

ALERT

FCC Releases Report and Order to Encourage the Deployment of Broadcast Internet Services Through ATSC 3.0

December 16, 2020

On December 10, 2020, the Federal Communications Commission (FCC or Commission) released a Report and Order that it hopes will encourage the deployment of the ATSC 3.0 Next Generation Television Standard (ATSC 3.0) and facilitate the expansion of new and innovative ancillary and supplementary services made possible by ATSC 3.0 technology. The Commission collectively refers to these ancillary and supplementary services as “Broadcast Internet” services, which are distinct from traditional over-the-air video programming services. With the adoption of the Report and Order, the FCC praises itself for continuing to “lay the groundwork for broadcasters, and thereby the general public, to explore and benefit from the possibilities and opportunities that Broadcast Internet provides.” The Report and Order will become effective 30 days after publication in the Federal Register.

The Report and Order is the culmination of a proceeding commenced earlier this year with the Commission’s release of a Declaratory Ruling and Notice of Proposed Rulemaking (NPRM), discussed here. The Declaratory Ruling clarified that the Commission’s media ownership and attribution rules do not affect the ability of a television broadcaster to lease spectrum to another broadcaster (including one operating in the same geographic market) or to a third party that intends to provide Broadcast Internet services. With the NPRM, the Commission sought comment on a number of tentative conclusions about how the agency could clarify and update its rules to foster the growth of ATSC 3.0-enabled Broadcast Internet services. Below is a brief summary of the earlier proposals adopted by the Report and

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Order, as well as several new proposals adopted by the Commission specific to noncommercial educational (NCE) television stations, which the agency believes will encourage the “efficient and robust use of broadcast spectrum capacity for the provision of Broadcast Internet services.”

Ancillary and Supplementary Service Fee

With an exception for NCE stations discussed further below, the Report and Order declines to adjust the Commission’s current ancillary and supplementary services fee program, thus retaining the agency’s currently imposed fee of 5% of the gross revenues received by a broadcaster for any feeable ancillary or supplementary services provided. Feeable ancillary and supplementary services are those for which the broadcaster charges a subscription fee or receives compensation from a third party. The Report and Order does, however, adopt the FCC’s tentative conclusion that ancillary and supplementary service fees should be calculated based on the gross revenues received by the broadcaster rather than revenue received by a spectrum lessee. In addition, the Report and Order concludes that to the extent a licensee and a lessee are affiliated, the Commission will attribute the gross revenue of the lessee to the licensee for purposes of calculating the ancillary and supplementary services fee, based on the share of gross revenue that is proportional to the licensee’s stake in the lessee.

Significantly, the Report and Order declines to exempt from the ancillary and supplementary services fee the value of “in-kind” facility improvements from the gross revenue calculation, finding that the record on the issue in the proceeding “was limited and the comments were mixed.” Nevertheless, the Commission intends to monitor the status of “in-kind” facility improvements in the marketplace, and may address the issue in the future if warranted. The Report and Order also declines at this time a suggested proposal to use the fees collected from ancillary and supplementary services to fund a subsidiary program for consumers to upgrade their reception equipment as a part of the ATSC 3.0 transition. Finally, the Report and Order declines to grant fee exemptions for certain classes of Broadcast Internet services, such as telehealth, distance learning, public safety, or homeland security-related services, or for services that promote Internet access in rural areas, noting that it would be “premature to take any such action given the nascent state of the market for these ATSC 3.0 services.”

Derogation of Service Standard

Pursuant to the FCC’s current rules, broadcasters must transmit at least one standard-definition over-the-air video program signal at no direct charge to viewers that is at least comparable in resolution to analog television programming. As long as broadcasters provide at least one free stream of programming to viewers, they may also offer any number of ancillary and supplementary services provided such services do not derogate the broadcaster’s free over-the-air video programming service. The Report and Order confirms that the determination of whether a broadcast station’s signal has been “derogated” should continue to be based on whether it provides “at least one standard definition over-the-air video program signal at no direct charge to viewers that is at least comparable in resolution to analog television programming,” but goes further to specify that the precise minimum resolution required is 480i (*i.e.*, a vertical resolution of 480 lines, interlaced).

