IX. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

This final rule establishes an exemption from the tolerance requirement under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*., or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub.L. 104–4). Nor does it require special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629), February 16, 1994), or require OMB review in accordance with Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). In additions, since tolerance exemptions that are established on the basis of a petition under section 408(d) of the FFDCA, such as the exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq*.) do not apply. Nevertheless, the Agency previously assessed whether establishing tolerances, exemptions from tolerances, raising tolerance levels or expanding exemptions might adversely impact small entities and concluded, as a generic matter, that there is no adverse economic impact. The factual basis for the Agency's generic certification for tolerance actions published on May 4, 1981 (46 FR 24950), and was provided to the Chief Counsel for Advocacy of the Small Business Administration.

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (58 FR 58093, October 28, 1993), EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments. If the mandate is unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded Federal mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19,1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

X. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq*., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 1, 1998.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180— [AMENDED]

1. The authority citation for part 180 continues to read as follows:

§180.1001 [Amended]

Authority: 21 U.S.C. 346a and 371.

2. In §180.1001, by adding ''copper ammonium complex'' immediately after ''copper acetate,'' in paragraph (b)(1).

[FR Doc. 98–33117 Filed 12–15–98; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 97–247; FCC 98–303]

Fees for Ancillary or Supplementary Use of Digital Television Spectrum

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This *Report & Order* establishes a fee of five percent of gross revenues received from ancillary or supplementary services for which DTV licensees receive specified

compensation from third parties. This 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. Licensees will be required to annually report to the Commission whether they provided ancillary or supplementary subject to a fee and the amount of fees to be paid to the Commission.

EFFECTIVE DATE: January 15, 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. 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: 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 *Report & Order*, FCC 98–303, adopted November 19, 1998 and released November 19, 1998. The full text of this Commission *Report & Order* is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room TW–A306), 445 12 St. S.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 Report & Order

I. Introduction

1. With this *Report & Order* (''R&O''), the Commission establishes a program for assessing and collecting fees for the provision of ancillary or supplementary services by commercial digital television (''DTV'') licensees as required by the Telecommunications Act of 1996 (''1996 Act''), Public Law 104–104, 110 Stat. 56, section 201 (1996), codified at 47 U.S.C. 336. The rules promulgated pursuant to this *R&O* implement the criteria of the 1996 Act, establishing a fee of five percent of gross revenues received from certain ancillary or supplementary uses of the DTV bitstream. Consistent with the 1996 Act, the fee will be assessed on revenues from all ancillary or supplementary services for which the licensee receives compensation other than advertising revenues used to support broadcasting.

II. Background

2. The 1996 Act established the framework for licensing DTV spectrum to existing broadcasters, and permitted them to offer ancillary or supplementary services consistent with the public interest. 47 U.S.C. 336. In the 1996 Act, Congress directed the Commission to require that any ancillary or supplementary services carried on DTV capacity: (1) must be consistent with the advanced television technology designated by the Commission (''the DTV Standard''); (2) must avoid derogating any advanced television services that the Commission may require; and (3) must, with specified exceptions, be subject to Commission regulations applicable to analogous services. Congress also gave the Commission discretion to prescribe such other regulations with respect to ancillary or supplementary services ''as may be necessary for the protection of the public interest, convenience, and necessity, 47 U.S.C. 336(b)(5). Moreover, Congress directed the Commission to establish a fee program for any ancillary or supplementary services for which the payment of a subscription fee is required to receive such services or for which the licensee receives any compensation from a third party other than commercial advertisements used to support non-subscription broadcasting (hereinafter referred to as ''feeable ancillary or supplementary services''). 47 U.S.C. 336(e).

3. In a number of recent orders, the Commission adopted rules implementing the transition to DTV pursuant to the 1996 Act. In the *Fourth R&O* in MM Docket No. 87–268, 62 FR 14006 (March, 1997), the Commission adopted the DTV Standard that supports the transmission of High Definition Television (''HDTV''), as well as allowing for the transmission of multiple programs of standard definition television (''SDTV'') and non-video services. This Standard permits the provision of other services, including large amounts of data. For example, a DTV licensee will be able to transmit ''telephone directories, stock market updates, * * * computer software distribution, interactive education materials or virtually any other type of information.'' The DTV Standard ''allows broadcasters to send video, voice and data simultaneously and to provide a range of services dynamically, switching easily and quickly from one type of service to another.''

4. In the *Fifth R&O* in MM Docket No. 87–268, In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, 62 FR 26966 (May, 1997), the Commission we assigned the initial DTV licenses and established rules allowing broadcasters to use their DTV capacity to provide ancillary or supplementary services which ''do not interfere with the required free service.'' The Commission stated that the DTV licensees' ability to provide ancillary or supplementary services in addition to the mandated free television service ''allow[s] the broadcasters flexibility to respond to the demands of their audience'' for such services. This flexibility ''should encourage entrepreneurship and innovation'' and will give ''broadcasters the opportunity to develop additional revenue streams from innovative digital services.''

