DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *All-In Pricing for Cable and Satellite Television Service*, Report and Order, MB Docket 23-203.

In this item, the Commission requires cable operators and direct broadcast satellite (DBS) providers to disclose the "all-in" price of video programming in subscribers' bills and promotional materials. The disclosure regime covers four scenarios: (1) cable billing, (2) DBS billing, (3) cable advertising, and (4) DBS advertising. Because we lack statutory authority over all but the first, I must dissent from today's decision.

The text of the item suggests that it is implementing the Television Viewer Protection Act of 2019 (TVPA),[1] which requires multichannel video programming distributors (MVPDs) to disclose, at the point of sale, "the total monthly charge" of the individual or bundled service "selected by the consumer."[2] The TVPA also requires an itemized breakdown of MVPD fees in subscriber bills.[3] As relevant to this proceeding, the TVPA has two key features. First, the law's disclosures are limited to the point of sale. The TVPA does not regulate how prices are shown in advertising. In fact, Congress considered and ultimately rejected extending the law to advertisements.[4] Second, the TVPA speaks for itself. It does not delegate rulemaking power to the Commission.[5] Congress codified the TVPA outside of the Communications Act, and it has governed MVPDs well before this proceeding started. The FCC thus lacks the power to adopt price disclosure rules without a separate grant of statutory authority.

Only in the case of cable billing does that authority arguably exist. A separate statutory provision allows us to establish "consumer service requirements," including "communications between the cable operator and the subscriber (including standards governing bills and refunds)."[6] That language provides the clarity we ordinarily need, and I agree that the Commission may regulate cable bill disclosures, so long as those rules are consistent with the TVPA.

If the item were so limited, I could have supported it. But the item goes further and strays markedly from our statutory authority.

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[1] Television Viewer Protection Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534 (2019), *codified at* 47 U.S.C. § 562.

[2] 47 U.S.C. § 562(a).

[3] 47 U.S.C. § 562(b) (requiring "an itemized statement that breaks down the total amount charged for or relating to the provision of the covered service by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges").

[4] *Compare* Television Viewer Protection Act of 2019, H.R. 5035, 116th Cong. § 4 (2019), https://www.congress.gov/bill/116th-congress/house-bill/5035/text/ih (original bill introduced in the House of Representatives) ("A provider of a covered service may not advertise the price of the covered service unless the advertised price is the total amount that the provider will charge for or relating to the provision of the covered service, including any related taxes, administrative fees, equipment rental fees, or other charges, to a consumer who accepts the offer made in the advertisement.").

[5] The only authority that the TVPA gave the Commission was to extend the compliance date by six months, which the Commission already did. *See Implementation of Section 1004 of the Television Viewer Protection Act of 2019*, Order, MB Docket No. 20-61, DA 20-375 (MB rel. Apr. 3, 2020).

[6] 47 U.S.C. § 552(b)(3).

For starters, the Commission is powerless to extend its cable billing rules to DBS providers. Nothing gives us authority to regulate what appears on DBS bills, in contrast to our authority to adopt "standards governing [cable] bills." Nonetheless, the item seeks refuge in Section 335(a), which states:

> *The Commission shall, within 180 days after October 5, 1992, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming*. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) of this title and the use of facilities requirements of section 315 of this title to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this chapter, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.[7]

Focusing on the first sentence, the Commission claims freestanding authority here to "impose … public interest or other requirements for providing [DBS] video programming."[8]

That interpretation is unsupportable. It effectively reads the express limitation—"providing video programming"—out of the statute. If "providing video programming" includes the way prices are presented, then there is no limiting principle on the scope of FCC regulation over DBS. The item does not even try to draw such a line. In fact, Section 335 tells us what "providing video programming" means by listing the specific DBS activities the Commission may regulate. They include access to broadcast time, the use of facilities, and the permissible use of channel capacity for noncommercial purposes.[9] Tellingly, the statute authorizes us to prescribe "reasonable prices, terms, and conditions" that DBS operators assess on *educational programmers*.[10] But no similar provision covers *DBS subscribers*. Congress was thus clear what it meant. Beyond the text, the Commission concedes that "the legislative history suggests that when enacting section 335(a), Congress was focused on potential requirements to be placed on DBS providers with respect to public service programming."[11] The item does not—and cannot—suggest that Congress intended the expansive authority the Commission gives itself here.

