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General Comment

See attached file(s)

Attachments

01.06.24 NTCA FTC Junk Fees

The attachment is restricted to restrict all because it contains personally identifiable information data

01_06_24 NTCA FTC Junk Fees_Redacted

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Trade Regulation Rule on Unfair or Deceptive Fees	**)** **)**	**No. R207011**

Comments of

NTCA–THE RURAL BROADBAND ASSOCIATION

To the Commission:

I. INTRODUCTION

NTCA–The Rural Broadband Association (NTCA) hereby files these comments in the above-captioned proceeding.[1] NTCA represents approximately 850 small, locally operated rural broadband providers. In addition to fixed broadband internet access services, these facilities-based entities also provide, variously, voice, video, and mobile services. On average, these firms have approximately 30 employees and operate in areas where the average customer density is less than seven locations per mile.

As explained below, core operations of NTCA's member companies fall within the common carrier exemption of the Federal Trade Commission (FTC) Act.[2] Accordingly, those operations are beyond the jurisdiction of FTC oversight. Moreover, other core *non*-common carrier operations of these firms are subject to extensive and specialized regulations of the Federal Communications Commission (FCC) regulations that address billing and consumer-

[1] *Unfair or Deceptive Fees Trade Regulation Rule: Notice of Proposed Rulemaking,* Federal Trade Commission, Matter No. R207011, 88 Fed. Reg. 77420 (2023) (NPRM).

[2] 15 U.S.C. § 45(a)(1), (2).

facing issues. Accordingly, subjecting these firms to additional FTC regulations would at best be redundant and unnecessary, and at worst impose significant duplicative compliance costs at no marginal gain while also introducing the prospect of contradictory regulatory schemes – an outcome particularly problematic for small businesses like those within NTCA's membership. Accordingly, NTCA recommends that to the extent the FTC implements measures in the instant proceeding, it includes a clear and unambiguous exemption for firms that are already subject to industry-specific regulatory oversight by other Federal agencies of jurisdiction, and that it also specifically consider how to mitigate the burdens of any such rules on small businesses.

II. DISCUSSION

A. FEES CHARGED BY COMMUNICATIONS SERVICES PROVIDERS INCLUDE CHARGES ARISING OUT OF MANDATORY GOVERNMENT PROGRAMS.

The FTC proposes to address what it characterizes as "unfair or deceptive practices relating to fees."[3] The NPRM asserts that consumers report "sellers misrepresent or do not adequately disclose the nature of purpose of fees, leaving consumers wondering what they are paying for or believing fees are arbitrary, and they are getting nothing for the fees charged."[4] The NPRM offers several industry sectors as examples where these practices are purported to exist, including, *inter alia,* live-event tickets, hotel and short term lodging, prepared food and grocery store apps, and transportation.[5] Relevant to NTCA is the inclusion of "Telecommunications Fees" as a category of concern.[6] As a threshold matter, it must be noted that in all events the

[3] *Id.*

[4] 88 Fed. Reg. 77421.

[5] 88 Fed. Reg. 77424-77427.

[6] 88 Fed. Reg. 77427.

FTC lacks jurisdiction to regulate the common carrier operations of NTCA members. The FTC explains that the NPRM is published "under authority of Section 18 of the Federal Trade Commission (FTC) Act."[7] Section 18 of the FTC Act authorizes the FTC to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the FTC Act. However, NTCA members' common carrier activities would be exempt from rules contemplated by the instant NPRM because Section 5 bars the FTC from regulating common carriers.[8]

NTCA notes, as well, that even if the common carrier exemption did not exist (*i.e.,* even if the FTC had authority to prescribe rules for common carriers), FTC regulation of common carrier communications providers would be redundant and unnecessary. Common carrier communications providers regulated under Title II of the Communications Act are already subject to "Truth in Billing" requirements pursuant to 47 C.F.R. § 64.2000, *et seq.* These rules "apply to all telecommunications common carriers" and prescribe standards for bill organization, descriptions of billed charges, "deniable" and "non-deniable" charges, and "clear and conspicuous disclosure of inquiry contacts." These existing FCC rules address the very issues envisioned by the NPRM. As such, any additional FTC requirements would be redundant and unnecessary. Moreover, the *non*-common carrier operations of communications providers like NTCA members are subject to comprehensive Federal standards that address consumer-facing information and billing matters.

