Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
All-In Pricing for Cable and Satellite Television Service	)	MB Docket No. 23-203
	)	
	)	

REPLY COMMENTS OF THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES; CITY OF BOSTON, MA; MT. HOOD CABLE REGULATORY COMMISSION; FAIRFAX COUNTY, VA; AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. Action is needed. 3

A. Consumers are confused. 3

B. Economic theory and common sense show a need for the proposed rules. 5

II. The Commission should adopt an all-in marketing disclosure rule. 6

A. The rule should require clarity in advertising. 6

B. The industry's objections and proposed exemptions should be rejected. 8

C. Itemization in advertising and bills. 12

III. The Commission possesses legal authority to adopt the proposed rule. 15

CONCLUSION 19

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INTRODUCTION AND SUMMARY

The Texas Coalition of Cities For Utility Issues, City of Boston, Massachusetts, the Mt. Hood Cable Regulatory Commission, Fairfax County, Virginia and National Association of Telecommunications Officers and Advisors (NATOA) (collectively Local Government Commenters) welcome this opportunity to submit reply comments and support the Commission's proposals to eliminate confusing "junk fees" and promote competition by ensuring that consumers can price shop and compare Multi-channel Video Programming Distributor (MVPD) products with other products available in the marketplace. Consumers should know the ultimate price they will pay, and should not be misled into believing that ordinary costs of doing business are actually government-imposed fees or taxes. The record supports the Commission's proposal; the confusion and damage to consumers is clear. The Commission possesses sufficient legal authority to adopt the proposed rules.

The Commission's proposed rule will work in conjunction with, and ensure the proper operation of, the Television Viewer Protection Act (TVPA). The TVPA requires providers to

disclose the total monthly charge for services provided by MVPDs, including the dates discounts will expire and a good faith estimate of any government-imposed tax or fee. Within 24 hours of signing up, a provider must send a written disclosure of that information, and the law offers a customer the right to cancel within 24 hours of receiving the written notice without a penalty.[1] But the TVPA will not work well if consumers are already confused by marketing and advertising by the time they reach the 48-hour disclosure and cancellation period provided by the TVPA.

Local Government Commenters propose the following:

- Companies must advertise the all-in price, *i.e.*, the total amount consumers will pay, including all programming, equipment, franchise fees, and taxes, but excluding local sales taxes.
- Advertising should include accurate information regarding consumer rights pursuant to the Television Viewer Protection Act (TVPA), including the opportunity to cancel without penalty within 24 hours of receiving the final price.
- In a case where the video programming is bundled with a non-programming product, this obligation will be met if either: 1) the bundle is advertised via an all-in price for the bundle, or 2) the provider breaks out the all-in price for video programming only.
- Any line item that is not optional should be included in the all-in price and any optional costs must be clearly disclosed in advertising.

[1] 47 U.S.C. § 562(a). The TVPA also provides the right to a clear breakdown of any charges for the covered service, including the termination date of the contract and any promotional discount, and protections against paying for equipment a customer does not use or need. *Id.*, § 562(b)-(c).

- Providers should be subject to a requirement similar to the TVPA's terms with respect to the disclosure of the length of a promotional rate or discount.[2]
- Local service and rate information should be available on operator web sites.

I. Action is needed.

All commenters agree consumers are entitled to clarity. Consumer advocates, local and state governments and the National Association of Broadcasters support Commission action.[3] MVPDs agree consumers should receive accurate information. "NTCA's members agree that consumers are entitled to clear, concise, and easily digestible information about their video programming services."[4] "DIRECTV supports the Commission's twin goals here: promoting transparency and preventing companies from blaming the government for fees not imposed by the government."[5] "NTCA recognizes the value of transparency in allowing consumers to 'comparison shop' and the importance of avoiding 'surprise fees' that change the amount they will be charged for the service."[6]

A. Consumers are confused.

The record shows that state and local governments receive complaints from confused consumers or consumers pressed by rising expenses to reduce their bills. The City of Boston's Broadband & Cable Office fields over 2000 calls, emails, and 311 reports annually, ranging from downed lines, poles, billing and service issues, of which 20-25 percent are from seniors or those assisting an elderly family member/neighbor and residents on fixed incomes, looking for ways to

