

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

In the Matter of

Assessment and Collection of Regulatory
Fees for Fiscal Year 2014

MD Docket No. 14-92

Assessment and Collection of Regulatory
Fees for Fiscal Year 2013

MD Docket No. 13-140

Procedures for Assessment and Collection
of Regulatory Fees

MD Docket No. 12-201

FURTHER REPLY COMMENTS OF DIRECTV, LLC AND DISH NETWORK L.L.C.

Jeffrey Blum
Senior Vice-President and
Deputy General Counsel
Alison A. Minea
Director & Senior Counsel
Regulatory Affairs
Hadass Kogan
Associate Corporate Counsel
DISH NETWORK L.L.C.
1110 Vermont Avenue NW,
Suite 750
Washington, DC 20005
(202) 293-0981

Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street,
Suite 600
Washington, DC 20004
(202) 383-6300

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, LLC

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SUMMARY

The cable industry once again asks the Commission to raise Direct Broadcast Satellite (“DBS”) regulatory fees, this time by more than twenty million dollars each year. It once again argues that today’s regulatory fee system—a system under which more than 1,500 highly regulated providers of cable and broadband service pay more in regulatory fees than do two lightly regulated DBS providers—is unfair. And it once again argues that DBS providers should pay per-subscriber regulatory fees as if they were cable operators, despite the fact that DBS generates nowhere near the regulatory costs of cable.

DIRECTV and DISH have fully responded to these misplaced “fairness” arguments the last five times the cable industry raised them. They have also explained why, even setting aside false claims of “unfairness,” the Commission lacks legal authority to adopt cable’s proposal. This time around, cable devotes only a single paragraph—four sentences—to the question of legal authority. Such hand waving cannot suffice where, as here, three separate provisions of law flatly prohibit cable’s proposal.

1. Section 9’s “permitted amendment” provision. Section 9 permits the Commission to amend its regulatory fee schedule only in response to “changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.” 47 U.S.C. § 159(b)(3). Cable points to a handful of new Media Bureau proceedings to support its argument that DBS operators must now pay Media Bureau fees in addition to the International Bureau fees they already pay. But cable fails to explain how these proceedings change the “nature” of DBS regulation. No such explanation exists. The Media Bureau (or its predecessor) has regulated DBS as long as DBS has existed. It has regulated essentially the same topics, including access to cable programming, carriage of broadcast programming,

and disabilities access. And it has issued roughly the same volume of regulation over time. While Media Bureau oversight of DBS may have changed in some details, the “nature” of such regulation has remained constant.

2. ***Section 9’s “cost recovery” requirement.*** Even if the Commission could amend the fee schedule to account for Media Bureau DBS regulation (which it cannot), Section 9 also requires the Commission to “recover the costs” of regulation. The statute defines “costs,” in turn, through full time equivalent (“FTE”) staff hours. Cable argues that that it is illogical to insist that any new “DBS Media Bureau” regulatory fees be tied to the cost of DBS Media Bureau regulation. Yet this is precisely what the statute requires—otherwise, the concept of cost recovery is written out. And, by any measure available to the public, the Media Bureau spends far more FTEs regulating cable than it does DBS. Indeed, even under cable’s (highly misleading) calculations, the Media Bureau “regulates” DIRECTV roughly as much as it does Suddenlink. But DIRECTV would pay nearly *seventeen times* as much as Suddenlink in Media Bureau-related regulatory fees under cable’s proposal.

There is a broader point to be made here as well. Cable argues that the Commission should hunt for “unrecovered” FTEs left unaccounted for by the existing fee schedule. If so, surely the place to start is with the FTEs regulating cable’s broadband service. Broadband regulation is perhaps the most important and time-consuming issue facing the Commission today—and cable pays nothing today to cover it.

