

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

In the Matter of)	
)	
PROCEDURES FOR ASSESSMENT AND COLLECTION OF REGULATORY FEES)	MD Docket No. 12-201
)	
ASSESSMENT AND COLLECTION OF REGULATORY FEES FOR FISCAL YEAR 2013)	MD Docket No. 13-140
)	
ASSESSMENT AND COLLECTION OF REGULATORY FEES FOR FISCAL YEAR 2008)	MD Docket No. 08-65
)	

REPLY COMMENTS OF DIRECTV, LLC

DIRECTV, LLC (“DIRECTV”) hereby responds to the latest set of comments filed by the cable industry regarding satellite regulatory fees. Cable has long and unsuccessfully sought to raise the regulatory fees paid by its Direct Broadcast Satellite (“DBS”) rivals. The American Cable Association (“ACA”) now seeks to have DBS operators included in a new, “multichannel video programming distributor” (“MVPD”) regulatory fee category, imposing new fees *in addition* to the geostationary satellite (“GSO”) satellite fees they already pay.¹ The Commission, however, may not lawfully adopt ACA’s latest proposal, and it should not accept ACA’s latest salvo or arguments purportedly based on “fairness.”

To put ACA’s latest request in context, the cable industry has spent much of the last four years travelling the country seeking to increase taxes paid by its satellite rivals. Twenty-

¹ Comments of the American Cable Association, MD Docket No. 13-140 *et al.* at 1 (filed June 19, 2013) (“ACA Comments”); *Procedures for Assessment and Collection of Regulatory Fees*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 13-74, ¶¶ 50-52 (rel. May 23, 2013) (“*Notice*”).

four states proposed such measures at the behest of the cable industry, some on multiple occasions.² Such taxes, the cable industry argues, are necessary to “balance” the franchise fees paid by cable operators in exchange for the right to dig up streets and lay cable in public rights-of-way. In reality, however, this campaign is nothing more than an attempt by an industry with a great deal of state-by-state regulatory clout to raise its rivals’ costs. ACA’s rewarmed version of arguments it and others in the cable industry have made for nearly a decade follows from the same playbook.³

The Commission should reject this proposal for the same reasons it has done so four times previously:

- ***The Commission may not lawfully adopt ACA’s proposal.*** The Commission may only amend the regulatory fee schedule based on changes in law and regulation that, in turn, change the costs of regulating particular industry segments. No such changes have occurred. ACA complains specifically that DBS pays International Bureau regulatory fees despite being partially regulated by the Media Bureau, but this has been true since 1996.
- ***Even if the Commission could adopt ACA’s proposal, no “unfairness” exists that would justify doing so.*** Cable and DBS remain regulated very differently, which more

² In 2009, measures were proposed in Massachusetts, New York, Connecticut, Indiana, Texas, Vermont, Nevada, New Jersey, Michigan, California, and Washington. In 2010, measures were proposed in Connecticut, New Jersey, Indiana, Mississippi, and California. In 2011, measures were proposed in Alabama, California, Texas, Georgia, Indiana, Hawaii, West Virginia, Tennessee, Minnesota, and Connecticut. In 2012, measures were proposed in Delaware, Illinois, Indiana, Maryland, New Jersey, Rhode Island, Utah, and Mississippi.

³ As described in DIRECTV’s initial comments, ACA’s proposal now marks the fifth time in eight years that the Commission has considered a cable industry proposal not to lower its own regulatory fees but to raise the regulatory fees paid by DBS rivals such as DIRECTV.

than justifies different regulatory-fee treatment. ACA does not claim otherwise. It claims instead that it is “inequitable” for DBS to pay regulatory fees to the International Bureau and not the Media Bureau. Yet this is no more “inequitable” than many other features of the regulatory fee system that benefit ACA’s cable members, such as not having to pay regulatory fees on broadband services. At least in the absence of a global accounting of Commission staff-hours that would take into account *all* such issues, the existing system provides something approaching “rough justice” that the cable industry itself has called “the best the Commission can hope to achieve.”

