

(BCFs)⁴ on subscribers. We have initiated proceedings to review how the Commission’s existing cable customer service standards may be updated to protect consumers from misleading pricing and be applied to DBS providers.⁵ This item builds upon those efforts and addresses additional junk fee billing practices of cable and DBS providers that penalize subscribers for terminating video service or switching video service providers, and further protects consumers and promotes competition in the video programming marketplace.

II. BACKGROUND

2. *Billing Practices.* ETFs require subscribers to pay a fee for terminating a video services contract prior to its expiration date, making it costly for consumers to switch services during the contract term. Because an ETF may have the effect of limiting consumer choice after a contract is enacted, it may negatively impact competition for services in the marketplace. This billing practice has been used by video service providers for some time and, in 2008, the Commission heard from expert panelists regarding the use of ETFs by communications service providers, including representatives from cable and DBS providers.⁶ More recently, the *Executive Order on Promoting Competition in the American Economy* encouraged the Commission to consider “prohibiting unjust or unreasonable early termination fees for end-user communication contracts; enabling consumers to more easily switch providers” in order to promote competition and lower prices.⁷

3. BCFs require video service subscribers to pay for a complete billing cycle even if the subscriber terminates service prior to the end of that billing cycle. As such, BCFs penalize consumers for terminating service by requiring them to pay for services they choose not to receive. Video service subscribers may terminate service for any number of reasons, including moving, financial hardship, or poor service. Recently, some states have enacted laws restricting BCFs.⁸ The U.S. Court of Appeals for the First Circuit in *Spectrum Northeast, LLC v. Frey* recently decided that one such BCF regulation imposed by the State of Maine was not impermissible cable service rate regulation.⁹ Likewise, the

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³An ETF is a fee that a provider charges a subscriber when the subscriber terminates its service contract prior to its expiration.

⁴ A BCF is the fee that subscribers pay when they cancel service prior to the end of a billing cycle but do not receive a refund of a pro-rated share of the monthly charge for the unused service.

⁵ See *All-In Pricing for Cable and Satellite Television Service*, MB Docket No. 23-203, FCC 23-52 (rel. June 20, 2023) (2023 WL 4105426).

⁶ See *Open Commission Meeting*, June 12, 2008, <https://www.fcc.gov/news-events/events/2008/06/open-commission-meeting-june-2008>.

⁷ Executive Order 14036, 86 FR 36987 (July 9, 2021), §(1)(iv) (link: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>).

⁸ See, e.g., Maine regulation, 30-A M.R.S.A. § 3010(1-A) (“A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.”) and New Jersey regulation, N.J. Admin. Code § 14:18-3.8 (“Bills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service.”).

⁹ *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287 (1st Cir. 2022), *cert denied*, 143 S.Ct. 562 (2023) (finding that a Maine statute requiring cable franchisees to provide a *pro rata* credit or rebate to subscribers that cancel their service is not a law governing “rates for the provision of cable service” but rather is a “consumer protection law” that is not preempted). See *infra* para. 14.

Supreme Court of New Jersey recently reached the same conclusion regarding a similar New Jersey statute in the *Alleged Failure of Altice* case.¹⁰

4. *Customer Service Standards.* The 1984 Cable Act added Title VI to the Communications Act of 1934 (Act).¹¹ Section 632, entitled “Consumer Protection,” addressed one particular type of consumer protection—“customer service requirements,” providing specifically that “[a] franchising authority may require . . . provisions for enforcement of . . . customer service requirements . . .”¹² Although the term “customer service” is not defined in the statute, the legislative history of the 1984 Cable Act defined “customer service” as “the direct business relation between a cable operator and a subscriber” and “customer service requirements” as including requirements related to “rebates and credits to consumers.”¹³ In 1992, Congress amended section 632 to “provide protection for consumers against . . . poor customer service”¹⁴ in part by requiring the Commission to “establish standards by which cable operators may fulfill their customer service requirements.”¹⁵ The legislative history of the 1992 Cable Act explained that Congress considered cable customer service “an area of paramount concern,”¹⁶ and that the standards are intended to “provide increased consumer protection.”¹⁷ In 1993, the Commission implemented this mandate in section 76.309 of its rules, adopting baseline customer service requirements for cable operators.¹⁸ Although section 632 specifies certain topics that must be addressed in the

¹⁰ *Alleged Failure of Altice USA, Inc., to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1.1 et seq.*, --- A.3d ---- (Supreme Court of New Jersey, Apr. 3, 2023), 2023 WL 2746964 (“*Alleged Failure of Altice*”).

¹¹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

¹² 47 U.S.C. § 552.

¹³ H.R. REP. 98-934 at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716 (“Customer service means the direct business relation between a cable operator and a subscriber. Customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator’s consumer service offices; and the provision to customers (or potential customers) of information on billing or services.”).

¹⁴ S. REP. 102-92, at 1 (1992).

¹⁵ Pub. L. No. 102-385, 106 Stat. 1460 (1992); 47 U.S.C. § 552 (1992 Cable Act). The legislative history of the 1992 Cable Act points out that, “despite the ability of franchising authorities to include customer service requirements in franchise agreements, some cable operators have failed to provide satisfactory customer service. Numerous submissions to the Committee demonstrate that some cable operators . . . ignore or are slow to respond to customer billing inquiries.” H.R. REP. 102-628 at 36-37, 105 (1992).

¹⁶ H.R. REP. 102-628, at 36-37, 105 (1992); S. REP. 102-92, at 1, 3 (1992).

¹⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992). Nothing in the 1992 Cable Act changed the statement in the legislative history of the 1984 Cable Act that included “rebates and credits to consumers” as an example of customer service requirements. We note that, while not specifically addressing ETFs and BCFs, Congress has recently renewed its commitment to protecting consumers of video programming services, including DBS services, with the Television Viewer Protection Act of 2019 (TVPA). *See Television Viewer Protection Act of 2019*, Pub. L. No. 116-94, 133 Stat. 2534 (2019) (TVPA) (requiring MVPDs to “give consumers a breakdown of all charges related to the MVPD’s video service” before entering into a contract with a consumer for service). *See also* 47 U.S.C. § 562; *Media Bureau Seeks Comment on Implementation of the Television Viewer Protection Act of 2019*, DA 21-1610 (MB 2021). Congress stated its purpose in enacting the TVPA was “to provide basic protections to consumers when purchasing MVPD services . . .” *See* H.R. REP. 116-329, 116th Cong., 1st Sess. 2019 at 4. Both cable operators and DBS service providers fall within the statutory definition of the term MVPD or multichannel video programming distributor. *See* 47 U.S.C. § 522(13) (“the term “multichannel video programming distributor” means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming”).

Commission's cable customer service rules, such as "communications between the cable operator and the subscriber (including standards governing bills and refunds),"¹⁹ the list is not exhaustive.²⁰ Because section 632(b) states that the standards must address these topics "at a minimum," the Commission has broad authority to adopt customer service requirements beyond those enumerated in the statute.²¹ Indeed, when enacting its customer service standards, the Commission noted that "we reserve the right to respond to particular circumstances brought to our attention to ensure that customer service satisfaction is achieved nationwide."²²

5. With regard to DBS providers, section 303(v) of the Act grants the Commission "exclusive jurisdiction to regulate the provision of direct-to-home satellite services,"²³ and section 335(a) provides broad statutory authority to the Commission to impose "public interest or other requirements for providing video programming" on DBS providers.²⁴ While the Commission has not adopted specific customer service obligations for DBS providers as it has for cable providers, it has adopted rules implementing other public interest obligations.²⁵

III. DISCUSSION

6. Consistent with the objectives outlined above, we seek comment on our tentative conclusions with respect to ETFs and BCFs. As more thoroughly discussed below, this includes the scope and substance of our proposed rules, our legal authority to adopt these rules, the benefits and impacts of the proposed rules, and the extent to which any alternatives could achieve our policy goals.

7. *Proposed Rules.* First, we propose to prohibit cable and DBS service providers from imposing a fee for the early termination of a cable or DBS video service contract.²⁶ To the extent that the existing terms of service between a cable operator or DBS provider and its subscriber provide for an ETF,

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¹⁸ 47 CFR § 76.309(c)(1) (addressing cable system office hours and telephone availability), 76.309(c)(2) (addressing installations, outages, and service calls), 76.309(c)(3) (addressing communications between cable operators and cable subscribers); *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992 Consumer Protection and Customer Service*, MM Docket No. 92-263, Report and Order, 8 FCC Rcd 2892, 2901, para. 34 (1993) (*1993 Cable Consumer Protection Order*). The Commission later moved the notification requirements to a newly created Subpart T of its rules. *1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132, 14 FCC Rcd 4653, 4655-58, paras. 7-11 (1999).

