

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

In the Matter of)	
)	
Procedure for Assessment and Collection of Regulatory Fees)	MD Doc. No. 12-201
)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2008)	MD Doc. No. 08-65
)	

REPLY COMMENTS



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October 23, 2012

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I. INTRODUCTION

The American Cable Association (“ACA”) submits this Reply in response to comments filed in answer to the Notice of Proposed Rulemaking in the above-captioned proceeding.¹ In this proceeding the Commission seeks to reform its policies and processes used to assess the regulatory fees that cover its operational costs.² In light of the degree to which the Commission’s current fee setting mechanism is out of step with the requirements set forth by Congress,³ a fact recognized by

¹ *In the Matter of Procedures for Assessment and Collection of Regulatory Fees, Assessment and Collection of Regulatory Fees for the Year 2008*, MD Doc. Nos. 12-201, 08-65, FCC 12-77, Notice of Proposed Rulemaking (rel. July 17, 2012) (“NPRM”).

² See NPRM, ¶ 4 (describing Congressional appropriations requirements for the Commission).

³ The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, Sec. 9 (codified as amended at 47 U.S.C. § 159).

prominent lawmakers and the Government Accountability Office (“GAO”),⁴ this is a challenging task with potentially significant consequences for the Commission and fee payors alike.

ACA agrees with the NPRM’s proposals that the Commission’s reforms should be aimed at achieving the fairness, sustainability and administrability of regulatory fee assessments. However, ACA submits that fairness should be the primary goal. As discussed in more detail below, fairness in the assessment of regulatory fees must ensure that all service providers that receive direct benefits from the activities of a core bureau (International, Media, Wireline Competition and Wireless Telecommunications) are assessed fees to support the activities of that bureau. Under the current fee structure, cable television system operators (“cable operators”) and cable antenna relay system (“CARS”) licensees are the only multichannel video programming distributors (“MVPDs”) that pay fees derived from Media Bureau costs. To ensure fairness, the Commission must reform its fee categories so all MVPDs, including direct broadcast satellite (“DBS”) operators pay their fair share of the costs associated with the Media Bureau’s activities in regulating MVPD services.

Fairness should also mean the Commission embraces an ability-to-pay principle in its assessment of regulatory fees. The Commission must recognize that not all entities have the same financial ability to pay regulatory fees, and that larger entities have a greater ability to bear these costs than smaller ones. To achieve greater fairness in its regulatory fee structure, the Commission should assess regulatory fees in a more progressive manner, that is subscriber totals should be considered in different steps, where subscriber totals between certain points will be taxed at a certain rate.

ACA opposes the suggestion in the NPRM that fees be based on revenues as a means of measuring the benefit that a payor receives from the Commission’s regulatory work.⁵ This proposal

⁴ See Government Accountability Office, *Regulatory Fee Process Needs to be Updated*, GAO 12-686, pp. 2, 11 (Aug. 2012) (“GAO Report”), available at, <http://www.gao.gov/products/GAO-12-686> (last accessed October 22, 2012).

⁵ NPRM, ¶ 30.

would cause significant new administrative burdens for both the Commission and fee payors.

Moreover, there is nothing in the record to indicate that there would be any benefit from adopting a revenue-based approach. As a result, with regard to the cable television systems and CARS fee categories, the Commission should keep its current subscriber-based fee assessment approach.

As the NPRM makes clear, the fee setting process involves multiple variables, any one of which, if changed, can have a significant impact on the fees assessed. The Notice raises a number of important issues regarding the reallocation of full time equivalent employee (“FTEs”) among the four core Bureaus to avoid a precipitous increase in the fees assessed to International Bureau fee payors and makes some specific proposals for lessening this impact.⁶ However, it does not identify with any specificity the basis upon which it could reallocate FTEs across bureaus in a consistent and rational manner so as to permit informed comment by fee payors. Moreover, the initial comments in this proceeding demonstrate that there is no consensus approach for allocating FTEs across the core Bureaus.⁷ As a consequence, before adopting an approach for reallocating FTEs across bureaus, the Commission should develop a specific reallocation mechanism for reallocating the FTEs from one bureau to cover benefits provided to fee payors in another, and make this proposal available for public review and comment.

While comprehensively addressing the overall structural issues required to fully reform the Commission’s fee setting process will take time, there are several issues that can and should be addressed without further delay. These include correcting the significant regulatory fee disparity between cable and DBS operators, taking measures to ensure that regulatory fees are assessed in a manner that takes account of the fact that smaller entities have less ability to pay these fees, and

⁶ NPRM, ¶ 28.

