

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees	)	MD Docket No. 17-134
for Fiscal Year 2017	)	

**REPLY COMMENTS**



**I. INTRODUCTION**

The American Cable Association (“ACA”) submits these reply comments in response to the comments filed by DISH and AT&T (collectively, the “Joint DBS Commenters”) concerning the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned docket.<sup>1</sup> The Joint DBS Commenters oppose the Commission’s proposal to increase the DBS subcategory regulatory fee level in fiscal year (“FY”) 2017 to \$0.38 per subscriber,<sup>2</sup> claiming, as they have before, that the increase would harm consumers and that the Commission has failed to justify the increase.<sup>3</sup>

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<sup>1</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Notice of Proposed Rulemaking, MD Docket No. 17-134 (rel. May 23, 2017) (“NPRM”).

<sup>2</sup> The FY 2017 \$0.38 per subscriber fee includes a baseline fee of \$0.36 per subscriber, plus a two cent per subscriber facility relocation fee. *Id.*, ¶ 17.

<sup>3</sup> See *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, MD Docket No. 17-134, Comments of DISH Network LLC and AT&T Services, Inc. at 3-7 (filed June 22, 2017) (“Joint DBS Comments”).

AT&T and DISH also argue that the Commission does not possess the legal authority to assess all MVPDs the same per-subscriber Media Bureau regulatory fee.<sup>4</sup>

These objections lack merit. The proposed increase in the DBS subcategory rate will not harm consumers. In addition, the DBS providers' continued participation in Media Bureau MVPD activities on par with cable and IPTV providers and the equivalent benefits they derive from the efforts of Media Bureau full-time equivalent employees ("FTEs"), coupled with the Commission's indisputable legal authority to adjust the DBS subcategory rates, more than justify the DBS subcategory fee increase proposed in FY 2017, and support an even further adjustment to full parity among all MVPD payors.

## **II. UPWARD ADJUSTMENT OF THE REGULATORY FEES ASSESSED DBS PROVIDERS IN SUPPORT OF MEDIA BUREAU MVPD REGULATORY ACTIVITIES WILL NOT HARM CONSUMERS**

The Joint DBS Commenters object to the proposed upward revision of the DBS subcategory fee rate from \$0.27 per subscriber in FY 2016 to \$0.38 per subscriber in FY 2017, and declare that this increase, when passed through, will harm their subscribers.<sup>5</sup> This claim lacks merit.

The proposed 11 cents per year increase in per-subscriber DBS fees will not harm DBS subscribers. If passed through, such an increase amounts to less than one cent per month per subscriber. At a time when DISH and AT&T affiliate DirecTV just increased their customers' fees by \$5 per month and \$2-\$8 per month for 2017, respectively, their claims that less than one cent per month regulatory fee increase is harmful rings hollow.<sup>6</sup> Also, in light of DISH's average

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<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> *Id.* at 3. To the extent that DISH and AT&T believe that the proposed relatively insignificant increase to their regulatory fees would harm their subscribers, they are multi-billion-dollar enterprises and have the option of absorbing the increased costs themselves.

<sup>6</sup> See DirecTV Pricing, *available at* [http://cdns.directv.com/content/dam/dtv/directv\\_marketing/help\\_center/DTV\\_Price\\_Increase\\_NewCust\\_2017.pdf](http://cdns.directv.com/content/dam/dtv/directv_marketing/help_center/DTV_Price_Increase_NewCust_2017.pdf) (increasing rates effective January 22, 2017) (last viewed July 7, 2017); James K. Willcox, *Your Cable Bill Is Going Up More Than You Think This Year*, CONSUMER REPORTS, Feb. 4, 2017, *available at*

revenue per unit (“ARPU”) of \$86.79 per month and AT&T affiliate DirecTV’s ARPU of \$118.00 per month, their assertion that a less than one cent per month regulatory fee increase is harmful, let alone noticeable, becomes laughable.<sup>7</sup>

Moreover, any alleged harm is more than offset by the public interest benefit of regulatory fee parity for all MVPDs in the Cable/IPTV fee category and the lower regulatory fee that tens of millions of cable and IPTV subscribers will pay as a result of the DBS fee increase.<sup>8</sup> It is well settled that the lower regulatory fees assessed on the DBS providers can have market-distorting effects. The Commission was criticized by the Government Accountability Office (“GAO”) for just these problems five years ago<sup>9</sup> and the “deliberate speed” marking the Commission’s progress to full fee parity is both unwarranted and unfair to cable and IPTV subscribers. The GAO’s recognition that cable operators (and now IPTV providers) effectively cross-subsidize their DBS competitors is a fact the Commission relied in part on to justify

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<http://www.consumerreports.org/tv-services/your-cable-bill-is-going-up-more-than-you-think-this-year/> (last viewed July 7, 2017).