5. The 1996 Act charged the Commission with establishing a means of assessing and collecting fees for feeable ancillary or supplementary services. Last December, the Commission issued a Notice of Proposed Rule Making in MM Docket No. 97–247, In the Matter of Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to section 336(e)(1) of the Telecommunications Act of 1996, 63 FR 00460 (January, 1998), which sought comment on various issues relating to the establishment of a fee program in accordance with the 1996 Act. The Notice of Proposed Rule Making, invited comment on all aspects of the proposed fee program and proposed several methods of assessing such fees, including a fee based upon a percentage of revenues received from the ancillary or supplementary use of the digital bitstream, or a fee based upon a hybrid of a flat rate and a percentage of revenues.

III. Issue Analysis

A. Goals

6. The 1996 Act sets forth general criteria the Commission must follow in assessing fees for ancillary or supplementary services carried on the

DTV bitstream. First, the 1996 Act requires the Commission to establish a program which recovers ''for the public a portion of the value of the public spectrum'' made available for ancillary or supplementary use by DTV licensees. Second, the statute requires that the fee be designed ''to avoid unjust enrichment'' of broadcast licensees through the method used to permit digital use of the spectrum. These provisions recognize that existing DTV licensees received their licenses without charge, while providers of potentially competing services may have paid for the spectrum used to provide these services. Finally, 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. This requirement refers to the competitive bidding provisions of the Communications Act of 1934. As discussed fully below, the fee program established today is consistent with these criteria as set forth in the 1996 Act. In addition, consistent with our goal of promoting the efficient deployment of digital television, in implementing the statutorily mandated fee program, the Commission seeks to avoid dissuading broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services.

7. The 1996 Act also generally defines which ancillary or supplementary uses of the DTV bitstream are subject to a fee. Section 336(e)(1), adopted by 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.'' In the latter case, the 1996 Act specifically exempts from the fee any ancillary or supplementary service which relies for its revenues upon ''commercial advertisements used to support broadcasting for which a subscription fee is not required.'' Thus, a fee must be assessed on any ancillary or supplementary service for which a subscription fee is required or for which the licensee receives any compensation for transmission of material other than commercial advertisements used to support broadcasting. These services previously have been defined as ''feeable ancillary or supplementary services.'' The Commission noted 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 with other non-feeable ancillary or supplementary services. The fact that a feeable ancillary or supplementary service is being transmitted by the DTV licensee does not subject all simultaneously transmitted services to a fee.

8. In establishing fees for the ancillary or supplementary use of DTV capacity, the Commission was cognizant of the administrative burdens which such fees could entail. In order to minimize these burdens both for broadcasters and for the Commission, the fee program established is intended to be simple to understand, and calculable with readily available information. An overly complex fee program could be difficult for licensees to calculate and for the Commission to enforce and could create uncertainty that might undermine a DTV licensee's efficient planning of what services it will provide.

B. Basis of Fee

9. Background. In the Notice of Proposed Rule Making we set forth several fee options which we determined to be consistent with the guidelines of the 1996 Act. The options included a fee akin to the amount that would have been received in an auction of the spectrum, a fee based upon the net revenues or incremental profits from the ancillary or supplementary use of a licensee's DTV capacity, a fee assessed as a percentage of the gross revenues received for the ancillary or supplementary use of this capacity, and a fee based upon a hybrid of a flat rate and a percentage of revenues.

10. In describing the various fee options in the Notice of Proposed Rule Making, the Commission described the advantages and disadvantages of each. The Commission stated that while net revenues or incremental profits could serve as effective proxies for the value of DTV capacity used for feeable ancillary or supplementary services, the process of ascertaining the costs involved in calculation of net revenues or incremental profits would involve the burdensome apportionment of expenses between free television services and feeable ancillary or supplementary services and among ancillary or supplementary services. Another fee approach suggested was a combination of a flat dollar amount and a percentage of gross revenues, which would include a uniform means of preventing unjust enrichment but would also create an up-front cost, which could serve as a disincentive to broadcasters' provision of feeable ancillary or supplementary services.

11. In the Notice of Proposed Rule Making, the Commission expressed an inclination to favor a fee program that incorporates gross revenues. Such a fee would ''foster our goal of creating a fee structure which does not dissuade broadcasters from offering feeable ancillary and supplementary services [and]. * * * would be straightforward to assess and calculate.''

