere with the stations' provision of public telecommunications services.¹⁴ Section 399B, however, does not permit public broadcast stations to make their facilities "available to any person for the broadcasting of any advertisement."¹⁵ In addition, under Section 73.621 of the Commission's rules, public television stations are required to furnish primarily an educational as well as a nonprofit and noncommercial broadcast service.¹⁶

8. In the *Fifth Report and Order*, we implemented Section 336 of the 1996 Act, which sets forth the DTV licensing provisions of the 1996 Act, by adopting Section 73.624 of our rules. Section 73.624(g) allows broadcasters the flexibility to respond to the demands of their audience by providing ancillary or supplementary services, including subscription television, provided that these services do not derogate the

¹² 47 U.S.C. § 397(6).

¹³ Omnibus Budget Reconciliation Act of 1981, Pub. Law No. 97-35, § 1231, 95 Stat. 357, 731 (codified at 47 U.S.C. §399B). *See also* H.R. Rep. No. 97-82, at 13-14.

¹⁴ Section 399B also requires that public stations engaged in revenue generating activities comply with accounting procedures designed to separately identify these commercial revenues and costs, and it prohibits Corporation for Public Broadcasting funds from being used to defray any costs associated with these activities. 47 U.S.C. § 399B.

¹⁵ 47 U.S.C. § 399B(a)(2).

¹⁶ Section 73.621 of the Commission's Rules, 47 C.F.R. § 73.621, provides in pertinent part:
(a) . . . noncommercial educational broadcast stations will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.

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

mandated free, over-the-air program service.¹⁷ In the *NPRM* in this proceeding, we invited comment on AAPTS/PBS's request that we clarify that Section 73.621 of our rules, which requires public stations to provide a primarily nonprofit, noncommercial, educational broadcast service, is not applicable to ancillary or supplementary services provided on DTV capacity, and on whether such a clarification is consistent with the nonderogation of services provisions of Section 399B.

9. In particular, we sought comment on a number of options with respect to whether and how we should amend Section 73.621 of our Rules. For example, we sought comment on whether we should extend the requirement to provide an educational nonprofit service to ancillary or supplementary services provided by noncommercial licensees on their DTV capacity, or whether we should clarify that the requirement applies only to the single, free-over-the-air broadcast service it is required to provide.

10. We also sought comment on whether and how we can permit NCE stations to provide remunerative ancillary or supplementary services in a manner that does "not interfere with the provision of public telecommunications services" by such stations as required by Section 399B of the Act.¹⁸ In particular we asked whether NCE DTV stations will have the capacity to provide ancillary or supplementary services without interfering with their ability to provide a primarily educational NCE broadcast service, and whether such ancillary or supplementary services can provide an important funding source that could facilitate the transition to DTV for NCE stations, and, more generally, enhance their primary mission of providing a robust noncommercial, educational broadcasting service.

11. *Comments.* In its comments, AAPTS modifies its original request, presented in its Petition for Reconsideration of the *Fifth Report and Order*, which would have exempted remunerative ancillary or supplementary services from Section 73.621 of our rules. AAPTS now agrees that, with respect to provision of remunerative ancillary or supplementary service, a public television station must be used primarily to provide a noncommercial educational broadcast service, and the offering of such service must not interfere with the provision of public telecommunications services. AAPTS also contends that its proposed standards are consistent with those we have applied in the analog environment in approving the offer by public television stations of a variety of ancillary services.¹⁹ AAPTS suggests that we only need clarify that Section 73.621 of our rules applies, without change, to the digital channel. It states that the requirement that the primary use of public television stations is to provide an educational and nonprofit, noncommercial broadcast service would still allow ancillary or supplementary service to be provided on NCE's excess digital capacity. AAPTS also requests that, since we concluded in the *Fifth Report and Order* that DTV broadcasters may offer subscription television as an ancillary or supplementary service, that we amend Sections 73.642 and 73.644 of our rules to clarify that public television stations may provide subscription television services.²⁰

¹⁷ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd at 12820-21, 12859, Appendix A, Part 73, Section 73.624 (c), amending Part 73 of the U.S. Code of Federal Regulations.

¹⁸ 47 U.S.C. § 399B(c). See ¶ 7, *supra*, for definition of a "noncommercial educational broadcast station" and "public broadcast station" under Section 397(6) of the Communications Act of 1934, 47 U.S.C. § 397(6). Section 73.621(a) of our rules, 47 C.F.R. § 73.621(a), reiterates the purpose of public television stations, stating that such licenses will be granted only upon a showing that the stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service.

¹⁹ Comments of AAPTS at 20-22 citing 47 C.F.R. § 73.621(a); 47 U.S.C. § 399B(c).

²⁰ Comments of AAPTS at 26-27.

12. APTS denies that provision of remunerative ancillary or supplementary services would change the essential nature of public television. It contends that digital technology will provide sufficient capacity for public television stations to offer a range of services while preserving their primary use for a noncommercial educational broadcast service. In addition, it argues that Section 336 provides, via its prohibition against derogation of services, separate assurance that any ancillary or supplementary service will not interfere with a public television station's basic broadcast service.²¹ APTS submits that other limitations on the extent to which public television stations can engage in commercial ventures include their nonprofit educational mission upon which their tax exempt status is based, the need to preserve viewer and government support, the requirement to pay taxes on income unrelated to the exempt purpose of the organization, and the oversight of stations by responsible bodies.²² APTS also notes that although Section 336 itself does not impose special restrictions on public television stations, two limitations must be applied to the provision of ancillary or supplementary service by these stations: first, a public television station must be used primarily to provide a noncommercial educational broadcast service under the Commission's rules; second, the offering of these services must not interfere with the provision of public telecommunications services under Section 399B of the Communications Act.²³

13. APTS states that, at this point, public television stations do not have firm plans for the use of their digital spectrum, and it is impossible to predict what opportunities may be available to them or to what extent individual stations will take advantage of such opportunities.²⁴ It urges us not to impose restrictions now on the activities of public television stations, but to wait until the scheduled biennial examination of digital regulations, set forth in the *Fifth Report and Order*, to determine whether changes are needed.²⁵ The Office of the United Church of Christ and other public interest parties ("UCC *et al.*")²⁶, however, contend that APTS is unclear about its members' plans to engage in advertiser supported ancillary or supplementary services and how much of their digital capacity they plan to commit to subscription and other remunerative services. UCC *et al.* urges us to draw a bright line and find that an NCE broadcaster "primarily" serves the educational needs of a community when it provides free, not-for-profit over-the-air services over 50 percent

²¹ Comments of APTS at 23-24.

²² Comments of APTS at 27-29.

²³ See 47 C.F.R. § 73.621(a); 47 U.S.C. 399B(c). See also 47 U.S.C. 336(b) (non-derogation requirements). *Ex parte* letter of APTS, October 20, 1988 (Voluntary Guidelines assuring that ancillary or supplementary services will not interfere with a station's primary noncommercial educational broadcast service in terms of either quantity or quality.)

²⁴ APTS notes that its recent survey of public television licensees indicates that nearly 30 percent of licensees do not intend to use any of their digital capacity for non-mission-related services. In any case, APTS contends that there is no question that any remunerative ancillary or supplementary services offered by public television stations will be subsidiary to their noncommercial mission-related activities. Comments of APTS at 9.

²⁵ Examination of our digital television regulations are scheduled every two years until the transition to the digital spectrum is completed. Comments of APTS at 30. *Fifth Report and Order*, 12 FCC Rcd at 12856-57.

