

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[MM Docket No. 97-247; FCC 97-414]

#### Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This Notice of Proposed Rule Making implements Section 336 of the Telecommunications Act of 1996 ("1996 Act") which requires the Commission to establish a program to assess and collect fees for digital television (DTV) licensees' use of DTV capacity for the provision of ancillary or supplementary services. The statute requires the imposition of a fee where DTV licensees use their capacity for services for which the payment of a subscription fee is required or where the licensee receives revenues from a third party other than advertising revenues in return for transmitting material furnished by the third party. With this Notice of Proposed Rule Making, the Commission seeks comment on various methods by which such fees might be assessed including a fee assessed as a percentage of gross revenues received from the ancillary or supplementary use of DTV capacity, a fee based on net revenues or incremental profits received from the ancillary or supplementary services provided, or a fee based upon a combination of a flat rate and a percentage of revenues.

**DATES:** Comments are due on or before March 3, 1998 and Reply Comments are due on or before April 2, 1998.

**ADDRESSES:** Comments should be sent to the Office of Secretary, Federal Communications Commission, 1919 M St., N.W., suite 222, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Jerry Duvall, Chief Economist, Mass Media Bureau (202) 418-2600, Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418-2140, or Jonathan Levy, Office of Plans and Policy (202) 418-2030.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, FCC 97-414 adopted December 18, 1997 and released December 19, 1997. The full text of this Commission Notice is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919

M Street N.W., Washington, D.C. The complete text of this Notice may also be purchased from the Commission's copy contractor, International Transcription Services (202) 857-3800 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

### Synopsis of Notice

#### I. Introduction

In April, 1997, the Federal Communications Commission ("Commission") adopted rules implementing a transition to digital television ("DTV") for all existing television broadcasters. In accordance with 1996 Act, established standards for license eligibility, a transition and construction schedule, and a requirement that broadcasters continue to provide one free, over-the-air television service. As required by the 1996 Act, the Commission adopted rules permitting DTV licensees to use this spectrum to provide ancillary or supplementary services, provided such services do not derogate the free television service. The 1996 Act further requires the Commission to assess and collect a fee for the ancillary or supplementary use of the spectrum when the licensee receives for these services either subscription fees or other compensation from third parties. With this Notice of Proposed Rule Making, the Commission identifies various programs by which such fees may be assessed.

#### II. Background

The 1996 Act set up the framework for licensing DTV spectrum to existing broadcasters and, in an earlier proceeding, the Commission established rules by which those licenses are assigned and adopted regulations regarding DTV licensees' provision of ancillary or supplementary services. Specifically, Congress directed the Commission to require that the broadcast of any ancillary or supplementary services on frequencies designated for advanced television services: (1) Must be consistent with the advanced television technology designated by the Commission; (2) must not derogate any advanced television services (including high definition television ("HDTV")) that the Commission may require; and (3) may be subject to Commission regulations applicable to analogous services. Moreover, Congress directed the Commission to establish a fee program for any ancillary or supplementary services for which a licensee receives any compensation other than

commercial advertisements used to support non-subscription broadcasting.

The Commission adopted a technical standard that supports the transmission of HDTV as well as the transmission of multiple programs of standard definition television ("SDTV") and non-video services. This standard permits the provision of other services including the transmission of CD quality audio signals or large amounts of data. The standard allows broadcasters to send video, voice and data simultaneously and to provide a range of services, switching easily and quickly from one type of service to another.

The Commission's rules permit broadcasters to use their DTV capacity to provide ancillary and supplementary services which do not interfere with the required free service. Broadcasters ability to provide ancillary or supplementary services will allow the broadcasters flexibility to respond to the demands of their audience for such services.

The 1996 Act required 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. The Commission was charged with establishing a means of assessing and collecting fees for those ancillary or supplementary services specified in the statute ("feeable ancillary or supplementary services"). These services are described more fully below.

To implement this provision of the 1996 Act, the Commission seeks comment on various methods of assessing a fee. The Commission sets forth possible fee assessment programs, including a fee related to the amount that would have been realized at auction, a fee based upon net revenues or incremental profits received from the provision of feeable ancillary or supplementary services, a fee assessed as a percentage of gross revenues, and a fee based upon a hybrid of a flat rate and a percentage of revenues. The Commission invites public comment on these fee assessment programs.