Analogous Services Analysis

Pursuant to the FCC's current rules, broadcasters are permitted to provide ancillary and supplementary services on their broadcast spectrum that are analogous to other regulated services. If they choose to do so, however, they are required to adhere to any rules specific to such type of analogous service. In the NPRM, the FCC sought comment on whether the agency should provide guidelines for determining whether an ancillary or supplementary service is "analogous" to another regulated service. The Report and Order concludes that it is premature to adopt a presumption that certain Broadcast Internet services are or are not analogous to another service regulated by the FCC, and that the FCC will continue to make analogous service evaluations on a case-by-case basis. The Report and Order also declines to adopt a de minimis service threshold under which ancillary and supplementary services would be exempt from Commission fees or the need to comply with other FCC-regulated services.

Noncommercial Educational Television Stations

In recognition of the important role NCE stations play in providing unique educational and public services to their communities, the Report and Order adopts several proposals designed to promote and support NCE stations' provision of Broadcast Internet services.

First, the Report and Order provides NCE stations with greater flexibility to provide Broadcast Internet services alongside their mandated free, over-the-air nonprofit, noncommercial, educational broadcast service. In 2001, the Commission interpreted Section 73.621 of its rules, which requires that an NCE broadcaster use its spectrum "primarily" for nonprofit, noncommercial, and educational purposes, as meaning that a "substantial majority" of an NCE station's digital capacity be dedicated to the provision of nonprofit, noncommercial, and educational *broadcast* services, thus limiting the amount of ancillary and supplementary services an NCE station could otherwise provide.¹ The Report and Order clarifies that an NCE station may provide any type of Broadcast Internet services, provided that the substantial majority of its 6 MHz channel is dedicated to a combination of free, over-the-air nonprofit, noncommercial, educational television broadcast service and any nonprofit, noncommercial, educational (or "primary") ancillary and supplementary services it chooses to provide. The Report and Order declines, however, to specifically define what constitutes a "substantial majority" of an NCE station's digital bitstream, noting that the FCC expects to seek comment on the issue in a future proceeding. The Report and Order also declines to pre-approve specific ancillary and supplementary services that could qualify as primary services, noting that the Commission will instead defer to the judgment of an NCE broadcaster unless the NCE broadcaster's categorization of content as a primary service appears arbitrary or unreasonable.

Second, to the extent NCE stations offer feeable ancillary or supplementary services that are considered "primary" services (*i.e.*, nonprofit, noncommercial, and educational in nature), the Report and Order adopts a reduced fee of 2.5% on gross revenues generated by such primary services. Feeable ancillary and supplementary services offered by NCE stations that are not considered primary services will continue to be subject to the 5% fee otherwise applicable to commercial television stations.

Finally, the Report and Order clarifies that when an NCE station provides “donor exclusive” ancillary and supplementary services that are nominal in value in return for contributions to the licensee, the Commission will not treat such contributions as “subscription fees” subject to the agency’s ancillary and supplementary services fee program. The Report and Order identifies as examples of “donor exclusive” services exclusive links to supplemental content, such as extended interviews or reference materials for public affairs programming, or enhanced viewing experiences such as an opportunity to view a local orchestra performance in 4K definition and immersive sound. Such “donor exclusive” services will not be considered feeable, provided that the services are comparable in value to the kinds of small gifts that NCE stations often give to donors in exchange for contributions (e.g., coffee mugs or tote bags).

Other Issues

The Report and Order declines to adopt any of the many proposals put forth by low power television (LPTV) broadcasters seeking to change the Commission’s LPTV service rules, noting that such proposals are beyond the scope of the Broadcast Internet proceeding. Similarly, the Commission declined to reinterpret its retransmission consent rules as proposed by the MVPD industry, finding such actions to be beyond the scope of the Broadcast Internet proceeding.

If you have questions about the Report and Order, please contact the Wiley attorney who regularly assists you with your FCC matters or one of the attorneys listed on this alert.

¹ *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 16 FCC Rcd 19042, 19048, para. 15 (2001) (NCE Ancillary Services Report and Order).