<sup>7</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, ¶ 71 (rel. Jan. 17, 2017). These ARPU figures are from 2015. Both DirecTV and DISH likely have even higher ARPUs in 2017. For example, Forbes reports that DISH’s ARPU is now \$88.66. *Dish Network’s Subscriber Numbers Boosted by Sling TV, But ARPU Could See Pressure*, FORBES, Mar. 1, 2017, available at <https://www.forbes.com/sites/greatspeculations/2017/03/01/dish-networks-subscriber-numbers-boosted-by-sling-tv-but-arpu-could-see-pressure/#5e51b8491ddc> (last viewed July 7, 2017).

<sup>8</sup> See *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Notice of Proposed Rulemaking, MD Docket No. 17-134, Comments of American Cable Association at 2 (filed June 22, 2017) (“ACA Comments”). The modest increase proposed for DBS leaves their fee levels far below those of cable and IPTV providers, who continue to cross-subsidize their competitors’ regulatory fees by bearing a higher percentage of the Media Bureau fee burden than is warranted. At \$0.38 per subscriber in FY 2017, the DBS fee remains \$0.58 per subscriber less than the per-subscriber fee assessed on cable and IPTV providers and leaves cable and IPTV providers paying the same rate that they paid two years ago when the Commission first established the DBS fee subcategory. See *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd 10268, Appendix C (2015) (“FY 2015 Order and FNPRM”) (establishing \$0.96 per subscriber per year regulatory fee for cable operators and IPTV providers).

<sup>9</sup> Government Accountability Office, *Regulatory Fee Process Needs to be Updated*, GAO 12-686, at 17 (Aug. 2012), available at <http://www.gao.gov/products/GAO-12-686> (last viewed July 7, 2017).

adopting the DBS subcategory fee.<sup>10</sup> The GAO Report stated that one effect of fee cross-subsidization, “is that, if entities in different fee categories are directly competing for the same customers, cross subsidization could result in competitively disadvantaging entities in one fee category over another.”<sup>11</sup> This prescient observation from five years ago remains today in the MVPD marketplace. DBS providers directly compete with cable operators and IPTV providers, and continue to reap the benefits of a lower regulatory fee assessment.<sup>12</sup>

It is also worth noting that only a few years ago, AT&T, prior to its acquisition of DirecTV, in addressing the Commission’s stated goals of regulatory fee reform of “fairness, administrability, and sustainability” stated that while all are appropriate, “the chief hallmark of any regulatory fee program should be fairness.”<sup>13</sup> At the time, AT&T, although opposed to including IPTV in the cable fee category, was in favor of the creation of an MVPD fee category to better reflect “the evolving dynamic nature of the MVPD video marketplace.”<sup>14</sup> Presumably, this would be done with the aim of assessing all MVPDs the same fee level based on Media Bureau regulatory activities that benefitted all MVPDs and their subscribers equally as a matter of overall fairness. What would have been the fairest then remains what would be the fairest

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 18.

<sup>12</sup> AT&T’s use of Media Bureau FTEs on behalf of all of its MVPD affiliates, representing both DBS and IPTV subscribers alike, is a case in point. There is no basis for assessing AT&T’s regulatory fee obligation at different levels for its U-verse video subscribers than those taking its DirecTV service, especially considering that AT&T’s participation in Media Bureau MVPD proceedings is to the benefit of all of its MVPD subscribers in roughly equal measure. ACA agrees with NCTA that “[r]egulatory fees should be evenly distributed among MVPDs, regardless of the technology they use, to keep fees fair and to preserve competitive neutrality.” *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Notice of Proposed Rulemaking, MD Docket No. 17-134, Comments of NCTA – The Internet & Television Association at 5 (filed June 22, 2017) (“NCTA Comments”).