¹⁹ *Id.* See also 47 U.S.C. § 552(b)(3).

²⁰ 47 U.S.C. § 552(b) ("such standards shall include, at a minimum, requirements governing" three enumerated areas, including (i) cable system office hours, telephone availability; (ii) installations, outages, and service calls; and (iii) communications between the cable operator and the subscriber, including billing and refunds).

²¹ *Id.* Congress emphasized the minimal nature of its articulated standards by noting that section 632 does not "prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section." 47 U.S.C. § 552(d)(2).

²² *1993 Cable Consumer Protection Order*, 8 FCC Rcd at 2907, para. 69.

²³ 47 U.S.C. § 303(v).

²⁴ 47 U.S.C. § 335(a).

²⁵ See, e.g., 47 CFR § 25.701 (political broadcasting and children's programming rules) and 47 CFR § 76.1300 (regulation of carriage agreements).

²⁶ See Appendix A, proposed rules 47 CFR § 25.701(g), "A DBS provider shall not charge a subscriber a fee for terminating a DBS services contract before its expiration date," and 47 CFR § 76.309(c)(5), "A cable operator shall not charge a subscriber a fee for terminating a cable services contract before its expiration date."

we seek comment on whether to deem such a provision unenforceable if we were to prohibit ETFs. We seek comment on this proposal to regulate video service ETFs. We tentatively find that our proposed prohibition on ETFs is a reasonable customer service requirement in an area, billing practices, where the Commission receives hundreds of complaints annually.²⁷ When the Commission first established its customer service standards, it acknowledged that a “key objective” of the Act was to “ensure that cable operators nationwide provide satisfactory service to their customers.”²⁸ We tentatively find that the imposition of ETFs inhibits subscribers from switching providers and making choices about the video services they wish to receive.²⁹ We tentatively find that the prohibition of ETFs will create a standard that protects consumers from a billing practice that may effectively limit their ability to switch video service providers.³⁰ Limiting such restrictions imposed on consumer choice could serve the public interest by allowing consumers to freely choose among providers, which promotes vibrant competition in the market for video services and encourages providers to maintain high customer service standards to retain subscribers to their service.³¹ Although in the past video service providers have generally claimed that ETFs decrease overall consumer costs,³² individual consumers maintain in general that ETFs are unreasonably restrictive.³³ We tentatively find that our proposed rule preventing ETFs will protect consumers from billing practices that may deter or make it more difficult for consumers to switch providers, and thereby impede competition in the video marketplace. We seek comment on these tentative conclusions.

8. We also propose to require cable and DBS service providers to grant subscribers a prorated credit or rebate³⁴ for the remaining whole days in a monthly or periodic billing cycle after the

²⁷ This figure is based on informal consumer complaints filed with the Commission for the years 2018-2022. The Commission’s Consumer Complaint Center can be found at: <https://consumercomplaints.fcc.gov/hc/en-us>.

²⁸ See *1993 Cable Consumer Protection Order*, 8 FCC Rcd 2892, 2893 at para. 4, citing S. REP. 102-92 and H.R. REP. 102-628.

²⁹ Examples taken from the Commission’s informal complaint process include the following consumer complaints: A subscriber moved to a different state that the provider did not service and was charged an ETF that they were not aware existed; a subscriber was told an ETF would be waived after moving to a new state but it was not; a subscriber was charged an ETF after moving to an address not serviced by the provider even after paying for service for 8 years; an elderly subscriber who needed to relocate for care was charged an ETF by the provider.

³⁰ S. REP. 102-92, at 1 (1992) (“The purpose of this legislation is to . . . provide protection for consumers against . . . poor customer service.”).

³¹ See 47 U.S.C. § 335(a) (authorizing the Commission to impose “public interest or other requirements for providing video programming” on DBS providers). See also 1992 Cable Act, Sec. 2(a)(6) (“There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.”).

³² In testimony at the June 12, 2008 Open Commission Meeting, John F. Murphy, then Senior Vice President, Controller & Chief Accounting Officer for DIRECTV stated that DIRECTV’s early cancellation fee is “critical to its competitiveness with other video providers. It enables DIRECTV to reduce upfront costs to consumers, encouraging consumers to switch to our offering.” Similarly, Daniel Brenner, then Sr. Vice President, Law and Regulatory Policy, NCTA, testified that “[b]arring early termination fees would only serve to squelch the offering of additional long-term options – and to deny consumers the savings benefits that such options can provide.” See <https://www.fcc.gov/news-events/events/2008/06/open-commission-meeting-june-2008>.

³³ Individual consumers testified that, at least in the context of cellular phone service, “It is my belief that the ETF is not a rate charge but is a marketing tool used to prevent customers from changing providers” (*Id.*, Testimony of Harold P. Schroer) and ETFs “have the intentional appearance of offering the consumer, me, a deal, while ultimately locking me into a long-term service agreement and making it very difficult and expensive for me to elect to change carriers when a better deal is available somewhere else.” (*Id.*, Testimony of Molly White).

³⁴ We note that the Act uses the term “refund” in section 632(b) whereas Congress referred to “rebates or credits” in the legislative history of section 632. Compare 47 U.S.C. 552(b)(3) with H.R. REP. 98-934 at 79 (1984), *reprinted*

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cancellation of service.³⁵ We seek comment on this proposal, and whether the specific language reflects our intent of relieving a subscriber from payment obligations as of the date the provider receives a cancellation request. To the extent that the existing terms of service between a cable operator or DBS provider and its subscriber provide for a BCF, we seek comment on whether to deem such a provision unenforceable if we were to prohibit BCFs. We tentatively find that this prohibition on BCFs is a reasonable customer service requirement because this practice requires consumers to pay for service they no longer wish to receive.³⁶ As with ETFs, we tentatively find that prohibition of BCFs will create a standard that protects consumers from poor customer service,³⁷ specifically, paying for services that have been cancelled, and that such a standard will serve the public interest³⁸ by protecting consumers from unfair billing practices. BCFs impose significant costs on consumers for services they have cancelled and no longer wish to receive. For instance, based on the average price for cable service, subscribers cancelling mid-billing cycle could pay a significant price even after cancelling their service: the average monthly price for basic tier cable service is \$42.63, for expanded basic tier service it is \$101.54, for the next most popular cable service tier it is \$115.67,³⁹ and the price for services comparable to expanded basic tier service from DIRECTV and DISH average \$123.52 and \$90.44 per month, respectively.⁴⁰ We tentatively find that our proposed rule preventing BCFs will protect consumers from charges for cancelled cable or DBS service they no longer want.⁴¹ We seek comment on these tentative conclusions.

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in 1984 U.S.C.C.A.N. 4655, 4716. Neither the Act nor the legislative history otherwise define these terms. We note that the dictionary definitions of each terms is similar. See Merriam-Webster Dictionary, online version, <https://www.merriam-webster.com/dictionary/rebate> (defining “rebate” as “a return of a part of a payment”); <https://www.merriam-webster.com/dictionary/credit> (defining “credit” as “a deduction from an amount otherwise due”); <https://www.merriam-webster.com/dictionary/refund> (defining “refund” as “to return (money) in restitution, repayment, or balancing of accounts”). Accordingly, we tentatively conclude that Congress did not intend for there to be any legal distinction between these terms, and thus we may use these terms interchangeably, as we do throughout this notice. We seek comment on this analysis and tentative conclusion.

³⁵ See Appendix A, proposed rules 47 CFR § 25.701(g), “A DBS provider must provide a subscriber a prorated credit or rebate for the remaining days in a monthly billing cycle after the cancellation of DBS service,” and 47 CFR § 76.309(c)(5), “A cable operator must provide a subscriber a prorated credit or rebate for the remaining days in a monthly billing cycle after the cancellation of cable service.”

