Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices	)	MB Docket No. 23-405
	)	

REPLY COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA")[1] hereby submits these reply comments in connection with the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") in the above-captioned proceeding.[2] NTCA shares the Commission's desire to protect consumers and promote competition in the video programming marketplace; however, NTCA agrees with the majority of commenters that the proposal to prohibit cable operators and direct broadcast satellite ("DBS") providers (collectively, "providers") from imposing early termination fees ("ETFs") and billing cycle fees ("BCFs") on subscribers is misguided and will not benefit consumers.

[1] NTCA–The Rural Broadband Association represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services.

[2] *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices,* MB Docket No. 23-405, FCC 23-106, Notice of Proposed Rulemaking (rel. Dec. 14, 2023).

I. INTRODUCTION

In the NPRM, the Commission proposes to: (1) prohibit cable and DBS providers from imposing a fee when a subscriber terminates service prior to the end of the subscription term; and (2) require cable and DBS providers to prorate fees for remaining days in a periodic billing cycle after the cancellation of service.[3] The Commission would declare unenforceable any provisions in existing agreements between providers and their subscribers that include ETFs or periodic billing cycles.[4] Even if well-intended, these proposals would hurt video competition, drive up prices for consumers (particularly in rural areas), and constitute impermissible forms of regulation. The Commission is also already addressing these concerns in other proceedings, as the NPRM recognizes.[5]

II. THE PROPOSALS ARE MISGUIDED AS A POLICY MATTER AS THEY WOULD DRIVE UP PRICES FOR CONSUMERS AND INCREASE PRESSURE ON SMALL PROVIDERS, POTENTIALLY HASTENING THEIR EXIT FROM THE VIDEO MARKETPLACE.

The proposal to ban ETFs and BCFs is misguided as a policy matter. In fact, the term commitments that underpin ETFs can benefit consumers and increase competition. With an agreed upon term commitment that includes an ETF if broken by the customer, the customer can receive a discount for video service. As NCTA explained, "[t]erm contracts with ETFs represent a voluntary bargain in which the cable operator provides the consumer with a discount on the

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[3] NPRM at ¶¶ 6 – 7.

[4] Although the Commission refers to periodic billing cycle as "billing cycle fees" or "BCFs," the consumer pays only for the regular monthly bill based on the contracted rate, not an additional fee for cancelling service.

[5] NPRM at ¶ 1, citing *All-In Pricing for Cable and Satellite Television Service*, MB Docket No. 23-203, FCC 23-52 (rel. June 20, 2023).

price of the service – that is often deeper than the discount a customer might get without the ETF – in exchange for the increased certainty that the consumer will remain a customer for a longer period."[6]

Contrary to Public Knowledge's assertion that ETFs "have no economic rationale, other than the fact that [multichannel video programming distributors ("MVPDs")] can get away with charging them, and no economic benefit, other than to the MVPDs who impose them,"[7] as the International Center for Law & Economics described, "[c]hurn can have several costly effects on providers. There are advertising and marketing costs to recruit new customers. There are transaction costs associated with signing up and cancelling subscribers."[8] Cable and DBS providers also incur installation costs including wiring and equipment with each new subscriber. These costs are spread out through the length of a subscription plan so that customers are not faced with the full cost upon requesting service and providers are able to recoup the cost of these items that go beyond merely transmitting video service.

To give consumers a financial benefit that entices them into plans that help reduce these costs, providers charge lower monthly subscription rates for longer-term plans. NTCA members report that they often either waive the installation charge in exchange for a term contract or build

[6] Comments of NCTA – The Internet and Television Ass'n, MB Docket No. 23-405 (Feb. 5, 2024), p. 11.

[7] Comments of Public Knowledge, MB Docket No. 23-405 (Feb. 5, 2024), p. 1

[8] Comments of International Center for Law & Economics, MB Docket No. 23-405 (Feb. 5, 2024), p. 9 (citing Open Commission Meeting, Statement of Daniel Brenner, Sr. Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association, FCC (Jun. 12, 2008), available at https://transition.fcc.gov/realaudio/presentations/2008/061208/brenner.pdf)). *See also* Comments of ACA Connects, MB Docket No. 23-405 (Feb. 5, 2024), p. 10.

the charge into the longer term. The choice is fully the consumer's to make – customers who do not want to commit to a term of service may opt for a month-to-month contract at a different (higher) rate. If the Commission were to adopt the proposed rules, cable and DBS providers would likely have to discontinue offering discounted longer-term subscription plans, leaving subscribers with no option but to pay the higher-priced month to month plan. While those subscribers might have the option of switching to another video provider that charges a lower monthly fee, not all consumers have effective options for doing so – and presumably competitors were already charging prices for both monthly and subscription plans aimed at winning customer business without Commission action here.

