

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

In the Matter of	)	
	)	
Procedures for 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
	)	
Assessment and Collection of Regulatory Fees	)	MD Docket No. 12-201
	)	

**REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION AND THE AMERICAN CABLE ASSOCIATION**

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**REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS  
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The National Cable & Telecommunications Association (“NCTA”) and the American Cable Association (“ACA”) submit this reply to comments filed in response to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding, specifically addressing the assessment and collection of regulatory fees for Direct Broadcast Satellite (“DBS”) services.<sup>1/</sup>

**INTRODUCTION AND SUMMARY**

In initial comments in this proceeding, NCTA and ACA explained the reasons why “[i]t is logical, fair, and legal for the Commission to adopt a regulatory fee category that applies equally to all MVPDs, including DBS operators.”<sup>2/</sup> It is long past time to end the competitive disparity that the current regulatory fee structure perpetuates. As the Government Accountability Office has stressed:

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<sup>1/</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 10767, ¶¶ 38-43 (2014).

<sup>2/</sup> NCTA and ACA Comments at 5.

One potential effect of 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>3/</sup>

Despite the evidence – some provided in their own submissions in this proceeding – that as MVPDs, DIRECTV and DISH (“the DBS Operators”) create significant costs for, and derive significant benefits from, the Commission’s Media Bureau, the DBS Operators argue that the Commission is helpless under section 9 of the Communications Act to hold that DBS should share in support of Media Bureau activities by paying an equitable share of the regulatory fees that support the Bureau. This contention is wrong.

The DBS Operators err with their claim that statutory changes and rulemaking proceedings affecting regulation of DBS by the Media Bureau as an MVPD are neither recent enough nor significant enough to allow modification of the DBS fee structure under section 9. The statute is not written narrowly to allow fee changes only in immediate reaction to a sweeping regulatory change brought about by a new statute or rulemaking. Instead, section 9 is written to allow the Commission flexibility in determining when, over time, sufficient changes in regulation may have accumulated to warrant – indeed, to mandate – a change in fees. The Commission is right to suggest that the time is right now to make that change for DBS fees, and such a change is clearly allowed by section 9.

The DBS Operators are similarly wrong in their contention that the Commission must demonstrate that there is exact parity between Media Bureau regulation of cable, IPTV, and DBS if it is to assess a fee on DBS similar to that assessed on cable and IPTV to support the Bureau. In fact, the record shows that the DBS Operators are substantially involved in Media Bureau

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<sup>3/</sup> Government Accountability Office, “*Federal Communications Commission Regulatory Fee Process Needs To Be Updated*” (Aug. 2012) (“GAO Report”) at 18.

regulatory activities. And importantly, 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. To the contrary, the Commission has consistently grouped similar services into broad categories for purposes of assessing regulatory fees.

In recent times, IPTV was brought into the same fee category as cable, despite differences in their regulatory burden on the Commission; likewise, VoIP services were brought into the same broad “telecommunications services” fee category, even though that category includes heavily regulated incumbent local exchange companies (“ILECs”). As MVPDs, the DBS Operators are subject to many of the same Media Bureau regulatory requirements and receive substantially the same regulatory benefits as cable and IPTV, the other MVPDs currently assessed Media Bureau regulatory fees. It is not unreasonable that DBS should pay such regulatory fees at the same rate.

Finally, the DBS Operators are also wrong in their contention that the Administrative Procedure Act (“APA”) would prevent the Commission from changing its position on DBS fees from its 2006 determination not to change the fee structure at that time. While the APA does require the Commission to make a reasoned explanation of a change, making such an explanation is not difficult given the announced temporary nature of the 2006 decision and the continuing statutory and rulemaking changes affecting DBS since 2006. An explanation for the fee change that the Commission decided not to undertake “at this time” in 2006 would simply be the further accumulation of DBS-affecting statutory and regulatory changes since that time; this would be more than sufficient to satisfy APA requirements.

Similarly, despite the DBS Operators’ assertions, it would not be difficult for the Commission to provide an explanation for not adopting a 7.5 percent cap on regulatory fee

increases as it did in 2013 to avoid “rate shock” for changes being immediately implemented that year. The facts surrounding the proposal that DBS Operators pay fees is very different; there are much greater lead times before any implementation of a new DBS fee, and the Commission could use a variety of phase-in options that would provide reasonable accommodation for the transition.

