U.S. Chamber of Commerce

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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

RE: In the Matter of Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices (MB Docket No. 23-405)

Dear Ms. Dortch:

The U.S. Chamber of Commerce ("Chamber") respectfully submits these reply comments to the Federal Communications Commission's ("Commission" or "FCC") in response to the above-titled Notice of Proposed Rulemaking ("NPRM").[1] The NPRM would ban cable operators and direct satellite broadcast providers from charging early termination fees ("ETFs") and billing cycle fees ("BCFs").[2]

The Chamber has serious concerns that the Commission does not have the legal authority to issue the NPRM. Furthermore, the Commission's actions are an attempt to rate regulate the communications industry, and more broadly for federal regulators to impose price controls in violation of the Cable Act. Also, the Chamber believes that the NPRM's underlying policy justification to prohibit these pricing practices are deeply flawed.

Accordingly, the Chamber urges the Commission to withdraw the NPRM.

I. The Commission Lacks Sufficient Legal Authority to Adopt Its Proposal

The Commission does not have legal authority to ban ETF and BCF pricing practices. Therefore, it appears that the NPRM would violate the major questions doctrine as held by the Supreme Court in *West Virginia v. EPA*.

First, the Commission argues that Section 632, which focuses on customer service requirements of cable operators, allows the Commission to prohibit these fees.[3] However, the intent of Section 632 clearly focuses the Commission on practices such as refunds and

[1] *Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices*, Notice of Proposed Rulemaking, MB Docket No. 23-405 (rel. Dec. 14, 2023) ("NPRM").
[2] NPRM at 2.
[3] NPRM at 3-4.

consumer communications, not pricing.[4] Further, the statutory text of Section 632 distinguishes between customer service and consumer protection, which is significant, as Congress did not grant the Commission such a broad consumer protection power.[5]

Second, the Commission argues that Section 335 gives it authority to prohibit direct broadcast satellite (DBS) services from utilizing ETF and BCF pricing practices.[6] As commenters have noted, the text of Section 335 should be read as allowing the Commission to impose carriage-related obligations for public service programming, not as a general grant of authority to regulate terms, conditions, or pricing for the provision of DBS services.[7] If the Commission were to adopt this view in a final Report and Order, it would be a massive and unprecedented expansion of the Commission's authority to regulate DBS. There is no evidence that Congress ever granted the Commission such sweeping authority.

Finally, the NPRM's prohibitions amount to a form of rate regulation, which violates the Cable Act. The Commission argues that the NPRM does not rate regulate, and thus the Cable Act's prohibition does not apply.[8] We disagree. The plain meaning of the term "rate" incorporates ETF and BCF pricing practices.[9] Pricing practices are complex and vary across the industry sectors. Prohibitions on rate regulation and prices should be construed broadly to capture varying price structures and strategies. Otherwise, this type of prohibition would be virtually meaningless.

II. Prohibiting Early Termination and Billing Cycle Fees Negatively Impacts Consumers

The NPRM argues that the rule is necessary to protect consumers. The NPRM would not achieve that goal and instead, would actually harm consumers.

The Chamber echoes other commenters who note the consumer benefits of these fees. The primary benefits are a lower monthly price and no upfront installation fees for consumers during the term of the contract. The products covered by the rule are often offered as a subscription service, a business practice that provides certainty for consumers to continue utilizing a product or service without interruption.[10] It also provides revenue certainty for a business, which, in turn, allows a firm to effectively plan and offer the appropriate price and benefits package to consumers.[11] BCFs and ETFs serve a critical tool to protect this certainty for

[4] NCTA Comments at 14.
[5] Id. at 14-15.
[6] NPRM at 4.
[7] DIRECTV Comments at 15-19.
[8] NPRM at 8.
[9] NCTA Comments 10-13.
[10] *See* U.S. Chamber of Commerce Comments, Notice of Proposed Rulemaking, Federal Trade Commission; Negative Option Rule, Project No. P064202 (88 Fed. Reg. 24,716-24,739, April 24, 2023).
[11] Id.

businesses and, as the record indicates, removing these tools will harm consumers through future price increases and fewer bundling options.[12]

Lastly, these charges are only imposed if a service is terminated before the end of a service agreement or in mid-cycle. In order to deal with the interruption of revenue flow and platform stability, consumers who abide by the terms of a service agreement will be charged a higher price.

III. Conclusion

We appreciate the Commission's consideration of our concerns. If you have any questions, please do not hesitate to reach out to Matt Furlow, Policy Director at mfurlow@uschamber.com.

Sincerely,

Jordan Crenshaw
Senior Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce

[12] NCTA Comments at 9; DIRECTV Comments at 5.