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Barbara S. Esbin
Admitted in the District of Columbia

February 22, 2013

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Presentation – Procedures for Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2008; MD Docket Nos. 12-201 and 08-65

Dear Ms. Dortch:

On February 20, 2013, Ross Lieberman, Vice President of Government Affairs, American Cable Association[1] ("ACA") and the undersigned, counsel to ACA, met with Mika Savir of the Enforcement Bureau, and Roland Helvajian and Thomas Buckley of the Office of the Managing Director, to discuss ACA's views on the above-captioned rulemaking regarding reform of the Commission's regulatory fees.[2]

During the meeting, ACA discussed the aim of the Commission's regulatory fee reform proceeding to achieve fairness, sustainability and administrability of regulatory fee assessments. ACA reiterated the view expressed in its reply comments that fairness should be the primary goal and its recommendations that to ensure fairness and ease of administration, the Commission should (i) require all multichannel video programming distributors ("MVPDs") pay regulatory fees to support the work of the Media Bureau; (ii) adopt a progressive fee structure that utilizes graduated rates that take account of an MVPD's ability to pay; and (iii) refrain from changing the assessment of these fees from a per subscriber to revenue basis.[3]

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[1] ACA represents nearly 850 small and medium sized cable operators, companies providing video, broadband Internet, and phone service generally in smaller and rural markets throughout the contiguous United States, Alaska, and numerous U.S. territories. ACA's membership includes a variety of businesses – family-owned companies serving small towns and villages, multiple system operators, and hundreds of companies in between. ACA's membership also includes competitive cable providers and municipalities. In total, ACA members offer cable service to 7.4 million subscribers. More than two-thirds of ACA's members serve fewer than 5,000 subscribers.

[2] *In the Matter of Procedure for Assessment and Collection of Regulatory Fees; Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, MD Docket Nos. 12-201 and 08-65, Notice of Proposed Rulemaking, 27 FCC Rcd 8458 (2012).

[3] ACA Reply Comments at 2-16.

Fee Parity Among MVPDs. ACA explained that fairness requires that all entities classified as an MVPD, including cable operators, direct broadcast satellite ("DBS") operators and other non-cable operators, receiving direct benefits from the Media Bureau, should support its activities. Today, of all MVPDs, only cable operators and cable antenna relay service ("CARS") licensees support Media Bureau functions through regulatory fees. DBS operators, DirecTV and DISH Network – now the second and third largest MVPDs in the country, pay no fees to support Media Bureau activities that benefit all MVPDs.[4] AT&T, which does not consider itself a cable operator, does not pay fees either. As a result, cable operators, particularly small and mid-size ones serving smaller and rural markets where DBS competition is most intense, are bearing a disproportionate share of regulatory fee payments supporting Media Bureau activities and are effectively cross-subsidizing their competitors.[5] The following chart, based on data obtained from the National Cable Television Cooperative ("NCTC") and SNL Kagan highlights the disparity in treatment among MVPDs related to regulatory fee payments:

[4] ACA Reply Comments at 4-7.

[5] ACA Reply Comments at 6-7. This is a problem recognized by the General Accountability Office in its recent report. *See* Government Accountability Office, *Regulatory Fee Process Needs to be Updated,* GAO 12-686 at 17 (Aug. 2012), available at http://www.gao.gov/products/GAO-12-686.

MVPD Category	Total Subscribers	% of Total MVPD Subscribers	Total Est. Reg Fees Paid for Media Bureau Activity
Cable Operators	61,642,001[6]	61.64%	$59,090,000[7]
Non-Cable MVPDs	38,367,000[8]	38.37%	$0
Total	100,009,001	100%	$59,090,000

In particular, ACA discussed how post-licensing regulation of DBS MVPD services is provided primarily by Media Bureau staff, none of whose efforts are currently supported by regulatory fees paid by DBS companies even though these efforts have grown significantly in scope over recent years. This MVPD regulation includes, but is not limited to activity concerning the revisions to the program access rules and administering program access complaints; retransmission consent reform and administering retransmission consent complaints; CALM Act implementation; implementation of the Twenty-First Century Communications and Video Accessibility Act; and implementation of the Satellite Television Extension and Localism Act of 2010 ("STELA").[9] ACA also notes that non-cable non-DBS MVPDs, such as AT&T, are essentially treated the same as cable operators by the Media Bureau.

