Perspectives from FSF Scholars
September 4, 2024
Vol. 19, No. 34

Disparate Consequences Doom Video Billing Proposal

by

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As the FCC considers saddling facilities-based multichannel video programming distributors (MVPDs) with still more one-sided regulations, this time in the form of unwarranted billing constraints, the record evidence makes clear that the true beneficiaries of the rules proposed would be unregulated streaming alternatives. Consumers, which ought to be the paramount consideration, would endure net harms in the form of reduced competition, fewer choices, and higher prices.

What's more, facilities-based MVPDs – cable operators and direct broadcast satellite (DBS) providers – typically market their video services in distinct ways, the former in bundles which include broadband Internet and/or voice services, the latter on a standalone basis. That difference necessarily has regulatory ramifications.

There is only one way to address the disparate consequences of this economically deficient proposal: outright rejection.

In comments and reply comments, the Free State Foundation explained how the FCC's proposal to prohibit cable operators and DBS providers from utilizing common billing practices ignores basic economic principles in a manner that threatens higher prices and fewer options for consumers. Unregulated online streaming video services, already growing rapidly at the expense of facilities-based MVPDs, would remain free to market discounted long-term products – for example, a prepaid, non-refundable annual subscription to Hulu for 16 percent off. Cable operators and DBS providers, on the other hand, would be denied the use of the early termination fees (ETFs) that are commonly used in many other markets. ETFs are essential to enforcing long-term agreements that benefit consumers because their use enables lower overall costs and the amortization, over time, of installation and equipment expenses unique to facilities-based offerings. Absent enforceable ETFs, service providers necessarily would increase the up-front price of the offering in order to have the opportunity to recover their investment before customers abandoned the service.

Similarly, unregulated streaming services would remain free to bill in monthly increments, a practice common across a wide range of industries, while facilities-based MVPDs would be forced to bill on a daily basis, a form of impermissible rate regulation that would increase costs and necessarily lead to higher prices.

What's more, subsequent responses on the record, as well as developments in the marketplace, reveal that banning traditional MVPDs from using ETFs and whole-month billing would disadvantage DBS providers in particular – and do so at an especially inopportune time.

Filings by the two DBS providers, DIRECTV and DISH Network, highlight two truths that render the FCC's generally bad idea especially onerous for them specifically. First, that the equipment and installation expenses for new customer installations – that is, the otherwise prohibitive upfront costs that ETFs allow them to amortize over time to the benefit of subscribers – can be higher for DBS providers than other traditional MVPDs subject to the FCC's limited jurisdiction. According to DIRECTV, "equipment and installation costs can range from $450 to $700 per new subscriber."

Second, that because cable operators often bundle their video offerings with other services, and those other services do not fall within the scope of the Commission's asserted authority to act with respect to video offerings, a ban on ETFs and/or whole-month billing as a practical matter could disproportionately impact DBS providers (which typically offer only a "single-play" video-only product). Consequently, the Commission's poorly conceived proposal would create a multitiered caste-like system in which the services with by far the most subscribers – Netflix, Hulu, Amazon Prime Video, Disney Plus, Max, and so on – are completely unregulated while DBS providers, with a relatively small number of subscribers, are the most impacted by unjustified uneconomic rules.

In addition, and as NCTA – The Internet & Television Association spelled out in a recent *ex parte* letter, "the Commission does not have authority to regulate the rates of video services on a stand-alone basis, *let alone apply such rules to non-video services within the bundle*." (emphasis added). Moreover, in its comments, NCTA explained that, even if the FCC did have authority to regulate video rates in this fashion, any administrative attempt to isolate the video portion of a bundled price "would create significant logistical challenges and would be highly confusing to consumers." I agree with NCTA.

DIRECTV, in its own recent *ex parte* letter, argued that a carve-out for bundled offerings in practice would disadvantage DBS providers – and instead advocated for a far more reasonable agency response to this logistic logjam: "the rules should not apply to bundled services *because they should not apply to any services at all*" (emphasis added).

Stepping back from the proposal's specifics, press reports paint a problematic picture of DBS provider prospects that additional regulations would only exacerbate. Cable operators, to be sure, continue to suffer subscriber losses too – the latest public disclosures indicate that Charter and Comcast, the two largest cable operators, shed over 800,000 customers combined during the first three months of this year alone. The forecasts for the two DBS providers are especially bleak.

In the second quarter of 2024, DISH Network saw revenues shrink 10 percent compared to the same period in 2023 and lost another 182,000 subscribers – prompting MoffettNathanson analyst Craig Moffett to predict that parent company EchoStar is "highly likely to go bankrupt, quite possibly by the end of the year." DIRECTV – which has taken to emphasizing its streaming services in its marketing – does not publicly disclose subscriber totals, but one estimate puts its total loss in 2023 at 1.8 million users, another at 617,000 in just the fourth quarter. These ongoing subscriber losses have prompted rumors that AT&T will divest its remaining interest in DIRECTV for a mere fraction of what it paid in 2015.

Big picture, then, the FCC's billing proposal is a bad idea unmoored from fundamental economic principles – and it's a counterproductive one that likely would diminish competition and reduce overall consumer welfare in an otherwise robust and efficiently operating marketplace. As DIRECTV wrote in its comments:

> [T]he proposed prohibitions would undermine the *Notice's* stated goal of making switching easier. It might make it easier for consumers to switch providers from cable and satellite companies to unregulated online providers. At the same time, it would make it *more difficult* for online customers to switch *to* cable and satellite providers (emphasis in original).

Rather than disproportionately further burden already struggling facilities-based MVPDs without any sound justification, the Commission should heed the compelling warnings of commenters in this proceeding, recognize the multitiered harms that could result from its proposal, and redirect its attention to adopting deregulatory responses to the unrelenting rise of streaming alternatives designed to maximize the consumer benefits that unbridled competition can generate.

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Further Readings

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