⁷ See, e.g., USTA Comments at 5-6 (proposing that all direct and indirect FTEs be allocated in the same percentage as the core bureaus’ direct FTE’s of the total Commission FTEs with no exceptions); NAB Comments at 6 (opposing the reallocation of FTEs across bureaus without a better explanation of the processes that would be employed); Satellite Industry Association Comments at 15 (agreeing with NPRM’s proposal for reallocating International Bureau FTEs to other bureaus).

updating the FTE data upon which regulatory fees are based. The Commission should not let the need for a comprehensive solution for assessing fees fairly be a barrier to solving these more narrowly targeted and immediately addressable issues.⁸

II. THE FEE ASSESSMENT PROCESS SHOULD BE REVISED TO ENSURE THAT ALL MVPDS PAY FEES TO COVER THE WORK OF THE MEDIA BUREAU

A. DBS Operators Do Not Pay Fees to Cover the Benefits They Receive From the Media Bureau.

In order for the Commission's fee assessment process to be rational, let alone fair, it must ensure that all industry participants that receive direct benefits from the activities of a core bureau are assessed fees that reflect those benefits from that bureau.⁹ Under the current system DBS operators receive numerous direct regulatory benefits from the activities of the Media Bureau due to their status as MVPDs.¹⁰ However, DBS operators pay no regulatory fees to cover Media Bureau activities governing the provision of MVPD services.¹¹ This is contrary to Section 9 of the Act, which requires that the benefits provided by the bureaus' activities be taken into account in the Commission's fee

⁸ *In the Matter of Basic Service Tier Encryption, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 11-169, PP Docket No. 00-67, Report and Order (rel. Oct. 12, 2012), ¶ 21 (Commission can address consumer protection issues by first imposing regulatory requirements only on the largest industry participants), *citing, e.g.*, U.S. Cellular Corp. v. FCC, 254 F.3d 78, 86 (D.C. Cir. 2001) ("agencies need not address all problems in one fell swoop") (citations and internal quotation marks omitted).

⁹ 47 U.S.C. § 159(b)(1)(A) (in setting regulatory fees, the Commission must take into account "the benefits provided to the payor of the fee by the Commission's activities . . .").

¹⁰ 47 U.S.C. § 522(13) (defining MVPD as an entity "such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

¹¹ ACA acknowledges that DBS operators do pay regulatory fees covering the activities of the International Bureau associated with the licensing of geostationary satellites. *See, e.g., What You Owe – International and Satellite Services Licensees, Regulatory Fact Sheet* (July 2003) (describing the entities that must pay Geostationary Orbit Space Station fees as including DBS providers operating under Pat 100 of the Commission's rules). Depending on other licenses held, they may also pay regulatory fees supporting Wireless Telecommunications Bureau FTE activities. However none of these fees support Media Bureau MVPD regulation.

assessments.¹² The Commission must remedy this problem through its regulatory fee reforms in this proceeding.

DBS operators are licensed as geostationary satellite operators, but post-licensing regulation of the video services provided by DBS operators in their capacity as MVPDs occurs solely in the Media Bureau. It is therefore appropriate for DBS providers to pay regulatory fees for the work of the Media Bureau because there are a number of important benefits that these entities receive from their classification as MVPDs. Importantly, MVPD status allows DBS operators to file program access complaints if they believe they have been harmed by prohibited conduct,¹³ and confers the right to file complaints seeking relief under the retransmission consent good faith rules.¹⁴ In addition, MVPDs are also subject to various regulatory obligations that lead to Media Bureau FTE activities, the cost of which the Commission must recover through regulatory fees.¹⁵ Regulatory activities based on recent legislation include the Commission's implementation of the Commercial Advertisement Loudness Mitigation ("CALM") Act,¹⁶ which requires MVPDs to comply with standards for regulating the audio of TV commercials to ensure that they are not louder than the programming with which they are aired.¹⁷ Congress also passed the Twenty-First Century Video Accessibility Act ("CVAA"),¹⁸ and the Media Bureau has devoted significant resources implementing its IP closed captioning and video description

¹² 47 U.S.C. § 159(b)(1)(A) (requiring regulatory fees to take into account "the benefits provided to the payor of the fee by the Commission's activities . . .").

¹³ 47 U.S.C. § 548; 47 C.F.R. §§ 76.1000-1004 (program access).

¹⁴ See 47 U.S.C. §§ 325(b)(1), (3)(C)(ii); 47 C.F.R. § 76.65(b)(retransmission consent; good faith).

¹⁵ 47 U.S.C. § 159(a)(1) (stating that the Commission "shall assess and collect regulatory fees to recover the costs of the following regulatory activities of the Commission: enforcement activities, policy and rulemaking activities, user information services, and international activities).

¹⁶ P.L. 111-311.

¹⁷ *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Notice of Proposed Rulemaking, MB Docket No. 11-93, FCC 11-119 (rel. May 27, 2011).