To remedy the inequity of cable operators bearing the totality of these costs, ACA recommended that the Commission should create a new fee category for MVPD services applied on

[6] This number includes the most recent subscribership information available to ACA from NCTC, whose cable operator members are required to provide monthly subscriber updates to the association. The data was obtained by ACA from NCTC on Feb. 21, 2013. Given that NCTC can generally secure programming rates for cable programming on better prices, terms and conditions than small and medium-sized cable operators can secure on their own, and accepts for membership all cable operators who apply, except in relatively rare circumstances (i.e., issues with an applicant's financial responsibility, creditworthiness, or inability to comply with general terms of all NCTC vendor contracts), ACA believes NCTC's membership today represents essentially the entire universe of cable operators, except for the three largest cable operators: Comcast, Time Warner Cable and Bright House networks. Accordingly, this number also includes the third quarter 2012 basic subscriber totals for these three large cable operators. *See* SNL Kagan, *Top Cable MSOs*, Period: 09/12 Q, http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q3&sortcol=subscribersbasic&sortorder=desc (last accessed Feb. 22, 2013).

[7] *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, Report and Order, 27 FCC Rcd 8390, Attach. B, "Expected FY 2012 Revenue" for "Cable TV Systems." The $59.09 million projected revenue figure is based on the FCC's estimate of 62,200,000 Cable TV system "payment units" (i.e., subscribers). ACA notes that the Commission's estimated revenue figure is slightly higher than the revenue figure that would be collected based on ACA's estimate number of cable subscribers. However, the difference between ACA's estimated number of cable subscribers and the FCC's estimated number is less than 1% off.

[8] In the third quarter of 2012, DISH Network reported 14,042,000 subscribers; DirecTV reported 19,981,000 subscribers; and AT&T U-Verse reported 4,344,000 subscribers. *Multichannel subscriber losses persist in Q3*, SNL Kagan, Nov. 12, 2012.

[9] ACA Reply Comments at 5-6, 11-12. Additional rulemaking activities affecting all MVPDs include updates to the Commission's navigation device rules. Id. at 11.

a per-subscriber basis to support Media Bureau costs.[10] ACA noted that failure to require DBS operators and other non-cable MVPDs to pay their fair share of the fees associated with Media Bureau regulation of MVPD services is inconsistent with well-established practice with respect to providers of services regulated by more than one of the core bureaus.[11] Finally, ACA emphasized the importance of promoting equal treatment of competitors providing the same service – MVPD service – under the FCC's regulatory fee program to avoid marketplace distortions. Accordingly, ACA reiterated its view that regardless of the merits of the argument that MVPDs who are cable operators derive greater benefit from the work of the Media Bureau than non-cable operators, the fact that non-cable MVPDs pay nothing for actual benefits they derive is unfair. The fact that cable operators may place greater burdens on Media Bureau staff as a result of the filing of periodic reports and other filings can be accounted for in the fee setting process.

Graduated Rates Based on Ability to Pay. Fairness also requires adoption of an ability-to-pay principle in assessing regulatory fees implemented through gradations of fees based on differing levels of subscribership. ACA explained that a regulated entity's ability to pay varies with their size – imposing the same fee on a Fortune 500 company serving millions of subscribers and a small family business serving a few thousand would have very different effects. The cable industry is a high fixed cost business, and operators serving smaller and rural markets have far fewer subscribers over which to spread their costs. The Commission's regulatory fees are particularly burdensome for these smaller operators serving low density areas and lacking benefits of economies of scale. ACA discussed its recommendation that the Commission adopt a progressive regulatory fee structure for cable similar to federal income tax structure to address this issue.[12]

In response to questions about the breakdown of cable operators paying regulatory fees on a per cable subscriber basis, ACA has composed the following chart using the same data obtained from NCTC and SNL Kagan as referenced above, which ACA believes represents essentially the entire universe of cable operators.[13]

[10] ACA Reply Comments at 7-11.

[11] ACA Reply Comments at 12.

[12] ACA Reply Comments at 13-15.

