

# JUNK FEES AND CABLE TV: LESSONS FROM THE TELEVISION VIEWER PROTECTION ACT



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## JUNK FEES AND CABLE TV: LESSONS FROM THE TELEVISION VIEWER PROTECTION ACT

By Harold Feld

In both an Executive Order and the State of the Union, the Biden Administration has announced a campaign to eliminate "junk fees." The Biden Administration has singled out cable and internet services as an industry that uses junk fees and has called on Congress and the FCC to take action against these fees. Prior to the Biden Administration, Congress attempted to address the specific problem of junk fees in the cable and broadband industry through the Television Viewer Protection Act of 2019. The TVPA requires providers to give consumers the total price, inclusive of all fees, for a subscription to cable and/or broadband service at the point of sale and prohibits charging an equipment fee for internet service where the customer provides their own equipment. Analysis shows neither the TVPA or competition from streaming services has reduced the use of junk fees by cable providers. To the contrary, competition from streaming services may actually increase the incentive to use junk fees. The problem is made more complicated by the offering of bundled services, further obscuring the true price of service. This limited natural experiment suggests that eliminating junk fees will require direct regulation and not merely disclosure obligations.

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President Biden has made the elimination of “junk fees” a prominent initiative. Initially introduced as part of his Executive Order on Competition in July of 2021,<sup>2</sup> the President highlighted its anti-junk fees campaign as part of the 2023 State of the Union Address<sup>3</sup> and in a White House statement on advancing equity for Black Americans<sup>4</sup> as part of Black History Month. In all these statements, President Biden singled out the cable and internet providers as using junk fees to overcharge subscribers and thwart competition.<sup>5</sup> The President called on the FCC to take specific steps to address carrier junk fees in the Competition EO<sup>6</sup> and indicated in the SOTU that he intended to include provisions to target carrier junk fees in legislation he planned to propose.

Congress previously took limited action against carrier junk fees in the Television Viewer Protection Act of 2020<sup>7</sup> (“TVPA”). The TVPA adopted the most common prescription for dealing with junk fees, requiring full disclosure of the bottom-line price inclusive of all fees.<sup>8</sup> This negates what most scholars and advocates identify as the primary purpose of junk fees – hiding the true price from purchasers when they evaluate whether or not to buy the product of service. The TVPA therefore provides an opportunity to see how effective this disclosure strategy will be if adopted as the primary remedy for junk fees. While data is limited, two studies by Consumers Reports suggests that, at least in the specific context of cable and broadband services, disclosure did not have a material impact on the prevalence of junk fees in the cable industry. Extrapolating from this, it seems unlikely that the “broadband consumer label” mandated by Section 60504 of the Infrastructure Investment and Jobs Act of 2021<sup>9</sup> will have significant impact on the prevalence of junk fees in the broadband access industry.

## I. WHAT ARE JUNK FEES?

In a blog post, the White House described what President Biden means by “junk fees.” The blog post cited a technical definition proposed by the Federal Trade Commission (“FTC”) in its pending proceeding on junk fees,<sup>10</sup> but generally broke these fees down into four broad categories: (1) mandatory fees designed to hide the full price (for example, an additional “service fee” added to a ticket price); (2) surprise fees consumers only learn about after the purchase (such as a ‘family seating fee’ for airline tickets when a parent requests seating next to a minor child); (3) exploitive or predatory fees that take advantage of the lack of choices available to the customer (such as a high early termination fee (“ETF”) to prevent a customer from discontinuing service); and, (4) fraudulent fees (such as advertising a “no fee” bank account but in fact subject to significant fees described as “charges” or some other name).

