



Myra Creeks
Manager
Regulatory Relations

AT&T Services Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036

T: 202.457.3009
F: 202.457.3070

July 29, 2013

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

RE: 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); and Assessment and Collection of Regulatory Fees for Fiscal Year 2008 (MD Docket No. 08-65)

Dear Ms. Dortch:

In its recently released *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (Notice)*, the Commission advised that it is considering whether to assess regulatory fees on Internet Protocol TV (IPTV) and, if so, whether to assess them “in the same manner as cable services, which is on a per subscriber basis.”¹ The Commission sought comments on whether the failure to assess these fees on IPTV would “place cable providers at a competitive disadvantage.”² We file this letter to amplify the comments we have already made in this proceeding and to clarify our concerns about the any such proposed fees.

In our comments, we made three essential points on this topic. *First*, as a general statement, we noted that, in addition to any statutory obligations and limitations imposed on the Commission, the result of the Commission’s review of its regulatory fee assessment regime should meet the stated goals of “fairness, administrability, and sustainability”—with fairness being most important.³ *Second*, with regard to the proposed regulatory fee for IPTV, we reminded the Commission that AT&T’s U-verse TV service is an IP-based *MVPD service*, and not a “cable service.”⁴ With respect to this second point, we referred the Commission to AT&T’s prior filings on this topic.⁵ And *third*, we argued that, were the Commission interested in imposing a fee on IPTV providers, it should either establish a single “MVPD” fee category that would encompass all MVPDs (including cable operators) or establish a separate MVPD fee category for non-cable-service MVPDs, in addition to the existing category for cable service.⁶

¹ *Procedures for Assessment and Collection of Regulatory Fees; etc., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, MD Docket Nos. 12-201, 13-58, and 08-65, FCC 13-74 para. 37 (May 23, 2013).

² *Id.*

³ Comments of AT&T at 1 (filed June 19, 2013).

⁴ *Id.* at 5. See 47 U.S.C. §522 (6).

⁵ *Id.*, n.10 (“See for example Letter from James C. Smith, Senior Vice President, SBC Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 04-36 (Sept. 14, 2005)”).

⁶ AT&T Comments at 5.

On the topic of *fairness*, our primary concern was to encourage the Commission to conduct regular and frequent FTE data updates, as well as to assign both direct and indirect FTEs in a fair manner. Before the recent 2012 FTE update, the Commission was relying on data from as far back as 1998. Given the vibrant and dynamic market that the Commission regulates, we saw the use of old FTE data as profoundly unfair. That said, however, everyone, including the Commission, recognizes that the congressional regulatory-fee regime is not designed to assess fees on an entirely fair basis.⁷ It is what it is, and the Commission has to be as fair as it can be within the strictures of that statutory regime, which places limits on the Commission's ability to amend the Schedule to reflect "the benefits provided to the payor of the fee by the Commission's activities."⁸

In the statute, Congress permits the Commission to make amendments to "the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A) [for the law]."⁹ A determination to add or to reclassify a service in the Schedule, however, must reflect "additions, deletions, or changes in the nature of its [meaning, the Commission's] services as a consequence of Commission rulemaking proceedings or changes in the law."¹⁰ Yet, in the *Notice*, the Commission proposes to amend the Schedule without citing to any determination that there have been any changes in the nature of its services. Instead, the Commission merely inquires whether "assessing regulatory fees on cable services but not on IPTV . . . may place cable providers at a competitive disadvantage," an inquiry which is strictly speaking statutorily irrelevant.¹¹

Along these lines, we note that, during the span of these proceedings, cable operators (primarily through the American Cable Association or ACA), on the one hand, and direct broadcast satellite (DBS) operators,¹² on the other, have been squabbling over whether DBS operators should be assessed regulatory fees that are reasonably related to the benefits provided to DBS operators by the Media Bureau. The ACA has pointed out that DBS operators are MVPDs that "us[e] a satellite distribution technology [that] imposes costs on both the International Bureau and the Media Bureau," with the International Bureau addressing "unique technical licensing matters" related to satellite operations while the Media Bureau addresses "post-licensing tasks" applicable to MVPDs generally.¹³ What's more, as part of its campaign to include IPTV and DBS operators in the Media Bureau-related regulatory fees, the ACA has pointed out that "Non-Cable MVPDs"

⁷ *Notice* para. 8 ("Thus the total benefit received by any particular regulatee from Commission actions will not necessarily correlate directly with the quantity of Commission resources used for that regulatee's benefit. For example, regulatory fees also cover the costs the Commission incurs in regulating entities that are statutorily exempt from paying regulatory fees, entities whose regulatory fees are waived, and entities that provide nonregulated services, as well other Commission activities, such as consumer-related services.").

