Before the
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Statutory Cable, Satellite, and DART	)	Docket No. 2005-6
License Reporting Practices	)	

REPLY COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

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TABLE OF CONTENTS

INTRODUCTION & SUMMARY....1

I. THE OFFICE SHOULD ADOPT GAAP AS THE GOVERNING STANDARD FOR REPORTING GROSS RECEIPTS....2

II. THE OFFICE SHOULD NOT ADOPT COPYRIGHT OWNERS' PROPOSALS TO BROADLY INCLUDE FRANCHISE FEES AND EQUIPMENT FEES IN REPORTABLE GROSS RECEIPTS....6

A. Franchise Fees Should Not be Included in Gross Receipts....7

B. The Office Should Reject Copyright Owners' Approach to Equipment Fees....8

III. THE OFFICE SHOULD REDUCE, NOT EXPAND, THE SPACE E REPORTING OBLIGATIONS....11

A. The Office Should Eliminate, Not Add, Categories of Service for Reporting in Space E....11

B. The Office Should Not Adopt Copyright Owners' Proposal to Require Monthly Reporting....14

IV. REFERENCES TO GRADE B CONTOURS SHOULD NOT BE ELIMINATED....15

CONCLUSION....16

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NCTA – The Internet & Television Association ("NCTA") hereby submits its Reply Comments to the Copyright Office ("Office") in response to the above-captioned Notice of Proposed Rulemaking ("NPRM").[1/]

INTRODUCTION & SUMMARY

As NCTA indicated in its initial Comments, the cable industry and the participating copyright owners ("Copyright Owners") share a common position on several of the issues raised in the NPRM.[2/] Significantly, NCTA and the Copyright Owners agree that it would be helpful for the Office to clarify how operators should calculate and report their Section 111 "gross receipts" with respect to bundled offerings of video, voice, and Internet services. As set forth in their Comments, the "Copyright Owners agree that revenues from the sale of Internet and telephony services should not be included in Gross Receipts."[3/] However, the Copyright Owners stop short of identifying a reporting mechanism to accomplish that objective in cases involving

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1/ *Statutory Cable, Satellite, and DART License Reporting Practices*, 82 Fed. Reg. 56926 (Dec. 1, 2017) ("*NPRM*").

2/ For example, NCTA and the Copyright Owners agree that the Office should not adopt proposed revisions addressing the definitions of a "cable system" and "community," headend information, or the specific listing of tiers in Space E as proposed by the Office. NCTA and the Copyright Owners also agree with the Office's proposal to require the addition of county information.

3/ Copyright Owners Comments at 8.

bundled services. NCTA's Comments, by contrast, advance Generally Accepted Accounting Principles ("GAAP") as the appropriate governing standard, consistent with reliance on GAAP reporting under other statutory copyright licenses. For the reasons set forth in its Comments, NCTA submits that GAAP is uniquely suited to ensure that Section 111 gross receipts are properly calculated in a marketplace replete with multiple-element service bundles.

NCTA disagrees with the Copyright Owners to the extent they seek a "more granular breakdown" in Statement of Account ("SOA") reporting. Additional detail would be burdensome, unnecessary, and run directly counter to the government's efforts to streamline regulatory paperwork. NCTA also opposes the Copyright Owners' efforts to use this proceeding to expand gross receipts to include franchise fees and equipment fees.[4/]

DISCUSSION

I. THE OFFICE SHOULD ADOPT GAAP AS THE GOVERNING STANDARD FOR REPORTING GROSS RECEIPTS

The NPRM attempts to clarify how cable operators should calculate gross receipts from subscribers who purchase a multiple-element bundle of video, voice, and/or Internet services for a price that is less than the aggregate cost of those services purchased individually. In their initial Comments, both NCTA and the Copyright Owners agree that clarification of this issue is worthwhile – although neither NCTA nor the Copyright Owners endorse the specific approach proposed by the Office.

As NCTA explained in its Comments, the final clause of the Office's proposed revision to the definition of "gross receipts" in its rules runs directly contrary to the underlying statute and

[4/] NCTA also disagrees with the Copyright Owners that references to the Grade B contour should be eliminated from the rules and forms implementing the cable compulsory license.

the Office's stated objective in this proceeding.[5/] Rather than recognize the significance of bundled discounts and reasonably allocate such discounts among multiple-element bundled service components, the revised definition would effectively allocate all discounts to non-video services. It would thereby erroneously attribute to the gross receipts for basic video service revenue received from the sale of non-video services, such as voice and Internet.[6/] This would subvert the statute itself and result in copyright royalties being paid on non-video revenues.