I. THE COMMISSION MAY NOT LAWFULLY ADOPT ACA’S PROPOSAL

DIRECTV and ACA seem to agree⁴ that, under Section 9 of the Communications Act, the Commission may make “permitted amendments” to the fee schedule first set forth by Congress⁵ only in response to changes in law and regulation. It is hard to see how ACA could argue otherwise. The statute provides that permitted amendments arise “as a consequence of Commission rulemaking proceedings or changes in law.”⁶ The one court to have considered

⁴ ACA Comments at 15. ACA does note that, “[a]s an initial matter,” it “has not suggested that the Commission amend the GSO fee schedule,” as DIRECTV earlier claimed, but rather it suggests that the Commission create a new MVPD fee category. *Id.* at 14. DIRECTV presumes this is not meant to suggest that a different legal standard would somehow apply to ACA’s latest formulation. ACA does not explain why it would be less of a departure to create a whole new fee category out of whole cloth than it would be to amend an existing fee category established by Congress.

⁵ 47 U.S.C. § 159(g). The Commission added DBS operators to this category in 1996. *Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, 11 FCC Rcd. 18774, ¶ 15 (1996) (“1996 Reg. Fees Order”) (incorporating without comment proposal from NPRM); *Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd. 16515, ¶ 41 (1996) (“1996 Reg. Fees NPRM”).

⁶ 47 U.S.C. § 159(b)(3).

the issue confirmed what the statutory language plainly says—that the Commission may make permitted amendments “only” “in response to [a] ‘rulemaking proceeding[] or change[] in law.’”⁷

In the face of these statutory directives, ACA is left to argue about the magnitude of changes required for permitted amendments. Because DIRECTV fails to define how “material” such changes must be, argues ACA, DIRECTV inappropriately suggests that only “single dramatic” changes should count.⁸ Yet as DIRECTV stated in its comments, the statute itself defines the sort of changes required for permitted amendments: those that change “the full-time equivalent number of employees performing [specific regulatory activities] . . . adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission’s activities.”⁹ In addition, the Administrative Procedure Act compels the Commission to focus primarily on changes that have occurred since the last time it examined the issue in 2006.¹⁰

Accordingly, the Commission may amend the fee schedule only if new laws and regulations change how much time and effort it takes to regulate a particular entity, “adjusted”

⁷ *COMSAT Corp. v. FCC*, 114 F.3d 223, 225 (D.C. Cir. 1997) (noting that the “Commission may amend the fee schedule in the circumstances articulated by the first sentence *only* where the requirements of the second sentence are met”) (emphasis in original).

⁸ ACA Comments at 15-16.

⁹ 47 U.S.C. § 159(b)(1)(A). More generally, the regulatory fee schedule may only be amended by the Commission under the procedures established in Section 9. *See* 47 U.S.C. § 159(b)(1)(C).

¹⁰ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (requiring an agency to adequately explain a departure from prior policy); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that, while an “agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” it must do so “when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy,” and continuing that, in such cases “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy”).

by the benefit the entity gets out of such regulation. Whether this takes the form of one big change or many little changes is immaterial, so long as the changes go to the manner in which an entity is regulated.

On this score, ACA has no argument at all. ACA’s basic claim is that DIRECTV pays regulatory fees to the International Bureau when its “primary, revenue-generating service that it provides to consumers is an MVPD service regulated by the Media Bureau.”¹¹ Yet this was so from the minute DIRECTV served its first customer in 1994, well before the Commission added DBS to the GSO fee category in 1996.¹² It has remained true under the Satellite Home Viewer Act and throughout passage and implementation of the Satellite Home Viewer Improvement Act, and the Satellite Home Viewer Extension and Reauthorization Act, just as it is now true under the Satellite Television Extension and Localism Act. Neither of the new statutes cited by ACA last fall¹³ changes this—which is perhaps why ACA failed to discuss them this time around.¹⁴

So any disconnect between DBS’s International Bureau fees and Media Bureau regulation has existed for at least seventeen years, arises from a specific choice made by the Commission, and has not changed meaningfully since then. In such circumstances, there are

¹¹ ACA Comments at 15.

¹² Indeed, this was true even though the Commission had just described DBS as a “Mass Media [Bureau] service[]” in the regulatory fee context. *See Implementation of Section 9 of the Communications Act*, 9 FCC Rcd. 6957, ¶ 60 n. 52 (1994) (noting that, while DBS was not on the original Congressional schedule of regulatory fees, its omission was “inadvertent,” and stating the intention to add DBS to the fee schedule the following year).

¹³ Comments of the American Cable Association, MD Docket 12-201, MD Docket No. 08-65 at 5 (filed Oct. 23, 2012) (*citing* Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), Pub. L. 111-260, 124 Stat. 2751, § 202(b) *and* Commercial Advertisement Loudness Mitigation Act (“CALM Act”), Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621)).

