

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

In the Matter of)	
)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2013)	MD Docket No. 13-140
)	
Procedure for Assessment and Collection of Regulatory Fees)	MD Docket No. 12-201
)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2008)	MD Docket No. 08-65
)	

COMMENTS



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I. INTRODUCTION

The American Cable Association (“ACA”) submits these comments in response to the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking in the above-captioned dockets.¹ With these actions, the Commission is taking important steps in its continuing effort to reform its out-of-date regulatory fee assessment program. ACA believes the Commission’s proposals, as adjusted through the suggestions contained herein, will lead to more equitable fee assessments for video service providers that support Media Bureau Full Time Employees (“FTEs”).

First, the Commission should assess regulatory fees on providers of Internet Protocol television (“IPTV”) in the same manner as cable operators must pay them. IPTV providers offer a service substantially similar to “cable service” and are subject to, and benefit, from Media Bureau regulation; these providers should remit commensurate regulatory fees. Further, including IPTV service providers in the fee base will avoid distortions in the marketplace that can occur when some similarly situated competitors must pay regulatory fees while others can avoid them.

Second, the Commission should also maintain its assessment of cable fees on a per-subscriber basis and apply this methodology to all multichannel video programming distributors (“MVPDs”), including IPTV providers. Assessing fees in this manner has a demonstrated track record of efficiency, simplicity and predictability. An alternative revenue-based model would introduce needless complexity, inevitable imprecision, and require extensive recordkeeping that would be burdensome—particularly for smaller MVPDs.

Third, ACA supports reallocation of FTEs using updated Commission data, but suggests that any increases in fees as a result of the reallocation take into account pending proposals that may

¹ *Assessment and Collection of Regulatory Fees, Assessment and Collection of Regulatory Fees for the Fiscal Year 2013, Assessment and Collection of Regulatory Fees for the Fiscal Year 2008*, MD Docket Nos. 12-201, 13-58, 08-65, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 13-74 (rel. May 23, 2013) (“NPRM or FNPRM”).

affect the level of these fees. Cable operators, for one, are subject to increases in fees from the reallocation of FTEs to the Media Bureau, but may face decreases in fees from the inclusion of IPTV and DBS providers in their contribution base. To that end, ACA urges the Commission to avoid raising fees paid by cable operators, or at least to significantly lower the proposed 7.5% fee increase they face, relative to the fee increases for other fee payors who do not face such regulatory uncertainty about their fees.

Finally, ACA encourages the Commission to create a new regulatory fee category for MVPDs and to include Direct Broadcast Satellite (“DBS”) providers in this group so that they may support Media Bureau FTEs in the same manner as cable television operators. This much-needed regulatory reform will ensure regulatory parity between cable operators and DBS providers. The Commission has ample authority to undertake this reform given the regulation and benefits that DBS providers receive from the Media Bureau. To the extent that cable operators receive disproportionate benefits or regulation, the Commission is capable of addressing this issue through its rate-setting process.

II. THE COMMISSION SHOULD ASSESS REGULATORY FEES ON IPTV SERVICE PROVIDERS AS IT DOES ON CABLE OPERATORS

ACA applauds the Commission for seeking to impose regulatory fees on providers of IPTV on the same basis as cable operators.² As explained in ACA’s reply comments, requiring all beneficiaries of Media Bureau regulatory activities, including IPTV providers, to pay their fair share of the costs is consistent with Congress’ intent that the Commission assess and collect regulatory fees

² NPRM, ¶ 37. The Commission began this inquiry five years ago, by seeking comment on whether “this video service [IPTV] should be subject to regulatory fees, and if so, should the IPTV provider count this service for regulatory fee purposes in the same manner as cable services” *Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6388 ¶ 48 (2008) (“2008 R&O and FNPRM”). The Commission noted that “According to AT&T, [t]he AT&T U-Verse portfolio of IP-based services integrates digital video, AT&T Yahoo! High Speed Internet U-Verse Enabled, and in the future, voice over IP services.” *Id.* at ¶ 48 n.98.

to recover the costs of its core bureaus, including the Media Bureau.³ Moreover, broadening the base of entities paying fees to support the Media Bureau's work to include all video providers benefitting from its activities will help ensure that regulatory fee reform results in fair and equitable regulatory fee assessments.⁴ Insofar as providers of IPTV qualify as MVPDs and video programming distributors ("VPDs"), these providers (i.e., video service providers that do not consider themselves to be cable operators) receive numerous direct regulatory benefits from the activities of the Media Bureau and therefore should be paying fees to cover its costs, yet today pay no fees to support these activities due to their self-selected status as non-cable operators.⁵ In today's highly competitive video marketplace, it is imperative that all providers benefitting from or subject to regulation administered by the Media Bureau operate on a level regulatory playing field. To carry out statutory objectives and achieve fairness, the Commission must broaden the class of entities supporting Media Bureau activities to include those using IPTV technology.