[13] The chart does not include AT&T based on ACA's understanding that the company does not pay regulatory fees for benefits received from the Media Bureau because it considers itself to be an MVPD but not a cable operator.

Cable Subscriber Bracket	Number of Companies	Aggregate Subscribers	% of Total Cable Subscribers
Under 5,000	719	870,367	1.41%
5,000-49,999	140	1,864,806	3.03%
50,000-399,999	23	2,870,610	4.66%
400,000-999,999	3	2,154,811	3.50%
More than 1,000,000[14]	8	53,881,407	87.41%
Total	893	61,642,001	100.00%

Under a progressive regulatory fee structure as proposed by ACA, the cable fees would be set on a graduated scale, with the fee categories supported by all cable operators containing rates on a per-subscriber basis. The level of rates assessed would gradually increase based on the number of subscribers, starting with a relatively low rate per subscriber, 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 effective rate than operators with fewer subscribers and the least ability to pay. The foregoing chart may guide the Commission in determining more precisely where to set the increments.[15] Such an approach would create a fair and relatively simple fee structure that takes appropriate account of the greater ability of the relatively small number of large cable operators who together serve nearly 90 percent of cable subscribers while affording meaningful relief to the hundreds of smaller operators serving the fewest number of subscribers. This action would be consistent with Commission precedent affording relief to the declining, economically challenged CMRS Messaging Service (i.e., paging industry) while assessing higher fees on the providers of thriving CMRS Mobile Services (i.e., wireless phone carriers).[16]

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[14] Cable operators with more than 1,000,000 subscribers are: Comcast, Time Warner Cable, Verizon, Cox, Charter, Cablevision, Bright House Networks, and Cequel dba SuddenLink.

[15] Based on the ACA's chart, the following illustrates a possible regulatory fee rate schedule:

i. The lowest per subscriber regulatory fee rate would apply to an MVPD's first 5,000 MVPD subscribers;

ii. A higher per subscriber regulatory fee rate would apply to an MVPD's next 5,000 to 49,999 MVPD subscribers;

iii. An even higher per subscriber regulatory fee rate would apply to an MVPD's next 50,000 to 399,999 MVPD subscribers;

iv. The second highest per subscriber regulatory fee rate would apply to an MVPD's next 400,000 to 999,999 MVPD subscribers; and

iii. The highest per subscriber regulatory fee rate would apply to an MVPD's subscribers above 1,000,000.

[16] *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, Report and Order, 18 FCC Rcd 15985 ¶ 20-22 (2003) (freezing regulatory fees for paging services operators based in part on their "geographically localized[] and very cost sensitive" industry); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2012*, Report and Order, 27 FCC Rcd 8390, Attach. C

Retention of Per Subscriber Fee Assessments. ACA reiterated its position that switching from the current per subscriber to a revenue-based fee assessment for cable operators would cause significant new administrative burdens for both the Commission and fee payors without evidence of any corresponding benefits from adopting this approach.[17] ACA member companies are familiar with subscriber based fee assessments; the method is well established and is by far the easiest option for operators. ACA noted that adopting revenues-based fee assessments would require the Commission to clearly define the MVPD service subject to the fee (e.g., whether to include revenues derived from advertising, VOD, PPV, Whole-Home DVR, TV Everywhere, etc.); establish an accepted method for disaggregating video revenues from revenues derived from other triple play services (data and voice) so that revenues are segregated service-by-service; and address the difficult question of revenue allocation for bundled "Triple Play" services sold at a discounted price.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

Barbara Esbin

cc (via email): Mika Savir
Roland Helvajian
Thomas Buckley

(assessing a fee of $0.08/unit for CMRS Messaging Services and $0.17/unit for CMRS Cellular/Mobile Services). *See also* Comments of American Cable Association, MB Docket No. 12-203, at 3-6 (describing closing of numerous smaller cable systems); Mike Farrell, *Small Cable Operators Tread Water over High Programming, Hardware Costs*, Multichannel News, Feb. 4. 2013 (explaining the significant economic challenges faced by small cable operators and noting that "since October 2005 the number of cable systems has declined by 26% from 7,208 to 5,312, including sales, shutdowns and headend consolidations" and that "for systems with fewer than 10,000 subscribers, the percentage drop has been even greater").

[17] ACA Reply Comments at 15-16.