¹⁸ Pub. L. 111-260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

requirements,¹⁹ which are both applicable to video programming distributors such as DBS and cable operators.²⁰

Despite the extensive regulatory, policy, rulemaking and enforcement activities that Media Bureau FTEs engage in that concern and benefit all MVPDs, including DBS operators, DBS MVPDs pay no (zero) fees to cover these costs. In contrast, cable operators pay a fee of \$0.95 per subscriber.²¹ Yet, the two DBS operators are the second and third largest MVPDs in the country, with DirecTV serving 19.9 million subscribers and DISH Network serving over 13.3 million, in no small part due to the regulatory benefits they receive as MVPDs.²² The Commission's fee reforms should recognize and correct this fundamental problem.

The fact that DBS operators do not shoulder their fair share of the Media Bureau fee burden is more than simply a matter of equity. This disparity in fee assessment can have market-distorting effects. Because DBS operators do not pay fees to cover any of the Media Bureau FTE expenses, these costs are shifted entirely onto the entities that do pay Media Bureau fees, such as cable operators. As recognized in the GAO Report, this has the effect of forcing cable operators to cross-subsidize their DBS competitors.²³ Moreover, because cable operators typically pass on regulatory fees to customers through subscription rates, it also has the effect of raising the costs of service that cable customers must shoulder. As the GAO report states, one effect of fee cross-subsidization, "is

¹⁹ *In the Matter of Video Description: Implementation of the Twenty-First Century Communications Video Accessibility Act of 2010*, MB Doc. No. 11-43, Report and Order (rel. Aug. 25, 2011).

²⁰ *In the Matter of the Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, ¶ 8 (rel. Jan. 13, 2012) (defining Video Programming Distributor and Video Programming Provider under CVAA).

²¹ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, MD Doc. No. 12-116, Report and Order, FCC 12-72, Attachment C (rel. July 19, 2012) ("2012 Fee Order").

²² DirecTV 10-K Annual Report for Fiscal Year Ended December 31, 2011, p. 2 (available at: http://idc.api.edgar-online.com/efx_dll/edgarpro.dll?FetchFilingConvPDF1?SessionID=lz8cF8VMEW-oalS&ID=8432452) (stating that DirecTV has over 19.9 million subscribers); DISH Network 10-K Annual Report for Fiscal Year Ended December 31, 2011, p. 3 (available at: http://www.sec.gov/Archives/edgar/data/1001082/000110465912011853/a11-31127_110k.htm) (stating that DISH has over 13.9 million subscribers).

²³ GAO Report at 17.

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.²⁴ This is exactly the case in the market for MVPD services, where cable operators and DBS operators are in direct competition with one another. This is especially unfair to smaller operators serving smaller and rural markets, who are the least able to shoulder regulatory fee burdens and for whom the two DBS operators are the primary competition.²⁵ The current fee assessment system is irrational and unfair in this way, and the FCC needs to amend its fee assessment process to correct this anomaly.

B. The Commission Should Take Immediate Steps to Lessen the Cable-DBS Regulatory Fee Disparity.

As a method for ensuring that DBS operators pay their fair share of Media Bureau costs, ACA supports the assessment of per-subscriber regulatory fees on satellite operators providing MVPD services through the creation of a new regulatory fee category for MVPD services. This is similar to the approach proposed by the National Cable and Telecommunications Association (“NCTA”), and supported by ACA, in this docket in 2008.²⁶ ACA believes this is the most straightforward way to ensure that the activities of Media Bureau FTEs are covered by entities directly benefited as required by Section 9 of the Act. It will also advance the goal of fairness and reduce the market-distorting effects of the current fee disparity between cable operators and DBS operators.

ACA proposes that the MVPD fee category fees be calculated based on Media Bureau FTEs, and be applied on a per-subscriber basis to all fee payors that meet the statutory definition of an

²⁴ *Id.* at 18.

²⁵ See discussion *infra* at 13-15 on regulatory burdens for small entities.

²⁶ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Doc. No. 08-65, Comments of the National Cable & Telecommunications Association, p. 3-4 (filed Sept. 25, 2008) (proposing that DBS providers be charged the same per-subscriber regulatory as all other MVPDs); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Doc. No. 08-65, Reply Comments of the American Cable Association, p. 3-4 (filed Oct. 27, 2008) (supporting NCTA’s proposal).

MVPD.²⁷ Creating an MVPD fee category will ensure that all MVPDs not currently captured by the cable television system category, such as DBS operators, and any other MVPD providers that may not be currently paying Media Bureau fees (e.g., incumbent local exchange carriers providing video services on a non-cable basis) are assessed their fair share of the Media Bureau FTE costs.²⁸ This approach is also consistent with Section 9(b)(3) of the Act, which states that “in making [amendments to its fee schedule], the Commission shall add, delete, or re-classify 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 the law.”²⁹

As acknowledged in the NPRM “the changes that have occurred since 1998 in the communications industry have caused significant shifts in the amount of time the Commission devotes to specific industry segments and activities.”³⁰ The GAO Report was more to the point, stating that:

The major changes that have occurred in the telecommunications industry over the past 14 years dramatically increase the likelihood that FCC’s current division of fees among fee categories has become obsolete. In 2008, FCC stated in a *Further Notice of Proposed Rulemaking* that major industry changes since 1994 included the significant increase of wireless, broadband, and voice over Internet protocol (“VoIP”), and discussed the fact that FCC itself had reorganized several times to reflect

²⁷ 47 U.S.C. § 522(13).

