

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Promoting Competition in the American Economy: ) MB Docket No. 23-405  
Cable Operator and DBS Provider Billing Practices )  
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**COMMENTS OF  
THE FREE STATE FOUNDATION\***

**I. Introduction and Summary**

These comments are filed in response to the *Notice of Proposed Rulemaking* narrowly and exclusively targeting the billing practices of traditional, regulated multichannel video programming distributors (MVPDs) – cable operators and direct broadcast satellite (DBS) providers – adopted by the Federal Communications Commission (Commission or FCC) on December 13, 2023 (*Billing Practices NPRM*).<sup>1</sup>

The *Billing Practices NPRM* proposes (1) "to prohibit cable and DBS service providers from imposing a fee for the early termination of a cable or DBS video service contract"<sup>2</sup> – that is, to deny traditional MVPDs the benefit of their open-eyes bargains with consumers in a manner that certainly will result in higher prices – and (2) "to require cable and DBS service providers to grant subscribers a prorated credit or rebate for the remaining whole days in a monthly or

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\* These comments express the views of Randolph J. May, President of the Free State Foundation, and Andrew Long, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

<sup>1</sup> *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405, Notice of Proposed Rulemaking (December 13, 2023), available at <https://docs.fcc.gov/public/attachments/FCC-23-106A1.pdf> (*Billing Practices NPRM*).

<sup>2</sup> *Id.* at 5 (citations omitted).

periodic billing cycle after the cancellation of service"<sup>3</sup> – that is, to require that traditional MVPDs establish a daily price for their service despite a statutory prohibition against rate regulation. In short, the Commission's proposal would reduce consumers' options and lead to higher prices, while contravening Congress's bar on rate regulation of cable services. This misguided effort to implement an ill-conceived instance of "Regulatory Bidenomics" should be abandoned.

Forty years ago, in the 1984 Cable Act, Congress articulated a clear intent to leverage competition, rather than regulation, to generate efficiencies – lower prices, greater options, enhanced innovation – for consumers of video content. Today that competition undeniably exists, and the variety of billing arrangements offered to consumers – including those vilified and proposed to be prohibited in this proceeding – is evidence, not of consumer harm, but of competition-fueled consumer choice. Nevertheless, employing some linguistic legerdemain that would make George Orwell blush 75 years after publication of his masterpiece, the coincidentally titled *1984*, the Commission proposes to not just regulate rates, but to dictate – and, for existing relationships, disregard – the specific terms of the informed voluntary agreement between (1) empowered purchasers of video programming, and (2) the shrinking subset of providers over which it has some regulatory authority: traditional, facilities-based MVPDs. If adopted, these proposals would diminish consumer welfare directly, through higher monthly prices and fewer billing options, and indirectly, by further hindering the ability of subscriber-shedding cable operators and DBS providers to compete with ascendent streaming alternatives.

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<sup>3</sup> *Id.* at 5-6 (citations omitted).

Indeed, to avoid acknowledging the absurdity of its plan, the Commission all but ignores the current state of the video programming distribution marketplace. Put simply, Americans by the millions are "cutting the cord" and migrating to streaming services with undeniable ease: in the third quarter of 2023 alone, two highly relevant, but unmentioned in the *Billing Practices NPRM*, developments continued to unfold. One, a net total of nearly 1.8 million cable and DBS customers cancelled their subscriptions – clear evidence that consumers are able to switch with ease between providers.<sup>4</sup> And two, Netflix alone *acquired* almost as many *new* subscribers as the largest traditional MVPD *serves*.<sup>5</sup>

As for Netflix – by far the largest player in video, with a third more subscribers than cable operators and DBS providers *combined*<sup>6</sup> – it is not mentioned by name even once in the entire *Billing Practices NPRM*. Nor is the fact that Netflix offers its service to consumers in monthly increments, a common practice across a range of industries that the Commission curiously refers to as "billing cycle fees" but that Commissioner Nathan Simington astutely notes "the rest of the world calls *monthly billing*" (emphasis added).<sup>7</sup> And Hulu, with nearly as many total subscribers as traditional MVPDs, elects both to bill on a monthly basis and offer

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<sup>4</sup> See Press Release, "Major Pay-TV Providers Lost About 465,000 Subscribers in 3Q 2023," Leichtman Research Group (November 14, 2023), available at <https://leichtmanresearch.com/major-pay-tv-providers-lost-about-465000-subscribers-in-3q-2023/> (LRG Press Release).

