

FCC to Consider Proposals to Promote “Broadcast Internet” Services Through ATSC 3.0

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In an effort to facilitate the deployment of the ATSC 3.0 Next Generation Television standard and promote the build out of what the agency calls “Broadcast Internet” services – i.e., the new and innovative ancillary and supplementary services enabled by ATSC 3.0 technology that go beyond traditional over-the-air video programming services – the Federal Communications Commission (FCC or Commission) has released the proposed draft of a Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) that the agency intends to consider at its June open meeting. With this item, the Commission hopes to “further unlock the potential of broadcast spectrum, empower innovation, and create significant value for broadcasters and the American public alike by removing the uncertainty cast by legacy regulations.”

With the draft Declaratory Ruling, the FCC intends to clarify that the agency’s long-standing television ownership and attribution rules will have no impact on the ability of a broadcaster to lease spectrum to another broadcaster (including one operating in the same geographic market) or to a third party for the provision of Broadcast Internet services. In the accompanying draft NPRM, the FCC asks a number of questions and proposes several tentative conclusions regarding (1) whether any existing rules should be clarified or modified in order to further promote the deployment of Broadcast Internet services; (2) whether the FCC’s rules imposing a fee on broadcasters providing ancillary and supplementary services should be reconsidered; and (3) whether the Commission should clarify its ancillary and supplementary services rules (i) prohibiting such

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services from derogating a broadcaster’s required free over-the-air video programming service and (ii) determining how a Broadcast Internet service being offered may be considered analogous to another regulated service and therefore subject to regulation under the rules for such analogous service.

Background. The Commission first adopted its ancillary and supplementary broadcast service rules in 1997 in the *DTV Fifth Report and Order* following Congress’ passage of Section 336 of the Telecommunications Act.¹ Section 336 directed the FCC to develop a framework for licensing digital television and permitted broadcasters to offer ancillary and supplementary services. The rules promulgated by the FCC in 1997 obligate DTV broadcasters to “transmit at least one over-the-air video program signal at no direct charge to viewers on the DTV channel.”² As long as broadcasters provide at least one free stream of programming to viewers, they may “offer services of any nature, consistent with the public interest, convenience, and necessity, on an ancillary or supplementary basis” provided the services do not derogate the broadcaster’s free over-the-air video programming service.³ Moreover, the FCC determined that any ancillary and supplementary services provided would be subject to any regulation on services “analogous” to the ancillary and supplementary service.

The Communications Act also directed the Commission to collect a fee for any ancillary and supplementary broadcast services for which DTV licensees charge a subscription fee or receive compensation from a third party. The FCC set the fee at 5 percent of the gross revenues received by a broadcaster for any feeable ancillary and supplementary services provided. The FCC also required DTV licensees that provide feeable ancillary or supplementary services to annually report information regarding such service offerings.

Recognizing that its existing rules for ancillary and supplementary services – adopted more than 20 years ago – may need to be modified in order to foster the introduction of Broadcast Internet services enabled by ATSC 3.0 technology (such as data transmissions to autonomous vehicles, Internet of Things devices, telehealth applications and utility automation services), the Commission is proposing to adopt the draft Declaratory Ruling and accompanying NPRM, as briefly summarized below.

The Draft Declaratory Ruling

The Commission’s draft Declaratory Ruling is intended to encourage a television broadcaster to develop partnerships with other broadcasters or third parties for the lease of a portion of the licensee’s spectrum for the provision of Broadcast Internet services. Accordingly, the draft Declaratory Ruling makes clear that the lease of excess broadcast television spectrum to a third party, including another broadcaster, for the provision of ancillary and supplementary services does not result in attribution under the Commission’s broadcast television ownership rules or for any other requirements related to television station attribution (e.g., filing ownership reports). The FCC’s attribution rules measure interests that “confer influence or control such that those interests should be counted for purposes of the media ownership limits.” By clarifying that broadcast spectrum leasing arrangements do not count toward the Commission’s media ownership limits, the FCC hopes to “provide additional clarity in order to encourage the investment in and deployment of potentially beneficial Broadcast Internet services.”

