Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of	)	
Unfair or Deceptive Fees NPRM	)	NPRM R207011
	)	

COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

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Washington, D.C.

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COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA")[1] respectfully submits these comments on the Federal Trade Commission ("FTC" or "Commission") Notice of Proposed Rulemaking ("NPRM") to promulgate a trade regulation rule entitled "Rule on Unfair or Deceptive Fees" (the "proposed rule").[2]

I. INTRODUCTION AND OVERVIEW

NCTA members ("Members") offer cable, broadband, voice,[3] video streaming, and other services (collectively, "NCTA Members' services"). NCTA Members provide consumers with clear information regarding the price of their services in advertising, promotional materials, throughout the purchasing process, in order confirmations, and on monthly bills. Clear pricing information is a necessity in today's competitive communications marketplace. Consumers have

[1] NCTA represents network innovators, content creators, and voice providers that connect, entertain, inform, and inspire consumers nationwide. NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving nearly 90% of the nation's cable television households and cable program networks with a rich history of creating award-winning programming. The cable industry is also the nation's largest residential broadband provider after investing more than $310 billion over the last two decades to build high-speed networks in both rural and urban communities. Cable companies also provide state-of-the-art competitive voice service to more than 30 million customers.

[2] Trade Regulation Rule on Unfair or Deceptive Fees, Notice of Proposed Rulemaking ("NPRM"), 88 Fed. Reg. 77420 (Nov. 9, 2023), https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees.

[3] References to "voice" service include both digital voice, *i.e.*, Voice over Internet Protocol ("VoIP"), and mobile wireless unless otherwise noted.

a wide array of options for broadband, voice, and video subscription services, and can and do comparison-shop for their preferred service options. Widespread cord-cutting in the video marketplace provides just one example of the robust competition, and underscores the ease with which consumers can make subscription decisions based on pricing and other factors.

While NCTA Members support the FTC's efforts to protect consumers from unfair or deceptive pricing, we believe that the FTC's proposed rule is impermissible, unconstitutional, unnecessary, and unsupported by substantial evidence, especially with respect to NCTA Members' services. Although the vast majority of the NPRM focuses on the practices of just three industries (live-event ticketing, short-term lodging, and to a lesser extent, the restaurant industry), it nevertheless proposes a rule that would extend far more broadly. The proposed rule would upend industry practices with respect to pricing, disclosures, and advertising across virtually the entire U.S. economy, all without demonstrating the requisite "prevalence" of unfair or deceptive practices[4] or assessing the significant costs involved across the marketplace.

As to NCTA Members' services specifically, the proposed rule would directly overlap and conflict with existing pricing disclosure laws and Federal Communications Commission ("FCC") regulations and related FCC proposals.[5] These include the Television Viewer Protection Act of 2019 ("TVPA"),[6] the Cable Act,[7] the FCC's Broadband Labeling Rule,[8] the FCC's

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[4] *See* 15 U.S.C. § 57a(b)(3).

[5] While NCTA has opposed some of the FCC's recent proposals as exceeding the FCC's authority, the FCC has nonetheless pushed ahead aggressively, seeking to extensively regulate the pricing disclosures of companies subject to its jurisdiction.

[6] The Television Viewer Protection Act, Pub. L. No. 116-94, 133 Stat. 2534 (2019), codified at 47 U.S.C. § 562.

[7] *See, e.g.,* 47 U.S.C. § 542(c).

[8] FCC Report and Order and Further Notice of Proposed Rulemaking, Empowering Broadband Consumers Through Transparency, CG Docket No. 22-2 (rel. Nov. 17, 2022) ("Broadband Labeling Rule"), https://docs.fcc.gov/public/attachments/FCC-22-86A1.pdf.

proposed All-In Pricing Rule,[9] and the FCC's proposed Cable Operator and DBS Provider Billing Practices Rule.[10] The FTC's proposed rule differs from these existing and proposed laws and regulations in many significant respects. As a result, rather than "promot[ing] a level playing field that enables comparison shopping [by consumers] and allows honest business to compete,"[11] the proposed rule would create huge compliance challenges for Members and potentially flood consumers with conflicting and confusing disclosures for the very same services.