<sup>13</sup> *Assessment and Collection of Regulatory Fees*, *Assessment and Collection of Regulatory Fees for the Fiscal Year 2014*, *Assessment and Collection of Regulatory Fees for the Fiscal Year 2013*, *Procedures for Assessment and Collection of Regulatory Fees*, MD Docket Nos. 14-92, 13-140, 12-201, Comments of AT&T at 1 (filed June 19, 2013).

<sup>14</sup> *Id.* at 5.

today: all MVPD payors should be assessed the same regulatory fee levels, regardless of technology.

The public interest would also be served by not assessing excessive fees on customers of cable and IPTV providers. As NCTA observed, the Joint DBS Commenters' arguments about harm to DBS customers are unpersuasive, as "[w]hatever increase in the cost of DBS that may occur as a result of equitable sharing of support for Media Bureau regulation will be offset by the benefit to cable and IPTV consumers who currently bear an unfairly large share of the burden of these costs."<sup>15</sup> Assuming that the Commission collected the \$71,600,000 it proposes to collect from all MVPDs and left the DBS subcategory fee at the \$0.27 per subscriber level it assessed in FY 2016, cable and IPTV providers would be required to pay \$1.01 in per-subscriber regulatory fees for FY 2017, a \$0.05 per-subscriber increase over the proposed \$0.96 fee.<sup>16</sup>

### **III. UPWARD ADJUSTMENT OF THE REGULATORY FEES ASSESSED DBS PROVIDERS IN SUPPORT OF MEDIA BUREAU MVPD REGULATORY ACTIVITIES IS JUSTIFIED**

AT&T and DISH object, once again, to the proposed upward revision of the DBS subcategory fee rate on the basis that the Commission has failed to provide information in the record sufficient to determine whether the fee proposed for FY 2017 is "reasonably" equal to the amount of staff resources appropriated for DBS activities.<sup>17</sup> AT&T and DISH also proclaim that the Commission "has failed to explain how regulatory developments in the last year have impacted staff resource allocation consistent with the fee increase proposed for FY 2017."<sup>18</sup> This argument fails for two reasons. First, the NPRM has given the DBS providers sufficient notice of the basis for the Commission's proposed fee increase and solicited comment. ACA and

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<sup>15</sup> NCTA Comments at 9.

<sup>16</sup> The Commission expects to collect \$59,250,000 from cable and IPTV providers and \$12,350,000 from the DBS providers, for a total of \$71,600,000 from all MVPDs. NPRM, Appendix A. The Commission also estimates 62,000,000 cable and IPTV subscribers and 32,500,000 DBS subscribers. *Id.*

<sup>17</sup> Joint DBS Comments at 3-7.

<sup>18</sup> *Id.* at 4.

NCTA have provided record support for the Commission's proposal as well as demonstrated why it does not go far enough. Second, as discussed below, the DBS providers misconceive the nature of the Commission's fee setting exercise, as it is not required to calculate fee levels with scientific precision.

The NPRM gives sufficient notice of the reasons for increasing the DBS subcategory rate, identifying a number of Media Bureau regulatory and oversight activities with respect to MVPDs that justify regulatory parity among all MVPDs, including DBS. In their Comments, both ACA and NCTA further bolster the case by identifying numerous other MVPD proceedings and activities administered by the Media Bureau in which DBS providers participate and from which they benefit. ACA and NCTA's filings demonstrate that all payors in the Cable/IPTV fee category have imposed and continue to impose similar burdens on Media Bureau resources used to administer MVPD regulation, have received and continue to receive similar regulatory benefits in their provision of MVPD services, and therefore should be assessed similar regulatory fees to support Media Bureau MVPD activities.<sup>19</sup>

Notwithstanding the fact that the fee increase is fully justified in the NPRM and record, the DBS providers once again incorrectly focus solely on Media Bureau resources allocated to DBS matters in the past fiscal year to support their claim that an upward adjustment in the DBS subcategory fee is unwarranted.<sup>20</sup> As the Commission made plain in its FY 2016 Order, the

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<sup>19</sup> As ACA explained, AT&T and DISH have been active participants in FY 2017 in the Media Bureau's proceeding implementing the Satellite Television Extension and Localism Act Reauthorization Act of 2014, in the Nexstar/Media General broadcast license transfer and assignment proceeding, and in the Commission's ATSC 3.0 rulemaking, launched this spring, requiring oversight and involvement from Media Bureau FTEs. ACA Comments at 4-5. Also, in FY 2017 and over the next two fiscal years, DBS providers, like cable and IPTV providers, will engage Media Bureau FTEs to seek reimbursement from costs related to the broadcast incentive auction. *Id.* at 5. NCTA also provided evidence that, in addition to rulemaking proceedings cited in the NPRM, DISH Network or DIRECTV (as part of the AT&T family) or both, like ACA, have participated in several rulemaking and non-rulemaking proceedings before the Media Bureau in relatively equal measure as cable operators. NCTA Comments at 3-5.

