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

In the Matter of	)	
	)	
Procedures for Assessment and Collection of Regulatory Fees for Fiscal Year 2014	)	MD Docket No. 14-92
	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2013	)	MD Docket No. 13-140
	)	
	)	
Assessment and Collection of Regulatory Fees	)	MD Docket No. 12-201
	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION AND THE AMERICAN CABLE ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") and the American Cable Association ("ACA") submit these reply comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("NPRM") on assessment and collection of regulatory fees.[1/]

INTRODUCTION AND SUMMARY

As explained by NCTA, ACA, and other commenters in initial comments in this proceeding, basic principles of fairness and technological neutrality require the Commission to adopt the proposal made in the NPRM to assess direct broadcast satellite ("DBS") service providers regulatory fees as part of a multichannel video programming distributor ("MVPD") fee category that also includes cable operators and IPTV services.[2/] "Like cable operators, IPTV

[1/] *Assessment and Collection of Regulatory Fees for Fiscal Year 2014*, Notice of Proposed Rulemaking, Second Further Notice of Proposed Rulemaking, and Order, FCC 14-88, ¶¶ 41-46 (June 13, 2014) ("*2014 Regulatory Fee NPRM*").

[2/] NCTA Comments at 1-4. *See also* ACA Comments at 2-9; ITTA Comments at 11-12.

providers, and other MVPDs, DBS providers receive numerous regulatory benefits from the activities of the Media Bureau," and should share in regulatory fee assessments that support the Bureau.[3/]

In its last regulatory fee order, the Commission took a key step in promoting regulatory parity among providers of multichannel video services when it required IPTV service providers to begin this year making regulatory fee payments to support the Media Bureau, as cable operators have been doing for decades.[4/] The Commission should now take the logical – and long overdue – next step toward providing regulatory parity by also including DBS providers among services assessed regulatory fees in an MVPD fee category that supports the regulatory activities of the Media Bureau.

Unable to refute the fact that DBS providers are, by definition, MVPDs and are regulated as MVPDs by the Media Bureau the same as cable operators and providers of IPTV services, DIRECTV and DISH Network – the nation's second and third largest MVPDs[5/] – rely on legalistic arguments to try to avoid sharing in financial support of the Media Bureau's operations.[6/] They take an unnecessarily narrow interpretation of the Commission's fee setting powers under the Communications Act and suggest that the Commission is therefore helpless to alter a DBS fee structure first set in the 1990s. They suggest that the Administrative Procedures Act ("APA") prevents the Commission from making a decision about DBS fees that differs from one made eight years ago in different circumstances.[7/] And they suggest that the Commission

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[3/] ACA Comments at 3-4. *See also* ITTA Comments at 11.

[4/] *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, Report and Order, 28 FCC Rcd 12351, ¶ 32 (2013) ("*2013 Fee Order*").

[5/] *See* NCTA, Top 10 Video Subscription Services, *at* https://www.ncta.com/industry-data.

[6/] DIRECTV and DISH Comments at 3-18.

[7/] DIRECTV and DISH Comments at 11 (*citing* 5 U.S.C. § 706(2)(A)).

cannot assess the same fee on DBS that it assesses on cable and IPTV unless each is regulated exactly the same and to the exact same extent, despite the longstanding precedent of wide variations in regulatory attention from year-to-year or service-to-service among entities in every FCC regulatory fee category. As explained in more detail below, each of these arguments is unpersuasive and based on faulty premises. There are, in fact, no legal impediments to the Commission adopting a fair and equitable regulatory fee system that applies to all MVPDs, including DBS providers, and the Commission should take action to do so without further delay.