²⁸ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Doc. No. 08-65, RM-11312, Comments of Verizon, pp 2-3 n.3 (Sept. 25, 2008) (regulatory parity requires that all providers of video services, regardless of regulatory classification under the Act be assessed regulatory fees associated with video services, including cable operators, DBS providers and non-cable providers of Internet Protocol TV; (*citing* 2008 FNPM, ¶ 47 (recognizing that “[p]resently, ILECs that provide video services are not subject to regulatory fees for their video service, unless they are classified as a cable provider.”))).

²⁹ 47 U.S.C. § 159(b)(3). In their 2008 comments in this proceeding, DirecTV and Dish Networks argued that, under DC Circuit’s decision in *COMSAT v. FCC*, 114 F.3d 223, the Commission lacks the authority to amend its fee structure to add an MVPD fee category because such a change may only be made in direct response to changes in law and regulation. *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Doc. No. 08-65, Joint Reply Comments of DirecTV and Dish Network, p. 2-3 (Oct. 27, 2008). However, the *COMSAT* decision is not so narrow as to preclude the Commission from adopting a new fee category for MVPDs based on the legal and regulatory changes that have occurred since 1998. The *COMSAT* decision turned on the fact that the Commission created a new fee category while admitting that there had been absolutely *no* change in rules or law giving rise to the change. *COMSAT*, 114 F.3d at 227-228. That is simply not the case here.

³⁰ NPRM, ¶ 12.

industry changes. FCC acknowledged that there could be several areas in which the regulatory fee process could be revised and improved to better reflect the current industry.³¹ Two former FCC commissioners told [the GAO] that the significant increase in broadband and wireless services, the increasing convergence of telecommunications industries, and the transition to digital television are major changes that have occurred since fiscal year 1998 that have affected FCC's workload and priorities.³²

In addition, there have been a number of specific regulatory changes that have increased the level of post-licensing regulation of DBS MVPD services since 1998 as well as the activity of Media Bureau FTE's associated with regulating these services. While the Commission declined to change the way it assessed fees for DBS operators in 2006 in response to a request by NCTA,³³ this was in part due to the Commission's findings that it had not provided sufficient notice of the changes proposed by NCTA and because it did not have time to make the requested modification prior to collecting the fees.³⁴ Nevertheless, as of 2006 it was clear that there were a number of specific legislative and regulatory changes that had increased not only the burden that DBS services place on the Media Bureau, but also the direct benefits that DBS operators receive from Media Bureau activities.

As NCTA stated in 2006:

For example, several years after the FCC decided that DBS regulation was unrelated to its service to subscribers, Congress changed the Communications Act to permit DBS to offer local broadcast stations to customers subject to various regulatory requirements.³⁵ The Satellite Home Viewer Improvement Act of 1999 ("SHVIA") permitted DBS for the first time to deliver "local-into-local" broadcast stations. SHVIA resulted in more DBS-specific subscriber-based benefits and regulations. It also

³¹ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Doc. No. 08-65, Report and Order, 24 FCC Rcd 6388, 6401 (2008). The Commission has also stated that the statute does not require amendment to the fee schedule to mirror all changes in regulatory costs. See *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Doc. No. 04-73, FCC 04-146, ¶¶ 9-10 (rel. June 24, 2004).

³² GAO Report at 12.

³³ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Doc. No. 06-68, Report and Order, FCC 06-102, ¶ 10 (rel. July 17, 2006).

³⁴ 2006 Fee Order, ¶¶ 11, 16.

³⁵ Pub. L. No. 106-113.

imposed additional regulatory responsibilities on the FCC, which conducted a series of rulemakings to implement SHVIA.³⁶

FCC regulation of DBS has only increased since Congress adopted a new DBS-specific law in 2004 – the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”). Congress assigned the FCC significant new responsibilities in SHVERA. It directed the agency to conduct inquiries and to establish rules in multiple new areas relating to DBS service to customers.³⁷ The FCC has been implementing these DBS-specific provisions ever since. The agency has adopted rules relating to DBS carriage of significantly viewed television stations,³⁸ DBS carriage of local broadcast stations in Alaska and Hawaii,³⁹ and several others.⁴⁰

None of these responsibilities was assigned to the FCC when the agency last evaluated whether to apply the DBS regulatory fees on a per subscriber basis⁴¹

³⁶ See, e.g., *Implementation of the Satellite Home Improvement Act of 1999; Retransmission Consent Issues*, Notice of Proposed Rulemaking, CS Docket No. 990363, 14 FCC Rcd. 21,736 (1999); *Implementation of the Satellite Home Viewer Improvement Act of 1999; Enforcement Procedures for Retransmission Consent Violations*, FCC 00-22, 15 FCC Rcd. 2522 (2000); *Implementation of the Satellite Home Viewer Improvement Act of 1999; Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, CS Docket No. 00-2, 15 FCC Rcd. 434 (2000); *Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations*, ET Docket No. 00-11 (2000).

