The Commission Should Not Amend the GSO Fee Category To Treat DBS Operators Like Cable Operators

- The Commission lacks legal authority to engage in such a "permitted amendment" under the Communications Act and cannot justify such action under the Administrative Procedure Act.

    - Section 9 of the Communications Act (attached hereto in full) created a schedule of regulatory fees "to recover the costs" of the Commission's regulatory activities based primarily on which bureau licensed a particular category of payor. 47 U.S.C. § 159(a)(1).

    - That provision also specifies that the Commission may engage in "permitted amendments" of this schedule *only* if a change of law or a Commission rulemaking proceeding changes the "nature" of Commission services for which costs must be recovered. More specifically:

        - Section 159(b)(3) permits amendments to the regulatory fee schedule adopted by Congress where the "Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A) [described above]." 47 U.S.C. § 159(b)(3).

        - The next sentence of § 159(b)(3), however, states that, "[i]n making such amendments, the Commission shall add, delete, or reclassify services in the Schedule to reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law." *Id.*

        - In *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997), attached hereto in its entirety, the DC Circuit held:

            - "The second sentence [of section 159(b)(3)] limits the authority granted to the Commission under the first sentence. 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." *Id.* at 227 (emphasis in original).

            - Thus, where a permitted amendment "was not imposed in response to any such 'rulemaking proceeding[ ] or change[ ] in law,'" the Commission "had no lawful basis" for the amendment, as it "was neither authorized nor justified by § 159(b)(3)." *Id.* at 225.

    - Given the congressionally established purpose of cost recovery, this rule elaborated in *COMSAT* makes perfect sense. Unless the regulatory services provided by the Commission change fundamentally, the costs of providing

those services—required by § 9(b)(a)(A) to be measured "by determining the full-time equivalent number of employees performing the [regulatory] activities"—should not change sufficiently to justify amendment of the schedule, which Congress clearly sought to discourage by imposing strict conditions.

- There have been no changes to the "nature" of DBS regulation sufficient to justify amending the fee schedule.
    - Most of the regulations discussed in the *Notice* (and by cable) have existed essentially in their current form for years.
    - A relative handful of new laws—TCPA, STELA, and the CALM Act—have appeared recently. None, however, changes DBS regulation in any meaningful way, much less the very "nature" of DBS regulation.
    - Nor is it even true that DBS regulation has shifted to the Media Bureau over the years. The number of Media Bureau orders has remained roughly the same over time.
- Even if the Act permitted the Commission to raise DBS regulatory fees to the levels proposed in the *Notice*, the APA would prohibit such a change.
    - The Commission rejected amending the classification of DBS—this exact proposal—in 2006, explicitly finding that the current arrangement properly calibrates DBS regulation with DBS regulatory fees.
    - The Commission stated just last year that fee increases more than 7.5 percent would be unreasonable.

- There is no regulatory parity between cable and DBS.
    - If a "parity" argument is to have any weight, it must rely on the premise that cable and DBS are regulated equally and therefore should pay the same regulatory fees. That is not the case here.
    - Cable is the dominant (and growing) provider of broadband services and is thus subject to a panoply of regulation that does not apply to DBS.
    - In addition, cable remains the dominant provider of video and is thus subject to competition-based regulation that has never applied to DBS.
    - There are only two DBS operators nationwide but thousands of cable operators—*each* of which is subject to pervasive regulation often not

applicable to DBS. *Each* cable operator must keep things like signal leakage, aeronautical notifications, and availability-of-signals files. Just one of these reports—signal leakage reports required under 47 C.F.R. § 76.611—generated more than 200,000 pages last year.

- Implementing the proposal would be problematic.
    - Among other concerns, the Commission cannot create an "MVPD" category without determining which entities fit in that category.