I. SECTION 9(B)(3) OF THE COMMUNICATIONS ACT DOES NOT PROHIBIT THE COMMISSION FROM ADOPTING A REVISED FEE STRUCTURE FOR DBS

DIRECTV and DISH (the "DBS Operators") argue that the Commission lacks legal authority to change the fee structure to assess DBS providers the same regulatory fee as cable and IPTV because Section 9(b)(3) of the Communications Act allows a change in the regulatory fee structure to "add, delete, or reclassify services" only "as a consequence of Commission rulemaking proceedings or changes in law,"[8/] and that Commission rulemakings and changes in law since the DBS regulatory fee schedule was established in 1996 are not sufficient to permit a change in the fee schedule under the terms of the statute.[9/]

Evidence presented in the DBS Operators' own comments refutes this contention. In appendices to their comments, the DBS Operators identify 127 separate orders from rulemakings and other proceedings involving the Media Bureau and DBS regulation, all issued in just 10 of the 18 years since the DBS fee schedule was established in 1996.[10/] This clearly establishes

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[8/] DIRECTV and DISH Comments at 3-4 (*quoting* 47 U.S.C. § 159(b)(3)).

[9/] *Id*. at 11.

[10/] *Id*. at 10-11; Appendix B; Appendix C.

significant DBS-related rulemaking by the Media Bureau since the current DBS fee structure was established.

Similarly, there have been many changes in the laws affecting DBS providers. The DBS Operators' comments also highlight changes in law since 1996 affecting DBS regulation, noting work by the Media Bureau to implement the Satellite Home Viewer Act ("SHVA") of 1998, the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") of 2004, and the Satellite Television Extension and Localism Act ("STELA") of 2010.[11/] They also point out the Commercial Advertisement Loudness Mitigation Act ("CALM Act) and the Twenty-First Century Video Accessibility Act ("CVAA").[12/]

The DBS Operators try to minimize the importance of these regulatory and statutory changes in the regulation of DBS service since 1996 by asserting that they are not sufficient to "change the 'nature' of DBS regulation necessary to justify a permitted amendment" of DBS regulatory fee assessment. Setting aside the fact that this is a questionable assertion given the absolute number of regulatory and statutory changes involved, there is no requirement in Section 9(b)(3) that the very "nature" of DBS regulation need be altered before the regulatory fee structure can be changed. The statute merely requires that the fee change be "a consequence of Commission rulemaking proceedings or changes in law."[13/] There have been sufficient rulemaking proceedings and changes in law demonstrating increased Media Bureau regulatory attention on DBS providers to support a change in the DBS fee structure as a consequence.[14/]

[11/] *Id.* at 9.

[12/] DIRECTV and DISH Comments at 7-8.

[13/] 47 U.S.C. § 159(b)(3).

[14/] *See* ACA Comments in MD Docket No. 13-140, at 15-16 (filed June 19, 2013).

The DBS Operators suggest that many of the rulemaking proceedings and law changes may be too old to serve as the basis for a change in the DBS fee structure,[15/] but there is no "recency" requirement in Section 9(b)(3). That the Commission may have delayed making regulatory fee changes to take into account "rulemaking proceedings or changes in law," sometimes for many years, does not prevent it from finally doing so now. Moreover, many of the regulatory changes, such as regulations being implemented pursuant to the CVAA, are quite recent.

II. ADOPTING A REVISED FEE STRUCTURE FOR DBS WOULD COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT

The DBS Operators claim that because the APA requires the Commission to provide a reasoned explanation for any change in a previously adopted policy, the Commission is unable to alter its 2006 decision not to change the DBS fee structure because "the Commission faces a high burden to explain what new laws and regulations have occurred in the last eight years that might change the 'nature' of DBS regulation."[16/] This statement misunderstands both the nature of the APA requirement and the nature of the Commission's 2006 decision.

First, there is no requirement that "the 'nature' of DBS regulation" have changed since 2006 for the Commission to adopt a different decision in 2014. The Commission needs only to provide a reasoned explanation for its change in policy.[17/] This would not be difficult. The Commission did not hold in the 2006 regulatory fee order that there had been a lack of rulemaking proceedings or changes in law that would warrant a change in DBS fee structure. Rather, the Commission merely said that it found unpersuasive NCTA's "arguments that

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[15/] *See, e.g.*, DIRECTV and DISH Comments at 6-7 (complaining that retransmission consent regulation "was first applied to DBS in 1999").

[16/] DIRECTV and DISH Comments at11-12.