[7] 88 Fed. Reg. 77420.

[8] *See, i.e., FTC v. AT&T Mobility,* 883 F.3d 848 (9th Cir. 2018) (finding that Section 5 of the FTC Act prohibits the FTC from regulating common carriers only to the extent those firms engage in common carrier activities).

The NPRM cites, generally, issues that consumers have with vague fees such as "convenience fees," or "economic impact fees," or "improvement fees."[9] But those type of charges portrayed in the NPRM are wholly different than the specific enumerated fees in telecom bills and which tie directly to Congressional or local government mandates. For example, a typical communications service bill can be expected to include line-item charges for Federal Universal Service Fund assessments (tying back to 47 U.S.C. § 254), or state and/or local 911 fees (*see, i.e.,* 47 CFR Part 9). Even if these fees would be initially unexpected, they can hardly be characterized as "junk fees" that "have little or no added value to the consumer . . . .[10] These fees, which support everything from local emergency services to assistance for low-income subscribers to schools and libraries, arise out of defined Federal and local regulatory programs that are related *directly* to the communications service offered.

Federal Universal Service Fund assessments contribute toward the deployment and maintenance of communications networks throughout the country; increased access to these networks by schools and libraries; the use of these communications services to provision healthcare; and programs to ensure affordability for low-income users.[11] Likewise, state or local E911 fees relate directly to the purchased service by supporting emergency call centers that are reached by that purchased communications service to ensure public health and safety. While highly regulated capital-intensive infrastructure industries may charge fees that consumers

[9] 88 Fed. Reg. 77422.

[10] *Unfair or Deceptive Fees Trade Regulation Rule: Advance Notice of Proposed Rulemaking,* Federal Trade Commission, Matter No. R207011, 87 Fed. Reg. 67413 (2022) (ANPRM). The NPRM does not define "junk fees," but cites commenters on the ANPRM who suggest similar wording to that included in the ANPRM. *See,* 88 Fed. Reg. 77429, n.100.

[11] *See,* 47 U.S.C. § 254(b)(3), (b)(6).

perceive as "hidden" or "unexpected,"[12] these charges generally arise directly from regulatory programs that have been vetted and approved by the regulatory agencies of jurisdiction and are neither unfair nor deceptive. Rather, they reflect activities that add value to the consumer and whose institution is grounded in Congressional mandate.[13] Accordingly, they should be treated as being beyond any potential FTC action addressing "junk fees."

Yet even fees that do not tie directly to regulatory requirements are nonetheless rational and should come as no surprise to the reasonable consumer. For example, the NRPM reports that telecom consumers complained about fees for installation; activation; penalties for exceeding data caps; and early termination fees. The NPRM cites comments suggesting "these fees should be considered as part of the true monthly cost" of service.[14] But a non-recurring fee cannot be included as part of a monthly fee because (by definition) it is not a monthly event. And suggestions that such fees should be "prohibited when they are arbitrary or do not add value" likewise miss the mark: neither installation, nor activation, nor data overage, or early termination fees are arbitrary. All relate to standard business practices and reflect the inherent costs of providing service and/or the very real value realized by the consumer in agreeing to a term commitment or a limitation on the use of service in exchange for a lower rate than otherwise would have been applied. As explained by an NTCA member,

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[12] *See,* WTFees Survey: 2018 National Representative Multi-Mode Survey, Consumer Reports, at 5 (Jan. 3, 2019) (https://advocacy.consumerreports.org/wp-content/uploads/2019/09/2018-WTFee-Survey-Report- -Public-Report-1.pdf) (visited Dec. 27, 2022). .

[13] *See, i.e.,* 47 U.S.C. § 254, which codifies the Universal Service Fund (USF). These USF supports the High Cost Program, which creates affordable rates for users in rural and insular areas of the Nation; the Lifeline Program, which offers service rate discounts for low-income consumers; the Rural Health Care Program, which supports access to advanced services by health care providers in rural areas; and the Schools and Libraries Program (popularly known as "E-Rate"), which supports access to advanced communications services by schools and libraries. *See, also,* 47 C.F.R. Part 9, setting forth 911 requirements.