²⁶ The Office of Communication of the United Church of Christ, Inc., filed jointly with the Alliance for Community Media, the Benton Foundation, the Center for Media Education, Independent Television Service, Libraries for the Future, Media Access Project, Native American Public Telecommunications, Inc, and the Screen Actors Guild.

or more of its digital capacity at any one time.²⁷

14. National Datacast, Inc. ("National Datacast") is a for-profit subsidiary of the Public Broadcasting Service that provides data services using the vertical blanking interval (VBI) on the analog signal of public television stations. It argues that the Commission imposed no restrictions on the commercial operation of data services using the VBI, including advertiser-supported services, by public television stations or entities affiliated with public television; that the force of this ruling remains unaltered by Section 336; and that no restrictions should be applied to National Datacast's data transmission in the digital spectrum of public television stations.²⁸ The analog spectrum requires the use of most of an NCE licensee's channel to carry their video broadcast signal, leaving only a very small portion, the VBI and the Visual Signal, available to be used for ancillary or supplementary services. The digital spectrum, however, allows NCE licensees to offer a number of ancillary or supplementary services on their excess digital capacity in addition to mandated free, over-the-air program service. National Datacast points to its service as a "precursor to the successful use of digital spectrum" for generating revenues to help support public television.²⁹

15. *Decision.* We will amend Section 73.621 of our rules to clarify that the Section's requirements apply to the entire digital bitstream of NCE licensees, including the provision of ancillary or supplementary services. We will require that NCE licensees use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service. This amendment will adapt Section 73.621 of our rules to the digital environment. Although we decline to quantify the term "primarily," we will consider it to mean a "substantial majority" of their entire digital capacity.

16. We decline to adopt the suggestion of UCC *et al.* that we draw a bright line to require that NCE broadcasters provide free, not-for-profit over-the-air services over 50 percent or more of their digital capacity at any one time. Such a decision would provide substantially less flexibility to NCE licensees in developing their digital services. For example, an NCE licensee might want to use most of its digital capacity for High Definition Television ("HDTV") programming during certain times of the day and, at other times, various amounts of capacity for Standard Definition Television ("SDTV") programming and remunerative ancillary or supplementary services. UCC *et al.*'s suggestion, by specifying 50 percent or more at all times, would seem to restrict their flexibility in this regard. We see no persuasive reason to impose such a limitation. While we believe that a "minute by minute" approach, such as that suggested by UCC *et al.*, above, would restrict the flexibility of NCE licensees to too great an extent, we believe that some time

²⁷ Reply comments of UCC *et al.* at 7-8.

²⁸ Comments of National Datacast at 3-4 citing *Teletext Transmission*, 53 R.R. 2d 1309, 1322 (1983).

²⁹ Reply comments of National Datacast, Inc. at 2. National Datacast also contends that its commercial data transmissions, which help support public television, should not be classified as ancillary or supplementary services, reasoning that its data services advance the statutory mission of public television no less than do NCE stations' programs and other services. Comments of National Datacast, Inc. at 5. It is clear from the *Fifth Report and Order*, however, that such services are ancillary or supplementary services. *Fifth Report and Order*, 12 FCC Rcd at 12859, Appendix A, Part 73, Section 73.624(c), amending Part 73 of Title 47 of the U.S. Code of Federal Regulations. To the extent National Datacast is seeking reconsideration of the *Fifth Report and Order*, its pleading is untimely. Moreover, it is not clear how a determination whether National Datacast's services are or are not ancillary or supplementary relates to the issues in this proceeding. If its arguments relate to future must carry status of its services, they should be directed to the must carry proceeding, *In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120 ("Must Carry Proceeding").

period limitation is appropriate. Because stations typically schedule their programming on a weekly basis, we believe that requiring them to use their entire bitstream primarily for nonprofit, noncommercial, educational broadcast services on a weekly basis will provide them with sufficient flexibility. We will require NCE licensees to maintain documentation sufficient to show compliance with this requirement at renewal time and in response to any complaints.³⁰

17. Our decision to apply Section 73.621 of our rules to the entire digital bitstream also is consistent with the 1996 Act,³¹ as well as our *Fifth Report and Order*, in which we stated that our overarching goal is to promote the success of a free, local television service using digital technology.³² We believe that this action will help to preserve the noncommercial educational nature of public broadcasting, while allowing NCE licensees some flexibility in remunerative use of their spectrum and indicating the boundaries that we will apply to such use. We agree with AAPTS that digital technology will allow sufficient capacity for public television stations to offer a range of services while preserving their primary use for a nonprofit, noncommercial, educational broadcast service. We also note that Section 336 provides, via its prohibition against derogation of services, separate assurance that any ancillary or supplementary service will not interfere with a public television station's basic broadcast service.³³ Moreover, NCE licensees are, of course, subject to the general requirement to provide one free over-the-air video programming service.³⁴ In light of the other limitations on the extent to which public television stations can engage in commercial ventures,³⁵ we will not, at this time, impose additional restrictions on an NCE licensee's ability to provide ancillary or supplementary services on its excess digital capacity. We will address any problems that might arise in the periodic reviews of our digital regulations set forth in the *Fifth Report and Order*,³⁶ or on a case-by-case basis.

18. We will amend Sections 73.642 and 73.644 of our rules to clarify that NCE licenses may offer subscription services on their excess digital capacity. We included such services in our definition of ancillary or supplementary services in the *Fifth Report and Order*.³⁷ Given our goal of providing NCE licensees with flexibility in the use of their digital spectrum, within certain boundaries, we see no reason to prohibit them

³⁰ See, e.g., In the Matter of Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations in MM Docket No. 93-48, 11 FCC Rcd 10660, 10711 (1996).

³¹ 47 U.S.C. 336(b).

³² *Fifth Report and Order*, 12 FCC Rcd at 12820.

³³ 47 U.S.C. 336(b).

³⁴ *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd at 12820-23.

³⁵ Examples of such limitations include NCE licensees' nonprofit educational mission upon which their tax exempt status is based, the need to preserve viewer and government support, the requirement to pay taxes on income unrelated to the exempt purpose of the organization, and the oversight of stations by responsible bodies. See ¶ 12, *supra*.

³⁶ *Fifth Report and Order* at 12852.

³⁷ *Fifth Report and Order*, 12 FCC Rcd at 12859, Appendix A, Part 73, Section 73.624(c), amending Part 73 of Title 47 of the U.S. Code of Federal Regulations.

from providing subscription services.

B. Advertising

19. *Background.* In its Petition for Reconsideration of the *Fifth Report and Order*, AAPTS/PBS requested that we clarify that public television stations may use their excess capacity on DTV channels for commercial purposes.³⁸ In opposing this request in part, MAP argued that, while public television stations should be able to provide some revenue-generating ancillary or supplementary services, these services must be consistent with the noncommercial nature of public television as set forth in Section 399B, which restricts advertising by these stations.³⁹ In reply, AAPTS/PBS argued for an interpretation in which the advertising ban of Section 399B would continue to apply to the primary noncommercial broadcast service, while any ancillary or supplementary use of DTV channels would be free from the restrictions of this section. It also argued that even if the Section 399B advertising restrictions are found to apply to these services, we have discretion under Section 336(a)(2) to allow public TV licensees to offer advertiser-supported services if we find these services to be in the public interest.⁴⁰

20. In the *NPRM* we sought comment on how the advertising ban set forth in Section 399B of the Communications Act implicates the provision of remunerative services by public DTV stations.⁴¹ Section 399B prohibits a public station from "making its facilities available to any person for the broadcasting of any advertisement."⁴² By its plain language, we noted that this section would appear to prohibit advertisements on any service that would constitute broadcasting, while permitting a public DTV station to air advertisements on any nonbroadcast service.

21. We sought comment on our tentative conclusion that while Section 399B continues to apply to all video broadcast programming streams provided by public DTV stations, it does not apply to any subscription services they provide on their DTV channels since such services do not constitute "broadcasting." We also sought comment on the extent to which Section 399B applies to advertising carried on any other non-subscription ancillary or supplementary services carried by a public TV station. In addition, we asked parties to address AAPTS/PBS's argument that even if Section 399B's advertising restrictions apply to some ancillary or supplementary services, we have discretion under Section 336(a)(2) of the Act to allow public TV licensees to include advertiser-supported services if we find these services to be in the public interest.⁴³

³⁸ AAPTS/PBS Petition on Reconsideration of the *Fifth Report and Order* at 26-28.

³⁹ MAP Opposition to AAPTS/PBS Petition for Reconsideration of the *Fifth Report and Order* at 8-9.

⁴⁰ AAPTS/PBS Reply at 6-7 (*citing* 47 U.S.C. § 336 (a)(2)).

⁴¹ 14 FCC Rcd at 549-50.

⁴² 47 U.S.C. § 399B. An advertisement is defined as a "message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office." Under Section 399A, public stations may acknowledge underwriting contributions with brief messages that identify but do not promote underwriters and their products (e.g., do not provide information on sales or discounts, call upon the viewer to take action, provide qualitative claims such as "the best.") 47 U.S.C. § 399A.