12. Comments. Virtually all of the commenters supported a fee based upon gross revenues. The commenters agreed with the Commssion's assessment that a fee based upon gross revenues could be the simplest to calculate and enforce. Commenters also agreed that a fee based upon gross revenues would satisfy the statutory criteria of preventing unjust enrichment, recovering for the public a portion of the value of the spectrum, and approximating, without exceeding, the amount which would have been received at auction.

13. Decision. The Commission adopted a fee based upon a percentage of the gross revenues generated by feeable ancillary or supplementary services. We believe this approach is consistent with the 1996 Act, supported by sound economic principles, and grounded in simplicity. We also believe it will afford broadcasters flexibility in developing new and innovative DTV services. A gross revenues approach is consistent with the 1996 Act because it enables the Commission to assess a fee that recovers for the public a portion of the value of the spectrum and prevents the unjust enrichment of broadcasters through the use of the DTV bitstream for feeable ancillary or supplementary services. While the amount recovered will be more a result of the percentage rate of the fee than of the nature of revenues on which the fee is based, commenters overwhelmingly support a fee based upon gross revenues as a means of achieving these important statutory goals.

14. The Commission stated that a fee based upon gross revenues is consistent with the statutory directive that it assess a fee that ''to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed'' at auction. As stated in the Notice of Proposed Rule Making, and as echoed in many comments, it would be difficult if not impossible to determine the amount that would have been received at auction. To the extent possible, however, the Commission stated that a fee based upon gross revenues can function as a proxy for auction value.

15. The microeconomic theory supporting this determination is laid out in the Notice of Proposed Rule Making. Briefly, economic theory indicates that gross revenues received from the ancillary or supplementary use of DTV capacity are related to the implicit value of that DTV capacity. The postulated relationship between gross revenues received from ancillary or supplementary services and the value of the bitstream used to provide those services was supported by a number of commenters, who found this economic rationale to be ''theoretically sound.''

16. In determining the basis of the fee, the Commission sought not only to comply with the criteria set forth in the Act, but also to foster the important goal that the fee program be simple to comply with and to enforce. As discussed above, a fee program based upon net revenues or incremental profits would have entailed burdensome accounting by the licensees and enforcement and auditing by the Commission. Using gross revenues as the basis of the fee will minimize the accounting and auditing required, permitting licensees to calculate the fee based upon readily available information. It will also make the Commission's administration of the fee program much more efficient, and impose considerably fewer paperwork and compliance burdens on licensees.

17. Finally, the Commission stated that a gross revenues approach will serve the public interest goal of giving broadcasters flexibility to develop new uses of the DTV bitstream. In the Notice of Proposed Rule Making, the Commission stated its intention to establish a fee program which allows broadcasters the flexibility to provide new services and made clear that it is not its intention to dissuade broadcasters from using the DTV capacity to provide feeable ancillary or supplementary services. Commenters generally supported this goal and, given the costs of implementing and enforcing a program based on net revenues, agreed that a fee based upon a percentage of gross revenues would be the least likely to discourage the development of new uses of broadcast spectrum. Accordingly, the Commission rejected the net revenues approach. A fee based upon a percentage of gross revenues received would not involve up-front costs, such as those that would be incurred by a hybrid fee based on a flat fee coupled with a percentage of gross revenues, that could dissuade broadcasters from initiating new services. In addition, the uniform application of a fee based upon gross revenues to all feeable ancillary or supplementary services (as opposed to a varying fee based on the type of service provided) will minimize the potential of the fee program to affect broadcasters' choice of one service over another. Finally, the percentage rate of the fee, not the revenues on which the fee is based, will ultimately affect broadcasters' decisions as to whether or not to offer feeable ancillary or supplementary services at all.

C. Percentage of Revenues

18. Background. As stated in the Notice of Proposed Rule Making, 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 received had these services been licensed through an auction. The Notice of Proposed Rule Making also indicated our disinclination to set the percentage rate so high that it would dissuade broadcasters from providing feeable ancillary or supplementary services.

19. Comments. Commenters advocated percentages for the fee that ranged from less than one percent to more than ten percent. Those commenters who proposed a low fee—two percent or less of gross revenues—based their proposal on the declining auction values of the nonbroadcast spectrum, and on the possibility that a higher fee would discourage broadcasters from offering innovative services. Commenters proposing a high fee—ten percent or more—argued that such a fee would be consistent with other government licensing fees, and would be necessary to prevent unjust enrichment, as required by the 1996 Act.

20. Decision. The Commission set the fee for feeable ancillary or supplementary services provided on the DTV bitstream at five percent of gross revenues received from these services. The Commission stated that a fee of five percent of gross revenues fulfills its statutory obligations to impose a fee which recovers for the public some portion of the value of the spectrum, prevents the unjust enrichment of broadcasters providing feeable ancillary or supplementary services, and approximates, to the extent possible, the revenues that would have been received had the spectrum on which these services are provided been licensed through an auction. The Commission also stated that a five percent fee will not dissuade broadcasters from using their DTV capacity to provide new and innovative services that can greatly benefit consumers.