The DBS Operators continue to rely on legalistic arguments to create a narrative in which DBS fees, unchanged in form since 1996, must remain frozen in time, while the Commission is unable to make any changes, regardless of how logical and well supported they may be. As explained more fully below, that narrative relies on misreading and misapplication of the statutes and ignores longstanding Commission precedent. The Commission is authorized by statute and supported by precedent to change the regulatory fee structure for DBS to reflect equitable sharing of the costs of operation of the Media Bureau. It should do so in this proceeding.

**I. THE COMMISSION HAS SUFFICIENT LEGAL AUTHORITY TO ADOPT A REVISED FEE STRUCTURE**

The DBS Operators’ assertion that the Commission lacks legal authority to change its regulatory fee structure to assess DBS providers the same fee as cable and IPTV or to create a new DBS fee category is flatly wrong. The DBS Operators rely on an unnecessarily narrow reading of the statute to fashion an argument that such a change would fail Communications Act requirements for adopting fee structure changes. In fact, the Act clearly provides that the Commission has ample authority to adopt proposed changes to the DBS fee structure in the current proceeding.

The Communications Act makes clear that the Commission may change the regulatory fee structure to “add, delete, or reclassify” services “as a consequence of Commission

rulemaking proceedings or changes in law.”<sup>4/</sup> Commission rulemakings and changes in law since the DBS regulatory fee schedule was established in 1996 are more than sufficiently recent and significant to permit a change in the fee schedule under the terms of Section 9(b)(3) of the Communications Act.<sup>5/</sup>

Although the DBS Operators claim that the Commission cannot make such changes because there is no recent change in law sufficiently meaningful to justify it, that argument relies on a standard contained nowhere in the law. Nothing in the statute or its interpretation in the courts suggests that regulatory fee changes must be made immediately after the rulemakings or changes in law that support the need for the fee structure change. Similarly, the statute does not require that individual statutes or rulemakings standing alone must be sufficient to justify a fee structure change. Rather, it provides the Commission great flexibility to determine when a number of statutes and rulemakings, perhaps accumulating over a period of many years, has sufficiently altered the Commission’s delivery of regulatory services to justify changing the regulatory fee structure. That is precisely the case that is presented in this rulemaking, and it falls squarely within the Commission’s authority under the statute.

In the 18 years since the current DBS fee structure was set, there has been a steady accumulation of rulemakings and statutory changes affecting DBS regulation by the Media Bureau. The DBS Operators admit as much in their own comments. In appendices to their comments, the DBS Operators identify 127 separate orders ranging from rulemakings to other types of proceedings involving the Media Bureau and DBS regulation, all issued in just 10 of the 18 years since the DBS fee schedule was established in 1996.<sup>6/</sup> This clearly establishes

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<sup>4/</sup> 47 U.S.C. § 159(b)(3).

<sup>5/</sup> DIRECTV and DISH Comments at 2-9.

<sup>6/</sup> *Id.* at 9; Appendix B; Appendix C.

significant DBS-related regulatory activity by the Media Bureau since the current DBS fee structure was established.

Similarly, there have been many changes in laws affecting DBS providers. The DBS Operators' comments highlight changes in law since 1996 affecting DBS regulation, noting (while attempting to minimize) work by the Media Bureau to implement the Satellite Home Viewer Improvement Act ("SHVIA") of 1999, the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") of 2004, and the Satellite Television Extension and Localism Act ("STELA") of 2010.<sup>7/</sup> They also acknowledge (again while trying to minimize) application of the Commercial Advertisement Loudness Mitigation Act ("CALM Act) and the Twenty-First Century Video Accessibility Act ("CVAA") to DBS.<sup>8/</sup> Despite their claims that the statute has little to do with DBS,<sup>9/</sup> both DIRECTV and DISH submitted comments in CVAA proceedings and met with Media Bureau staff extensively regarding CVAA issues.<sup>10/</sup>

The DBS Operators try to minimize the collective impact of the substantial record of rulemaking and statutory changes on the Commission's regulation of DBS service since 1996, saying the long list of laws and regulatory proceedings "do not represent a meaningful increase in the regulation of DBS, much less a change in the 'nature' of DBS regulation necessary to justify a permitted amendment" of DBS regulatory fee assessment.<sup>11/</sup> But the sheer volume of Media Bureau proceedings and statutory changes involving DBS – as acknowledged in the DBS Operators' own comments – makes this a questionable assertion. And these are not, as suggested

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

<sup>8/</sup> *Id.* at 6-7.

<sup>9/</sup> *Id.*

<sup>10/</sup> NCTA and ACA Comments at Attachment A, Attachment B, and Attachment C.