⁴³ AAPTS/PBS Reply at 6-7. Section 336(a)(2) requires us to "adopt regulations that allow [DTV licensees] to

22. *Comments.* UCC *et al.* contends that the plain language of 399B, its legislative history, and subsequent actions by Congress demonstrate that Congress as recently as the 1996 Act did not intend that NCE licensees carry commercial advertisements, including on any ancillary or supplementary services provided on their DTV capacity. An advertisement is defined in Section 399B(b) as "any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration." UCC *et al.* contends that this definition is incorporated by reference in Section 399B(b)(2), so that when the statute prohibits broadcasting of "advertisements," it prohibits any message that is either broadcast or otherwise transmitted. Moreover, although Section 399B expressly prohibits only the "broadcasting" of advertisements, UCC *et al.* notes that in 1981 that was the only way NCE stations could carry advertising.⁴⁴ UCC *et al.* urges us to not extend the *Subscription Video* decision to allow NCEs to provide advertiser-supported subscription services over public broadcast stations. It particularly would object to advertisements on NCE licensees' free over-the-air services. UCC *et al.* contends that NCE licensees did not, and still do not, have the authority to provide advertiser-supported subscription services.⁴⁵

23. UCC *et al.* also contends that Section 336(a)(2) does not explicitly permit NCE licensees to carry commercial advertising based on the Commission's finding that it is in the public interest, nor does Section 336(a)(2) explicitly repeal the ban on advertising in Section 399B(b)(2). It argues that to interpret Section 336 in that manner would directly conflict with Section 399B. UCC *et al.* submits that these sections can be harmonized by permitting NCE licensees only to provide non-advertiser-supported ancillary or supplementary services.⁴⁶

24. AAPTS and Family Stations of New Jersey, Inc. ("Family NJ") contend that the Section 399B ban on advertising by NCE stations applies only to the basic broadcast service, not to any ancillary or supplementary services.⁴⁷ AAPTS acknowledges that the 399B definition of advertisement is broader, referring to material that is "broadcast or otherwise transmitted," than the language of the prohibition. But AAPTS contends that it is the language of the prohibition, which only forbids "broadcasting" of an advertisement, not "broadcasting or otherwise transmitting," that is relevant.⁴⁸ AAPTS reasons that Congress adopted Section 399B in the context of analog broadcasting, where a station carries only a single broadcast service, and was concerned with insulating public television program control and content from the influence of special interests. AAPTS argues that digital technology would allow a station to offer advertiser-supported broadcast service on its ancillary or supplementary capacity that is completely unrelated to and has no influence over the station's primary noncommercial broadcast service.⁴⁹

offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." 47 U.S.C. § 336(a)(2).

⁴⁴ Comments of UCC *et al.* at 5-9. Reply comments of UCC *et al.* at 3-5.

⁴⁵ Comments of UCC *et al.* at 5-9. Reply comments of UCC *et al.* at 1-2.

⁴⁶ Comments of UCC *et al.* at 8-9.

⁴⁷ Comments of AAPTS at 24-25. Reply comments of Family Stations of New Jersey, Inc. ("Family NJ") at 2.

⁴⁸ Reply comments of AAPTS at 4-5. *Ex parte* letter of AAPTS, October 8, 1999, at 1-2.

⁴⁹ Comments of AAPTS at 24-25. Reply comments of AAPTS at 5-6.

25. AAPTS, Family NJ, and National Datacast also contend that our previous decisions have allowed NCEs to provide subsidiary communications services on the VBI without regard to whether they include advertisements.⁵⁰ National Datacast argues that we authorized the use of the VBI for commercial services, including advertising, in *Teletext Transmission*. The only pertinent restriction was that any offering of services for remuneration "shall not interfere with the provision of public telecommunications services".⁵¹

26. UCC *et al.*, however, argues that the our 1980 decisions allowing NCE licensees to use their analog VBI for remunerative services do not support commenters' assertions that we have allowed advertiser-supported ancillary services on noncommercial stations. UCC *et al.* contends that we never squarely addressed in those decisions whether Section 399B prohibits advertiser-supported services on the VBI, but always specified that the activity must be consistent with Section 399B. UCC *et al.* also contends that it would be arbitrary and capricious for us to apply decisions that affect a minuscule slice of analog capacity used only for text to digital services that could use as much as 80% of the bitstream at any one time for services that would include text, data, broadband and, most importantly, video services.⁵² UCC *et al.* cautions that providing advertiser-supported services would harm NCE licensees more than it would help them, leading to a loss of public and Congressional support.⁵³ AAPTS, however, urges us to allow public television stations the flexibility to develop and implement remunerative ancillary or supplementary uses of the digital spectrum and avoid premature promulgation of rules that may be overbroad and unnecessary, addressing any concerns arising under Section 399B in a "concrete context."⁵⁴

27. *Decision.* We conclude 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."⁵⁵

28. While the definition of "advertisement" in Section 399B refers to material that is "broadcast or otherwise transmitted," the plain language of the specific prohibition only forbids the "broadcasting" of any advertisement. UCC *et al.* argues that limiting the prohibition on advertisements to "broadcasting" renders the "otherwise transmitted" language in the definition of "advertisement" meaningless and, thus, UCC *et al.* would read the prohibition as applying to all transmissions.⁵⁶ Although UCC *et al.*'s argument is one way to read the statute, we believe that UCC *et al.*'s reading is problematic because, as noted, the prohibition in Section 399B(b)(2) refers to the "broadcasting of any advertisement," whereas the definition in (a)(1) treats

⁵⁰ Comments of AAPTS at 24-25. Reply comments of Family NJ at 2 *citing Teletext Transmission by TV Stations*, 53 R.R. 2d 1309, 1322 (1983)). *See also* reply comments of National Datacast at 1-2.

⁵¹ Reply comments of National Datacast at 1-2 *citing Teletext Transmission by TV Stations*, 53 R.R. 2d 1309, 1322 (1983).

⁵² Reply comments of UCC *et al.* at 5-7.

⁵³ Comments of UCC *et al.* at 13-15.

⁵⁴ AAPTS comments at 25-26.

⁵⁵ As discussed in the following paragraphs, some ancillary or supplementary services may fit the definition of "broadcasting."

⁵⁶ Comments of UCC *et al.* at 8.

broadcasting as only one means of transmitting advertising. We believe the better way to reconcile this disparity is the following: By defining an “advertisement” as “any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration,” Congress was arguably acknowledging that noncommercial stations were technologically capable of transmitting advertisements on a broadcast or nonbroadcast basis.⁵⁷ When Congress set out the prohibition in Section 399B(b)(2), however, it expressly limited it to those advertisements provided on a *broadcast* basis. We thus believe that the better reading is the literal one: that Section 399B only prohibits public broadcast stations from making their facilities “available to any person for the *broadcasting* of any advertisement.”⁵⁸

29. The term “broadcasting” is defined in the Communications Act as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”⁵⁹ In 1986, we addressed this definition in our *Subscription Video* proceeding.⁶⁰ In that decision we determined that the term “broadcasting” as defined by the Communications Act “refers only to those signals which the sender intends to be received by the indeterminate public.”⁶¹ We therefore found that “a necessary condition for the classification of a service as broadcasting is that the licensee’s programming is available to all members of the public, without any special arrangements or equipment.”⁶² Based on these criteria, we ruled that subscription television does not constitute broadcasting. Applying these same criteria to the digital spectrum, we find that subscription television provided by NCE licensees on their excess digital spectrum does not constitute “broadcasting.” We conclude therefore that NCE licensees may include advertising in their subscription television offerings, as the Section 399B ban on advertising applies only to broadcast streams. We also conclude that these same criteria continue to apply to any DTV capacity that NCE licensee might lease to other parties.⁶³

⁵⁷ AAPTS argues that “[t]he phrase ‘otherwise transmitted’ also has clear meaning, given the technologies available in 1981 when the legislation was under consideration. At the time the statute was being deliberated, several forms of ‘non-broadcast’ transmission services were being used or had been used by television stations. It is therefore reasonable to suppose that Congress was fully aware of these developments and intentionally considered them when legislating.” *Ex parte* letter of AAPTS, October 8, 1999, at 2; *see id.* at 2-7 (describing such nonbroadcast services as use of the vertical blanking interval, teletext, the instructional television fixed service, and the broadcast auxiliary service).