<sup>5</sup> See Netflix Fourth Quarter 2023 Letter to Shareholders, at 1, available at [https://s22.q4cdn.com/959853165/files/doc\\_financials/2023/q4/NEW-FINAL-Q4-23-Shareholder-Letter.pdf](https://s22.q4cdn.com/959853165/files/doc_financials/2023/q4/NEW-FINAL-Q4-23-Shareholder-Letter.pdf) (reporting that Netflix added 13.12 million new subscribers globally during the third quarter of 2023) (*Netflix Letter to Shareholders*), LRG Press Release (reporting that Comcast, the largest traditional MVPD, had just under 15 million domestic subscribers at the end of the third quarter of 2023).

<sup>6</sup> See *Netflix Letter to Shareholders* at 9 (reporting that Netflix had a total of 80.13 million paid memberships in the U.S. and Canada at the end of the third quarter of 2023), LRG Press Release (reporting that, at the end of the third quarter of 2023, the top cable operators (including telco TV providers) and DBS providers had a total of 56.77 million subscribers). Netflix does not publicly disclose U.S. subscribers separately, only U.S. and Canadian subscribers combined.

<sup>7</sup> Dissenting Statement of Commissioner Nathan Simington, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405, Notice of Proposed Rulemaking (December 13, 2023), at 2, available at <https://docs.fcc.gov/public/attachments/FCC-23-106A5.pdf> (*Simington Dissenting Statement*).

consumers willing to commit to a twelve-month relationship a discount. The FCC majority's plan singling out traditional MVPDs rightly would leave these options untouched despite the regulative disparity that would result.

Moreover, the proper application of the relevant statutory provisions reveals these proposals to be impermissible rate regulation masquerading as "customer service requirements." As Free State Foundation scholars explained in connection with a prorated billing requirement adopted by the state of Maine,<sup>8</sup> the Commission-adopted presumption that "effective competition" exists nationwide bars both the FCC and states from regulating the rates of cable operators – and a mandate to prorate last-month bills would regulate rates by requiring cable operators to implement a specific (per-day) pricing scheme. Similarly interfering with MVPDs' pricing autonomy, a prohibition on early termination fees (ETFs) would deny them the ability to amortize one-time upfront costs (installation, account creation, customer acquisition, and so on) beyond the first month of service, while offering consumers consistently lower prices coupled with longer-term commitments. Both proposals, therefore, would result in the regulation of rates despite the explicit absence of the requisite statutory authority. Likewise, the legal justifications set forth in the *Billing Practices NPRM* for applying these proposals to DBS providers – for one, that they are somehow in the "public interest" – falls short.

## **II. As Congress Intended, Robust Competition Maximizes Consumer Welfare**

One of the primary goals of the Cable Communications Policy Act of 1984 (the "1984 Cable Act") was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."<sup>9</sup> Four decades later,

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<sup>8</sup> See, e.g., Andrew Long, "Maine Cable Law, Ignoring Competition, Is 'Unambiguously Preempted,'" *Perspectives from FSF Scholars*, Vol. 15, No. 56 (October 26, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/10/Maine-Cable-Law-Ignoring-Competition-Is-Unambiguously-Preempted-102620.pdf>.

<sup>9</sup> 47 U.S.C. § 521(6).

and thanks to the emergence of the Internet as a viable delivery platform, consumers reap the full benefits of vibrant competition in the video programming distribution marketplace. In fact, traditional MVPDs – both cable operators and DBS providers – for years have experienced substantial subscriber losses, as more and more consumers elect to switch to streaming services: Netflix, Amazon Prime Video, YouTube, Hulu, Disney+, Paramount+, Apple TV+, free ad-supported streaming television (FAST) offerings, and so on.<sup>10</sup> The latest available data, from the third quarter of 2023, confirms that this trend continues apace:

- According to the Leichtman Research Group, the top cable operators lost over one million net customers, representing 3 percent of their current subscriber base.<sup>11</sup>
- The two DBS providers, DIRECTV and DISH TV, experienced a net customer defection of 681,000, or nearly 4 percent of their total subscribers.<sup>12</sup>
- Netflix added 13.12 million net subscribers worldwide and 2.81 million in the United States and Canada alone. In total, Netflix reported over 260 million global subscribers and more than 80 million in North America.<sup>13</sup>
- Over a similar period of time, the number of subscribers to Disney+ grew by 7 million internationally – including 500,000 in North America. Total Hulu subscribers grew by 200,000 to 48.5 million.<sup>14</sup>
- Paramount+ added 2.7 million net subscribers, for a total of 63 million.<sup>15</sup>