[2] 47 U.S.C. § 562(a)(1), (b)(3).
[3] City of Oklahoma et al. at 1-2; Consumer Reports at 14-15; Truth in Advertising at 2-3, 5-7.
[4] NCTA at 2 (quotations omitted); see also NAB at 1 ("NAB agrees with the FCC's proposal and urges the Commission to require cable and DBS providers to provide an "all-in" price on promotional materials and bills.")
[5] DIRECTV at 1.
[6] NTCA at 2.

lower their monthly bills. Like Boston and other Local Government Commenters, other Local Franchise Authority commenters filing in the docket have heard from consumers who easily mistake these charges for government-imposed fees "when, in fact, they are operator-imposed charges that have been misleadingly itemized outside the price for cable services."[7] The City of Seattle explains that ten years of tracking shows "the cable industry practice of using 'broadcast TV' and 'regional sports' to obfuscate the true price of cable TV services. … [T]he cable industry has taken what are nondiscretionary programming costs to consumers, that used to be part of the basic programming price for buying their services, added a designation of 'fees', and placed them away from the now artificially low 'price' on separate parts of advertising and bills."[8] The City of Minneapolis reports it has received 83 questions so far this year from consumers confused by these practices, the Northwest Suburbs Cable Commission and the Metropolitan Area Communications Commission receive many complaints every year from cable consumers confused by charges on their bills.[9] Connecticut's State Office of Broadband reports receiving many complaints.[10] NAB also correctly contends that segregating out these charges lead consumers to believe these cost inputs are different from other costs incurred by MVPDs.[11]

Consumer Reports documents a secret shopper study showing consumers received inaccurate or confusing charge-related information as they attempted to sign up for MVPD programming.[12] Companies, most importantly, did not acknowledge that broadcast and regional sports charges were broken out in line items apart from the base service price solely at the

[7] City of Oklahoma et al. at 1-2.
[8] City of Seattle at 1.
[9] City of Oklahoma et al. at 5, 7.
[10] Connecticut at 6.
[11] NAB at 5.
[12] Consumer Reports 14-15.

election of the cable operator.[13] Consumer Reports' surveys demonstrate that nearly 6 in 10 (59 percent) Americans who encountered unexpected or hidden charges or fees while using telecom services in the past two years say the charges caused them to exceed their budgets.[14]

Increases in charges like broadcast and regional sports charges continue even though consumers believe they are protected by "fixed-rate" contracts.[15] Truth in Advertising's comment is replete with consumer confusion and concern when faced with advertising for bundled products, video and internet offerings.[16] The City of Seattle documents the confusing advertising on web sites for services offered in in its community.[17] Consumers should not have to scrutinize the fine print to figure out what they will be paying for a service.[18]

B. Economic theory and common sense show a need for the proposed rules.

Companies claim that robust competition increases their incentives for clear pricing,[19] but the literature does not accord with their claims. As Local Government Commenters explained in our opening comments, and as the evidence of consumer confusion and harm submitted into the record demonstrates, competition has not resolved the issue. Moreover, as the Consumer Finance Protection Bureau has pointed out, improperly disclosed charges and fees undermine competition. They make it harder for consumers to price shop for products and thereby "undermine competition" and create "a serious ripple effect on people's finances," causing

[13] *Id.*
[14] Consumer Reports at 5.
[15] Consumer Reports at 5; City of Seattle at 6 ("providers are able to increase the fees over time, while keeping the promotional or minimum-term price guarantee the same").
[16] Truth in Advertising at 2-3, 5-8.
[17] City of Seattle, attachments.
[18] City of Oklahoma et al. at 6.
[19] NCTA at 4 (NCTA states "consumers today can access linear and on-demand video programming from a wide variety of sources. In this robust environment, cable operators must compete fiercely for consumers' eyeballs."; ACA at 9, 11 (no indication of any gap in transparency that the proposed "all-in" price requirement is necessary to fill).

consumers to experience greater difficulty meeting basic needs, such as rent, utilities and food.[20] According to one author, unregulated charges exacerbate wealth inequality, resulting in a massive transfer of wealth from the many to the few – to a few large wealthy corporations.[21]

Competition will function better if customers know what they must pay, and what they are paying for, when they shop in the marketplace.