⁵⁸ 399B(b)(2) (emphasis added).

⁵⁹ 47 U.S.C. § 153(6).

⁶⁰ *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff’d sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). We recognize that Section 399B was enacted before *Subscription Video*. Congress gave no indication in Section 399B, however, that it intended to lock in the Commission’s prior interpretation of the statutory definition of the term “broadcasting.” *See Lukhard v. Reed*, 481 U.S. 368, 379 (1987) (“It is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place.”).

⁶¹ *Id.* at 1004.

⁶² *Id.*

⁶³ For example, a public television station would not be permitted to enter into an agreement that would allow “Network A” to *broadcast* its advertiser-supported “Popular Program B” over the public television station’s excess digital capacity, while an agreement that would allow “Network A” to transmit its “Popular Program B” on a *subscription basis* would be permitted.

30. With respect to the extent to which Section 399B applies to advertising carried on any other ancillary or supplementary services carried by a public TV station, we turn to the rules that we adopted in the *Fifth Report and Order*.⁶⁴ These rules list examples of the kinds of services that may be offered as ancillary or supplementary services. 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 broadcast signal provided at no direct charge to viewers."⁶⁵ We stated that such services may be provided on a broadcast, point-to-point or point-to-multipoint basis, provided, however, that "no video broadcast signal provided at no direct charge to viewers shall be considered ancillary or supplementary."⁶⁶

31. This definition and illustrative list of ancillary or supplementary services makes clear, first, that over-the-air video programming provided at no charge to viewers is not ancillary or supplementary service, and, conversely, that services other than a free video broadcast signal are, by definition, ancillary or supplementary services. Although we received very little comment on the types of non-subscription ancillary or supplementary services parties contemplate providing, it is possible that NCE licensees may provide without a fee to viewers data, audio or other services.⁶⁷ Such services, although ancillary or supplementary, if constituting "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations," would fall under the definition of "broadcasting" as defined in the Communications Act, and would be subject to the Section 399B advertising ban.⁶⁸ To the extent that ancillary or supplementary services offered by DTV licensees are *not* broadcasting services, NCE licensees may include advertising in their ancillary or supplementary services on their excess DTV capacity, as the Section 399B prohibition of advertising applies only to broadcast programming.⁶⁹ Until we gain more experience in determining whether an ancillary or supplementary service is a broadcasting service, we will simply be guided by the statutory criteria as questions arise.

32. Finally, in the *NPRM*, we asked parties to address AAPTS/PBS's argument that even if Section

⁶⁴ *Fifth Report and Order*, 12 FCC Rcd at 12859, Appendix A, Part 73, Section 73.624 (c), *amending* Part 73 of Title 47 of the U.S. Code of Federal Regulations.

⁶⁵ *Fifth Report and Order*, 12 FCC Rcd at 12859, Appendix A, Part 73, Section 73.624(b) & (c), *amending* Part 73 of Title 47 of the U.S. Code of Federal Regulations.

⁶⁶ *Fifth Report and Order*, 12 FCC Rcd at 12859, Appendix A, Part 73, Section 73.624 (c), *amending* Part 73 of Title 47 of the U.S. Code of Federal Regulations.

⁶⁷ For example, an NCE licensee might provide data services that could be accessed by the general public using a personal computer or provide, through interactive DTV programming, sports scores that could be accessed by the public viewing a broadcast sports event.

⁶⁸ 47 U.S.C. § 153(6).

⁶⁹ Section 399B also requires that public stations engaged in revenue generating activities comply with accounting procedures designed to separately identify these commercial revenues and costs, and it prohibits Corporation for Public Broadcasting funds from being used to defray any costs associated with these activities. 47 U.S.C. § 399B.

399B's advertising restrictions apply to some ancillary or supplementary services, we have discretion under Section 336(a)(2) of the Act to allow public TV licensees to include advertiser-supported services if we find these services to be in the public interest.⁷⁰ Section 336(a)(2) states that if we issue additional licenses for DTV, we shall "adopt such regulations that allow the holders of such licensees to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience or necessity."⁷¹ Given our statutory interpretation of Section 399B, which allows NCE licensees considerable flexibility to offer advertiser-supported subscription services and other ancillary or supplementary services, there is no need to interpret Section 336(a)(2) as APTS/PBS suggests. More importantly, we conclude that the plain language of Section 336(a)(2) does not support the result APTS/PBS suggests.

33. As we stated in the *NPRM*, we are sympathetic to the relief requested in the APTS/PBS petition, which described a range of revenue-generating ancillary or supplementary services that could help NCE stations flourish in a digital age. We noted that the costs of converting to digital service will be considerable, and that many NCE stations rely on public funds for the digital build-out. Our decision regarding the provision of advertising on NCE licensees' ancillary or supplementary services will permit NCE stations flexibility in providing such services as well as enhancing their ability to raise revenue for their support and the transition to digital television. We are mindful, however, of UCC *et al.*'s concern that allowing NCE licensees to provide advertiser-supported services will denigrate the noncommercial nature of the public television system.⁷² We emphasize that NCE licensees will continue to be prohibited from providing advertising on their free over-the-air service. Moreover, although we are allowing NCE licensees considerable flexibility in providing remunerative ancillary or supplementary services, they are, of course, required by our amendment of Section 73.621 in this *Report and Order* to use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service and to provide at least one free over-the-air video program signal.⁷³ As noted above, NCE licensees are further constrained by such limitations as the nonprofit educational mission upon which their tax exempt status is based, the need to preserve viewer and government support, the requirement to pay taxes on income unrelated to the exempt purpose of the organization, and the oversight of stations by responsible bodies. If we find that these requirements are not sufficient to ensure the integrity of the noncommercial educational broadcast service, we will revisit our decision to allow NCE licensees to provide advertiser-supported ancillary or supplementary services.

C. Payment of fees

34. *Background.* Section 336(e) of the 1996 Act requires DTV licensees receiving fees or certain other compensation for ancillary or supplementary services provided on the DTV spectrum to return a portion of

⁷⁰ APTS/PBS Reply at 6-7. Section 336(a)(2) requires us to "adopt regulations that allow [DTV licensees] to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." 47 U.S.C. § 336(a)(2).

⁷¹ 47 U.S.C. § 336(a)(2).

⁷² Comments of UCC *et al.* at 14 ("While permitting advertiser-supported ancillary or supplementary services over noncommercial stations may bring some short-term financial gains for those stations, they could very well lead to the long-term erosion of the entire system.").

⁷³ Although we decline to quantify the term "primarily," we will consider it to mean a "substantial majority" of their entire digital capacity. See ¶¶ 15- 16, *supra*.

that revenue to the public.⁷⁴ In the *DTV Fees Report and Order*, we established a program for assessing and collecting fees for the provision of ancillary or supplementary services by commercial DTV licensees as required by the 1996 Act.⁷⁵ We defined as "feeable ancillary or supplementary service" any ancillary or supplementary services for which the payment of a subscription fee is required to receive such services or for which the licensee receives any compensation from a third party other than commercial advertisements used to support non-subscription broadcasting.⁷⁶

35. In its Petition for Reconsideration of the *Fifth Report and Order*, AAPT/PBS requested that we exempt public television licensees from any fee assessed in connection with revenue-generating use of the ancillary or supplementary services on their DTV spectrum "to the extent that revenues from those service are used to support the licensee's mission-related activities."⁷⁷ We sought comment in the *DTV Fees Proceeding* on whether noncommercial television licensees should be exempt from such fees or subject to a nominal fee when they offer ancillary or supplementary services as a source of funding for public television.⁷⁸ In the *DTV Fees Report and Order*, we decided to consider the request for exempting NCE

⁷⁴ 47 U.S.C. § 336

(e) FEES

(1) SERVICES TO WHICH FEES APPLY -- If the regulations prescribed pursuant to subsection (a) 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 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 that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) COLLECTION OF FEES.-- The program required by paragraph (1) shall--

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act and the Commission's regulations thereunder; and

(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

⁷⁵ *Report and Order* in MM Docket No. 97-247, 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, 14 FCC Rcd 3259 (1998) ("*DTV Fees Report and Order*"). We subsequently adopted a *Memorandum Opinion and Order* on Reconsideration in MM Docket No. 97-247, 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, FCC 99-362 (released November 24, 1999) ("*Reconsideration of DTV Fees Report and Order*").

