

Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 98-33064 Filed 12-11-98; 8:45 am]

BILLING CODE 6712-01-U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 98-213; RM-9352]

Radio Broadcasting Services; Clifton, IL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by STARadio Corporation proposing the allotment of Channel 297A at Clifton, Illinois, as the community's first local aural transmission service. Channel 297A can be allotted to Clinton in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5.0 miles) south to avoid a short-spacing to the licensed site of Station WZVN(FM), Channel 296A, Lowell, Indiana. The coordinates for Channel 297A at Clifton are North Latitude 40-52-00 and West Longitude 87-58-00.

DATES: Comments must be filed on or before January 25, 1999, and reply comments on or before February 9, 1999.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, his counsel, or consultant, as follows: Michael Ruger, Esq., Baker & Hostetler, LLP, 1050 Connecticut Ave., NW., Suite 1100, Washington, DC 20036-5304 (Counsel for Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 98-213, adopted November 25, 1998, and released December 4, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

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Radio broadcasting.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 98-203; FCC 98-304]

Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission initiates this *Notice of Proposed Rule Making* to seek comment on whether we should impose limits on activities undertaken by noncommercial educational ("NCE") television licensees on their DTV capacity. The request for clarification made by AAPTS/PBS raises significant issues regarding the service and funding opportunities made available to NCE stations as a result of the transition to digital transmission. We recognize the

importance of this issue to the future of public television as it enters the digital age. Therefore, we believe it is appropriate to seek further comment on the AAPTS/PBS petition in order to establish a more complete record on the issues it raises.

EFFECTIVE DATES: Comments are due on or before January 28, 1999; reply comments are due on or before March 1, 1999.

ADDRESSES: Federal Communications Commission, 445 12th Street, Room TW-A306, SW, Washington, DC 20554. 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 C-1804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, NW, Washington, DC 20503 or via the Internet to fain_t@al.eop.gov. Comments may also be filed by using the Commission's Electronic Comment Filing System (ECFS), via the Internet to <http://www.fcc.gov/e-file/ecfs.html>.

FOR FURTHER INFORMATION CONTACT: Jane Gross or Robert Somers, Policy and Rules Division, Mass Media Bureau (202) 418-2130.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making*, MM Docket No. 98-203, adopted November 19, 1998 and released November 23, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, NW, Washington, DC, 20036, (202) 857-3800.

Synopsis of Notice of Proposed Rulemaking

I. Introduction

1. In our *Fifth Report and Order*, 62 FR 26966 (May 16, 1997), in the digital television ("DTV") proceeding, we adopted rules implementing a transition to digital technology for all existing television broadcasters. 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 television service in accordance with section 336 of the Telecommunications

Act of 1996 ("1996 Act"). 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 these services do not derogate the free digital television service.

2. 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 on the ability of public television stations to use excess capacity on DTV channels for commercial purposes. In opposing this request in part, Media Access Project and other public interest parties ("MAP"), jointly argued that, while public television stations should be able to provide some revenue-generating ancillary and 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.

3. We initiate this *Notice of Proposed Rule Making* to seek comment on whether we should impose limits on remunerative activities undertaken by noncommercial educational ("NCE") television licensees on their DTV capacity. The request for clarification made by AAPTS/PBS raises significant issues regarding the service and funding opportunities made available to NCE stations as a result of the transition to digital transmission. We recognize the importance of this issue to the future of public television as it enters the digital age. Therefore, we believe it is appropriate to seek further comment on the AAPTS/PBS petition in order to establish a more complete record on the issues it raises.

4. In their Petition for Reconsideration AAPTS/PBS also requested that the Commission 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 services are used to support the licensee's mission-related activities. 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 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. In the *Notice of Proposed Rule Making*, 63 FR 460 (January 6, 1998), In the Matter of Fees

for Ancillary or Supplementary Use of Digital Television Spectrum ("Fees Proceeding"), we sought comment on AAPTS/PBS's request. In the Fees Proceeding we determined that the request for such an exemption should be considered in this proceeding. We therefore seek additional comment on this issue in light of the comments received on this issue in the Fees Proceeding and the tentative proposals outlined below.