In this comment, NCTA respectfully requests that the Commission reconsider the scope of any rule that may be adopted. Specifically, we ask that the proposed rule not apply to broadband, cable, voice, or video streaming services because the record does not show the prevalence of unfair or deceptive pricing practices for these services, and because the proposed rule overlaps and conflicts with other applicable laws and regulations that already address the policy concerns on which the proposed rule is premised.

In addition, we explain that the proposed rule would make advertising difficult, if not impossible, for NCTA Members – an outcome that would benefit neither consumers nor competition; that the NPRM's approach to government charges, contingent fees, advertising discounts, consumer disclosures, and preemption will needlessly burden both industry and consumers, and that the Commission has not appropriately weighed the significant costs of its

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[9] FCC Notice of Proposed Rulemaking, All-In Pricing for Cable and Satellite Television Service, 88 Fed. Reg. 42,277 (June 30, 2023) ("All-In Pricing Rule"), https://www.federalregister.gov/documents/2023/06/30/2023-13971/all-in-pricing-for-cable-and-satellite-television-service.

[10] FCC Notice of Proposed Rulemaking, Promoting Competition in the American Economy: Cable Operator and DBS Provider Billing Practices, 89 Fed. Reg. 740 (Jan. 5, 2024), ("Cable Operator and DBS Provider Billing Practices Rule"), https://www.govinfo.gov/content/pkg/FR-2024-01-05/pdf/2023-28622.pdf

[11] NPRM, 88 Fed. Reg. at 77440.

proposed rule on both industry and consumers. Finally, this comment identifies disputed issues of material fact that should be resolved at an informal hearing.

II. THE FTC DOES NOT HAVE THE AUTHORITY TO ISSUE A RULE RESTRICTING PRICE DISCLOSURES AND ADVERTISING ACROSS THE ECONOMY

The language of Section 18 of the FCT Act makes clear that the Commission does not have the ability to issue broad rules. Instead, it limits the FTC to rulemaking only where it has defined with specificity the unfair acts or practices that are the subject of the rule[12] *and* determined that these specific acts or practices are "prevalent."[13] This language does not permit the FTC to issue rules that would cover all conduct for which it could bring an enforcement action under Section 5. Rather, it limits any rulemaking power to only a subset of conduct that the Commission defines with specificity and has substantial evidence to show is unfair or deceptive and prevalent.[14]

Even if Section 18 were interpreted to permit the Commission to issue such broad rules, this grant of authority would be an unconstitutional delegation of lawmaking power. The Constitution vests lawmaking power in Congress, and any rulemaking authority is only constitutional when Congress supplies an intelligible principle to guide the entity authorized to exercise the power.[15] The FTC Act's language granting economy-wide rulemaking power based

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[12] 15 U.S.C. § 57a(a)(1)(B).

[13] 15 U.S.C. § 57a(b)(3).

[14] The Second Circuit recognized that the Commission's rulemaking authority is not co-extensive with its enforcement authority. *Katharine Gibbs School v. FTC*, 612 F.2d 658, 662 (2nd Cir. 1979) ("'Because the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct,'" quoting Conf. Rep. No. 93-1401, joint Explanatory Statement of the Committee of Conference, reprinted in (1974) U.S.C.C.A.N.at 7702, 7755, 7763).

[15] *Gundy v. United States*, 139 S. Ct. 2116 (2019).

on nothing more than the words "unfair or deceptive" does not constitute an intelligible guiding principle. Thus, the Commission does not have the authority to issue the proposed rule.

III. THE FTC'S PROPOSED RULE SHOULD NOT APPLY TO NCTA MEMBERS' SERVICES

The proposed rule should not apply to NCTA Members' services because (A) the FTC has not met its Section 18 burden of demonstrating that their practices relating to fees are unfair or deceptive, let alone that any such wrongdoing is prevalent, and (B) communications services are already heavily regulated with respect to pricing disclosures in ways that conflict with the FTC's proposed rule.