¹⁴ *See* ACA Comments at 13 n. 42 (citing *Notice* without discussion).

no “Commission rulemaking proceedings or changes in law” that could justify a permitted amendment.

II. NO UNIQUE “UNFAIRNESS” EXISTS FOR THE COMMISSION TO REMEDY

Unable to muster a convincing statutory argument, ACA is left to argue that the Commission should essentially ignore the statute in order to correct a perceived unfairness concerning regulatory fees. According to ACA, fees must be adjusted “to promote equal treatment for competitors providing the same service—in this case MVPD services.”¹⁵

Yet regulatory fees have never provided “equal treatment” for competitors that are regulated differently.¹⁶ Otherwise, in today’s world of increasing intermodal competition, the very concept of separate service categories would soon collapse upon itself. Last week, for example, the Miami Heat defeated the San Antonio Spurs in what will come to be regarded as a classic Game Six of the NBA Finals.¹⁷ Some viewers watched the game on over-the-air television, others through their cable operator, and still others through a satellite carrier. Others doubtless watched on their smartphones or iPads using Sling and similar technologies. Perhaps next year, viewers will watch the NBA Finals through their Rokus, Xboxes, or through Aereo, or through the broadcaster’s website. All of these services and devices

¹⁵ ACA Comments at 17.

¹⁶ See Joint Reply Comments of DIRECTV, Inc. and DISH Network, L.L.C., MD Docket No. 08-65 (filed Oct. 27, 2008); Joint Reply Comments of DIRECTV, Inc. and EchoStar Satellite L.L.C., MD Docket No. 06-68 (filed Apr. 21, 2006); *1996 Reg. Fees Order*, ¶ 55-56 (rejecting NCTA’s request to lower cable regulatory fees to bring them more in line with wireless cable regulatory fees).

¹⁷ Michael Lee, *NBA Finals: Furious Rally in Closing Seconds, LeBron’s Triple-Double Lift Heat to Game 6 Win*, WASHINGTON POST (June 19, 2013), available at http://www.washingtonpost.com/sports/wizards/nba-finals-furious-rally-in-closing-seconds-lebrons-triple-double-lift-heat-to-game-6-win/2013/06/19/44062b56-d86d-11e2-9df4-895344c13c30_story.html.

compete with one another. Yet they all pay different regulatory fees (or, in some cases, no regulatory fees) because they are all regulated differently (or, in some cases, not at all).¹⁸

This is not “unfair” because regulatory fees, by law, are supposed to reflect how particular entities are regulated. Thus, as DIRECTV pointed out in its initial comments, any claim of unfairness must be one of *regulatory* unfairness—that cable and DBS are regulated similarly but charged different regulatory fees.

With respect to that question, however, ACA now appears to abandon much of the field. It concedes, as it must, that there are far more cable operators than DBS operators, a point highly relevant to regulatory fees.¹⁹ ACA also concedes that cable is subject to a panoply of regulation that does not apply to DBS, another point highly relevant to regulatory fees.²⁰

ACA thus does not argue that the Commission regulates DBS as much as cable. It makes a much narrower argument: that regulatory fees do not reflect whatever time Media Bureau staff *does* spend regulating DBS.²¹ This, ACA argues, is in and of itself “inequitable and market distorting.”²² Again, however, DIRECTV has never paid regulatory fees based on Media Bureau FTEs. Like most Commission licensees, it has paid fees for its infrastructure to the bureau that licenses that infrastructure. Nothing has changed in this regard.

¹⁸ This itself raises a concern with ACA’s proposal to create an “MVPD” category limited to those now classified as MVPDs. ACA Comments at 18. At least some new regulations, including those promulgated under CVAA, apply to MVPDs and non-MVPDs alike. ACA fails to explain why it would not include non-MVPDs in its proposed new category.

¹⁹ ACA Comments at 16.

²⁰ *Id.* at 17.

²¹ ACA Comments at 14-15.

²² *Id.*

In any event, ACA is in no position to level charges of regulatory fee “inequity.” Cable operators pay no regulatory fees at all for the costs of regulating their broadband activities, even though they provide more than half of America’s residential broadband connections.²³ As DIRECTV pointed out, cable operators have presented a number of complex and novel regulatory issues related to broadband for consideration by the Commission and the courts.²⁴ This alone represents a regulatory-fee inequity dwarfing anything arising from DBS’s Media Bureau regulation.