#### III. Discussion

##### *Goals and General Criteria for Assessing Fees*

The 1996 Act first directs that any fee established should "recover for the public a portion of the value of the public spectrum" made available for ancillary or supplementary use by DTV licensees. This requirement echoes the competitive bidding provisions of the Communications Act of 1934 ("Communications Act"). Second, the

1996 Act requires that the fee be designed "to avoid unjust enrichment" of broadcast licensees by their use of the spectrum for ancillary or supplementary services for which they collect fees or certain other compensation. DTV licensees could be placed at an unfair advantage if they paid no fee when using their DTV capacity to provide certain ancillary or supplementary services, given that nonbroadcast licensees providing analogous services may have acquired their spectrum through an auction process. Third, the 1996 Act requires that the fee 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" in an auction.

Section 336(e)(1) of the 1996 Act requires a fee to be assessed upon any services "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." The Act specifically exempts from the fee any service which relies upon "commercial advertisements used to support broadcasting for which a subscription fee is not required." Further, the Conference Report states that the Commission must "establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation apart from commercial advertisements are required in order to receive such services." Thus, a fee must be assessed on any ancillary or supplementary services that are not supported entirely by commercial advertisements. The Commission recognizes that feeable ancillary or supplementary services may be offered simultaneously with other services, including HDTV, SDTV, or other video programming supported entirely by commercial advertisements, or other non-feeable ancillary or supplementary services. The mere fact that a feeable ancillary or supplementary service is being transmitted does not mean that all simultaneously transmitted ancillary or supplementary services are feeable.

In establishing a fee for the feeable ancillary or supplementary use of DTV capacity, the Commission is cognizant of the administrative burden which such a fee could entail. In order to minimize this burden both for broadcasters and for the Commission, the fee should be simple to understand and be calculable with readily available information. An overly complex fee program could be difficult to calculate

and enforce and could create uncertainty that might undermine a DTV licensee's business planning.

The Commission intends to establish a fee program consistent with the criteria set forth in the 1996 Act. The 1996 Act evidences the intent of Congress that broadcasters be allowed the flexibility to provide such services. In implementing the statutorily mandated fee program, it is not the Commission's intention to dissuade broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services.

The Commission recognizes that there may be some tension among our goals. The means of assessing the fee may affect whether ancillary or supplementary services are offered at all and which services are offered. A fee set too high would serve as a disincentive for broadcasters to provide feeable ancillary or supplementary services. It could reduce the benefits that consumers receive from services provided on the DTV capacity. On the other hand, a fee that is set too low might not prevent the unjust enrichment of DTV licensees as required by the 1996 Act and might not recover an amount approximating the amount that would have been recovered at auction, although it could recover for the public a "portion of the value" of the spectrum. Commenters are asked to address how the proposals and options set forth below strike the appropriate balance among the goals outlined.

#### *Proposals for Establishing Fees for Feeable Ancillary or Supplementary Services*

Among the fee options consistent with the guidelines of the 1996 Act are first, a fee akin to the amount that would have been received in an auction of the spectrum; second, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee's DTV capacity; third, a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity; and fourth, a fee based upon a hybrid of a flat rate and a percentage of revenues.

Revenue-based fees can affect the mix of ancillary or supplementary services provided, and also raise issues of accounting, auditing, and cost allocation. The choice of a fee structure may affect the choices made by consumers of feeable ancillary and supplementary services. A fee based on gross revenues does not require any cost allocation, but does require auditing of revenues to ensure that licensees do not attribute revenues from feeable ancillary