<sup>11/</sup> DIRECTV and DISH Comments at 8.

by the DBS Operators, primarily proceedings that only peripherally involve DBS.<sup>12/</sup> The record shows that in recent years, each DBS Operator has, on average, made more filings in Media Bureau proceedings than the average cable operator has made, and each has held numerous meetings with Media Bureau staff to discuss regulatory issues.<sup>13/</sup>

Further, while the DBS Operators claim that their involvement in Media Bureau proceedings has decreased over time,<sup>14/</sup> Commission records show that the DBS Operators' involvement in Media Bureau proceedings has actually increased significantly since the current fee structure was set in 1996. Analysis of records in the Commission's Electronic Comment Filing System shows that DIRECTV made 66 filings in Media Bureau dockets in the twelve months ending in November 2014, while in 1996 it made only 8 filings in Cable Services Bureau proceedings. In the same 2014 period, DISH made 47 filings in Media Bureau dockets, while its predecessor EchoStar made no filings in Cable Services Bureau proceedings in 1996.<sup>15/</sup> Given the substantial and increased Media Bureau regulatory attention on DBS providers, the DBS Operators' claim that regulatory and statutory changes do not warrant a change in the DBS fee structure must be rejected.

## **II. IT IS NOT NECESSARY FOR THE COMMISSION TO DEMONSTRATE ABSOLUTE REGULATORY PARITY BETWEEN DBS, CABLE, AND IPTV BEFORE ASSESSING MEDIA BUREAU REGULATORY FEES ON DBS OPERATORS**

The DBS Operators argue that if the Commission is to create a new "DBS Media Bureau" fee category, any such category must reflect the costs of regulating DBS. Because, in

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<sup>12/</sup> See, e.g., *id.* at 6.

<sup>13/</sup> NCTA and ACA Comments at 10-11, Attachment A, Attachment B, and Attachment C.

<sup>14/</sup> DirecTV and DISH Comments at 7-8.

<sup>15/</sup> NCTA and ACA Comments at Attachment A; see Analysis of ECFS filings, attached hereto as Exhibit 1.

their view, DBS providers and cable “generate markedly different regulatory costs,” they argue DBS cannot be assessed fees on the same basis as cable operators.<sup>16/</sup> NCTA and ACA agree that the Commission may assess regulatory fees to recover the costs that the Media Bureau expends administering regulations of interest and pertaining to DBS providers. However, contrary to the claims of the DBS providers, the regulatory disparities between cable/IPTV and DBS do not warrant different fee assessments. The record shows not only that DBS providers utilize Media Bureau FTEs on a comparable basis to cable/IPTV, but that even if they did not, it would be consistent with Commission precedent to bring them into the same fee category without making special distinctions based on either the technology or business model they employ in providing multichannel video programming distribution services.

**A. DBS Providers Utilize Media Bureau FTEs Engaged In MVPD Regulation On A Basis Comparable To Cable And IPTV Providers.**

NCTA and ACA explained in initial Comments that the Commission need not establish, and traditionally has not established, regulatory fee categories for specific types of service providers based on a person-by-person assessment of the sorts of regulatory work performed in its various Bureaus.<sup>17/</sup> Rather, it has grouped providers of like services, many of whom compete with one another, into fee categories and assessed fees on the same per-line or per-subscriber basis within each category regardless of disparities in the nature and level of regulatory services performed for each type of provider, the types of business models represented, or fluctuations in usage of regulatory resources year-over-year among providers of essentially identical services.<sup>18/</sup>

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<sup>16/</sup> DIRECTV and DISH Comments at 10-11.

<sup>17/</sup> NCTA and ACA Comments at 6-12.

<sup>18/</sup> *Id.* at 8-10 (discussing inclusion of IPTV in the Cable Television fee category despite recognition of some differences from a regulatory perspective and voice over Internet Protocol services in the same Interstate Telecommunications Service Provider (“ITSP”) regulatory fee assessment category as telecommunications service providers, despite significant differences in the extent of regulation of the two

Nonetheless, even if the Commission were to undertake such an assessment it would find roughly comparable use by DBS and cable/IPTV of Media Bureau FTEs engaged in administering MVPD regulation. Based on an informal review of the numerous rulemaking, merger reviews, and enforcement proceedings pertinent to the DBS Providers, and based on results of the survey of *ex parte* filings of the two largest DBS MVPDs over the past few years, as described in NCTA and ACA’s Joint Comments, it is evident that numerous members of the Media Bureau have dedicated their time to DBS-related matters.<sup>19/</sup> This is not surprising, given the high degree of overlap in the functions of Media Bureau FTEs involved in administering regulations that apply to DBS, cable, and IPTV providers. As NCTA and ACA stated in their Joint Comments, even if an FTE-by-FTE assessment were possible, “an accurate assessment would assuredly reveal that the FTE counts for matters concerning DBS are similar to those for cable and IPTV.”<sup>20/</sup>