It is also worth noting that ACA’s small-cable members sometimes enjoy the benefit of arguable “inequity” in the regulatory fee system. For example, because cable operators pay fees not based on the regulatory costs they impose but instead based on the number of subscribers they serve, smaller cable operators pay smaller fees. In the related context of DBS, the Commission has previously concluded that “DBS rules do not impose additional regulatory requirements on video service providers that are specifically related to the individual subscriber.”²⁵ There is no reason to believe this same conclusion would not apply to a great deal of cable regulation as well, yet the regulatory fee regime does not reflect this reality.

²³ See *Internet Access Services: Status as of June 30, 2011*, Chart 8 (WCB, rel. June 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314630A1.pdf (noting that cable provided high-speed Internet access service to more than half of the nation’s high-speed Internet access residential and small business subscribers, as of June 30, 2011).

²⁴ See *Preserving the Open Internet*, 25 FCC Rcd. 3582 (2010), on appeal, *Verizon v. FCC*, Case No. 11-1355 (D.C. Cir.) (network management); *Universal Service Contribution Methodology; A National Broadband Plan for our Future*, 27 FCC Rcd. 5357 (2012) (universal service).

²⁵ *1996 Reg. Fees NPRM*, ¶ 41 (emphasis added); see also *1996 Reg. Fees Order*, ¶ 15 (incorporating NPRM proposal without further discussion).

At the moment, this particular metric benefits small cable operators only vis-à-vis their larger brethren, and does not concern DIRECTV. Under ACA's proposal, however, DIRECTV too would presumably pay regulatory fees many times those of small-cable operators who are actually more heavily regulated than are DBS operators. Such a result would add to inequity, not remedy it.

The satellite industry, moreover, is an especially poor target for charges of regulatory-fee "inequity." As DISH Network, EchoStar, and Hughes point out, the Commission today allocates for regulatory fee purposes International Bureau FTEs whose principal function is the processing of satellite applications.²⁶ Applications, of course, are not one of the four enumerated activities—"enforcement activities, policy and rulemaking activities, user information services, and international activities"²⁷—that regulatory fees are meant to recover. Staff-hours spent processing applications by definition are not spent engaging in these four activities. Congress provided a separate mechanism for recovering application-fee costs,²⁸ pursuant to which the Commission charges over \$120,000 to process each space station application.²⁹ That the Commission double-counts these FTEs represents an inequity that works against DIRECTV and other satellite operators.

²⁶ Comments of EchoStar Corporation and Dish Network L.L.C., MD Docket No. 13-140 *et al.* at 7-8 (filed June 19, 2013).

²⁷ 47 U.S.C. § 159(a)(1).

²⁸ 47 U.S.C. § 158.

²⁹ See *Public Notice: FCC Announces Revised FY 2011 Application Fee Rates*, 26 FCC Rcd. 7622 (2011); *International and Satellite Services Fee Filing Guide: Section 8 Fees*, (rel. June 21, 2011) (setting application fees of \$120,005.00 for GSO space station applications and \$120,005.00 for replacement satellites) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308200A1.pdf.

Were ACA proposing to address *all* of these (and other) inequities by engaging in a strict accounting of the Commission’s staff-hours, and were the Commission to thus demonstrate how many staff-hours actually go to regulating each of the many industry sectors across all bureaus, DIRECTV would have less reason to object. This, however, is not what ACA proposes. Rather, it asks the Commission to flout the requirements of Section 9 in order to remedy a perceived “inequity” that it believes benefits its rivals, while ignoring those that benefit its members, harm its rivals, or have effects in other parts of the Commission. This, DIRECTV submits, the Commission cannot and should not do.

Last fall, the cable industry observed that “rough justice” is perhaps “the best the Commission can hope to achieve” with its regulatory fee regime.³⁰ For all of its warts, “rough justice” is exactly what the *status quo* delivers, at least with respect to fees paid by DBS operators. Unless and until there is a full and detailed accounting of staff-hours, the Commission should leave DBS fees where they are.

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For the reasons set forth above, the Commission should not adopt ACA’s proposal to increase the regulatory fees paid by its satellite rivals.

³⁰ Reply Comments of the National Cable and Telecommunications Association, MD Docket No. 12-201, MD Docket No. 08-65 at 6 (filed Oct. 23, 2012).

Respectfully submitted,

William M. Wiltshire
Michael Nilsson
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, LLC

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/s/

Susan Eid
Executive Vice President,
Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street, NW, Suite 600
Washington, DC 20004
(202) 383-6300