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<sup>10</sup> See, e.g., Andrew Long, "Ever-Expanding Video Competition Undercuts Calls for More Rules, Compels Elimination of Existing Regulations," *Perspectives from FSF Scholars*, Vol. 18, No. 47 (October 23, 2023), available at <https://freestatefoundation.org/wp-content/uploads/2023/10/Ever-Expanding-Video-Competition-Undercuts-Calls-for-More-Rules.pdf>, Andrew Long, "With Pay-TV on the Wane, Legacy Regulations Should Follow," *Perspectives from FSF Scholars*, Vol. 18, No. 25 (July 6, 2023), available at <https://freestatefoundation.org/wp-content/uploads/2023/07/With-Pay-TV-on-the-Wane-Its-Regulations-Should-Follow-070623.pdf>, Andrew Long, "Greater Video Competition Should Prompt Less Regulation, Not More," *FSF Blog* (April 10, 2023), available at <https://freestatefoundation.blogspot.com/2023/04/greater-video-competition-should-prompt.html>.

<sup>11</sup> See LRG Press Release.

<sup>12</sup> See *id.*

<sup>13</sup> See *Netflix Letter to Shareholders* at 1, 9.

<sup>14</sup> See Press Release, "The Walt Disney Company Reports Fourth Quarter and Full Year Earnings for Fiscal 2023," The Walt Disney Company (November 8, 2023), at 4, available at <https://thewaltdisneycompany.com/app/uploads/2023/11/q4-fy23-earnings.pdf>.

<sup>15</sup> See Dade Hayes, "Paramount+ Hits 63M Subscribers As Parent Company Trims Streaming Losses And Overcomes TV Weakness To Top Q3 Forecasts," *Deadline* (November 2, 2023), available at <https://deadline.com/2023/11/paramount-plus-63-million-subscribers-parent-company-q3-wall-street-123559117/>.

Thus, the evidence demonstrates not only an abundance of competitive options, but a substantial amount of consumer movement among them.<sup>16</sup> As Congress intended when it adopted the 1984 Cable Act, the efficient operation of the video programming distribution marketplace is maximizing consumer welfare. Abundant choice is one example. A variety of innovative billing methods is another.

As evidence that ETFs – as well as the longer terms and lower prices that inextricably come with them – harm consumers, the *Billing Practices NPRM* points only to a handful of anecdotal claims, from 2008 and in reference to mobile phone service, that "ETFs are unreasonably restrictive."<sup>17</sup> By all reasonable accounts, however, long-term commitments in the video programming context typically are a win-win exchange between informed consumers and providers: the former enjoy lower monthly prices and are able to amortize first-month costs (installation, account creation, and so on) while the latter mitigate against the costs associated with churn (for example, customer acquisition expenses).

The inclusion of an ETF merely represents the liquidation of damages suffered by the provider should the consumer back out of the bargain into which they freely entered. The fact that a consumer does not enjoy paying a fee does not, by itself, render that fee "unjust or unreasonable."<sup>18</sup> As Commissioner Simington explained in his Dissenting Statement:

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

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<sup>16</sup> See also *Simington Dissenting Statement* at 2 ("Do we typically consider [streaming] 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.").

<sup>17</sup> *Billing Practices NPRM* at 5.

<sup>18</sup> See Executive Order 14036, 86 FR 36987 (July 9, 2021), § 1)(iv), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (directing the FCC to "consider ... prohibiting *unjust or unreasonable* early termination fees for end-user communications contracts, enabling consumers to more easily switch providers") (emphasis added).

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.<sup>19</sup>

Absent reliable evidence that the ETF was not adequately disclosed to the consumer at the time the agreement was entered, it is completely inappropriate to view the ETF in isolation, separate from the benefits that come with a long-term commitment, and conclude that it is problematic. In a dynamically competitive environment devoid of clear instances of imperfect information, individuals and businesses should be free to enter voluntarily into contractual arrangements. That includes long-term agreements that include penalties for a failure to perform, penalties that according to NCTA – The Internet & Television Association can be "significantly less than the discount the customer is provided for agreeing to a term contract" and that providers in many cases reduce or waive altogether.<sup>20</sup> Keep in mind, too, that consumers are able to choose between longer-term commitments with ETFs and other billing arrangements (such as month-to-month) that do not include ETFs. It also is important to acknowledge that streaming services employ similar marketing strategies.<sup>21</sup>

Indeed, streaming alternatives generally employ monthly billing for their services, as well.<sup>22</sup> Some examples:

- Per the customer service section of the Netflix webpage, "[i]f you cancel with time left in your billing period, you can use Netflix until the end of the billing period."<sup>23</sup> (In other words, you will not receive a prorated refund.)