All these fees serve to harm consumers and injure competition by making it difficult or impossible to accurately gauge the true price of a product or service. This does more than trick consumers into buying these they otherwise would not. By disguising the true price, the provider makes it impossible for consumers to accurately compare prices thus frustrating competition. Without the ability to compare prices, consumers cannot reward providers of lower-price goods and require competitors to lower their prices. In some markets, a provider may try to compete on simplifying the bill and providing an accurate bottom-line price. For example, certain mobile providers offer (or at least claim to offer) a clear bottom-line price without hidden fees.<sup>11</sup> But the entire point of hidden fees is that everyone claims to offer a bottom-line price, making true

2 Promoting Competition in the American Economy, EO 14036 of July 9, 2021, 86 Fed. Reg. 36987 (“Competition EO”).

3 Speech as drafted available at <https://www.whitehouse.gov/state-of-the-union-2023/>. (“SOTU”).

4 The White House, “FACT SHEET: The Biden-Harris Administration Advances Equity and Opportunity for Black Americans and Communities Across the Country” (February 27, 2023) (“WH Fact Sheet”). Available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/27/fact-sheet-the-biden-%E2%81%A0harris-administration-advances-equity-and-opportunity-for-black-americans-and-communities-across-the-country/>.

5 Because the largest cable providers are also the largest providers of home internet access, this article will refer to these collectively as “carriers” unless the distinction matters.

6 Competition EO, *supra* note 2, 88 Fed. Reg. at 36998-99.

7 The Television Viewer Protection Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534 (2019). The TVPA was enacted as Title X of the “Further Consolidated Appropriations Act, 2020” (H.R. 1865, 116th Cong.).

8 TVPA § 1004(a), codified at 47 U.S.C. § 562.

9 Pub. L. 117-58, Div. F, Title V, § 60504, codified at 47 U.S.C. § 1753.

10 “Unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price; the term also encompasses ‘hidden fees,’ which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.” Brian Deese, Neale Mahoney, Tim Wu, “The President’s Initiative on Junk Fees and Related Pricing Practices,” White House Blog (Oct. 26, 2022) (“Junk Fees Blog”). Available at <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/>.

11 See “What are the fees and taxes associated with my Mint Mobile plan?” available at: <https://www.mintmobile.com/help/what-are-the-fees-and-taxes-associated-with-my-mint-mobile-plan/>.

comparison impossible. Consumers have no way to know who offers a “real” bottom line price and who is hiding the real price until after making the purchase, recapitulating the problem.

Because the FCC currently defines broadband as a Title I “information service,” its authority to regulate charges directly is highly limited. Even when the FCC exercised authority over broadband as a Title II telecommunications service, giving it direct authority to prohibit any “unjust or unreasonable” charges,<sup>12</sup> direct regulation of broadband prices was highly controversial politically. Scholarship cited by the Biden Administration recommends requiring that providers be required to state the full price, inclusive of all fees upfront, as requiring a provider to show the all-inclusive price helps consumers choose lower cost products.<sup>13</sup> As part of its initiative against junk fees and to promote competition, the Administration urged the FCC to initiate a rulemaking designed to increase price transparency in broadband pricing.<sup>14</sup> Congress mandated that the FCC create a “broadband consumer label” providing an all-inclusive price as part of the Infrastructure Investment and Jobs Act of 2021.<sup>15</sup> The FCC completed the initial rulemaking to require the broadband consumer label in November 2022.<sup>16</sup>

## II. TELEVISION VIEWER PROTECTION ACT OF 2019

The broadband consumer label is not the first effort by Congress to require transparency in the communications marketplace in response to the proliferation of junk fees. Congress passed the Television Viewer Protection Act of 2019 (“TVPA”)<sup>17</sup> as part of the Further Consolidated Appropriations Act of 2020.<sup>18</sup> The House Report states that Congress intended the TVPA to “protect consumers throughout the media market and when purchasing MVPD or broadband service.”<sup>19</sup> The law requires that any provider of a cable service<sup>20</sup> disclose the all-inclusive fee at the time of purchase – including the amount of any discount and the length of time covered by the discount. Where the consumer buys the service as part of a bundle, the provider must break out the cost of the cable service separately. Subsequent bills must include a clear list of all charges, the date on which the contract ends, and the date on which any discount ends. Finally, the TVPA prohibits a carrier from charging a subscriber for any equipment, including a broadband modem and Wi-Fi router, that customers provide themselves. The law went into effect on December 20, 2020.<sup>21</sup>

