NSR Policy: Update on Bulk Billing

By Blair Levin | June 20, 2024

In the last few months, most of our writings have been on the interplay of the fate of the Affordable Connectivity Program (ACP), Spectrum, Title II, and potential state actions related to low-income broadband affordability. This has reflected the potential immediate market consequences those policy processes could have.

But there are other issues percolating along that will have also have a market impact, but for which there is not an immediate decision pending or where the impact will be a function of multiple different decisions. Last week we updated the situation involving copper retirement and ending carrier of last resort obligations (LINK). In this update, we look at another one of those percolating issues; the FCC Chair's effort to either ban or otherwise constrain bulk billing.

As we discuss in the note, we had previously indicated that we thought the Chair's proposal would hit significant resistance. The record reveals that the resistance is strong, coming not just from the expected ISPs but also from groups traditionally at odds with ISPs, groups generally aligned with low-income consumers, and those concerned about low-income adoption. Considering the opposition:

- *We don't see the proposal moving forward anytime soon.*
- *We think that if a vote goes forward the two Democrats are not likely to vote against the Chair.*
- *Still, If the FCC moves forward with its proposal, it will likely adopt a more modest approach than what the FCC Chair suggested in her initial press release.*
- *A ban is highly unlikely, but an opt-out requirement is still possible.*
- *The November 2024 election also plays a significant role. If the NPRM isn't approved beforehand, its fate will hinge on the results, as will any enforcement.*

Coverage Impacted by Analysis: AT&T (**T**), Verizon (**VZ**), Charter (**CHTR),** Comcast (**CMCSA**),

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- Tech Policy: Supreme Court to Soon Rule on Big Cases Affecting Big Tech
- NSR Policy Quick Take: Third Time's Not the Charm for Cantwell Spectrum/ACP Effort
- NSR Policy Quick Take: Paramount/Skydance Deal Over: What Next?
- NSR Policy Quick Take: Maybe the fourth time will be the charm?
- NSR Call: Telecom and Media mergers are back (sort of)
- More ACP Action (and Bills) and Litigation Chess Moves on New York Law and Net Neutrality
- NSR Policy Quick Take: ACP/Spectrum Mark-Up Pulled

Bulk Billing

Our Earlier Analysis. As we noted back in March, two days before this year's State of the Union, on March 5th, Chair Rosenworcel announced that the FCC would vote on an item designed to address alleged consumer harm resulting from bulk billing.[1] (LINK)

We suggested at that time, that the opposition to the proposal would be significant and create political problems for the Chair's proposal for three reasons.

First, bulk billing generally involves some consumer benefits, as with any volume discount arrangement.

- Bulk billing is a version of volume discounts, a common and valid practice in many retail settings.
- As the FCC found when it evaluated bulk billing in the context of MTEs in 2010, it can be beneficial for consumers.[2]

Second, some bulk billing arrangements involve significant involvement of groups representing and/or including the affected consumers. Bulk billing arrangements could involve landlords negotiating for volume discounts on behalf of the tenants. But bulk billing arrangements can also involve tenant groups themselves or Homeowner Associations (HOAs) negotiating for such benefits.

- If the bulk billing results from negotiations in which the residents themselves are directly represented, it makes it harder to argue that the arrangements are always anti-consumer.
- It is not clear whether the upcoming FCC order will recognize the distinction and ban or constrain some but not others.

Third, bulk billing can be seen as a tool for increasing adoption in low-income MTEs. The Administration has stated that lowering the cost of broadband is essential to increasing broadband adoption for low-income residents.

- We expect various parties to argue that bulk billing is helpful to the Administration goal of increasing low-income adoption.

Current Status

All these issues have come into play, with numerous filings at the FCC that reenforce those three points. As discussed below, the record in the proceeding presents both policy and political difficulties for regulating bulk billing.

Traditional ISPs have, as expected, opposed the proposal. Opposition to the proposal has come from both incumbent ISPs, such as Comcast, Charter, and Cox, as well as new entrants that compete with these providers, like Hotwire, Blue Stream, Summit, and dozens of other smaller providers.

- While expected, broad based opposition from entities that compete with each other for the MTE contracts somewhat undercuts the narrative that incumbent ISPs use bulk billing as a pathway for exclusivity.
- Further, some smaller competitors believe that incumbent broadband providers might actually favor

banning bulk arrangements because it would make it harder for smaller providers to displace them in buildings, something they believe bulk billing arrangements make possible.

- One notable example was a coalition of small broadband providers to MTEs [3] who argued against the proposal, saying that due to bulk billing they are able to "generally offer bulk rates for broadband that are between 35% to 80% below retail rates for similar service with the average bulk rate 48% lower than the comparable retail rate."