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<sup>19</sup> *Simington Dissenting Statement* at 1.

<sup>20</sup> Letter from Mary Beth Murphy, Vice President & Deputy General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, MB Docket No. 23-405 (December 6, 2023), at 2, available at <https://www.fcc.gov/ecfs/document/120675924241/1>. *See also id.* ("Without the ability to recoup at least some of those lost revenues and costs through an ETF, providers will be less inclined to offer longer-term discounts, removing an option for consumers that can reduce their monthly bills for video service.").

<sup>21</sup> For example, Hulu offers a 16 percent discount to customers who prepay for an entire year of service – and "[y]ou will not be entitled to a refund (or any credits) for the remainder of your billing cycle once you cancel," *see* <https://www.hulu.com/annual-offer>.

<sup>22</sup> *See also Simington Dissenting Statement* at 2 ("[H]ere are some folks who typically aren't going to take you[r] 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.").

<sup>23</sup> "How to cancel Netflix," available at <https://help.netflix.com/en/node/407>.

- The website for Max makes plain that "[y]ou can stream until your subscription expires at the end of your billing period."<sup>24</sup>
- Disney+ discloses on its website that "[y]ou'll continue to have access to Disney+ until the end of your current billing cycle but will not be charged moving forward. We do not refund or credit for partially used billing periods."<sup>25</sup>
- Hulu declares that "[y]ou'll continue to have access to Hulu until the end of your current billing cycle, but will not be charged moving forward."<sup>26</sup>

Monthly billing is a standard practice in the video programming distribution business, as well as many other businesses. There is nothing inherently anti-consumer about this method. And given that streaming services would remain free to employ it should the Commission attempt to ban its use by regulated MVPDs, the practical impact solely would be to accelerate the consumer exodus that already is taking place.<sup>27</sup>

### III. The Billing Proposals Impermissibly Would Regulate Rates

The Cable Communications Policy Act of 1984 (the "1984 Cable Act") bars the FCC from regulating "rates for the provision of cable service" wherever cable systems are subject to "effective competition."<sup>28</sup> And "effective competition" effectively exists everywhere.<sup>29</sup>

<sup>24</sup> "How do I cancel Max?," available at <https://help.max.com/US-en/answer/detail/000002526>.

<sup>25</sup> "Canceling Disney+," available at <https://help.disneyplus.com/article/disneyplus-cancel>.

<sup>26</sup> "Cancel your Hulu subscription," available at <https://help.hulu.com/s/article/cancel-hulu-subscription>.

<sup>27</sup> In a separate rulemaking, the Rosenworcel Commission has proposed to "requir[e] cable operators and direct broadcast satellite (DBS) providers to specify the 'all-in' price for service in their promotional materials and on subscribers' bills." *See generally All-In Pricing for Cable and Satellite Television Service*, MB Docket No. 23-203, Notice of Proposed Rulemaking (June 14, 2023), available at <https://docs.fcc.gov/public/attachments/FCC-23-52A1.pdf>. In an *ex parte* submission, NCTA – The Internet & Television Association asserted that "[a]t a time when traditional MVPDs are working to stem their subscriber losses to other video services, the government should be finding ways to reduce unnecessary regulations that apply only to MVPDs rather than proposing new pricing regulations that apply only to a decreasing segment of the market." Letter from Mary Beth Murphy, Vice President & Deputy General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, MB Docket No. 23-203 (October 2, 2023), at 2, available at <https://www.fcc.gov/ecfs/document/1002238864139/1> (citations omitted). The billing proposals in the instant proceeding obviously raise similar marketplace-skewing concerns.

<sup>28</sup> 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 . . .").

<sup>29</sup> *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53, Report and Order, 30 FCC Rcd 6574 (2015), available at <https://docs.fcc.gov/public/attachments/FCC-15-62A1.pdf>. *See also Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283, CSR No. 8965-E, Memorandum Opinion and Order, FCC 19-110 (October 25, 2019), available at



Accordingly, it would seem straightforward that the proposed ETF and monthly billing bans – two clear attempts to dictate how traditional MVPDs charge for service – are preempted by statute. Instead, in a failed attempt at linguistic legerdemain, the *Billing Practices NPRM* asserts that its proposals in fact are permissible "customer service requirements," not rate regulation.