3. ***The APA’s requirement of reasoned decisionmaking.*** Even if it could amend the fee schedule to account for Media Bureau DBS regulation (which it cannot), and even if it then found that cable and DBS generate the same Media Bureau FTEs (which it will not), the Commission still should not increase DBS fees by more than 7.5 percent per year. Last year,

the Commission imposed this cap to avoid rate shock, even at the risk of limiting fee reductions others might otherwise enjoy. It cannot now lawfully impose an 1100 percent increase on DBS operators without explaining what has alleviated its prior concerns. Cable's answers—that DBS operators are big and that “rate shock” only exists when fee increases threaten to drive payors into bankruptcy—are specious. However big DBS operators may be, a \$20 million fee increase will cause rate shock and is the exact type of increase the Commission sought to avoid when imposing the cap. Indeed, it is fair to suggest that cable has spent so many years pushing its proposal *in order to cause* just such rate shock for DBS operators and their subscribers.

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DIRECTV, LLC (“DIRECTV”) and DISH Network L.L.C. (“DISH”) hereby submit these further reply comments in response to the cable industry’s latest submission on regulatory fees. The Commission seeks to amend its regulatory fee schedule so that Direct Broadcast Satellite (“DBS”) operators pay the costs of certain Media Bureau full-time equivalent (“FTE”) employees that regulate them.¹ As DIRECTV and DISH have explained, this proposal faces substantial legal hurdles, all of which remain essentially unaddressed.

The cable industry, however, would go even further. It wants DBS operators to pay regulatory fees *as if they were cable operators*—despite the fact that the two are not regulated

¹ *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 10767 (“*Notice*”).

in remotely the same manner.² This is the sixth time in the last nine years that cable operators have made this argument. DIRECTV and DISH have addressed it fully and repeatedly—particularly cable’s misplaced argument that “fairness” somehow requires less-regulated entities offering one service (like DBS) to pay the same regulatory fees as more-regulated entities offering multiple services (like cable).

Cable’s latest argument is notable principally for how little time it spends discussing the legal basis for its proposed change. In a fifteen page pleading, cable devotes a single paragraph—only four sentences—to the question of the Commission’s legal authority.³ Cable merely identifies some (but not all) of the relevant statutory language and states, with no support, its view that current circumstances fulfill the relevant criteria. In truth, at least three statutory provisions flatly preclude the Commission from adopting cable’s proposal: (1) Section 9’s provision regarding “permitted amendments” to the regulatory fee schedule; (2) Section 9’s requirement that fees recover the costs of regulation; and (3) the Administrative Procedure Act’s (“APA”) requirement of reasoned decisionmaking.

I. THE COMMISSION MAY ONLY AMEND DBS REGULATORY FEES RESPONSE TO CHANGES IN THE “NATURE” OF DBS REGULATION

The cable industry cites Section 9’s requirement that the Commission may only “add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in

² Comments of the National Cable & Telecommunications Association and the American Cable Association, MD Docket No. 14-92 *et al.* (filed Nov. 26, 2014) (“Cable Further Comments”); Comments of DIRECTV, LLC and DISH Network L.L.C., MD Docket No. 14-92 *et al.* (filed Nov. 26, 2014) (“DBS Further Comments”).

³ Cable Further Comments at 15.

law.”⁴ It then asserts that “numerous rulemaking proceedings and changes in law” since 1996 have changed the nature of the regulatory services the Commission provides to DBS operators. Nowhere, however, does cable provide the basis for this assertion.

As DIRECTV and DISH have pointed out,⁵ Section 9 establishes a precise purpose for the regulatory fees at issue here (to recover the costs of regulating). It prescribes a particular method for determining those costs (by determining full-time equivalent employees performing the relevant regulatory activities). And it limits the specific circumstances under which the fee schedule recovering those costs may be amended (to situations where the regulatory activities for which costs are to be recovered change fundamentally in response to a change of law or a rulemaking proceeding).⁶ Absent such a showing, the creation of a new DBS fee category would be “neither authorized nor justified” under the Communications Act, and could be held “unlawful” and “set aside” by a reviewing court.⁷

DIRECTV and DISH agree that new rulemaking proceedings and changes in law have occurred over time, some of which involve the Media Bureau. Yet cable’s claims that these changes have somehow *changed the nature* of DBS regulation—as reflected in the cost of regulating—are without merit:

- ***Media Bureau regulation of DBS is not new.*** The Media Bureau (or its predecessor, the Cable Services Bureau) has regulated DBS since its inception.