[14] 88 Fed. Reg. 77423.

> We offer free installation if the customer signs a two-year service agreement that has an early termination fee. Almost every single customer chooses that over an installation fee – if the agreement is honored, there is never a fee. So, it's certainly not a junk fee, and it's saving the customer money per their choice.

NTCA urges the Commission to recognize the role of standard service contract pricing strategies, and the values that accrue to both consumers and providers in term and volume pricing models.

B. COMMUNICATIONS PROVIDERS ARE SUBJECT TO COMPREHENSIVE CONSUMER-FACING INFORMATION REQUIREMENTS PROMULGATED BY THE FEDERAL COMMUNICATIONS COMMISSION.

The NPRM declares "[t]he comment record supports a finding that bait-and-switch pricing practices are prevalent. Specifically, commenters identified pricing structures that do not disclose the total price for goods or services, but instead advertise a lower cost to consumers that is ultimately inflated by mandatory charges."[15] Here, too, examination of this issue within the context of FCC regulations reveals that these perceived problems are not the result of inappropriate industry practices. In fact, telecom industry participants have been clear about their interest in ensuring useful information to consumers and have even requested measures *in excess* of FCC requirements.

As noted above, in addition to providing common carrier services that are beyond the jurisdiction of the FTC, NTCA members are also broadband service providers. Although broadband internet access service is not a Title II common carrier service (though this legal classification, however, is currently the subject of an extensive FCC proceeding),[16] the FCC regulates multiple aspects of broadband internet access services under Title I of the

[15] 88 Fed. Reg. 77432.

[16] *See, generally, Restoring Internet Freedom: Report and Order,* FCC Docket No. 17-108, 83 Fed. Reg. 7852 (2018).

Communications Act. And, pursuant to explicit authority and directives established in the Infrastructure Investment and Jobs Act (IIJA), the FCC has promulgated detailed and significant rules relating to sales and billing practices of internet service providers.[17]

Specifically, the IIJA requires broadband internet service providers to "display, in the form of labels, certain information regarding their broadband Internet access service plans."[18] FCC rules promulgated pursuant to the IIJA require ISPs to list the following at the point of sale: Monthly price, with special instructions for introductory rates including the duration of the introductory period and the rate after that period); additional charges and fees, including one-time fees, early termination fees, and government taxes; links to information about discounts and bundles, including information about using "bring your own" equipment rates; data allowances; and unique plan identifiers to ensure that each service plan can be identified.[19] Moreover, the rules require ISPs in certain instances to read label contents over the phone to prospective shoppers.[20] Accordingly, there is little margin for internet service providers to obfuscate consumer bills. And, notably, the industry *itself* has recommended measures to bring added clarity to consumers.

By way of example, the labels rules "require ISPs to state under 'Additional Charges and Terms' that *taxes will apply* and that they may vary depending on location."[21] As an alternative

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[17] Infrastructure Investment and Jobs Act, Pub. Law 117-58 (2021) (IIJA).

[18] *See, Empowering Broadband Consumers Through Transparency: Report and Order and Further Notice of Proposed Rulemaking,* FCC Docket No. 22-2, at para. 2 (2022) (Broadband Labels Order).

[19] *See,* Broadband Labels Order at p.6.

[20] *See,* Broadband Labels Order at para. 95. " . . . in the case of alternate sales channels, while a provider may satisfy the label requirement by providing a hard copy of the label, we find it may do so through other means." The Order provides in footnote 214, "In such circumstances, the provider must read the entire label to the consumer over the phone."

