International Center for Law & Economics

RE: Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices

Federal Communications Commission, MB Docket No. 23-405

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I. Introduction

Writing on behalf of the International Center for Law & Economics ("ICLE"), we thank the Federal Communications Commission ("FCC" or "the Commission") for the opportunity to respond to this notice of proposed rulemaking ("NPRM"). The Commission is considering whether to prohibit cable operators and direct-broadcast satellite ("DBS") providers from imposing or enforcing fee for the early termination of a cable or DBS video-service contract, known as "early-termination fees" or "ETFs."[1] The Commission also proposes requiring cable and DBS-service providers to grant subscribers a prorated credit or rebate for the remaining whole days in a monthly or periodic billing cycle after the cancellation of service.[2]

Nearly every U.S. household and organization likely has copious interactions with ETFs as a part of their daily lives. Your mortgage loan may have an ETF described as a "prepayment penalty."[3] Your gym membership may have an ETF.[4] When you pay for your morning latte at the local coffee shop with your debit card, the shop owner likely has an ETF on the point-of-sale service that runs your card, as well as the merchant services that process the payment.[5] If you drive to work, your auto insurance likely has an ETF.[6] If you lease your car, there may be an ETF.[7] When you book your

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[1] Notice of Proposed Rulemaking, In the Matter of Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices, MB Docket No. 23-405 (Nov. 22, 2023) [hereinafter "NPRM"] ¶ 7.

[2] NPRM, ¶ 8.

[3] *What Is a Prepayment Penalty?*, CONSUMER FINANCIAL PROTECTION BUREAU (Sep. 9, 2020), https://www.consumerfinance.gov/ask-cfpb/what-is-a-prepayment-penalty-en-1957 ("A prepayment penalty is a fee that some lenders charge if you pay off all or part of your mortgage early. If you have a prepayment penalty, you would have agreed to this when you closed on your home.")

[4] Diana Kelly Levey, *How to Cancel Your Gym Membership: 11 Things to Know About Contracts*, MEN'S JOURNAL (May 6, 2022), https://www.mensjournal.com/health-fitness/how-to-cancel-your-gym-membership-11-things-to-know-about-contracts ("Many gyms charge a fee to cancel a membership. The cost can vary widely and is worth knowing about when you sign the contract.").

[5] *What Is an Early Termination Fee in a Merchant Agreement?*, HOST MERCHANT SERVICES (2024), https://www.hostmerchantservices.com/articles/early-termination-fee ("Early termination fees come into play whenever a merchant terminates an agreement before the initial contract term has ended. These fees are meant to cover costs the vendor has already incurred by securing the merchant's business and any upfront payments, setup fees, or ongoing minimums the merchant has committed to. The fees aim to compensate the vendor for losing that revenue early and potentially having to find a replacement merchant.").

[6] Lizzie Nealon, *When and How to Cancel Your Car Insurance Policy*, BANKRATE (Jun. 2, 2023), https://www.bankrate.com/insurance/car/get-refund-cancel-car-insurance, ("For example, some providers may require you to pay a cancellation fee or give a 30-day notice ahead of your cancellation date.")

[7] *Turning in a Lease Early? Here's What You Need to Know*, CHASE (2024), https://www.chase.com/personal/auto/education/leasing/turning-in-a-lease-early ("An early termination fee is standard and, depending on the lessor's standards and the terms of your lease agreement, may require payment of remaining lease payments, an amount equal to the difference between the remaining balance of your lease and the realized value of the car after sale, or other charges.")

travel, you'll find that most hotels charge a late-cancellation fee, which is just another name for an ETF.[8] Likewise, your doctor may charge a late-cancellation fee.[9]

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.[10] It's a *quid pro quo* in which the consumer pays a lower rate in exchange for a promise to maintain purchases over a contracted time period. An ETF is the cost of breaking that promise.

In these comments, we focus on the economics of ETFs in the cable and DBS industries. In Section II, we discuss the contractual nature of ETFs, and why consumers benefit from—and willingly choose—contracts with ETF provisions. In Section III, we examine the relationship between ETFs and cable and DBS rates. We identify a direct link through the *quid pro quo*, and an indirect link through subscriber-acquisition costs, revenue projections, and investment returns. Because of these direct and indirect links, we conclude that ETFs are inextricably connected to rates to such a degree that they are central element of the rate structure, and cannot be disentangled from that structure.