⁷⁶ *DTV Fees Report and Order* in MM Docket No. 97-247, 14 FCC Rcd 3259, 3260. See also 47 U.S.C. § 336(e)(1)(A)-(B); H.R. Conf. Rep. No. 458, 104th Cong., 2nd Sess. 160 (1996).

⁷⁷ Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service in MM Docket No. 87-268 filed June 13, 1997, p. 28, n. 29.

⁷⁸ *Notice of Proposed Rule Making* in MM Docket No. 97-247, 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

licensees from DTV fees in this proceeding, which focuses specifically on questions related to the remunerative use by NCE licensees of their excess digital capacity.⁷⁹

36. In the *NPRM*, we sought additional comment on this issue in light of the comments received in the *DTV Fees Proceeding* and the tentative proposals outlined in the *NPRM*. We sought comment on whether NCE licensees should be exempt from DTV fees when they offer remunerative ancillary or supplementary services as a source of funding for their mission-related activities. We sought comment generally on AAPTS/PBS's arguments in the *DTV Fees Proceeding* to exempt noncommercial licensees from fees for remunerative ancillary or supplementary services offered on their excess digital capacity. We particularly sought comment on whether such an exemption is consistent with Section 336, which does not distinguish between commercial and noncommercial licensees. We also sought comment on whether, if such an exemption is inconsistent with the statute, a nominal or reduced fee would be consistent with the statute. We also asked parties to address MAP's argument that if we allow noncommercial licensees to include advertising in any ancillary or supplementary services, these licensees should pay a fee comparable to that imposed on commercial broadcasters.⁸⁰

37. *Comments.* All NCE licensees that responded to this issue support granting NCE licensees an exemption from any assessment of fees on revenues earned by use of their digital spectrum for ancillary or supplementary services when those revenues are used to fund mission-related activities.⁸¹ AAPTS argues that although Section 336 requires us to collect a fee when a licensee uses its digital spectrum for ancillary or supplementary service, when the revenue is used to support noncommercial services that are in the public interest, there is no need to "recover" anything for the public, as the revenue is already devoted to that purpose.⁸² AAPTS also argues that because these revenues help to support noncommercial activities, the provision of ancillary or supplementary services would not result in any "unjust enrichment" of the stations.⁸³ AAPTS asserts that the provision in Section 336 governing the amount to be recovered through any fee, *i.e.*, the amount that would have been received if the excess digital spectrum had been subject to competitive bidding, makes no sense in the context of public television, as our competitive bidding authority does not apply to licenses issued to public television.⁸⁴ In addition, the Curators of the University of Missouri ("Curators"), the licensee of commercial VHF station KOMU-TV, an NBC affiliate, urge us to make clear that governmental licensees are exempt from paying fees for ancillary or supplementary DTV

1996, 12 FCC Rcd 22821 (1997) ("*DTV Fees NPRM*").

⁷⁹ *Fees Report and Order* in MM Docket No. 97-247, 14 FCC Rcd at 3272-73.

⁸⁰ Comments of MAP in MM Docket No. 97-247 at 15-17.

⁸¹ Comments of AAPTS/PBS in MM Docket No. 97-247, filed as an attachment to comments of AAPTS in this proceeding. *See also* Go, Inc., Goodlife Broadcasting, Inc. and Central Florida Educational Foundation (filed collectively as "Hardy & Carey Clients"). *See also* Reply Comments of AAPTS; Family Stations of New Jersey, Inc. ("Family NJ").

⁸² Comments of AAPTS/PBS in MM Docket No. 97-247 at 6-12. *See also* comments of Curators at 4; reply comments of AAPTS at 8-10.

⁸³ Comments of AAPTS/PBS in MM Docket No. 97-247 at 6-7. *See also* comments of Curators at 4.

⁸⁴ Comments of AAPTS/PBS in MM Docket No. 97-247 at 6-7.

services.⁸⁵

38. Go, Inc., Goodlife Broadcasting, Inc. and Central Florida Educational Foundation (filing collectively as "Hardy & Carey Clients") and AAPTS contend that such an exemption would be consistent with Congressional policy to provide support to public television.⁸⁶ AAPTS notes that Congress has exempted public television from fees on various occasions, and it would be counterproductive to detract from the federal financial assistance for public broadcasting and place additional pressure on that support by imposing a DTV fee.⁸⁷ Hardy & Carey Clients and Family Stations of New Jersey, Inc. ("Family NJ") also contend that imposing such fees could slow the transition to DTV and undermine the ability of noncommercial stations to sustain their operations.⁸⁸

39. UCC *et al.*, however, supports exempting NCE licensees from DTV fees only if the licensees are not permitted to provide advertiser-supported ancillary or supplementary services. It contends that the plain language of Section 336(e) requires that fees be paid to recover a portion of the public spectrum resource made available for commercial use, and that AAPTS is inconsistent in arguing that Section 336 makes no distinction between noncommercial and commercial broadcasters for the purpose of offering ancillary or supplementary services, but then reading into the statute a distinction to exempt NCEs from paying fees for providing such services.⁸⁹

40. *Decision.* We conclude that NCE licensees are not exempt 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. Section 336(e)(1) of the 1996 Act does not support exempting NCE licensees from DTV fees or charging them nominal fees when they offer feeable ancillary or supplementary services as a source of funding for their mission-related activities. It draws no distinction between commercial and noncommercial stations, stating that we "shall establish a program to assess and collect . . . an annual fee" from DTV licensees offering subscription-based ancillary or supplementary services.⁹⁰ The statute requires that a fee be assessed upon any ancillary or supplementary services on DTV spectrum "for which the payment of a subscription fee is required in order to receive such services" or "for which the licensee directly or indirectly receives compensation from a third party in return for transmitting materials furnished by such third party."⁹¹

⁸⁵ Comments of the Curators of the University of Missouri ("Curators") at 1.

⁸⁶ Comments of Hardy & Carey Clients at 6-8; reply comments of AAPTS at 8-10. With respect to governmental entities, *see also* Curators at 5.

⁸⁷ Comments of Hardy & Carey Clients at 6-8. Reply comments of AAPTS at 8-10. With respect to governmental entities, *see also* comments of Curators at 5.

⁸⁸ Comments of Hardy & Carey Clients at 4-6, 8-9. Reply comments of Family NJ at 2-3. With respect to governmental entities, *see also* comments of Curators at 6.

⁸⁹ Comments of The Office of Communication of the United Church of Christ, Inc., filed with the Alliance for Community Media, the Benton Foundation, the Center for Media Education, Independent Television Service, Libraries for the Future, Media Access Project, Native American Public Telecommunications, Inc, and the Screen Actors Guild ("UCC *et al.*") at 15-16.

⁹⁰ 47 U.S.C. § 336(e)(1)(B).

⁹¹ 47 U.S.C. § 336(e)(1)(A)&(B).

41. As noted above, Section 336 requires, among other things, that the amount of the fee be designed to recover for the public an amount that would have been received had feeable ancillary or supplementary services been licensed pursuant to competitive bidding.⁹² We are not persuaded by AAPTS's argument that this provision makes no sense in the context of public television licensees because they are not subject to competitive bidding.⁹³ The Commission was not directed to take into account the amount of money that would have been recovered had *broadcasters* purchased *this* spectrum through competitive bidding. Rather, the provision refers to the amount of money that would have been recovered if spectrum had been made available for these kinds of ancillary or supplementary services and had been licensed pursuant to auction. Indeed, existing commercial broadcasters were also statutorily exempt from competitive bidding for initial digital television licenses.⁹⁴ Thus, under AAPTS's reading, all existing commercial broadcasters that received initial DTV licenses under Section 336(a) would also be exempt from the fee, making the fee provision almost meaningless. We therefore reject AAPTS's argument.