or supplementary services to non-feeable services in order to reduce their fee liability. Because a fee based upon gross revenues ignores variations in the cost of providing different feeable ancillary or supplementary services, it will affect consumer choices among feeable ancillary or supplementary services. The magnitude of this effect depends on how much variation there is in the unit cost of different feeable ancillary or supplementary services. If the costs are quite similar, the effects will be minor. Notwithstanding any differences in cost, a smaller fee on gross revenues will reduce the impact on consumer choice. A variant on the gross revenue fee is a hybrid fee, consisting of a flat fee combined with a percentage of gross revenues. This structure would not further affect consumers' choices among feeable ancillary or supplementary services and would place a fixed floor under the amount recovered in return for use of the public spectrum. A fee based on net revenues or incremental profits presents additional accounting challenges, because it requires assigning costs to each feeable ancillary or supplementary service. Apportioning common costs among services may be quite difficult, but determining service-specific incremental costs could be less difficult. A fee based on net revenues or incremental profits could make consumers' choices among feeable ancillary or supplementary services more efficient. The paragraphs below describe each of these options, and explain the Commission's inclination to favor a formula that incorporates gross revenues as an element.

#### *Auction-Related Fee*

The statute requires that the fee "to the extent feasible" equal but not exceed, over the term of the license, the amount that would have been realized at auction. There are significant obstacles, however, to basing the fee directly on such a spectrum-auction model. Were it possible to construct, an auction model would provide some guidance in valuing the DTV spectrum. However, spectrum auctions that have been held to date, such as those conducted for licenses to provide personal communications services, took place in circumstances so different from those in which a fee is to be assessed for the ancillary or supplementary use of DTV capacity that they are not necessarily applicable. Depending upon a variety of technological and regulatory factors including what services are authorized, auctioned spectrum may be usable either for more or fewer kinds of services than those authorized on the

DTV spectrum. Moreover, the process of assessing a fee for feeable ancillary or supplementary use of DTV capacity involves setting a fee for the use of the assigned spectrum for any number of services at different times. The relative market demand among services may change month-to-month, day-to-day, or hour-by-hour. In addition, different types of services may require different amounts of capacity. For example, at any given instant HDTV may require the entire 20 Mbps payload capacity while standard definition television programming requires far less capacity. Moreover, a licensee providing free, advertiser-supported programming on its DTV channel, whether in the form of HDTV or multiple SDTV streams, is exempt from the statute's fee requirement. Thus, it is difficult to identify market transactions that involve the transfer of spectrum usage rights equivalent to that capacity which DTV licensees may use to provide feeable ancillary or supplementary services. A fee directly tied to the auction-model estimate of the value of the capacity used for particular feeable ancillary or supplementary services would necessarily be a moving target, would involve innumerable unknown variables, and would be difficult if not impossible to assess. Given these problems, the Commission is initially disinclined to base the fees on a model that would seek to simulate the revenue that would be generated from an auction. The language of the 1996 Act provides flexibility in this regard, stating that the Commission should use the auction value "to the extent feasible."

#### Relationship Between the Value of the DTV Spectrum and Revenues

The Commission believes that a fee program can be constructed that satisfies the statutory directive through the imposition of a fee based upon revenues received from the feeable ancillary or supplementary use of the DTV capacity. The relationship between the value of the DTV capacity used in the provision of feeable ancillary or supplementary services and the revenue produced from the provision of those services can be demonstrated using microeconomic theory. It may, therefore, be possible to establish a fee program as required by the 1996 Act based upon some measure of revenues received from these services.

More specifically, where DTV capacity is viewed in economic terms as an input of production used to produce a given ancillary or supplementary service, and the capacity can be combined with other inputs of

production, such as equipment, programming, and labor in variable proportions to produce the service, it is possible to postulate a relationship between variable quantities of DTV capacity and the quantity of the service actually produced, holding constant all other inputs of production. Whatever the nature of the actual empirical input-output relationship, it will reflect the economic principle of diminishing returns to DTV capacity as a variable input of production, if the other inputs of production are held constant. In other words, all other things remaining the same, an increase in the quantity of digital capacity used to produce a given feeable ancillary or supplementary service will result in the production of increasing quantities of the ancillary or supplementary service although the rate of increase will diminish as the increasing quantity of capacity is forced to work with fixed quantities of all other inputs of production. The relationship between the quantity of DTV capacity used in production and the diminishing rate of increase in total output is called, in graphical terms, a marginal product curve.