<sup>20</sup> Joint DBS Comments at 6 (claiming that the Media Bureau only cited four proceedings and failed to provide internal accounting or other explanations to justify its proposed \$0.38 fee). See also *Assessment and Collection of Regulatory Fees for Fiscal Year 2016*, MD Docket No. 16-166, Comments of Dish Network, L.L.C. at 4-6 (filed June 20, 2016) ("The Commission has failed to justify how Media Bureau

yearly increases in the DBS fee level are “not based on an incremental increase in Media Bureau FTEs working on MVPD issues,” but are based on data and analysis of what a “sensible” fee should be.<sup>21</sup> Furthermore, the Act leaves the Commission with a good deal of discretion in setting fee levels.<sup>22</sup>

The DBS providers are also well aware that, despite having set the initial DBS regulatory fee at a very low level relative to the regulatory fee assessed on cable operators and IPTV providers (the “Cable/IPTV” rate) in 2015, the Commission plainly stated that it would “update this rate for future years, based on relevant information, as necessary for ensuring an appropriate level of regulatory parity and considering resources dedicated to this new regulatory fee subcategory.”<sup>23</sup> They should not be surprised when the Commission, as it had for FY 2016, proposes to increase DBS Media Bureau fee levels for FY 2017. As such, AT&T and DISH’s arguments that the Commission has failed to justify its proposed increase of the DBS subcategory regulatory fee completely overlook the Commission’s long-standing commitment to achieve regulatory parity among cable, IPTV, and DBS providers. In its FY 2016 Order, the

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FTE resource allocation has changed over the past year to justify a 125 percent per-subscriber fee increase.”); Comments of AT&T at 2 (filed June 20, 2016) (“Nothing in the 2016 NPRM justifies the inference that the precipitate 125% increase in DBS regulatory fees is ‘a sensible fee supported by data and analysis’ that is ‘based on relevant information.’”).

<sup>21</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2016*, Report and Order, 31 FCC Rcd 10339, ¶ 30 (2016) (“FY 2016 Order”); FY 2015 Order and FNPRM, ¶ 20.

<sup>22</sup> See 47 U.S.C. § 159(b)(2) (“[T]he Commission shall, by rule, revise the Schedule of Regulatory Fees by proportionate increases or decreases to reflect, in accordance with paragraph (1)(B), changes in the amount appropriated for the performance of the activities described in subsection (a) for such fiscal year. Such proportionate increases or decreases shall – (A) be adjusted to reflect, within the overall amounts described in appropriations Acts under the authority of paragraph (1)(A), unexpected increases or decreases in the number of licensees or units subject to payment of such fees; and (B) be established at amounts that will result in collection of an aggregate amount of fees pursuant to this section that can reasonably be expected to equal the aggregate amount of fees that are required to be collected by appropriations Acts pursuant to paragraph (1)(B).”). Increases or decreases in fees made by adjustments pursuant to Section 159(b)(2) are not subject to judicial review. *Id.*

<sup>23</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd 5354, ¶ 31 (2015) (“FY 2015 NPRM and Order”). See also *id.*, ¶ 38 (deciding to “phase in the DBS fee and introduce it initially as a subcategory of the cable television and IPTV category” to quell DBS providers’ fears regarding rate shock for their subscribers).