42. Consequently, we will amend Section 73.624(g) of our rules to apply to NCE licensees the same program for assessing and collecting fees upon feeable ancillary or supplementary services provided on their DTV capacity that we established for commercial licensees in the *Fees Proceeding*,⁹⁵ as required by the 1996 Act. NCE licensees will be required to report to us annually on December 1 on their use of their digital bitstreams, and remit fees of five percent of their gross revenues received for feeable ancillary or supplementary services provided on their digital bitstreams. For the first report filed on December 1, 2002, NCE licensees are to report only on services provided from the effective date of this *Report and Order* through September 30, 2002. We will amend form FCC 317, which currently is used to collect information on DTV ancillary or supplementary use by commercial TV licensees, to include NCE licenses. We will release a Public Notice with a copy of the revised form once it is approved by the Office of Management and Budget.

43. Finally, we also conclude that the Curators of the University of Missouri, the licensee of commercial VHF station KOMU-TV, an NBC affiliate, is not exempt from the requirement to pay fees on revenues generated by the remunerative use of its excess digital capacity, even when those revenues are used to support noncommercial services that are in the public interest. Although Curators is a not-for-profit governmental entity that we have exempted from paying certain application and regulatory fees,⁹⁶ Section 336(e)(1) does not distinguish between governmental and nongovernmental licensees with respect to the requirement to pay DTV fees. Curators are therefore subject to the program for assessing and collecting fees upon feeable ancillary or supplementary services provided on their DTV capacity that we established

⁹² 47 U.S.C. § 336(e)(2)(B).

⁹³ Comments of AAPTS/PBS in MM Docket No. 97-247 at 6-7.

⁹⁴ 47 U.S.C. § 309(j)(2)(B) (exempting from competitive bidding "initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses").

⁹⁵ *Fees Report and Order* in MM Docket No. 97-247, 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, 14 FCC Rcd at 3275-76, *Memorandum Opinion and Order*, FCC 99-362, (released November 24, 1999).

⁹⁶ *Public Notice*, Fee Decisions of the Managing Director Available to the Public, 10 FCC Rcd 5168 (1995).

for commercial licensees in the *Fees Report and Order* in MM Docket No. 97-247,⁹⁷ and apply to NCE licenses in this proceeding.

44. We are sensitive to NCE licensees' need to provide funding to support their programming and operations and their transition to DTV. As described above, NCE licensees will be able to use their ancillary or supplementary services for remunerative purposes, and earn advertising revenue, as well, on ancillary or supplementary services.

45. We also note that we have previously recognized the financial difficulties often faced by NCE licensees. For example, the construction timetable we adopted in the *Fifth Report and Order* provides noncommercial stations a six-year period within which to construct their DTV facilities, the longest construction period allotted to any category of DTV applicant. In the *Fifth Report and Order*, we also stated that special relief measures may eventually be warranted to assist public television stations to make the transition to DTV, but we concluded that it was premature to determine what those specific measures should be. We stated then, and we continue to believe, that determining the specific nature of whatever special relief may be needed for noncommercial educational broadcasters is best considered during our periodic reviews.⁹⁸

D. Administrative Matters

46. *Paperwork Reduction Act of 1995 Analysis.* The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

47. Accordingly, IT IS ORDERED that, pursuant to authority contained in Sections 4(i), 303, 336 and 399B of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307, 336 and 399B, Part 73 of the Commission's rules IS AMENDED as set forth in Appendix C, below.

48. A Final Regulatory Flexibility Analysis ("FRFA"), *see* 5 U.S.C. § 604, is contained in Appendix A. IT IS FURTHER ORDERED that the Commission's Compliance and Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

49. IT IS FURTHER ORDERED that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments set forth in Appendix C SHALL BE EFFECTIVE the later of either thirty days after publication in the Federal Register, or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Pub. L. No. 104-121.

50. IT IS FURTHER ORDERED that implementation of the new or modified reporting and recordkeeping requirements imposed by this action SHALL BE EFFECTIVE upon approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act of 1995.

⁹⁷ *Id.*

⁹⁸ *Fifth Report and Order*, 12 FCC Rcd at 12852.

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

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),⁹⁹ an Initial Regulatory Flexibility Analysis (IRFA), was incorporated in the *Notice of Proposed Rule Making (NPRM)* in this proceeding.¹⁰⁰ The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.¹⁰¹

A. Need for, and Objectives of, the Report and Order: With this *Report and Order*, the Commission clarifies the manner in which noncommercial educational (NCE) television licensees may use their excess digital television (DTV) capacity for remunerative purposes. The objectives of this *Report and Order* are to: (1) require NCE licensees to use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service; (2) clarify that NCE licensees may provide subscription television services; (3) determine that although NCE licensees are prohibited from including advertising on their broadcasting services, they may include advertising on nonbroadcast services, such as subscription services, provided on their DTV channels; and (4) require NCE licensees to pay fees on revenues generated by the remunerative use of their excess digital capacity.

The action taken with respect to the first objective amends Section 73.621 of the Commission's rules to require NCE licensees to use their entire digital capacity primarily for a nonprofit, noncommercial, educational broadcast service. Although the Report and Order declined to quantify the term "primarily," it states that it considers it to mean a "substantial majority" of NCE licensees' entire digital capacity. Because stations typically schedule their programming on a weekly basis, it requires NCE TV licensees to use their entire bitstream primarily for nonprofit, noncommercial, educational broadcast services on a weekly basis. This action adapts Section 73.621 of the Commission's rules to the digital environment.

The action taken with respect to the second objective amends Sections 73.642 and 73.644 of the Commission's rules to allow NCE licensees to provide subscription television services. It is taken because the Commission included subscription services in its definition of ancillary and supplementary services in the *Fifth Report and Order*¹⁰² that may be provided by DTV licensees, and because such action advances the Commission's goal of providing NCE licensees with flexibility in the use of their digital spectrum, within certain boundaries.

⁹⁹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁰⁰ *Notice of Proposed Rulemaking* in MM Docket No. 98-203, In the Matter of Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees, 14 FCC Rcd 537, 553-55 (rel. Nov. 23, 1998) ("*NPRM*").

¹⁰¹ See 5 U.S.C. § 604.

¹⁰² *Fifth Report and Order*, in MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 12 FCC Rcd 12809, 12859 (1997).

The action taken with respect to the third objective determines that Section 399B, the provision of the Communications Act restricting advertising by NCE licensees, continues to apply to all broadcasting by NCE licensees, but does not apply to nonbroadcast services, such as subscription services, provided on their DTV channels. This action maintains the integrity of NCE licensees' nonprofit, noncommercial, educational service on their free over-the-air video programming, while allowing NCE licensees some flexibility to use their ancillary and supplementary services for remunerative purposes.

The action taken with respect to the fourth objective amends Section 73.624(g) of the Commission's rules to apply to NCE licensees the program for assessing and collecting fees upon feeable ancillary or supplementary services provided on their DTV capacity that the Commission established for commercial DTV licensees. This action is taken because Section 336(e) of the Telecommunications Act of 1996 requires the Commission, without distinguishing between commercial and NCE DTV licensees, to return to the public a portion of the fees or certain other compensation earned by DTV licensees for ancillary and supplementary services provided on their DTV spectrum.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA: No comments were received specifically in response to the IRFA attached to the *NPRM*. No small business issues were raised specifically in the comments responsive to the *NPRM*.

C. Description and Estimate of the Number of Small Entities to Which the Rules Would 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.¹⁰³ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁰⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰⁵ 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 Small Business Administration (SBA).¹⁰⁶ The RFA¹⁰⁷ generally defines the term "small organization" to mean "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁰⁸

¹⁰³ 5 U.S.C. § 603(b)(3).

¹⁰⁴ *Id.* § 601(6).

¹⁰⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the small business Act, 15 U.S.C. § 632.) Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

¹⁰⁶ 15 U.S.C. § 632.

¹⁰⁷ 5 U.S.C. § 601(4).