Microeconomic theory demonstrates that the marginal product curve represents a firm's demand curve for a single variable input of production, or, here, a broadcaster's demand for digital capacity for producing feeable ancillary or supplementary services. Theory also shows that a profit-maximizing firm will use an amount of the variable input of production (DTV capacity) that equates the marginal product (or incremental change in total output produced resulting from an incremental change in the amount of DTV capacity used in production) of the variable input or DTV capacity, multiplied by the unit market price of the specific ancillary or supplementary service, with the unit price of the input (DTV capacity) itself. In the case of DTV capacity as a variable input of production, there is no market-determined price established by auction which can be equated with the value of marginal product ("VMP"), i.e., marginal product multiplied by the unit market price of a specific ancillary or supplementary service. Within the range of efficient production described by the empirical input-output relationship, the value of marginal product curve represents the implicit value to the broadcaster of DTV capacity used to produce feeable ancillary or supplementary services. Moreover, it can be shown that VMP may be interpreted as a measure of incremental revenue attributable to a one unit increase in the quantity of DTV capacity

used to produce a given ancillary or supplementary service. Multiplying the implicit unit value of DTV capacity by the corresponding quantity of capacity actually used in providing a given service provides an estimate of the implicit market value of that particular quantity of capacity for that particular broadcaster providing that specific service. The ratio of this implicit value of DTV capacity to some measure of revenues generated by the sale of the specific feeable ancillary or supplementary service provides a conceptual basis for relating the value of the capacity to service revenues.

This conceptual approach can only approximate the implicit value of DTV spectrum over a range of possible quantities of the DTV capacity actually used to produce specific ancillary or supplementary services, since market-determined unit prices of DTV spectrum are unavailable. The Commission believes that the VMP curve provides some evidence of the implicit value of DTV capacity used to provide each specific feeable ancillary or supplementary service and, therefore, provides a conceptual basis for estimating the market value of such spectrum within the range of efficient production of feeable ancillary or supplementary services.

#### Fee Based Upon Net Revenues

The value of the DTV capacity used for feeable ancillary or supplementary services may be estimated through the net revenues from each such service provided. Net revenue is defined as revenue from a service less incremental costs and a portion of joint and common costs. The Commission believes that this revenue proxy for the auction value is one means of satisfying the criteria of the 1996 Act. A fee could be computed as a percentage of net revenues derived from each feeable ancillary or supplementary service. Such fee has the additional effect of allowing broadcasters to build their feeable ancillary or supplementary services to the break-even point without the assessment of a fee, fostering the development of these new services. Ascertaining the costs involved in calculation of net revenues may, however, be problematic. Such a determination would necessitate the apportionment of common expenses between and among free television services offered on a licensee's DTV capacity and each feeable ancillary or supplementary use of its DTV capacity. The Commission has concerns as to whether this information will be readily and reliably available. The Commission seeks comment on the burden such a fee

program would impose on broadcasters and on Commission staff in the audit and review process.

#### Fee Based Upon Incremental Profits From Specific Services

An alternative to such a cost accounting approach that would avoid the problem of the allocation of costs shared by multiple broadcasting and ancillary or supplementary services is assessing the fee on the difference between the incremental gross revenues for a given feeable ancillary or supplementary service and the incremental economic costs associated with the production of the service. The service-specific incremental cost would include the costs of all directly-attributable inputs of production, such as labor and equipment, and the economic depreciation and rate of return on any specific capital assets that are used exclusively in the production of a given feeable ancillary or supplementary service. Any costs, either variable or fixed, that are shared in the production of the advertiser-supported television service and an ancillary or supplementary service would be omitted in the calculation of profit. This approach has an advantage over the net revenue approach of reduced auditing requirements since joint and common costs do not have to be allocated. Nevertheless, due to the accounting and enforcement difficulties, especially the potential need to conduct audits, the Commission remains concerned about the feasibility of the incremental profits fee. The Commission seeks comment on the costs to broadcasters and the Commission of the specific proposal that DTV spectrum fees be based on the calculated profit for each feeable ancillary or supplementary service. In particular, what type of studies or recordkeeping will be required to estimate service-specific incremental cost? Will the Commission need to prescribe specific cost accounting rules to insure consistent and uniform calculations of incremental cost for purposes of calculating service-specific profit? Will the costs to broadcasters and the Commission of calculating and auditing the computation of service-specific profit exceed the benefit of avoiding whatever inefficiency in consumption may be induced by a fee based on gross revenues?