[21] FCC Broadband Labels Order at para. 36 (emphasis added).

to multiple label versions, NTCA joined four other industry trade associations to suggest that providers operating in multiple jurisdictions be permitted to list the *maximum* amount firms would charge to reflect state and local government fees.[22] Listing the *highest* possible fee can hardly be characterized as trying to *hide* fees. At the same time, a separate industry filing requested FCC authorization to do what the NPRM appears to champion, specifically, to publish all-in-pricing rates. As explained by CTIA, a trade association representing wireless communications providers, "some wireless providers advertise monthly pricing with taxes already built in as one way to simply and clearly offer an all-in plan to consumers."[23] CTIA asked the FCC to "confirm, consistent with the goal of ensuring that labels provide consumers of a complete understanding of what their bill will be, that labels may be written to display taxes-included pricing."[24] And, in addressing data caps (another matter noted in the NPRM (*see,* 88 Fed. Reg. 77423)), CTIA asked the FCC to authorize wireless providers to "describe their data allowance options with sufficient detail to identify their plan variations . . . consistent with the *Report & Order's* recognition that data usage limits are critical information for consumers."[25] The FCC granted CTIA's request to allow wireless carriers to "state 'taxes included' or add similar language to the label template when the provider has chosen to include taxes as part of

[22] *Empowering Broadband Consumers Through Transparency: Joint Petition for Clarification or, in the Alternative, Reconsideration of ACA Connects, CTIA, NCTA-The Internet & Television Association, NTCA–The Rural Broadband Association, and USTelecom,* Federal Communications Commission, Docket No. 22-2 (filed Jan. 17. 2023).

[23] *Empowering Broadband Consumers Through Transparency: Petition for Clarification or, in the Alternative, Reconsideration of CTIA-The Wireless Association,* Federal Communications Commission, Docket No. 22-2 (Jan. 17, 2023) (CTIA Labels Petition).

[24] CTIA Labels Petition at 2 (internal citation omitted).

[25] CTIA Labels Petition at 3 (internal citation omitted).

the base price" (notably, no party opposed CTIA's request).[26] However, whereas CTIA requested the authorization to "use multiple lines of data allowances descriptions," the FCC denied this request, explaining, favoring simple labels over more detailed expositions.[27] This outcome demonstrates several points relevant to the instant proceeding: (1) The FCC, as the agency of specialized jurisdiction, has promulgated rules and is involved deeply in the very matters the NPRM proposes to address; (2) Major trade association aim to achieve clarity for consumers and are not in the habit of intentionally hiding, blurring, or obfuscating relevant pricing information; (3) The industry and the FCC are working collaboratively to strike the best balance that delivers useful consumer information without being overwhelming.

These broadband label rules will become effective for large ISPs (defined as those with 100,000 or more customer accounts) on April 10, 2024, and for smaller providers on October 10, 2024. Moreover, even before the rules were effective, the FCC issued a *Further Notice of Proposed Rulemaking* to investigate an even more comprehensive approach to these issues. Notwithstanding the various positions taken by NTCA and other industry participants on the need for or usefulness of certain supplementary measures before the effectiveness of the initial rules can be measured, FTC action in these regards would set the stage for confusion, inefficiency, and unnecessary burdens were ISPs required to balance implementation of redundant regulatory schemes. The broadband labels rules meet precisely the concerns articulated in the NPRM.[28] They are similar to the Truth in Billing requirements for common

[26] *Empowering Broadband Consumers Through Transparency: Order on Reconsideration,* Federal Communications Commission, Docket No. 22-2, FCC 23-68, at para. 20 (2023) (Labels Reconsideration Order).

[27] Labels Reconsideration Order at para. 30.

[28] Although the broadband label rules will not be effective until January 17, 2024, and may be subject to clarification or revision if parties file for relevant relief during the administrative appeal period, the overall directive of the IIJA casts an adequate, if not substantial, directive for standards to meet the concerns articulated in the instant NPRM.

carriers, which require requiring "brief, clear, non-misleading, plain language description[s]" of billed charges,[29] and yet even more expansive because the "broadband label" requirements commence at the point of sale. Moreover, the broadband labels rules prescribe the precise *form* in which the information must be conveyed.[30] These standards are directed by the IIJA, have been promulgated by the FCC, and supplemental FTC requirements would be confusing and unnecessary. Accordingly, NTCA submits that the any FTC action arising out of the NPRM should include a clear and unambiguous exemption for firms that are already subject to industry-specific regulatory oversight by other Federal agencies of jurisdiction.

