

any statutory basis for the change they propose. For this reason alone, the Commission cannot legally make the changes cable requests.

Likewise, cable still cannot justify the changes it proposes as a matter of “regulatory parity.” As the Commission found two years ago, DBS operators are regulated very differently than cable operators. Nearly one thousand cable operators manage more than 6,500 cable systems in the United States, collectively generating reports and files that dwarf those associated with DIRECTV’s and DISH Network’s systems. Unlike DIRECTV and DISH Network, moreover, many cable operators provide residential broadband service – the regulation of which generated nearly 50,000 pages of commentary in a single proceeding this year. And unlike DIRECTV and DISH Network, most cable operators are the dominant incumbent video providers in their service areas, and as such are subject to rules and regulatory proceedings that apply only to them. For these reasons, and because the cable industry has given almost no details about how its proposed amendment might work in practice, the Commission could not reasonably amend the GSO regulatory fee category even if it had the legal authority to do so.

I. THE CABLE INDUSTRY ONCE AGAIN FAILS TO SATISFY THE COMMUNICATIONS ACT’S LEGAL STANDARD FOR CHANGES TO THE REGULATORY FEE STRUCTURE.

The Commission is not free to amend the regulatory fee structure at its sole discretion. Rather, under Section 9 of the Communications Act, the Commission may make “permitted amendments” to the schedule first set forth by Congress³ *only* in response to changes in law

³ 47 U.S.C. § 159(g). The Commission added DBS operators to this category in 1996. *Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, Report and Order, 11 FCC Rcd. 18774, ¶ 35 (1996).

and regulation.⁴ NCTA and Verizon fail to discuss such changes because there are none to discuss. Accordingly, the Commission lacks legal authority to amend the GSO fee schedule.

Regulatory fees must reflect “the full-time equivalent number of employees performing [specific regulatory activities] . . . , 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.”⁵ The statute further specifies that, “[i]n making such amendments, 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.”⁶ Thus, before it can amend the GSO satellite fee category that applies to DBS operators, the Commission must, at a minimum, find *all* of the following:

- that new rulemaking proceedings or changes of law . . .
- have caused additions, deletions, or changes to the nature of the GSO service category such that . . .
- the GSO fee no longer reasonably relates to . . .
- the regulatory costs caused by the GSO service for certain regulatory activities, as those costs may be “adjusted” by the benefits to GSO operators of such activities.

Two years ago, after reviewing extensive submissions on a cable industry proposal to change DBS regulatory fees, the Commission determined that cable “[had] not shown that the requirements of section 9 would be better satisfied by the reclassification of DBS and the

⁴ *COMSAT Corp. v. FCC*, 114 F.3d 223, 225 (D.C. Cir. 1997) (quoting 47 U.S.C. § 159(b)(3)) (holding that Section 9(b)(3) authorizes an amendment to the fee regime only “in response to [a] ‘rulemaking proceeding[] or change[] in law.’”).

⁵ 47 U.S.C. § 159(b)(3) (incorporating 47 U.S.C. § 159(b)(1)(A)). 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).

⁶ 47 U.S.C. § 159(b)(3).

assessment of the DBS fee on a per subscriber basis.”⁷ To the contrary, the Commission found that “[t]he existing [per-satellite GSO] regulatory fee classification and related methodology has ensured that regulatory fees are reasonably related to the benefits provided by the Commission’s activities.”⁸ Nothing of consequence has changed in the past two years to disturb the Commission’s conclusion. There have been no new rulemaking proceedings or changes of law in the past two years that would have any bearing at all on GSO regulatory fees.⁹

Because cable has remained silent on the issue, there is no record evidence in this proceeding that might justify changes to the GSO fee category as required under Section 9 of the Communications Act. Nor has cable offered any reasonable basis for the Commission to revisit the legal conclusions it reached just two years ago. On this record, the Commission is without authority to make the changes NCTA and Verizon seek.

II. CABLE’S POLICY ARGUMENTS ONCE AGAIN LACK MERIT.

In order to side-step the fundamental statutory hurdles to their proposal, NCTA and Verizon resort once again to an argument based on misleading claims of “regulatory parity.” Because DIRECTV and DISH Network provide one of the bundle of services offered by cable companies, the argument goes, they should pay the same per-subscriber regulatory fees.¹⁰ As DIRECTV and DISH Network have previously observed, the mere fact that one service

⁷ 2006 Order, ¶ 16.