³ 47 U.S.C. § 9(a)(1) ("The Commission, in accordance with this section, 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.") The Media Bureau conducts enforcement, policy, and rulemaking activities and provides user information services, that benefit cable operators, MVPDs, VPDs, and radio and television broadcasters. The Commission currently assesses regulatory fees only on entities specifically classified as cable operators and broadcasters.

⁴ ACA Reply Comments at 4-12; ACA notes that many IPTV providers consider themselves to be cable operators and therefore already pay regulatory fees to support Media Bureau activities. ACA understands the NPRM to be directed to non-cable IPTV providers who qualify as MVPDs under the Act and the Commission's rules but do not pay fees. See NPRM, ¶ 37. ACA takes no position on whether the Commission has the authority to assess regulatory fees on non-MVPD IPTV providers to support Media Bureau activities.

⁵ ACA takes no position in these comments on whether all IPTV providers should be classified as cable operators. The key issue addressed is whether their service is sufficiently similar to cable service to justify their payment of regulatory fees to help cover Media Bureau costs, and an issue the Commission can decide without getting into the classification of the service/service provider for all regulatory purposes.

A. IPTV Service is Sufficiently Similar to Cable Service in the Marketplace that IPTV Providers Should Be Assessed Regulatory Fees In a Similar Fashion.

The Commission is correct to assume that IPTV service providers should pay regulatory fees to support video-related regulatory activities of the Commission.⁶ Even AT&T has previously acknowledged that, as an MVPD, it should pay regulatory fees supporting Commission regulation for its U-Verse service.⁷ With regard to AT&T, it is particularly appropriate now that AT&T has grown to be at least the seventh largest MVPD.⁸

As far back as 2008, the Commission aptly observed that “[f]rom the customer’s perspective, there is likely not much difference between IPTV and other video services, such as cable service.”⁹ This was undoubtedly correct then as it is now. Cable operators and IPTV providers transmit to subscribers multiple channels of video programming that they either have licensed from broadcast television stations and cable programming providers, or carry upon request under “must carry,” and also provide subscribers the ability to select and use that programming through programming guides and other interactive features.

As the NPRM notes, “[b]y assessing a regulatory fee on cable services but not on IPTV, we may place cable providers at a competitive disadvantage.”¹⁰ ACA agrees. The lack of regulatory fee parity is both unfair and harmful to competition. Regulatory fees increase a cable operator’s cost of serving each customer, and therefore uniquely burden cable operators vis-à-vis other similar video

⁶ See *id.*

⁷ Reply Comments of AT&T, MD Docket No. 08-65, at 2-3 (filed Oct. 27, 2008) (“AT&T fully agrees that, as an MVPD, it should pay an equitable share of the Commission’s regulatory costs”).

⁸ See NCTA, Top 25 Multichannel Video Service Customers (2012), <http://www.ncta.com/industry-data/item/217>.

⁹ 2008 R&O and FNPRM, ¶ 48. The Commission’s view was shared by at least one U.S. District Court. See Office of Consumer Counsel and New England Cable and Telecommunications Association v. Southern New England Telephone Company d/b/a AT&T Connecticut, Inc., and Department of Public Utility Control of the State of Connecticut, 515 F. Supp. 2d 269, 281 (D. Conn. 2007) (finding that AT&T’s U-verse service is a “cable service,” under 47 U.S.C. § 522(6)), *vacated as moot on other grounds*, 368 Fed. Appx. 244 (2d.Cir. 2010).

¹⁰ NPRM, ¶ 37.

distributors like IPTV providers. Therefore, because cable operators are assessed regulatory fees for video-related regulatory activities of the Commission, their MVPD competitors have a competitive advantage. To level the playing field, it is appropriate for the Commission to establish regulatory fee parity, and the NPRM's suggestion of assessing IPTV providers regulatory fees like cable operators would achieve this result.¹¹

By assessing regulatory fees on cable operators and not some IPTV providers, the Commission is also effectively having cable operators foot the bill for the work done by the Media Bureau on behalf of these IPTV providers. An IPTV provider such as AT&T competes head-to-head with ACA members in many areas, with the result that cable operators effectively pay for the work done by the Media Bureau on behalf of their competitor. For example, when AT&T files a program access complaint, cable operators pay the bill for the work done by the Media Bureau.¹² IPTV providers benefit from Media Bureau regulation in the same manner as cable operators at least insofar as they function as MVPDs and VPDs.¹³

Commission action to rectify the unfair situation by which cable operators, particularly small and mid-size operators, are put at a competitive disadvantage and effectively pay for government work that helps their competitors in the video programming distribution market, is timely and appropriate.