#### Fee Based Upon Gross Revenues

A fee assessed as a percentage of a licensee's gross revenues from the provision of feeable ancillary or supplementary services would be consistent with the 1996 Act and would avoid some of the infirmities of the fee

based upon net revenues described above. Moreover, the Commission believes a fee based upon a percentage of gross revenues could foster our goal of creating a fee structure which does not dissuade broadcasters from offering feeable ancillary and supplementary services. Such a fee would be straightforward to assess and calculate; the licensee would be required to report its gross revenues from feeable ancillary or supplementary services and to calculate a fee based upon a percentage of these revenues. In addition, a fee set at a percentage of gross revenues provides broadcasters a more certain fee amount to use in their long term planning and decisions.

#### Hybrid Fees

Another possible fee structure is a two-part, tariff-like fee, in which the fee is comprised of a combination of a flat dollar amount and a percentage of gross revenues. Compared to a fee based purely on a percentage of gross revenues, a hybrid fee would include an element—the flat fee—that would provide a uniform means of preventing unjust enrichment and recover a portion of the value of the spectrum consistent with the statute. Moreover, a flat fee component would permit us to set the percentage rate of gross revenues at a lower level, thus avoiding a fee program that dissuades broadcasters from offering feeable ancillary and supplementary services. A flat amount, however, would be an up-front cost, which could serve as a disincentive to broadcasters to provide ancillary or supplementary services. Given the statutory requirement that a fee be imposed on feeable ancillary and supplementary uses, a flat fee may be appropriate even if it does discourage some such uses. The addition of a percentage of gross revenues to the flat rate could prevent the unjust enrichment that might result from a flat fee, by recovering some percentage of gross revenues in excess of the up-front payment. The Commission invites comment on the two-part fee proposal. The Commission is especially interested in comments that recommend what the initial flat rate should be and explain the basis of the recommendation. Would the initial flat rate discourage broadcasters' institution of feeable ancillary or supplementary services or serve as an incentive to broadcasters to further develop feeable ancillary or supplementary services once established?

#### Percentage Rate of Fee

If the fee is assessed as a percentage of revenues or incremental profits, the

percentage rate of the fee, more than the process by which it is derived will determine the degree to which the fee affects broadcasters' decisions. The 1996 Act exempts free broadcasting services from any such fees, thus to some extent creating an incentive for DTV licensees to use this capacity for free broadcasting services in addition to the one FCC-mandated free television service. This is consistent with the Commission's previous statement that "the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service." The greater the fee, the greater the incentive created by the fee for a broadcaster to use its assigned spectrum to provide free, over-the-air broadcast programming instead of subscription programming or other feeable ancillary or supplementary services. The lower the fee, the more flexible the broadcaster may be in serving audience demand for services and in choosing the mix of services it provides. The Commission seeks comment as to the types of services broadcasters may provide using DTV capacity. The Commission is particularly interested in DTV licensees' plans for the provision of feeable ancillary or supplementary services. To the extent that commenters can estimate revenues at this time, the Commission seeks information as to the revenues anticipated from the use of the DTV capacity for feeable ancillary or supplementary services.

The percentage rate of the fee must reflect the statutory requirements that the fee recover a portion of the value of the spectrum used for these services, avoid unjust enrichment, and approximate the revenue that would have been achieved had these services been licensed through an auction. The Commission asks commenters to take the statutory requirements and policy goals into account in proposing particular percentage rates. The Commission seeks comment on how to factor in permitting broadcasters flexibility to provide feeable ancillary or supplementary services in establishing an appropriate percentage rate for the fee. The Commission is reluctant to set the percentage rate so high that it would dissuade broadcasters from providing feeable ancillary or supplementary services. The Commission asks commenters to explain how the percentages they propose implicate this consideration. The Commission seeks comment on what percentage would be appropriate for the fee, taking into account the various proposals for assessing a fee. Clearly, a fee based upon gross revenues will be set at a lower

percentage rate than a fee based upon net revenues or incremental profits. Similarly, the percentage rate of a fee incorporated into a hybrid approach will be lower than the percentage rate of a fee that is not additional to an up-front payment. Commenters are encouraged to make specific recommendations as to the level of the fee and type of fee assessment program to which the fee is to be tied and to provide evidence to build a record supporting those recommendations. For example, should the fee be set at one percent or less of gross revenues generated from feeable ancillary and supplementary services, or up to a more substantial ten percent of gross revenues?

