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

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2019	)	MD Docket No. 19-105
	)	

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION AND ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION

By these reply comments, NCTA – The Internet & Television Association ("NCTA") and ACA Connects – America's Communications Association ("ACA Connects") respond to the comments filed by AT&T and DISH[1] – the nation's Direct Broadcast Satellite ("DBS") multichannel video programming distributors ("MVPDs") – on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[2]

INTRODUCTION

Once again, AT&T and DISH rely on flawed reasoning and discredited arguments to attempt to justify a regulatory fee schedule that would perpetuate the preferential treatment DBS operators receive over other MVPDs. As NCTA and ACA Connects demonstrated in their initial comments,[3] the time has come for the Commission to complete its phase-in of the DBS regulatory fee and require, in Fiscal Year 2019, that DBS operators pay the same fee as other MVPDs to fund the Media Bureau's activities. As they have done before, AT&T and DISH

[1] *See* Comments of AT&T and DISH, MD Docket No. 19-105 (filed June 7, 2019) ("AT&T/DISH Comments").

[2] *Assessment and Collection of Regulatory Fees for Fiscal Year 2019*, Notice of Proposed Rulemaking, MD Docket No. 19-105, FCC 19-37 (rel. May 8, 2019).

[3] *See* Comments of NCTA and ACA Connects, MD Docket No. 19-105 (filed June 7, 2019) ("NCTA/ACA Connects Comments").

assert that the Commission is raising the DBS per subscriber fee on a whim, and ignore that the Communications Act requires the Media Bureau to collect fees from regulatees to recover operational costs. AT&T and DISH also claim that they should not be subject to a regulatory fee increase because they do not participate as extensively as cable operators in Media Bureau proceedings – a claim that NCTA and ACA Connects have repeatedly disproven – and because they are subject to regulation by the International Bureau. The Commission should reject these claims (as it has done before) and assess all MVPDs the same fee for Fiscal Year 2019.

ARGUMENT

None of AT&T/DISH's arguments for keeping the DBS regulatory fee lower than that paid by other MVPDs holds water. First, AT&T and DISH wrongly suggest that the NPRM proposes increasing the DBS regulatory fee solely "because the Commission *desires* regulatory fee parity between cable operators and DBS providers."[4] This gets the story half right. While the DBS per-subscriber fee has increased annually (the logical endpoint of which would result in assessing cable television/IPTV and DBS providers the same rate), assessing all MVPDs the same rate is not the Commission's *rationale* for increasing the DBS fee, but rather the result of applying the statute. The Commission established a DBS per-subscriber regulatory fee because it had a statutory obligation to do so. A phase-in approach was implemented – at the DBS providers' request – to help spread out any immediate increase in cost to DBS providers and their customers.

Section 9 of the Communications Act requires the Commission to assess and collect fees from Media Bureau regulatees, including MVPDs, to recover the costs of the Bureau's

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[4] AT&T/DISH Comments at 3 (emphasis added).

operations.[5] The expectation that DBS operators share in this burden derives from "the continued participation of DBS operators in Commission proceedings, and the use of a pool of Media Bureau [Full Time Employees ("FTEs")] to oversee MVPD issues."[6] Because DBS providers, like other MVPDs, are subject to the Media Bureau's "oversight and regulation," the Commission must require DBS operators to pay the fee it assesses other MVPDs.

Although the Commission would have been justified in requiring DBS providers to pay the same fee as other MVPDs when it created the DBS subcategory in 2015,[7] the Commission decided to phase in the fee gradually, not because DBS providers used Media Bureau resources less, but "to avoid sudden and large changes in the amount of fees" levied on DBS customers.[8] Under this approach, the 12-cent per-subscriber DBS fee introduced in 2015 has increased by 12 cents each year. That these annual fee increases appear large when measured on a percentage basis is not "astounding," as AT&T and DISH claim.[9] These increases are merely artifacts of the phase-in, an approach taken for the benefit of DBS providers and their customers—not evidence of unfair treatment. Indeed, even after three years of phase-in, DBS operators pay a much lower fee than other MVPDs to support the Media Bureau's work.

Second, as in the past, AT&T and DISH argue that they should continue to pay a lower regulatory fee because the Media Bureau regulates them less extensively than it does other MVPDs.[10] The Commission has repeatedly rejected this argument and should do so once again.

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[5] *See* 47 U.S.C. § 159.

[6] NPRM ¶ 19.

[7] *See, e.g.*, Comments of NCTA and the American Cable Association, MD Docket No. 15-121, at 2-6 (filed June 22, 2015).

[8] *See Assessment and Collection of Regulatory Fees for Fiscal Year 2015* et al., MD Docket No. 15-121 et al., Notice of Proposed Rulemaking, Report and Order and Order, 30 FCC Rcd. 5354, 5372 (2015).

[9] *See* AT&T/DISH Comments at 2.

[10] *Id*. at 8.