The Office's proposal conflicts with Congress's directive that cable operators exclude revenues from services other than the basic video service as part of their Section 111 gross receipts,[7/] as acknowledged by the Office,[8/] NCTA,[9/] and the Copyright Owners.[10/] Ensuring a proper accounting of gross receipts so that cable operators can continue to offer multiple-element packages of services in today's highly competitive communications marketplace benefits consumers as well as copyright owners. As NCTA explained in its Comments, consumers benefit from the favorable pricing and additional choices that bundled services provide, and

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5/ That clause reads: "instead, when cable services are sold as part of a bundle of other services, gross receipts shall include fees in the amount that would have been collected if such subscribers received cable service as an unbundled stand-alone product." *NPRM*, 82 Fed. Reg. at 56937.

6/ NCTA Comments at 12.

7/ *See, e.g.*, H.R. Rep. 94-1476, at 96 (1976) ("For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts."); *see also* 37 C.F.R. § 201.17(b)(1); *Cablevision Sys. Dev. Co. v. MPAA*, 836 F.2d 599 (D.C. Cir. 1988).

8/ *NPRM*, 82 Fed. Reg. at 56937 (proposing that "gross receipts shall not include any fees collected from subscribers for the sale of Internet services or telephony services when such services are bundled together with cable service").

9/ NCTA Comments at 12.

10/ Copyright Owners Comments at 8 ("Copyright Owners agree that revenues from the sale of Internet services and telephony services should not be included in Gross Receipts . . .").

copyright owners benefit from the higher penetration of the basic video service tier that bundles help maintain in an age of consumer "cord-cutting."[11/]

Notably, the Copyright Owners do not propose an alternative to the Office's proposed rule.[12/] To the extent the Copyright Owners are concerned about reliable and consistent reporting of gross receipts,[13/] GAAP provides an obvious solution. As explained in NCTA's Comments and Professor Holder's supporting declaration, GAAP specifically prescribes how to account for revenues from bundled services.[14/] The GAAP-based approach advocated by NCTA is consistent with the approach that cable operators are required to follow in other financial reporting contexts.[15/] Rather than creating rules out of whole cloth to address what revenue should or should not be recognized solely for purposes of Section 111, the Office can ensure consistency and predictability among reporting entities and alleviate the Copyright Owners' concern about unexplained reporting methodologies simply by expressly incorporating GAAP as

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11/ NCTA Comments at 17.

12/ The Copyright Owners note in passing the existence of a 1988 "notice of policy decision" that purports to address revenue recognition in cases where there are packaged services. Copyright Owners Comments at 8, n.5. That notice, however, did not squarely grapple with the issue here, which is whether a cable operator's gross receipts can effectively be made to include revenue received from non-basic-cable services without running afoul of Section 111; it cannot. Furthermore, as discussed in detail in NCTA's initial Comments and Professor Holder's declaration, GAAP's guidance on multiple-element bundles did not develop until after 1988. *See* NCTA Comments at 11; Holder Declaration at 8. There is no longer any need for the Copyright Office to create a bespoke version of revenue recognition rules solely for Section 111. Additionally, the market itself has changed substantially since 1988. For example, the 1988 policy decision was based on video-only service bundles, but because of technological advancements, cable operators today can and do provide a variety of non-video services that are wholly unrelated to video delivery, including voice and Internet service. In any event, the statute requires that royalties be limited to gross receipts for providing basic video service, and an approach that simply ignores bundled discounts or provides no rational methodology for allocating them among constituent services is inconsistent with that mandate.

13/ Copyright Owners Comments at 5-6.

14/ NCTA Comments at 13-14; Holder Declaration at 7-12.

15/ *See* NCTA Comments at 13-14; Holder Declaration at 7.

the governing standard for revenue recognition under the rules implementing the cable compulsory license.

There are a number of reasons to recognize GAAP as the relevant standard here. The guidance provided by GAAP is authoritative for accounting and financial reporting by most businesses in the United States, including cable operators.[16/] The Office and the Copyright Royalty Board themselves rely on GAAP for reporting under other statutory copyright licenses.[17/] Additionally, several states have specifically adopted the GAAP approach for recognizing revenues when cable video services are sold as part of a multiple-element package with other services.[18/] The risk of inconsistency or confusion in recording and reporting gross receipts is minimized by aligning the accounting methodology for the cable compulsory copyright license with the GAAP methodology already prescribed for accounting, state-level reporting, and financial reporting.