An additional consideration is whether different feeable ancillary or supplementary services should be subject to fees set at different percentage rates. A varying percentage rate could have a number of disparate effects. Different rates for different services might create incentives for broadcasters to offer services with lower fees over services with higher fees and could affect broadcasters' choice from among alternative feeable ancillary or supplementary uses. On the other hand, a varying percentage rate fee could be used to adjust the costs to broadcasters of providing feeable ancillary or supplementary services to reflect the different costs to competitors offering analogous services on spectrum purchased at auction or on spectrum not obtained at auction or through technologies that are not spectrum-based. Another consideration is whether the percentage rate of the fee should vary based upon the time of day during which the service is being provided or other factors. The Commission seeks comment on the imposition of a varying percentage rate fee.

The statute provides for the periodic adjustment of the fee, requiring that the fee "be adjusted by the Commission from time to time in order to continue to comply" with the 1996 Act. While this provision generally gives us the authority to recalculate the fee once DTV is established and feeable ancillary or supplementary services are being offered, it also raises the possibility that the fee be set at a lower percentage rate at the outset. The assessment of a lower initial percentage rate would allow broadcasters a greater percentage of gross revenues during the build-out of DTV service and would also provide the Commission the opportunity to adjust the percentage rate after gaining more information concerning the nature of the services offered by licensees. The periodic adjustment of the fee allows the Commission to ensure that the fee

program continues to meet the requirements of the statute, including the prevention of unjust enrichment and the recovery of a portion of the value of the spectrum. For example, the fee program could be adjusted where it is shown that it has given DTV licensees an unfair advantage in the provision of their feeable ancillary or supplementary services as compared with their nonbroadcast competitors providing analogous services on spectrum licensed through a competitive bidding process.

#### Noncommercial Television Licensees

In their Petition for Reconsideration of the Fifth Report and Order, the Association of America's Public Television Stations and the Public Broadcasting Service ("APTS/PBS") requested that the Commission exempt public television licensees from any obligation to pay fees when they offer feeable ancillary or supplementary services on their DTV capacity as a source of funding for their public television operation. APTS/PBS argue that the revenues from the remunerative provision of feeable ancillary or supplementary services on their DTV capacity may provide a revenue stream to support their noncommercial broadcasting activities.

To the extent public television licensees ultimately offer feeable ancillary and supplementary services, the Commission must determine whether and in what circumstances they are subject to fees for these services. The Commission seeks comment on the argument that noncommercial television licensees should be exempt from fees or subject to lower fees. Is such relief consistent with the 1996 Act's requirement that a fee be collected where the DTV spectrum is used for feeable ancillary or supplementary services for which a subscription fee is charged or compensation is received other than advertising revenues? If so, what form should such an exemption take? Should noncommercial DTV licensees be exempt from the fee where they offer revenue producing feeable ancillary or supplementary services as a source of funding for public television? If noncommercial licensees are subject to a fee for the feeable ancillary or supplementary use of the DTV capacity, should the fee be assessed at the same percentage as the fee for commercial licensees or at a lower rate? If noncommercial broadcasters are exempt from the fee, or assessed a reduced fee what effect would this have on competing providers of these services?

#### Implementation

The Commission proposes to employ similar procedures to those it currently uses for the administration of its filing fees, regulatory fees, and auction revenue programs. Further, it proposes to generally follow the same reporting and filing requirements as currently exist for other programs. The Commission seeks comment on the proposed means of implementing and collecting the fee and on any special circumstances that merit an exception to current processes.