**B. The Fact That DBS And Cable/IPTV Operators All Provide Multichannel Video Service Is A Reasonable And Permissible Basis For Putting Them All In The Same Regulatory Fee Category.**

Once again, the DBS Operators argue that to place them in the same fee category as cable/IPTV, the Commission would have to show that DBS and cable are in a position of precise regulatory parity – that is, occupying a comparable number of FTEs to justify equivalent

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services and business models of the providers); *see also* 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) (“2007 Fee Order”) (“Section 9 does not require the Commission to engage in a company-by-company assessment of relative regulatory costs. In any given year, companies grouped in the [telecommunications] category, or other regulatory fee categories, might be the subject of more regulation than others, e.g., merger proceedings. As a result, our responsibility here is to identify the category of regulatory fee payees with which interconnected VoIP providers most closely relate.”).

<sup>19/</sup> *Id.* at 10-11.

<sup>20/</sup> *Id.* at 11.

regulatory fees.<sup>21/</sup> Their claim that the case for this has not been made rests on three primary bases: (i) cable operators are now the leaders in the residential broadband market; (ii) most cable operators remain dominant incumbents; and (iii) and there are far more cable operators and cable systems than there are DBS operators. None of the reasons support the DBS Operators' arguments.

The DBS Operators concede, as they must, that Section 9 of the Communications Act states that fees are to be derived from the FTE costs of the Commission's bureaus, adjusted to take into account factors relating to the benefits derived from the bureaus' activities.<sup>22/</sup> There is no support for their premise that fees cannot be adjusted to promote fair and equal treatment for competitors providing the same service – in this case, MVPD service.

As a preliminary matter, the statute does not require a finding of regulatory parity before the Commission can alter its regulatory fee schedules. The Communications Act authorizes changes in the regulatory fee schedule if the Commission determines that the schedule requires amendment to comply with the regulatory cost recovery requirements of the statute, and provides that “the Commission shall 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 law.”<sup>23/</sup> Numerous rulemaking proceedings and changes in law since the current DBS fee structure was adopted in 1996 have changed the nature of the regulatory services the Commission, through the Media Bureau, provides to DBS Operators.<sup>24/</sup> The

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<sup>21/</sup> DIRECTV and DISH Comments at 11.

<sup>22/</sup> *Id.* at 10.

<sup>23/</sup> NCTA and ACA Comments at 15; 47 U.S.C. 159(b)(3).

<sup>24/</sup> NCTA and ACA Comments at 15; *see Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, MD Docket No. 14-92, et al., Reply Comments of the National Cable & Telecommunications Association and the American Cable Association, at 3-7 (filed July 21, 2014). *See also, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, MD Docket No. 14-92, et al., Comments of the

Commission has broad discretion to adjust its regulatory fees based on “factors that the Commission determines necessary in the public interest,” and nowhere does the statute specify that adjustments must be based on absolute “regulatory parity” among the members of a particular fee category.<sup>25/</sup> Plainly, the Commission has never read Section 9(b)(1)(A) of the Act to be so constrictive; nor should it do so in this instance.<sup>26/</sup>

Moreover, even if “regulatory parity” were a legitimate consideration, the record shows tremendous overlap in Media Bureau functions pertinent to DBS, cable, and IPTV providers. Further, it demonstrates that providers of DBS and cable/IPTV occupy a comparable number of Media Bureau FTEs engaged in MVPD regulatory activities. As NCTA and ACA detailed in their Joint Comments, over the past twelve months alone, DBS operators made 113 filings in Media Bureau dockets, thirty of which were DIRECTV filings in support of its proposed merger with AT&T, and 83 of which were DIRECTV and DISH filings in other regulatory dockets such as the Comcast-TWC merger review, retransmission consent reform, media ownership review, television close captioning quality rules, and implementation of the CVAA.<sup>27/</sup> Similarly, the review of ex parte filings since 2010 conducted by NCTA and ACA showed DIRECTV representatives having 43 different meetings with 46 different members of the Media Bureau

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American Cable Association, at 8-9 (filed July 7, 2014); *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, MD Docket No. 13-140, Comments of the American Cable Association, at 14-16 (filed June 19, 2013); *Procedure for Assessment and Collection of Regulatory Fees*, MD Docket No. 12-201, Reply Comments of the National Cable & Telecommunications Association, at 3-4 (filed June 26, 2013).