¹¹ *Id.* (“[b]y assessing a regulatory fee on cable services but not on IPTV, we may place cable providers at a competitive disadvantage); Letter from Barbara Esbin, Counsel to ACA, to Marlene Dortch, Secretary, FCC, MD Docket Nos. 12-201, 08-65, at 2-4 (filed Feb. 22, 2013); ACA Reply Comments at 6-7; GAO, *Regulatory Fee Process Needs to Be Updated*, GAO 12-868, at 17 (released Aug. 10, 2012). See also Assessment and Collection of Regulatory Fees for Fiscal Year 2008, *Comments of the National Cable & Telecommunications Association*, MD Docket No. 08-65, at 3-4 (filed Sept. 25, 2008) (“[A]ll providers of the same service should be treated in the same manner regardless of the technology that they employ.”), citing Appropriate Regulatory Treatment of Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, Statement of Chairman Kevin J. Martin (rel. Mar. 23, 2007).

¹² See, e.g., *AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Order, 26 FCC Rcd 13206 (MB 2011).

¹³ As ACA discusses, *infra* at Section V, with respect to requiring DBS providers to support Media Bureau post-licensing MVPD regulatory activities, to the extent that there is an argument that cable operators place greater burdens on the Media Bureau than non-cable MVPDs, there are ways to address this issue through the fee setting process.

B. IPTV is Sufficiently Similar to Cable Services for Regulatory Purposes to be Included in the Same Fee Category.

The NPRM posits that “IPTV is digital television delivered through a high speed Internet connection, instead of through traditional formats such as cable or terrestrial broadcast” and seeks comment on whether IPTV service is sufficiently similar to cable service to be included in the same regulatory fee category.¹⁴ As noted above, the Commission is correct in its earlier observation that consumers likely do not perceive much difference between IPTV and other video services, such as cable service.¹⁵ Moreover, fairness dictates that IPTV providers share the burden of supporting Media Bureau regulatory activities on the same basis as cable operators, particularly when the Bureau’s activities benefit IPTV providers. There are also numerous other substantial similarities between IPTV and cable service from a regulatory perspective sufficient to justify each paying regulatory fees in support of Media Bureau activities.

First, IPTV service meets the attributes of a “cable service” as defined in the Communications Act.¹⁶ Just the same as traditional cable subscribers, IPTV subscribers also receive the “one-way transmission ... of video programming” and have the ability to select and “to use” that programming through programming guides and other interactive features.¹⁷ It is also undeniable that the “video programming” received by IPTV subscribers is “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”¹⁸ The only difference between traditional cable operators and IPTV is the transmission technology involved in transporting the content from the service provider to the subscriber — i.e., IPTV uses Internet Protocol over a fiber or copper connection to deliver content, whereas traditional cable providers may use analog, digital,

¹⁴ NPRM, ¶ 37.

¹⁵ See 2008 R&O and FNPRM, ¶ 48.

¹⁶ See 47 U.S.C. § 522(6) (cable service is defined to mean “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service”).

¹⁷ See *id.*

¹⁸ See 47 U.S.C. § 522(20).

QAM, or even IP over coaxial cable, hybrid fiber-coax, or all fiber connections. This distinction with respect to the video transmission technology should not result in a difference for regulatory fee assessment purposes given the functional similarities of these video programming services.

Second, both cable and IPTV service providers benefit from and are subject to, Media Bureau regulation as MVPDs. This means that they may file program access complaints and complaints seeking relief under the retransmission consent good faith rules. The IPTV provider's ability to exercise their rights under these rules must go hand-in-hand with their responsibility to pay fees to support the administration of these rules.