Under this economic reasoning, the Commission should be prohibited from regulating cable-television ETFs. Moreover, even if the Commission has authority to ban ETFs, it would be harmful to consumers and providers to do so. Consumers who enter contracts with ETFs do so willingly with an expectation that they will pay a lower price over the term of their agreement than if they did not have such a contract. Producers benefit from reduced subscriber churn and uncertainty. Banning ETFs removes one dimension of consumer choice and provider competition. More importantly, a ban on ETFs will almost certainly lead to higher prices for cable and DBS consumers, the costs of which likely would swamp any speculated benefits of avoiding an ETF.

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[8] Shine Colcol, *Hotel Cancellation Policy: Complete Guide*, LITTLE HOTELIER (Aug. 28, 2023), https://www.littlehotelier.com/blog/running-your-property/hotel-cancellation-policy.

[9] Alan A. Ayers, *Are There Any Restrictions on an Urgent Care Provider Charging a No-Show or Cancellation Fee?*, J. URGENT CARE MED. (Feb. 28, 2021), https://www.jucm.com/are-there-any-restrictions-on-an-urgent-care-provider-charging-a-no-show-or-cancellation-fee ("Many primary care and specialty practices have a policy of charging a fee for missing an appointment (or a fee for cancelling with less than 24 hours' notice). This fee can range from a modest $25 to upwards of $100.").

[10] Indeed, this type of contract has long been a part of the common law. For example, a 2,200-year-old rental agreement from the Greek city of Teos in what is now modern-day Turkey specifies a steep penalty for a tenant backing out of the agreement. *See*, *Translations of Hellenistic Inscriptions: 206, Rental Agreement for Precinct of Dionysas at Teos*, ATTALUS (May 26, 2021), https://www.attalus.org/docs/other/inscr_206.html ("If the *tenant* does not ratify the contract on the day on which he is chosen or on the following day, we shall choose another tenant, and if the bid price is less, he shall owe ten times *the difference* to the lessors."). Economically speaking, an ETF functions identically to an options contract, which protects an optionor from untimely revocation by the optionee, and typically prescribes damages in the event of such a breach. *See, e.g.*, the Restatement (Second) of Contracts:

> An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer. § 25 (1981)

The Restatement notes that in these contexts, disregarding the terms for future performance would "extend the option contract to subject one party to greater obligations than he bargained for." *Id.* at comment D.

II. Consumer Choice, Contracts, and Early-Termination Fees

Critics of early-termination fees claim they are unpopular with consumers. Even so, many companies across many competitive industries offer services with ETF terms. Many consumers also purchase services with ETF terms, even when the seller offers an alternative with no ETF. Appearing before the FCC, a National Cable & Telecommunications Association ("NCTA") representative testified that cable plans with ETFs are "always *optional*."[11] At the time, NCTA estimated less than 10% of cable customers had minimum-term agreements.[12] DIRECTV's representative testified that its DBS customers have a choice of plans either with or without an ETF.[13]

This raises the question of why consumers would enter into agreements with an ETF when non-ETF options are readily available, even from the same provider. The short answer is "different strokes for different folks."[14] For consumers who enter an agreement with an ETF, the expected net benefits of such an agreement outweigh the expected net benefits of an agreement without an ETF. For consumers who choose a non-ETF agreement, the calculus is reversed.

One widely acknowledged consumer benefit of ETFs is that plans with an ETF typically have lower billing rates than plans without such a provision.[15] In 2020, New America and the Open Technology Institute calculated that the monthly cost of plans with ETFs were about $17 less costly than those without an ETF.[16] NCTA reported that "the amount many providers charge for ETFs is significantly less than the discount the customer is provided for agreeing to a term contract."[17] Thus, all other things equal, a consumer who expects to remain with the same provider over the next 12 or 24

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[11] Open Commission Meeting, *Statement of Daniel Brenner, Sr. Vice President, Law & Regulatory Policy, National Cable & Telecommunications Association*, FCC (Jun. 12, 2008), *available at* https://transition.fcc.gov/realaudio/presentations/2008/061208/brenner.pdf ("And most importantly, residential offers that may include ETFs are always *optional*, and they always convey value, in the form of lower combined price over the life of the term, to the customer. Whether it's voice, video or data, a customer can always choose instead to go on a month-to-month basis—with the ability to change service providers whenever they choose, without charge. And more often than not, the advertised cable rates are month-to-month rates rather than rates offered only when a minimum term contract is required.").

