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	)	
	)	
	)	

REPLY COMMENTS OF
THE FREE STATE FOUNDATION[*]

I. Introduction and Summary

These reply comments are filed in response to the *Notice of Proposed Rulemaking* adopted by the Federal Communications Commission (Commission or FCC) in the above-captioned proceeding on December 13, 2023 (*Billing Practices NPRM*).[1]

In our initial comments, we presented compelling reasons why the Commission should not, and legally may not, move forward with its proposal to dictate – and limit – the terms of agreements between informed, empowered consumers and those facilities-based multichannel video programming distributors (MVPDs) over which the FCC retains legacy regulatory authority.[2] In short, available marketplace data paints a crystal-clear picture: with each passing day, more and more consumers exercise their unfettered ability to switch between traditional sources of video content to streaming alternatives –

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[*] These reply 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.

[1] *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*).

[2] *See generally* Comments of the Free State Foundation, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405 (filed February 5, 2024), available at https://freestatefoundation.org/wp-content/uploads/2024/02/FSF-Comments-Cable-Operator-and-DBS-Provider-Billing-Practices-010524.pdf (*FSF Comments*).

and the steady trend is away from the former and toward the latter.[3] Consequently, the Commission's misguided proposal to prohibit MVPDs – and MVPDs alone – from utilizing these standard billing practices only would exacerbate the disparate regulatory treatment of competitors in the video programming distribution marketplace.

As such, what the regulatory handcuffs championed by Chairman Jessica Rosenworcel in this proceeding would do is suppress competition and raise prices. What they would not do is benefit consumers or comply with the 1984 Cable Act's bar on rate regulation.

II. ETFs Are Standard Contractual Provisions that Benefit Video Consumers

At the outset, we challenge the notion that ETFs are inherently anti-consumer – a view that is central to the *Billing Practices NPRM* but even more extreme than the position taken by the Biden White House.[4] To the contrary, ETFs often benefit consumers through lower prices, as the International Center for Law & Economics explained in its comments:

> Put simply, ETFs are ubiquitous. Consumers regularly consider and sign contracts with ETFs. In most cases, these consumers are fully aware of the ETF, because contracts with an ETF often have lower prices or rates than agreements without ETFs. It's a *quid pro quo* in which the consumer pays a

[3] *See, e.g.*, Daniel Frankel, "U.S. Streaming Revenue Will Surpass Total Pay TV Coin in Q3, Research Company Predicts," *NextTV* (February 26, 2024), available at https://www.nexttv.com/news/us-streaming-revenue-will-surpass-total-pay-tv-coin-in-q3-research-company-predicts ("Revenue generated by U.S. streaming services will surpass sales from domestic pay TV operators for the first time in the third quarter, Ampere Analysis predicts.").

[4] *See* Comments of ACA Connects – America's Communications Association, MB Docket No. 23-405 (filed February 5, 2024), at 3, available at https://www.fcc.gov/ecfs/document/1020560017103/1 (pointing out that the *Executive Order on Promoting Competition in the American Economy* upon which the *Billing Practices NPRM* relies heavily "calls only for measures to address 'unjust or unreasonable' early termination fees. It does not declare all early termination fees unjust or unreasonable, as the *NPRM* implies") (*ACA Comments*). *See also id*. (highlighting the fact that that *Executive Order* "does not address 'billing cycle fees' in name or in substance).

> lower rate in exchange for a promise to maintain purchases over a contracted time period. An ETF is the cost of breaking that promise. [5]

Nevertheless, Public Knowledge in its comments baldly and unequivocally proclaimed that ETFs "have no economic rationale, other than the fact that MVPDs can get away with charging them, and no economic benefit, other than to the MVPDs who impose them."[6] But more substantive responses to the *Billing Practices NPRM* conclusively establish that long-term contracts – and the ETFs that render them financially viable – benefit consumers in two significant respects.

First, such arrangements make it possible for new customers to pay off installation-related charges (such as truck rolls) and other upfront expenses over time, rather than all at once. As DIRECTV explained in its comments, it "employs ETFs not as a permanent source of revenue, but as a tool to permit gradual payment for specific things."[7] By preventing first-month sticker shock, ETFs *remove* a potential barrier to consumers switching to facilities-based MVPDs – and thus promote, rather than interfere with, the Commission's stated desire to enhance mobility between competitive alternatives.[8]

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[5] Comments of the International Center for Law & Economics, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405 (filed February 5, 2024), at 3, available at https://www.fcc.gov/ecfs/document/10204246609086/1 (*International Center for Law & Economics Comments*).