Indeed, GAAP's guidance regarding revenue recognition for discounted multiple-element arrangements was developed specifically to address the appropriate accounting of revenue from bundled products and services – the very issue raised in the NPRM. The Office should now acknowledge the accounting expertise behind GAAP, embrace GAAP guidance on this issue, and incorporate GAAP into its rules. Specifically, the Office should strike the final sentence of its proposed revision to the definition of "gross receipts"[19/] and, consistent with language used

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16/ Holder Declaration at 5-7.

17/ NCTA Comments at 13, n.37.

18/ *Id.* at 14, n.41.

19/ "In addition, gross receipts shall not include any fees collected from subscribers for the sale of Internet services or telephony services when such services are bundled together with cable service; instead, when cable services are sold as part of a bundle of other services, gross receipts shall include fees in the amount that would have been collected if such subscribers received cable service as an unbundled stand-alone product." *NPRM*, 82 Fed. Reg. at 56937.

when states have incorporated GAAP into revenue recognition for bundled services by cable operators,[20/] replace it in 37 C.F.R. § 201.17(b)(1) with the following language:

> In addition, gross receipts shall not include any fees collected from subscribers for the sale of Internet services, telephony services, or any other services when such services are bundled together with basic service; instead, when basic service is sold as part of a bundle of other services, gross receipts shall include only those revenues that are attributable to basic service, as determined pursuant to Generally Accepted Accounting Principles.

Amending the definition of gross receipts in this manner to incorporate GAAP would ensure consistency and accuracy in the reporting of gross receipts.

II. THE OFFICE SHOULD NOT ADOPT COPYRIGHT OWNERS' PROPOSALS TO BROADLY INCLUDE FRANCHISE FEES AND EQUIPMENT FEES IN REPORTABLE GROSS RECEIPTS

The Copyright Owners incorrectly urge the Office to decide as part of this rulemaking that cable operators must include in their reportable gross receipts all franchise fees and equipment fees paid by subscribers.[21/] As an initial matter, the status of franchise fees for purposes of the compulsory license was not raised in the NPRM and therefore is not properly the subject of this rulemaking.[22/] In any event, the Copyright Owners' interpretation of Section 111 is incorrect: that provision, by its plain terms, does not include any reference to franchise fees,

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[20/] *See, e.g.*, Ga. Code § 36-76-2(8)(E) ("Where. . . noncable or nonvideo service is bundled with . . . cable services or video services . . . 'gross revenues' shall include only those revenues that are attributable to cable service or video service . . . . [S]uch revenues shall be allocated in a manner consistent with generally accepted accounting principles."); S.C. Code § 58-12-300(h) ("Where … noncable service is bundled with the sale of any cable service or services and sold for a single nonitemized price, the term gross revenues shall include only those revenues that are attributable to cable services based on the provider's books and records, such revenues to be allocated in a manner consistent with Generally Accepted Accounting Principles."); Cal. Pub. Util. Code § 5860(f) ("Where the holder of a state franchise . . . bundles . . . video services with nonvideo services . . . gross revenues shall be determined based on an equal allocation of the package discount, that is, the total price of the individual classes of service at advertised rates compared to the package price.").

[21/] Copyright Owners Comments at 10.

[22/] *See* 5 U.S.C. § 553(b); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

taxes, or similar "pass-throughs" to local governments. Similarly, Section 111 is devoid of any reference to equipment fees. To the contrary, Section 111 requires only that cable operators pay a percentage of gross receipts "for the basic *service* of providing secondary transmissions."[23/] The Office should reject the Copyright Owners' calls to mandate inclusion of franchise fees and equipment fees in reportable gross receipts.

A. Franchise Fees Should Not be Included in Gross Receipts.

"Under the APA, an NPRM must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."[24/] The Office's NPRM in this rulemaking proceeding did not propose that franchise fees be included as part of gross receipts. Adopting a rule to expand the definition of gross receipts to encompass franchise fees would, therefore, violate the Administrative Procedure Act.[25/]

Beyond this threshold procedural issue, requiring inclusion of franchise fees in calculating copyright royalties is not authorized by Section 111 and is entirely unwarranted. Franchise fees are costs imposed by local governments for use of their public rights-of-way – in effect, an indirect tax for rights-of-way that cable operators pass through to subscribers as required by law and remit to franchising authorities without profit or markup.[26/] By definition,

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23/ 17 U.S.C. § 111(d)(1)(B) (emphasis added).