³⁷ The FCC was required to adopt rules implementing the statutory provision allowing DBS to carry significantly viewed broadcast stations subject to certain conditions and limitations (47 U.S.C. §340(c)(1)(A) and (B)); to revise the retransmission consent/must carry election rules for satellite carriers (47 U.S.C. §340(h)(1) and (3)); to complete an inquiry and report to Congress on whether, for purposes of identifying digital white areas, the current digital signal strength standard or testing procedures should be changed to take into account types of antennas available to customers (47 U.S.C. §339(c)(1)); to adopt rules under which DBS is to give notice to television stations of carriage rights (47 U.S.C. §338(h)(2)); to adopt rules implementing the good faith retransmission consent negotiation requirements (47 U.S.C. §325(b)); to complete an inquiry and report to Congress on the impact of retransmission consent and blackout rules on competition in the MVPD market (Section 208 of SHVERA); to revise rules governing broadcast signal strength test measurements (47 U.S.C. §339(c)(4)); to adopt rules concerning DBS carriage of television stations in Alaska and Hawaii (47 U.S.C. §338(a)); and to ensure compliance with the single dish rule (47 U.S.C. §338(a)(2)). The FCC is well aware of the complicated tasks involved.

³⁸ MB Docket No. 05-49.

³⁹ MB Docket No. 05-181.

⁴⁰ See, e.g., ET Docket No. 05-182 (digital signal measurement for DBS carriage); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Order (Mar. 30, 2005) (establishing carriage election, retransmission consent negotiations, and notification rules); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005).

⁴¹ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, MD Doc. No. 06-68, Comments of The National Cable & Telecommunications Association, pp. 5-6 (April 14, 2006) (footnotes in original).

Moreover, as noted above, the level of regulation applicable to DBS MVPDs has further increased since 2006 with passage and implementation of the CALM Act and CVAA. In addition, Congress passed the Satellite Television Extension and Localism Act of 2010 (“STELA”), which required the Commission to report on the number of households in a state that receive local broadcast stations assigned to a community of license located in a different state, the extent to which consumers in each local market have access to in-state broadcast programming over the air or from a MVPD, whether there are alternatives to the use of designated market areas, and to define local markets that would provide more consumers with in-state broadcast programming.⁴² This report was generated by the Media Bureau.⁴³ The Commission has also made significant changes to its program access rules,⁴⁴ continued with its efforts to update its navigation device rules,⁴⁵ and initiated a rulemaking to re-examine its retransmission consent good faith rules, all of which directly impact DBS MVPDs.⁴⁶ The Commission also has an active proceeding open through which it has amended, and will

⁴² Public Law 111-175, § 304. STELA was intended to increase competition for and service to satellite and cable consumers and update the law to reflect the completion of the digital television (DTV) transition. *In the Matter of In-State Broadcast Programming Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Doc. No. 10-238, Report, DA 11-1454, ¶ 1 (rel. Aug. 29, 2011) (“Section 304 Report”).

⁴³ Section 304 Report, ¶ 2.

⁴⁴ *In the Matter of Revision of the Commission’s Program Access Rules; News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable inc. (subsidiaries), Assignees, et. al.*, Report and Order in MB Doc. No. 12-68, 07-18, 05-192, Further Notice of Proposed Rulemaking in MB Doc. No. 12-68, Order on Reconsideration in MB Doc. No. 07-29, MB Doc. No. 12-68, 07-18, 05-192 (rel. Oct. 5, 2012).

⁴⁵ See, e.g., *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Doc. No 97-80, PP Doc. No. 00-67, Fourth Further Notice of Proposed Rulemaking (rel. April 21, 2010) (opening investigation for replacement of CableCARD rules); *In the Matter of Video Device Competition, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, MB Doc. No. 10-91; CS Doc. No 97-80, PP Doc. No. 00-67, Notice of Inquiry, FCC 10-60 (April 21, 2010) (opening investigation into the AllVid standard).

⁴⁶ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Doc. No. 10-71, Notice of Proposed Rulemaking (rel. Mar. 3, 2011).

continue to amend its program carriage rules, which allow programmers to bring complaints to enforce their right to nondiscriminatory access to distribution over certain MVPDs.⁴⁷ This list is in no way exhaustive, but illustrates that DBS MVPDs clearly, directly and increasingly benefit from the activities of the Media Bureau.