[6] Comments of Public Knowledge, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405 (filed February 5, 2024), at 1, available at https://www.fcc.gov/ecfs/document/1020576195834/1 (*Public Knowledge Comments*). *See also Billing Practices NPRM* at ¶ 7 ("Although in the past video service providers have generally claimed that ETFs decrease overall consumer costs, individual consumers maintain in general that ETFs are unreasonably restrictive.") (citations omitted).

[7] Comments of DIRECTV, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405 (filed February 5, 2024), at i, available at https://www.fcc.gov/ecfs/document/102051547214316/1.

[8] *Cf. Billing Practices NPRM* at ¶ 7 (asserting that a *ban* on ETFs "could serve the public interest by allowing consumers to freely choose among providers").

Second, long-term contracts provide MVPDs greater certainty regarding future revenue and reduce customer-acquisition costs – and ETFs make it possible for them to share those savings with consumers. As NCTA – The Internet & Television Association (NCTA) detailed in its comments:

> [T]he reduced rates available through term contracts are calculated based on an operator's saved costs and expected steady return when a customer commits to purchasing a specified amount of cable service. Should a customer cancel prior to the [end of] the agreed-upon term, the operator's costs are increased and its return reduced, undercutting the basis for the lesser rate.[9]

Accordingly, there in fact is a legitimate *economic rationale* underlying long-term agreements that include an ETF that delivers *economic benefit* to both parties to the agreement.

Were the FCC to ban MVPDs from entering long-term contracts with subscribers that rely upon ETFs to enforce the terms of their arm's length agreement – which, let's not forget, are just one of many options from which consumers are able to choose[10] – consumers would be deprived a cost-saving option. With fewer opportunities to save costs, prices overall necessarily would go up.

III. ETFs and Service Offering Term Lengths Are Intrinsic to MVPD Rates

Beyond a bad idea, the billing proposal exceeds the FCC's authority. Section 623(a)(2) of the 1984 Cable Act clearly states that, where effective competition exists (that is, effectively everywhere), the Commission may not regulate the "rates for the

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[9] Comments of NCTA – The Internet & Television Association, *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, MB Docket No. 23-405 (filed February 5, 2024), at 11, available at https://www.fcc.gov/ecfs/document/10206340220096/1 (*NCTA Comments*).

[10] *See Id*. at 5 ("The *NPRM*'s reliance on anecdotal consumer complaints obscures the fact that most cable subscribers purchase service month-to-month and are *not* on contracts with ETFs.") (citation omitted) (emphasis in original).

provision of cable service."[11] The *Billing Practices NPRM* went to great lengths to characterize its proposal to ban ETFs and monthly billing as "customer service requirements" permissible pursuant to Section 632,[12] not as prohibited rate regulation. As we demonstrated in our comments, however, the statutory authority to "include requirements *related to* 'rebates and credits to consumers'" (emphasis added) cannot reasonably be invoked to regulate rates – particularly not in the face of Section 623(a)(2).[13]

Other commenters presented additional compelling arguments as to why bans on ETFs and monthly billing constitute impermissible rate regulation. For example, ACA Connects emphasized that the Commission has never before suggested that how customers *pay* for service should be addressed as a 'customer service standard'" (emphasis in original).[14] NCTA explained that "a rate is not just the price, but the price *relative to a specific amount of the product*" – and reminded us that, in a similar context, the FCC concluded that "regulation of 'rate structures' *is* rate regulation" (emphases in original).[15] And the International Center for Law & Economics argued that "ETFs are inextricably connected to rates to such a degree that they are [a] central element of the rate structure, and cannot be disentangled from that structure."[16]

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[11] 47 U.S.C. § 543(a)(2).
[12] 47 U.S.C. § 552.
[13] *See FSF Comments* at 9.
[14] *ACA Comments* at 9.
[15] *NCTA Comments* at 11. *See also id*. at 13 n.25 (pointing out that in paragraph 23 of *Southwestern Bell Mobile Systems, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 19898 (1999), the FCC held that regulation of the time increment by which cellular providers bill for service would constitute rate regulation). Perhaps for obvious reasons, the *Billing Practices NPRM* includes no reference to, or discussion of, this decision.
[16] *International Center for Law & Economics Comments* at 3. *See also id*. at 7-11.

IV. Conclusion

For the foregoing reasons, we once again urge the Commission to reject its misguided, anti-consumer, and unlawful proposal to regulate the billing practices of MVPDs.

Respectfully submitted,

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