Commission affirmed that “[it] remain[s] committed as a goal to regulatory fee parity for all MVPDs paying into the cable/IPTV fee category.”<sup>24</sup> To that end, the Commission has gradually increased the DBS subcategory fee schedule towards parity each year, and the proposed increase for FY 2017 is neither insufficiently explained nor different in kind its prior increase.<sup>25</sup> Increasing the DBS subcategory rate to achieve full regulatory parity with cable and IPTV payors for FY 2017 would furthermore be consistent with the Commission’s goal to “ensure[e] a more equitable distribution of the regulatory fee burden among categories of Commission licensees” under Section 9.<sup>26</sup>

#### **IV. THE COMMISSION HAS THE LEGAL AUTHORITY TO ASSESS DBS PROVIDERS THE SAME REGULATORY FEES AS CABLE OPERATORS AND IPTV PROVIDERS**

In 2015, the Commission rejected arguments by the DBS providers that it lacked the authority to assess regulatory fees on DBS providers in their capacity as MVPDs.<sup>27</sup> The Joint DBS Commenters now assert that there is no legal foundation to support parity in the fees imposed upon DBS and cable operators.<sup>28</sup> The Commission should reject this claim out of hand.

In 2015, the Commission conducted a review of Media Bureau work devoted to MVPD resources and concluded that DBS providers should be included in the same fee category as cable operators and IPTV providers.<sup>29</sup> Having reached that conclusion, the Commission may now make any adjustments to the fee levels within the category that it deems are warranted. In the NPRM, the Commission found that Media Bureau resources devoted to MVPD proceedings,

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<sup>24</sup> FY 2016 Order, ¶ 30.

<sup>25</sup> ACA agrees with NCTA’s observation that this move toward parity has been “unusually slow[.]” NCTA Comments at 9.

<sup>26</sup> FY 2016 Order, ¶ 6.

<sup>27</sup> FY 2015 NPRM and Order, ¶¶ 31-33.

<sup>28</sup> Joint DBS Comments at 8 (“[A]ny suggestion that there must be parity in the fees imposed upon DBS and cable providers lack legal foundation and should be rejected.”).

<sup>29</sup> FY 2015 NPRM and Order, ¶ 31.



including DBS, supported revising the DBS regulatory fee rate upward.<sup>30</sup> This observation alone is sufficient justification to increase the amount of regulatory fees that the DBS providers must pay to support Media Bureau FTEs. ACA observed in its Comments that “Section 9 does not require the Commission to engage in a company-by-company assessment of relative regulatory costs.”<sup>31</sup> NCTA, as well, pointed out that the Commission has never “held that each entity should pay fees *exactly* equal to its interaction with the Media Bureau or any other bureau – nor is it required by the statute to do so.”<sup>32</sup> Thus, the Commission is not required to demonstrate that the Media Bureau has devoted an increased amount of resources to DBS activities in FY 2017 over FY 2016. Rather, as the Commission has done, it may set fee levels for reasons that the Commission determines “are in the public interest.”<sup>33</sup>

Accordingly, the record supports the Commission's conclusion that as MVPDs, DBS providers impose a similar burden as cable and IPTV providers on Media Bureau FTEs, and as such the Commission has ample authority to adjust its regulatory fee levels accordingly.<sup>34</sup>

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<sup>30</sup> NPRM, ¶ 17.

<sup>31</sup> ACA Comments at 5, *citing Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712, ¶ 19 (2007).

<sup>32</sup> NCTA Comments at 7-8.

<sup>33</sup> 47 U.S.C. § 159(b)(3).

<sup>34</sup> See ACA Comments at 2-6; NCTA Comments at 3-5.

## V. CONCLUSION

AT&T and DISH have provided no basis for the Commission to withhold from increasing the fee level assessed to the DBS providers for FY 2017. The proposed increase will not harm DBS subscribers and the DBS providers have continued to participate in Media Bureau MVPD proceedings and continued to benefit from Media Bureau FTE work. Together with the Commission's ample legal authority to adjust the fee levels assessed on the DBS providers, the Commission's proposed raise is fully justified. Moreover, increasing the DBS subcategory rate to achieve full regulatory parity with cable and IPTV payors for FY 2017 would be consistent with the Commission's goal to more equitably distribute regulatory fee burdens among Commission licensees, and the Commission should take this step.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

By: 

Matthew M. Polka  
President and CEO  
American Cable Association  
875 Greentree Road  
7 Parkway Center, Suite 755  
Pittsburgh, Pennsylvania 15220-3704  
  
(412) 922-8300

Ross J. Lieberman  
Senior Vice President of Government Affairs  
American Cable Association  
2415 39<sup>th</sup> Place, NW  
Washington, DC 20007  
(202) 494-5661

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Barbara S. Esbin  
Scott C. Friedman  
Elizabeth M. Cuttner  
Cinnamon Mueller  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 872-6811

Attorneys for American Cable Association