24/ *U.S. Telecom Ass'n*, 825 F.3d at 700 (internal quotation marks and citations omitted).

25/ *See* 5 U.S.C. § 553(b).

26/ The FCC has explained that the effect of franchise fees is "to levy an indirect and regressive tax on cable subscribers." *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communication Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Dockets Nos. 18397; 18397-A, et al. Cable Television Report and Order, 143 F.C.C.2d 143 ¶ 185 (1972). Franchise fees are like sales taxes, essentially a pass through of indirect taxes/fees that are required to be paid to the government. The courts have held that franchise fees provide local franchise authorities a mechanism to avoid directly taxing consumers. *See Texas Coalition of Cities v. FCC*, 324 F.3d 802, 806 (5th Cir. 2003) (explaining that a "franchise fee is essentially a form of rent: the price paid to rent use of public right-of-ways").

the term "franchise fee" includes "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[27/] Cable operators are mere collection agents of the franchise fees imposed by the government.

Even if franchise fees were to be considered as cable operator revenue, they are unrelated to the basic purpose of Section 111 (*i.e.*, compensation for cable retransmission of broadcast signals). Rather, as just explained, franchise fees are collected for use of public rights-of-way.[28/] Indeed, the rate regulations adopted by the Federal Communications Commission ("FCC") treat franchise fees as outside of the fees charged for basic service.[29/] Franchise fees are passed through to subscribers as separately itemized charges on customer bills, distinct from the charges related to the basic tier of video service.

B. The Office Should Reject Copyright Owners' Approach to Equipment Fees.

The Office proposes to amend its regulations to require operators to report "fees for any other type of equipment or device necessary to receive broadcast signals that is supplied by the cable operator."[30/] As a preliminary matter, NCTA disagrees that any such fees should be included in gross receipts. The Copyright Act makes no mention of converter or equipment

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[27/] 47 U.S.C. § 542(g)(1).

[28/] Under the Communications Act, franchise fees are not collected *for* basic or other cable services, but are only *capped by* a percentage of cable service revenues. Under the governing statute, the fee could be a fixed dollar amount, or all paid in one year, or all paid as an in-kind assessment, as long as when measured against cable video revenue the fee does not exceed the 5% cap. *See* 47 U.S.C. § 542(b), (g).

[29/] The FCC excluded franchise fees from the revenues on which the regulatory "benchmarks" for setting cable system basic service rates were established. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, ¶¶ 254, 256 (1993).

[30/] *NPRM*, 82 Fed. Reg. at 56937.

revenue, and Congress precluded inclusion of additional receipts from subscribers.[31/] Rather, the Act requires that copyright royalties be based on "actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic *service* of providing secondary transmission of primary broadcast transmitters."[32/] By definition, *equipment* fees are not *service* fees.[33/]

To the extent any equipment fees are included in gross receipts, such inclusion must be strictly limited, as suggested in the Office's proposed regulation, to equipment truly "necessary" or "required" to receive basic service.[34/] When the Office amended the definition of gross receipts in 1978 to include some converter fees,[35/] it focused on fees for devices that a subscriber "must have" to receive usable broadcast signals.[36/] In 1989, the Office issued a General Counsel letter addressing the treatment of converter revenue and emphasized the limited inclusion of such revenue. It explained that if more than one converter is available to a subscriber, such as a $1.00 box that receives all basic service and a $3.00 box that also includes non-basic service, "then it

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31/ *See also* H.R. Rep. No. 94-1476, at 96 (1976) ("For purposes of computing royalty payments, *only* receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered" and "[o]ther receipts from subscribers … are not included in gross receipts.") (emphasis added).

32/ 17 U.S.C. § 111 (emphasis added).

33/ Again, cable rate regulation is instructive, as the Communications Act, 47 U.S.C. § 543(b), and the FCC's implementing regulations, 47 C.F.R. §§ 76.922 and 76.923, expressly distinguish and separate "service" fees from "equipment" fees.