[12] *Id.* (An informal survey of our larger members indicates that only around 5 to 7% of triple play customers have elected minimum term agreements.)

[13] Open Commission Meeting, *Testimony of John F. Murphy, Senior Vice President, Controller & Chief Accounting Officer, DIRECTV*, FCC (Jun. 12, 2008), *available at* https://transition.fcc.gov/realaudio/presentations/2008/061208/murphy.pdf ("Among other options, consumers can currently choose to pay full retail price for equipment and installation with no ECF [early cancellation fee], or they can opt for free equipment and installation with either an 18 or 24 month commitment and a pro-rated ECF. When presented with this choice, consumers have given their answer—they overwhelmingly prefer no upfront payment. Clearly, our customers believe our ECF policy represents a significant value.")

[14] *See*, George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. R. 76 (1977).

[15] Brenner, *supra* note 11. *See also Ex Parte Comments of NCTA*, MB Docket No. 23-405 (Dec. 6, 2023) [hereafter, "NCTA Ex Parte Comments"] ("ETFs are a term of a common business arrangement in which a customer receives a discounted offering for a specified period of time in exchange for a reasonable cancellation fee ….").

[16] Becky Chao, Claire Park, & Joshua Stager, *The Cost of Connectivity 2020*, NEW AMERICA & OPEN TECHNOLOGY INSTITUTE (Jul. 2020) at 50, *available at* https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Cost_of_Connectivity_2020__.pdf.

[17] NCTA Ex Parte Comments, *supra* note 15 at 2

months would benefit from entering a contract with an ETF. On the other hand, a consumer who anticipates switching providers within that time period may benefit from a month-to-month agreement with no ETF.

The source of complaints about ETFs likely arises from a disconnect between *expectations* and actuality. That is, consumers who complain about having to pay an ETF may have been unaware of that provision in the agreement; had not anticipated that they would terminate the agreement early; had hoped that the ETF would not be enforced when triggered; or anticipated that a third party (such as a rival provider or employer) would pay the fee.

Some critics of ETFs suggest that many consumers subject to an ETF are unaware of these contractual provisions or of their terms. For example, a 2010 FCC survey reported that slightly more than half of respondents indicated they either didn't know if their broadband provider charged an ETF or what the amount of the fee was.[18] These survey results, however, are unhelpful for the issue at-hand, as they do not address what share of households are subject to an ETF but unaware of it. If the key criticism of ETFs is consumer confusion or provider obfuscation, then the survey provides no useful information in answering whether this is the case.

The NPRM cites the 2008 testimony of consumers Harold Schroer and Molly White before the FCC's hearing on ETFs.[19] Schroer testified that he never signed a contract with his provider and was unaware he agreed to an ETF provision.[20] In contrast, White testified that she knew when she entered her agreement with her provider that the contract specified an ETF, yet attempted to breach this provision.[21] Both White and Schroer were named plaintiffs in a class-action lawsuit regarding mobile ETFs.[22] In that matter, the judge noted that a California jury ruled in a previous class-action case that class members' early termination was a breach of contract with their provider.[23] Based on these examples, there appears to be little evidence of widespread unawareness of contracts with ETF provisions.

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[18] John Horrigan & Ellen Satterwhite, *Americans' Perspectives on Early Termination Fees and Bill Shock: Summary of Findings*, FCC (May 2010), *available at* https://docs.fcc.gov/public/attachments/DOC-298414A1.pdf. (Reporting "38% said did not know whether they would have to pay a fee or not" and "[a]mong the 21% of home broadband subscribers who are subject to an ETF, nearly two-thirds (64%) do not know what their fee would be.")