Requiring proration of service would be similarly disruptive. As NCTA explains, "[a]s a threshold matter, providing and charging for service on a monthly basis is not the equivalent of imposing a fee and to characterize this common practice as such is a gross misnomer."[9] The practice of offering consumers a discounted price for purchasing more than one of the same item is not new to consumers. For instance, in stores, consumers routinely see items priced based on the number they purchase or a gift card that accompanies the purchase of multiple items, while the pricing also clearly states that if one of the items is returned, the amount refunded will be the price of the item if purchased by itself rather than the discounted "bundle" price.

The Commission recognizes in the NPRM that "the majority of cable companies and cable systems are small."[10] Yet these small companies would be the most affected by the Commission's proposal because they have the least ability to absorb the costs of equipment and

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[9] NCTA Comments at p. 7.

[10] NPRM, Appendix B, ¶ 6.

installation fees. Without allowing cable and DBS providers to account for the savings inherent in larger (longer-term) purchases, similar to practices routinely used in many other marketplaces, the Commission's proposed rules would likely result in unintended consequences that would harm instead of protect consumers. Indeed, the New York Public Service Commission predicted that "the important protections contemplated under the [Notice] could potentially become obsolete over time" if imposed solely on cable operators and DBS providers."[11] Furthermore, providers may offer different classes of rates based on bundles of services the customer purchases. Bills would need to be calculated differently for different customers dropping service and the amount of proration would vary daily. The Commission's proposal, taken to its logical conclusion, could, as DIRECTV described, result in a customer purchasing a month-to-month subscription one week prior to the Super Bowl and then cancelling the subscription the day after the Super Bowl with no requirement to pay for the month subscription chosen by the customer.[12] The logistics of the new billing requirements in circumstances like these would be overwhelming, particularly for small companies with limited staff.

The Commission's proposal comes at a time of increased pressure on video providers which is driving many small, rural providers out of the business. A recent NTCA survey found

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[11] Comments of New York State Public Service Comm'n, MB Docket No. 23-405 (Feb. 5, 2024), p. 2.

[12] *See* Comments of DIRECTV, MB Docket No. 23-405 (Feb. 5, 2024), p. 11 n. 33. A quick look at the statistics for returns of television sets following the Super Bowl demonstrates that this is not merely hypothetical. *See, e.g.*, "Retailers Need a Game Plan for All Those Returned TVs After the Super Bowl," by Joan Verdon, Forbes, Jan. 31, 2020 (noting that many retailers see a spike in the return of televisions following the Super Bowl, due in part to elimination of restocking fees necessary to compete with online retailers), available at https://www.forbes.com/sites/joanverdon/2020/01/31/retailers-need-a-game-plan-for-the-super-bowl-tradition-of-tv-returns/?sh=19e0a53c5138 (last visited Feb. 29, 2024).

that 18% of current video providers who responded to the survey are not very likely to continue to offer service and another 11% reported that they already have plans to discontinue service.[13] More than half cite "not enough subscribers to justify the costs" as the reason.[14] This is particularly troubling for the rural consumers served by NTCA's members. More than one quarter of survey respondents indicated that 50% or more of their service area households cannot receive an over the air broadcast signal[15] and must rely on their local video providers for local news, weather, and sports. Many rural consumers also do not have the option of satellite service and the rural population is comprised of more elderly adults than the urban population,[16] who are less likely to use streaming services.[17] The Commission's proposal, if adopted, would drive up costs to consumers and increase pressure on video providers.[18]

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[13] *See* NTCA – The Rural Broadband Association, Broadband/Internet Availability Survey Report, p.27 (Dec. 2023) available at: https://www.ntca.org/sites/default/files/documents/2023-12/2023%20Broadband%20Survey%20Report%20FINAL.pdf ("NTCA Survey").

[14] *Id.* at p. 29.

[15] *Id.* at p. 27.

[16] In a report from the US Census Bureau on "The Older Population in Rural America," older adults comprise 17.5% of the rural population compared to 13.8% in urban areas. Smith, A. S., & Trevelyan, E. (2019). The older adult population in rural America: 2012-2016. United States Census Bureau. https://www.census.gov/content/dam/Census/library/publications/2019/acs/acs-41.pdf

[17] A 2021 survey showed that 81% of adults 65 years old or more receive video services via cable or satellite. Among adults between 18 and 29 years old, only 34% receive video services via cable or satellite. Stoll, Julia (Nov. 11, 2022). Cable and satellite TV penetration in the US 2021, by age group. https://www.statista.com/statistics/659779/cable-tv-penetration-by-age/