II. Background

5. *Ancillary or Supplementary Services on DTV Capacity.* The DTV standard we adopted will allow for the simultaneous transmission of multiple streams of programming, information, and other non-broadcast services. To enable licensees to take full advantage of the opportunities provided by digital technology, the 1996 Act provided that DTV licensees may use a portion of their new DTV capacity for ancillary or supplementary services.

6. Specifically, section 336 of the Communications Act authorizes the Commission to permit DTV licensees to offer ancillary or supplementary services on their DTV capacity as long as the provision of these services does not derogate any advanced television services the Commission may require and is "consistent with the public interest, convenience, and necessity." The statute does not distinguish between commercial and noncommercial DTV licensees, nor does the legislative history of section 336 draw any such distinction.

7. In the *Fifth Report and Order* in our DTV proceeding we adopted rules to allow broadcasters the flexibility to respond to the demands of their audience by providing ancillary or supplementary services, provided that these services do not derogate the mandated free, over-the-air program service. We found that this approach would serve the public interest by fostering the provision of innovative services to the public and by permitting the realization of the full possibilities of DTV. We recognized the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services. We also found that allowing such services contributes to efficient spectrum use and can expand and enhance the use of existing spectrum. At the same time, we noted our expectation that the fundamental use of the DTV licenses will be for the provision of free over-the-air television.

8. We clarified that "we will consider as ancillary or supplementary any service provided on the digital channel

other than free, over-the-air video services." We noted that this approach is consistent with Commission precedent that has treated telecommunications services provided by an NTSC station other than the regular television program service as ancillary. We also did not impose a requirement that the ancillary or supplementary services provided by the broadcaster must be broadcast-related. We explained that such ancillary or supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmissions, teletext, interactive services, and audio signals.

9. Section 336(e)(1) of the 1996 Act also 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." The Act specifically exempts from the fee any service which relies only upon "commercial advertisements used to support broadcasting for which a subscription fee is not required." In our Fees Proceeding we have adopted rules to implement this provision with respect to commercial DTV licensees.

10. *Noncommercial Educational Television.* Throughout the DTV proceeding, the Commission has acknowledged that noncommercial licensees will face unique problems in the transition to DTV. In the *Fifth Report and Order*, we recognized the high quality programming service noncommercial stations have provided to American viewers over the years and reaffirmed our commitment to noncommercial educational television service. We also observed that public broadcasters have been pioneers in experimenting with the capabilities of digital technology. We further noted our awareness of the unique financial difficulties faced by noncommercial stations and reiterated our view that these stations will need and warrant special relief to assist them in the transition to DTV. In this regard, for example, we applied a six-year construction period timetable to noncommercial stations, the longest permitted to any category of DTV applicant. We also found, however, that at that time it was premature to attempt to resolve the issue of what additional special treatment, if any, should be afforded to noncommercial broadcasters. We stated that we would

consider these issues in our periodic reviews examining the progress of the DTV transition.

11. *AAPTS/PBS's Request for Clarification—Use of DTV Capacity.* In its Petition for Reconsideration of the *Fifth Report and Order*, AAPTS/PBS requested clarification on the ability of public television stations to use capacity on DTV channels for commercial purposes. As neither section 336 nor the Commission's DTV rules distinguishes between commercial and noncommercial stations, AAPTS/PBS argued that both are intended to allow public stations to offer ancillary or supplementary services for revenue-generating purposes.