[19] NPRM, n. 33.

[20] Open Commission Meeting, *Testimony of Harold Schroer*, FCC (Jun. 12, 2008), *available at* https://transition.fcc.gov/realaudio/presentations/2008/061208/schroer.pdf.

[21] *See*, Open Commission Meeting, *Testimony of Molly White*, FCC (Jun. 12, 2008), *available at* https://transition.fcc.gov/realaudio/presentations/2008/061208/white.pdf ("I knew when I signed up for cellular service with Verizon that I was obligated to agree to the early termination fee" but "tried to dispute or reverse the charges.")

[22] *Cellphone Termination Fee Cases*, 186 Cal.App.4th 1380, 1382 n.1 (Cal. Ct. App. 2010) ("Plaintiffs/respondents are Molly White, Christina Nguyen, Patricia Brown and Harold Schroer and are collectively referred to as 'plaintiffs.'")

[23] *Id.* at 1393 (Cal. Ct. App. 2010) ("She ignores, however, the verdict returned by the same jury on Sprint's cross-complaint, finding that the plaintiffs had breached their contracts with Sprint" resulting in actual damages to Sprint caused by early termination.).

Even if there were widespread consumer unawareness of, or confusion with, ETF provisions, recent FCC rules are expected to address this problem. This year, the Commission's broadband "Nutrition Labels" rule will apply to all internet-service providers,[24] including cable and DBS providers.[25] The rules require that providers disclose any ETFs, when the fee is triggered, the maximum fee payable, and any pro-rationing of the fee, as well as a link providing details of early-termination policies.[26] FCC Chair Jessica Rosenworcel asserted the rules were a step toward ending "unexpected fees."[27]

Many complaints about ETFs stem from unanticipated events that trigger the early termination.[28] White testified to the FCC that she terminated her mobile plan with Verizon because she accepted a job in a different state that provided her with mobile service.[29] DIRECTV briefly made national headlines for charging an ETF to a 102-year-old woman who died in the middle of her contract—although the provider quickly apologized and waived the fee.[30] Comcast attracted attention for charging ETFs to several business owners who cancelled their services after a flash flood destroyed their businesses.[31] Comcast remedied the issue by waiving the ETF and halting billing while the customers were without service.[32]

Most providers do not charge ETFs if a customer under contract moves to an address that is serviced by the provider and the customer maintains service with that provider at the new address.[33] We are not aware of any provider that charges an ETF in the event of a subscriber's death.[34] NCTA reports

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[24] *Empowering Broadband Consumers Through Transparency*, 37 FCC Rcd 13686 (15) (2022), *available at* https://docs.fcc.gov/public/attachments/FCC-22-86A1_Rcd.pdf [informally "Nutrition Labels" rule].

[25] *Id.*, ¶ 16.

[26] *Id.*, ¶ 34 and template at 13691.

[27] *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking (Jessica Rosenworcel statement, Nov. 14, 2022), *available at* https://docs.fcc.gov/public/attachments/FCC-22-86A2.pdf ("[B]y requiring that providers display introductory rates clearly, we are seeking to end the kind of unexpected fees and junk costs that can get buried in long and mind-numbingly confusing statements of terms and conditions.")

[28] *See*, NPRM n. 29 (noting complaints to the FCC about ETFs triggered by subscribers moving to a new address or state).

[29] White, *supra* note 21.

[30] *DirecTV Sends Family of Deceased 102-Year-Old Woman "Early Termination" Fee*, GOOD DAY SACRAMENTO (Oct. 8, 2019), https://www.cbsnews.com/gooddaysacramento/news/102-year-old-directv-early-termination-fee.

[31] Ethan McLeod, *After Complaints, Comcast Waives Termination Fees for Destroyed Ellicott City Business*, WBFF (Aug. 4, 2016), https://foxbaltimore.com/news/local/after-complaints-from-destroyed-ellicott-city-businesses-comcast-waives-termination-fees.

