Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Proposed Rulemaking	)	
	)	37 C.F.R. Part 201
	)	Docket No. 2012-5
Verification of Statements of Account	)	
Submitted by Cable Operators and	)	
Satellite Carriers	)	
	)	

Reply Comments of AT&T Inc.

AT&T Inc., on behalf of its operating company affiliates (collectively "AT&T"), offers these Reply Comments on the Copyright Office's Notice of Proposed Rulemaking (the "NPRM") proposing a new regulation to implement the audit provisions of the Satellite Television Extension and Localism Act of 2010 ("STELA"). 77 Fed. Reg. 35,643 (June 14, 2012) (the "Proposed Rule").

AT&T has been advised that the National Cable & Telecommunications Association ("NCTA") and representatives of the Copyright Owners have been in discussions regarding potential revisions to the proposals set out in the NPRM and that the parties to the discussions have reached agreed positions on a number of issues (the "NCTA/Copyright Owners Proposal"). Upon learning of the existence of the discussions from the Copyright Office's notices extending the due date for reply comments, AT&T contacted the NCTA to learn more about the discussions and volunteered to participate in the negotiations.

While AT&T has been made aware of the status of negotiations, as well as potential areas of agreement between those two groups, it was not invited to participate in the negotiations and was only presented an opportunity to raise its issues with the group this past Monday. Accordingly, due to the insufficient time for meaningful engagement, AT&T is not in a position to agree to the NCTA/Copyright Owners Proposal. Indeed, should the NCTA and Copyright Owners ultimately submit a "compromise" proposal in this docket, AT&T believes that it should be put out for further comment by other interested parties who were not parties to the agreement. Nevertheless, the following comments reflect AT&T's understanding of the potential proposals to be made, and provide, where appropriate, AT&T's views on those proposals.

I. The Procedures Regarding the Designation of an Auditor Should be Strengthened and Specifically Preclude the Payment of Contingent Fees

STELA requires that the audit be conducted by a "qualified independent auditor."[1] In its initial comments, AT&T urged the Copyright Office to strengthen the requirements surrounding the independence of the auditor, including the establishment of procedures to enable a cable operator to object to an auditor's qualifications and the establishment of an express prohibition on the payment of contingent fees.[2]

AT&T understands that the NCTA/Copyright Owners Proposal addresses these issues to a degree, but AT&T continues to believe that additional requirements should be imposed. Specifically, AT&T submits that the audit should not be allowed to commence until any objections regarding the auditor's independence have been resolved. As an alternative, AT&T would not object to a provision that would require the copyright owners to bear the risk that their designated auditor is not qualified or independent. Specifically, an audit may commence while any objections to the auditor's qualifications are being resolved, but if a determination is made that the chosen auditor is not qualified or independent, the audit process shall be terminated, all materials regarding the audit returned to the system operator, and the copyright owners would not be allowed to proceed with an alternative auditor for the remainder of the audit cycle. In no event should any audit report be provided to the copyright owners until objections to the auditor are resolved.

AT&T also again requests that the rules expressly prohibit the payment of contingent fees to the auditor. The AICPA Code of Professional Conduct and Statements on Auditing Standards relating to attest engagements prohibit such fees, but it is not clear that they are part of the rules governing "independence," which are the only rules expressly adopted by the regulations.

II. The Statute Does not Support the Imposition of a Regulation that Shifts the Cost of an Audit to the System Operator

AT&T demonstrated in its comments not only that the statute does not authorize the Copyright Office to shift the costs of an audit to the party being audited but that cost shifting is inconsistent with the purposes of the audit process.[3] AT&T again urges the Copyright Office to refrain from imposing any cost shifting requirements. System operators subject to an audit will already bear significant costs in fulfilling their obligations to the auditor. To the extent that an underpayment is discovered, the

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1 17 U.S.C. Section 111(d)(6)(A).