12. AAPTS/PBS states that public television stations are exploring various revenue generating options such as: leasing capacity to other digital operators; joint ventures with commercial entities; and subscription channels for popular PBS programming. It emphasizes the importance of the revenue potential of these services in order to continue public television's commitment to providing a high quality noncommercial, educational broadcast service. AAPTS/PBS has noted that the multiple programming streams offered by the extra capacity of digital transmission will enable public broadcasters to extend the reach of their educational services. New expanded "multicast" programming channels planned by public television as a result of multicasting capabilities include: PBS's Ready-to-Learn service for children; K-12 instructional programming; college credit telecourses; workforce training; and local public affairs programming. AAPTS/PBS notes that many public stations are relying on the revenue from ancillary or supplementary services to help fund the construction of DTV facilities and the operation of both DTV and NTSC facilities. Such flexibility is crucial, it maintains, as federal and corporate funding have become increasingly difficult to obtain.

13. Specifically, AAPTS/PBS requests that the Commission clarify that § 73.621 of its rules, which requires public stations to provide a noncommercial service, is not applicable to ancillary or supplementary services provided on DTV capacity. It proposes that the Commission make clear that, as long as a public station provides one noncommercial broadcast service pursuant to § 73.621, it can use its additional DTV capacity as a source of revenue, subject only to the requirement of non-derogation in § 73.624.

14. AAPTS/PBS notes that its proposal to use its additional DTV capacity as a source of revenue is consistent with existing §§ 73.621(f) and (g), and 73.646(b) and (d) of the Commission's rules, which allow public television stations to use the vertical blanking interval ("VBI"), and auxiliary broadcast services for revenue generating activities. It argues that use of their DTV capacity as a source of revenue follows rationally from these provisions. Similarly, public television licensees seek the opportunity to use that portion of their DTV spectrum that is not necessary for their primary public television mission as a means of financing their DTV broadcast operations.

15. In opposing AAPTS/PBS's request in part, MAP requests that the Commission make clear that any leased or joint-venture programming undertaken by public television licensees that is advertiser-supported would violate the advertising ban of section 399B of the Act. MAP argues that AAPTS/PBS's request is unclear as to what specific programming would be offered or whether it would comport with the requirements of section 399B. For example, MAP specifies programming that it believes would violate the advertising ban as "programming that is predominantly utilized for the transmission of sales presentations or program length commercials, such as home shopping or infomercials, or that otherwise encourages or solicits the purchase of goods and services from commercial entities." MAP also argues that because section 336 of the Act does not explicitly permit noncommercial stations to broadcast advertisements on any ancillary or supplementary services, AAPTS/PBS's argument that section 336 extends to both commercial and noncommercial entities is possible only if the inconsistent requirements of section 399B were repealed. MAP notes that, while public television stations should be able to provide some revenue-generating ancillary services, these services must be consistent with the nature of noncommercial public television as set forth in that section.

16. In reply, AAPTS/PBS acknowledges that the advertisement ban of section 399B will apply to the primary noncommercial broadcast service, but argues that it should not extend to the provision of ancillary and supplementary services on DTV spectrum. AAPTS/PBS points out that section 399B was enacted by Congress in 1981 in an effort to reduce public television's dependence on federal appropriations. Although Congress was

also concerned that public broadcasting's primary broadcasting service remain noncommercial, AAPTS/PBS notes that the balance Congress struck in section 399B was to allow such remunerative activities, provided that the public broadcast service remained noncommercial.

17. AAPTS/PBS also notes that previous Commission decisions have allowed noncommercial licensees to provide subsidiary communications services without regard to whether they include advertisements. AAPTS/PBS maintains that even if the section 399B advertising restrictions are found to apply to these services, the Commission has discretion under section 336(a)(2) to allow public TV licensees to include advertiser-supported services if it finds these services to be in the public interest. AAPTS/PBS urges an interpretation in which the advertising ban in section 399B would continue to apply to the primary noncommercial broadcast service, while any ancillary and supplementary use of DTV channels would be free from the restrictions of this section.

18. *AAPTS/PBS's Request for Exemption From Fees under section 336(e).* In its Petition for Reconsideration of the *Fifth Report and Order*, AAPTS/PBS requested that the Commission 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 services are used to support the licensee's mission-related activities." We sought comment in the Fees Proceeding on whether noncommercial television licensees should be exempt from such fees or subject to a nominal fee where they offer ancillary and supplementary services as a source of funding for public television.