Third, both cable and IPTV service providers (as video programming distributors) are subject to Media Bureau regulation under the Commercial Advertisement Loudness Mitigation Act (CALM Act), as well as under the Americans with Disabilities Act (TV closed captioning), and the Twenty-First Century Communications and Video Accessibility Act (CVAA) as ("VPDs").¹⁹ These regulations subject IPTV providers, like cable operators, to closed captioning, video description, emergency information accessibility, and video programming user guides and menu accessibility rules.²⁰

Yet, currently, only cable operators are assessed fees to support Media Bureau activities in their capacity as cable service providers, MVPDs, and VPDs. Cable operators are required to comply with the Commission's rules and regulations in their multiple capacities as cable operators, MVPDs, and VPDs, and participate in the development of, and benefit from, Media Bureau rules and regulations. Verizon, like many IPTV providers, considers its service to be a "cable service," and

¹⁹ See *Implementation of the Commercial Advertisement, Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, ¶ 1 (2011) ("As mandated by the statute, the rules apply to digital TV broadcasters, digital cable operators, and other digital multichannel video programming distributors ("MVPDs")."); *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, ¶ 8 (2012) (Defining VPDs); *In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272 (1997) ("plac[ing] responsibility for compliance with the closed captioning rules on video programming distributors, defined as all entities who provide video programming directly to customers' homes, regardless of distribution technology used (i.e., broadcasters and MVPDs).")

²⁰ See, e.g., Part 76, Subpart K, of the Commission's rules (47 C.F.R. § 76.601, *et seq.*).

complies with the same rules and regulations as cable operators, and participates in the development of Media Bureau policies, and benefits from Media Bureau activities. These IPTV providers pay the same regulatory fees as cable operators. Other IPTV providers, such as AT&T consider its service to be an MVPD and VPD service, but not a cable service.²¹ Such non-cable IPTV providers (i.e., those who do not consider themselves cable operators but provide similar services) are obligated to comply with MVPD and VPD-specific rules and regulations, and also fully participate in the development of and benefit from the Media Bureau regulations and protections that apply to MVPDs and VPDs.²² These non-cable IPTV providers, however, currently pay nothing in support of any Media Bureau activities. Although cable operators are subject to certain unique additional requirements specific to the historic regulation of cable systems and technology, that fact is not germane to the question of whether IPTV service providers should share in the burden of paying for supporting Media Bureau activities in the same manner as cable operators. In short, IPTV is sufficiently similar to cable to service to be included in the same regulatory fee category.

C. IPTV Providers Should be Assessed Regulatory Fees in the Same Manner as Cable Operators

In response the NPRM's call for comment on whether the same per-subscriber assessment methodology applicable to cable service providers should apply to IPTV providers,²³ ACA strongly favors the existing per-subscriber basis under which cable operators are assessed regulatory fees. For many of the reasons that we note in Section III, *infra*, assessing fees based on subscribers provides an established and efficient way to calculate regulatory fee assessments. The alternative—revenue-based assessments, would involve the Commission in resolving significant complexities with

²¹ See AT&T, Inc., SEC Form 10-Q (for the period ending March 31, 2013), at 26 (AT&T believes that “U-verse TV service is a ‘video service’ under the Federal Communications Act” but suggests that U-verse is not a “traditional cable service”).

²² See, e.g., Comments of AT&T, MB Docket No. 12-68 (filed Dec. 14, 2012); Reply Comments of AT&T, MB Docket No. 12-68 (filed Jan. 14, 2012).

²³ NPRM, ¶ 33.

calculating and reporting revenue. As the Commission notes in the NPRM, issues concerning the manner of reporting, the information provided, and that information's confidentiality would have to be resolved.²⁴ The Commission would also have to provide guidance on how reporting entities should disaggregate their video service revenue from bundles or other ancillary services.²⁵ As the Commission is well aware, disaggregating revenue from bundled services can be a time-intensive and controversial task.²⁶

III. THE COMMISSION SHOULD NOT ADOPT A REVENUE-BASED FEE ASSESSMENT SYSTEM FOR CABLE PROVIDERS

In the NPRM and FNPRM, the Commission asks whether it should require cable operators to pay regulatory fees based on revenues.²⁷ Consistent with its previous filings in this docket, ACA opposes this proposal.²⁸

Using revenues instead of the number of cable subscribers to determine regulatory fees for cable operators would be more complex, inevitably imprecise, and require extensive recordkeeping, as well as likely cause significant new administrative burdens for both the Commission and fee payors without evidence of any corresponding benefits from adopting this approach. First, as the Commission recognizes, it would need to determine how to track a cable operator's revenues, and

²⁴ *Id.*

²⁵ See *id.* at ¶ 37 ("IPTV service generally is offered bundled with the customer's Internet and telephone or VoIP services").

²⁶ See, e.g., *Universal Service Contribution Methodology*, etc., WC Docket No. 06-122, etc., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (establishing universal service contribution obligations for providers of interconnected VoIP service); *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C.Cir. 2007) (partially vacating the Commission's order as it relates to the calculation of a VoIP provider's revenue subject to universal service fund contributions).

²⁷ NPRM, ¶ 33; FNPRM, ¶ 52.

