

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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)	
Assessment and Collection of)	MD Docket No. 18-175
Regulatory Fees for Fiscal Year 2018)	
)	

COMMENTS OF DISH NETWORK L.L.C. AND AT&T SERVICES, INC.

DISH Network L.L.C. (“DISH”) and AT&T Services, Inc. on behalf of its affiliate DIRECTV LLC (collectively, “AT&T”) respectfully submit these comments in response to the Commission’s proposal to increase the annual per-subscriber regulatory fee imposed on Direct Broadcast Satellite (“DBS”) for FY 2018.¹ This is the fourth consecutive year the Commission has proposed a per-subscriber rate hike on DBS providers. After requiring DBS providers to pay a per-subscriber regulatory fee of 12 cents in 2015 purportedly to “recover the burden of regulation and oversight”² by Media Bureau full time employees (“FTEs”), the Commission now proposes to raise this fee again to a total of 48 cents per subscriber, a 300 percent increase in just three years.³ Such an increase cannot be justified based on Media Bureau resources devoted to DBS providers and DBS providers’ participation in Media

¹ See Assessment and Collection of Regulatory Fees for Fiscal Year 2018, *Notice of Proposed Rulemaking*, MD Docket No. 18-175, FCC 18-65, ¶¶ 17-20 (rel. May 22, 2018) (“*2018 Regulatory Fees NPRM*” or “*NPRM*”).

² See Assessment and Collection of Regulatory Fees for Fiscal Year 2015, Amendment of Part 1 of the Commission’s Rules; Assessment and Collection of Regulatory Fees for Fiscal Year 2014, *Notice of Proposed Rulemaking, Report and Order, and Order*, MD Docket Nos. 15-121 and 14-92, FCC 15-59, ¶ 28 (rel. May 21, 2015) (“*2015 Regulatory Fees R&O and NPRM*”).

³ See *2018 Regulatory Fees NPRM* ¶ 20 (“Ultimately, this will be an increase of ten cents from the FY 2017 DBS rate.”).

Bureau proceedings cited in the *NPRM*, and it would harm consumers. For these reasons, among others, DISH and AT&T oppose it.

First, with respect to the proposed rate increase for DBS providers, the Commission has failed to satisfy its statutory directive to establish and collect regulatory fees that reasonably equal the amount appropriated for the performance of certain regulatory activities. Instead, the Commission appears to premise its proposed fee increase on “revising the DBS regulatory fee rate to continue to bring the DBS rate closer to the cable television/IPTV rate[.]”⁴ But, such a results-driven proposal that is unsupported by the facts, which we discuss herein, is contrary to the statute.

Second, the Commission’s proposal to increase the per-subscriber fee dramatically and without justification – for the fourth consecutive year – is exactly the kind of arbitrary action DISH and AT&T feared would result from the Commission’s 2015 decision to begin assessing per-subscriber DBS fees.⁵ The Commission’s current proposal generates significant concerns on behalf of DBS subscribers regarding what to expect in future years, given that there appears to be no legal basis on which these ever-escalating proposed fee increases are premised. Ultimately, the Commission’s approach leaves DBS customers to absorb these arbitrary and unjustified rate increases. Even worse, the Commission is proposing to decrease the per subscriber rate paid by cable systems by almost 20 percent citing the same record as it does to support the 25 percent DBS per subscriber rate increase.⁶ Plainly, the hundreds of

⁴ 2018 *Regulatory Fees NPRM* ¶ 19.

⁵ 2015 *Regulatory Fees R&O and NPRM* ¶ 28.

⁶ 2018 *Regulatory Fees NPRM* ¶ 19 (proposing to reduce the cable rate from the current \$0.95 per subscriber to \$0.77).

cable operators that the Commission regulates impose more burdens on Media Bureau FTEs than the nation's two DBS providers, and the Commission's cost-shifting proposal is inequitable and inconsistent with the statute.