A. *The NPRM Does Not Establish the Requisite Prevalence of Unfair or Deceptive Pricing Practices by the Communications Industry.*

NCTA Members provide consumers with clear and transparent pricing information. When consumers subscribe, Members clearly and conspicuously explain the costs of the services that they provide, detailing all up-front costs, subsequent subscription costs, mandatory fees, and optional fees that consumers may encounter. When consumers change services, Members provide consumers with new cost estimates. As discussed further below, cost-related disclosures comply with applicable regulations and ensure that upfront, clear pricing information is available to consumers before they make purchasing decisions. Furthermore, Members are responsive to consumer inquiries, feedback, and complaints about service pricing, and work with consumers to identify the best level of service appropriate to the consumer's budget and needs. There is no substantial evidence in the record to support a finding that Members' pricing practices are unfair or deceptive.

Members' clear and conspicuous pricing disclosures underscore that there is no basis for new FTC regulations in this area. Under the rulemaking procedures set forth in Section 18 of the

FTC Act (also known as Magnuson-Moss rulemaking), the Commission may issue an NPRM "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[16] The FTC must show prevalence based on (1) "cease and desist orders regarding such acts or practices," or (2) "any other information available to the Commission indicat[ing] a widespread pattern of unfair or deceptive acts or practices."[17] The FTC has stated that, in the absence of cease and desist orders, a showing of prevalence requires it "to conduct extensive investigations and obtain extrinsic evidence."[18]

The NPRM does not make this showing for NCTA Members' services. Instead, it devotes a mere three paragraphs of its 66-page discussion to "telecommunications fees" associated with internet, television, and telephone services.[19] The first of these paragraphs cites to individual comments that are merely anecdotal, comprising a miniscule percentage of customers' experience.[20] The second presents arguments by two consumer advocacy organizations about broadband services only, based on studies that are not statistically representative and have other shortcomings.[21] The third paragraph provides evidence *opposing* application of the rule to our

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[16] 15 U.S.C. § 57a(b)(3).

[17] 15 U.S.C. § 57a(b)(3)(A)-(B).

[18] *See* In Re Citizen's Petition to Change the Labeling Requirements for Eggs Sold in the United States, FED. TRADE COMM'N (Dec. 12, 2013) at 7, https://www.ftc.gov/sites/default/files/attachments/other-applications-petitions-requests/131212compoverkillingltr.pdf.

[19] NPRM, 88 Fed. Reg. at 77427 (Section II(B)(5)). The NPRM does not mention video streaming services at all. The pricing structure for streaming services is straightforward and there is no evidence of prevalent unfair or deceptive pricing practices or need for regulation.

[20] NPRM, 88 Fed. Reg. at 77427 (Section II(B)(5)).

[21] The Comments of New America's Open Technology Institute ("OTI"), FTC-2022-0069-6087 (Feb. 7, 2023), cite OTI's own study and a Consumer Reports study, and Comments of the Consumer Federation of America, FTC-2022-0069-6095 (Feb. 8, 2023), rely on the same Consumer Reports study. OTI's study is limited to 28 cities spread across Asia, Europe, and North America, and "recognize[s] that these cities may not be fully representative of their countries or continents." OTI, *The Cost of Connectivity 2020*, at 13 (July 15, 2020). The Consumer Reports study acknowledges that the data "is not a nationally representative study" and most of the charts note that, "This is a convenience sample, no inference can be drawn." Jonathan Schwantes, *Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills*, Consumer Reports, Executive Summary (Nov. 17, 2022).

industry. In addition, the NPRM cites just one communications-related enforcement action, which focused primarily on negative option billing and not unfair or deceptive pricing.[22]

The NPRM's scant treatment of communications fees stands in stark contrast to its overwhelming focus on just three other industries. The NPRM also uses nearly 8,600 words[23] and Tables 5 – 14 to quantify the benefits and costs related to the proposed rule on these three industries "about which [the FTC has] more information regarding mandatory fees" while summarily assuming that "for the remainder of the economy," 90% of firms already comply with the proposed rule and the other 10% do not.[24] Section 18 requires that any final rule be supported by "substantial evidence."[25] The record before the FTC does not meet this standard, and the Commission may not regulate NCTA Members' services unless and until it fully develops a record of prevalence to support such regulation.