⁴ *Id.*, citing 47 U.S.C. § 159(b)(3).

⁵ DBS Further Comments at 3.

⁶ More generally, the regulatory fee schedule may only be amended by the Commission under the procedures established in Section 9. *See* 47 U.S.C. § 159(b)(1)(C).

⁷ *COMSAT Corp. v. FCC*, 114 F.3d 223, 228 (D.C. Cir. 1997).

- ***The principal areas regulated by the Media Bureau are not new.*** The Media Bureau regulates DBS in a handful of areas, most notably with respect to access to cable programming, carriage of broadcast stations, and disabilities access. It has regulated each of these areas for nearly twenty years. That some specific rules have changed over time (closed captioning rules applied to programming delivered via IP⁸ as well as through traditional means,⁹ for example) does not mean that the “nature” of this regulation—as reflected in the costs of regulating—has changed.
- ***The volume of Media Bureau regulation is not new.*** DIRECTV and DISH have demonstrated that the Media Bureau issued *more* orders related to DBS during the first six years of DBS’s placement in the geostationary satellite fee category (1996-2001) than it did during a corresponding recent period (2008-2013).¹⁰ The cable industry has not disputed these figures.

In light of this uncontroverted evidence, the cable industry cannot demonstrate a change in the “nature” of DBS regulation. And the Commission lacks the authority to enact cable’s proposal absent such a showing.

II. DBS REGULATORY FEES MUST REFLECT THE COSTS OF REGULATING DBS

The cable industry argues that DIRECTV and DISH are “illogical” to suggest that Section 9 “requires the Commission to apply a regulatory fee to DBS providers that is tied to

⁸ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-first Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd. 8785 (2013).

⁹ *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, 11 FCC Rcd. 19214 (1996).

¹⁰ DBS Further Comments, Apps. B & C.

the number of FTEs ‘dedicated to DBS regulation.’”¹¹ Yet this is precisely what Section 9 requires.

Section 9 created regulatory fees to “recover the costs” of four kinds of regulatory services provided by the Commission—“enforcement activities, policy and rulemaking activities, user information services, and international activities.”¹² It specified that regulatory fees must reflect “the full-time equivalent number of employees performing [the four listed activities]. . . .”¹³ It then provides that such fees may *be adjusted* “to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”¹⁴ Setting aside the question of permitted amendments, this language requires the Commission to “recover the costs” that the Media Bureau expends regulating “the payor”—in this case, DBS—in terms of FTEs, subject to some “adjustment.”

Of course, Section 9’s cost recovery language does not mean that regulatory fees must exactly reflect the Commission’s costs of regulating individual companies in individual years.¹⁵ As the cable industry itself once said, regulatory fees can only hope to achieve “rough justice.”¹⁶ It does, however, mean that the fees paid by particular categories of payors must reflect the basic costs of regulating them. Otherwise, the statutory directive to “recover the costs” of regulation is written out.

¹¹ Cable Further Comments at 10.

¹² 47 U.S.C. § 159(a).

¹³ *Id.* (incorporating 47 U.S.C. § 159(b)(1)(A)).

¹⁴ *Id.*

¹⁵ Cable Further Comments at 10.

¹⁶ Reply Comments of the National Cable and Telecommunications Association, MD Docket Nos. 12-201 and 08-65, at 5 (Oct 23, 2012).

Cable’s essential complaint is that DBS operators pay International Bureau fees but do not pay Media Bureau fees.¹⁷ In other words, cable complains that the Commission does not “recover the costs” of a *particular set* of FTEs—Media Bureau FTEs spent regulating DBS. Again, this has been true since the Commission first placed DBS on the regulatory fee schedule, and the Commission thus has no legal authority to amend its schedule on this basis. Even setting this aside, Section 9’s “cost recovery” requirement requires the Commission to determine the number of Media Bureau FTEs devoted to DBS.