⁸ *Id.*

⁹ *See Motor Vehicle Mfrs. Ass’n 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 Fox Television Stations v. FCC*, 489 F.3d 444, 467 (2nd Cir. 2007) (same).

¹⁰ Verizon Comments at 6; NCTA Comments at 3.

competes against another in some capacity is not a reasonable or permissible basis to restructure and rearrange long-standing regulatory fee categories.¹¹ Otherwise, in today's world of increasing intermodal competition, the very concept of separate service categories would soon collapse upon itself. Section 9 established that the regulatory costs imposed on the Commission by particular classes of licensees – and not the extent to which one class of licensees competes with another – was the only basis for assessing regulatory fees.

Nor does the number of subscribers have anything to do with the relevant legal standard. In 1996, the Commission found that “the number of subscribers to a DBS service does not significantly affect the regulatory costs arising from DBS services.”¹² This is just as true for newer rules as for older ones.¹³ It would, for example, be absurd to suggest that the burden on Commission resources increased substantially from 2007 to 2008 just because DIRECTV and DISH Network each gained subscribers last year. The issues remain the same regardless of subscribership levels.

Nonetheless, because NCTA has couched its proposal as a demand for “equal treatment,” DIRECTV and DISH Network are compelled to explain why, whatever similarities they may have, cable and satellite are very different from a regulatory perspective and therefore do not impose comparable regulatory burdens.

¹¹ See Joint Reply Comments of DIRECTV, Inc. and EchoStar Satellite L.L.C., MD Docket No. 06-68 (filed Apr. 21, 2006); *Assessment and Collection of Regulatory Fees for FY 1996*, Report and Order, 11 FCC Rcd. 18774, ¶ 55-56 (1996) (rejecting NCTA's request to lower cable regulatory fees to bring them more in line with wireless cable regulatory fees).

¹² *Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 16515, ¶ 41 (1996).

¹³ To take a recent example, there is no obvious relation between the number of subscribers a DBS operator serves and the cost imposed on the Commission to promulgate rules regarding carriage of HD signals.

There are more cable operators and cable systems. There are two DBS operators employing fourteen U.S.-licensed satellites. There are, by contrast, 942 cable operators¹⁴ and 6,635 cable systems in the United States.¹⁵ Indeed, Verizon – a relatively new entrant in the cable business – already operates 16 cable systems,¹⁶ while Comcast operates 793.¹⁷ Each cable system generates its own regulatory costs, and poses a regulatory burden on Commissioner resources – meaning that, even if all other things were equal, the total scope of regulation would be much higher for cable than it is for satellite.

One easy if rough way to measure this disparity is through paperwork. Every cable operator, like each DBS operator, must submit numerous reports and keep numerous records.¹⁸ Cable operators have more such requirements, however, and, unlike DBS operators, generally must keep records on a system-by-system basis. The collective volume of this paperwork, all of which is subject to Commission review, is overwhelming. Just one of these reports – signal leakage reports required under 47.C.F.R. § 76.611 – generated more

¹⁴ See Television and Cable Factbook 2008 D-1626 to D-1723 (Paul L. Warren & Daniel Y. Warren, eds., 2008) (“Warren”).

¹⁵ See *id.* at F-12.

¹⁶ This data is derived from the FCC’s Cable Operations and Licensing database Cable Search form, <http://fjallfoss.fcc.gov/csb/coals/index.html>.

¹⁷ See Warren at D-1688.

¹⁸ These include the following: Political File (47 C.F.R. § 76.1701); EEO File (47 C.F.R. § 76.1702); “Kid Vid” File (47 C.F.R. § 76.1703); Proof-of-Performance Test Data File (47 C.F.R. § 76.1704); Signal Leakage Logs and Repair Records File (47 C.F.R. § 76.1706); Aeronautical Notifications (47 C.F.R. § 76.1804); Leased Access File (47 C.F.R. § 76.1707); Principal Headend File (47 C.F.R. § 76.1708); Availability-of-Signals File (47 C.F.R. § 76.1709); Operator Interests in Video Programming File (47 C.F.R. § 76.1710); Emergency Alert System File (47 C.F.R. § 76.1711); Complaint Resolution File (47 C.F.R. § 76.1713); Regulatory File (47 C.F.R. § 76.1714); Sponsorship Identification File (47 C.F.R. § 76.1715).

than 200,000 pages last year.¹⁹ This is 72 times more than *everything* filed by DIRECTV and DISH Network in docketed proceedings over the same time period.²⁰