## III. THE TVPA HAS HAD NO VISIBLE IMPACT ON JUNK FEES

The FCC does not collect pricing or billing information on cable providers, making it difficult to assess the effectiveness of the TVPA in any formal way. One year after the law went into effect, the FCC’s Media Bureau issued a Public Notice seeking comment on the implementation of the TVPA and its overall effectiveness.<sup>22</sup> In response, Consumer Reports submitted the results of a survey of 350 of its members.<sup>23</sup> Separately, in November 2022, Consumer Report released a study of approximately 22,000 consumer bills from ISPs collected between July 2021 and April 2022.<sup>24</sup> Although the second study focused on internet rather than cable service, the 2022 Report observed that because most providers (especially the largest providers) offer bundled services, it is frequently impossible to break out junk fees assigned to one service or the other – despite

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12 47 U.S.C. § 201(b).

13 Junk Fees Blog *supra* note 10.

14 Competition EO, 88 Fed. Reg. at 36998-99.

15 IJA note 9 *supra*.

16 Empowering Broadband Consumers Through Transparency, *Report and Order and Further Notice of Proposed Rulemaking*, CG Docket No. 22-2 (rel. Nov. 17, 2022) (“Broadband Consumer Label Order”).

17 Codified at 47 U.S.C. § 562.

18 Pub. L. 116-94.

19 H.R. Rep. No. 116-329, 116th Cong., 1st Sess. 2019 at 7.

20 The statute includes all multichannel video programming distributor (“MVPD”) services, a term that includes direct broadcast satellite but does not include streaming services, as “covered services” subject to the TVPA. See 47 U.S.C. § 562(d)(3). The term “cable service” is used for convenience.

21 Implementation of Section 1004 of the Television Viewer Protection Act of 2019, MB Docket No. 20-61, Order, 35 FCC Rcd 3008 (MB 2020).

22 Public Notice, Media Bureau Seeks Comment on Implementation of the Television Viewer Protection Act of 2019, 36 FCC Rcd 17809 (MB 2021).

23 Reply Comments of Consumer Reports, MB Docket No. 21-501 (filed March 7, 2022) (“CR Reply Comments”).

24 Jonathan Schwantes, “Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills,” Consumer Reports (Nov. 17, 2022) (“Broadband Pricing Report”).

the requirement of the TVPA that a provider of bundled service distinguish between charges associated with cable service and other charges.<sup>25</sup> Additionally, increases in cable rates and fees are the subject of press coverage, providing some basis for analysis.

Based on these sources, it does not appear that the TVPA has had significant impact on the elimination of junk fees. As an initial matter, as reported in the Consumer Report response to the Public Notice, compliance with the TVPA has been varied. This is confirmed by the analysis of bills in the 2022 Report, which indicates that many providers of bundled services do not distinguish between the fees for cable services and broadband. Even where carriers do break out these fees, carriers offering bundles can simply move fees from one service to the other. Carriers providing cable service can therefore simply shift hidden fees designed to disguise the full price to the broadband portion of the bill.<sup>26</sup> This practice will, to some degree, be addressed with the introduction of the broadband consumer label next year.

But further analysis of the fees, particularly cable fees, indicates that even more accurate break fee disclosure and inclusion of a more honest all-inclusive price will have significant impact on the persistence of junk fees. Cable operators disclose a wide range of fees which are essentially a list of operating costs broken out as separate fees. Comcast, for example, imposes both a “broadcast TV fee,” a “regional sports network fee.”<sup>27</sup> Customers cannot elect not to receive either the broadcast programming or the regional sports networks, making them part of the programming bundle for which customers already pay the subscription price. As one article observed: “Comcast’s statement would be like a restaurant telling customers that they have to pay for the food that goes into your meal.”<sup>28</sup> Additionally, while it is possible to buy modems and Wi-Fi routers for internet service, it is impossible to buy a set-top box to receive cable programming. Customers must therefore rent the equipment from the cable operator, allowing the cable operator to raise the rental rate on a regular basis.

