FREE STATE FSF FOUNDATION

Perspectives from FSF Scholars
March 9, 2023
Vol. 18, No. 12

Preserve Consumer Choice for Affordable Broadband Plans With ETFs

by

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On February 1, the Biden White House released a "Fact Sheet" outlining the administration's plans to eliminate a variety of fees that different industries charge consumers. It calls on Congress to enact a "Junk Fee Prevention Act" that would, among other things, apparently "[e]liminate exorbitant early termination fees [ETFs] for TV, phone, and internet service." While the Fact Sheet perhaps was designed to be headline-grabbing, when it comes to Internet services, Congress should maintain the policy of market freedom that has led to such astounding innovation and investment. Based on economic realities nowhere acknowledged or even alluded to in the Fact Sheet, broadband plans with ETFs can affirmatively benefit consumers by offering lower-price options, as well as smartphones, routers, and other devices with zero down payments.

Market competition keeps ETFs in check, giving consumers choices among competing providers and putting pressure on ISPs to offer reasonable terms or risk losing subscribers to their rivals. Competitive pressure is reflected in the fact that most broadband Internet service providers (ISPs) prorate or reduce the termination fee amounts over time. Restricting or banning broadband plans with ETFs would undercut consumer choices, reduce service affordability, and pose barriers to broadband adoption.

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Agreements with minimum service terms and termination fees in the event of early cancellation are common for a variety of consumer products and services. From an economic standpoint, there are sound reasons for consumers and service providers to enter into agreements with minimum service terms and ETFs. Many consumers chose such plans because they offer discount prices compared to other plans. In the broadband Internet services context, agreements with ETFs routinely come with lower monthly rates for a set period of time or with devices for accessing services with zero down payment terms – or both. Many broadband consumers realize the benefit in not having to pay any up-front costs to obtain a Wi-Fi 6e router or 5G smartphone as well as a discounted monthly rate in exchange for agreeing a 12-, 18-, or 24-month term of service. For ISPs, minimum service terms and ETFs provide certainty that they will be able to generate enough revenues to cover their service costs and device subsidies.

Importantly, consumers almost always can choose broadband service contracts *without* ETFs. Under these "no contract" plans, consumers can switch service immediately without a breakup fee. For instance, Charter Communications currently offers a bundled package that includes cable broadband services of up to 300 Mbps, free use of a router, and a Spectrum One mobile line for $49.99 monthly rate on a "no contract basis." Indeed, most ISPs that offer service plans with ETFs also offer plans without them. There are recognizable trade-offs in pricing and flexibility that come with both ETF and non-ETF plans. And consumers ought to remain free to select plans that fit their preferences, all things considered.

The White House "Fact Sheet" states that Congress should ban "exorbitant early termination fees" or "excessive early termination fees." But it doesn't define what amount is "exorbitant" or "excessive." It simply notes that "[t]hese fees can exceed $200." But context is always necessary, of course, as retail sales prices for smartphones and Wi-Fi routers typically exceed $200. Moreover, most broadband ISPs prorate their ETFs. For instance, AT&T Wireless customers who agree to receive a smartphone with mobile data service under a new or upgraded agreement incur a fee for early termination of the service. But AT&T reduces that fee $10 for every full month that a subscriber maintains the service.

Additionally, the White House "Fact Sheet" claims that ETFs "mak[e] it harder for innovative companies to win a toe-hold in the market by encouraging customers to switch." But that claim is belied by the fact that that many broadband ISPs offer subscribers inducements to switch. In its *Eighteenth Wireless Competition Report* (2015), the Commission noted the rise in mobile broadband ISPs offering switching incentives to counteract ETFs:

> With the shift away from handset subsidies, marketing tactics have increasingly focused on Early Termination Fee ("ETF") buyouts to encourage customers to switch from rivals. ETF buyouts typically include a cash payment or credit to reimburse ETFs for customers on traditional contract plans, or alternatively, to pay off the remaining balance of an [equipment installment plan], plus a separate device credit for trading in a customer's current handset.

In 2023, many mobile as well as fixed broadband ISPs offer consumers ETF buyouts. For example, Verizon Home Internet currently offers a credit of up to $500 to assist potential subscribers in switching from their old provider. And T-Mobile offers new subscribers up to $650 per line in reimbursements for ETFs.

Furthermore, the White House "Fact Sheet" states that "providers often charge people when they're most vulnerable," such as when they are forced to move because of a job loss or other financial downturn. But that claim cuts both ways: broadband service plans with ETFs offer a zero-down, lower-cost option for broadband access to those who have recently lost their jobs, have relocated to a new residence, and need the service.

If broadband ISPs are prevented or significantly curtailed in their ability to recoup the costs of providing devices and offering services through ETFs, then zero-down, lower-cost plans will become uneconomical. Legislation that prohibits or significantly restricts ETFs likely will make broadband less affordable for many consumers and pose a barrier to broadband adoption.

Details about the forthcoming Junk Fees Act are, for the moment, sketchy. Perhaps the bill will concretely define and prohibit abusive practices for "junk fees" charged by airlines, resorts, or online sports and entertainment ticketing industries. The fees charged by those industries possibly might warrant scrutiny by Congress. But there is not a discernable problem with ETFs in the broadband services market that requires government intervention.

The law already provides baseline consumer protection when it comes to ETFs. Disclosure of terms and informed consent are consumer protection principles that already apply to broadband ISPs, including service plans with ETFs. Also, any ETF that is truly astronomical – especially a termination fee that is grossly excessive and fails to take any account for a consumer's partial fulfillment of the service term – is subject to traditional unconscionability claims in a court of law.

In today's competitive broadband market environment, any regulation that attempts to define what constitutes reasonable early termination fees effectively amount to price controls and government second-guessing of business judgments and consumer preferences. Given the variety of devices and service tiers offered by broadband ISPs as well as differential consumer preferences, the free market offers a non-arbitrary mechanism for determining what constitutes reasonable ETFs that is preferable to government regulation.

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Further Readings

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