In the NPRM's list of questions for commenters, the FTC appropriately asks whether its definition of "Covered Business" should be limited to businesses in certain industries – particularly live-event ticketing and/or short-term lodging.[26] Given the NPRM's intense focus on these industries and the lack of evidence of deceptive pricing in others, the answer is a resounding "yes."[27]

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[22] *FTC v. Vonage Holdings Corp.*, No. 3:22–cv–6435 (D.N.J. filed Nov. 3, 2022).

[23] NPRM, 88 Fed. Reg. at 77453 - 77477.

[24] NPRM, 88 Fed. Reg. at 77448.

[25] A court may set aside any rule that is not supported by substantial evidence. 15 U.S.C. § 57a(e)(3)(A).

[26] NPRM, 88 Fed. Reg. at 77481.

[27] Even the FTC has acknowledged that pricing practices, such as drip pricing, are not inherently deceptive. After its 2012 conference on the economics of drip pricing, the FTC Bureau of Economics summarized that: "Models of information acquisition suggest that drip pricing may be benign, beneficial, or harmful, depending on the environment." Howard A. Shelanski, Joseph Farrell, Daniel Hanner, Christopher J. Metcalf, Mary W. Sullivan & Brett W. Wendling, *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* at 17, 21 (Dec. 2012), https://www.ftc.gov/sites/default/files/documents/reports/economicsftc-drug-and-pbm-mergers-and-drip-

B. *Multiple Laws and Rules Already Regulate Pricing Disclosures by NCTA Members, and the FTC's Proposal Would Just Add Overlapping and Inconsistent Requirements to an Already Heavily-Regulated Space.*

Equally concerning is the FTC's attempt to regulate pricing disclosures that are already heavily regulated. Notably, Congress enacted the TVPA in 2019 to directly address pricing disclosures for the cable and direct broadcast satellite ("DBS") industries.[28] Further, the Cable Act and the FCC's implementing regulations have long regulated how charges may appear on cable bills.[29] In recent years, the FCC has been adding to these requirements, promulgating and proposing a series of service-specific rules and proposals governing pricing disclosures that directly conflict with the FTC proposed rule.[30] These include the Broadband Labeling Rule,[31] the All-In Pricing Rule,[32] expansion of the Truth-in-Billing Rule,[33] and a Cable Operator and DBS Provider Billing Practices Rule.[34]

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pricing/shelanskietal_rio2012.pdf. The FTC economists added that conference "participants were hesitant to recommend a broad effort to regulate drip pricing because the practice is used in many industries, making it unlikely that a single policy would be optimal for all markets." *Id.* at 21.

[28] TVPA, *supra* note 6.

[29] *See* 47 U.S.C. 542(c) (permitting cable operators to itemize "as a separate line item on each regular bill," franchise fees, fees for public, educational, and governmental (PEG) channels, and "the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber"); 47 C.F.R. § 76.1619(a) (requiring that bills for cable service "must be clear, concise and understandable" and must also "be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges").

[30] As discussed above, NCTA has opposed some of these efforts as exceeding the FCC's authority but the FCC is pressing ahead notwithstanding these objections and the pendency of the FTC's rulemaking. See *supra* note 5.

[31] Broadband Labeling Rule, *supra* note 8.

[32] All-In Pricing Rule, *supra* note 9.

[33] Public Notice, Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Truth-In-Billing Rules to Ensure Protections for All Consumers of Voice Services, CC Docket No. 98-170, WC Docket No. 04-36 (rel. Dec. 13, 2019) ("Truth-In-Billing Refresh"), https://docs.fcc.gov/public/attachments/DA-19-1271A1.pdf.

[34] Cable Operator and DBS Provider Billing Practices Rule, *supra* note 10.