In order to ensure that DBS MVPDs pay their fair share of Media Bureau costs, the Commission must assess them a per-MVPD subscriber fee. The fact that DBS operators currently pay satellite regulatory fees for costs incurred by the International Bureau in no way precludes them from shouldering responsibility for also paying fees for the benefit they receive from the Media Bureau. Section 9 of the Act expressly states that regulatory fees should take into account the benefits provided to the fee payor.⁴⁸ Many regulated entities pay multiple fees based on the various benefits they receive, and burdens they place on the four core bureaus. For instance, many cable operators pay fees both for the work of the Media Bureau based on their classification as cable operators,⁴⁹ as well as annual regulatory fees based on Wireline Competition Bureau FTEs for their interconnected VoIP services.⁵⁰ In this way, cable operators pay fees based on the benefits they receive from both of these bureaus. Failing to require DBS operators to pay their fair share of the fees associated with the Media Bureaus' regulation of MVPD services is inconsistent with this well-established practice.

⁴⁷ *In the Matter of Revision of the Commission's Program Carriage Rules, Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Doc. No. 11-131, MB Doc. No. 07-42, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131 (rel. Aug. 1, 2011).

⁴⁸ 47 U.S.C. § 159(b)(1)(A).

⁴⁹ *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, MD Doc. No. 12-116, Report and Order, FCC 12-76, Appendix B (rel. July 19, 2012) ("2012 Fee Order") (listing fee categories for 2012, including Cable TV Systems category).

⁵⁰ Interconnected VoIP providers are responsible for fees related to the Commission functions recovered from interstate telecommunications service providers ("ITSP"). *Assessment and Collection of Regulatory Fees for Fiscal Year 2007: Report and Order and Further Notice of Proposed Rulemaking*, MD Docket No. 07-81, 22 FCC Rcd 15712, FCC 07-140, ¶ 11, Attachment B (rel. Aug. 6, 2007).

III. THE COMMISSION SHOULD ADOPT A GRADUATED FEE STRUCTURE TO ENSURE THAT REGULATORY FEES ARE PROPORTIONAL TO THE PAYOR'S ABILITY TO PAY

As discussed, ACA agrees with the NPRM's assessment that one of the chief aims of the Commission's regulatory fee assessment process should be to promote fairness in fee assessments. Achieving the goal of fairness should include ensuring that regulatory fees are proportional to the payor's ability to pay them. As the NPRM points out, "regulatees' ability to pay varies with their size and revenues—imposing the same fee on a Fortune 500 company and a local family business would have very different effects on those entities."⁵¹ ACA urges the Commission to expressly acknowledge this fact in its order in this proceeding and take steps to ensure that the fee assessments are structured to take into account the lesser ability of small entities to pay regulatory fees.

The fact that small businesses are less able to contend with regulation and pay regulatory fees is well documented. According to a recent study, the biggest single challenge that small businesses face is complying with government regulation.⁵² Moreover, according to the Small Business Administration ("SBA"), the cost for small business to comply with federal regulations is much higher than for large corporations. In fact, SBA studies show that regulatory compliance costs per employee are 42 percent higher in small companies (defined as those with fewer than 20 employees) compared with mid-sized firms (defined as those with between 20 and 499 employees), and 36 percent higher in small firms than in large firms (defined as those with 500 or more employees).⁵³

⁵¹ NPRM, ¶ 14.

⁵² See Chamber of Commerce, Survey, What is the Biggest Challenge Facing Small Businesses?, available at: <http://www.chamberofcommerce.com/the-small-business-tax/> (viewed on Oct. 19, 2012) (Over 22% of respondents reported that complying with government regulation was their biggest challenge, followed by consumer confidence (15%), lack of consumer demand (12%), and lack of available credit (10%).

⁵³ Nicole V. Crain, W. Mark Crain, Lafayette College, *The Impact of Regulatory Costs on Small Firms*, Small Business Administration, Office of Advocacy, pp. 54-55 (rel. Sept. 2010) (available at <http://archive.sba.gov/advo/research/rs371tot.pdf>).

The Commission's regulatory fees can be especially difficult for small cable operators to pay because cable television is a high fixed-cost business. Cable operators benefit from economies of scale, particularly where population densities are high and more subscribers can be served through the same cable facilities. The more subscribers that share the same facilities, the lower the costs on a per-subscriber basis. It is for this reason that operating costs per-subscriber for larger cable operators serving densely populated areas are typically lower than the costs for smaller operators serving low-density rural markets where cable distribution facilities have longer runs and serve fewer customers.