## IV. JUNK FEES MAKE IT EASIER TO RAISE PRICES FOR SUBSCRIPTION SERVICES AND CREATE ADDITIONAL REVENUE STREAMS

There are several reasons why cable operators continue to charge junk fees even when forced to disclose them and provide an all-inclusive price. Notably, they make raising the price over the course of the contract much easier. They also allow a carrier to disguise a large cumulative price increase by breaking the cost into relatively smaller pieces. Carriers have several reasons for pursuing this strategy. In some cases, carriers offer to sell a fixed-rate multiyear contract, but the fixed rate does not include the additional fees. Previous research by Consumer Report found that junk fees accounted for nearly a third of the total cost of service. [Reply Comments]

Carriers have incentive to bill this way for several reasons. Some carriers offer fixed-rate multiyear contracts. Raising fees allows them to effectively raise the rate while purporting to adhere to the letter of the contract.<sup>29</sup> But even absent a fixed term contract, carriers have incentive to hide the true price of the product for several reasons. Carriers can raise rates multiple times in the same year by first raising the rate for the cable service, then raising the fees, and then raising the rate for the internet service.<sup>30</sup>

It is important to note that the presence of competition from streaming services has not appeared to decrease the incentive to create junk fees. To the contrary, competition may actually increase the incentive to use junk fees to raise prices. As customers increasingly “cut the cord” and abandoned cable for streaming services,<sup>31</sup> cable operators have additional incentive to use junk fees to increase revenue. Using junk fees to raise rates after a customer is already subscribed helps to reduce cancellation of service because of the ability to obscure the true annual increase and reduce “bill shock” by spreading out the cost. Since customers must call their cable service to cancel, cable operators can attempt to retain customers by lowering the inflated fees for a limited period (and frequently locking customers into a new long-term contract).

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25 *Id.* at 3-4.

26 *Id.*

27 Daniel Kline, “Comcast Lists One Cable Price, Charges Another: Here’s Every Fee,” *The Street* (Feb. 27, 2023). Available at: <https://www.thestreet.com/technology/comcast-lists-one-xfinity-cable-price-charges-another-heres-every-fee>.

28 *Id.*

29 Jessy Edwards, “Cox Class Action Alleges Company Increases Monthly Rate During Fixed-Rate Term Contracts,” *Top Class Actions* (September 7, 2022). Available at: <https://topclassactions.com/lawsuit-settlements/money/fees/cox-class-action-alleges-company-increases-monthly-rate-during-fixed-rate-term-contracts/>.

30 Philip Swann, “Charter’s Spectrum TV Raising Broadcast TV & Package Prices,” *The TV Answer Man* (January 6, 2023) available at: <https://tvanswerman.com/2023/01/06/charters-spectrum-raising-broadcast-tv-package-prices/> (noting previous increases of video subscription price and internet service price).

31 James Brumley, “Cord-Cutting Claims Another 1.4 Million Cable Customers in Q4,” *The Motley Fool* (March 2, 2023). Available at: <https://www.msn.com/en-us/money/companies/cord-cutting-claims-another-14-million-cable-customers-in-q4/ar-AA1881Nn>.

## V. THE NEW BROADBAND CONSUMER LABEL SEEMS UNLIKELY TO MATERIALLY IMPACT THE USE OF JUNK FEES IN BROADBAND

In November of 2022, the FCC adopted preliminary rules for the “broadband consumer label” as required by the IJJA.<sup>32</sup> The initial rules adopted by the FCC are fairly similar to those mandated by the TVPA.<sup>33</sup> Providers must clearly display an all-inclusive price for any broadband service as a standalone service. The provider must break out and clearly list all fees, and state whether the rate is an introductory rate or the standard rate (and, if an introductory rate, when the introductory rate expires and the all-inclusive price for the full rate). Providers may offer bundled services and make that information available through a link to the provider’s website rather than as part of the label. Providers must make the label available at the point of sale, but not as part of any subsequent bill.