The NPRM barely discusses these laws and regulatory measures. It briefly mentions the Broadband Labeling Rule[35] but states that the provisions that "potentially overlap" with the proposed rule "appear generally compatible with the proposed rule's requirements regarding the disclosure of pricing information."[36] This is far from true, as the FCC's rule, among other things, mandates separate disclosures of costs that the FTC's rule would roll into the "Total Price." The NPRM also makes a passing and vague reference in a footnote to the FCC's efforts regarding "junk fees."[37] In addition, the press release announcing the NPRM contains a quote from FCC Chairwoman Rosenworcel championing the FTC's proposal, but does not recognize the overlap and conflicts it presents.[38]

As part of its Regulatory Flexibility Act analysis, however, the NPRM asks "if compliance with the proposed rule along with the specific disclosure provisions for certain types of sectors or transactions would be "impossible" or "overly burdensome."[39] Here again, the answer is "yes." The proposed rule would create significant overlap and conflicts with existing laws and regulations, rendering compliance by NCTA members costly and even impossible. We detail some of the many regulatory conflicts in Sections III(B)(1)-(3) below, and urge the FTC to recognize both the significance and consequence of the overlap here.

Any final rule that the FTC issues should not apply to services subject to existing pricing disclosure laws and rules. Members have already expended countless resources to comply with

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[35] *See* NPRM, 88 Fed. Reg. at 77480, n.371.

[36] NPRM, 88 Fed. Reg. at 77480.

[37] *See* NPRM, 88 Fed. Reg. at 77423, n.23.

[38] Press Release, FTC Proposes Rule to Ban Junk Fees (Oct. 11, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees.

[39] NPRM, 88 Fed. Reg. at 77480.

the TVPA and the FCC's Broadband Labeling Rule, and the FCC is proposing additional rules that would add more obligations. Complying with these mandates requires revising pricing, updating website or advertised disclosures, modifying bills and billing practices, and training employees regarding compliance. The FTC's proposal would add another layer of costs and complexity to an already burdensome scheme. It also will lead to immense consumer confusion as consumers encounter multiple conflicting disclosures.

To be sure, the FTC saw the merits of avoiding overlap and duplication as to its own regulations in other industries. In the NPRM, the FTC makes a determination that motor vehicle dealers should be excluded from coverage of the proposed rule because its then-proposed Motor Vehicle Dealers Trade Regulation Rule (now adopted as the Combating Auto Retail Scams Trade Regulation Rule or "CARS Rule") would require dealers to disclose the "true 'offering price' of a vehicle in advertisements or communications that reference a specific vehicle or any monetary amount or financing term for any vehicle."[40] By the same logic, the FTC should exclude NCTA Members' services that are subject to overlapping laws and regulations.[41]

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[40] NPRM, 88 Fed. Reg. at 77438; Final Rule, Combating Auto Retail Scams Trade Regulation Rule ("CARS Rule"), 89 Fed. Reg. 590 (Jan. 4, 2024)(to be codified at 16 C.F.R. Part 463) (effective date stayed pending judicial review).

[41] California's new "junk fee" law similarly exempts service providers subject to overlapping regulations. Specifically, the new law, slated to take effect July 1, 2024, exempts communications providers that offer broadband and other bundled services as follows:

> Compliance by a person providing broadband internet access service on its own or as part of a bundle, as defined in Section 8.1(b) of Title 47 of the Code of Federal Regulations, with the broadband consumer label requirements adopted by the Federal Communications Commission in FCC 22-86 on November 14, 2022, codified in Section 8.1(a) of Title 47 of the Code of Federal Regulations, shall be deemed compliance with this paragraph.

Cal. Civ. Code 1770(a)(29)(B) (operative July 1, 2024). The FTC should similarly carve out services subject to overlapping laws and regulations.

1. *The FTC proposed rule conflicts with the FCC Broadband Labeling Rule.*

Today's broadband marketplace is highly competitive and offers consumers more options than ever for high-speed internet access. Fixed broadband competition has rapidly increased over the past decade, as existing providers upgrade and expand, new competitors enter, and new technologies have become available.[42] Today, the vast majority of U.S. consumers have not just one but multiple choices among facilities-based fixed broadband providers—including cable companies, new fiber entrants, traditional telecom companies, and fixed wireless providers. According to FCC data, 89.9% of U.S. households had access to 25/3 Mbps service from at least two fixed broadband providers as of 2021, and 64.1% had access to 100/20 Mbps service from at least two such providers.[43] In this dynamic marketplace, the FCC has recognized that "access to clear, easy-to-understand, and accurate information . . . empowers consumers to choose services