³⁶ As noted above, the Commission receives hundreds of complaints annually about billing practices. This figure is based on informal consumer complaints filed with the Commission for the years 2018-2022. The Commission’s Consumer Complaint Center can be found at: <https://consumercomplaints.fcc.gov/hc/en-us>. Examples of consumer complaints include the following: A subscriber cancelled service on the 11th day of the month and was charged for the whole month despite service being disconnected; a subscriber cancelled service on the 16th day of the month and returned all of the provider’s equipment but was charged for the whole month; a subscriber terminated service on the 3rd day of the month but was charged for the whole month.

³⁷ S. REP. 102-92, at 1 (1992).

³⁸ 47 U.S.C. § 335(a).

³⁹ 2022 *Communications Marketplace Report, Appendix E, Report on Cable Industry Prices*, GN Docket No. 22-203, FCC 22-103, at 231, 233 (Dec. 30, 2022) (“[P]rogramming services referenced in the Report on Cable Industry Prices . . . reflect the non-promotional rates and exclude taxes and fees as well as fees subscribers may incur to lease cable equipment . . . We collected information on basic service and other cable programming services not offered on a per channel or per program basis, as well as cable equipment.”)

⁴⁰ 2020 *Communications Marketplace Report*, 36 FCC Rcd 2945, 3500-3501, Appendix E, Report on Cable Industry Prices at para. 40 and Attachment 1 (2020).

⁴¹ As one consumer stated, “Essentially, I was giving them a full month payment for less than a day of service.” (Testimony of Chris Black with regard to Maine’s BCF legislation). See <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=141443>. Another Maine video subscriber testified that a BCF “takes choice away from consumers in an already very limited marketplace, it disproportionately

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9. *Legal Authority.* We seek comment on our authority to adopt ETF and BCF regulations for cable and DBS providers.⁴² We tentatively conclude that adoption of restrictions on both ETFs and BCFs is a proper exercise of the Commission’s authority under section 632 to “establish standards by which cable operators may fulfill their customer service requirements.”⁴³ Section 632(b)(3) directs the Commission to establish standards governing “communications between the cable operator and the subscriber (including standards governing bills and refunds).”⁴⁴ Because ETFs and BCFs involve cable operators’ billing and refund practices, we tentatively conclude that these are customer service matters within the meaning of section 632(b)(3). In addition, we tentatively find that we may regulate these practices under our general authority in 632(b) to establish “customer service” standards. Although the term “customer service” is not defined in the statute, the legislative history defines the term “customer service” to mean “in general” “the direct business relation between a cable operator and a subscriber,” and goes on to explain that “customer service requirements” include requirements related to “rebates and credits to consumers.”⁴⁵ We tentatively conclude that the proposed restriction on ETFs and BCFs satisfies the definition of a “customer service requirement” because billing practices governing the termination of service, such as ETFs and BCFs, involve the “direct business relation between a cable operator and a subscriber.”⁴⁶ Additionally, we tentatively find that pro-rata refunds are properly considered “rebates [or] credits” given to consumers, which, according to the legislative history, are customer service matters.⁴⁷ Furthermore, the list of topics Congress required the Commission to address in terms of customer service⁴⁸ was not exhaustive. We tentatively conclude that fees—both those inhibiting subscribers from making choices about the video services they wish to receive and those imposing significant costs on consumers for services they did not choose to receive—are precisely the type of customer service concerns that Congress meant to address when it enacted section 632.⁴⁹ Thus, we tentatively find that restrictions on such practices are within the statute’s grant of authority. We seek comment on this analysis. We also seek comment on whether there are alternative or additional statutes or arguments that provide a legal basis for our authority to adopt this customer service requirement for cable operators.

10. We also seek comment on our authority to adopt ETF and BCF regulations for DBS providers. We tentatively find that restrictions on ETFs are in the public interest because the fees unreasonably inhibit competition and consumer choice among video service providers. We tentatively find that restrictions on BCFs are in the public interest because the practice imposes fees on subscribers for services that they did not choose to receive and that the fees can be significant. Excluding DBS from these rules would mean that their subscribers would remain vulnerable to these practices. Do we have authority under section 335(a) to adopt ETF and BCF regulations for DBS providers?⁵⁰ Do we have

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affects fellow Mainers subject to housing and other financial insecurities, and it’s simply unfair by any reasonable measure of fairness.” (Testimony of Ryan Minikis). See <http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=141444>.

⁴² 47 U.S.C. § 552.

⁴³ 47 U.S.C. § 552(b).

⁴⁴ 47 U.S.C. § 552(b)(3).

⁴⁵ H.R. REP. 98-934 at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 47 U.S.C. § 552(b). See also H.R. REP. 102-628, at 36-37, 105 (1992); S. REP. 102-92, at 1, 3 (1992).

⁴⁹ H.R. REP. 98-934 at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4716; H.R. REP. 102-628, at *34 (both noting that customer service topics include “rebates and credits to consumers” and “information on billing or services.”).

⁵⁰ Section 335(a) authorizes the Commission to impose on DBS providers “public interest or other requirements for providing video programming.” 47 U.S.C. § 335(a). Although section 335(a) requires the Commission to adopt

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authority under other provisions of Title III?⁵¹ We also seek comment on whether we have—and should exercise—ancillary authority under section 4(i) of the Act to adopt such regulations and whether it is necessary to undertake this regulation for the Commission to effectively perform its responsibilities under the foregoing primary sources of statutory authority?⁵² By doing so, we will ensure uniformity of regulation between and among cable operators (regulated under Title VI and by various state consumer protection laws and local franchising provisions) and DBS providers (under Title III), thereby preventing DBS providers from gaining a competitive advantage over their competitors through the use of ETFs and BCFs.⁵³ We seek comment on this analysis. We also seek comment on whether there are alternative or additional statutes or arguments that provide a legal basis for our authority to adopt these customer service requirements for DBS providers.

11. Finally, as noted above, based on the language and structure of section 632, Congress authorized the Commission to establish customer service requirements, and franchising authorities to adopt additional laws above and beyond the Commission’s baseline requirements.⁵⁴ Therefore, we tentatively find that this proposed rule would not preempt existing state and local laws that prohibit ETFs and BCFs or otherwise exceed the requirements we adopt in this proceeding, so long as they are not inconsistent with Commission regulations. We seek comment on this analysis.

12. *Rate Regulation versus Customer Service Regulation.* In *Spectrum Northeast, LLC v. Frey*, the First Circuit determined that a state regulation prohibiting BCFs substantially similar to the prohibition we propose here is not rate regulation pursuant to the Act.⁵⁵ We tentatively conclude that this same analysis (as described in further detail below) applies to our proposed BCF prohibition. We seek comment on this tentative conclusion. While *Spectrum Northeast, LLC v. Frey* addresses the issue of whether a BCF prohibition is impermissible rate regulation, the court did not address ETFs. We tentatively conclude that cable ETF regulations are not rate regulations under section 623 of the Act.⁵⁶ We seek comment on this tentative conclusion. The statute does not define the term “rates” or explain the

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certain statutory political broadcasting requirements for DBS providers, the statute is clear that this list is not exhaustive. 47 U.S.C. § 335(a) (“Any regulations prescribed pursuant to such rulemaking shall, *at a minimum*, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service . . .”) (emphasis added).

⁵¹ See *Targeting and Eliminating Unlawful Text Messages*, Report and Order and Further Notice of Proposed Rulemaking, 2023 WL 2582658, para. 40 (2023) (noting the Commission’s authority under Sections 303(b), 307, and 316).

⁵² 47 U.S.C. § 154(i).

⁵³ See, e.g., *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1405-06 (D.C. Cir. 1996) (upholding reliance on 4(i) for the Commission to adjust the terms of preferences to reduce the gulf between recipients of preferences (who would otherwise receive a free license) and other license aspirants (who, under the new auction regime, would have to pay for a license)).

⁵⁴ 47 U.S.C. § 552. See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, MB Docket No. 05-311, 22 FCC Rcd 19633, 19646, para. 27 (2007) (citing 47 U.S.C. § 552(d)(2) (stating that the “statute’s explicit language makes clear that Commission standards are a floor for customer service requirements, rather than a ceiling, and thus do not preclude LFAs from adopting stricter customer service requirements”).

⁵⁵ *Spectrum Northeast, LLC v. Frey*, 22 F.4th 287, 293 (1st Cir. 2022), *cert denied*, 143 S.Ct. 562 (2023) (stating a “termination event ends cable service, and a rebate on termination falls outside the ‘provision of cable service.’ Thus, the plain language of § 543 excludes the time after provision of service . . .”). See 47 U.S.C. § 543(a)(1); Maine regulation, 30-A M.R.S.A. § 3010(1-A) (“A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.”).