¹⁰⁸ *Id.*

The rules and policies adopted in this Report and Order will apply to noncommercial educational (NCE) television licensees, particularly those television stations licensed to operate on channels reserved as "noncommercial educational." For RFA purposes, television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.¹⁰⁹ Included in this industry are commercial, religious, educational, and other television stations.¹¹⁰ Also included are establishments primarily engaged in television broadcasting and that produce taped television program materials.¹¹¹ There were 1,678 operating television broadcasting stations in the nation as of June 30, 2001, of which 374 were noncommercial educational stations.¹¹² The SBA has determined that television broadcasters are considered small when they have \$10.5 million or less in annual revenue.¹¹³

NCE TV licensees, by virtue of their nonprofit, noncommercial, educational broadcasting operations, generate less revenue than commercial TV licensees and are more likely than commercial TV broadcasters to experience financial difficulties in constructing their DTV facilities and making the transition to DTV broadcasting. NCE TV licensees depend partially on fundraising activities and grants from the Corporation for Public Broadcasting to support their programming and operations and their transition to DTV. Based on such differences between typical commercial TV licensees and typical NCE TV licensees, and based on the concern that NCE TV licensees may be differently impacted by the rule amendments and other actions taken in this Report and Order, we choose to separate out NCE TV licensees as smaller entities in the context established herein by the RFA. Therefore, of the 1,678 television stations previously noted, we will consider the 374 NCE TV stations to be smaller entities in the context established herein by the RFA.¹¹⁴

¹⁰⁹ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995).

¹¹⁰ *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833) as: Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

¹¹¹ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 CENSUS OF TRANSPORTATION, COMMUNICATIONS AND UTILITIES, ESTABLISHMENT AND FIRM SIZE, Series UC92-S-1, Appendix A-9 (1995). Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number. SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services (producers of live radio and television programs).

¹¹² FCC News Release "Broadcast Station Totals as of June 30, 2001," issued July 129, 2001.

¹¹³ 13 C.F.R. § 121.201, NAICS Code 51312.

¹¹⁴ At this time, the Commission does not have access to information about the annual revenues of NCE stations. The Commission is therefore unable to distinguish between NCE broadcasters based on their annual revenues. However, based on the differences between typical commercial TV licensees and typical NCE TV licensees, and based on the concern that NCE TV licensees may be differently impacted by the rule amendments and other actions taken in this Report and Order, we choose to separate out NCE TV licensees as smaller entities in the context established herein by the RFA.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: The *Report and Order* adopts modifications to existing reporting and recordkeeping requirements. The fee program established herein will require NCE TV licensees annually to file a new reporting form. Licensees will be required to report whether they provided ancillary or supplementary services, what ancillary or supplementary services they provided, which of those services are subject to a fee, and the gross revenues received from all feeable ancillary or ancillary services. NCE licensees providing service subject to a fee additionally will be required annually to file FCC Form 159 in remittance of the fee. So that we may audit NCE licensees records supporting the calculation of the fees due, each NCE licensee will be required to retain such records for three years from the date of remittance of fees. In addition, each NCE TV licensee will be required to maintain documentation sufficient to show compliance at renewal time and in response to any complaint with the requirement to use their entire bitstream primarily for nonprofit, noncommercial, educational broadcast services on a weekly basis.

All these new recordkeeping and reporting requirements will apply to all NCE TV licensees in the same way. Therefore, the action taken here imposes no separate or greater compliance burdens on smaller commercial or non-commercial TV stations within the group of all stations hereby affected.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: With respect to steps taken to minimize significant economic impact on small entities, the actions taken herein will enhance NCE TV licensees' ability to provide funding to support their programming and operations and their transition to DTV. As described above, NCE licensees will be able to use a portion of their digital capacity for remunerative purposes, including the provision of advertising on their non-broadcast ancillary and supplementary services. We also note that the Commission has previously recognized the financial difficulties often faced by NCE licensees. For example, the construction timetable adopted in the *Fifth Report and Order* provides noncommercial stations a six-year period within which to construct their DTV facilities, the longest construction period allotted to any category of DTV applicant. The *Fifth Report and Order* also stated that special relief measures may eventually be warranted to assist public television stations to make the transition to DTV, but concluded that it was premature to determine what those specific measures should be. The Commission stated then, and continues to believe, that determining the specific nature of whatever special relief may be needed for noncommercial educational broadcasters is best considered during the Commission's periodic reviews.¹¹⁵ Lastly, we are considering all NCE broadcasters to be small for the purposes of this RFA analysis.

With respect to significant alternatives considered with respect to the first objective, the Commission considered applying Section 73.621 of the Commission's rules to only the one free-over-the-air video broadcast required of all DTV licensees, allowing NCE TV licensees commercial use on their remaining digital capacity. This alternative was not adopted because the Commission believed that it would conflict with Section 73.621, which requires that public television stations furnish primarily an educational as well as a nonprofit and noncommercial broadcast service.

Another significant alternative to the first objective considered requiring NCE TV licensees to provide free, not-for-profit over-the-air services over 50 percent or more of their digital capacity at any one time. This alternative was not adopted as such a decision would provide substantially less flexibility to NCE licensees in developing their digital services. For example, an NCE licensee might want to use most of its digital capacity for High Definition Television ("HDTV") programming during certain times of the day and, at other times, various amounts of capacity for Standard Definition Television ("SDTV") programming and remunerative ancillary or supplementary services.

¹¹⁵ *Fifth Report and Order*, 12 FCC Rcd at 12852.

With respect to the second objective, a significant alternative considered prohibiting NCE TV licensees from providing subscription services on their excess digital capacity. This alternative was not adopted because the Commission had included such services in the definition of ancillary or supplementary services in the *Fifth Report and Order*. Moreover, given the Commission's goal of providing NCE licensees with flexibility in the use of their digital spectrum, within certain boundaries, there seemed to be no reason to prohibit them from providing subscription services. Moreover, the ability to provide such a remunerative service is positive.

With respect to significant alternatives considered to the third objective, the Commission considered interpreting Section 399B of the Communications Act as prohibiting all advertising on all of NCE TV licensees' digital capacity. This alternative was not adopted because the Commission decided that the better interpretation of the statute was that the broadcasting of advertising is prohibited to NCE TV licensees, but that they may include advertising on their non-broadcast ancillary and supplementary services. Moreover, as the action allows all stations affected to earn money from the provision of advertising, the effect is positive.

With respect to significant alternatives to the fourth action taken, the Commission considered collecting a reduced fee or no fee on the gross revenues earned by NCE TV licenses from all feeable ancillary and supplementary services. The Commission did not adopt either of these alternatives because the Telecommunications Act of 1996, without distinguishing between commercial TV licensees and NCE TV licensees, requires it to collect fees from such revenues from DTV licensees. The Commission will apply to NCE TV licensees the program for assessing and collecting such fees that it established for commercial DTV licensees. Although all NCE TV licensees, including small entity licensees, will be required to pay these fees, they will be allowed to retain 95 percent of such revenues, which is a positive, impact.

Report to Congress: The Commission will send a copy of this *Report and Order*, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.¹¹⁶ In addition, the Commission will send a copy of this *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this *Report and Order*, including this FRFA, will also be published in the Federal Register.¹¹⁷

¹¹⁶ See 5 U.S.C. § 801(a)(1)(A).

¹¹⁷ See 5 U.S.C. § 604 (b).

APPENDIX B

LIST OF COMMENTERS

The Association of America's Public Television Stations

Curators of the University of Missouri

Go, Inc., Goodlife Broadcasting, Inc. and Central Florida Educational Foundation (filed collectively as "Hardy & Carey Clients")

National Datacast, Inc.

The Office of Communication of the United Church of Christ, Inc., the Alliance for Community Media, the Benton Foundation, the Center for Media Education, Independent Television Service, Libraries for the Future, Media Access Project, Native American Public Telecommunications, Inc, and the Screen Actors Guild ("UCC *et al.*")

LIST OF REPLY COMMENTERS

The Association of America's Public Television Stations

Family Stations of New Jersey, Inc.

National Datacast, Inc.

UCC *et al.*

APPENDIX C

Rule Changes

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

1. Section 73.621 is amended by adding paragraph (i) to read as follows:

§ 73.621 Noncommercial educational TV stations.

* * * * *

(i) With respect to the provision of advanced television services, the requirements of this Section will apply to the entire digital bitstream of noncommercial educational television stations, including the provision of ancillary or supplementary services.

* * * * *

2. Section 73.624(g) is amended by revising paragraphs (g)(1), (g)(2)(i), and (g)(2)(ii) to read as follows:

§ 73.624 Digital Television Broadcast Stations.