21. As stated in the Notice of Proposed Rule Making, the Commission must carefully balance potentially competing requirements and goals in establishing a percentage rate of the fee. On the one hand, a fee set too high might dissuade broadcasters from providing feeable ancillary or supplementary services, and could therefore reduce the benefits that consumers receive from efficient deployment of DTV capacity. On the other hand, a fee 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.

22. The Commission stated that a fee of five percent of gross revenues best serves its goals and the requirements of the statute. The 1996 Act gives the Commission broad discretion in setting the amount of the fee for ancillary or supplementary services, relying upon the predictive judgment of the agency in that regard. In addition, no commenter has pointed to any obvious or commonly accepted formula for setting a fee in these circumstances. Therefore, the Commission must use its best judgment in balancing the relevant goals.

23. The five percent fee satisfies the statutory mandate that the fee be high enough to prevent the unjust enrichment of the licensees and to recover compensation for the DTV capacity used by the licensees. The Commission takes seriously the intent of the 1996 Act that broadcasters providing feeable ancillary or supplementary services on the DTV bitstream be required to pay more than a nominal fee. We believe that a five percent fee is appropriate.

24. A fee set at five percent of gross revenues also satisfies the statutory requirement that the fee recover ''an amount that, to the extent feasible, equals but does not exceed'' the amount that would have been recovered at auction. Looking at this mandate through the prism of economic theory, the reference to auctions invokes a system designed to foster the efficient allocation of resources and suggests that we should set a fee that fosters efficient resource allocation. The efficient allocation of the resource of DTV bitstream will allow the marketplace to provide those feeable ancillary or supplementary services demanded by consumers. A fee based on gross revenues will allow such efficient allocation so that it meets the statutory requirement.

25. In setting the fee at five percent of gross revenues, the Commission takes into account the costs broadcasters will incur in the development of digital ancillary or supplementary services. While we note the comments of NCTA stating that a fee set too low would unfairly subsidize broadcasters, we are conscious of the financial burdens faced by digital television broadcasters in the coming years. As will be discussed at greater length below, the Commission anticipates that the fee assessment program established here will be reviewed and possibly adjusted within the five year period prescribed by the 1996 Act, and that such review will take into account the actual costs of the development of digital ancillary or supplementary services.

26. Commenters advocating a higher fee have argued that fees for the ancillary or supplementary use of the DTV bitstream are analogous to mineral and oil royalty rates, which range from 12 to over 17 percent. The Commission rejected this analogy, stating that the policy and economic considerations in setting DTV ancillary and supplementary fees are quite distinct from the considerations that would be relevant for leasing resources such as minerals or oil. The economic analysis detailed in the Notice of Proposed Rule Making specifically addresses the efficient allocation of DTV spectrum between free, over-the-air television service and feeable ancillary services, not the general issue of royalty rates. That economic analysis also addresses the unjust enrichment which may result from the provision of comparable services by competitors, such as multichannel video service providers and other competing service providers, which have incurred sunk costs that do not accrue to DTV licensees.

27. The Commission also rejected commenters' analogy to recent auction rates for non-broadcast spectrum. Commenters argued that the Commission should set the fee at a rate lower than five percent based upon analyses they have submitted that purport to demonstrate that the value of non-broadcast spectrum available at auction has been declining in recent months. These commenters argue that these studies demonstrate that the fees for the ancillary or supplementary use of the broadcast spectrum should be set very low, as the fees should recover approximately the amount which would have been received at an auction of the spectrum.

28. In arguing for very low fees, some commenters have drawn an analogy to copyright royalty rates, which are very low, rather than royalties for mining and oil, which are higher. The Commission stated that the policy concerns and economic considerations of our analysis here are quite distinct from the considerations of privately-contracting parties negotiating copyright royalty rates.

29. Based upon the foregoing, the Commission determined that a fee set at five percent of gross revenues received from the ancillary or supplementary use of the DTV bitstream will best satisfy the requirements of the 1996 Act and will not discourage the provision of these new services by DTV licensees.

D. Services on Which Fee is to be Assessed

30. In establishing a fee assessment program, the Commission determined which services are subject to the fee. The fee program established today applies only to ancillary or supplementary services. While it specifically refers to ancillary or supplementary services, section 336 does not define these services. Consistent with the 1996 Act and Commission precedent, Commission rules specify that ancillary or supplementary services ''include, but are not limited to computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, [or] subscription video.'' Our rules also specify that ''any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary.'' 47 CFR 73.624(c).