<sup>25/</sup> 47 U.S.C. § 159(b)(1)(A) (providing that regulatory fees should be “derived by determining the full-time equivalent number of employees performing the activities described in subsection (a) of this section,” but 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, including such factors as service area coverage, shared use versus exclusive use, and other factors that the Commission determines are necessary in the public interest”).

<sup>26/</sup> See *2007 Regulatory Fee Order*, ¶ 19; *Assessment and Collection of Regulatory Fees for Fiscal Year 2013, Report and Order*, 28 FCC Rcd 12351, ¶ 32 (2013) (“*2013 Regulatory Fee Order*”).

<sup>27/</sup> NCTA and ACA Comments at 7.

staff, and DISH Network's representatives attending 29 meetings with 40 different members of the Media Bureau staff.<sup>28/</sup> Even accounting for overlaps, this demonstrates considerable Media Bureau staff attention to regulatory matters concerning the two DBS providers.

None of the three factors cited by the DBS Operators should deter the Commission from continuing the reform of its regulatory fee categories to achieve greater fairness by making its assessments more competitively and technologically neutral with respect to providers of MVPD services. The DBS Operators cite the fact that cable operators are now the leaders in the residential broadband market and participate in numerous Commission proceedings involving universal service that the DBS Operators are not involved in, in support of their contention that there is no regulatory parity between cable/IPTV and DBS.<sup>29/</sup> The Media Bureau, however, administers not a single one of the universal service proceedings cited by the DBS Operators. Their broadband claim, even if true, is utterly irrelevant to the question whether DBS, cable and IPTV providers should be in the same fee category recovering the costs of Media Bureau MVPD regulatory activities.

Next, the DBS Operators claim that because most cable operators remain the dominant incumbent providers in their franchise areas, and are accordingly subject to a variety of policies that do not apply to DBS, they should not be placed in the same fee category as the DBS providers.<sup>30/</sup> NCTA and ACA acknowledge that there are some differences between the rules administered by the Media Bureau pertinent to cable operators and DBS providers. However, these differences are not different in kind or quantity from the differentials applicable to the ITSP fee category, for example. It too contains incumbent local exchange carriers, competitive

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<sup>28/</sup> NCTA and ACA Comments at 11.

<sup>29/</sup> DIRECTV and DISH Comments at 11.

<sup>30/</sup> *Id.* at 12.

local exchange carriers, resellers, VoIP providers and a variety of other interstate telecommunications service providers, all of whom are under varying levels of regulation applicable to their position in the industry. An over-the-top VoIP provider will likely utilize only a fraction of the Wireline Competition Bureau staff resources of those used by an incumbent local exchange carrier, and yet they are all in one fee category and all are assessed fees on the same per-line basis. There should be no different result with respect to DBS providers paying regulatory fees to support Media Bureau MVPD regulatory activities.

The final factor relied upon by the DBS Operators is that there are far more cable operators and cable systems than there are DBS operators, giving rise to a far higher per-page paperwork burden for cable than DBS in the Media Bureau.<sup>31/</sup> Specifically, they argue that there are two DBS providers, operating twenty U.S.-licensed satellites, where as there are 845 cable operators and 4,932 cable systems in the U.S., leading to a total scope of regulation that is much larger for cable than it is for satellite, as exemplified by a larger number of cable than DBS filing requirements, many of which are on a per-cable system basis.<sup>32/</sup> In support, they observe that the collective volume of the paperwork resulting from regular cable reporting requirements is 225 times more than the volume of all filings made by both DIRECTV and DISH in docketed proceedings so far this year (890 pages across all dockets for the period beginning January 1, 2013 and ending December 31, 2013 as reflected in ECFS).<sup>33/</sup>

While the DBS Operators' page-count thesis is interesting, to the extent it is even accurate it represents one data point in determining the costs and benefits of Media Bureau regulation pertaining to DBS. The fact remains that the Commission, following a GAO Report

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<sup>31/</sup> *Id.* at 13.

<sup>32/</sup> *Id.* at 13.