[32] *Id.*

[33] *See, e.g.*, XfinityMarcos, Reply to *Early Termination Fee for Moving to a Non Service Area*, XFINITY COMMUNITY FORUM (Feb. 2022), https://forums.xfinity.com/conversations/customer-service/early-termination-fee-for-moving-to-a-non-service-area/620c2368d5ffd22c1b568793?commentId=620c2907d5ffd22c1b5687b9.

[34] *See, e.g.*, Again, Reply to *Early Termination Fee for Moving to a Non Service Area*, XFINITY COMMUNITY FORUM (Feb. 2022), https://forums.xfinity.com/conversations/customer-service/early-termination-fee-for-moving-to-a-non-service-area/620c2368d5ffd22c1b568793?commentId=620c3e4fd5ffd22c1b568826.

that "[p]roviders also often waive ETFs for a variety of reasons."[35] The examples of the 102-year-old woman and the flooded business are better characterized as idiosyncratic customer-service mishaps, rather than an indictment of ETFs generally.

Conversely, White's ETF experience is an example of an ETF policy working as designed. She was aware of the ETF at the time she entered into the contract, moved to another state serviced by her existing provider, received a superior mobile plan through her employer, broke her contract, and paid a fee for doing so—despite her efforts to "dispute or reverse" the fee.[36]

III. ETFs Are an Inextricable Component of Cable and DBS Rates

The NPRM concludes that the Commission has wide discretion "to regulate the provision of direct-to-home satellite services" and "to impose 'public interest or other requirements for providing video programming' on DBS providers."[37] In contrast, the FCC generally is prohibited from regulating cable-television rates.[38] As a workaround, the Commission claims it has authority to ban cable ETFs under its authority "to establish standards by which cable operators may fulfill their customer service requirements" which includes "communications between the cable operator and the subscriber (including standards governing bills and refunds)."[39]

Thus, whether the Commission has authority to regulate cable ETFs hinges on the crucial question of whether its proposal is a form of rate regulation (which is forbidden) or customer-service regulation (which is permitted). Unfortunately, Congress has provided no guidance, as the Commission notes: "The statute does not define the term 'rates' or explain the meaning of the phrase 'rates for the provision of cable service.'"[40]

Nevertheless, the FCC has a lengthy history of using an expansive definition of rates when it has suited the Commission's goals. For example, in the mobile market, the FCC has concluded that "the term 'rates charged' in [section 332(c)(3)(A)] may include ***both rate levels and rate structures*** for [cellular providers] and that the states are precluded from regulating either of these."[41]

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[35] NCTA Ex Parte Comments, *supra* note 15.

[36] White, *supra* note 21.

[37] NPRM, ¶ 5 *citing* 47 U.S.C. § 303(v) and 47 U.S.C. § 335(a).

[38] 47 U.S. Code § 543 ("No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title.").

[39] NPRM, ¶ 9. *See also*, 47 U.S.C. § 552.

[40] NPRM, ¶ 12.

[41] *Ball v. GTE Mobilnet*, 81 Cal.App.4th 529, 538 (Cal. Ct. App. 2000), *citing In re Southwestern Bell Mobile Systems, Inc.* F.C.C. 99-356 (November 24, 1999), ¶ 20. [emphasis added] *See* 47 U.S.C. § 332(c)(3)(A) ("no State or local government shall have any authority to regulate the … rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services"). *See also*, *In re* AT&T, 84 F.C.C.2d 158, 182 n.52 (1980) ("The pricing mechanisms employed to determine rates and charges as well

Perhaps because of this history, the Commission is now perplexed as to whether its proposed ETF regulations amount to rate regulation. On the one hand, the Commission "tentatively conclude[s] that Commission practice and precedent supports the notion that ETF regulations [] are not rate regulation."[42] On the other, the NPRM asks whether "the elimination of ETFs alter the price of long term contracts," specifically by "offer[ing] them at higher prices."[43] It seems the Commission is seeking it have it both ways: acknowledging its proposed ban on ETFs could be tied to higher prices, while claiming that connection does not amount to regulating rates.