Of course, at present only the Commission itself possesses this information. Presumably, it forms the basis of the Commission’s proposal to charge DBS operators regulatory fees one-tenth of those for cable.¹⁸ As DIRECTV and DISH have demonstrated, this figure roughly corresponds with the number of pages filed in docketed proceedings by the two sectors.¹⁹ It is also consistent with the number of pages filed in docketed proceedings *before the Media Bureau* by the two industries, in which cable filed more than nineteen times the number of pages in roughly six times the number of pleadings.²⁰ The figure thus

¹⁷ Cable Further Comments at 2.

¹⁸ Notice, ¶ 41.

¹⁹ DBS Further Comments at 13.

²⁰ By our count, the top twenty cable MSOs filed 81,501 pages in 1,310 pleadings in Media Bureau docketed proceedings since 2012, while the DBS operators filed 4,176 pages in 224 pleadings during that time period. Counsel for DIRECTV obtained this figure by reviewing the pleadings submitted to the Commission’s Electronic Comment Filing System (“ECFS”) for calendar years 2012-14 from, on the one hand, DIRECTV, EchoStar, DISH Network and the Satellite Broadcasting and Communications Association, and on the other hand, NCTA, the American Cable Association and the cable operators among the top-25 MSOs (Comcast, Time Warner Cable, Cox, Charter, Cablevision, Bright House Networks, Suddenlink, Mediacom, WOW!, Cable One, RCN, Atlantic Broadband, Midcontinent, Armstrong, Service Electric, Metrocast Cablevision, Blue Ridge Communications, Wave, GCI, Buckeye, and Grande). This count included obvious affiliates of the entities listed above, except for entities that appear specific to telephony services (such as Mediacom Telephony, for example). The count excluded both ministerial submissions (such as acknowledgements of confidentiality) and confidential

distinguishes reasonably between cable and DBS, and there is nothing “unnecessarily complicated” about it.²¹ This is so even if, as the cable industry points out, some Media Bureau activities “overlap” cable and DBS.²² Just because some Media Bureau rulemakings apply equally to cable and DBS does not mean that the Media Bureau regulates the two industries equally overall.

The cable industry’s attempt to provide its own estimation of Media Bureau FTEs serves only to demonstrate the unlawfulness of its proposal. Cable suggests that DIRECTV and DISH combined made roughly double the number of non-merger related filings this year than did a single “average top twelve” cable operator.²³ This, of course, means that each of DIRECTV and DISH made roughly the same number of non-merger related filings as did a hypothetical “average” cable operator—one akin to Suddenlink, the seventh largest cable operator. Yet the cable industry wants DIRECTV to pay nearly *seventeen times* and DISH to pay nearly *twelve times* more Suddenlink in regulatory fees.²⁴

The cable industry also suggests that, over the last five years, DIRECTV met with the Media Bureau 43 times and DISH did so 29 times. This means that DISH met with the Media Bureau roughly once every two months, while DIRECTV did so roughly every month and a half. This does not provide any proof that DIRECTV and DISH are using “considerable”

submissions. It also excluded Verizon and AT&T, and thus likely understated the disparity in regulatory costs.

²¹ Cable Further Comments at 8.

²² *Id.* at 11.

²³ Cable Further Comments at 7.

²⁴ Suddenlink has roughly 1.2 million subscribers. DIRECTV has roughly 20 million subscribers. DISH has roughly 14 million subscribers. Under the cable industry’s proposal for a subscriber-based system in which cable and DBS paid equally, DIRECTV would pay 16.66 times the regulatory fees of Suddenlink, and DISH would pay 11.66 times the regulatory fees of Suddenlink.

Media Bureau staff resources—particularly in light of the fact that, by our count, Comcast, Time Warner Cable, and Cablevision met with the Media Bureau regarding docketed proceedings more often than that this year alone.