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[42] *See, e.g.*, Comments of NCTA – The Internet and Television Association, FCC Docket 23-320, Exhibit A ¶ 14 (Dec. 14, 2023), https://www.fcc.gov/ecfs/document/121484978453/1 (submitting in FCC Open Internet rulemaking an expert declaration by Drs. Mark Israel, Brian Keating, and Allan Shampine finding that "the U.S. broadband industry is a highly competitive and well-functioning marketplace, and indeed is one of the great success stories of the U.S. economy"); Clay Sturgis, *Broadband Industry Market and Transaction Trends 2023 Update*, Moss Adams (June 30, 2023), https://www.mossadams.com/articles/2023/06/broadband-industry-trends-report-2023 (noting that "[c]ompetition is intense and growing . . . as companies seek to gain market share and expand their capabilities"); John Fletcher, *2022 Broadband Forecast Shifts to Market Share Battle with Intense Competition*, S&P Global Market Intelligence (May 11, 2022), https://www.spglobal.com/marketintelligence/en/newsinsights/blog/2022-broadbandforecast-shifts-to-market-share-battle-with-intense-competition ("The U.S. residential broadband outlook is increasingly dominated by market share battles amid surging investment and technological advance . . . . Cable operators believe they can continue to take market share, the telcos believe they can steal momentum with fiber, the wireless services believe 5G is their answer to residential substitution and the satellite services believe they can elevate access everywhere."); Doug Brake & Robert D. Atkinson, *A Policymaker's Guide to Broadband Competition*, Info. Tech. & Innovation Found. (Sept. 3, 2019), https://itif.org/publications/2019/09/03/policymakersguide-broadband-competition/ ("The private-sector broadband industry is more competitive than ever, and it is clear access networks are poised to change more in the next ten years than they did in the last ten. A slew of new technologies are set to advance the capabilities of Internet Protocol networks generally.").

[43] *See* FCC, *2022 Communications Marketplace Report*, GN Dkt. No. 22-103, Fig. II.A.28 (Dec. 30, 2022), https://docs.fcc.gov/public/attachments/FCC-22-103A1.pdf.

that best meet their needs and match their budgets and ensures that they are not surprised by unexpected charges or service quality that falls short of their expectations."[44]

To further pricing transparency in this marketplace, the FCC recently adopted the Broadband Labeling Rule. This rule, which takes effect over the next nine months, requires providers to disclose the base monthly price for a stand-alone broadband service offering in a new broadband label, modeled on the nutrition labels required for food products by the U.S. Food and Drug Administration.[45] The monthly price is reported exclusive of additional taxes and fees, with additional charges and terms disclosed lower down in the label, including itemized monthly fees, one-time fees at purchase, early termination fees, government taxes, and discounts and bundles.[46] The label also reports on details about the service, such as speeds, data, network management, privacy, and customer support.[47] In addition, the FCC issued a further notice of proposed rulemaking soliciting feedback on how to display additional information in the label that "affects the bottom line price consumers pay each month," including discounts or bundled pricing.[48]

In finalizing the rule, the FCC made clear that the type of all-in pricing requirement proposed by the FTC would be impractical and potentially misleading:

> We disagree with commenters that recommend ISPs aggregate the monthly price identified on the label with any other discretionary fees and government taxes—creating an "all-in" price. Although this approach may have some benefit, we agree with providers that it may be difficult to implement. For example, government taxes vary according to the consumer's geographic location. And a consumer's election to rent or purchase equipment may increase their upfront or

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[44] Broadband Labeling Rule, *supra* note 8, at para. 1.

[45] *See id.* at para. 15.

[46] *See id.* at paras. 15, 22-23.

[47] *See id.* at para. 15.

[48] *See id.* at paras. 135-136.