31. Pursuant to the 1996 Act, not all ancillary or supplementary services are feeable. We determine that all revenue from subscription services will be subject to a fee. In addition, as required by the statute, ancillary or supplementary services for which the licensee directly or indirectly receives compensation from a third party in exchange for the transmission of material provided by the third party, other than commercial advertisements used to support broadcasting, will be subject to a fee.

32. Commenters provided very little guidance as to what services DTV licensees will provide. With this *R&O*, the Commission resolved several questions raised by commenters regarding particular types of services, and set out general principles that may be used to determine whether other non-subscription ancillary or supplementary services are subject to fees.

Viewer-paid Subscription Services

33. As discussed above, the 1996 Act requires the Commission to establish a fee program for any ancillary or supplementary services ''for which the payment of a subscription fee is required in order to receive such services.'' The legislative history of the 1996 Act indicates that the statute requires that a fee be assessed on ''any ancillary or supplementary service if subscription fees or any other compensation fees apart from commercial advertisements are required in order to receive such services.''

34. The Commission stated that consistent with the 1996 Act, it will assess fees on all revenue—both subscription and advertising revenue—from all ancillary or supplementary services for which viewers must pay subscription fees to receive. The Commission rejected commenters' argument that advertising revenues from subscription services should not be subject to the fee. First, section 336(e)(1)(A) makes clear that those services for which ''the payment of a subscription fee is required in order to receive such services'' are feeable. The exclusion in section 336(e)(1)(B) for ''commercial advertisements used to support broadcasting for which a subscription fee is not required'' does not support NAB's position. Advertising revenues from services that cannot be received without payment of subscription fees do not fit within this exemption. The Commission therefore declined to allow DTV licensees to exclude from gross revenues subject to a fee advertising revenues received from services for which a subscription fee is also required. The Commission stated that such an approach would not be consistent with the statute and would unduly complicate the fee program.

Non-Subscription Ancillary or Supplementary Services for Which Licensee Receives Compensation From a Third-Party

35. The 1996 Act directs that fees be assessed on ancillary or supplementary services ''for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than for commercial advertisements used to support broadcasting for which a subscription fee is not required.)'' The Commission's rules state that over-the-air video programming provided at no charge to viewers is not an ancillary or supplementary service. This provision therefore applies to ancillary or supplementary services, consisting of material which does not originate with the licensee, which the viewer can receive without payment of a fee. These ancillary or supplementary services may

include data, audio, or any other ancillary or supplementary services that may be established in the future.

Home Shopping and Other Direct Marketing Programming

36. Commenters argued that the statute requires fees to be imposed when broadcasters receive payments from sales on home shopping channels, infomercial and direct marketing programming. The Commission declined to impose fees on revenues received from home shopping, infomercial or direct marketing programming. The Commission stated that the purpose of this proceeding is not to exact fees from existing broadcasters for existing services but, rather, to design a program for the assessment of fees on ancillary or supplementary services which will be provided on the DTV bitstream. The Commission agreed with the commenters who argued that home shopping and infomercials are commercial advertisements, excluded by statute from the scope of ancillary and supplementary services as they are video services received by viewers without a fee. The Commission found that home shopping channels and infomercials are free, over-the-air television services, supported by commercial advertisements, and not subject to a fee.

Retransmission Consent Agreements

37. Commenters raised the issue of whether in-kind consideration, in the form of retransmission consent agreements, constitutes compensation from a third party for the purposes of the 1996 Act. The Commission stated that a retransmission consent agreement constitutes the payment of compensation by a third party to a licensee in exchange for the transmission of material provided by that third party. A retransmission consent agreement involves in-kind consideration given to a licensee by a cable system operator for carriage of the licensee's programming on the cable system. It is not compensation given to the licensee for carriage of programming provided by a third party on that licensee's frequency.

Noncommercial Licensees

38. In the Notice of Proposed Rule Making the Commission sought comment on the question of whether noncommercial television licensees should be exempt from fees or subject to lower fees. This argument was raised initially in the Petition for Reconsideration of the *Fifth R&O* filed by the Association of America's Public Television Stations and the Public Broadcasting Service. Petitioners further sought a determination as to whether they might offer feeable ancillary or supplementary services on their DTV capacity as a source of funding for their public television operations. Because the Commission has not yet determined whether or to what extent noncommercial licensees may provide revenue-generating ancillary or supplementary services, it stated that it is premature to determine whether such services would be subject to a fee and whether that fee should be lower than that paid by commercial broadcasters. The Commission instead initiated a proceeding in which it will build a record on noncommercial licensees' remunerative use of the DTV bitstream and whether and in what circumstances such uses would be subject to fees. The Commission stated that it will address the comments received on this issue in that proceeding.