II. The Commission should adopt an all-in marketing disclosure rule.

A. The rule should require clarity in advertising.

Taking into account the record, the needs of consumers and of competition, Local Government Commenters propose the following formulation of the "all-in" rule:

- Companies must advertise the all-in price, *i.e.*, the total amount consumers will pay, including all programming, equipment, franchise fees, and taxes, but excluding local sales taxes.
- Advertising should include accurate information regarding consumer rights pursuant to the Television Viewer Protection Act, including the opportunity to cancel without penalty within 24 hours of receiving the final price.
- In a case where the video programming is bundled with a non-programming product, this obligation will be met if either: 1) the bundle is advertised via an all-in price for the bundle, or 2) the provider breaks out the all-in price for video programming only.

[20] Truth in Advertising at 4 (citing The Hidden Cost of Junk Fees, Consumer Financial Protection Bureau, Feb. 2, 2022, https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/.)
[21] Devin Fergus, LAND OF THE FEE: HIDDEN COSTS AND THE DECLINE OF THE AMERICAN MIDDLE CLASS (Oxford Univ. Press 2019).

- Any line-item that is not optional should be included in the all-in price and any optional costs must be clearly disclosed in advertising.
- Providers should be subject to a requirement similar to the TVPA's terms with respect to the disclosure of the length of a promotional rate or discount.[22]
- Local service and rate information should be available on operator web sites.[23]

Local Government Commenters agree with Consumer Reports that the monthly lease or cost of any device—such as a DVR or set-top box—must be included in the all-in price.[24] Further, as in the proposed formulation, optional charges for optional products or services should be disclosed.[25] Local Government Commenters' proposed formulation aligns with Connecticut's suggestion that the rules should not be exempted if the cable services are bundled with phone or internet service,[26] and addresses Verizon's concerns with respect to the display of pricing for bundled services[27] by offering the provider a choice and also offering the consumer clear information. The Commission should make clear, however, that the advertisement must accurately disclose what is in the advertised bundle and how any bundle discount applies.

Requiring clear explanations with respect to "teaser" rates will reduce consumer confusion, similar to the kind of problems the Commission has addressed with bill shock policies. Fairfax County has received complaints from consumers confused by teaser rates and from cable operator policies that resulted in inconsistent implementation of promotional rates by a cable operator in northern Virginia.

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[22] 47 U.S.C. § 562(a)(1), (b)(3).
[23] *Accord* City of Seattle at 7.
[24] Consumer Reports at 10-11.
[25] Verizon at 10.
[26] Connecticut at 5.
[27] Verizon at 11-13.

The Commission should permit the exclusion of sales taxes because sales taxes are effectively collected on behalf of the government,[28] as opposed to "other fees that are best characterized as 'regulatory pass-through fees,'" as Consumer Reports explains.[29] Just as the Fifth Circuit ruled in *City of Dallas v. FCC*, any fee or tax that is legally imposed on the operator (whether generally applicable or not) is an expense of the operator not deductible from gross revenues.[30] Therefore, the operator must recover that expense through its retail (*i.e.*, all-in) price. Those taxes and fees therefore should be included in the all-in price.

The City of Seattle demonstrates effectively the problem with locating clear prices online. For this reason its suggestion of a mandatory web disclosure is a good one.[31] Local Government Commenters support the Connecticut Office of State Broadband recommendation that the Commission codify the new rules at 47 C.F.R. § 76.309 because many state laws and franchise agreements reference those rules.[32]

B. The industry's objections and proposed exemptions should be rejected.

Industry claims a wide variety of reasons why the proposed rule should not be adopted or, alternatively, proposes exemptions and grandfathering that would negate most of the positive impact of the proposed rule. These objections and exemptions are unsound.