⁵⁶ 47 U.S.C. § 543.

meaning of the phrase “rates for the provision of cable service” for purposes of section 623. Historically, the Commission’s cable rate regulations have not covered service termination fees or termination rebates.⁵⁷ The Commission has previously found the regulation of fees similar to the proposed regulation of ETFs and BCFs is not rate regulation. For instance, the Commission has found that limits on late fees are considered customer service regulation and not rate regulation.⁵⁸ And, in practice, the Media Bureau and its predecessor bureau (the Cable Services Bureau) have found that local regulations similar to the proposed ETF and BCF regulations herein, were not properly categorized as rate regulation and therefore not pre-empted. Such findings have included local regulations that address unreturned equipment fees, pay-by-phone fees, late fees, returned check fees, and other miscellaneous cable subscriber charges that were found not to be included as part of the Commission’s rate regulations.⁵⁹ Thus, we tentatively conclude that Commission practice and precedent supports the notion that ETF regulations also are not rate regulation.

13. Furthermore, our tentative conclusion is consistent with recent court precedent. In the First Circuit’s recent decision in *Spectrum Northeast, LLC v. Frey*,⁶⁰ the court determined that a state BCF regulation is not rate regulation pursuant to the Act.⁶¹ The Maine regulation was enacted after a cable company implemented a new practice of declining to provide refunds when cable service was terminated prior to the end of a billing cycle. The regulation then required cable operators to issue prorated credits or rebates for the days remaining in a billing period after termination of cable service. The court determined that the federal preemption of cable rate regulation⁶² “did not extend to the regulation of termination rebates”⁶³ and concluded that the Maine law is not a law governing “rates for the provision of cable service” but rather is a “consumer protection law”⁶⁴ that is not preempted.⁶⁵ The court based its decision on four aspects of the structure and legislative history of the Act. First, the court explained that the legislative history of the Act and the Commission’s regulations “focused on preempting monthly ‘rates’ charged for the provision of basic cable service” and do not “suggest that the term ‘rates

⁵⁷ See 47 CFR §§ 76.901-76.990.

⁵⁸ See 1993 Cable Consumer Protection Order, 8 FCC Rcd at 2907, para. 68.

⁵⁹ See, e.g., *Falcon Cablevision, Memorandum Opinion and Order*, 11 FCC Rcd 10511, 10525 (CSB 1996) (late fees and charges for returned checks, converter equipment deposits, field collections, and account transfers may be reviewed through the application of customer service laws); *Charter Communications*, 20 FCC Rcd 3503, 3505-06 (MB 2005) (unreturned equipment fees may be reviewed through application of customer service laws).

⁶⁰ *Spectrum Northeast*, 22 F.4th at 301 (“It is also not a stretch to think that Maine’s limited termination-rebate law in the Pro Rata Act protects against the kind of deceptive business practices that consumer protection laws typically target.”).

⁶¹ 47 U.S.C. § 543(a)(1); Maine regulation, 30-A M.R.S.A. § 3010(1-A) (“A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.”).

⁶² See 47 U.S.C. § 556 (“Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.”).

⁶³ *Spectrum Northeast*, 22 F.4th at 299-301.

⁶⁴ The court left open the separate issue of whether the state BCF regulation was a “customer service” regulation within the broader category of consumer protection laws. *Id.* at 303.

⁶⁵ *Id.* The Maine statute, entitled “When Service Is Cancelled by a Subscriber” amended Me. Stat. tit. 30-A, § 3010, titled “Consumer rights and protection relating to cable television service,” to add: “A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period.” This language is similar to the proposed rule in Appendix A. See Appendix A, proposed rule 47 CFR § 76.309(c)(5), “A cable operator must provide a subscriber a prorated credit or rebate for the remaining days in a monthly billing cycle after the cancellation of cable service.”

for the provision of cable service’ includes termination fees or termination rebates.”⁶⁶ Second, the court noted that Congressional silence concerning termination fees or rebates is “particularly significant” because Congress included regulation of rates for “installation” fees, but not termination fees, as rates “for the provision of cable service.”⁶⁷ Third, the court observed that Congress acknowledged multiple potential sources of competition but did not identify termination credits as being controlled by effective competition. Instead, termination credits encourage competition “by prohibiting cable companies from creating artificial barriers to switching between competitors by charging consumers beyond termination of service.”⁶⁸ Finally, the court found that Congress expressed a purpose to “preserve state consumer protection laws” despite preempting the regulation of “rates for the provision of cable service,” and this favors “a narrow reading of the scope of the preemption provision.”⁶⁹

14. The New Jersey Supreme Court also recently concluded that a New Jersey statute banning BCFs was not rate regulation preempted by federal law.⁷⁰ The New Jersey code states that “[b]ills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service.”⁷¹ In *Alleged Failure of Altice*, the Supreme Court of New Jersey concluded that New Jersey’s BCF regulation does not regulate cable rates or control the rates for the provision of cable service.⁷² The court based its decision on the “ordinary meaning” of the text from the New Jersey statute and the Cable Act.⁷³ The court determined that “the plain and ordinary meaning of rate regulation . . . is not so broad as to encompass all laws that affect or concern cable prices.”⁷⁴ With regard to the New Jersey BCF regulation, the court concluded that “the challenged regulation does not even indirectly affect the actual rate Altice charges . . . the regulation merely uses the rate that the cable provider sets to enforce a price proportional to the quantity of service provided.”⁷⁵

15. With regard to cable ETFs, we tentatively conclude that the courts’ logic in *Spectrum Northeast, LLC v. Frey* and *Alleged Failure of Altice* applies to the ETF regulation we propose in this *NPRM*. Similar to a BCF, an ETF is assessed upon *termination* of service, i.e., it concerns the time period when cable service ends. Thus, a restriction on ETFs does not appear to cap the amount a cable operator can charge for the provision of cable service; rather, it regulates only the charge that a cable operator may impose on a customer *after* the customer has elected to *terminate* service. Further, we tentatively find that the structure and legislative history of the Act does not support treating ETFs as a form of rate regulation, just as the courts found with regard to BCFs.⁷⁶ Also, we tentatively find that an ETF does not

⁶⁶ *Spectrum Northeast*, 22 F.4th at 298-299.

⁶⁷ *Id.* at 299.

⁶⁸ *Id.* at 300.

⁶⁹ *Id.*

⁷⁰ See *Alleged Failure of Altice*. See also, *Altice USA, Inc. v. New Jersey Board of Public Utilities*, 26 F.4th 571 (3d Cir. 2022) (vacating and remanding a Federal District Court’s finding of preemption).

⁷¹ N.J. Admin. Code § 14:18-3.8.

⁷² 2023 WL 2746964 at 8.

⁷³ *Id.*

⁷⁴ *Id.* at 9.

⁷⁵ *Id.*

⁷⁶ See discussion in para. 14, *supra*. That is, (i) the legislative history of the Cable Act does not suggest that the term “rates for the provision of cable service” includes termination fees; (ii) Congressional silence concerning termination fees is “particularly significant” because Congress included regulation of rates for “installation” fees, but not termination fees, as rates “for the provision of cable service”; (iii) Congress acknowledged multiple potential sources of competition but did not identify termination fees as being controlled by effective competition; and (iv)

(continued....)

fall within the plain and ordinary meaning of rate regulation, similar to the court’s reasoning regarding BCFs.⁷⁷ Thus, we tentatively conclude that regulation of ETFs is not “rate regulation.” In addition, our tentative conclusion is consistent with case law evaluating whether State regulation of cellular telephone ETFs is preempted by federal rate regulation.⁷⁸ In *In re Cellphone Termination Fee Cases*, the California Court of Appeals for the First District concluded that a cellular telephone ETF regulation was not preempted by federal law.⁷⁹ Although the court was not addressing cable rate regulation specifically, it was addressing a similar statutory provision⁸⁰ that carves out the universe of “other terms and conditions” from rate regulation of wireless services, similar to how “consumer protection” and “customer service” is distinct from rate regulation in the cable statute. The scope of both carveouts appears to be similar in nature and includes billing issues, consumer protection, and customer service.⁸¹ The court concluded that the “purpose in adopting the cellular telephone ETF was to control churn” and prevent customers from leaving,⁸² and because the State law invalidating the ETFs had “only an indirect and incidental effect on . . . rates,” it was not preempted by federal law.⁸³ We find this reasoning and that of the BCF cases discussed above to be applicable to the question of whether cable ETF regulations are rate regulations under the Act, and tentatively conclude that they are not. We therefore tentatively conclude that, consistent with case law and the Commission’s own precedent, regulations concerning cable ETFs also are not rate regulations. Thus, we tentatively find inapplicable section 623’s prohibition on the Commission’s regulation of “the rates for the provision of cable service” in franchise areas where effective competition exists.⁸⁴ Nearly all, if not all, cable operators now face effective competition and are not subject to rate regulation.⁸⁵ However, there is no such prohibition found in section 632’s customer

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Congress preserved the regulation of customer service, despite placing limitations on the regulation of “rates for the provision of cable service.” *Id.* See also *Cable Television Ass’n of N.Y., Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992) (“[T]he Cable Act does not expressly pre-empt state regulation of downgrade charges.”).