19. In its comments in the Fees Proceeding, AAPTS/PBS argues that public television stations should be exempt from such fees because the statutory purposes of section 336(e)(2) do not apply to services provided by public television licensees. AAPTS/PBS notes that if these revenues would be used to support noncommercial activities, there would be no need to "recover" a portion of the value of the spectrum for the public and that an exemption would not result in any "unjust enrichment". AAPTS/PBS also argues that, as public television stations are not auctioned, there is no equivalent amount that would have been received at auction. Further, AAPTS/PBS contends that such an exemption would be consistent with other Congressional

and regulatory policies, and that the Commission has concluded in other proceedings that the imposition of a fee on public broadcasting would dilute the financial support paid to public broadcasting by Congress.

20. MAP generally supports allowing public broadcasters to be exempt from such fees, but only if they do not provide advertiser-supported ancillary and supplementary services. MAP asserts that the statute makes no distinction between noncommercial and commercial licensees, either in their ability to provide advertiser-supported ancillary and supplementary services, or in their obligation to pay fees on such services. We have determined that AAPTS/PBS's request for such exemption should be considered in this proceeding. Accordingly, we seek additional comment on this issue in light of the comments received in the Fees Proceeding and the tentative proposals set forth in this Notice.

III. Request for Comments

21. *Noncommercial Educational Television.* Public broadcasting's mission has long been to provide quality educational and cultural programming to a wide and diverse audience. Noncommercial educational television stations have also been at the forefront of exploring innovative services and new technologies to accomplish this mission. These stations also appear poised to take full advantage of the opportunities made available by digital technology. We fully recognize the public interest benefits inherent in the services that may be offered by NCE licensees on the digital spectrum.

22. As we stated in the Fifth Report and Order, granting broadcasters the flexibility to offer the ancillary or supplementary services they choose will help them attract consumers to the service, which will, in turn, speed the transition to digital television. We stated that such flexibility will encourage entrepreneurship and innovation, will contribute to efficient spectrum use, and will expand and enhance use of existing spectrum. We seek comment on whether these same considerations apply to the NCE context.

23. Throughout the development of the public broadcasting system, both Congress and the Commission have continually balanced the desire to maintain the integrity of its noncommercial status with the fact that public television must have access to adequate funding in order to survive. Congress enacted the Public Broadcasting Act of 1967 in response to increasing public demand for the government to sponsor independent

sources of broadcast programming as an alternative to commercial broadcasting. This legislation sought to promote the development of noncommercial, educational broadcasting stations and established the framework for today's public broadcasting system.

24. Public television has since flourished and developed from an experimental educational service into the valuable and unique programming service that exists today. The Commission has supported the goals of the public broadcasting system and promulgated rules to implement the public broadcasting provisions of the Communications Act. For example, in 1952, recognizing the important and unique role to be served by public television, the Commission reserved spectrum exclusively for the noncommercial broadcasting service.

25. We are consequently sympathetic to the relief requested in the AAPTS/PBS petition. The petition describes a range of revenue-generating ancillary or supplementary services that could help NCE stations flourish in a digital age. We seek comment on these new services and specifically on NCE stations' plans for using excess digital capacity. We note that the costs of converting to digital service will be considerable, and that many NCE stations rely on public funds to provide the build-out to DTV service. At the same time we are sensitive to the concerns raised by MAP that in permitting NCE stations flexibility in providing such services we must be consistent with section 399B and also not undermine their fundamental mission of providing a noncommercial educational broadcast service. To help us determine the limits, if any, on the remunerative activities of NCE licensees on their DTV capacity, we seek comment below on a number of issues.