These statistics, moreover, focus exclusively on docketed proceedings. As the Commission just observed in its recent *MVPD-OTT NPRM*, this ignores the non-docketed regulation of the nearly 5,000 cable systems across the country, each of which must comply with a panoply of rules inapplicable to DBS.²⁵ Cable’s estimates ignore all of this, all of which must be taken into account in order to satisfy Section 9’s cost recovery requirement.

Even this, however, ignores perhaps the most fundamental issue related to cost recovery under Section 9. The cable industry wants the Commission to “recover” FTEs it believes unaccounted for by the existing fee schedule. If the Commission is to go down this path, however, it should start with the most egregious case of all—the FTEs devoted to

²⁵ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, FCC 14-210, MB Docket No. 14-261, ¶76 (rel. Dec. 19, 2014) (describing “many cable-specific requirements” contained in the Act and the Commission’s rules, including Emergency Alert System requirements; the V-Chip; commercial limits in children’s programs; network non-duplication; syndicated program exclusivity; notice to broadcasters regarding: (i) deletion or repositioning of a broadcast signal, (ii) a change in designation of principal headend, (iii) change in technical configuration, (iv) the provision of service to 1000 subscribers, thereby entitling broadcast stations to exercise non-duplication protection or syndicated exclusivity protection; political programming and candidate access rules; sponsorship identification; lotteries; public inspection file; public, educational, or governmental channels (“PEG”); program access; leased access; various reporting requirements; cross-ownership restrictions; prohibition on buy outs; national subscriber limits (horizontal ownership restriction); limits on carriage of vertically integrated programming; various franchising requirements; rate regulation, including a requirement to offer a basic service tier, a prohibition on negative option billing, an obligation to offer a tier buy-through option, and requirements pertaining to information on subscriber bills; regulation of services, facilities, and equipment, including minimum technical standards and notification to customers of changes in rates, programming services, or channel positions; consumer protection and customer service; consumer electronics equipment compatibility, including prohibition on scrambling or encrypting the basic service tier; support for unidirectional digital cable products (Plug and Play); protection of subscriber privacy; transmission of obscene programming; and scrambling of cable channels for non-subscribers).

regulating cable's broadband service.²⁶ This is perhaps the most time consuming topic before the Commission today. The network management proceeding alone is massive and has attracted more comments than any proceeding in the Commission's history. One blog estimates that it would have taken 70 Commission staffers working full time, with no weekends and holidays, simply to *read* all of the comments by the end of the year.²⁷ Cable broadband service also generates regulatory costs with respect to the Connect America Fund,²⁸ the E-Rate,²⁹ and the Contributions proceedings.³⁰

Cable operators, however, pay for none of this. Those that happen to offer common carrier telephone service pay Interstate Telephone Service Providers fees.³¹ Such fees, however, are a percentage of their "interstate and international end-user revenues"—*i.e.*, telephony revenues. They are not based on broadband revenues, and they do not cover broadband regulation.³² It would thus be arbitrary and capricious for the FCC to recover the cost of DBS media regulation without simultaneously recovering the cost of cable broadband regulation.

²⁶ Likewise, if the Commission is to go down this path, it should also consider FTEs devoted to regulating entities not licensed by the Commission, such as programmers and online video providers.

²⁷ Harry Cole, "New Fast Lanes in Open Internet Proceeding," Sept. 14, 2014, *available at* <http://www.commlawblog.com/2014/09/articles/internet/new-fast-lane-in-open-internet-proceeding/>.

²⁸ *Connect America Fund et al.*, FCC 14-190 WC Docket Nos. 10-90, 14-58, and 14-192 (rel. Dec. 18, 2014).

²⁹ *Modernizing the E-Rate Program for Schools & Libraries*, FCC-14-189, WC Docket Nos. 13-184 and 10-90 (rel. Dec. 19, 2014).

³⁰ *Universal Service Contribution Methodology*, 27 FCC Rcd. 5357 (2012).