²⁸ Reply Comments of American Cable Association, MD Docket Nos. 12-201, 08-65, at 15-16 (filed Oct. 23, 2012) ("ACA Reply Comments"); Letter from Barbara Esbin, Counsel to ACA, to Marlene Dortch, Secretary, FCC, MD Docket Nos. 12-201, 08-65, at 6 (filed Feb. 22, 2013) ("ACA Feb. 22 Ex Parte").

decide whether such information would require confidential treatment.²⁹ Second, the Commission would need to determine which revenues derived from cable service would be included as part of the regulatory fee calculation, which would not necessarily include all the cable-related services. For instance, as ACA previously noted, the Commission would need to determine how a cable operator would account for revenue derived from Pay-Per-View, Video-on-Demand, Whole-Home DVR Service, or a TV Everywhere service when determining its regulatory fees, which may or may not necessarily be deemed related cable services.³⁰ Furthermore, disaggregating cable service revenue from bundled packages that include broadband Internet and/or phone service, where the price of the bundled package is less than the sum of the price of each service sold separately, would be complex, inevitably imprecise, and require extensive recordkeeping.³¹ The Commission would either need to create a formula for service-by-service revenue disaggregation that cable operators would follow to determine their regulatory fee payment, or allow each cable operator to develop its own way of disaggregating their cable service revenue to account for the portion relevant to their regulatory fee assessment. Both options would be more burdensome than calculating fees based on the number of subscribers, and have unique flaws. The complexity, extensive recordkeeping required, inevitable imprecision, and the costs of this exercise for the Commission and cable operators must be weighed against the fact that there is nothing in the record or the NPRM to suggest that a revenue-based fee structure for cable operators is superior to the existing subscriber-based fee structure.

Assessing regulatory fees on cable operators based on the number of cable television subscribers has worked well for both the Commission and the cable industry, and there is no reason

²⁹ NPRM, ¶ 33 (“Commenters also should discuss how [the Commission] would determine the revenues for companies that do not file a FCC Form 499-A, what information should be provided to the Commission, and whether such information would require confidential treatment.”).

³⁰ ACA Reply Comments at 15.

³¹ The Commission noted the wide range of packages, prices, and services that MVPDs offer and how these packages, prices, and services can differ based on location and other factors. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 26 FCC Rcd 14091, ¶¶ 26, 86-88 (2012).

why it would not continue to be a fair and sustainable assessment method. ACA member companies are familiar with subscriber-based fee assessments; the method is well-established and is by far the most straightforward option for operators. ACA repeatedly has affirmed that assessing regulatory fees based on a cable operator's year-end subscriber count is an easy and efficient mechanism and should be preserved.³² The Commission too has acknowledged on multiple occasions that permitting cable operators to base regulatory fee payments on year-end subscriber counts has eased administrative burdens for the cable television industry.³³ The Commission should take note of its prior findings, acknowledge that the likely costs of switching assessment methods for cable operators would exceed any potential (and as yet unproven) benefits, and decline to shift cable operators from per-subscriber to revenues-based fee assessments.

IV. REALLOCATION OF FTES SHOULD RESULT IN NO, OR MINIMAL, FEE CHANGES FOR REGULATEES OF BUREAUS SUBJECT TO PENDING ADJUSTMENTS IN THEIR FUNDING BASE

ACA supports the NPRM's proposal for limiting increases in FY 2013 regulatory fees resulting from the Commission's use of updated FTE counts and its reallocation of FTEs from the International Bureau to the Media Bureau to determine regulatory fee assessments.³⁴ As the Commission explains, the proposed limit is to prevent "unexpected, substantial [fee] increases which could severely impact the economic wellbeing" of regulatees.³⁵ This is an important consideration, particularly for small and medium-sized cable operators who are ACA members.

The NPRM also suggests that fairness dictates that the Commission adopt "different limitations for certain industry groups in light of other reform proposals and the likely impact on the

³² See, e.g., Reply Comments of the American Cable Association, MD Docket No. 07-81, at 4 (filed May 11, 2007); Comments of the American Cable Association, MD Docket No. 08-64, at 2-3 (filed May 30, 2008).

³³ See, e.g., *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 4208, ¶ 43 (2007); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2008*, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6388, ¶ 72 (2008).

³⁴ NPRM, ¶¶ 15-30.