26. *Noncommercial Educational Television: Funding Issues.* Many NCE stations have traditionally received most of their funding from federal, state and local government sources in addition to corporate and viewer contributions. In its request for clarification, AAPTS/PBS notes the uncertainty of continued federal financial support and the tightening of support from the corporate sector. We seek comment on such funding trends and on NCE licensees' specific funding needs to convert to digital and maintain a robust NCE television service. We also seek comment on the appropriate role of the Commission in ensuring that such funding needs are met.

27. *Ancillary or Supplementary Services.* In the *Fifth Report and Order*, we adopted rules implementing section

336 to allow broadcasters the flexibility to respond to the demands of their audience by providing ancillary or supplementary services, including subscription television, providing that these services do not derogate the mandated free, over-the-air program service. As an initial matter, we generally invite comment on AAPTS/PBS's request that we clarify that § 73.621 of our rules, which requires public stations to provide a noncommercial service, is not applicable to ancillary or supplementary services provided on DTV capacity. We also seek comment on whether such a clarification is consistent with the provisions of section 399B.

28. The Communications Act defines a "noncommercial educational broadcast station" and "public broadcast station," 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." In 1981, Congress amended the Communications Act to give public broadcasters more flexibility to generate funds for their operations. 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. In addition, under § 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.

29. We have previously been called on to determine the extent to which public television stations can transmit subscription television ("STV") or other revenue-generating services on their analog channels consistent with the statutory and regulatory requirements we have just described. In particular, in 1984, the Commission considered amending its rules to permit public television stations to engage in subscription television operations. The Commission stated that it "clearly has the authority [under section 399B of the Act] in particular instances and under certain circumstances to permit STV operation by public television." But the Commission expressed sympathy with concerns expressed by some parties in that proceeding that such a rule change could result in public television service, then operating with analog technology, being "dominated" by STV. It therefore

concluded at the time that it should not generally authorize such operation through a rule change.

30. The Commission nonetheless recognized that STV operations can benefit public stations as a supplementary funding source. It consequently stated that it would permit individual public television stations to engage in STV operations on a waiver basis. The Commission has also given public television stations flexibility in their use of the analog channels in other ways. In particular, the Commission has ruled that noncommercial spectrum, like commercial spectrum, can be used for remunerative ancillary services such as data delivery or teletext provided by NTSC licensees on the vertical blanking interval (VBI) and the video portion of the analog signal in accordance with section 399B of the Act.

31. The AAPTS/PBS petition raises many of the same legal and policy questions raised by our previous consideration of requests to provide STV and other revenue-generating ancillary services on analog NCE channels. Unlike the previous requests, however, the AAPTS/PBS petition concerns *digital* television, which offers significant new challenges and opportunities to NCE stations. We are inclined to permit NCE stations to take advantage of these opportunities and offer innovative ancillary and supplementary services that are remunerative and consistent with their educational mission. We therefore seek comment on whether, and under what conditions, NCE licensees should be permitted to use their DTV capacity to offer ancillary or supplementary services, including STV, on a remunerative basis.

32. In particular, we seek comment on whether and how we should amend § 73.621 of our Rules, which requires NCE stations to provide a noncommercial service that "primarily" serves the educational needs of the community. For example, should we extend this requirement to ancillary or supplementary services provided by noncommercial licensees on their DTV capacity? Should we clarify that an NCE licensee's obligation to provide a primarily educational service applies to its entire DTV bitstream? Under this proposal, NCE stations would be permitted to provide ancillary or supplementary services, but still would be required to ensure that their overall digital bitstream was primarily devoted to serving the educational needs of the community. Should we clarify that the requirement to provide a primarily educational service applies only to the single, free-over-the-air broadcast

service it is required to provide? We seek comment on these and any other options for amending § 73.621 in this regard.

33. We also seek 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. In particular, we seek comment on 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 service. We also seek comment on 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.