The proposal has also been opposed by groups usually at odds with ISPs. For example, EducationSuperhighway, a group working with local jurisdictions and state broadband offices to bring connectivity solutions to assist lower income Americans in affordable multifamily housing recently met with FCC to argue against the proposal.

- It noted that the "ability of a building owner to negotiate bulk billing arrangements with Internet Service Providers (ISPs) and Managed Service Providers (MSPs) enables competitive options such as managed Wi-Fi."
- It further argued that the "availability of these competitive options leads to lower prices, better service quality, and higher internet adoption amongst residents in affordable multifamily housing."
- The group recommended the FCC withdraw the rulemaking or delay a vote to allow the FCC more time to gather evidence and information on bulk billing practices.

Similarly, groups seen as friendly to the affordable housing for lower-income Americans have also been unified in opposing the proposal.

- For example, the Council of Large Public Housing Authorities[4] told the FCC that while "we understand there are concerns with bulk billing, wholesale elimination of bulk billing would precipitate unintended consequences by having a negative effect on low-income residents. The FCC's proposal will widen the digital gap, especially as the Affordable Connectivity Program winds down.
- Mayors, such as Mayor Alix Desulme, Mayor of North Miami, FL and Mayor-Ann Baldwin, Mayor of Raleigh,

NC, and Democratic legislators, such as Jason Dawkins of Philadelphia, have also weighed in against the proposal in op-eds, articulating how the proposal could negatively impact the poor.

- Further, a coalition of ten housing groups[5] opposed the proposal, writing President Biden that "Bulk billing arrangements are a way to provide residents with a bundled price for broadband services, which is often cheaper, better, faster and more reliable than apartment residents would typically be able to secure in the open market. Banning bulk internet agreements will harm residents, and disincentivize investment in broadband service, especially in rural areas as well as low-income, smaller, and more-affordable rental communities who struggle the most to get connected."
- Officials with the National Multifamily Housing Council have been advocating against the proposal, saying the proposal to ban bulk billing offers a "serious threat for industry operations and the future of affordable broadband access for residents." Further, they have written "Bulk billing has evolved into managed Wi-Fi, and together they are extremely beneficial to removing barriers to adoption and deployment of broadband to a broad range of residents, including the most vulnerable. Housing providers often include broadband bulk billing as an added benefit, negotiating lower broadband costs for residents compared to standard market rates. Prohibiting bulk internet agreements could negatively affect residents' access to affordable broadband services, especially in rural and low-income areas, as well as smaller rental communities that face challenges in connectivity."

The proposal has garnered some tentative support from progressive groups. Public Knowledge, an influential public interest advocacy group, has been the leading supporter but for various reasons, it does not appear to have the usual progressive coalition echoing its advocacy.In its advocacy, Public Knowledge acknowledged

- "That bulk billing can, in some instances, result in landlords being able to negotiate for better rates – and for competing providers to offer services"
- It then argued, however, that "this is not generally the case. There is a considerable record in this proceeding observing that bulk billing arrangements are used in MTEs where competition is available, but the bulk billing arrangement is used to preserve an in-building monopoly at the expense of the tenants."
- It suggested what it characterized as an appropriate middle ground between banning bulk billing

arrangements and the status quo by permitting tenants to opt out of the bulk billing arrangement.

- While that can be seen as a compromise, we note that Rosenworcel, in a letter to Congress, already supported the "opt-out" mechanism, as opposed to a ban, to address the issue.

Where is the proposal likely to go from here?

We don't see the proposal moving forward anytime soon. This is a Notice of Proposed Rulemaking (NPRM), something that can languish at the FCC for extended periods.

- A recent example is the independent programming NPRM, which took roughly a year to circulate before being adopted just last month.
- Given the record so far, we don't think the Chair is under pressure to move quickly.

The Republican Commissioners will oppose it, but the level of Democratic support is still uncertain.

- We don't think the two Democrats will threaten the Chair with complete opposition, but we don't know to what extent they will want to move forward at all or move forward but in modest ways.
- We also have not seen Congressional Democrats weigh in. They often do not do so until the end of an FCC process, but they can be persuasive with all three Democrats and, as noted above, this issue has attracted opposition from sources influential with Democrats.

If the FCC moves forward with its proposal, it will likely adopt a more modest approach than what the FCC Chair suggested in her initial press release.

- Chairwoman Rosenworcel's observed in her response to Congress that the FCC's rule hasn't been reviewed in 14 years, and that it's reasonable to reassess old rules based on changes in technology and the market.
- That is a significant contrast with her original press release, which asserted that bulk billing is harmful to consumers and that regulation would benefit consumers.