<sup>33/</sup> *Id.* at 14.

highly critical of its regulatory fee system, is in the process of reforming its fee assessments to achieve, among other goals, greater fairness.<sup>34/</sup> One of the key unfair attributes of the Commission's current system, cited by the GAO, is the fact that cable operators (and now IPTV providers) pay 100% of the regulatory fees supporting Media Bureau MVPD regulation that benefits the DBS providers, thus cross-subsidizing the MVPD businesses of their primary and direct competitors, DirecTV and Dish Network, now the second and third largest MVPDs in the nation.

Moreover, the fact cited by the DBS Operators that cable operators may file thousands of pages more of regular reports with the Media Bureau, whose receipt is minimally burdensome to the Commission as they are filed via electronic means, does not necessarily mean that thousands of hours of staff time are spent reviewing these files. It is far more likely that hours are spent on the regulatory proceedings in which the DBS Operators are major participants. And regardless, the number of pages of regular reports filed electronically with the Media Bureau by cable operators cannot be the correct metric under the statute for determining whether to amend a regulatory fee category to account for changes in the law or regulation leading to changes in the nature of the Commission's regulatory activities with respect to the DBS MVPD service. The correct metric is an assessment of the regulatory benefits DBS providers receive from the activities of the Media Bureau, and as NCTA and ACA have repeatedly shown they are both numerous and significant.<sup>35/</sup>

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<sup>34/</sup> GAO Report; *Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 28 FCC Rcd 6417 (2014); *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd 7790 (2013); *Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking, 27 FCC Rcd 8458 (2012).

<sup>35/</sup> NCTA and ACA Comments at 6-7.

**III. THE COMMISSION CAN EASILY DEMONSTRATE THAT THE REQUIREMENTS OF SECTION 9 WOULD BE BETTER SATISFIED TODAY BY ASSESSING REGULATORY FEES ON DBS ON THE SAME BASIS AS CABLE AND IPTV**

It is clear that adding DBS to the same fee assessment category as cable and IPTV providers would be a permitted amendment under the Communications Act, and that good cause has been presented to make this long overdue change. The DBS Operators are incorrect in their claim that including DBS in an MVPD fee category would risk violating the Administrative Procedure Act (“APA”) because the Commission would be unable to provide a reasoned explanation for changing from its 2006 decision not to alter the DBS fee classification. The Commission can easily provide a reasoned explanation for making this change in light of numerous changes involving DBS regulation since 2006 administered by the Media Bureau.

**A. The APA Poses No Bar To Inclusion of DBS In The Same Fee Assessment Category As Cable And IPTV.**

In discussing the Commission’s 2006 decision, the DBS providers conveniently leave out three key words in the explanation of the determination not to disturb the existing per-satellite GSO regulatory fee classification: “*at this time.*”<sup>36/6</sup> Rather than making a decision for all time in that order, the Commission simply deferred the question until a later date. That date has arrived.

Plainly, the APA poses no bar to inclusion of DBS in the same fee assessment category as cable and IPTV or creating a separate DBS fee category. While it is true that the APA requires the Commission to explain a change in regulatory policy, it does not require a heightened standard for review of such actions by the courts. Rather, the Supreme Court has held that there is no distinction between an initial agency action and later action revising the

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<sup>36/</sup> 2006 Order, ¶ 16.

prior action such that a heightened standard of review applies to a Commission decision revising its enforcement policy.<sup>37/</sup> In both cases, the Commission must provide a reasoned explanation for its action; in the case of a change in policy, a reasoned explanation ordinarily would indicate awareness that a change is being made and that there are good reasons for the new policy.

But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.<sup>38/</sup>

Changes to the regulatory fee classification of DBS would not be inconsistent with the decision not to change the DBS fee classification in 2006 when that decision clearly suggested that the Commission would consider making changes to assess DBS Media Bureau regulatory fees in the future. To the extent the decision represents a change in policy, the record before the Commission more than justifies it. NCTA and ACA have provided extensive evidence that the volume and nature of Media Bureau regulation pertinent to the DBS providers has increased markedly since 2006 and now, more than ever, governs and benefits their provision of MVPD services.<sup>39/</sup> The Second Further Notice itself appears to recognize this as a sufficient justification for the change.<sup>40/</sup>

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<sup>37/</sup> *FCC v. Fox*, 556 U.S. at 515.

<sup>38/</sup> *Id.*

<sup>39/</sup> NCTA and ACA Comments at 10-11.

<sup>40/</sup> *Second Further Notice*, ¶ 39 (“For example, DBS providers and cable operators are permitted to file program access complaints and complaints seeking relief under the retransmission consent good faith rules; and DBS providers are also required to comply with Media Bureau oversight and regulation such as Commercial Advertisement Loudness Mitigation Act (CALM Act), the Twenty-First Century Video Accessibility Act (CVAA), as well as the closed captioning and video description rules.”).