I. THE COMMISSION HAS FAILED TO ADEQUATELY JUSTIFY THE DRAMATIC PROPOSED RATE INCREASE

As the Commission explains, regulatory fees are collected by the agency “to recover the costs of ... enforcement activities, policy and rulemaking activities, user information services, and international activities.”⁷ Regulatory fees are “derived by determining the full-time equivalent number of employees performing” these activities, “adjusted to take into account factors that are reasonably related to the benefits provided to the payer of the fee by the Commission’s activities.”⁸ In addition, the statute requires that regulatory fees “be established at amounts that will result in collection, during each fiscal year, of an amount that can reasonably be expected to equal the amount appropriated for such fiscal year for the performance”⁹ of the regulatory activities enumerated above.

A. The Commission Has Not Provided Transparency in the Fee Setting Process.

Despite its statutory directives described above, the Commission has failed to provide information in the *NPRM* demonstrating how the fee proposed for FY 2018 is “reasonably” equal to the amount of staff resources appropriated for DBS activities. Indeed, the Commission has failed to explain how regulatory developments in the last year have caused the Media Bureau to allocate additional FTEs to handle DBS matters consistent with the fee

⁷ 2018 Regulatory Fees *NPRM* ¶ 2, citing 47 U.S.C. § 159(a).

⁸ *Id.* ¶ 2, citing 47 U.S.C. § 159(b)(1)(A).

⁹ 47 U.S.C. § 159(b)(1)(B).

increase proposed for FY 2018 while simultaneously causing the Media Bureau to allocate significantly fewer FTEs to handle cable matters.

Instead, the Commission leaves this determination to commenting parties, asking them to weigh in on “whether Media Bureau resources devoted to MVPD proceedings, including DBS, support further revising the DBS regulatory fee rate to continue to bring the DBS rate closer to the cable television/IPTV rate[.]”¹⁰ Based on what DISH and AT&T have observed as the only two DBS providers in the nation, there has been no increase in Media Bureau activities related to DBS providers that would justify the proposed 25 percent fee increase this year. But, in any event, it is the Commission’s burden to identify the resources spent on regulatory activities and to allocate regulatory fees accordingly. The Commission here has failed to meet this burden.

Indeed, the only Commission activities it mentions to justify the DBS rate increase come in a footnote, where the agency cites five proceedings – three of which the Commission cited in previous years. These include: a *Notice of Proposed Rulemaking* regarding unlocking the set-top boxes of cable and DBS operators; a *Notice of Inquiry* regarding Independent Programmers; a *Report and Order* imposing new rules that require cable, DBS, and other licensees to post their public file documents to a Commission-hosted database; a *Report and Order* regarding expanding the availability of video described programming on certain networks; and a *Notice of Proposed Rulemaking* seeking comment on certain procedures to, among other things, modernize the cable subscriber notification and carriage election processes.¹¹ It is unclear how these proceedings have increased the workload of Media

¹⁰ 2018 Regulatory Fees NPRM ¶ 19.

¹¹ *Id.* ¶ 19, FN 68.

Bureau FTEs to justify a sharp per-subscriber rate increase for DBS providers and, at the same time have decreased the Media Bureau's workload as it relates to cable operators to justify a proposed decrease of 18 cents per cable subscriber (an almost 20 percent decrease).

B. The Commission Has Failed to Adequately Justify How Regulatory Developments in the Last Year Support the Proposed Fee Increase.

As an initial matter, the Commission cited three of the five proceedings discussed above in previous regulatory fee *Orders* as justification for the rate hikes imposed during those years and the Commission has taken no action in these proceedings since the last regulatory fee increase. For example, the set-top box and online public file proceedings were first cited in 2016 (and again in 2017) as two proceedings that justified the fee increase of 12 cents imposed on DBS providers that year. If an additional 12 cents was the appropriate fee to assess to cover the burden imposed by a proposed rulemaking and inquiry on Media Bureau staff in 2016, and we disagree that it was, it is unclear how these same proceedings could once again contribute to a significant fee increase for FY 2017 *and* FY 2018, given that the set-top box proceeding did not produce any new rules¹² and the online public file proceeding was initiated in 2014 and final rules were issued in January of 2016.¹³ Moreover, as we note

¹² In addition, the set-top box proceeding initiated by the Commission impacted a variety of stakeholders, including several (like public interest groups and third-party manufacturers) that do not pay any regulatory fees to the Commission for Media Bureau FTEs. Further, as DISH has explained, the FCC's *NPRM* in that proceeding failed to adequately address issues relevant to DBS providers. Given that DBS-specific issues were not even addressed in the *NPRM* considering new set-top box rules, it is unclear how this *NPRM* has contributed to an increase in staff resources sufficient to justify a rate increase for three consecutive years.