C. CLARITY IN CABLE TV PRICING WOULD BE AIDED BY PERMITTING PROVIDERS TO DISCLOSE RETRANSMISSION FEES.

Notwithstanding the discussion above, NTCA acknowledges that certain fees could confuse consumers in certain circumstances. As noted in NTCA comments on the Advanced Notice of Proposed Rulemaking, while telephone and broadband customers can find publicly available information about the Universal Service Fund and E911 operations, cable television subscribers, by design, are typically unable to develop a working understanding of retransmission consent fees. As explained by NTCA in its comments on the ANPRM,[31] retransmission consent fees refer to charges that cable providers pay for the rights to retransmit commercial television, low power television, and radio broadcast signals.[32] According to FCC data, the compound average annual growth rate in per-subscriber retransmission consent fees

[29] *See,* 47 C.F.R. § 64.2401.

[30] *See,* Broadband Labels Order at para. 15.

[31] *Unfair or Deceptive Fees Trade Regulation Rule: Comments of NTCA–The Rural Broadband Association,* Federal Trade Commission, Matter No. R207011 (Jan. 9, 2023).

[32] *See, generally,* 46 C.F.R. § 76.64.

over the past nine years is 30.6%, rising from $24.06 in 2013 to $203.03 in 2021.[33] Current regulations governing such fees were promulgated about 30 years ago pursuant to the 1992 Cable Television Consumer Protection and Competition Act.[34] Many NTCA members are multi-channel video programming distributors (MVPDs) and relate that retransmission fees are a continuing source of frustration to consumers who must pay them. And, as small providers, NTCA members tend to pay higher retransmission fees, per subscriber, over what large and medium providers pay. These have contributed significantly to the overall increase in cable bills over the past nine years. But broadcasters' confidentiality terms preclude MVPDs from providing to frustrated subscribers reasonable and complete explanations of these Federally contemplated fees – particularly how the fees can be attributed to individual local and cable-only stations.

NTCA supports greater clarity in cable billing. In a pending FCC docket addressing "all in cable pricing," NTCA expressed its recognition of 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." NTCA supported in that proceeding an approach that would allow video service providers to provide a "line-by-line breakdown of the amount . . .

[33] *See 2022 Communications Marketplace Report,* FCC 22-103 (rel. Dec. 30, 2022), at App. E., Fig. 10.

[34] Cable Television Consumer Protection and Competition Act of 1992, Pub. Law 102-385, 106 Stat. 1460 (1992).

attributable to retransmission fees paid by the video service provider for the channels offered."[35] NTCA accordingly suggests that this discrete issue, which is separate and apart from (a) common carrier telephone services over which the FTC does not have authority and (b) broadband internet access services which are governed by new and detailed broadband label rules, may be ripe for examination – again, in coordination with the FCC – to determine whether greater transparency would benefit the marketplace.

III. CONCLUSION

As set forth above, the common carrier operations of NTCA members are exempt from FTC jurisdiction pursuant to the general Section 5 common carrier exemption. Moreover, even if such an exemption did not exist, the practices of NTCA members and similarly situated companies would be governed by specific and detailed FCC Truth in Billing requirements, which address the concerns articulated in the NPRM. As regards the broadband internet access service operations of NTCA members and similarly situated firms, their billing and disclosure practices are regulated pursuant to Congressional directives set forth in the IIJA and promulgated by the FCC in its Broadband Labels docket. Those rules address basic rates as well as other recurring and one-time fees, meeting the goals set forth in the NPRM. Accordingly, and for the reasons set

[35] *All-In Pricing for Cable and Satellite Television Service: Comments of NTCA–The Rural Broadband Association,* Federal Communications Commission, Docket No. 23-203, at 2 (2023). *See, also, All-In Pricing for Cable and Satellite Television Service: Comments of ACA Connects,* Federal Communications Commission, Docket No. 23-203, at 4, 5 (2023).

forth above, NTCA submits that any FTC action arising out the NPRM provide a specific carve-out exemption for broadband internet access service providers and other firms whose billing and disclosure practices are regulated by their agency of jurisdiction.

Respectfully submitted,

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