E. Commencement of Fee Assessment

39. Some commenters asked that the Commission delay imposing a fee on ancillary or supplementary services and proposed several different plans for such delay. The Commission stated that it would not delay the imposition of fees for ancillary or supplementary services. Even assuming that the Commission has authority to impose such a delay, a delay in the imposition of a fee would not serve the public interest. In addition, the Commission stated that a delay in the imposition of a fee would result in unjust enrichment during the time the broadcasters were providing feeable ancillary or supplementary services but were not paying a fee. A delayed fee would not effectively recover the value of the spectrum. The fee program established today is designed to minimize any detrimental effect the fee might have on the development of new and innovative services. A delay in the imposition of a fee would therefore be superfluous. Indeed, with a revenue based approach, as opposed to a flat fee, licensees will not have to commence paying a fee until they begin to collect revenues.

F. Other Issues

Cap on the Amount of the Fee

40. One commenter argued that the Commission should cap the aggregate payments made by any broadcaster for feeable services. The statutory provision referenced is the provision which states that the fee shall recover an amount that ''equals but does not exceed'' the amount that would have been recovered at auction. This statutory provision does not require us to establish a cap on the fee amount. As discussed above, gross revenues from feeable ancillary or supplementary services are related to the implicit value of the DTV spectrum used to provide such services. If the Commission were to establish an upper limit on the total fees that it collected, then the theoretical linkage established in our analysis would no longer hold, and the Commission would fail to satisfy its mandate from Congress. The Commission also declined to adopt this proposal as it would unduly complicate the implementation and enforcement of the fee assessment program. Establishing a cap on the amount of the fee might involve a calculation that takes into account the size of a station, the market it serves, the amount of feeable ancillary or supplementary services provided, and numerous other factors which would certainly complicate the establishment and enforcement of the fee assessment program. It would be difficult, if not impossible, to determine on a license by license basis what the auction value of that spectrum should be and thus where a cap should be placed. Thus, ease of administration of the fee program would be compromised by a cap on the total amount of fee payments.

Variable Fee Rate Depending Upon the Type of Service

41. The Commission sought comment as to whether the percentage rate of the fee should vary with the type of service provided. Commenters argued that the Commission should not take into account preferences for one type of service over another in setting the fee and that varying the level of the fee depending upon the service could discourage new services and would exceed the Commission's authority. The percentage rate of the fee will be fixed at five percent, for all services subject to a fee. The Commission agreed that a varying fee rate could have the effect of dissuading licensees from providing particular services. To the extent that the fee is set lower for one service than for another, it would create an incentive for a licensee to provide the service with a lower fee rate over a service subject to a higher fee. The Commission stated that it wished to establish a fee program that does not affect broadcasters' decisions to provide one service over another, other than the mandated free, over-the-air television service, and therefore did not establish a fee which varies based upon the type of services provided. In addition, a varying fee rate would be difficult to adhere to and to enforce, in contravention of the Commission's goal of a fee program that

is simple to comply with and administer.

Review of Fee Assessment Program

42. The 1996 Act requires the Commission to adjust the fee ''from time to time in order to continue to comply with the requirements of'' the statute and to ''report to the Congress on the implementation of the program'' within five years of the enactment of the 1996 Act.

43. The fee program established concerns services which are not yet available to consumers. Once digital television licensees have implemented ancillary or supplementary services, the Commission and the licensees will have a better concept of what these services might include and of the profit-making capacity of these services. The Commission intends to review the fee assessment program established herein by the time of our mandated report to Congress. Also, the Commission may adjust our fee program as necessary to continue to comply with the requirements of the statute.

IV. Collection of Fees

44. The 1996 Act requires that the Commission ''establish a program to assess and collect . . . an annual fee or other schedule or method of payment that promotes the objectives described'' above and that the fee ''be adjusted by the Commission from time to time in order to continue to comply with [these] requirements.'' The statute requires that ''all proceeds obtained pursuant to the regulations required by this subsection . . . be deposited in the Treasury.'' In addition, the 1996 Act requires that ''within 5 years after the date of enactment of the [1996 Act] . . . the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.'' Commenters did not address the collection of fees pursuant to this program.

45. In order that the Commission fulfill its statutory obligation to report to Congress on the program established here, and in order that the Commission have the information necessary to adjust the fee program as appropriate consistent with the use of the spectrum, as discussed above, we will require all commercial DTV licensees to report to the Commission on their use of the DTV bitstream. Each DTV licensee will be required to file a new FCC form annually on December 1.

46. Pursuant to a Public Notice to be issued as soon as possible, the Mass Media Bureau will issue a new reporting form, to be filed by each DTV licensee on December 1 of each year. Beginning on December 1, 1999 all licensees will annually file the new reporting form electronically with the Mass Media Bureau. For the report filed December 1, 1999 only, licensees are to report on services provided from the effective date of this *R&O* through September 30, 1999.