¹³ Even though final rules in this proceeding were issued almost two years ago, the Commission has not provided any information regarding how many Media Bureau staff or staff hours contributed to this proceeding, the resulting rules, or the Commission's implementation. Moreover, there are only 2 DBS providers and 2 DBS provider online public files. By contrast, there are hundreds of cable operators with several thousands of cable system public files for the Commission to maintain.

above, the Commission illogically cites these same proceedings to support decreasing cable's per subscriber rate by almost 20 percent.

The Commission has failed to provide information regarding how the two new proceedings cited in the *NPRM* have impacted staff resource allocation sufficient to justify the proposed 10 cents per subscriber rate hike on DBS providers and the 18 cents per subscriber proposed rate cut on cable providers. Among other things, the *Report and Order* cited by the Commission primarily impacted the obligations of programmers to provide video described content on certain networks. DIRECTV filed only comments in the proceeding, while DISH did not participate. On the other hand, ACA filed comments, reply comments, and several *ex parte* filings.¹⁴ NCTA also filed comments and two *ex parte* filings cited by the Commission in its *Report and Order*. If the Commission is basing the relative burden for these proceedings on the sheer number of Commission filings, then the Commission's own data show that cable operators, not DBS providers, should bear the Media Bureau resource burden for this proceeding. Similarly, the 2017 *Electronic Delivery of MVPD Communications NPRM* that the Commission cites in footnote 68 requests comment on, among other things, modernizing subscriber notifications that mostly affect cable operators, not DBS providers.¹⁵

¹⁴ We note that ACA also filed an emergency petition for waiver in this docket (MB Docket No. 11-43) earlier this year.

¹⁵ See *Electronic Delivery of MVPD Communications, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-317, 17-105, FCC 17-168 (2017) ("*Electronic Delivery of MVPD Communications NPRM*"). Only one of the subscriber notifications (related to privacy notifications) addressed in this NPRM also affects DBS providers. *Id.* ¶ 18.

II. THERE IS NO LEGAL BASIS TO CHARGE DBS PROVIDERS THE SAME REGULATORY FEES AS CABLE AND IPTV PROVIDERS

As discussed above, the Commission has failed to provide transparency surrounding the process by which it sets the per-subscriber regulatory fee. The Commission instead asks a series of questions regarding whether there is support for revising the regulatory fee to continue to “bring the DBS rate closer to the cable television/IPTV rate”¹⁶ and asks for comment on whether “such an increase [is] justified based on Commission resources allocated to DBS, and the related benefits provided to DBS providers by the Commission’s activities[.]”¹⁷ The answer to both questions – based on the Commission’s own previous statements, the record, and the governing statute – is no.

Among other things, the Commission has previously recognized that “DBS is not identical to cable television,”¹⁸ and “the two DBS providers and their trade association had fewer filings than the top 25 cable operators and their two trade associations (combined).”¹⁹ Media Bureau rulemakings sometimes apply equally to cable and DBS, or include participation by DBS providers; however, that fact alone does not mean that the Media Bureau generates equal regulatory oversight.

The Commission asks whether the regulations imposed on DBS and cable providers are similar.²⁰ Even the most cursory review of Part 76 answers that question. For statutory reasons, cable MVPDs are subject to different – and more – regulatory requirements than

¹⁶ *2018 Regulatory Fees NPRM* ¶ 19.

¹⁷ *Id.* ¶ 20.

¹⁸ *2015 Regulatory Fees R&O and NPRM* ¶ 33.

¹⁹ *Id.* ¶ 34.

²⁰ *2018 Regulatory Fees NPRM* ¶ 19.