The Draft NPRM

General Matters. As an initial matter, the draft NPRM seeks input on what rule changes the Commission should make to encourage the deployment of Broadcast Internet services. Additionally, the FCC makes several procedural inquiries about the steps that it can take to facilitate greater use of broadcast television spectrum that can increase ancillary and supplementary service offerings. For example, the Commission seeks comment on whether there are regulatory limitations on the ability of non-commercial educational (NCE) television stations to provide Broadcast Internet services. The Commission notes that although Section 399B of the Communications Act prohibits NCE stations from advertising on their broadcast programming streams, Section 399B does not apply to any ancillary or supplementary services provided. The draft NPRM tentatively concludes that Section 399B permits NCE broadcasters to offer Broadcast Internet services, and requests input on the types of Broadcast Internet services that NCE stations are likely to provide.

Ancillary and Supplementary Services Fee. The draft NPRM seeks comment generally about whether the FCC should clarify or modify its rules regarding the amount or method of fee calculation for ancillary or supplementary services “given the new potential uses of spectrum capacity to provide ancillary and supplementary offerings through ATSC 3.0 technologies.” For example, the Commission asks (1) whether it should consider adjustments to either the basis or percentage of the fee and (2) what ATSC 3.0-related benefits might accrue from such adjustments. The FCC also asks additional questions about ancillary and supplementary fee adjustments, such as whether there should be a gross revenue threshold to trigger fee collection, and if certain classes of services should be exempt from fees.

Moreover, the Commission seeks input on how ancillary and supplementary service fees should be calculated when a broadcaster receives compensation from an unaffiliated third party, such as a spectrum lessee, in return for airing material provided by the third party. The draft NPRM tentatively concludes that the applicable fee should be calculated based solely on the gross revenue received by the broadcaster, without regard to the gross revenue of the spectrum lessee. The draft NPRM also seeks comment on the FCC’s tentative conclusion that the value of any “in-kind” improvements made by an unaffiliated third party to a broadcaster’s infrastructure should be excluded from ancillary and supplementary services fees. Finally, the draft NPRM seeks input on whether the agency should consider changes to the annual ancillary and supplementary services reporting requirements.

Derogation of Service and Analogous Services. The draft NPRM seeks comment on (1) whether the Commission should redefine what constitutes a derogation of service and (2) whether the agency should provide greater clarity to broadcasters regarding the definition of an “analogous service.”

The draft NPRM tentatively concludes that the determination of what constitutes derogation of service should continue to be evaluated on whether a broadcast station “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.” The draft NPRM also tentatively concludes that the FCC should amend its rules to specifically define 480i as the precise resolution that is “at least comparable in resolution to analog television programming.” The draft NPRM also asks a number of questions about how the broadcast industry currently

complies with the “comparable resolution” standard and whether any other rule changes may be advisable to aid broadcasters’ ability to deploy Broadcast Internet services.

The draft NPRM also asks a series of questions on whether the FCC should provide guidelines for determining whether an ancillary or supplementary service being offered by a broadcaster is “analogous” to another regulated service and therefore subject to regulation under the rules for such analogous service. For example, the FCC asks whether it should adopt a presumptive standard that deems any service with specific enumerated characteristics to be “analogous” under its rules. Additionally, the Commission asks what process broadcasters should follow to obtain a determination that a particular Broadcast Internet service is sufficiently “analogous” to another service for regulatory purposes. Finally, the draft NPRM asks whether the Commission’s analogous service rules should apply in instances where an ancillary or supplementary service is only provided for a discrete amount of time (e.g. only one hour per day) and seeks comment on whether there should be a “de minimis” exception where a broadcaster or its third-party spectrum lessee only provides services on a limited basis.

If you have questions about the NPRM or are interested in filing comments, please contact the Wiley attorney who regularly assists you with your FCC matters or one of the attorneys listed on this alert.

¹ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Fifth Report and Order, 12 FCC Rcd 12809, 12811-12, paras. 5-6 (1997) (*DTV Fifth Report and Order*).

² 47 CFR § 73.624(b).

³ *Id.* § 73.624(c).