#### IV. Conclusion

The 1996 Act required the Commission to assess fees on the provision of feeable ancillary or supplementary services over the DTV spectrum. The Commission issues this Notice of Proposed Rule Making to seek comment on the fee assessment programs proposed herein.

#### V. Administrative Matters

##### *Initial Paperwork Reduction Act of 1995*

This Notice proposes a new fee assessment program which may contain an information collection requirement. As part of our continuing effort to reduce paperwork burdens, the Commission invites the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collection contained in this Notice, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due at the same time as other comments on this Notice; OMB comments are due 60 days from the date of publication of this Notice in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Timothy Fain, OMB Desk Officer, 10236

NEOB, 725—17th Street, N.W., Washington, DC 20503 or via the Internet to [fain\\_t@al.eop.gov](mailto:fain_t@al.eop.gov).

#### *Ex Parte Rules*

This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under section 1.1206(b) of the rules. 47 CFR 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 CFR 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

#### *Initial Regulatory Flexibility Analysis*

With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A and summarized below. As required by the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected significant economic impact on small entities by the policies and rules proposed in this Notice. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, the Commission asks a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this Notice. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, but they must have a distinct heading designating them as responses to the IRFA.

#### **VI. Initial Regulatory Flexibility Analysis**

As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this Notice. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided

above. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

#### *Reasons Why Agency Action Is Being Considered*

The 1996 Act directed the Commission to adopt regulations allowing licensees to use a portion of the DTV spectrum to provide feeable ancillary or supplementary services and to establish a program to assess and collect a fee for these services. In the Fifth Report and Order the Commission established rules permitting broadcasters to offer feeable ancillary or supplementary services on the DTV spectrum. As directed by Congress, in this proceeding the Commission proposes a means of assessing and collecting a fee for the feeable ancillary or supplementary use of the DTV spectrum.

#### *Need For and Objectives of the Proposed Rule Changes*

The 1996 Act specified that the Commission shall establish a program to assess and collect fees for the feeable ancillary or supplementary use of the DTV capacity. Congress set forth the following objectives to be achieved by the assessment of the fee: First, that the fee recover a portion of the value of the DTV capacity; second, that the fee prevent the unjust enrichment of broadcast licensees using the DTV capacity to provide services for which they receive revenues other than advertising revenues; third, that the fee 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" in an auction of the spectrum; and finally, that any free broadcasting service which relies upon commercial advertisements rather than subscription fees or other compensation for its revenues be exempt from the fee requirement. In the Fifth Report and Order the Commission expressed its objective that broadcasters develop innovative uses of the DTV spectrum and be free to respond to market demand for feeable ancillary or supplementary services provided over this spectrum. This proceeding should achieve the objectives set forth in the 1996 Act and in the Fifth Report and Order.

#### *Legal Basis*

Authority for the actions proposed in this Notice may be found in sections 4(i), 303(r), 336 and 403 of the Communications Act of 1934, as

amended, 47 U.S.C. 154(i), 303(r), 336 and 403.

#### *Recording, Recordkeeping, and Other Compliance Requirements*

The Notice proposes a new fee assessment program which may contain an information collection requirement. In general, the proposed fee assessment programs which would assess a fee for feeable ancillary or supplementary services based upon revenues derived from these services would require broadcasters to report their revenues derived from these services. Certain alternative fee assessment proposals may require more information from broadcasters than would other proposals. In the Notice, the Commission has proposed a fee assessment program that seeks to minimize the administrative and reporting burdens on broadcast licensees.

#### *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply*

Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. The RFA 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." In addition, the RFA, generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. 632. 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"). 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 SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**."

The proposed rules and policies will apply to television broadcasting licensees. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business. Television broadcasting stations consist of 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 are establishments primarily engaged in television broadcasting and which produce taped television program materials. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,563 operating television broadcasting stations in the nation as of October 31, 1997. For 1992 the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.

Thus, the proposed rules will affect many of the approximately 1,563 television stations; approximately 1,200 of those stations are considered small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

In addition to owners of operating television stations, any entity who seeks or desires to obtain a television broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television broadcast license is unknown.