⁷⁷ See discussion in para. 15, *supra*. As mentioned above, ETFs are fees imposed upon termination of service, rather than charges for the provision of cable service.

⁷⁸ *In re Cellphone Termination Fee Cases*, 193 Cal.App.4th 298, 122 Cal.Rptr.3d 726 (2011), *cert. denied*, 565 U.S.1014, 132 S.Ct. 555, 181 L.Ed.2d 397 (2011) (regulation of cellular telephone ETFs as liquidated damages provisions was not preempted rate regulation).

⁷⁹ *In re Cellphone Termination Fee Cases*, 193 Cal.App.4th at 319, 122 Cal.Rptr.3d at 744, *cert. denied*, 565 U.S.1014, 132 S.Ct. 555, 181 L.Ed.2d 397 (2011).

⁸⁰ See 47 U.S.C. § 332(c)(3)(A) (“no State or local government shall have any authority to regulate the . . . rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services”).

⁸¹ *Id.* Section 332(c)(3)(A)’s clause governing “other terms and conditions,” which are regulated by the States, “include such matters as customer billing information and practices and billing disputes and other consumer protection matters.” See H.R. Rep. No. 103-111, at 211 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588.

⁸² *In re Cellphone Termination Fee Cases*, 193 Cal.App.4th 298, 320 (2011).

⁸³ *Id.* at 321.

⁸⁴ 47 U.S.C. § 543(a)(2) (“If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission. . .”). There is no corollary provision with regard to DBS providers.

⁸⁵ See, e.g., *NATOA v. FCC*, 862 F.3d 18 (D.C. Cir. 2017) (upholding the FCC’s rebuttable presumption that cable operators are subject to effective competition under the competing provider test); *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI*, Memorandum Opinion and Order, 34 FCC Rcd 10229 (2019), *petition for review denied*, *Mass. Dep’t of Telecomms. & Cable v. FCC*, 983 F.3d 28 (1st Cir. 2020) (finding of LEC effective competition). Likewise, if State and local ETF and BCF regulations are “rate regulations,” they would be preempted by the Commission’s rules and also susceptible to the effective competition rule. See 47 U.S.C § 543 (“No Federal agency or State may regulate the rates for the provision of cable service

(continued....)

service provision.⁸⁶ Accordingly, the applicability of ETF and BCF regulations are not affected by the existence of effective competition in a community. We seek comment on this analysis.

16. *Implementation.* We seek comment on how to tailor our rules to best protect consumers and promote competition. As an initial matter, we seek specific comment on the interplay of our proposed rules and any state or local ETF and BCF regulations.⁸⁷ To what extent are State and local authorities currently regulating ETFs and BCFs with respect to cable and DBS services?⁸⁸ Do local authorities have adequate resources to enforce the proposed rules effectively? To the extent the Commission were to enforce its own rules in individual cases, how could it best coordinate enforcement with local authorities?

17. We also seek specific comment from State and local authorities on our proposed prohibition on cable and DBS ETFs and BCFs as proposed in Appendix A. Should we adopt something less than a total ban and allow variations within States or communities?⁸⁹ Given our shared jurisdiction with local authorities over cable customer service issues, we seek comment regarding their local subscriber complaints and regulation experiences. We seek comment on what enforcement mechanisms should be implemented at the federal level. We also seek comment on what enforcement mechanisms have been or could be implemented at the local level and how those might inform enforcement mechanisms at the federal level. To the extent we adopt a ban on DBS ETFs and BCFs, would this need to be enforced by the Commission given that DBS providers are not required to have local or state franchises? If so, are there additional rules we should adopt to ensure an effective enforcement scheme?

18. If the Commission adopts the proposals to ban ETFs and BCFs, what is a reasonable amount of time for cable and satellite providers to implement this change? How should our proposed rule banning BCFs be implemented for the benefit of current subscribers? Do operators require time to implement changes to their current billing systems? What effect, if any, will our proposed rule banning ETFs have on consumers' existing contracts? If commenters argue that our proposed rule should apply only to new contracts entered into after its effective date, what are the legal and policy justifications for treating agreements of existing customers differently than new customers? Should there be a grace period to accommodate existing contracts with ETF provisions? If so, what effect, if any, will our proposed rule have on existing ETFs? In lieu of the rules proposed in Appendix A, we seek comment on whether the

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except to the extent provided under this section. . ."). See also 47 U.S.C. § 556 (“[A]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.”).

⁸⁶ 47 U.S.C. § 552.

⁸⁷ Section 632 does not prevent “the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section.” 47 U.S.C. § 552(d)(2).

⁸⁸ To date, the Commission has deferred to local authorities to enforce its cable customer service obligations. See *1993 Cable Consumer Protection Order*, 8 FCC Rcd at 2897, para. 19. Although the Commission previously determined that the statute did not give it a “specific enforcement role” with regard to customer service requirements whereas it gave such a role to local franchise authorities, we note that there is nothing in section 632 or its legislative history that precludes the Commission’s ability to enforce its own standards. *Id.* Indeed, the Commission has always retained its enforcement authority to address “systemic abuses that undermine the statutory objectives.” *1993 Cable Consumer Protection Order*, 8 FCC Rcd at 2897, para. 19. Moreover, the Commission has broad authority under the Act to enforce its rules. See 47 U.S.C. § 151 (directing the Commission to “execute and enforce the provisions of [the Communications] Act”); 47 U.S.C. § 312(b) (authorizing the Commission to order persons to cease and desist from violating any provision of the Act or the Commission’s rules); 47 U.S.C. § 503 (authorizing the Commission to assess a forfeiture penalty for failure to comply with any of the provisions of the Act, or any rule, regulation, or order issued by the Commission under this Act).

⁸⁹ See *infra* para. 19.

Commission should, on the other hand, adopt more detailed cable and DBS regulations that include grace periods, limiting or extenuating circumstances, or other factors for determining when an ETF or BCF might be appropriate. Is there any justification for less than a total ban on ETFs and BCFs? For example, should our rules exempt small cable operators or rural cable operators? Any party advocating for an exception should explain the reason they believe a carve-out from the prohibition is necessary. We seek comment on these issues.

19. To the extent cable or DBS video service is part of a bundled package with non-video services, could ETF and BCF rules be applied to the entire bundle, and if so, under what authority? We therefore seek comment on enforcement issues relating to an ETF or BCF ban when video services are bundled with non-video services. With respect to cable, does permitting state and local government enforcement of an ETF or BCF ban conflict with other sections of Title VI of the Act or the scope of local franchise authority under Title VI when video services are included as part of a bundle?⁹⁰ We recognize that section 624(b)(1) provides that franchising authorities “may not . . . *establish* requirements for . . . information services.”⁹¹ Does this provision limit franchising authorities’ ability to enforce a Commission-established ban on ETFs or BCFs when video services are part of a bundle with non-video services? We seek comment on these issues.