- One way to move forward is by asking follow-up questions that puts both sides in the position of having to strengthen their arguments by addressing specific FCC staff questions.
- The FCC could also move forward by either adopting or asking about exemptions, such as the proposal from the Council of Large Public Housing Authorities to exempt owners of federally assisted affordable housing properties and public housing authorities. Similarly, the FCC could move forward in a more modest way by focusing on hidden fees or another narrow problem withing bulk billing.
- One thing that is clear to us from the record is that while the Chair's original press release approached bulk billing as if it were one generalizable practice, it is a tool that is used in many different circumstances. It is difficult to apply a universal rule to a myriad of situations.

A ban is highly unlikely, but an opt-out requirement is still possible. As noted above, the Chair appears to favor an opt-out requirement, something that Public Knowledge also favors. At this point we don't know whether there are the votes to support it but note there is an important disagreement as to what the impact of an opt out would be, if adopted.

- Public Knowledge argues that as "a practical matter, the traditional 'inertia' of default opt out requirements mean that tenants are unlikely to opt out unless the in-building service is significantly inferior to service otherwise available, or the same service is available at a significantly lower cost."
- Real estate interests disagree. For example **Daniel Myers,** President of DojoNetworks, argues that said the opt-out will increase prices. He points out that opting out does not change the cost structure but reduces revenue, writing "[ISPs are] lowering the price based on the fact that [they] have one hundred percent penetration. So, it will push everyone's price up."
- From a simple economic perspective, we note that bulk billing's benefits stem from ISPs receiving payment for a guaranteed number of units over several years. Allowing consumer opt-outs introduces uncertainty for ISPs bidding to serve MTEs: how many customers will they get, and what price ensures a good return on investment?
- That uncertainty will, at least initially, cause ISPs to not bid as aggressively to win any bulk bidding contract.

- This dynamic could create a domino effect. Lower expected take rates for bulk deals necessitate higher prices to maintain profitability, further incentivizing customers to opt out and remain with the incumbent. This cycle could ultimately undermine the feasibility and attractiveness of bulk arrangements.

The November 2024 election also plays a significant role. If the NPRM isn't approved beforehand, its fate may hinge on the results.

- A Trump victory will likely result in the end of the NPRM with no change in the status quo concerning the regulation of bulk billing.
- A Biden win will keep the process going but political environment, without a looming Presidential election, could change the calculus for both the White House and the Democratic FCC Commissioners.

Bottom Line: A change in bulk billing regulation could have a material impact on ISPs, but as of now, we don't think the FCC is likely to move forward in a way that has such an impact. But it bears watching, as there will likely be three votes to continue to explore further inquiry and perhaps even changes such as requiring an opt-out.

[1] Bulk billing is an agreement between an ISP or MVPD (we will use ISPs to connote both) and a Multi-tenant Environment (MTE), generally consisting of apartments, condos, or gated communities, where the MTE's owner or community association negotiates a discounted rate with an ISP in exchange for all MTE tenants or homeowners receiving the bargained for service at the reduced rate over an extended period. The bulk-billed services are regarded as an amenity of residing within the MTE, which residents are obligated to pay for.

[2] It summarized bulk billing very differently than the current Chair did when she announced the proposal. In 2010 it wrote that bulk billing "is an arrangement in which one MVPD provides video service to every resident of an MDU (the term for what the FCC now calls MTEs), usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service provider from serving residents in the MDU. Bulk billing arrangements may deter second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPDs' services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD from providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements."

[3] This coalition consisted of Aerwave (Houston, TX), Allbridge (Raleigh, NC), BAI Connect (Sherman Oaks, CA), DoJo Networks (State College, PA), Elauwit Connection Inc. (Cheyenne, WY), Everywhere Wireless LLC d/b/a Zentro (Chicago, IL), GigStreem (New York, NY), ICS Advanced Technologies (Ames, IA), Mereo 89, LLC d/b/a Mereo Networks (Phoenix, AZ), Pavlov Media (Champaign, IL), Smartaira (Gardena, CA), and WireStar Networks (College Station, TX)

[4] The Council's memberships consists of eighty large public housing authorities that own and manage nearly half of the units in the nation's public housing program,

[5] The coalition included the CCIM Institute, the Council for Affordable and Rural Housing, the Institute of Real Estate Management, the Manufactured Housing Institute, the Mortgage Bankers Association, the

National Apartment Association, the National Association of Home Builders, the National Association of REALTORS®, the National Leased Housing Association, and the National Multifamily Housing Council.

Full 12-month historical recommendation changes are available on request

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