The industry is attempting to "have its cake and eat it, too," by protesting that a rule requiring accurate advertising would prohibit certain kinds of advertising, such as national

[28] 16 McQuillin Mun. Corp. § 44:262 (3d ed.) ("Under some laws, a city sales tax is on the buyer, and the seller is merely the collecting agent of the city….").
[29] Consumer Reports at 7.
[30] *City of Dallas, Tex. v. FCC*, 118 F.3d 393, 398 (5th Cir. 1997) ("[E]ven if franchise fees were treated as a tax, they would still be treated as a normal expense of doing business unless the tax was imposed directly upon the subscriber. Courts have held that gross revenue generally includes revenues collected for taxes.")
[31] City of Seattle at 7.
[32] Connecticut at 4.

advertising. Typically, businesses must choose between offering a single price nationwide and absorbing the differences in cost that might impact relative profitability for various consumers. Similarly, most businesses must set pricing and promotional deals based on their projections for the cost of their inputs. But as the City of Seattle explains, cable operators know their local broadcast and regional sports costs are "*among the fastest growing components of our programming costs.*"[33] There is no reason to permit cable operators and DBS operators to mislead consumers in order to avoid a burden faced by all other businesses.

It is up to cable and DBS providers to decide whether they want to offer term contracts with price guarantees. But if they do, the all-in contract price must be the price for the entire term of the contract. If companies want the flexibility to change that subscriber's price at any time, they can simply not offer the price guarantee. That is what the streaming services typically do: there is no fixed-term contract, and price increases are implemented with reasonable notice. Cable operators can take either course – fixed-price contracts or increases at will – but they cannot pretend to be offering the former when they are really providing the latter.

For similar reasons, residents of multi-dwelling units (MDUs) can often be the most vulnerable consumers and should not be excluded from the proposed rule's protections. The Commission should reject ACA's and NCTA's argument that their special pricing packages would exempt them from this important consumer protection rule.[34]

Local Government Commenters oppose categorically DIRECTV's proposal to exclude all national advertising campaigns,[35] which would hamstring the rule. ACA cites similar

[33] City of Seattle at 6.
[34] ACA at 14; NCTA at 8.
[35] DIRECTV at 16.

concerns as to the accuracy of marketing in regions while maintaining accuracy.[36] DIRECTV states it might be impossible or impractical to comply with new regulations for things like sponsored web search results, web banners and flash ads.[37] Such space-constrained advertisements invariably link to a web page with more details. As Consumer Reports explains, however, generating a single price for video service that accounts for company-imposed charges should not be as complex as creating a Broadband Nutrition Label, which the Commission successfully adopted.[38]

DIRECTV's proposal to require instead that that "bills and advertisements would have to be accurate" and "the price of related programming fees would have to be disclosed clearly and conspicuously and in close proximity to the price" is inadequate.[39] Not only is the proposed rule insufficient to protect consumers, but it is inadequate for another reason. As the NAB explains,[40] and as the MVPD industry acknowledges,[41] broadcast and regional sports charges often do not actually represent the costs incurred by the cable operator. Unless the industry is willing to support the robust accuracy controls put forward by the Connecticut Office of Consumer Counsel, Office of State Broadband,[42] mere proposals for generally "accurate" advertising and

[36] ACA at 12-13. DIRECTV similarly states that it advertises nationally but charges varying regional sports costs, depending on the market. DIRECTV at 11.
[37] DIRECTV at 16.
[38] Consumer Reports at 12.
[39] DIRECTV at 2.
[40] NAB at 3-4 & n.7.
[41] NTCA at 3 ("retransmission consent agreements routinely include nondisclosure clauses that prohibits these providers from disclosing the specific amount paid per subscriber. Furthermore, small video service providers in particular are unable to negotiate the terms of the agreement and instead are notified they can 'take it or leave it'….").
[42] Connecticut Office of State Broadband at 2-3 (providers "should be required to attest in writing – both to the FCC and the state or local authority that issues the provider's license to provide service – what specific 'costs' these surcharges purport to cover and be subject to review and audit by the Commission or such local authority."); *Id.* at 6 (the Commission should "do spot audits of the veracity and accuracy of the 'broadcast TV fee' being assessed in a particular market or to allow state utility commissions or other such agencies to conduct such audits.").

line items fall short. As they are currently employed in the industry, these charges do not correspond to actual costs.