³⁵ *Id.* at ¶ 30.

regulatory fees of such groups.”³⁶ ACA agrees. Given the uncertainty about whether the costs associated with the work performed by the Media Bureau will continue to be imposed solely on cable operators or will be shared by all MVPDs, ACA urges the Commission to avoid raising, or at least to significantly lower the proposed 7.5% fee increase cap that would apply to cable operators, relative to the fee increase cap applicable to other fee payors who do not face such uncertainty.³⁷

Cable operators would be subject to increases in fees based on the use of updated FTE data in the short term but their fees may also decrease in the long term based on pending reform proposals that would widen the base of fee payors supporting Media Bureau activities. The primary longer-term reform proposal of this type is the Commission’s proposed inclusion of DBS providers in the regulatory fee base to help support Media Bureau FTEs.³⁸ Including DBS providers in the base of contributors to Media Bureau regulatory fees would materially decrease the fees assessed on cable operators. The Commission should avoid immediately increasing fees for cable operators through one proposal (i.e., reallocation of FTEs), with the result of further enlarging the disparate treatment between competitors, and only to later potentially decrease it through another proposal (i.e., DBS providers supporting Media Bureau FTEs). Instead, it would be prudent and fair for the Commission to do what it can to maintain the regulatory fee status quo until decisions are made on implementing the pending reforms affecting the fees paid by cable operators, or at least consider a more modest increase compared to other regulatory fee categories where there are no reform issues.

³⁶ *Id.* at ¶ 31.

³⁷ ACA recognizes that reducing the proposed 7.5% cap on fee increases for one category of fee payors may result in a higher fee cap for other categories of fee payors.

³⁸ See FNPRM, ¶¶ 50-52. The proposal to assess fees for the cable industry based on their revenue may also impact the fees paid by this industry, though the complexity of this proposal makes the impact on fees uncertain. See NPRM, ¶ 33. Relatedly, as discussed in Section II, *supra*, the Commission is considering treating IPTV providers the same as cable operators for regulatory fee purposes as early as FY 2014. See *id.* at ¶ 37.

V. DBS PROVIDERS' REGULATORY FEES SHOULD BE BASED IN PART ON MEDIA BUREAU FTES

ACA appreciates the Commission seeking comment in the FNPRM on the very important issue of whether DBS providers should pay a per-subscriber regulatory fee based on Media Bureau FTEs, calculated on the same basis as cable television operators.³⁹ ACA fully supports this much-needed regulatory reform to ensure regulatory parity between cable services providers and DBS, as discussed at length in ACA's Reply Comments.⁴⁰

ACA previously explained, and the FNPRM acknowledged, the substantial degree to which DBS operators receive numerous direct regulatory benefits from the activities of the Media Bureau governing the provision of MVPD services, yet pay no fees to support these activities.⁴¹ Despite being licensed through the International Bureau, DBS providers can employ Media Bureau processes to file complaints under the Commission's rules governing programming, and are also subject to the Media Bureau's implementation of recent regulatory mandates.⁴² ACA also illustrated how maintaining the difference in fees paid between DBS and cable operators can have market-distorting effects and proposed that the solution be the creation of a new regulatory fee category for MVPD services. The fees for this category would be assessed based on Media Bureau FTEs and, given the changes in law, regulation and services that have occurred in recent years, the reforms would be consistent with Section 9 of the Act. ACA continues to believe that creating a new MVPD

³⁹ FNPRM, ¶ 50.

⁴⁰ ACA Feb. 22 Ex Parte at 2-4.

⁴¹ See FNPRM, ¶ 50; *id.* at ¶ 52 (DBS providers "paid much lower regulatory fees on a per subscriber basis [than cable service providers], and their regulatory fees were based on International Bureau FTEs, not Media Bureau FTEs.").

⁴² FNPRM, ¶ 50 ("DBS providers may file program access complaints and complaints seeking relief under the retransmission consent good faith rules; and they must comply with the Commercial Advertisement Loudness Mitigation Act (CALM Act), the Twenty-First Century Video Accessibility Act (CVAA), and the closed captioning and video description rules") (footnotes omitted).

fee category best responds to the FNPRM's question about whether "DBS providers should ... pay regulatory fees that are comparable to the regulatory fees paid by cable service providers."⁴³

DirecTV attempted to cast doubt on the Commission's authority to adopt these reforms in a subsequent responsive filing; suggested that cable and DBS lack regulatory parity in terms of the relative burdens they place on the Media Bureau; and questioned the fairness of the reforms and how they would be implemented.⁴⁴ DirecTV's self-serving arguments to maintain the current regulatory scheme through which cable subsidizes DBS competitors, which ACA refutes below, should be given little credence by the Commission.