[17/] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-16 (2009).

modifications to the section 9 regulatory fee structure are warranted *at this time*" because NCTA had failed to show that assessing DBS a fee on a per-subscriber basis would "better satisf[y]" the "requirements of section 9."[18/] While acknowledging that the current fee structure had "ensured that regulatory fees are reasonably related to the benefits provided by the Commission's activities," the Commission also gave as a reason to reject the DBS fee revision proposal the fact that there was not sufficient time to adopt the change and still comply with the 90-day congressional notification requirement before the fee collection deadline for that year. Thus, the Commission decided to "retain the existing section 9 regulatory fee classification and methodology for DBS *at this time*,"[19/] clearly suggesting that it might consider changes in the future.

Since 2006, there has been a significant amount of Media Bureau regulatory activity related to DBS – the DBS Operators' comment identifies 60 such proceedings between 2008 and 2013 alone[20/] – and multiple new laws affecting DBS, such as STELA, the CALM Act, and CVAA. This leaves ample room for the Commission to revisit its 2006 determination and hold that the time is now right for a regulatory change.[21/]

[18/] *Assessment and Collection of Regulatory Fees for Fiscal Year 2006*, Report and Order, 21 FCC Rcd 8092, ¶ 16 (2006) (emphasis added).

[19/] *Id.* (emphasis added).

[20/] DIRECTV and DISH Comments at Appendix C.

[21/] The DBS Operators also suggest the Commission would have significant difficulty in providing a reasoned explanation for not applying a rate cap to any increase in DBS fees, similar to the 7.5% cap adopted in the 2013 fee order. As explained in Part IV, *infra*, however, differences between the circumstances that gave rise to the 7.5% cap and an increase in DBS fees would allow the Commission to reasonably explain any policy change that may be identified.

III. DBS MVPD REGULATION IS SUFFICIENTLY SIMILAR TO REGULATION OF CABLE AND IPTV TO WARRANT PLACEMENT INTO A SINGLE REGULATORY FEE CATEGORY

The DBS Operators assert that a regulatory parity argument for DBS participation in supporting the operation of the Media Bureau cannot be convincing as long as there is any difference in the level of Media Bureau regulation of cable operators and DBS services.[22/] Leaving aside the speciousness of such an all-or-nothing proposition – essentially arguing that if DBS is not regulated in precisely the same way as cable, it should pay nothing for the level of Media Bureau regulation it does benefit from – the argument ignores the long history of Commission determinations of regulatory fee classifications holding that parity does not require such identical treatment.

The FCC's regulatory fee categories have always included broadly similar, but not necessarily identical, services. As NCTA noted in its initial comments, when the Commission last year included IPTV service providers in the same category as cable operators it "agree[d] that the services are not identical," but said it was "not persuaded that the relatively small difference from a regulatory perspective . . . would justify a different regulatory fee methodology and rate."[23/]

When VoIP service providers were first required to pay regulatory fees and placed in the same fee category as telecommunications service providers, the Commission said it did so while "recogniz[ing] that the costs and benefits associated with our regulation of interconnected VoIP providers are not identical as those associated with regulating interstate telecommunications

[22/] DIRECTV and DISH Comments at 13-17.

[23/] *2013 Fee Order*, note 81.

service."[24/] The Commission explained that "Section 9 does not require the Commission to engage in a company-by-company assessment of relative regulatory costs. In any given year, companies grouped in the [telecommunications] category, or other regulatory fee categories, might be the subject of more regulation than others, e.g., merger proceedings. As a result, our responsibility here is to identify the category of regulatory fee payees with which interconnected VoIP providers most closely relate."[25/]

The DBS Operators complain that "most cable operators remain dominant incumbents" and thus are "subject to a variety of policies and rules that do not apply to DBS."[26/] In fact, cable operators are not "dominant incumbents" in any sense, and in any event, the Commission has long recognized that in establishing broad regulatory fee categories, some entities will be regulated more than others and all in the same category will nonetheless pay the same regulatory fees. The telecommunications regulatory classification, for example, includes all of incumbent local exchange companies ("ILECs"), which are much more heavily regulated than the also-included competitive local exchange carriers ("CLECs"), as well as very differently regulated interexchange carriers ("IXCs") and VoIP service providers – yet all share the same regulatory category and pay regulatory fees at the same rate. Telecommunications resellers, too, are much more lightly regulated than facilities-based telecommunications providers – particularly ILECs – but pay regulatory fees at the same rate.