Local Government Commenters further caution the Commission from adopting a wholesale exemption for all enterprise customers. The Commission should be clear that small businesses are protected in the same way as household consumers under the proposed rule.[43]

The Commission should reject the MVPD industry arguments that they should not be subject to the proposed rules because streaming services would not be required to offer an all-in price, limiting the utility for consumers who are comparison shopping.[44] Improving a consumer's understanding of what she is purchasing for one service does not make it more difficult for her to compare with other products. As Verizon states, most streaming services offer very different products from cable and DBS providers.[45]

Moreover, DIRECTV's example shows exactly why an all-in price will aid consumers. DIRECTV offers an example where three competing companies might offer different numbers of channels at varying prices, noting that a single price could yield 165 channels from DIRECTV, 120 channels from DISH, and 125 channels from Xfinity, each with its own mix of programming.[46] But this scenario is exactly the point: with all-in pricing, a consumer will better be able to compare a 190 channel package to a 125 channel package. If a consumer believes she must only pay $80 for 125 channels, only to discover the actual price is $125 when she receives a bill, she might inadvertently choose a less cost-effective package given her needs.

[43] *Id.*
[44] ACA at 16.
[45] Verizon at 7.
[46] DIRECTV at 9-10.

ACA argues that most of its members do not find video-only services profitable and they may react by advertising fewer video-only offerings if they must comply with the Commission's proposed rule.[47] As long as the Commission applies the rule to bundled services, the ACA contention that its members would stop advertising or offering video services seems to be an empty threat.[48]

C. Itemization in advertising and bills

Local Government Commenters emphasize that providers should clearly identify the all-in price in marketing and on bills, even if the Commission elects to permit providers to break out costs on invoices as they request.[49] Contrary to Verizon's contention, a prominent disclosure is needed to clarify for confused consumers the difference between the most important, all-in price, and the subcategories of charges that contribute to the overall price.[50]

Local Government Commenters note that cable operators are permitted, by law, to break out franchise fees, PEG costs and taxes on their bills.[51] But, as Consumer Reports explains, the law does not make any provision for mandatory disclosure of other kinds of charges or costs.[52] Consumer Reports makes a valid point that the Commission helped create the problem we see today with misleading fees when it interpreted Section 622 to bless the separate itemization of non-governmental fees.[53]

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[47] ACA at 16.
[48] ACA at 16-17.
[49] See ACA at 17; NCTA at 2; NTCA at 2.
[50] Verizon at 2.
[51] 47 U.S.C. § 542(c), (f).
[52] Consumer Reports at 7.
[53] Consumer Reports at 5-6 (citing 8 FCC Rcd. at 5967, n.1402).

To address this problem, at a minimum the Commission should ensure that the labels for any charges that are not sales tax, but are broken out, are not misleading on consumer bills. Using the term "fee" (particularly given that the Cable Act uses the term "franchise fee" for the cost of using the public right-of-way) suggests a government imprimatur for these costs, when they are not governmental at all.[54] Perhaps the Commission should require a disclosure regarding any additional charge beyond the legally specified line items, making clear that such charges are not government-imposed. Or the Commission could prohibit the term "fee" as misleading. The term "charge" might more accurately capture the true nature of these costs. Or the placement of the charges on an invoice could help indicate to consumers the true source of these costs. The City of Seattle demonstrates that some cable operators utilize a broadcast charge on their bills, but do not help their consumers understand the connection between this charge and access to broadcast channels on cable.[55]

The Commission should also clarify that the TVPA does not permit the kind of mischief put forward by NCTA in interpreting that law's treatment of these junk fees. NCTA claims that the legislative history indicates programming charges "are separate from and in addition to the monthly service charge and must therefore be itemized on bills."[56] It further alleges that "the TVPA's mandate that MVPDs itemize all applicable charges on bills if the MVPDs add them to the price of the package precludes the Commission's proposal to require the opposite as part of an aggregated total."[57] The legislative history says, when quoted in full: "Consumers often face

[54] *Accord* DIRECTV at 2.
[55] City of Seattle at 5 (Comcast's practice is to refer to the charges as "Service Fees" and place them at the end of the Regular Monthly Charges bill section, making no direct connection with them being video programming costs.")
[56] NCTA 6-7.
[57] *Id.* Section 47 U.S.C. § 562(b) states:
(b) Consumer rights in e-billing
If a provider of a covered service provides a bill to a consumer in an electronic format, the provider shall include in the bill—

unexpected and confusing fees when purchasing video programming. These *include* fees for broadcast TV, regional sports, set-top box, and HD technology."[58] Nothing about this language sanctions excluding made-up charges from the retail price to mislead consumers about the impact on their wallets.