* * * * *

(g)(1) Commercial and noncommercial DTV licensees must annually remit a fee of five percent of the gross revenues derived from all ancillary or supplementary services, as defined by paragraph (b) hereof, which are feeable, as defined in paragraphs (i) - (ii) hereof. * * *

* * * * *

(g)(2) Payment of Fees

(i) Each December 1, all commercial and noncommercial DTV licensees will electronically report whether they provided ancillary or supplementary services in the twelve-month period ending on the preceding September 30. * * *

(ii) If a commercial or noncommercial DTV licensee has provided feeable ancillary or supplementary services at any point during a twelve-month period ending on September 30, the licensee must additionally file the FCC's standard remittance form (Form 159) on the subsequent December 1. * * *

* * * * *

3. Section 73.642 is amended by revising paragraphs (a), (b) and (e) to read as follows:

§ 73.642 Subscription TV service.

(a) Subscription TV service may be provided by:

- (1) Licensees and permittees of commercial and noncommercial TV stations, and
- (2) Licensees and permittees of low power TV stations.

(b) A licensee or permittee of a commercial or noncommercial TV station or a low power TV station may begin subscription TV service upon installation of encoding equipment having advance FCC approval. * * *

* * * * *

(e) A licensee or permittee of a commercial or noncommercial TV broadcast or low power TV station may not transmit a subscription service if it has a contract, arrangement, or understanding expressed or implied, that: * * *

* * * * *

4. Section 73.644 is amended by revising paragraph (a) to read as follows:

§ 73.644 Subscription TV transmission systems.

(a) Licensees and permittees of commercial and noncommercial TV broadcast and low power TV stations may conduct subscription operations only by using an encoding system that has been approved in advance by the FCC. * * *

* * * * *

STATEMENT OF MICHAEL K. POWELL, CHAIRMAN

Re: Report and Order in MM Docket No. 98-203—In the Matter of Ancillary or Supplemental Use of Digital Television Capacity by Noncommercial Licensees

The *Report and Order* we adopt today will help bring public television into the digital age.

First, we enhance the benefits of public television by providing stations with the flexibility to fulfill their mission through innovative uses of digital technology. Public television is on the cutting edge of some of the most exciting new digital programming and I am pleased that the *Order* we adopt today supports their continued exploration of this new medium.

Second, we provide a limited but critical additional funding source that can facilitate the transition of public TV stations to digital television. These stations expect to spend about 1.7 billion dollars on the transition. So far, only 11% of them have completed the required DTV build-out. Additional revenue streams, beyond those employed today, have become essential for public television to successfully make the transition to digital television.

Third, the *Order* has established strong safeguards to insure that the fundamental nature of public broadcasting will not suffer. However, I am of the strong belief that regardless of any regulatory safeguards, public television will continue to do in the digital age what it has done so well in the past; serve the public interest by producing superb, noncommercial educational programming.

**DISSENTING STATEMENT
OF COMMISSIONER MICHAEL J. COPPS**

Re: Report and Order in MM Docket No. 98-203 In the Matter of the Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees

This is a difficult issue. I've talked to many people about it, pro and con; I've read the pro-public TV press release that's going out today; I've tried to come at it from every perspective I can. But I just cannot convince myself that this is what we ought to be doing.

I am impugning no one's commitment to public television today. I believe that each of the Commissioners wants public television to succeed. We differ on strategy.

For my part, I am deeply troubled by this proposal. I think it is in some respects contrary to law. Additionally, it has the potential to warp the nation's image of public television and to endanger the identity and even the viability of a national treasure. Public television is the gem of broadcast television. It has a rich record of program success, a clearly identifiable niche in our national life, and unmatched credibility thanks to the tireless work of thousands of dedicated Americans.

I begin with the premise that Congress did not establish public television to be the same as commercial television, nor even to be a little different than commercial television. Public broadcasting was to be what commercial broadcasting was not. Commercial television is about appealing to and entertaining the broadest possible market. Public television is about serving the better angels of our nature. It is about sustaining the virtues of education, civic involvement and American democracy. It in no way denigrates commercial television to say that public television is supposed to be, and is, different. When it begins to lose this different identity, it begins to lose its soul.

In establishing the Corporation for Public Broadcasting, and public television as we know it, Congress reported that public broadcasters "will not be in economic competition with commercial broadcasters. [They] will be filling the gaps that commercial broadcasters do not fill. As Dr. Frank Stanton, president of CBS, observed: They will do special things that we don't do in quantity at the present time...they will appeal at certain times of the day to very small parts of the total audience. Because we are organized as a mass medium, because we have to serve the greatest number of people in order to do our job, they will be able to do special interest kinds of programming that we can't do."¹

Here at the FCC, we are talking quite a lot about convergence – convergence of technologies, convergence of capital, convergence of regulatory schemes. We need to deal with convergence. But there may be some convergences that are neither inevitable nor good. The sort of convergence we *don't* want to see is convergence of our public and commercial television services until they become indistinguishable one from another.

¹ P.L. 90-129, Public Broadcasting Act Of 1967, House Report No. 90-572 (Aug. 21, 1967).

It's advertising that has me upset. The sale of advertising puts on the block one of the very things that makes public television special and different from commercial broadcasting. I believe that permitting advertisements on the digital spectrum of public television is contrary to statute, contrary to the will of Congress and contrary to the mission of public television.

Section 399B of the Communications Act prohibits public television stations from using any of their facilities for the broadcast of advertisements.² This section defines "advertisement" for the purposes of the section as "material which is broadcast or otherwise transmitted in exchange for any remuneration." That the Commission today may determine that this prohibition does not apply to advertisements carried on the non-broadcast portion of the bitstream – the spectrum used for subscription or data services – seems to me to contravene the clear language of the statute. And it is certainly inconsistent with the heritage, and indeed the integrity, of public television.

I agree with the apparent majority in its conclusion that non-commercial educational television stations should devote the majority of their capacity to the provision of non-commercial educational programming. That is consistent with the mission of public broadcasting and with the goals of Congress in establishing and funding the Corporation for Public Broadcasting.

I am mindful of the argument that public television needs these dollars in order to transition to digital. I support giving public television the opportunity to avail itself of the tremendous potential of digital technology, to give public broadcasters the opportunity to use their digital spectrum flexibly, for creative, innovative and even remunerative services. Some of the proposed uses I have been told about are quite impressive. Some stations intend to allow college students in rural areas to enroll in courses and subscribe to televised lectures on their local public television station. Others intend to bring up-to-the-minute classroom materials to children through the transmission of data over public television stations' bitstream. These are creative and remunerative uses of public television's capacity – and they further the mission of public television to serve the public interest. I want these stations to be able to collect subscription or lease fees for these services. What we must avoid, however, is turning this national treasure into just another commercial broadcast service.

Because public television stations *are* different, they should be able to use every penny they collect for the development of new and innovative programming. I would hope that, consistent with the law, public television could be exempted from the five per cent federal government fee for such services.

But it is also true that we have not heard from many public broadcasters about how they plan to use their digital spectrum. And I have even heard one or two schemes that I think would be counter-productive. So I am fearful that once we start down the road of commercialization, the Law of Unintended Consequences will kick in and ere long we will be dealing with revenue-raising schemes that will detract from and endanger the integrity of public television.

² 47 U.S.C. § 399b. ((b)(2) "No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement." (a) "For the purposes of this section the term "advertisement" is defined as a message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration and which is intended (1) to promote any service, facility or product offered by any person who is engaged in such offering for profit; (2) to express the views of any person with respect to any matter of public importance or interest; or (3) to support or oppose any candidate for political office.")

One of these unintended consequences could be the endangerment of current public television funding. If people see public television making money through advertising, what happens to their receptivity to appeals for contributions from the stations? What happens to foundation support and corporate contributions? Do the people's elected representatives begin to look differently at the levels of support they provide? And what about our commercial broadcast friends? Won't they take a jaundiced, although understandable, view against multiple revenue streams flowing to public television? Should we expect them to sit idly by while this happens?

I don't know the answers to these questions. I do know that it would be a shame if today's action undermines support for this precious national resource.

I am also troubled by the lack of consensus from the public television community. Some are full speed ahead. Some are clearly worried. Some, I think, sense danger but are reluctant to express it. I hope that there was, and will continue to be, at least a sustained dialogue among the friends of public television on this important issue.

While there are parts of the Report and Order that I support, I don't see this as the time for a mixed message. When the vote is called, I am going to dissent.