We expect numerous comments addressing the legal and plain0language definitions of what constitutes "rates for the provision of cable service." In these comments, however, we focus on the *economics* of cable and DBS pricing. Put simply, the existence or absence of an ETF in an agreement is tied directly to the rates paid by the subscriber, as summarized by Ben Everard:

> If nothing else, evaluating "rates" is a far more complicated undertaking than merely referencing cost per unit of time. "Rates … do not exist in isolation. They have meaning only when one knows the services to which they are attached." It is therefore important to examine the context of the fee and the rate. In context, ***a fee which would otherwise seem to be isolated from the rate charged may in fact become a component of the rate if the fee is attached to a service reflected in the rate***. The ETF is a "central element of the rate structure that compensates defendants for the upfront services they provide to their customers." Without the ETF, the rate goes up. In this way, the ETF is part of the fee charged for a service rendered.[44]

Consumers who opt for a contract with an ETF receive valuable consideration in the form of discounted monthly rates, among other things. As noted above, NCTA testified that contracts with ETFs have a lower combined price over the life of the term.[45] One study estimates savings of about $17 a month on contracts with an ETF.[46] These lower rates are inextricably "attached" to the ETF. In the competitive MVPD and broadband environment, it would be impossible to eliminate ETFs without affecting rates. The ban on ETFs would therefore raise providers' marginal cost per-subscriber, which would be expected to result in higher prices. Providers facing competitive pressures

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as any interrelationships which exist among rate elements are part of rate structures.") and *Ibid.*; *accord* AT&T, 74 F.C.C.2d at 235 ("Individual '[r]ate elements are the basic building blocks of rate structures.")

[42] NPRM, ¶ 12.

[43] NPRM, ¶ 20.

[44] Ben Everard, *Early Termination Fees: Fair Game or Federally Preempted?*, 77 GEO. WASH. L. REV. 1033 (2009), *citing AT&T v. Cent. Office Tel. Inc.*, 524 U.S. 214, 223 (1998) *and* Joint Reply Memorandum of Points and Authorities in Support of Defendants' Demurrers Re Early Termination Fee Claims at 3-7, *In re Cellphone Termination Fee Cases*, No. 4332, 2006 WL 3256037 (Cal. Super. Ct. June 9, 2006), *rev'd*, No. A115457, 2008 WL 2332971 (Cal. Ct. App. June 9, 2008). [emphasis added]

[45] Brenner, *supra* note 11.

[46] Chao, et al., *supra* note 16

to avoid raising prices may instead exit unprofitable markets, reducing competition in those markets and leading to higher prices.

The Commission asserts that ETFs "mak[e] it costly for consumers to switch services during the contract term."[47] Nearly a decade ago, then-FCC Chair Tom Wheeler recalled the fleeting period of aggressive long-distance pricing (when long-distance pricing mattered), hoping those giddy days would come to the broadband market:

> Some of you are old enough—like me—to remember the long-distance telephone wars of the 1990s. Sign up with Sprint in April, switch to MCI in May, and then to AT&T in June. Choose any one of them, or others, in July. That is what a truly competitive telecommunications marketplace looks like. That is not the reality—even for "competitive broadband"—today.[48]

But yesteryear's Wheeler and today's Commission both miss the point. The *purpose* of ETFs is to make it costly to switch *during the contract term*. Providers base their pricing and investment decisions on their subscriber projections. They have a keen business and competitive interest in minimizing consumer switching, or churn. For long-term investments, providers need a greater degree of certainty than for short-term projects. Moreover, unlike long-distance service—which was as easy to switch as dialing 10-10-321, 10-10-345, or 1-800-COLLECT—switching cable or DBS providers typically requires the installation of costly equipment specific to the provider. For example, NCTA testified before the Commission:

> Churn can have several costly effects on providers. There are advertising and marketing costs to recruit new customers. There are transaction costs associated with signing up and cancelling subscribers. There may be truck rolls to disconnect and connect service. And in the case of new services like Internet and telephone service, there may be more substantial installation costs than compared to traditional cable service. Moreover, churn results in *uncertainty* regarding the expected revenue and profit from particular customers.
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> Long-term contracts can reduce these costs and uncertainty, promoting efficiency and investment. They can also enable operators to attract new customers and retain existing customers for their services.[49]

In its latest quarterly report to the Securities and Exchange Commission, DISH Network reported that it incurs "significant upfront costs to acquire Pay-TV" subscribers, amounting to subscriber-acquisition costs of $1,065 per new DISH TV subscriber.[50] The company also reported that it incurs

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[47] NPRM, ¶ 2.