47. In filing licensees will report whether they provided ancillary or supplementary services in the twelve-month period ending on the preceding September 30. Licensees will further report, for the applicable period: (1) a brief description of the services provided; (2) which services were feeable ancillary or supplementary services; (3) whether any ancillary or supplementary services provided were not subject to a fee; (4) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and (5) the amount of bitstream used to provide ancillary or supplementary services during the applicable period. The licensee's signature on the form will certify under penalty of perjury the accuracy of the information reported. Failure to file the form regardless of revenues from ancillary or supplementary services or provision of such services may result in appropriate sanctions.

48. If a licensee has provided feeable ancillary or supplementary services at any point during any twelve-month period ending on September 30, the licensee must additionally annually file the FCC's standard remittance form (Form 159) on the subsequent December 1. Licensees will certify the amount of gross revenues received from feeable ancillary or supplementary services for the applicable twelve-month period and will remit the payment of the required fee. For revenues reported December 1, 1999 only, licensees are to certify revenues received from feeable ancillary or supplementary services provided from the effective date of this *R&O* through September 30, 1999 and remit payment of the required fee for that period.

49. The instructions for Form 159 will be amended by Public Notice to require DTV licensees to specify the amount of gross revenues received from feeable ancillary or supplementary services and the fees due. Pursuant to this *R&O,* section 1 of the Commission's rules is amended to specify that licensees file Form 159 annually. The instructions for Form 159 will be amended to require commercial DTV licensees providing feeable ancillary or supplementary services to annually file Form 159 on December 1 and to specify on line 19A the call sign by which they are registered with the Commission; on line 20A the payment type code; on line 23A the amount of gross revenues received from feeable ancillary or supplementary services; on line 22A the fee which they remit with Form 159, in the amount of five percent of the amount specified on line 23A; and on line 24A the facility identification number assigned to them by the Commission. The licensee's signature on line 27 certifies under penalty of perjury the accuracy of the information reported on Form 159.

50. The Mass Media Bureau will issue a Public Notice amending the Advice Reference Guide for FCC Form 159, and the Mass Media Services Fee Filing Guide. The Commission delegates authority to the Office of the Managing Director to specify by Public Notice procedures for filing and processing the fees required by this *R&O*. The Commission reserves the right to audit each licensee's records which support the calculation of the amount specified on line 23A of Form 159. Each licensee, therefore, is required to retain such records for three years from the date of remittance of fees pursuant to this *R&O*.

51. While the Commission does not here include automatic confidentiality for information submitted pursuant to this *R&O,* submission of the required reporting form, and/or remittance of fee payment may be accompanied by a request for confidentiality pursuant to 47 CFR 0.459.

V. Conclusion

52. By this *R&O* and the accompanying rule, the Commission establishes a program to assess a fee of five percent of gross revenues received from the provision of feeable ancillary and supplementary services as defined herein.

VI. Administrative Matters

53. Paperwork Reduction Act of 1995 Analysis. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act. *Accordingly, it is ordered* that, pursuant to the authority contained in section 4(i), 303, 336 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 336 and 403, part 73 of the Commission's Rules is amended.

54. It is further ordered that, pursuant to the Contract with America Advancement Act of 1996, the rule amendments shall be effective the later of either thirty days after publication in the **Federal Register**, or upon receipt by Congress of a report in compliance with the Contract with America Advancement Act of 1996, Public Law 104–121, or as soon thereafter as may be approved by the Office of Management and Budget.

55. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *R&O*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

56. *It is further ordered* that this proceeding *is terminated*.

Final Regulatory Flexibility Analysis

57. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making is *R&O*. The Commission sought written public comment on the proposals in the Notice of Proposed Rule Making, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order: 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 R&O* we established rules permitting broadcasters to offer feeable ancillary or supplementary services on the DTV spectrum. As directed by Congress, in this proceeding we adopt a program for assessing and collecting a fee for the feeable ancillary or supplementary use of the DTV spectrum.

Summary of Significant Issues Raised by Public Comments In Response to the IRFA: No comments were received specifically in response to the IRFA attached to the Notice of Proposed Rule Making.

Description and Estimate of the Number of Small Entities To Which Rules Will Apply Definition of a ''Small Business''

58. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), 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 4 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**.'' As discussed below, the SBA defines a television broadcast station that has no more than $10.5 million in annual receipts as a small business.

Issues in Applying the Definition of a ''Small Business''

59. The estimates, below, reflect the Commission's best judgments based on the data available to us. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio or television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated.