It only gets worse, for the item conjures sweeping new powers to regulate how video prices are advertised.[12] In the cable context, the Commission has authority to enact rules only for the benefit of "subscribers"—think service outages, customer service hours, rate change notifications, consumer contracts, or as noted above, "communications between the cable operator and the subscriber (including standards governing bills and refunds)."[13] In other words, the statute covers contractual relationships between cable companies and their customers. Advertisements are exactly the opposite. They are directed at *non-subscribers*—people who have *no* contract with the provider. The distinction between subscribers and non-subscribers is no trifling detail. It goes to the very heart of the law. As for DBS, Section 335 is completely silent; it says nothing about subscribers *or* the public at large.[14]

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[7] 47 U.S.C. § 335(a) (emphasis added).

[8] *Report and Order* at para. 37.

[9] 47 U.S.C. § 335(b).

[10] 47 U.S.C. § 335(b)(3).

[11] *Report and Order* at para. 40.

[12] I use "advertisements" interchangeably with "promotional materials." The latter term is used in the final rule.

[13] 47 U.S.C. §§ 552(a), (b).

[14] 47 U.S.C. § 335.

Recognizing its predicament when it comes to advertising, the item falls back on the FCC's ancillary jurisdiction under Section 4(i) of the Communications Act.[15] That Hail Mary falls incomplete. As the D.C. Circuit has recognized, Section 4(i) "does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmissions, without regard to the scope of the proposed regulations."[16] Instead, to properly invoke Section 4(i), the FCC must (1) point to a general jurisdictional grant under Title I that covers the regulated subject; and (2) show that the regulations are reasonably ancillary to the FCC's effective performance of statutorily mandated responsibilities.[17]

The Commission's claim of ancillary authority falters at both steps. For one, Title I does not give us generalized authority over consumer protection. It would be quite odd if it did, for that is the province of the Federal Trade Commission, which routinely polices unfair and deceptive trade practices[18] and advertising in particular.[19] For another, the item cannot point to an FCC statutory responsibility to which the new advertising rules are ancillary. While the item tries to bootstrap off the TVPA, that law does not speak to advertising (indeed, as noted above, Congress considered whether to extend the law to advertising and ultimately did not), and in any event it gives the FCC no powers or responsibilities. The D.C. Circuit has repeatedly rejected similar FCC attempts of mission creep based on Section 4(i).[20]

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This item is yet another example of the new normal at the FCC. After three years of restraint, the Commission is now unlawfully arrogating authority over every aspect of a communications provider's business. At this point, only the courts can put an end to this raw assertion of power. I dissent.

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[15] *Report and Order* at paras. 36, 42. *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

[16] *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 798-99 (D.C. Cir. 2002).

[17] *American Library Ass'n. v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

[18] *See* 15 U.S.C. § 45(a)(2) (vesting power in the FTC to "prevent," subject to enumerated exemptions, "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce").

[19] In fact, the FTC has an ongoing proceeding to regulate the disclosure of the very category of so-called "junk fees" that the Commission says are at issue here. *See Rule on Unfair or Deceptive Fees*, Notice of Proposed Rulemaking, 88 F.R. 77420 (Nov. 9, 2023), https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees.

[20] *See, e.g.*, *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (no ancillary authority over network management practices); *American Library Ass'n.*, 406 F.3d at 700-705 (no ancillary authority over broadcast receivers unrelated to signal reception); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d at 806 (no ancillary authority to issue video description rules); *see also Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972) (no ancillary authority over the Sears Tower construction as it affected broadcast reception).