Further, as to the legislation requiring all charges and fees to be itemized, the TVPA does not excuse similarly misleading behavior. The statute's definition of "covered service" informs the statute's use of the term "the service itself" and refers to a multi-channel video programming distributor acting as such,[59] and an MVPD is defined broadly as a wide array of providers who offer "video programming" the definition of which, in turn, references programming comparable to that provided by a television broadcast station.[60] These references demonstrate the broad sweep of the statute and contradict arguments that charges which are intended to recover costs related to broadcast television should be excluded from the covered service's price. Local Government Commenters also support the Commission's legal analysis with regard to the meaning of the terms in the TVPA, particularly the Commission's conclusion that listing below-the-line charges will confuse consumers by leading them to believe those charges are not for the core video programming service purchased.[61] Moreover, the legislative history is clear that Congress was concerned consumers were confused about the charges for cable and satellite

> (1) an itemized statement that breaks down the total amount charged for or relating to the provision of the covered service by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges ….

[58] H. Rept. 116-329 at 6 (emphasis added).
[59] 47 U.S.C. § 562(d)(3) states, "The term 'covered service' means service provided by a multichannel video programming distributor, to the extent such distributor is acting as a multichannel video programming distributor."
[60] 47 U.S.C. §522(13), (20).
[61] Notice at ¶16.

service, exactly the concerns the Commission is addressing here.[62] To interpret the TVPA as NCTA proposes would be to turn the statute on its head.

These industry arguments reveal that Commission action is needed because they incorrectly claim current law permits, and even requires them, to mislead consumers as to the total amount and the components of the price consumers will pay for a service. The Commission should adopt, in this proceeding, a declaratory ruling clarifying the meaning of the TVPA in order to prevent any further misleading industry behavior.[63]

III. The Commission possesses legal authority to adopt the proposed rule.

As we explain, the FCC should rely upon its combined authority under Sections 335, 552, 562 (the TVPA), and its ancillary authority under 154(i).[64] NCTA argues the Commission's proposal exceeds its authority, while acknowledging the FCC has already imposed substantial transparency requirements pursuant to its existing authority. But nothing about the FCC's current proposal exceeds its jurisdictional bounds. As NCTA admits, FCC rules already impose substantial transparency requirements.[65] DIRECTV argues the Commission cannot use Section 335 to regulate marketing by DBS providers because Section 335 confers authority on the Commission to impose "public interest or other requirements for providing video

[62] *Id.*
[63] 5 U.S.C. 554(e).
[64] 47 U.S.C. §§ 335, 552, 562, 154(i).
[65] NCTA n.7. See, e.g., 47 C.F.R. § 76.1602(b) (requiring that all cable subscribers be given a notice at installation, at least once annually, and also upon request, that includes a description of the products and services offered; the prices, options, and conditions of the subscriptions to programming and other services; and billing and complaint procedures, among other information); 47 C.F.R. § 76.1603(b) (requiring at least 30 days written notice to subscribers of any changes in rates or services); 47 C.F.R. § 76.1619 (requiring that bills be clear, concise, understandable, and fully itemized). These requirements are typically enforced by cable franchising authorities, many of which also have adopted additional customer service requirements for video service. See 47 U.S.C. § 552(d)(2); Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992—Consumer Protection and Customer Service, Report and Order, 8 FCC Rcd 2892, 2895-96 ¶ 12 (1993); id. at 2897-98 ¶ 20.

programming,"[66] but the TVPA provides the Commission the jurisdictional hook it needs when section 335 is combined with Sections 562 and 154(i).

The Commission's primary focus should be in ensuring the efficacy of the TVPA to adopt these rules. "The Commission may exercise this 'ancillary' authority only if it demonstrates that its action … is 'reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.'" *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). In this case, the combination of the authority under Section 562 (TVPA), Section 632 (cable) and Section 335 (DBS) can be combined with its ancillary 154(i) authority to adopt the rule. With respect to its DBS authority, the limiting principle for the use of 154(i) would be to ensure the TVPA is effective for services the Commission regulates under Section 335. The TVPA clearly reaches DBS programming. Authority under the combination of 562 and 335 is clear.