[18] While the National Association of Broadcasters ("NAB") "does not take a position" on whether the Commission has the authority to (or should) regulate the use of ETFs, NAB uses the proceeding to justify the retransmission consent process. *See* Comments of National Ass'n of Broadcasters, MB Docket No. 23-405 (Feb. 5, 2024). Despite NAB's claims, NTCA members serve many consumers who do not have access to an over the air broadcast signal – meaning the

III. THE COMMISSION LACKS LEGAL AUTHORITY TO ADOPT THE PROPOSED RULES.

NTCA agrees with other commenters that the Commission lacks authority to adopt the NPRM's proposals.[19] Regulation banning ETFs and requiring cable and DBS providers to prorate customers' subscription fees are forms of prohibited rate regulation. In the Cable Television Consumer Protect and Competition Act of 1992, Congress adopted a "preference for competition," pursuant to which the rates charged by a cable provider may be regulated only if the Commission finds that the cable system is not subject to effective competition.[20] In 2015, citing the ubiquitous availability of DBS service, the Commission created a rebuttable presumption that cable operators are subject to effective competition, meaning that absent demonstration that a cable system is not subject to effective competition,[21] the rates for the

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MVPD is helping the broadcaster reach customers that would not otherwise be reached *and* are paying the broadcaster for the "privilege" of doing so. Retransmission consent agreements are a primary driver of MVPD costs and a primary reason small MVPDs are leaving the video market. The fees paid to broadcasters have increased exponentially year over year. NTCA survey respondents indicated that in just the last two years, fees paid to broadcasters increased by an average of nearly $150,000. While that amount could be a rounding error for a large company, the amount represents approximately 25% to 40% of total operating expenditures for small MVPDs. *See* NTCA Survey at p.27.

[19] *See, e.g.*, ACA Connects Comments at p. 2; DIRECTV Comments at p. 10; Comments of The Free State Foundation, MB Docket No. 23-405 (Feb. 5, 2024), p. 8.

[20] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act"); 47 U.S.C. § 543(a)(2)(A).

[21] *Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of the Stela Reauthorization Act,* Report and Order, MB Docket No. 15-53, FCC 15-62 (rel. June 3, 2015).

provision of service may not be subject to regulation by either a franchising authority or the Commission.[22]

ETFs are material terms of a service contract that directly affect prices paid by consumers each month.[23] They are not charges that, as the Commission believes, come into play only at the termination of service.[24] An ETF is an amount of money the customer agrees to pay - when choosing to subscribe to a cable or DBS service - for the service and equipment received from a cable or DBS provider if the subscriber later chooses to cancel the service prior to the end of the subscription term chosen by the subscriber. ETFs therefore fit squarely within the Cable Act's definition of a "rate for the provision of cable service" and, as rates, they may not be regulated.

Similarly, requiring cable and DBS providers to prorate monthly subscription fees would be impermissible rate regulation.[25] The Commission's proposal, if adopted, would effectively require providers to charge a daily rate for service, and providers would have no discretion to base that daily rate on anything other than their monthly rate. To require proration of rates would therefore regulate the billing increment, which is itself a form of rate regulation,[26] as well

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[22] 47 U.S.C. § 543(a)(2).

[23] *See* NCTA Comments at p. 11.

[24] NPRM at ¶ 15.

[25] *See, e.g.*, DIRECTV Comments at p. 10; The Free State Foundation Comments at p. 8.

[26] The Commission previously held that the regulation of a provider's billing increment constitutes rate regulation. *See Southwestern Bell Mobile Systems, Inc.,* Memorandum Opinion and Order, 14 FCC Rcd 19898, 19908 ¶ 23 (1999).

as the rate charged. Significantly, other video service providers charge for the complete billing cycle following a customer's cancellation of the service.[27]

Furthermore, as other parties noted, the Commission's goals can readily be achieved most effectively and without impermissible rate regulation by promoting billing practices that provide consumers with transparency and choice.[28] For example, the Commission could consider requiring providers to make available to customers options without ETFs rather than prohibiting such approaches altogether.[29] This flexible approach would grant customers the ability to choose whether or not to accept ETFs in exchange for more favorable monthly pricing.

IV. CONCLUSION

NTCA appreciates the Commission's desire to protect consumers from unexpected fees; however, the Commission can accomplish that objective, without the unintended consequences to consumers or impermissible rate regulation by utilizing other avenues such as the Commission's All-In Pricing for Cable and Satellite Television Service proceeding.

Respectfully submitted,

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[27] *See, e.g.*, Free State Foundation Comments at pp. 7-8.

[28] *See* DISH Network Comments at p. 1.

[29] *See* DIRECTV Comments at pp. 22-23.