34/ *See NPRM*, 82 Fed. Reg. at 56930 (proposing to "revise Space E's instructions and its regulatory definition of 'gross receipts' to specifically note that cable operators' gross receipts must include revenue from subscription to non-broadcast tier(s) and/or from equipment sales or leases if they are *required* to obtain tiers with broadcast signals") (emphasis added); *see also id*. at 56937 (proposing to revise 37 C.F.R. § 201.17 to include "fees for any other type of equipment or device *necessary* to receive broadcast signals that is supplied by the cable operator") (emphasis added).

35/ *Compulsory License for Cable Systems*, Final Regulations, 43 Fed. Reg. 27827, 28828 (June 27, 1978) (amending the definition of gross receipts to include "the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees").

36/ *Id.*

can truly be said that the converter fee for providing secondary transmissions of broadcast signals is $1.00," and the cable operator is permitted to exclude $2.00 of the $3.00 converter fee from gross receipts from those subscribers who take the more advanced box.[37/] This guidance is well known and cable operators have relied on it for decades. Given this history, if the Office includes equipment fees in gross receipts (despite Section 111 limiting gross receipts to "service" revenue) it should merely affirm its existing guidance on inclusion of converter revenues necessary to receive basic service.

The Copyright Owners claim that the equipment fee issue has become "increasingly more significant as the FCC has eliminated its prohibition on encrypting the basic service tier."[38/] But other changes in the industry are at least as significant. Notably, as retail converters and cable-service apps have become commercially available, equipment rented from cable operators is often unnecessary for the reception of broadcast signals. Today, major cable operators typically make available free apps through which subscribers may receive their basic and other cable services and features on the retail devices they already own, such as Smart TVs, tablets, computers, mobile phones, and other retail devices. Given these technological advancements and commercial options, subscribers typically acquire operator-provided equipment *not* to obtain basic broadcast signals that are readily available through other means (even when the signals are encrypted), but rather to use features such as advanced guides and user interfaces, on-demand and over-the-top video content, and recording tools. If any equipment revenues are to be included in gross receipts, it should be limited to the *minimum* equipment a subscriber is

37/ Letter from Dorothy Schrader, General Counsel, Copyright Office, to James F. Ireland, Esq., Oct. 11, 1989 (attached as Exhibit A).

38/ Copyright Owners Comments at 10.

required to purchase or lease *from an operator* in order to obtain broadcast signals, consistent with the 1989 Copyright Office guidance.

III. THE OFFICE SHOULD REDUCE, NOT EXPAND, THE SPACE E REPORTING OBLIGATIONS

In its initial Comments, NCTA responded to the Office's request for suggestions to streamline SOA reporting,[39/] and proposed that the Office bring reporting practices more in line with the intent of Congress as expressed in Section 111(d)(1)(A) by eliminating all rate reporting from the SOA forms.[40/] Cable operators should be required to report only: (1) the total amount of reportable "gross receipts" from basic service as currently reported in Space K; and (2) the number of basic service subscribers as of the last day of the accounting period.[41/] Other than information about broadcast signals carried, this six-month total of gross receipts and subscribership numbers are all that Section 111 actually requires be reported.[42/] Moreover, despite the Copyright Owners' preoccupation with achieving a match between Space E and Space K, this simple information would be sufficient to enable the Copyright Owners to determine whether further investigation (or a formal audit) of an SOA is appropriate.[43/]

A. The Office Should Eliminate, Not Add, Categories of Service for Reporting in Space E.

The Copyright Owners concede that the Office's proposal to require cable operators to provide a more granular breakdown of subscriber and rate information on Space E "may not, by

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39/ *NPRM*, 82 Fed Reg. at 56927.

40/ NCTA Comments at 8-9.

41/ At the very least, the Office should eliminate the entirely superfluous information requested in Space F, which has no bearing on the gross receipts calculations for basic service. *Id.* at 9-10.

42/ 17 U.S.C. § 111(d)(1)(A).