**B. The APA Poses No Bar To The Commission Deciding To Use A Different Interim Fee Limit On Fee Increases Than It Used For FY 2014 Due To Changes In Its Fee Schedule.**

The DBS Operators argue further that the APA also requires the Commission to explain the basis of any fee increases exceeding 7.5 percent, the fee increase cap used by the Commission in 2013.<sup>41/</sup> As a corollary to this claim, they argue that, even assuming the Commission could justify its new proposed DBS category, both as a result of changes in law and regulation and as reflecting the Media Bureau FTEs attributable to DBS regulation, it must implement any changes over time so as not to exceed a 7.5 percent increase per year.<sup>42/</sup> These claims should be rejected. The APA poses no bar to a rate increase for DBS exceeding 7.5 percent in any given year. Moreover, the DBS Operators vastly overstate the purpose and effect of the temporary cap used by the Commission in 2013.

Although the Commission concluded that a limit on regulatory fee increases for FY 2014 fees was necessary to prevent sudden and extreme fee fluctuations year-over-year on a wide assortment of regulated entities, it is not forever bound to set a 7.5 percent limit on fee increases in any given year due to adjustments in its fee categories. The DBS Operators incorrectly portray the Commission's use of a cap on regulatory fee increases for FY 2014 as though the Commission was setting policy for all future regulatory fee changes. To the contrary, the Commission clearly stated that the FTE reallocations and the cap on fee increases adopted in its 2013 Regulatory Fee Order "are interim measures that constitute the first step in comprehensively examining and reforming our regulatory fee program so that the fees paid by all licensees will more accurately reflect the current cost of regulating them," adding that the

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<sup>41/</sup> DIRECTV and DISH Comments at 16; *2013 Regulatory Fee Order*, ¶ 21.

<sup>42/</sup> DIRECTV and DISH Comments at 17.

Commission intends “to conclusively readjust regulatory fees within three years.”<sup>43/</sup> The Commission further explained that “[c]apping fee increases at 7.5 percent is a *conservative* interim approach...” indicating that the cap is on the lower end of the range of possible regulatory fee increase relief measures that the Commission could employ.<sup>44/</sup>

The APA, as explained previously, generally requires the Commission to provide a reasoned explanation for an action or change in regulatory policy. The Commission explained that after adjusting FTE allocations among fee categories and adopting a cap for fee increases that were to be immediately implemented, a “flash cut” to the new fees would result in “significant and unexpected fee increases” for some categories of fee payers, some of which contained very small entities.<sup>45/</sup> As a result, the Commission decided to implement an interim 7.5 percent limit on regulatory fee increases for all classes of regulatees in FY 2014, as opposed to analyzing the impact on the fees paid by any one particular class of entities. Here, DBS Operators face no such “flash cut” to higher fees. The earliest any adopted change in the DBS regulatory fee structure could be implemented would be as part of the next year’s fee payments, which will be made in September 2015.

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<sup>43/</sup> *2013 Fee Order* ¶ 5.

<sup>44/</sup> *Id.* ¶ 23 (emphasis added).

<sup>45/</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd 12351, ¶ 25 (2013) (“*2013 Fee Order*”). *See also id.* ¶ 21 (saying the cap was needed “to avoid sudden and large changes in the amount of fees paid by various classes of regulatees). The Commission made a number of significant changes to its fee assessment program, including the use of then-current FY 2012 FTE data rather than the 2008 data it had been using, the reallocation of FTEs among the International and Media Bureaus to better reflect the costs and benefits of regulating various services and providers, and the inclusion of IPTV providers in the cable fee category for FY 2014. The Commission found, for example, that with respect to fees paid by International Bureau and Wireline Competition Bureau licensees, the changes it was making would cause fees paid by the former to triple, and fees paid by the latter to decrease by about 40 percent, with fees paid by wireless and media service licensee also changing but to a lesser extent. *Id.* ¶ 13.