Cable operators are now the leaders in the residential broadband market. As the providers of more than half of America's residential broadband connections,²¹ cable operators have presented a number of complex and novel regulatory issues for consideration by the Commission, both in regulatory fora and in the courts. Just one of these proceedings – the Commission's inquiry into Comcast's network management practices – generated over 43,000 pages of regulatory submissions since the proceeding began.²² This is 14 times the number of pages submitted in the only two significant satellite-specific proceedings conducted during the same time period.²³

Most cable operators are dominant incumbents. Nearly every cable operator is the dominant video provider in its franchise area.²⁴ As such, cable is subject to a variety of

¹⁹ Multiplying the six pages of each annual signal leakage report by the 33,804 cable communities that have to file such reports each year results in approximately 202,824 total pages.

²⁰ As of October 8, 2008 ECFS reflects that DIRECTV and DISH Network (including its FSS affiliate EchoStar Corporation) filed 2,815 pages across all dockets for the period beginning January 1, 2008 and ending October 8, 2008.

²¹ See High-Speed Services for Internet Access: Status as of June 30, 2007, Chart 6 (WCB, rel. Mar. 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf (noting that cable provided high-speed Internet access service to more than half of the nation's high-speed Internet access residential and small business subscribers, as of year end 2007).

²² As of October 8, 2008, ECFS reflects that 43,554 pages have been filed in WC Docket No. 07-52. Even excluding electronically generated letters from the public, more than five thousand pages had been filed in that docket.

²³ As of October 8, 2008, ECFS reflects that 3,081 pages have been filed in Docket Nos. 00-96 (satellite carriage of broadcast signals), 98-120 (same) and 06-123 (17/24 GHz band Broadcast-Satellite Service) since March 22, 2007, when the Comcast network management proceeding commenced.

²⁴ One notable exception is Verizon, one of the commenters in this proceeding. Verizon is, however, the dominant local phone company in its local territory, and is also affiliated with the largest U.S. wireless provider. In any event, DIRECTV and DISH Network express no opinion on whether the regulatory fees associated with Verizon's video business should be the same or lower than those paid by other similarly-capitalized cable operators.

policies and rules, including a federally supervised rate regulation regime, that reflect this market dominance.²⁵ This in and of itself results in a regulatory *disparity* between cable and satellite providers. Time Warner Cable, for example, served DIRECTV with approximately 5,000 pages of effective competition petitions this year.²⁶ Many of these, in turn, generated oppositions, replies, and further filings.

Moreover, even setting aside false notions of regulatory parity, cable interests have not provided anywhere near the level of detail that would be required for the Commission to amend the schedule of regulatory fees. Would, for example, DBS operators be required to pay *both* “MVPD” and GSO fees? This would plainly be inequitable. Yet simply removing DBS from the GSO fee category would, presumably, require other GSO operators to increase their fees to make up the shortfall – also plainly inequitable. For that matter, how would regulatory fees work for hybrid satellites that offer both direct-to-home video and other services? Would those be subject to two sets of regulatory fees, or would only part of the satellite be subject to the fee? Here, too, each option appears unreasonable. Finally, creation of a new “MVPD” category, as Verizon and NCTA seem to contemplate, creates boundary-drawing issues of its own. MVPDs deliver video content to subscribers. So too, however, do wireless providers, broadcasters, and hundreds if not thousands of Internet-based services. A new regulatory fee category made up of cable and satellite alone (or even cable, satellite, and IPTV) would be perpetually under-inclusive and would fail even the misleading “parity” demand of cable providers.

²⁵ For example, cable operators are subject to rate regulation unless they face “effective competition” – a determination made by the FCC. *See* 47 C.F.R. § 76.905 (elaborating on the definition of effective competition); 47 C.F.R. § 76.907 (describing petitions for determination of effective competition).

²⁶ DIRECTV’s outside counsel has been served with roughly one and a half boxes of such pleadings from Time Warner since February 2008, with each box containing roughly 3,500 pages.

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Once again, the cable industry has argued for changes to the regulatory fees paid by GSO satellite operators. However, cable commenters have failed to even attempt the showing required by statute for such an adjustment, choosing instead to rely upon a flawed argument about regulatory “parity” notwithstanding the quantifiably greater regulatory burden imposed on the Commission by the cable industry. The Commission rejected the very same adjustment proposed by cable just two years ago, and no commenter in this proceeding has provided any basis for revisiting that decision today. The Commission should reject the cable industry’s latest attempt as well.

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