[48] Tom Wheeler, *Prepared Remarks of FCC Chairman Tom Wheeler "The Facts and Future of Broadband Competition,"* FCC (Sep. 4, 2014), https://docs.fcc.gov/public/attachments/DOC-329161A1.pdf.

[49] Brenner, *supra* note 11.

[50] DISH Network Corporation, Quarterly Report (Form 10-Q) (Nov. 6, 2023),

"significant" costs to retain existing subscribers. These retention costs include upgrading and installing equipment, as well as free programming and promotional pricing, "in exchange for a contractual commitment to receive service for a minimum term."[51]

In addition to substantial subscriber-acquisition costs, as NCTA noted above, churn creates uncertainty in expected revenues and profits. By imposing a cost for early termination, ETFs reduce the likelihood that consumers will break their contract during the term of the agreement. This, in turn, increases the reliability of providers' longer-term revenue projections, upon which they make investment decisions.

In contrast, the Commission is clear that it expects—and hopes—that a ban on ETFs will *increase* churn.[52] Yet the NPRM draws no conclusions, nor solicits any comments, regarding whether and how a ban on ETFs would affect revenue projections, the reliability of those projections, and how those lower and less-reliable projections would affect investment.[53]

Banning ETFs can turn profitable customers into unprofitable customers, thus reducing providers' expected revenues and placing pressure on providers to raise rates to maintain profitability. By increasing churn, a ban on ETFs increases the *uncertainty* in those projections and reduces providers' confidence in their reliability. Because of the well-known and widely accepted risk-return tradeoff, firms facing increased uncertainty in investment returns (*i.e.*, risk) will demand higher expected returns from consumers—through higher prices—to account for that higher risk.[54] Thus, the increase in uncertainty by itself will pressure providers to raise rates to improve risk-adjusted returns.

In summary, the economics of ETFs demonstrates that ETFs are so inextricably linked to rates that they cannot be disentangled into separate components. This linkage is made direct through the *quid pro quo* of offering lower rates to consumers to choose a contract with an ETF provision. The linkage

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https://www.sec.gov/ix?doc=/Archives/edgar/data/1001082/000155837023017649/dish-20230930x10q.htm ("DISH TV SAC was $1,065 during the three months ended September 30, 2023 compared to $1,029 during the same period in 2022, an increase of $36 or 3.5%. This change was primarily attributable to higher installation costs due to an increase in labor and other installation costs, and a lower percentage of remanufactured receivers being activated on new subscriber accounts, partially offset by a decrease in advertising costs per subscriber.")

[51] *Id.* ("We incur significant costs to retain our existing DISH TV subscribers, generally as a result of upgrading their equipment to next generation receivers, primarily including our Hopper® receivers, and by providing retention credits. As with our subscriber acquisition costs, our retention upgrade spending includes the cost of equipment and installation services. In certain circumstances, we also offer programming at no additional charge and/or promotional pricing for limited periods to existing customers in exchange for a contractual commitment to receive service for a minimum term. A component of our retention efforts includes the installation of equipment for customers who move.")

[52] NPRM, ¶ 2, *citing* Executive Order 14036, 86 FR 36987 (July 9, 2021), §(l)(iv), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy ("prohibiting unjust or unreasonable early termination fees" would "enable[e] consumers to more easily switch providers").

[53] The words "invest" or "investment" are absent from the NPRM. The closest the NPRM gets to expressing any interest in investment is its inquiry, "would a ban on ETFs limit entry by new providers by limiting their ability to recoup upfront costs through an ETF?" (NPRM, ¶ 22)

[54] *See*, EDWIN J. ELTON & MARTIN J. GRUBER, MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS (4th ed, 1991).

is also indirect, through providers' revenue projections and, in turn, investment decisions, which factor into rate calculations. Under this economic reasoning, the Commission should be prohibited from regulating cable television ETFs. But even if the Commission has authority to ban ETFs, it should not do so, because of the harms to both providers and consumers.