43/ This information would be sufficient to provide an average revenue per subscriber figure, which would enable the Copyright Owners to evaluate which SOAs warrant additional investigation, or even formal audits.

itself, provide greater transparency" as to how cable systems derive their gross receipts.[44/] They also concede that any disparity between what is reported on Space E and the gross receipts number reported on Space K is unlikely to be "resolved by a more expansive listing of tier offerings."[45/] NCTA agrees with the Copyright Owners that the modifications to Space E proposed by Office should not be adopted. As previously explained, the proposed modifications would impose onerous paperwork burdens on cable operators and potentially disclose competitively sensitive information with no corresponding benefit for copyright owners or the Office.[46/]

Yet, the Copyright Owners go on to support the Office's proposal to expand the number of categories in Space E for which rates and subscribership numbers be reported, replacing "Residential," "Motel/Hotel," "Commercial," and "Converter" with "Single-unit residential," "Multi-unit residential," "Motel/Hotel," "Commercial," "Other MDU," and "Equipment." This change is purportedly designed to facilitate a "rough comparison" between Space E and Space K.[47/] But as the Copyright Owners and NCTA both explain, the primary source of the variance between those spaces today is the widespread adoption of bundled and promotional pricing.[48/] Providing additional details about particular classes of subscribers that actually make up a relatively small portion of total cable subscribers would serve no useful purpose, and would serve more as a distraction than an aid in evaluating reported gross receipts. It would burden cable operators, the Copyright Office, and Copyright Owners alike without any discernable offsetting benefit.

44/ Copyright Owners Comments at 4.

45/ *Id.* at 5.

46/ *See* NCTA Comments at 5-7.

47/ *NPRM*, 82 Fed Reg. at 56928.

48/ *See* Copyright Owners Comments at 5-6; NCTA Comments at 6.

Furthermore, even the Copyright Owners acknowledge that several of these additional categories (*e.g.*, MDU and commercial) do not have standardized rates that could be easily reported, because bulk service packages are negotiated individually.[49/] So, there is not a single rate for these categories that, when multiplied by the reported subscriber numbers, would give the "rough comparison" the Office suggests would result.[50/]

And contrary to the Copyright Owners' claim that "cable operators have developed their own methodologies" for recording bulk subscribers,[51/] cable operators have followed longstanding FCC guidance that "subscribers" in the context of bulk accounts be recorded using the equivalent billing unit ("EBU").[52/] As described in relevant part in the instructions for the FCC's Form 325 Annual Cable Report, "Bulk-rate customers = total annual bulk-rate charge divided by basic annual subscription rate for individual households."[53/] This method of counting bulk account customers is mandated by the FCC in numerous contexts, and cable operators have used this methodology for decades for both reporting to the FCC and other business reporting purposes. The Office should follow suit and eliminate bulk reporting entirely, asking only for

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[49/] Copyright Owners Comments at 9.

[50/] As NCTA discussed in its initial comments, the comprehensive reporting that would be required to allow for such a comparison in the case of bulk services would be an expensive and overwhelming task that would also "run afoul of an operator's legitimate business interest in keeping such proprietary business information confidential." NCTA Comments at 6-7.

[51/] Copyright Owners Comments at 9.

[52/] *See*, *e.g.*, *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, Notice of Proposed Rulemaking, 54 F.C.C.2d 824, ¶¶ 16-19 (1975); *Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, Docket No. 20561, Second Report and Order, 68 F.C.C.2d 18, n.15 (1978).

[53/] FCC Form 325 Instructions at 1.

the overall subscribership numbers and gross receipts for a single "basic service" category as outlined in Section 111(d)(1)(A).[54/]

Moreover, as AT&T noted in its Comments, MPAA's initial 2005 proposal for more granular information in Space E was rooted in the lack of an audit mechanism under Section 111 at that time.[55/] But Copyright Owners have since obtained an audit right and have in fact exercised that right. The advent of audits weighs in favor of eliminating information from the SOA – as Copyright Owners now have a tool that gives them much more detailed information than could ever be gleaned from a public filing. Between the knowledge gained from informal inquiries and prior formal audits, the semiannual gross receipts and subscribership numbers required by Section 111(d)(1)(A), and the reassurance that cable operators record and report those figures in accordance with GAAP and FCC guidance, Copyright Owners have a sufficient basis on which to decide whether to initiate additional audits.

B. The Office Should Not Adopt Copyright Owners' Proposal to Require Monthly Reporting.

The Copyright Owners' proposal to require monthly (as opposed to semi-annual) reporting is similarly misguided. Monthly reporting directly conflicts with Section 111 and conflates the entirely distinct statutory licenses of cable operators and satellite carriers. Section 111 very specifically states that the calculation of gross receipts and the reporting on an SOA are made "on a semiannual basis" covering totals from "the six months next preceding,"[56/] not month-to-month. The fact that satellite carriers report on a monthly basis is inapposite – unlike

54/ NCTA Comments at 7-8.