As a means of ensuring that the Commission's regulatory fees do not unduly burden small cable operators with less ability to pay them, ACA proposes that the Commission establish a progressive regulatory fee structure for the cable television system fee category similar to the tax structure for the federal income tax system. Under a progressive regulatory fee structure, the cable fees would be set on a graduated scale, with the fee categories supported by all cable operators assessed rates on a per-subscriber basis. However, the level of rates assessed would gradually increase based on the number of subscribers, starting with a relatively low rate per [x] subscribers, and increasing in set increments, so that operators with the largest number of subscribers and therefore the greatest ability to pay, would pay a higher rate than the operators with fewer subscribers and the least ability to pay.⁵⁴ Adopting a progressive fee structure for cable operators

⁵⁴ The following is an example of one approach for structuring a progressive regulatory fee system:

- i. The lowest per subscriber regulatory fee rate would apply to an MVPD's first 2,000 MVPD subscribers;
- ii. A higher per subscriber regulatory fee rate would apply to an MVPD's next 2,001 to 15,000 MVPD subscribers;
- iii. An even higher per subscriber regulatory fee rate would apply to an MVPD's next 15,001 to 400,000 MVPD subscribers;
- iv. The second highest per subscriber regulatory fee rate would apply to an MVPD's next 400,001 to 1,500,00 MVPD subscribers; and
- iii. The highest per subscriber regulatory fee rate would apply to an MVPD's subscribers above 1,500,000.

would be fair to all operators and eliminate the disproportionate impact that fees have on small operators.

IV. THE COMMISSION SHOULD NOT ADOPT A REVENUE-BASED FEE ASSESSMENT SYSTEM

In the NPRM, the Commission asks whether it should assess fees based on revenues as a means of measuring the benefit that a payor receives from the Commission's regulatory work.⁵⁵ ACA opposes this proposal because it would impose a significantly greater administrative burden on cable operators, and the benefits of abandoning the current means of assessing fees is unclear. At least with regard to the cable television systems and CARS fee categories, the Commission should keep its current subscriber-based fee assessment program.

For many years, cable operators have been assessed regulatory fees based on the number of cable television subscribers they have.⁵⁶ Assessing fees in this manner has become familiar to the small system operators that ACA represents, and has proved to be a relatively easy and efficient mechanism for assessing cable operator fees. Cable operators, regardless of size, are able to determine the number of cable subscribers they have with a simple billing database query.

Collecting fees based solely on cable revenues would cause its own problems. Adopting a revenue-based system for cable fees would require the Commission to define the cable service subject to the fee, which may not include all associated video services offered by cable operators. For instance, the Commission would need to determine how a cable operator would account for revenue derived from Pay-Per-View, Whole-Home DVR Service, or a TV Everywhere service when determining its regulatory fees. In turn, cable operators would also need to find an accounting method for disaggregating their video revenues from the revenues derived from their other triple play offerings that would not be subject to assessment. This process becomes complicated where these

⁵⁵ NPRM, ¶ 30.

⁵⁶ 2012 Fee Order, Appendix C (stating that the Cable Television Systems fee is paid on a per subscriber basis).

services are sold as a bundle for a single discounted price. There is no clear process under the Commission's rules for accomplishing a service-by-service revenue disaggregation for bundled services and thus the Commission would need to develop one. In addition, the Commission may have to create and administer a process for verifying that revenues are accurately calculated, as well as address questions from confused fee payors. It is fair to say that adopting a revenue-based approach for assessment of cable fees would lead to significant new cost and administrative burdens for both fee payors and the Commission alike.

Finally, the benefit of switching from a subscriber-based fee structure to a revenue-based structure is unclear. There is nothing in the record to suggest that a revenue-based fee structure is any better than a subscriber-based fee structure. The current subscriber-based approach is a well-known process that is not complicated or overly burdensome for either cable operators or the Commission. ACA urges the Commission not to abandon this successful approach for assessing regulatory fees on cable operators.

V. THE COMMISSION SHOULD USE UPDATED FTE DATA TO CALCULATE REGULATORY FEES

ACA also supports the proposal made in the NPRM that the Commission update the data it uses to calculate regulatory fees to reflect the actual number of direct FTEs working in the four core bureaus as of FY 2011.⁵⁷ This is an important and necessary first step toward correcting the fee disparities that have developed in the Commission's fee setting process. As discussed above, the regulatory fee subsidy that is implicit in the Commission's current fee structure is profoundly unfair and has the potential to distort the marketplace. Using updated FTE data is a necessary and appropriate first step towards rationalizing the Commission's fee assessment process and bringing it into closer compliance with the requirements of Section 9 of the Act.

⁵⁷ NPRM ¶ 24; AT&T Comments at 3-4; USTA Comments at 2-3; Verizon Comments at 3-4.