The DBS Operators' other concerns are equally unpersuasive. Assertions that cable operators are leading broadband service providers and participate in Universal Service Fund programs are essentially irrelevant to the question of MVPD regulatory fees because broadband

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[24/] *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15712, ¶ 19 (2007) ("*2007 Fee Order*").

[25/] *Id.*

[26/] DIRECTV and DISH Comments at 14.

services are, for the most part, unregulated by the Commission and regulation of the Universal Service Fund is the responsibility of the Wireline Competition Bureau, not the Media Bureau which would be supported in part by DBS fees. The concern that DBS Operators would be only two providers among many MVPDs regulated by the Media Bureau is equally specious, given their position as some of the largest MVPDs in the country.

IV. ADOPTING A REVISED FEE STRUCTURE FOR DBS WOULD NOT CREATE "RATE SHOCK" FOR DBS OPERATORS

The DBS Operators complain that the proposed requirement for DBS to pay per-subscriber fees in an MVPD category equal to those paid by cable and IPTV would result in an increase of 1100 percent, and that this would constitute "rate shock" of the kind that the Commission "has consistently avoided in the past."[27/] This is flatly untrue.

The DBS Operators point to the 7.5 percent rate increase cap the Commission adopted when it adjusted staff FTE allocations among fee categories in its 2013 order, but that comparison is inapt. In that case, the Commission adopted a cap for fee increases that were to be immediately implemented, explaining that a "flash cut" to the new fees would result in "significant and unexpected fee increases" for some categories of fee payers.[28/] Here, DBS Operators face no such "flash cut" to higher fees. Because of the statutory requirement that the change in the fee structure be reported to Congress at least 90 days prior to its implementation,[29/] any adopted change in the DBS regulatory fee structure cannot be implemented in time to be applied to 2014 fee payments. Thus, any new requirements adopted pursuant to the current

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[27/] DIRECTV and DISH Comments at 17.

[28/] *2013 Fee Order* ¶ 25. *See also id.* ¶ 21 (saying the cap was needed "to avoid sudden and large changes in the amount of fees paid by various classes of regulates).

[29/] 47 U.S.C. § 159(b)(4).

NPRM would likely be implemented with 2015 fee payments in September 2015, more than a year away.[30/]

Given the likely delay, the change would certainly not be a "flash cut" or constitute an "unexpected fee increase" warranting the need for a fee rate increase cap. Notably, there were no complaints of "rate shock" from IPTV providers at the time, and no fee rate increase cap was implemented, when the Commission decided in its 2013 order to include IPTV in the same fee category as cable in 2014, even though it resulted in millions of dollars in new fees for IPTV providers.[31/] Similarly, no concerns were expressed about "rate shock" and no fee rate increase cap was implemented when VoIP service providers were ordered to pay regulatory fees in an August 2007 order and were first required to pay the fee over a year later in September 2008.[32/]

The delay in implementation also disposes of the DBS Operators' suggestion that the Commission may have difficulty providing a reasoned explanation of a policy change from a 7.5 percent rate increase cap in 2013 to applying no cap to the increase for DBS providers in 2014.[33/] In fact, the explanation would be clear and simple: while in 2013, the Commission was seeking to avoid immediately-implemented and unexpected increases for fee payers, no such result would attach to a finding in 2014 that DBS is subject to regulatory fees. Nothing further is required.

[30/] When the Commission decided in its 2013 order to include IPTV in the same fee category as cable, the 90-day congressional notice requirement delayed implementation of the fee for IPTV providers until 2014. *2013 Fee Order* ¶ 33.

[31/] *2013 Fee Order* ¶ 33.

[32/] *2007 Fee Order* ¶ 20.

[33/] DIRECTV and DISH Comments at 12-13.

CONCLUSION

For the foregoing reasons, the Commission should discount erroneous arguments that it lacks authority to adopt a DBS fee change and that a change would create an unfair "rate shock," and should proceed to include DBS Operators with cable operators and IPTV services in an MVPD regulatory fee category that supports the operation of the Media Bureau through assessments based on each provider's number of subscribers.

Respectfully submitted,

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