20. *State of the Video Marketplace.* We seek comment on how cable operators and DBS providers currently handle ETFs and BCFs.⁹² As noted above, BCFs are a more recent development than ETFs. Were there changes in the video marketplace that prompted introduction of ETFs and/or BCFs? Are there video service providers who currently do not impose ETFs and/or BCFs? Are there providers that offer multiple subscription choices including plans with and without ETFs? Are providers offering long term contracts at reduced prices without ETFs? If so, what other differences are there between offerings with and without ETFs? How likely are consumers to elect a plan that does not include ETFs when such offerings are available? If such offerings are available, what is the cable operator’s or DBS provider’s rationale for offering that plan or option? Would the absence or presence of an ETF impact a consumer’s choice of provider? Are there any cable operators or DBS providers that offer multiple subscription choices including plans with and without BCFs? If so, what is the cable operator’s or DBS provider’s rationale for offering that plan or option? Are there cable operators or DBS providers that only impose BCFs in certain circumstances and not in other circumstances? If so, what are the circumstances in which the BCF is not imposed? What is the cable operator’s or DBS provider’s rationale for not imposing the BCF in those circumstances? Would the absence or presence of BCFs impact a consumer’s choice of provider? How would prohibiting or limiting cable operators and DBS providers from imposing ETFs and/or BCFs change providers’ current customer services?

21. *Cost/Benefit Analysis.* If a ban on ETFs were implemented, we expect consumers to benefit because they would have the ability to switch video service providers more easily and cancel video service without cost. In addition, a ban on BCFs would benefit consumers because it would prevent consumers from paying for services they choose not to receive. If ETFs are eliminated, would video service providers still choose to offer long term contracts for reasons other than price, for instance in order to avoid churn? Could the elimination of ETFs alter the price of long term contracts and if so how? What would be the impact of such changes on consumers? If video service providers were to decide not

⁹⁰ See *City of Eugene, Oregon v. FCC*, 998 F.3d 701 (6th Cir. 2021), *cert. denied*, 142 S.Ct. 1109 (2022) (holding that the Act preempts State or local action that is “inconsistent” or “incompatible” with any of the Act’s provisions).

⁹¹ 47 U.S.C. § 544(b)(1) (emphasis added). See also *City of Eugene*, 998 F.3d at 715.

⁹² See Letter from Mary Beth Murphy, Vice President and Deputy General Counsel, NCTA to Marlene H. Dortch, Secretary, Federal Communications Commission (December 6, 2023); Letter from Michael Nilsson, Counsel to the American Television Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission (December 6, 2023); and Letter from Michael Nilsson, Counsel to DIRECTV, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (December 7, 2023).

to offer long term contracts or to offer them at higher prices, would the higher prices be offset by the consumer savings in avoiding ETFs? How would these possible outcomes affect low-income and new consumers? Further, would eliminating ETFs and BCFs affect billing cycles? We seek comment on how the Commission should assess the likelihood and magnitude of these potential benefits and costs to consumers.

22. We also seek comment on how a ban on ETFs and BCFs would affect competition among video providers. By reducing consumer switching costs, could a ban on ETFs foster competition between developing online video services and cable and satellite video providers? For example, might consumers who have signed multi-year contracts with cable and satellite video providers benefit from earlier opportunities to choose among all options? Would this additional choice enhance competition? For cable and satellite video customers, what are the shares of customers with month-to-month, one-year, two-year, or other service agreements subject to ETFs or BCFs?

23. We also seek comment on any potential costs that would be imposed on regulatees if we adopt the proposals contained in this *NPRM*. Do these costs differ between large and small cable providers? Would a ban on ETFs and BCFs impose substantial or unnecessary burdens on small cable operators? Further, would a ban on ETFs limit entry by new providers by limiting their ability to recoup upfront costs through an ETF? Would a ban on ETFs and BCFs have a positive impact on video service provider negotiations with broadcast stations and cable networks for programming by allowing consumers more freedom to switch providers to obtain preferred programming? Could programming costs be affected by a ban on ETFs and BCFs? What amounts do cable and DBS operators charge for early termination fees? Comments should be accompanied by specific data and analysis supporting claimed costs and benefits.

24. *Digital Equity and Inclusion*. Finally, the Commission, as part of its continuing effort to advance digital equity for all,⁹³ including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations⁹⁴ and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

IV. PROCEDURAL MATTERS

25. *Ex Parte Rules - Permit-But-Disclose*. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁹⁵ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are

⁹³ Section 1 of the Communications Act of 1934 as amended provides that the FCC "regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex." 47 U.S.C. § 151.

⁹⁴ The term "equity" is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

⁹⁵ 47 CFR §§ 1.1200 *et seq.*

reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

26. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
 - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
 - Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.⁹⁶
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

27. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),⁹⁷ requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a

⁹⁶ See *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

⁹⁷ See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

substantial number of small entities.”⁹⁸ Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible/potential impact of the rule and policy changes contained in this *NPRM*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. Comments must be filed by the deadlines for comments on the *NPRM* indicated on the first page of this document and must have a separate and distinct heading designating them as responses to the IRFA.

28. *Paperwork Reduction Act*. This document does not contain any proposed information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4).

29. *Providing Accountability Through Transparency Act*. Consistent with the Providing Accountability Through Transparency Act, Public Law 118-9, a summary of this document will be available on <https://www.fcc.gov/proposed-rulemakings>.⁹⁹

30. *People with Disabilities*. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

31. *Additional Information*. For additional information on this proceeding, please contact Katie Costello, Media Bureau, Policy Division at katie.costello@fcc.gov or (202) 418-2233.

V. ORDERING CLAUSES

32. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 1, 4(i), 303(v), 335(a) and 632(b), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(v), 335(a) and 552(b), this Notice of Proposed Rulemaking **IS ADOPTED**.

33. **IT IS FURTHER ORDERED** that the Commission’s Office of the Secretary, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹⁸ *Id.* § 605(b).

⁹⁹ 5 U.S.C. § 553(b)(4). The Providing Accountability Through Transparency Act, Pub. L. No. 118-9 (2023), amended section 553(b) of the Administrative Procedure Act.

APPENDIX A

Proposed Rules

Part 25 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

PART 25 – SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 is amended to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 335, 605, and 721, unless otherwise noted.

2. Amend § 25.701 by revising paragraph (a) and by adding paragraph (g) to read as follows:

§ 25.701 Other DBS Public interest obligations.

(a) DBS providers are subject to the public interest obligations set forth in paragraphs (b), (c), (d), (e), (f) and (g) of this section. * * *

* * * * *

(g) Customer service obligations.

A DBS provider shall not charge a subscriber a fee for terminating a DBS services contract before its expiration date. A DBS provider must provide a subscriber a prorated credit or rebate for the remaining days in a billing cycle after the cancellation of DBS service.

* * * * *

Part 76 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573

2. Amend § 76.309(c) by adding paragraph (5) to read as follows:

§ 76.309 Customer service obligations.

* * * * *

(c) * * *

(5) A cable operator shall not charge a subscriber a fee for terminating a cable services contract before its expiration date. A cable operator must provide a subscriber a prorated credit or rebate for the remaining days in a billing cycle after the cancellation of cable service.

* * * * *

APPENDIX B**Initial Regulatory Flexibility Act Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The NPRM initiates a proceeding to consider billing practices that inhibit video service subscribers from choosing the video services they want and that result in consumers paying fees for video services they choose not to receive. The Commission has received numerous complaints from cable and DBS subscribers about two billing practices: early termination fees (ETFs) and billing cycle fees (BCFs). An ETF is a fee that a provider charges a subscriber when the subscriber terminates its service contract prior to its expiration. ETFs remove consumer choice, negatively impacting competition for services in the marketplace. A BCF is a fee that subscribers pay when they cancel service prior to the end of a billing cycle and the service provider refuses to refund a pro-rated share of the billing cycle charge for the unused service. BCFs harm consumers by requiring them to pay for services they did not choose to receive. Both of these fees place a financial burden on subscribers and can create barriers to competition. The proposed rules in the NPRM will prevent the imposition of ETFs and BCFs, protecting consumers and promoting competition.

B. Legal Basis

3. The proposed action is authorized under sections 1, 4(i), 303(v), 335(a) and 632(b), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(v), 335(a) and 552(b).

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).⁶ A small

¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² 5 U.S.C. § 603(a).

³ *Id.*

⁴ 5 U.S.C. § 603(b)(3).

⁵ 5 U.S.C. § 601(6)

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.*

business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

5. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis.⁸ The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources.⁹ The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.¹⁰ The SBA small business size standard for this industry classifies firms with annual receipts less than \$41.5 million as small.¹¹ Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year.¹² Of that number, 149 firms operated with revenue of less than \$25 million a year and 44 firms operated with revenue of \$25 million or more.¹³ Based on this data, the Commission estimates that a majority of firms in this industry are small.

6. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.¹⁴ Based on industry data, there are about 420 cable companies in the U.S.¹⁵ Of these, only seven have more than 400,000 subscribers.¹⁶ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹⁷ Based on industry data, there are about 4,139 cable systems (headends) in the U.S.¹⁸ Of these, about 639 have more than 15,000 subscribers.¹⁹ Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

⁷ 15 U.S.C. § 632(a)(1)-(2)(A).

⁸ See U.S. Census Bureau, *2017 NAICS Definition, "515210 Cable and Other Subscription Programming,"* <https://www.census.gov/naics/?input=515210&year=2017&details=515210>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See 13 CFR § 121.201, NAICS Code 515210 (as of 10/1/22, NAICS Code 516210).

¹² See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515210, <https://data.census.gov/cedsci/table?y=2017&n=515210&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>. The US Census Bureau withheld publication of the number of firms that operated for the entire year to avoid disclosing data for individual companies (see Cell Notes for this category).

¹³ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue in all categories of revenue less than \$500,000 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in these categories). Therefore, the number of firms with revenue that meet the SBA size standard would be higher than noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.

¹⁴ 47 CFR § 76.901(d).

¹⁵ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

¹⁶ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022); S&P Global Market Intelligence, *Multichannel Video Subscriptions, Top 10* (April 2022).

¹⁷ 47 CFR § 76.901(c).

¹⁸ S&P Global Market Intelligence, S&P Capital IQ Pro, U.S. MediaCensus, *Operator Subscribers by Geography* (last visited May 26, 2022).

7. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, contains a size standard for a “small cable operator,” which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁰ For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 498,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator.²¹ Based on industry data, only six cable system operators have more than 498,000 subscribers.²² Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.²³ Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

8. *Direct Broadcast Satellite (“DBS”) Service*. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. DBS is included in the Wired Telecommunications Carriers industry which comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks.²⁴ Transmission facilities may be based on a single technology or combination of technologies.²⁵ Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services.²⁶ By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.²⁷

9. The SBA small business size standard for Wired Telecommunications Carriers classifies

(Continued from previous page)

¹⁹ S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 12/21Q* (last visited May 26, 2022).

²⁰ 47 U.S.C. § 543(m)(2).

²¹ *FCC Announces Updated Subscriber Threshold for the Definition of Small Cable Operator*, Public Notice, DA 23-906 (MB 2023) (2023 *Subscriber Threshold PN*). In this Public Notice, the Commission determined that there were approximately 49.8 million cable subscribers in the United States at that time using the most reliable source publicly available. *Id.* This threshold will remain in effect until the Commission issues a superseding Public Notice.. See 47 CFR § 76.901(e)(1).

²² S&P Global Market Intelligence, S&P Capital IQ Pro, *Top Cable MSOs 06/23Q* (last visited Sept. 27, 2023); S&P Global Market Intelligence, *Multichannel Video Subscriptions*, Top 10 (April 2022).

²³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission’s rules. See 47 CFR § 76.910(b).

²⁴ See U.S. Census Bureau, *2017 NAICS Definition*, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

²⁵ *Id.*

²⁶ See *id.* Included in this industry are: broadband Internet service providers (e.g., cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed-circuit television (CCTV) services; VoIP service providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system (DTH) services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services (MMDS).

²⁷ *Id.*

firms having 1,500 or fewer employees as small.²⁸ U.S. Census Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year.²⁹ Of this number, 2,964 firms operated with fewer than 250 employees.³⁰ Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service - DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation.³¹ DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

10. The *NPRM* proposes to adopt rules that prohibit cable and DBS service providers from imposing ETFs and BCFs. This may impose new or additional compliance obligations on small entities. When subscribers wish to terminate their services contract prior to its expiration date, small entity cable operators may need to use additional accounting and finance processes to determine the prorated credit or rebate to provide subscribers for the remaining days in a billing cycle. These operators must then determine how to return this fee to the subscriber. The *NPRM* seeks comment on any potential costs that would be imposed on regulatees and whether a ban on ETFs and BCFs would impose unnecessary burdens on small cable operators.³² The Commission anticipates the information received in comments including where requested, cost and benefit analyses, will help identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result from the proposals and inquiries made in the *NPRM*.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³³

12. To assist in the Commission's evaluation of the economic impact on small entities, as a result of actions that have been proposed in the *NPRM*, and to better explore options and alternatives, the Commission seeks comment on whether any of the burdens associated with the compliance requirements described above can be minimized for small entities.³⁴ An alternative option that may reduce burdens on

²⁸ See 13 CFR § 121.201, NAICS Code 517311.

²⁹ See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Employment Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEEMPFFIRM, NAICS Code 517311, <https://data.census.gov/cedsci/table?y=2017&n=517311&tid=ECNSIZE2017.EC1700SIZEEMPFFIRM&hidePreview=false>.

³⁰ *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

³¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report*, Table III.A.5, 32 FCC Rcd 568, 595 (Jan. 17, 2017).

³² *NPRM* at para. 22 (discussing cost/benefit analysis of ban on ETFs and BCFs for small cable operators).

³³ See 5 U.S.C. § 603(c).

³⁴ *NPRM* at para. 27.

small entities considered in the *NPRM* is whether the Commission should adopt more detailed cable and DBS regulations that include grace periods, limiting or extenuating circumstances, or other factors for determining when an ETF or BCF might be appropriate.³⁵ Additionally, the Commission seeks comment on whether potential costs associated with a ban on small entities imposing ETFs and BCFs would impose unnecessary burdens on small cable operators.³⁶ The Commission expects to more fully consider the economic impact and alternatives for small entities based on its review of the record and any comments filed in response to the *NPRM* and this IRFA.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

13. None.

³⁵ *NPRM* at para. 19.

³⁶ *NPRM* at para. 23 (discussing cost/benefit analysis of ban on ETFs and BCFs for small cable operators).

**STATEMENT OF
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Promoting Competition in the American Economy: Cable and DBS Provider Billing Practices*, MB Docket No. 23-405, Notice of Proposed Rulemaking (December 13, 2023)

If you are one of the millions of people in this country who subscribe to cable television or satellite service, one day you might want to end that subscription. You may move, you might want to switch providers, or you might want to check out new competitors offering different kinds of video service. When that happens you will have to contact your cable or satellite provider. If you have ever been on one of those calls you know they are no fun. They take too long. Plus you can get charged early termination fees when all you want to do is shut the service down. On top of that, you can get stuck with paying for weeks of service you do not want just because you cut it off early in the billing cycle.

Consumers are tired of these junk fees. They now have more choices when it comes to video content. But these friction-filled tactics to keep us subscribing to our current providers are aggravating and unfair. So today we kick off a rulemaking to put an end to these practices. We propose restricting early termination fees and requiring providers to grant subscribers credits or rebates for the remaining days in a billing cycle after the cancellation of service. We ask questions about legal authority, the impact of our proposed rules, and any alternatives we should consider.

This rulemaking is part of a broader effort to make billing across the economy—and across communications—more transparent and fair. Last year, we adopted broadband nutrition labels requiring carriers to disclose service terms to consumers in an easy and simple way. This year, we proposed all-in pricing for cable television and satellite providers so the advertised price for video service would actually be the price customers pay when the bill arrives. These initiatives are important. Because consumers know when they are being stuck with charges that are unfair, fees that no one told them about, and practices that try their patience and waste their time. We can do something about this—and we should.

Thank you to the staff responsible for this rulemaking, including Katie Costello, Hillary DeNigro, Maria Mullarkey, Brendan Murray, and Holly Saurer from the Media Bureau; Douglas Galbi, Kim Makuch, and George Williams from the Office of Economics and Analytics; Susan Aaron and David Konczal from the Office of General Counsel; Joycelyn James from the Office of Communications Business Opportunities; and Cathy Williams from the Office of Managing Director.

**DISSENTING STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405, Notice of Proposed Rulemaking.

Two years ago, President Biden signed an Executive Order directing the FCC to start regulating early termination fees—also known as service rates—for consumer communications agreements. Today, the FCC acts on the President’s demands in the cable/DBS context. It does so at a time when traditional MVPDs are bleeding market share to new, unregulated competitors. And it does so based on illusory statutory authority under the FCC’s customer service mandates. Congress’s charge was to address customer service issues such as wait times on service calls, not rate regulation.