In 2020, the United States District Court of Maine held – correctly, in our view – that requiring cable operators to provide a "pro rata" refund to subscribers who choose to terminate service prior to the end of the billing cycle amounts to an obligation to bill on a daily, rather than a monthly, basis – and thus regulates "rates for the provision of cable service."<sup>30</sup> However, the Court of Appeals for the First Circuit in 2022 reversed that decision in 2022.<sup>31</sup> And the *Billing Practices NPRM* embraces its reasoning.

It also asserts that the Commission has the legal authority to adopt its billing proposals by pointing to legislative history that defines permissible "customer service requirements" as "the direct business relation between a cable operator and a subscriber" and to "include requirements *related to* 'rebates and credits to consumers'" (emphasis added).<sup>32</sup> A permissible "customer service requirement" *related to* rebates and credits could, for example, specify the amount of time within which a cable operator must process and provide a rebate or credit – but not the amount of the rebate or credit, as that would be rate regulation.

By the logic of the *Billing Practices NPRM*, however, there is no distinction between "customer service requirements," which are permissible, and regulation of the "rates for the

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<https://docs.fcc.gov/public/attachments/FCC-19-110A1.pdf> (concluding that AT&T Now satisfies the "LEC Test" set forth in 47 U.S.C. § 543(l)(1)(D)).

<sup>30</sup> See generally *Spectrum Northeast, LLC, et al. v. Aaron Frey*, 1:20-cv-00168-JDL (D. Me. October 7, 2020).

<sup>31</sup> See generally Andrew Long, "First Circuit Wrongly Concludes Maine's Prorated Billing Requirement Is Not Unlawful," *Perspectives from FSF Scholars*, Vol. 17, No. 3 (January 14, 2022), available at <https://freestatefoundation.org/wp-content/uploads/2022/01/First-Circuit-Wrongly-Concludes-Maines-Prorated-Billing-Requirement-Is-Not-Unlawful-011422.pdf>.

<sup>32</sup> *Billing Practices NPRM* at 7 (citations omitted).

provision of cable service," which is not. In other words, if a regulation that (1) prevents a cable operator from charging a lower rate for the duration of an extended period of time, with a potential penalty should the customer cancel prior to the end of that agreed-upon term, or (2) dictates that a cable operator must employ a per-day rate does not constitute rate regulation, then essentially *any* form of rate regulation that might be expressed in the form of a mandatory rebate or credit would be permissible.<sup>33</sup> Congress's prohibition on rate regulation can't be so easily negated in the service of promoting "Regulatory Bidenomics."

Similarly, the legal justifications set forth in the *Billing Practices NPRM* for applying these proposals to DBS providers fall short. For one, the fact that the Commission has the authority to impose "public interest or other requirements for providing video programming" is irrelevant.<sup>34</sup> By its own admission, that provision relates to "certain statutory political broadcast requirements"; the inclusion of the phrase "at a minimum" is insufficient to bridge the gap to outright rate regulation. For another, the Commission cannot bootstrap from its flawed reading of the 1984 Cable Act to the conclusion that, because its billing proposals otherwise would apply solely to cable operators, it would be unfair not to apply them to DBS providers, as well: "[excluding DBS from these rules would mean that their subscribers would remain vulnerable to these practices."<sup>35</sup> As highlighted above, because streaming services would not be subject to these rules, the concept of equity is not just well beyond reach, it also is a sufficient and independent reason for the FCC to abandon this ill-conceived rulemaking altogether.

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<sup>33</sup> See also Letter from Mary Beth Murphy, Vice President & Deputy General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, MB Docket No. 23-405 (December 6, 2023), at 4, available at <https://www.fcc.gov/ecfs/document/120675924241/1> ("Nor can a ban on ETFs and a proration requirement be called 'customer service requirements' by any common understanding of the term, ....").

<sup>34</sup> 47 U.S.C. § 335(a).

<sup>35</sup> *Billing Practices NPRM* at 7.

#### **IV. Conclusion**

For the foregoing reasons, the Commission should abandon its misguided, legally dubious plan to regulate solely the rates of cable operators and DBS providers, disrupt the vibrantly competitive video programming marketplace by designating winners and losers, and harm consumers through the imposition of higher costs and fewer options.

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