*Federal Rules That Overlap, Duplicate, or Conflict With the Proposed Rules*

The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

*Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives*

This Notice solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. The proposed rules and policies are required to implement provisions of the 1996 Act. These proposed rules and policies may affect broadcast television licensees, some of which are small businesses. The Commission believes that the proposed rules and policies may be necessary to the recovery of a portion of the value of the public spectrum and to promote the development of innovative uses of the DTV capacity. The Commission seeks comment on the alternatives proposed in the *Notice* and on whether there is a significant economic impact on any class of small licensee or permittee as a result of any of the proposed approaches.

**List of Subjects in 47 CFR Part 1**

Television, Television broadcasting.

Federal Communications Commission.

**Magalie Roman Salas,**  
*Secretary.*

[FR Doc. 98-144 Filed 1-5-98; 8:45 am]

BILLING CODE 6712-01-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[I.D. 122397D]

**New England Fishery Management Council; Meeting**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Public meeting.

**SUMMARY:** The New England Fishery Management Council (Council) will hold a 2-day public meeting on January 14 and 15, 1998, to consider actions affecting New England fisheries in the exclusive economic zone.

**DATES:** The meeting is scheduled for Wednesday, January 14, 1998, at 10 a.m., and Thursday, January 15, 1998, at 8:30 a.m.

**ADDRESSES:** The meeting will be held at the Colonial Hilton Resort, 427 Walnut Street, Wakefield, MA; telephone (617) 245-9300. Requests for special accommodations should be addressed to the New England Fishery Management Council, 5 Broadway, Saugus, MA 01906-1097; telephone: (781) 231-0422.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council (781) 231-0422.

**SUPPLEMENTARY INFORMATION:**

**Wednesday, January 14, 1998**

After introductions the Council meeting will begin with a Stock Assessment Workshop advisory report on the status of spiny dogfish, surf clams, weakfish, and striped bass. Following the report, the Monkfish Committee will provide information on recent changes to the management measures proposed for inclusion in Amendment 9 to the Northeast Multispecies Fishery Management Plan (Multispecies FMP) and review the concerns of the Mid-Atlantic Fishery Management Council.

During the afternoon session, the Interspecies Committee will outline its priorities for the upcoming year: Long-term objectives and a Council strategic plan; approaches to easing management restrictions; consistency of Multispecies FMP objectives; the Multispecies FMP

exempted fisheries program; concerns over latent effort in some fisheries; inconsistencies in vessel upgrading, replacement, and permit-splitting restrictions; policy statement on the introduction of harvesting innovations, and new fisheries technology; NMFS's proposed list of authorized gear/fisheries; area management of fisheries; and the Atlantic Coastal Cooperative Statistics Program fishing vessel logbook form.

The Overfishing Definition Review Panel will discuss new overfishing definitions developed to comply with the Sustainable Fisheries Act (SFA); species will include Atlantic sea scallops, sea herring, silver hake, and possibly other groundfish species. The Sea Scallop Committee will review its discussions on alternatives to reach the new SFA-mandated overfishing targets, mechanisms for opening and closing management areas, and the inclusion of days-at-sea (DAS) leasing as a measure to be implemented through a framework adjustment to the Atlantic Sea Scallop Fishery Management Plan (Scallop FMP). The Council also will discuss further the recommendation to close mid-Atlantic areas to protect small scallops and the development of a framework adjustment to allow scalloping in areas where it is currently prohibited because of groundfish conservation concerns. Finally, the Council will consider additional management measures for implementation in 1998, such as other reductions in DAS to meet the Scallop FMP fishing mortality objectives.

**Thursday, January 15, 1998**

Thursday's meeting will begin with reports from the Council Chairman, Executive Director, NMFS Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, and representatives of the Coast Guard and the Atlantic States Marine Fisheries Commission. The Council will discuss and seek approval of final action on Framework Adjustment 25 to the Multispecies FMP. The adjustment will include the following measures to meet the 1998 fishing year rebuilding plan objectives: One or a combination of three options for area closures in the Gulf of Maine (sequential one or two month closures that progress from the Cape Cod to Penobscot Bay areas during March through September, with additional areas closed seasonally or, in one option, year-round); 400-1,000 lb/day (181.4-453.6 kg/day) trip limit for