A. The Commission Has Ample Authority to Assess Regulatory Fees on DBS Providers Based on Their Media Bureau Activities.

DirecTV has argued that under Section 9 of the Act, 47 U.S.C. § 159, the Commission is permitted to make amendments to the regulatory fee schedule in response to changes in law and regulation "only if such changes alter the relationship between the regulatory fees paid by the regulated entity, the cost it generates, and the benefits it receives."⁴⁵ According to DirecTV, because ACA failed to make this showing, "the Commission lacks legal authority to amend fee schedule [sic] for geostationary orbit ("GSO") satellites."⁴⁶ As an initial matter, ACA has not suggested that the Commission amend the GSO fee schedule. ACA instead proposes that the Commission create a new, separate fee category to cover the costs attributable to MVPD service providers to ensure that all MVPDs pay their fair share of the costs associated with the regulation of MVPD services.⁴⁷ Moreover, contrary to DirecTV's characterization of its argument, ACA never suggested "that the Commission can amend fee categories based solely on the perceived benefits of regulation to

⁴³ FNPRM, ¶ 52.

⁴⁴ Ex Parte Response of DIRECTV, LLC, MD Docket Nos. 12-201, 08-65 (filed Nov. 9, 2012) ("DirecTV Nov. 9th Ex Parte").

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

⁴⁷ ACA Reply Comments at 7.

particular classes of payees.”⁴⁸ Rather, ACA argues that the Commission should create a new fee category applicable to all providers of MVPD services to ensure that they all pay their fair share of the Media Bureau costs associated with regulating those services.⁴⁹ The benefits accrued to DBS and other MVPDs are directly relevant to the question of which are the proper entities to be included as payors into that new fee category. Currently, cable operators are the only MVPDs responsible for paying fees to support Media Bureau FTEs conducting MVPD regulatory activities. This is unfair and the Commission should revise its fee structure to ensure that regulatory fees related to MVPD matters are apportioned across all MVPDs regulated by Media Bureau FTEs, whether they be cable operators, IPTV providers or DBS providers.

Furthermore, in its efforts to dispute the extent to which the Media Bureau regulates DBS providers, DirecTV downplays the fact that the primary, revenue-generating service that it provides to consumers is an MVPD service regulated by the Media Bureau.⁵⁰ In their retail business, DBS providers rely on the regulations applicable to MVPD and broadcast television services and regularly seek to protect their rights as MVPDs in proceedings before the Media Bureau. This is entirely appropriate, given the MVPD regulatory framework. However, non-cable MVPDs, including DBS providers, do not pay fees to cover any of the work of the Media Bureau in regulating these services. This is inequitable and market-distorting.

DirecTV further interprets Section 9 very narrowly as requiring that the changes in law giving rise to the alteration in the fee category alter costs “materially,” without giving any indication what constitutes a material change.⁵¹ It then argues that there have been no changes in regulations

⁴⁸ DirecTV Nov. 9th Ex Parte at 4.

⁴⁹ ACA Reply Comments at 8.

⁵⁰ See, e.g., DirecTV Nov. 9th Ex Parte at 4 (arguing that there have been no changes to the GSO fee service category warranting fee category changes).

⁵¹ *Id.* at 4.

justifying changes in the regulatory fees applicable to DBS operators or the GSO category.⁵²

DirecTV notes essentially the same regulatory changes that ACA identified that have occurred since the FCC adopted its 2006 Fee Reform order, but draws an entirely different conclusion, arguing that “nothing of consequence has changed to disturb the FCC’s 2006 conclusion” regarding the creation of an MVPD fee category.⁵³

ACA strongly disagrees. The Commission may reform its regulatory fee categories to reflect “additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings of changes in law.”⁵⁴ The series of incremental changes in regulation of MVPD service identified in ACA’s reply comments constitute sufficient change to warrant adding an MVPD fee category. Under DirecTV’s narrow interpretation of Section 9, the Commission could apparently only make a change to the regulatory fee category in response to a single dramatic change in law or regulations. There is no support for such a narrow interpretation of Section 9 and the Commission’s authority to revise its fee categories is not so circumscribed.

B. The Commission Must Ensure Regulatory Fee Parity Between DBS and Cable.

DirecTV argues that there is no merit to the idea that DBS and cable fees should be in parity because there is no regulatory parity between DBS and cable.⁵⁵ It argues that the sheer number of individual cable operators accounts for a huge disparity in the regulatory burden of the industries. As a further indication that there is no regulatory parity, DirecTV also attempts to list regulations and filing requirements placed on cable operators but not on DBS providers.⁵⁶ However, DirecTV concedes,

⁵² *Id.* at 4-9.

⁵³ *Id.* at 5-9.

⁵⁴ 47 U.S.C. § 159(b)(3).

⁵⁵ DirecTV Nov. 9th Ex Parte at 10-16.