It is also worthy of note that the DBS Operators have been on notice for at least six years that the Commission was contemplating such an action. Given this, and the lengthy delay before the fee increase would occur, the change would certainly not be a “flash cut” for the DBS Operators or constitute an “unexpected fee increase” warranting the need for a fee rate increase cap.<sup>46/</sup> Moreover, unlike some of the smaller providers that may have been affected by the 2013 “flash cut” fee increase, the DBS Operators are multi-billion dollar corporations for which even substantial fee increases would cause minimal disruption and no threat to operational viability.<sup>47/</sup> The hurdle the DBS Operators posit to providing a reasoned explanation for not adopting a 7.5 percent rate cap for any DBS fee increase simply does not exist.<sup>48/</sup>

As the Second Further Notice explains, DBS operators currently pay less than nine percent of the regulatory fees they would be assessed if the Commission were to combine DBS in a fee category with cable operators and IPTV providers.<sup>49/</sup> Among the options explored in the Second Further Notice is assessing DBS operators one-tenth of the anticipated Media Bureau fee assessments resulting from their inclusion in that fee category.<sup>50/</sup> In addition, comment was sought on whether to phase-in the Media Bureau fee payment obligations for DBS operators over

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<sup>46/</sup> Notably, when the Commission decided in its 2013 order to include IPTV in the same fee category as cable in 2014, there were no complaints of “rate shock” from IPTV providers and no fee rate increase cap was implemented, even though that action resulted in millions of dollars in new fees for IPTV providers. *2013 Fee Order* ¶ 33. Similarly, no concerns were expressed about “rate shock” and no fee rate increase cap was implemented when VoIP service providers were ordered to pay regulatory fees in an August 2007 order and were first required to pay the fee over a year later in September 2008. *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, ¶ 20 (2007).

<sup>47/</sup> NCTA and ACA Comments at 13.

<sup>48/</sup> This would be particularly true if the Commission decides to adopt some reasonable phase-in process, such as the three-year phase in suggested in the NCTA and ACA comments. NCTA and ACA Comments at 14-15.

<sup>49/</sup> *Second Further Notice*, ¶ 39.

<sup>50/</sup> *Id.* ¶ 41.

a period of time until cable, IPTV and DBS could be assessed using the same methodology at the same rate.<sup>51/</sup>

DBS operators should be assessed using the same methodology at the same rate immediately, but we understand that the Commission has discretion if it wishes to offer some relief to avoid DBS “rate shock” for FY 2015 fee payments for these multi-billion dollar corporations. At most, the Commission’s suggestion of a 10 percent fee increase cap for the DBS providers in FY 2015, with a rapid ramp-up lasting no more than two years thereafter, would be considered reasonable and is all that appears required in this case. In making this determination, the Commission must keep in mind that additional unwarranted delay in assessing DBS Operators regulatory fees on the same basis as cable/IPTV providers means a concomitant delay in the reduction of Media Bureau fees paid by the cable/IPTV, thus extending the already lengthy period of time during which those providers – and by extension, their customers – are subsidizing their competitors.

Finally, precedent supports the Commission if it chooses not to use the same interim 7.5 percent increase cap applied to FY 2014 fee collections for FY 2015 fee collections. As the Commission explained in its FY 2013 Order, it had implemented a 25% cap on certain regulatory fee increases in 1997 and chose to implement a different percentage rate cap for FY 2014 based on a different set of circumstances.<sup>52/</sup> The Commission has the authority to make a similar determination and apply a higher regulatory fee increase cap or no cap at all on any regulatory fee increases for DBS providers. The DBS Operators’ argument that the APA would require the Commission to essentially codify for all time interim relief previously provided in another context flies in the face of logic and precedent.

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<sup>51/</sup> *Second Further Notice*, ¶ 41.

<sup>52/</sup> *2013 Fee Order*, ¶ 23.



**Exhibit 1**  
**DIRECTV and EchoStar Filings in Cable Services Bureau Dockets 1996**

**DIRECTV**

<b>Docket No.</b>	<b>Docket Name</b>	<b>Filing Date</b>	<b>Filing Type</b>
95-184	Telecommunications Services Inside Wiring; Customer Premises Equipment	3/18/96	Comments
95-184	Telecommunications Services Inside Wiring; Customer Premises Equipment	4/17/96	Reply Comments
96-133	Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	7/19/96	Comments
96-83	Implementation of Section 207 of the Telecommunications Act of 1996	9/27/96	Comments
96-83	Implementation of Section 207 of the Telecommunications Act of 1996	10/4/96	Petition for Reconsideration
96-83	Implementation of Section 207 of the Telecommunications Act of 1996	10/28/96	Reply Comments
96-83	Implementation of Section 207 of the Telecommunications Act of 1996	10/29/96	Errata or Addendum
96-83	Implementation of Section 207 of the Telecommunications Act of 1996	12/2/96	Comments

**Echostar**

None

**Source:** Analysis of Federal Communications Commission Electronic Comment Filing System database, December 22, 2014.