34. We ask commenters specifically to address how the provision of ancillary or supplementary services would affect our noncommercial channel reservation policies, regulatory treatment of noncommercial licensees, and other government support for noncommercial stations. While we are inclined to give NCE stations some flexibility in offering remunerative ancillary or supplementary services, we will continue to expect these stations to adhere to their fundamental mission of providing a noncommercial, educational broadcast service, as required by § 73.621(a) of the Commission's rules. We therefore seek comment on whether parties believe our proposed amendment to § 73.621 should incorporate any particular safeguards regarding a public television station's use of its DTV capacity to provide remunerative services to ensure that its DTV license is primarily being used for a noncommercial educational broadcast service, and that the proceeds of such services are used to support its NCE programming. We also ask commenters to address whether the accounting procedures and funding restrictions outlined in section 399B should apply to the provision of ancillary or supplementary services by NCE licensees on DTV capacity.

35. We note that in addition to those restrictions imposed by provisions in the Communications Act and the Commission's rules, the commercial activities of NCE stations are also restricted by their status as nonprofit corporations, as well as by state and local government oversight. We seek comment on the scope of these existing

limits and oversight and on the extent to which they help ensure that public television stations offering remunerative ancillary or supplementary services continue to serve their mission of providing a noncommercial educational broadcasting service?

36. *Advertising.* We also seek 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. Section 399B prohibits a public station from "making its facilities available to any person for the broadcasting of any advertisement." By its plain language, 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. 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." The Commission further clarified the definition of "broadcasting" in its 1986 *Subscription Video* proceeding. In that decision the Commission 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." 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." Based on these criteria, the Commission ruled that subscription television does not constitute broadcasting.

37. Applying these factors to the issue before us, we tentatively conclude 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 seek comment on this view. We also seek 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. Finally, we ask parties to address AAPTS/PBS's argument that even if section 399B's advertising restrictions apply to some ancillary or supplementary services, the Commission has discretion under section 336(a)(2) of the Act to allow public TV licensees to include advertiser-supported services if it finds

these services to be in the public interest.

38. *Fees Under section 336.* In the Fees Proceeding we determined that the issue of whether ancillary or supplementary services offered by noncommercial licensees are subject to fees should be considered in this proceeding. We take this opportunity to seek additional comment in light of the comments received in the Fees Proceeding and the tentative proposals outlined above. In the event that we clarify that § 73.621 does not apply to ancillary or supplementary services provided by noncommercial licensees on their DTV capacity, we seek comment on whether noncommercial licensees should be exempt from DTV fees when they offer ancillary or supplementary services as a source of funding for their mission related activities.

39. APTS/PBS submitted comments in the Fees Proceeding arguing that there is no need to "recover" a portion of the value of the DTV spectrum for the public if the revenue is used to support noncommercial services that Congress has declared to be in the public interest. APTS/PBS also argues that exemption would not result in any "unjust enrichment" because these revenues would be used to support noncommercial activities, and that as public television stations are not auctioned, there is no equivalent amount that would have been received at auction. An exemption from fees would allow public television stations to dedicate greater resources to their mission. Indeed, this reasoning has prompted Congress and the Commission to exempt public television stations from other regulatory and filing fees. We seek comment generally on APTS/PBS's arguments to exempt noncommercial licensees from fees for remunerative ancillary or supplementary services offered on their excess digital capacity.

40. We particularly seek comment on whether such an exemption is consistent with section 336. Specifically, section 336(e)(1) draws no distinction between commercial and noncommercial stations in stating that the Commission "shall establish a program to assess and collect * * * an annual fee" from DTV licensees offering subscription-based ancillary or supplementary services. Can this provision, or the criteria for establishing the fee set forth in section 336(e)(2) be interpreted to permit an exemption from such fees for noncommercial licensees? If an exemption is inconsistent with the statute, would a nominal or reduced fee be consistent with the statute? We also

ask 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.

IV. Administrative matters

41. To file paper copies formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W.; TW-A306; Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

42. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

43. *Initial Paperwork Reduction Act of 1995 Analysis.* This Notice explores the potential applicability to noncommercial broadcasters of a new fee assessment program which may contain an information collection requirement. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collection contained in the *NPRM* in the Fees Proceeding, *Notice of Proposed Rule Making* In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to section 336(e)(1) of the Telecommunications Act of 1996, MM

Docket No. 97-247, 12 FCC Rcd 22821 (1997), as required by the Paperwork Reduction Act of 1995, Public Law 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 C-1804, 445 12th Street, SW 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, NW, Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

44. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding. *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 § 1.1206(b).

45. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act, see 5 U.S.C. 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals suggested in this document. The IRFA is set forth as Attachment A. Written public comments are requested with respect to the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the rest of the *NPRM*, but they must have a separate and distinct heading,

designating the comments as responses to the IRFA. The Office of Public Affairs, Reference Operations Division, will send a copy of this *NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

46. Accordingly, *it is ordered* that pursuant to authority contained in section 4(i), 303, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 307 and 336, this Notice of Proposed Rulemaking is adopted.

47. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

48. *Additional Information.* For additional information on this proceeding, please contact Jane Gross or Robert Somers, Policy and Rules Division, Mass Media Bureau (202) 418-2130.

Initial Regulatory Flexibility Analysis

49. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the present *Notice of Proposed Rulemaking*. 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 IRFA provided above in paragraph 46. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. 603(a). In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**. See *id.*

Need For and Objectives of the Proposed Rule Change

50. In the *Fifth Report and Order* the Commission adopted rules permitting broadcasters to offer feeable ancillary or supplementary use of digital television (DTV) capacity. In their Petition for Reconsideration, the Association of America's Public Television Stations and the Public Broadcasting Service (AAPTS/PBS) requested clarification on the ability of public television stations to use excess capacity on DTV channels for commercial purposes. Media Access Project and other public interest parties jointly opposed this request, arguing

that while public television stations should be able to provide some revenue-generating ancillary and 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. AAPTS/PBS also requested that the Commission exempt, to the extent feasible, public television licensees from any obligation to pay fees when they offer ancillary services on their DTV capacity as a source of funding for their public television operation.

51. The petition describes a range of revenue-generating ancillary or supplementary services that could help noncommercial educational ("NCE") stations flourish in a digital age. The *Notice* in this proceeding notes that the costs of converting to digital service will be considerable, and that many NCE stations rely on public funds to provide the build-out to DTV service. This *Notice* seeks comment on these new services and on whether, and under what conditions, NCE licensees should be permitted to use their DTV capacity to offer ancillary or supplementary services, including subscription television, on a remunerative basis. This *Notice* also seeks comment on whether and in what circumstances NCE stations should be subject to fees for these ancillary or supplementary services.

52. *Legal Basis:* Authority for the actions proposed in this *Notice* may be found in section 4(i), 303 and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 307 and 336.

53. *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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 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." A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of 1992, there were approximately 275,801 small organizations. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

54. The proposed rules and policies will apply to television broadcasting licensees, particularly those television stations licensed to operate on channels reserved as "noncommercial educational." 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, of which 362 were noncommercial educational stations. That number has remained fairly constant as indicated by the approximately 1,583 operating television broadcasting stations in the nation as of August 31, 1998, of which 368 were noncommercial educational stations.

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

56. We seek comment on these estimates and data regarding the number of small entities affected by the proposals in this *Notice*.

Reporting, Recordkeeping, and Other Compliance Requirements

57. The Commission is not proposing any new or modified reporting, recordkeeping, information collection, or compliance requirements in this proceeding.

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

58. This *Notice* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. This proposal may ultimately benefit all noncommercial educational television stations. We seek comment on the alternatives proposed in this *Notice* and on whether there is a significant economic impact on any class of small licensees or permittees as a result of any of our proposed approaches.

Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules

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

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

[FR Doc. 98-33007 Filed 12-11-98; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapters 73 and 74

[MM Docket No. 95-31; DA: 98-2489]

Broadcast Services; Radio Stations, Television Stations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: Pursuant to the joint request of National Public Radio, the Association of America's Public Television Stations, and the Corporation for Public Broadcasting, the Chief, Mass Media Bureau, acting under delegated authority, extends the comment and reply comment deadlines in the subject proceeding for forty-five days.