ACA recognizes that correcting the FTE data has the potential to significantly increase the number of FTEs allocated to the International Bureau, and yield higher fees for payors whose fees are assessed based on International Bureau FTEs. However, this result is the natural by-product of the Commission's failure to keep its FTE data up-to-date for more than a decade. During this time entities paying fees to cover the activities of the International Bureau have been underpaying, and their fee burdens have been unfairly shifted to other payors. As the GAO Report states, "[a]s a result of the FCC's use of obsolete data in assessing regulatory fees, companies in some fee categories may be subsidizing companies in others."⁵⁸ This inequity has gone on long enough. It is time for the Commission to begin the corrective process by using current FTE data.

ACA acknowledges that it may be appropriate for the Commission to consider additional measures to establish a workable means of ameliorating the one-time fee shock that could occur for some payors whose fees are derived from International Bureau FTEs. However, ACA opposes the suggestion in the NPRM that the Commission reallocate 50% of International Bureau FTEs to the other core bureaus for the sole purpose of reducing the impact that use of the updated FTE counts would have on these payors.⁵⁹ As a general matter, the NPRM does not identify any rational basis for determining the correct number of International Bureau FTEs to reallocate among the other core bureaus to reflect the industries actually affected or benefitted by International Bureau work. As a result, the 50% reallocation appears completely arbitrary. One way to consistently and rationally reallocate International Bureau FTEs according to the industry members who benefit from their work would be to base the FTE reallocations on a system of direct cost accounting. The NPRM and GAO

⁵⁸ GAO Report at "What GAO Found" (unnumbered first page).

⁵⁹ NPRM, ¶¶ 26-27. While the proposal in the NPRM for allocating "indirect" FTEs so that each core bureau is responsible for covering the costs of their own indirect FTEs rather than having them redistributed across all the bureaus appears reasonable in theory, the NPRM does not provide sufficient information to allow a meaningful analysis of the effects this proposal will have on fee payors. See NPRM, ¶¶ 19-21. Moreover, raising this issue creates a new variable that magnifies the uncertainty regarding the effects of reallocating "direct" FTEs across the bureaus. The NPRM simply does not provide sufficient information to allow meaningful comment on how the Commission should deal with both of these issues in unison in its reforms.

Reports, however, each discount the approach of having FTE's account for their time in a detailed manner as unworkable because they create significant administrative problems.⁶⁰

Moreover, there is no rational reason why FTE's from the International Bureau should be reallocated in the ad hoc way proposed in the NPRM – 50% reallocation – without similarly reallocating the FTE's of other bureaus where the benefits of their work cross industry lines.⁶¹ Any approach for reallocating FTEs among bureaus should apply agency-wide, not just to International Bureau FTEs. Use of an ad hoc approach to FTE reallocation would lead to an arbitrary fee setting process based on the Commission's unreviewable determinations about what direct FTE's should be assigned to any given bureau.⁶² This would perpetuate the current problem with the Commission's fee structure and further exacerbate the problem of the lack of transparency of the Commission's fee setting process – which was one of the GAO Report's primary criticisms.⁶³ This lack of transparency makes it impossible for fee payors to understand how their fees are calculated or to provide meaningful input on the Commission's regulatory fee process. Instead, any attempt by the Commission to reallocate FTEs among the four core Bureaus must be guided by clearly defined principles, applied to each of the core Bureaus across-the-board, and be released for public comment before implementing.

VI. CONCLUSION

ACA applauds the Commission's efforts to reform its regulatory fee setting process to make it more fair, sustainable, and administrable and believes that the release of this NPRM was an important step toward achieving these goals. As recommended in the NPRM, the Commission should adopt fairness as the primary goal of its regulatory fee process reforms. Fairness includes

⁶⁰ NPRM, ¶ 15, GAO Report at 10-11.

⁶¹ NPRM, ¶ 27.

⁶² 47 U.S.C. § 159(b)(3)(stating that increases or decreases in regulatory fees are not subject to judicial review).

⁶³ GAO Report, "What GAO Found" (unnumbered first page) ("FCC's regulatory fee process also lacks transparency because of the limited nature of the information FCC has published on it. This has made it difficult for industry and other stakeholders to understand and provide input on fee assessments."), p. 23.

adopting an MVPD fee category to ensure that DBS operators are assessed fees that reflect the benefits they receive by virtue of the activities of the Media Bureau to regulate MVPD services. It also includes adopting a progressive fee assessment process to ensure that fees are assessed on cable operators in accordance with their ability to shoulder them.

The Commission should not abandon the current subscriber-based approach for assessing regulatory fees on cable operators. There is no evidence of any benefit that would flow from adopting such an approach, while it would cause substantial burdens and uncertainty for both cable operators and the Commission. Finally, the Commission should also immediately update the FTE data it currently uses to calculate fee assessments to reflect FY 2011 FTEs. However, the Commission must not undertake to reallocate FTE's among the core bureaus without first making a more specific proposal for doing so and providing an opportunity for affected fee payors to comment on it.

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October 23, 2012

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