2 Comments of AT&T at 3-4.

3 Comments of AT&T at 5-8. *See also* Comments of American Cable Association at 3 ("ACA strongly recommends that the Copyright Office not include a cost-shifting provision in its final regulations implementing audits as required by STELA."); Comments of DISH Network L.L.C. at 9 ("Nor should the costs of an audit be shifted to the satellite carriers and cable operators . . .."); Comments of NCTA at 13 ("[W] e do not believe it is equitable for cable operators to be forced to bear any of the auditor's costs.").

copyright owners will obtain increased royalties, and should not, absent express statutory provisions—which are entirely lacking here—gain any further benefit from the audit process.

To the extent that the Copyright Office nevertheless decides to impose cost shifting requirements, AT&T urges the adoption of certain parameters.[4] First, no cost shifting should arise until there is an undisputed finding that the underpayment is greater than ten percent (10%) of the aggregate amounts paid pursuant to the statements of account subject to the audit, and even then, only if the cost of the audit exceeds $10,000.[5] In determining these thresholds, however, underpayments attributable to issues that are identifiable on the face of the statements of accounts without the need for an audit should not be considered in assessing the amount of the underpayment. It should go without saying that the cost of an audit should not be shifted as a result of errors or disputes for which no audit was needed.

Moreover, to the extent that the system operator disputes the findings of the auditor, in whole or in part, no cost shifting should be required until the dispute has been resolved (unless the undisputed amount exceeds the ten percent (10%)/$10,000 threshold). AT&T submits that it would be unfair for the system operator, which has no control over the initiation of the audit, to bear expenses that ultimately turn out to be unwarranted—even though such expenses would ultimately be reimbursed. Rather, any such obligation should be triggered only after a judicial determination. Finally, in no event should the costs to be borne by the system operator exceed the amount of the underpayment determined by the auditor.

III. The Regulations Should Clearly Limit the Scope of the Audit and the Information Required to be Made Available to the Auditor

As AT&T demonstrated in its comments, the regulations should limit the scope of the audit to issues that are not evident on the face of the statement of account.[6] The verification provisions in STELA were implemented for a specific reason – to allow copyright owners to review the gross revenue calculations of the system operator. There is no basis for the auditor to consider other issues as part of the audit process. For example, as AT&T understands is recognized in the NCTA/Copyright Owners Proposal AT&T reviewed, the auditor should not re-evaluate the classification of stations (such as distant/local, permitted/non-permitted). Indeed, the licensing division of the Copyright Office already reviews statements of account for these types of issues. In any event, as noted above, to the extent that the Copyright Office imposes any fee shifting requirements, underpayments resulting from any such re-classifications should be excluded when determining whether any cost-shifting threshold has been reached.

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[4] AT&T does not, thereby, waive its objection to cost shifting.

[5] See Comments of AT&T at 7.

[6] AT&T Comments at 4-5. *See also* Comments of DISH Network L.L.C. at 5 ("The scope of the audit is Statements of Account authorized by Congress is a narrow one.").

To avoid potential controversy and enormous burden, the regulations should further clarify that system operators are required to provide information sufficient to enable the auditor to perform an audit in accordance with generally accepted accounting standards and, in particular, are not required to provide data at the individual subscriber level. In the case of AT&T's U-verse, the burden of providing such information (or of undertaking the work to create a sample) would be massive – the universe of subscriber-level information comprises millions of data records per month and tens to hundreds of millions of records per year, numbers that are growing as the number of U-verse subscribers grows. Such data would not only be unreasonably burdensome to produce, it would likely be useless to the auditor. It would be more reasonable for the regulations to provide that a system operator meets its audit response burden if it provides the auditor with information in the form of reports that include the number of subscribers, the amount of revenue and the numbers of subscribers and revenues applicable to specific service offerings at the system level. In the case of U-verse, for example, it is estimated such reports would still comprise nearly 90,000 records each reporting period. In this regard, the type of information required should take into account the particular operator's billing systems and standard recordkeeping practices. It would be unwarranted to require the operator to adapt its billing and recordkeeping requirements to the auditor. Rather, the auditor must adapt to the billing systems and methods utilized by the operator.

CONCLUSION

In sum, AT&T respectfully submits that the regulations ultimately adopted should not impose unreasonable burdens on system operators or obligations that go beyond those required to effectuate the purposes of the verification provisions set forth in STELA.

Respectfully submitted,

AT&T Inc.

By: _____/s/_____
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