55/ AT&T Comments at 2-3.

56/ 17 U.S.C. § 111(d)(1).

Section 111, Section 119 expressly requires satellite carriers to compute their compulsory license royalties on a month-by-month basis.[57/]

Moreover, as NCTA discussed in its Comments, increasing the complexity of the forms and reporting obligations moves in the wrong direction – the Office should eliminate, not add, reporting obligations.[58/] Monthly reporting would substantially increase the paperwork burden on cable operators and would likewise increase the burden on the Office to review the forms, adding complexity and reducing efficiency. It would also give competing providers confidential insight into the month-to-month effectiveness of dynamic marketing strategies.

IV. REFERENCES TO GRADE B CONTOURS SHOULD NOT BE ELIMINATED.

The Copyright Owners allege that the Grade B contour "has for all practical purposes outlived its usefulness for cable royalty reporting purposes," and they support the Office's proposal to remove references to the Grade B contour from its regulations and the SOA forms.[59/] The Copyright Owners appear to be unaware that the Grade B contour remains useful for cable copyright reporting and was specifically preserved by Congress. As NCTA explained in its initial Comments, cable operators continue to rely on a station's Grade B contour in assessing local and distant signals and eliminating all references to the Grade B contour from the Office's rules and forms would be contrary to Congress's instructions.[60/] The Copyright Office should retain its references to the Grade B contour.

57/ 17 U.S.C. § 119(b)(1)(b); *see also id.* § 119(a)(2)(C)(ii).

58/ NCTA Comments at 8-10.

59/ Copyright Owners Comments at 14.

60/ NCTA Comments at 23.

CONCLUSION

Consistent with the reasons set forth above, the Office should acknowledge and expressly adopt GAAP as the standard for reporting gross receipts. The Office should neither expand the definition of gross receipts to include franchise fees or equipment fees nor proceed with many of its proposed changes to Space E of the SOA. Rather, the Office should amend its rules to require only reporting of a six-month total of subscriber numbers and basic service gross receipts. And references to the Grade B contour should not be eliminated. The Office should only modify the SOA forms to the extent it simplifies reporting practices.

Respectfully submitted,

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October 25, 2018

EXHIBIT A

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Dear Mr. Ireland:

This is in response to your letter of September 7, 1989 wherein you sought guidance as to the proper amounts from converter box fees to be included in "gross receipts" pursuant to the cable compulsory license. You described the relevant facts as follows.

A cable operator essentially provides two different types of basic service. The first type, called "limited basic" service, includes all broadcast services and the second, called "full basic" service, includes the services of the limited basic plus additional non-broadcast services. The limited basic services are not scrambled and therefore only require a simple converter box which is provided, by way of example, at a cost of $1.00 per month per subscriber. The full basic service, which contains scrambled satellite services, requires a more expensive converter box which is provided at a cost of $3.00 per month per subscriber. The cable operator now wishes to know what amounts attributable to the converter boxes should be included in the system's gross receipts.

You argue in your letter that the only amount which must be included in gross receipts in the example above is the $1.00 amount charged for the simple basic converter box. Those subscribers receiving full basic would have $2.00 of their $3.00 converter box fee excluded from gross receipts because that amount is attributable to non-broadcast services. You cite an August 12, 1985 letter from Willie Adams to Robert L. James and Cablevision Systems Development Corp. v. Motion Picture Association of America, Inc., 836 F.2d 599 (D.C. Cir. 1988) as support for your position.

Your analysis of the example you provided is correct if and only if the following circumstances are true. The broadcast services provided on the full basic service tier must be the same broadcast services offered on the simple basic service tier. In other words, there cannot be any additional broadcast services on the full basic tier that are not included in the simple basic service tier. If there are any additional broadcast signals, then the entire $3.00 converter fee for full basic must be included in gross receipts. The Office firmly believes that this result is supported by the language of the *Cablevision* decision. If however, the difference between simple and full basic is that full basic contains non-broadcast signals and simple basic does not, then it can truly be said that the converter fee for providing secondary transmissions of broadcast signals is $1.00. Thus, the cable operator, in the case of a subscriber to full basic service, is permitted to exclude $2.00 of the $3.00 converter box fee from gross receipts.

If you have any further questions, do not hesitate to contact me.

Sincerely,

Dorothy Schrader

Dorothy Schrader
General Counsel