Specifically, the TVPA gives the Commission authority by adding to the Cable Act a requirement that consumers receive a disclosure "before" they subscribe to a service and offer an option to cancel a service within 24 hours. This focus on consumer decision-making with regard to prices of MVPD products and services evidences Congress's concern that consumers would be misled as to the total cost of a product when signing up. A disclosure at the time of purchase will be less effective pursuant to the TVPA if the consumer has already been confused by misleading and inaccurate advertising that led up to a consumer's decision to subscribe. Moreover, this also indicates the Commission should consider billing disclosures as discussed above in Part II.C, because a consumer will have a harder time knowing if she has been misled

[66] DIRECTV at 3-5.

under the TVPA if she does not receive information in her bill that is accurate and similarly labelled to the initial disclosure she received under the TVPA.

As NCTA says, the Commission should adopt the same rules for all providers under the TVPA.[67] Streaming services, as the commenters explain, offer different services under different regulations. However, consumers who are choosing among several streaming services and an MVPD package will want to know how much the total, final cost will be in order to determine which services, or combination of services, will best meet their needs and budget. The TVPA does not cover streaming services, so the Commission should act in accordance with its bounds in terms of regulated services. The Commission should act as expansively as possible, however, to protect consumers within its jurisdiction.

The Commission's broad authority to implement provisions of the Cable Act and the Communications Act have been upheld previously with respect to Section 621 of the Cable Act.[68] *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). The same legal analysis applies here. The Commission must act consistently: it cannot assert broad Commission authority to interpret the Cable Act when it is acting favorably to the industry, but reject it when consumers will benefit.

NCTA argues that, since Congress required disclosure of the all-in price at the point of sale in the TVPA, a decision by the FCC to adopt a new rule governing marketing would be arbitrary and capricious.[69] NCTA claims that Congress's action to adopt the TVPA means the FCC does not have the authority to impose pricing transparency regulation.[70] But NCTA

[67] NCTA at 7.
[68] 47 U.S.C. § 541.
[69] NCTA at 5.
[70] NCTA at 4-5.

overstates the effect of the Congressional decision to adopt the TVPA. The Supreme Court has not consistently applied a "rejected proposal" rule.[71]

NCTA is wrong that the Commission's authority under Section 632(b)(3) is limited to existing subscribers and customers only, not potential subscribers,[72] because Section 632 says the Commission's customer service standards must address communications between subscribers and cable operators "at minimum."[73]

NCTA is wrong that the Commission's proposed rules do not meet the *Zauderer* test because it would be unduly burdensome for national companies to conduct national marketing campaigns if their product prices vary by state or locality.[74] "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." *American Meat Institute v. U.S. Dept. of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) (*en banc*) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985)).

Consumer protection rules are needed in the marketplace, and the lower levels of competition in the MVPD market demonstrates that Verizon is wrong to dismiss relying on Section 552 because it was "designed for the monopoly cable era."[75]

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[71] The Supreme Court has adopted a statutory interpretation that Congress supposedly rejected legislatively. E.g., *Compare* Murphy v. Smith, 138 S.Ct. 784, 789 (2018) *with id.* at 794-95 (Sotomayor, J. dissenting); compare Rapanos v. United States, 547 U.S. 715, 749-52 (2006) with id. at , 797 (Stevens, J. dissenting);. *compare* Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 176 (1993) *with id.* at 202 (Blackmun, J., dissenting).
[72] NCTA at 8-9.
[73] 47 U.S.C. § 552(b).
[74] NCTA at 11.
[75] Verizon at 6.

CONCLUSION

Local Government Commenters support the Commission's proposals to eliminate confusing "junk fees" and promote competition by ensuring that consumers can price shop in the video programming marketplace. The Commission's proposed rule will work in conjunction with, and ensure the proper operation of, the Television Viewer Protection Act (TVPA). Local Government Commenters urge the Commission to adopt its proposed formulation of the all-in pricing rule. Consumers should receive accurate and clear pricing information, and should not be misled into believing that ordinary costs of doing business are actually government-imposed fees or taxes.

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