But taking a step back, it’s clear that the Administration has decided that the FCC is going to regulate rates, no matter how competitive the market and without regard to the FCC’s legal authority. We saw it in big proceedings like Net Neutrality and Digital Equity, and we see it in more targeted proceedings like this one. I cannot support this push for rate regulation, and I cannot support this item.

Accordingly, I dissent.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS**

Re: In the Matter of Promoting the American Economy: Cable Operator and DBS Provider Billing Practices, MB Docket No. 23-405, Notice of Proposed Rulemaking

There are some items that come before me at the FCC, that hit me not just as a regulator, but as an everyday consumer. I felt that way about our June 2023 NPRM, proposing to require MVPDs to clearly provide the bottom-line, all-in price for video service to consumers in both promotional materials and on subscribers' bills. And I feel that way about today's NPRM, which follows that item in many ways.

Obscuring the bottom-line fee isn't fair to consumers, and neither is imposing exorbitant, unexpected fees on consumers cancelling their service. We've begun our inquiry on the former; today we ask questions about the latter. Take, for example, early termination fees, or ETFs. I know what it's like to cancel a service, and get slapped with a startling high termination fee. I'd hazard a guess that most of us do – it's an experience that's all too common. That's why the Biden Administration's Executive Order on Promoting Competition in the American Economy encouraged the FCC to consider "prohibiting unjust or unreasonable early termination fees for end-user communications contracts."¹

But first, we have to understand how fees like this may be used in MVPD contracts. Do they unfairly prohibit consumers from switching providers? Are there circumstances in which they may benefit consumers – for example, by giving consumers a choice between a costlier, month-to-month contract and a cheaper, longer-term contract with an ETF? Even if those situations exist, are there ways we can protect consumers from unreasonable fees? These are the questions we're asking today. I look forward to seeing the record develop.

Not only is today's NPRM in conversation with the FCC's action in June on all-in pricing, it's in step with our sister agencies across the government. From the FTC to the CFPB, the government is pursuing proposals and advisories to protect consumers from unjust and unreasonable fees across industry. As President Biden said, this is "just about simple fairness."² I agree.

¹ Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² Remarks by President Biden on New Actions to Protect Consumers from Hidden Junk Fees and Put More Money Back in the Pockets of Hardworking Americans, Oct. 11, 2023, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/11/remarks-by-president-biden-on-new-actions-to-protect-consumers-from-hidden-junk-fees-and-put-more-money-back-in-the-pockets-of-hardworking-americans/>.

**DISSENTING STATEMENT OF
COMMISSIONER NATHAN SIMINGTON**

Re: *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket. No. 23-405

This item proposes to prohibit cable and satellite operators from charging early termination fees and so-called "billing cycle fees." I've never met a consumer who has not felt hard-done by paying fees that they would prefer not to pay. Certainly I have paid fees that I would have preferred not to pay, and I wished at the time that I didn't have to pay them. So, is that the end of the analysis?

Well, for this Commission, perhaps. At the behest of the Biden administration, Commission leadership and my colleagues across the aisle today approve an item notionally designed to improve consumer welfare through "prohibiting unjust or unreasonable early termination fees for end-user communication contracts[.]" and by "enabling consumers to more easily switch providers." I say notional because the relationship between consumer welfare and the rules this item proposes is actually negative. Let me be clear: consumers will be *worse* off after these rules are adopted—provided that the rules survive legal challenge, including a challenge to the almost certainly inadequate Section 632 authority on which they are based. Consumers will pay *more* for their cable packages. This isn't advanced economic theory, this is basic horse sense. By replacing consumer choice with the sacerdotal wisdom of the new regulatory clerics, the Commission proposes to leave consumers *worse* off than before. Here's how. Let's treat ETFs first.

The modal consumer who signs up for service with an MVPD (and, to be clear, I will use 'MVPD' to mean both MVPDs and DBS providers) generally has at least two options. One option is discounted service, which often comes with a contract for a service term. Some of those contracts do have an early termination fee—often at a somewhat lower price relative to other contracts—and some do not. The other option is a higher-rate, month-to-month service agreement. In the first case, a consumer terminating service prior to the end of the term is sometimes obligated to pay a fee; in the second, she is not.

Any consumer wishing to avoid the prospect of an early termination fee has the option, *ex ante*, to avoid the fee. Just don't sign up for the plan that has the fee. Seems simple enough. But, some may say: what about the consumer who signs up for the plan but then is forced by circumstance to terminate the contract? Say she has to move for a new job, and the prior MVPD is not available in her new location. Is the fee not punitive in this case?

Well, tabling for the moment that the consumer presumably knew or could have discovered what she was signing up for, *and* tabling for the moment that the contract terms *provide* for a variety of circumstances under which the ETF is not owed, she is *still* better off, generally speaking, in the second half of service term contracts than she otherwise would have been. If a contract for video service offers a \$10 monthly discounted promotional rate for a one year term, it is often joined with an early termination fee amounts to, in the case of one major provider, \$110. The early termination fee declines, generally, by 1/12th or 1/11th per month—this is a pretty universal industry practice. So, in literally half of the cases, assuming terminations occur randomly in a contract lifetime, the consumer is *better off having paid* the ETF and received the discounted service relative to the month-to-month service. Indeed, the discount is often *greater* on a monthly basis than the ETF reduction, putting the ETF-paying consumer in the money even faster. This is not the only case, but it is an archetypical one.

But now we are proposing to eliminate the prospect of the early termination fee altogether, and constructively proposing to eliminate the discounted rate that it supports—at least, the portion of the discount equivalent to the revenue lost by ETFs—and we are doing this in the name of consumer welfare. I am not sure what animates the Commission's logic here. Does the Commission imagine that the

invisible hand of this highly regulated market will keep contractual prices level after ETFs are removed (those same market forces that the Commission evidently discounts today by undercutting the commercial judgment of MVPDs)? Or does it imagine that MVPDs will, out of their gracious love of consumers, voluntarily fully retain today's long-term contractual discounts while merely doing without ETF revenue? Which of this twin naivetes will this rulemaking embrace? I suppose we'll find out when the supposed consumer advocates, whose very jobs require the invention of more and more phantasmagoric consumer harms, furnish the Commission with their conclusory cant in the record.

Turning briefly to what we term in the item "billing cycle fees," and what the rest of the world calls monthly billing, here are some folks who typically aren't going to take you call if you ask for part of the month you paid for back in your subscription service: Netflix. Hulu. Max. Disney. Paramount. YouTube. Spotify. Apple. Do we typically consider these services difficult to cancel? Is it hard to switch between and among them? Given their churn figures, I would be surprised to learn that that were the case. Consumer choice in the video marketplace abounds, and today, consumers are exercising that choice. They're marching right out the door from traditional MVPDs. Today's proposed action on monthly billing will make it marginally harder to operate as an MVPD, in that it puts a costly burden on them that no other video marketplace participant is required by law to bear. It may not be the proverbial straw on the camel's back, but the pro-consumer effect of today's proposal will certainly be a mirage. Rather than improving the consumer experience, it will just make the experience for most MVPD consumers marginally worse, as MVPDs recoup lost revenues in the form of higher monthly service costs overall.

Because, let's be clear, our so-called "pro-consumer" proposal today requires angelic forbearance on the parts of MVPDs to have actual pro-consumer effect. Putting this plainly: this proposal will reduce consumer choice, make it harder for MVPDs to compete in the unified video marketplace, and it won't save consumers one thin dime. Today's proposal is merely an optical victory.

Now that the Commission has a full slate of Commissioners, the hour of partisan politics has come round at last, and today's crypto rate regulation slouches toward approval. I dissent.

**STATEMENT OF
COMMISSIONER ANNA M. GOMEZ**

Re: *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking.

As the video market continues to evolve at a rapid pace that shows no signs of abating, initiating this rulemaking to seek comment on adopting rules around cable operators' and direct broadcast satellite providers' assessment of early termination fees and billing cycle fees is timely. Consumers have more choices than ever before, and it is imperative that we understand whether such billing practices have the effect of inhibiting subscribers from choosing the video services they want or result in consumers paying fees for video services they did not choose to receive as we consider these rules.

Thank you to the Chairwoman for her leadership on this item and for working with me to ensure that we ask broad questions about the state of the video marketplace as we consider these important rules. I look forward to reviewing a robust record. Thank you also to the Media Bureau for its hard work on this item.