⁸ 47 U.S.C. § 159(b)(1)(A).

⁹ 47 U.S.C. § 159(b)(3).

¹⁰ *Id.*

¹¹ *Notice* para. 37.

¹² DBS operators include DIRECTV, LLC (DIRECTV) ; EchoStar Satellite Operating Company and Hughes Network Systems, LLC; and, DISH Network L.L.C. (collectively "EchoStar").

¹³ Comments of American Cable Association, MD Docket Nos. 13-140, 12-201, and 08-65 (filed June 19, 2013) (ACA Comments).

account for roughly 38% of the “Total MVPD Subscribers.”¹⁴ Yet, more telling is the fact that DIRECTV and EchoStar account for slightly more than 34% of the Total MVPD Subscribers, while AT&T’s U-verse TV service accounts for only 4.34% of that total subscriber base, which includes cable operators at 61.64%.¹⁵

Using the same figures cited by the ACA, the distribution looks as follows:

MVPD CATEGORY	TOTAL SUBSCRIBERS	% OF TOTAL MVPD SUBSCRIBERS
Cable Operators	61,642,001	61.64%
DBS Operators	34,023,000	34.02%
AT&T U-verse IPTV	4,344,000	4.34%
TOTAL	100,009,001	100%

Given these figures, there can be no rational basis for the Commission to assess regulatory fees on IPTV, which accounts for merely 4.34% of the total number of MVPD subscribers, while ignoring DBS operators that account for more than 34% of those subscribers.

Assuming for the sake of argument that the Commission could even make a determination that there have been changes in the nature of the Commission’s services as described above, it is impossible to see how any such alleged changes wouldn’t apply equally to all MVPD providers. As noted above, AT&T’s U-verse TV service is not a cable service, and the nature of the services the Commission purportedly provides to AT&T’s U-verse TV service are no different than those provided to other non-cable provider MVPDs. In order to create a regulatory fee for MVPD providers—either under a general designation that includes cable providers and other MVPD providers or under a separate MVPD designation that is in addition to the cable-provider category—the Commission would need to make the necessary statutory determination. Once that determination is made, then, in our opinion, the Commission “should harmonize its fee collection scheme across all MVPDs”¹⁶—cable-service and non-cable-service MVPDs alike. Harmonizing the fee among all MVPD providers with respect to the services provided by the Commission would help the Commission meet its stated goal of fairness.

We assert that the Commission still has work to do before assessing any new regulatory fee on IPTV and other MVPD providers. The Commission must show that, due to Commission rulemaking or other changes in the law, the nature of the services that the Commission provides to the new potential fee payors has changed, allowing it the statutory authority to amend the Schedule of Regulatory Fees. Then the Commission must adopt criteria for assessing the new fee across on the board in a fair manner. We note that, while collecting regulatory fees on a per-subscriber basis may one such approach, where an MVPD provides multiple services, subscriber fees in an MVPD fee category must exclude subscription to other services that an MVPD may provide that do not constitute an MVPD service.

¹⁴ Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Barbara Esbin, Cinnamon Mueller LLC, MD Docket Nos. 12-201 and 08-65 at page 3 (filed Feb. 22, 2013) (ACA February Ex Parte).

¹⁵ ACA February Ex Parte, n.8.

¹⁶ AT&T Comments at 5.

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Sincerely,

/s/Myra Creeks
Manager-Regulatory Relations

CC: (via e-mail)
Acting Chairwoman Clyburn
Commissioner Rosenworcel
Commissioner Pai
Sean Lev, Office of the General Counsel
David Robbins, Office of the Managing Director
Roland Helvajian, Office of Managing Director
Thomas Buckley, Office of Managing Director
Megan Hartnett, Office of Managing Director
Mika Savir, Enforcement Bureau