³¹ *Notice*, App. I.

³² *Id.*, *see also* FCC Form 499-A.

III. THE COMMISSION CANNOT IGNORE ITS PRIOR STATEMENTS REGARDING RATE SHOCK

Even if the Commission could engage in a permitted amendment under the Communications Act, and even if it could lawfully “recover” DBS regulatory costs with regulatory fees equaling those of cable operators, it would have to also satisfy the APA, which prohibits agency action that is “arbitrary” or “capricious.”³³ Under this standard, the Commission must provide a reasoned explanation for changing its policies.³⁴ Thus, the Commission would have to explain the basis of any fee increases to DBS exceeding 7.5 percent, the cap it set last year.³⁵ In setting that cap, the Commission stated the following:

- The purpose of the cap was “to avoid sudden and large changes in the amount of fees paid by various classes of regulatees.”³⁶
- “[T]he imposition of a cap on fee increases is not unprecedented,” citing a 25 percent cap imposed in 1997 “to avoid the prospect of ‘fee shock’ resulting from large and unpredictable fluctuations in fees.”³⁷

³³ 5 U.S.C. § 706(2)(A).

³⁴ See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (requiring an agency to adequately explain a departure from prior policy); see also e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (holding that, while an “agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” it must do so “when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy,” and continuing that, in such cases “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”).

³⁵ *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, 28 FCC Rcd. 12351 (2013), ¶ 21 (“2013 Order”). The Commission did not impose a similar cap this year because, as it explained, it did not propose changes resulting in such large increases this year. See *Notice*, ¶ 35 (“As compared with FY 2013, very few fee categories will experience large fee rate increases in FY 2014, and these increases do not result from the reform measures that the Commission has adopted here.”).

³⁶ *2013 Order*, ¶ 21

³⁷ *Id.*, ¶ 23, citing *Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, 12 FCC Rcd. 17161, ¶ 37 (1997). See also *id.*, n.58 (“The fee shock the Commission sought to avoid was caused by the use of employee time sheet entries to calculate direct and indirect FTEs, a methodology that was ultimately abandoned as unworkable.”).

- It rejected arguments that a cap was inappropriate because some payors had paid “too little” over the years, noting that “we cannot ‘flash cut’ to immediate, unadjusted use of the FY 2012 FTE data without engendering significant and unexpected fee increases for other categories of fee payors.”³⁸
- “[T]he cap we impose on fee increases for some licensees will unavoidably limit the fee reductions other licensees . . . would otherwise enjoy.”³⁹

The Commission cannot increase DBS fees by more than 7.5 percent per year without explaining why these statements are no longer operative.

Certainly, the cable industry provides no such explanation. They argue that DBS operators are big, and can therefore “absorb” more than twenty million dollars in additional regulatory fees per year without any “threat to their operational viability.”⁴⁰ This is not the proper standard. If it were, rate shock would never be a concern, and the Commission would never have set a 7.5 percent cap. However big DBS operators may be, a \$20 million fee increase will cause rate shock, which is exactly what the Commission sought to avoid when imposing the cap. Indeed, it is fair to suggest that cable has spent so many years pushing its proposal *in order to cause* just such rate shock for DBS operators and their subscribers.

* * *

The cable industry’s proposal to charge DBS operators the same fees as cable operators would not promote “fairness.” And it faces insurmountable legal hurdles. The Commission should once again reject it.

³⁸ *Id.*, ¶ 25.

³⁹ *Id.*

⁴⁰ Cable Further Comments at 13.

Respectfully submitted,

Jeffrey Blum
Senior Vice-President and
Deputy General Counsel
Alison A. Minea
Director & Senior Counsel
Regulatory Affairs
Hadass Kogan
Associate Corporate Counsel
DISH NETWORK L.L.C.
1110 Vermont Avenue NW,
Suite 750
Washington, DC 20005
(202) 293-0981

/s/
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street,
Suite 600
Washington, DC 20004
(202) 383-6300

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, LLC

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