⁵⁶ *Id.* There is no merit to the DirecTV’s suggestion that any burdens placed on the Media Burden by DBS providers are so small that they should simply be disregarded. See DirecTV Nov. 9th Ex Parte at 7 (complaining that the regulations identified by ACA are “small potatoes” as they related to DBS providers). Indeed, DBS providers impose a substantial and increasing burden on the Media Bureau staff through involvement in

as it must, that Section 9 of the Act states that fees are to be derived from bureaus' FTE costs, adjusted to take into account factors relating to the benefits derived from the bureaus' activities.⁵⁷ Consequently, there is no support for DirecTV's premise that fees cannot be adjusted to promote equal treatment for competitors providing the same service – in this case MVPD services.

To the extent that there is an argument that cable operators place greater burdens on the Media Bureau than do non-cable MVPDs, there are ways to address this issue through the fee setting process. The FNPRM also acknowledges as much when seeking comment on the idea that a “portion of Media Bureau FTEs be allocated to DBS providers” by noting that there are “regulatory differences between cable operators and DBS operators.”⁵⁸ For example, one solution might be to have cable operators pay into both a cable category to cover Media Bureau FTE activities that only applies to cable operators, as well as an MVPD category that only covers costs associated with MVPD regulatory activities. DBS providers could similarly pay a split fee to cover their satellite-specific regulation by the International Bureau and their activities as an MVPD. The Commission has access to information sufficient to allow the creation of detailed proposals for implementing a fee structure that better achieves the goal of fairness than does the current system. The Commission can and should craft a regulatory fee structure that results in all providers of MVPD services paying their fair share of the Commission's costs associated with regulating these services.

rulemakings, as well as through complaint proceedings involving the OTARD and STELA rules. See *Quarterly Report of Consumer Inquiries and Informal Complaints for Third Quarter of Calendar Year 2012 Released*, FCC News Release (rel. Oct. 25, 2012) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1025/DOC-317012A1.pdf) (“The number of Cable and Satellite Services inquiries increased by more than 9%, from 1,511 to 1,661, due to an increase in inquiries regarding Service, Satellite Television Extension & Localism Act, Over-the-Air Reception Devices, and Programming issues).

⁵⁷ See *id.* at 4 (arguing that benefits received from regulation serve as a secondary consideration that adjusts the cost-based fee); 47 U.S.C. § 159(b)(1)(A).

⁵⁸ FNPRM, ¶¶ 51-52.

C. It Is Appropriate for DBS Providers To Pay Both Fees to Support Both IB and MB Regulatory Activities.

DirecTV notes that it only offers “a single service—video” when arguing that it should only be subject to fees from a single bureau.⁵⁹ This argument fails. DirecTV’s status as an MVPD using a satellite distribution technology imposes costs on both the International Bureau and the Media Bureau. The International Bureau must address the unique technical licensing matters that satellite operations entail—e.g., spectrum, orbit, and spacecraft disposal management, including the international treaty and organization negotiations pertaining to these matters.⁶⁰ The Media Bureau’s DBS post-licensing tasks are entirely different and it is reasonable that they must be paid for separately.

D. An MVPD Regulatory Fee Category Would Fairly Assess Fees on Those Entities Subject to Regulation.

DirecTV’s argument that “a new regulatory fee category made up of ... cable satellite and IPTV... would be perpetually under-inclusive” since it would not include “wireless providers, broadcasters... and Internet-based services” also does not withstand scrutiny.⁶¹ ACA’s proposal for a new MVPD fee category would subject any provider under the Commission’s jurisdiction that meets the FCC’s current definition of an MVPD to the fees.⁶² To the extent that wireless or Internet-based providers or broadcasters fit this definition and are properly regulated by the Commission, they would incur these fees as well.

⁵⁹ DirecTV Nov. 9th Ex Parte at 15.

⁶⁰ See Part 25 of the Commission’s Rules (47 C.F.R. § 25.101, *et seq.*); see also NPRM, ¶¶ 22-23.

⁶¹ DirecTV Nov. 9th Ex Parte at 16.

⁶² See 47 C.F.R. § 76.1000(e) (“The term ‘multichannel video programming distributor’ means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming.”). Consistent with ACA’s position concerning IPTV providers, an MVPD category would also include IPTV MVPDs. The point is that an MVPD’s choice of distribution technology should not affect its participation in the Commission’s regulatory fee program, or the manner in which fees are assessed.

VI. CONCLUSION

Reform of the Commission's regulatory fee program is long overdue. ACA commends the Commission for taking significant steps toward modernizing and rationalizing this program, and urges it to adopt the foregoing recommendations aimed at ensuring greater fairness in fee assessments.

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