Based on the experience with the TVPA, it seems that – contrary to the hope of the Biden Administration – the broadband consumer label will do little to eliminate junk fees for broadband services. The same incentives for carriers to use junk fees to obscure price increases on a going-forward basis exist for broadband. The ability of carriers to offer bundled services without the benefit of the consumer label breaking out a per-service price under the bundle (and to distribute junk fees between different services) further enhances the ability of carriers to obscure rate increases through fees, and to do so in a staggered manner so as to disguise the total annual fee increase.

This is not to say that the transparency required by the consumer label is worthless. To the extent that consumers have available to them competing broadband providers, greater transparency at the point of sale helps consumers comparison shop. The broadband consumer label also eliminates initial surprise fees. But the TVPA experience suggests that transparency at the point of sale has sharp limits. Certainly it will not, as the Biden Administration apparently hopes, significantly reduce the use of junk fees in the cable and broadband industries.

## VI. CONCLUSION: ELIMINATING JUNK FEES FOR CABLE AND BROADBAND WILL REQUIRE NEW, DIRECT FEDERAL AUTHORITY

Eliminating junk fees will require both direct prohibition on the use of junk fees and significant enforcement action. The FCC can invest itself with the necessary authority by reclassifying broadband as a “telecommunications service” subject to Title II of the Communications Act. The FCC has direct authority to eliminate any “unjust or unreasonable rates and practices” in the provision of telecommunications services.<sup>34</sup> The decision by the Trump FCC to reclassify broadband as an “information service” severely limited the FCC’s authority over broadband services.<sup>35</sup> The FCC’s 2017 reclassification order identified state consumer protection authority as a limit on carriers,<sup>36</sup> but the FCC in the same order asserted undefined preemption of state authority to the extent it contradicted what the reclassification order identified as a federal “policy of deregulation” on broadband.<sup>37</sup> Federal courts have reached conflicting results on the extent of this preemption.<sup>38</sup>

Additionally, even if the FCC reclassified broadband access as a Title II service, this would not provide the FCC with specific authority to address cable junk fees. Certainly the FCC could adopt rules to better enforce the TVPA. As part of the Cable Competition and Consumer Protection Act of 1992, Congress charged the FCC to regulate cable rates to ensure they were “reasonable,”<sup>39</sup> but Congress largely repealed this authority in the Telecommunications Act of 1996.<sup>40</sup> Any effort to directly address junk fees for cable subscription services would require either new authority or new theories on how to use existing authority.

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<sup>32</sup> Broadband Consumer Label Order *supra* note 16.

<sup>33</sup> See FCC, “Broadband Consumer Labels,” available at: <https://www.fcc.gov/broadbandlabels>. The FCC also sought additional comment on more detailed proposals – such as information on a carrier’s privacy practices.

<sup>34</sup> 47 U.S.C. § 201(b).

<sup>35</sup> Restoring Internet Freedom, *Declaratory Ruling, Report and Order and Order*, WC Docket No. 17-108 (rel. January 4, 2018).

<sup>36</sup> *Id.* at ¶¶ 140-154.

<sup>37</sup> *Id.* ¶¶ 194-204.

<sup>38</sup> Compare *ACA Connects – America’s Communications Assoc. v. Bonta*, 24 F.4<sup>th</sup> 1233 (9<sup>th</sup> Cir. 2022) (no preemption because FCC reclassification stripped FCC of authority to preempt) with *NY Telecommunications Assoc. v. James*, 544 F. Supp.3d 269 (EDNY. 2021) (finding NY law requiring low-cost plan for low-income residents preempted).

<sup>39</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 § 3 (codified at 47 U.S.C. § 453).

<sup>40</sup> Telecommunications Act of 1996, Pub. L. 104-104 § 301(b).

The Biden Administration has promised to propose a bill to address junk fees. This bill would provide the ideal vehicle to empower the FCC to address junk fees rather than simply increase transparency over junk fees. Under the current law, it appears highly unlikely that the Biden Administration can achieve its goal of eliminating junk fees in either cable or broadband access service. Given the importance of broadband to our modern lives, allowing such a failure can only be considered highly unfortunate.



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