DBS MVPDs. Indeed, many of the requirements that have been the subject of the Commission's ongoing media modernization initiatives have no effect on DBS providers. Just last week, the Commission sought comment on updating its leased access rules.²¹ Those rules have no applicability to DBS providers and neither do the Commission's *Notices of Proposed Rulemaking* on: eliminating the cable requirement to maintain copies of the Commission's rules,²² eliminating Form 325 (Annual Report of Cable Television Systems),²³ and allowing cable operators to distribute customer notices required in Subpart T of Part 76 electronically.²⁴

The Commission can only impose fees consistent with its statutory mandate to "recover the cost" of regulation. The Commission has failed to meet this burden with respect to the proposed fee increase for FY 2018. Given the differences in the way cable and DBS are regulated, the sheer number of cable operators versus DBS providers, and the resulting disparity in the burdens such regulations place on Media Bureau FTEs, any suggestion that there must be parity in the fees imposed upon DBS and cable providers lacks legal foundation

²¹ *Leased Commercial Access, Modernization of Media Regulation Initiative*, MB Dockets No. 07-42, 17-105, FCC 18-80 (rel. June 8, 2018).

²² *Amendment of Parts 74, 76 and 78 of the Commission's Rules Regarding Maintenance of Copies of FCC Rules, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-231, 17-105, FCC 17-121 (2017). The Commission adopted its proposal earlier this year. *Amendment of Parts 74, 76 and 78 of the Commission's Rules Regarding Maintenance of Copies of FCC Rules, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-231, 17-105, Report and Order, FCC 18-16 (2017).

²³ *FCC Form 325 Data Collection, Modernization of Media Regulation Initiative*, MB Docket Nos. 17-290, 17-105, FCC 17-157 (2017).

²⁴ *Electronic Delivery of MVPD Communications NPRM*. Additionally, we note that in 2017, the Commission granted a 2017 Petition for Declaratory Ruling filed by NCTA and ACA related to another Part 76 notice requirement. See *National Cable & Telecommunications Association and American Cable Association, Petition for Declaratory Ruling*, Declaratory Ruling, 32 FCC Rcd 5269 (2017).

and should be rejected. These differences, among others, provide a “reasonable basis to differentiate between DBS providers and cable television and IPTV”²⁵ within the context of regulatory fees.

III. THE COMMISSION’S PROPOSAL WILL CAUSE RATE SHOCK

The Commission also seeks comment on whether concerns regarding rate shock “remain valid.”²⁶ They do, and such concerns are vital for the Commission to consider in this process. The Commission has previously taken care to avoid rate shock by ensuring that regulatees are not subject to dramatic increases in fees. For example, in 2013, the Commission set a cap of 7.5 percent on fee increases for licensees subject to regulatory fees. In setting that cap, the Commission stated that the purpose was “to avoid sudden and large changes in the amount of fees paid by various classes of regulatees.”²⁷ The Commission’s current proposal generates significant concerns for DBS providers, on behalf of their subscribers, regarding what to expect in future years, given that there appears to be no legal basis on which the proposed fee increase is premised. Ultimately, the Commission’s approach leaves DBS consumers to absorb these arbitrary and unjustified rate increases that are due to Media Bureau resources spent on cable matters.

IV. CONCLUSION

For the reasons discussed herein, DISH and AT&T oppose the Commission’s proposal to increase the per-subscriber DBS fee dramatically for the fourth consecutive year. This increase will only harm DBS customers, who will have to unfairly shoulder the cost to the

²⁵ *2018 Regulatory Fees NPRM* ¶ 20.

²⁶ *Id.* ¶ 19.

²⁷ *Assessment and Collection of Regulatory Fees for Fiscal Year 2013, Report and Order*, MD Docket No. 13-140, 28 FCC Rcd 12351, 12358 ¶ 21 (2013).

Media Bureau of regulating hundreds of cable operators in the form of additional fees.

Among other things, the Commission has failed to explain how regulatory developments in the last year justify a rate hike on DBS providers while simultaneously justifying a significant rate cut for cable operators. To the contrary, it is clear from the proceedings issued by the Commission over the last year that most of them impact only cable operators, not DBS providers. Simply put, the Commission's proposed cost-shifting in the name of parity is not supported by the facts or the law.

Respectfully submitted,

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