60. With respect to applying the revenue cap, the SBA has defined ''annual receipts'' specifically in 13 CFR 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

61. Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms. 13 CFR 121.104(d)(1). The SBA defines affiliation in 13 CFR 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 CFR 121.103(a)(1). The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. 13 CFR 121.103(a)(2). Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

Estimates Based on Census Data

62. The rules adopted in this Report and Order will apply to commercial DTV 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 are classified under another SIC number.

63. There were 1,509 television stations operating in the nation in 1992. That number has remained fairly constant as indicated by the approximately 1,583 operating television broadcasting stations in the nation as of September 1998. For 1992, the (approximately 77%) number of television stations that produced less than $10.0 million in revenue, and we estimate that was approximately 1,155 establishments. Thus, the rules adopted here may affect approximately 1,583 television stations; approximately 77%, or 1,219 of those stations are considered small businesses. These estimates may overstate the number of small entities because the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements: The *R&O* adopts modifications to existing reporting and recordkeeping requirements. The fee program established here will require

licensees annually to file a new reporting form to be issued later. Licensees will be required to report whether they provided ancillary or supplementary services, the ancillary or supplementary services provided, the services provided which are subject to a fee, gross revenues received from all feeable ancillary and supplementary services, and the amount of bitstream used to provide ancillary or supplementary services. Licensees providing services subject to a fee will additionally be required annually to file FCC Form 159 in remittance of the fee. So that the Commission may audit licensees' records supporting the calculation of the fees due, each licensee will be required to retain such records for three years from the date of remittance of fees.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

64. This Report and Order establishes a program for assessing and collecting fees for the ancillary or supplementary use of the digital television spectrum. In the Notice of Proposed Rule Making, a variety of alternatives were proposed and we additionally sought comment on whether any of the proposed approaches would have a significant economic impact on any class of small licensee or permittee. We considered all alternatives presented in the comments. The rules adopted here 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 rules adopted here are 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.

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

65. Adoption of this Report and Order will necessitate the revision of 47 CFR 73.624 to add a new § 73.624(g).

Report to Congress:

66. The Commission will send a copy of the *R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *R&O*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *R&O* and FRFA (or summaries thereof) will also be published in the **Federal Register**. See 5 U.S.C. 604(b).

List of Subjects in 47 CFR Part 73

Television, television broadcasting.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows: 47 U.S.C. 154, 303, 334, 336

2. Section 73.624 is revised by adding a new paragraph (g) to read as follows:

§ 73.624 Digital Television Broadcast Stations

* * * * *

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

(1)(i) All ancillary or supplementary services for which payment of a subscription fee or charge is required in order to receive the service are feeable. The fee required by this provision shall be imposed on any and all revenues from such services, including revenues derived from subscription fees and from any commercial advertisements transmitted on the service.

(ii) Any ancillary or supplementary service for which no payment is required from consumers in order to receive the service is feeable if the DTV licensee directly or indirectly receives compensation from a third party in return for the transmission of material provided by that third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required). The fee required by this provision shall be imposed on any and all revenues from such services, other than revenues received from a third party in return for the transmission of commercial advertisements used to support broadcasting for which a subscription fee is not required.

(2) *Payment of fees.* (i) Each December 1, all commercial DTV licensees will electronically report whether they provided ancillary or supplementary services in the twelve-month period ending on the preceding September 30. Licensees will further report, for the applicable period: (A) a brief description of the services provided; (B) which services were feeable ancillary or supplementary services; (C) whether any ancillary or supplementary services provided were not subject to a fee; (D) gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and (E) the amount of bitstream used to provide ancillary or supplementary services during the applicable period. Licensees will certify under penalty of perjury the accuracy of the information reported. Failure to file regardless of revenues from ancillary or supplementary services or provision of such services may result in appropriate sanctions.

(ii) If a commercial DTV licensee has provided feeable ancillary or supplementary services at any point during a twelve-month period ending on September 30, the licensee must additionally file the FCC's standard remittance form (Form 159) on the subsequent December 1. Licensees will certify the amount of gross revenues received from feeable ancillary or supplementary services for the applicable twelve-month period and will remit the payment of the required fee.

(iii) The Commission reserves the right to audit each licensee's records which support the calculation of the amount specified on line 23A of Form 159. Each licensee, therefore, is required to retain such records for three years from the date of remittance of fees.

[FR Doc. 98–33065 Filed 12–15–98; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF VETERANS AFFAIRS

48 CFR Parts 801, 803, 805, 806, 808, 814, 817, 819, 822, 825, 828, 831, 832, 833, 836, 837, 842, 846, 847, 849, 852, 853, 870, and 871

RIN 2900–AJ29

VA Acquisition Regulation: Title and Reference Updates

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs Acquisition Regulation (VAAR): to update office names and job titles due to administrative changes within the Department; correct references and typographical errors; delete obsolete material; delete material which duplicates material in the Federal Acquisition Regulation (FAR); and to