As the NPRM explains, and NCTA/ACA Connects reiterated in their initial comments, "the DBS regulatory fee is based on the significant number of Media Bureau FTEs that work on MVPD issues that include DBS, 'not a particular number of FTEs focused solely on DBS' or 'specific recent proceedings.'"[11] The Commission has also long recognized that "services that are not technologically identical nevertheless can warrant placement in the same regulatory fee category."[12] At any rate, the Commission found as recently as 2017 that DBS operators impose on Media Bureau staff "roughly the same" burdens as other MVPDs,[13] and in their initial comments, NCTA/ACA Connects documented extensively the frequent participation of DBS operators in Media Bureau proceedings and activities.[14]

By contrast, the statistics cited by AT&T and DISH in their comments,[15] which attempt to minimize DBS operators' engagement with the Media Bureau over the past year, are misleading at best. As an initial matter, their attempt to catalogue the Media Bureau's work on MVPD issues by counting up the "releases" that appear on the Commission webpage is unsound. This approach fails to capture all of the relevant work performed by the Media Bureau, including on proceedings that remain pending or that never came to fruition.

In addition, the DBS providers' analysis drastically understates the impact of the Media Bureau's work on MVPDs. Most glaringly, AT&T and DISH's "accounting" of Bureau activities that affect MVPDs leaves out a number of high-profile merger proceedings of the past year – in particular, those involving Sinclair and Tribune, Nexstar and Tribune, and Raycom

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[11] NPRM ¶ 17; NCTA/ACA Connects Comments at 4.

[12] *See id*. ¶ 18; *see also* NCTA/ACA Connects Comments at 8-9.

[13] *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, MD Docket No. 17-134, Report and Order and Notice of Proposed Rulemaking, 32 FCC Rcd. 7057 ¶ 20 ("*FY 2017 Report and Order*").

[14] *See* NCTA/ACA Connects Comments at 5-6.

[15] *See* AT&T/DISH Comments at 5-7.

Media and Gray Television. While the parties to these transactions are broadcasters, each of the proceedings has raised significant regulatory issues for MVPDs, including DBS operators. Indeed, as we observed in our initial comments, DISH has participated substantially in all three merger proceedings, even filing a petition to deny Nexstar's proposed acquisition of Tribune.[16] Yet AT&T and DISH fail to count any of these proposed mergers among the recent Media Bureau proceedings "affecting" MVPDs. Major transactions such as these are among the most time-consuming and resource-intensive activities in which the Media Bureau engages, imposing considerable demands on staff. By ignoring these proceedings, AT&T and DISH have produced an analysis that is entirely disconnected from the Media Bureau's actual oversight and regulation of MVPDs.[17]

Finally, AT&T and DISH continue to try to make hay of the fact that DBS operators must pay separate regulatory fees to support the work of both the Media and International Bureaus.[18] The Commission should have no trouble dismissing this tired complaint. Far from an anomaly, it is routine for Commission regulatees to pay regulatory fees to support the work of more than one Bureau, depending on the services a regulatee offers. DBS providers pay separate fees to support the Media and International Bureaus because FTEs in the two bureaus play distinct,

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[16] *See* NCTA/ACA Connects Comments at 5-6.

[17] AT&T and DISH also ignore a number of complaint proceedings and other adjudicatory matters within the Media Bureau's purview in which these parties have been involved over the previous year. *See* NCTA/ACA Connects Comments at 5-6. Most recently, AT&T filed a complaint against nine Sinclair-related station groups alleging violations of the Commission's good faith retransmission consent negotiation rules. *See* Verified Complaint of DIRECTV and AT&T Services, Inc., MB Docket No. 12-1 (June 18, 2019).

[18] *See* AT&T/DISH Comments at 3.

complementary roles in regulating DBS services.[19/] The payment of one fee in no way offsets the other or accounts for the regulatory activities of a different Bureau.

CONCLUSION

Under the statutory framework that governs the Commission's assessment of regulatory fees, DBS operators must pay the same regulatory fee as other MVPDs. The Commission's stated rationale for phasing in the DBS regulatory fee – to avoid "rate shock" – is no longer tenable, if it ever was.[20] The Commission's adoption of a common regulatory fee for all MVPDs would impose on DBS providers an increase of only a few cents per month per customer – a "negligible fraction of a monthly bill"[21] – and AT&T and DISH have failed to offer any alternative justification for continuing to phase in the DBS fee incrementally. For these reasons, NCTA and ACA Connects urge the Commission to finally end the phase-in of the DBS regulatory fee and adopt a uniform rate for cable television, IPTV and DBS providers.

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[19] *See* NCTA/ACA Connects Comments at 9.

[20] *See, e.g.*, Comments of NCTA and the American Cable Association, MD Docket No. 18-175, at 5-6 (filed July 6, 2018) ("[T]he Commission should reject AT&T and DISH's tired arguments that the proposed fees will cause rate shock and their avowed concern about subscriber expectations going forward. As in past years, these claims are untenable. The proposed fee increase amounts to less than a penny per month for subscribers, and results in a fee still well below what DBS competitors have to pay, at a time when DBS providers regularly increase their rates by many dollars per month. As to preparing their subscribers for the future, DBS providers have had more than enough notice that their regulatory fees will increase by a few pennies each year and could have been setting subscriber expectations accordingly if they believed that would be a concern.") (internal citations omitted).

[21] *FY 2017 Report and Order* ¶ 21.

Respectfully submitted,

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