DATES: Comments are now due by January 28, 1999, and reply comments are due by March 15, 1999.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554

FOR FURTHER INFORMATION CONTACT: Irene Bleiweiss, Mass Media Bureau, Audio Services Division (202) 418-2780.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order* in MM Docket No. 95-31, DA 98-2489, adopted and released December 3, 1998. The complete text of this *Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 1231 20th Street, N.W., Washington, D.C. 20036. The *Order* is also available on the Internet at the Commission's web site: <http://www.fcc.gov>.

1. On October 21, 1998, the Commission released a Further *Notice*

of *Proposed Rule Making* ("Notice") in this proceeding, which was published in the **Federal Register** at 63 FR 58358 (October 30, 1998). The *Notice* solicited comment on proposed changes to the process used to select among competing applicants for noncommercial educational broadcast stations, on reserved and non-reserved channels. The deadlines for filing comments and reply comments were set at December 14, 1998 and January 4, 1999, respectively.

2. On November 30, 1998, National Public Radio (NPR), the Association of America's Public Television Stations (APTS) and the Corporation for Public Broadcasting (CPB) filed a "Joint Motion for Extension of Time of Comment and Reply Comment Deadlines" seeking forty-five-day extensions of the comment and reply comment deadlines. They stated that they are in the process of evaluating the likely impact of the Commission's proposals on public broadcasters and of consulting with hundreds of potentially affected public television and public radio stations, but that they require additional time to complete a thorough analysis and to fully address complex issues. They state that 45 additional days are needed because of the upcoming holiday season when many public broadcasters, particularly university-owned stations, operate with minimal staffing.

3. We will grant the requested extension. Although the Commission has a policy of not routinely granting extensions of time for filing comments in rulemaking proceedings, this proceeding raises a number of complex issues concerning an entirely new process that will affect large numbers of applicants. A well-documented record will best enable an informed decision as to which options for selecting public broadcasters are most in the public interest. Additionally: (1) NPR, APTS, and CPB, through their substantial interaction with noncommercial educational broadcasters, are in a position to compile the views of many of the parties that will most directly be affected by any actions we take in this proceeding; (2) they have shown good cause why a forty-five-day extension will enable them to provide more well-informed comments; and (3) no party will be prejudiced by this extension. Rather, all may make good use of this added time to prepare and present well-supported comments on these important issues.

4. This action is taken pursuant to the authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and

303(r), and sections 204(b), 0.283, and 1.45 of the Commission's Rules.

List of Subjects in 47 CFR Parts 73 and 74

Radio broadcasting, Television broadcasting.

Federal Communications Commission.

Roy J. Stewart,

Chief, Mass Media Bureau.

[FR Doc. 98-33066 Filed 12-11-98; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 395

[FHWA Docket No. FHWA-97-2350; MC-96-28]

RIN 2125-AD93

Hours of Service of Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent to consider negotiated rulemaking process.

SUMMARY: The FHWA is announcing its intent to explore the feasibility of conducting a negotiated rulemaking to revise the drivers' hours-of-service rules and has hired two convenors for that purpose. Until that process is complete and a decision is made concerning negotiated rulemaking, the FHWA will continue to move forward with its traditional rulemaking process which began with the publication of an advance notice of proposed rulemaking in the **Federal Register** on November 5, 1996 (61 FR 57252).

FOR FURTHER INFORMATION CONTACT: Neill L. Thomas or David R. Miller, Office of Motor Carrier Research and Standards, (202) 366-4009, or Charles E. Medalen, Office of Chief Counsel, (202) 366-1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Availability

An electronic copy of this document may be downloaded using a computer, modem, and suitable communications software from the Government Printing Office (GPO) electronic bulletin board service (telephone: 202-512-1661). Internet users may reach the **Federal Register's** home page at: <http://www.nara.gov/fedreg> and the GPO's