> monthly charges. Installation fees may vary according to the consumer's location and dwelling (e.g., apartment, single family home) as well. *Thus, requiring display of a single, "all-in" price on a label may be difficult for ISPs and potentially misleading for consumers. Further, we believe requiring that the labels clearly itemize any additional discretionary fees and state that additional government taxes will apply to each plan will better provide consumers with a complete understanding of their bill*.[49]

Moreover, the FCC recently affirmed that broadband providers must itemize the fees they add to base monthly prices – including fees related to government programs they choose to "pass through" to consumers, such as fees related to universal service or regulatory fees.[50] The FCC further stated that: "Clear itemization of all fees – including those related to regulatory programs – is essential to our goal of empowering consumers to make good purchase decisions."[51]

Contrary to the FCC's determinations and implementing rule, the FTC would mandate a single "all-in" pricing disclosure, including costs such as equipment and installation charges that may vary for each customer. Furthermore, while the FTC proposes excluding "government charges" from the Total Price, that exclusion "covers only fees or charges imposed by the government on consumers and does *not* encompass fees or charges that the government imposes on a business and that the business chooses to pass on to consumers."[52] This would create further inconsistencies with the Broadband Label Rule, which expressly permits such fees to be separately itemized. Accordingly, the FTC should explicitly exclude broadband services from its proposed rule.

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[49] *See id.* at para. 24 (emphasis added).

[50] FCC Order on Reconsideration, Empowering Broadband Consumers Through Transparency, CG Docket No. 22-2, ¶ 13 (rel. Aug. 29, 2023) ("FCC Recon. Order"), https://docs.fcc.gov/public/attachments/FCC-23-68A1.pdf.

[51] *Id.*

[52] NPRM, 88 Fed. Reg. at 77439 (emphasis added).

In addition, any exclusion for broadband providers should extend beyond pricing disclosures to include advertising disclosures as well, even though the FCC's Broadband Labeling Rule does not apply to advertising. If the FTC were to mandate all-in pricing for broadband-related advertising, this would confuse consumers who would see a different price calculation in FCC-required broadband labels.

2. *The FTC proposed rule conflicts with the Television Viewer Protection Act and the FCC proposed All-In Pricing Rule.*

The NPRM also conflicts with the TVPA and the FCC's proposed All-In Pricing Rule, potentially creating unacceptable burdens and confusion for the cable and DBS industries. The TVPA requires multichannel video programming distributors ("MVPDs"), including cable and DBS providers, to disclose at the point of sale before entering into a contract with a consumer for the provision of a covered service:

> the total monthly charge for the covered service, whether offered individually or as part of a bundled service, selected by the consumer (explicitly noting the amount of any applicable promotional discount reflected in such charge and when such discount will expire), including any related administrative fees, equipment fees, or other charges, a good faith estimate of any tax, fee, or charge imposed by the Federal Government or a State or local government (whether imposed on the provider or imposed on the consumer but collected by the provider), and a good faith estimate of any fee or charge that is used to recover any other assessment imposed on the provider by the Federal Government or a State or local government.[53]

This information must also be provided to each customer by email or a comparable means after entering a contract, and customers then have 24 hours to cancel service without penalty.[54] In addition, the TVPA addresses consumer rights in e-billing, requiring that bills include "an itemized statement that breaks down the total amount charged for or relating to the provision of

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[53] 47 U.S.C. § 562(a).

[54] 47 U.S.C. § 562(a)(2)-(3).

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."[55]

As an initial matter, NCTA Members agree that consumers are entitled to clear, concise, and easily digestible information about their video programming services. Providing accurate and transparent pricing information is already a marketplace necessity when 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. Members therefore have every incentive to provide prospective and existing customers with the best experience possible. Accordingly, Members disclose in promotional materials that the price for video service may include additional fees. These fees are typically dependent on what customers purchase and where they live.

NCTA Members have implemented the TVPA's transparency requirements in the way that best suits their customers and existing sales and billing systems. Some Members have chosen to go beyond the requirements of the TVPA, providing prospective consumers with the ability online to construct their service package based on their location. In the course of this "buy-flow" process, those operators fully disclose the all-in price that the consumer will pay, including any additional fees that may vary by location, before consumers actually purchase service, and well before they receive their first bill.

The pricing disclosure scheme in the NPRM is at odds with the scheme Congress mandated in the TVPA and the cable industry's substantial efforts to implement those requirements. First, the TVPA requires "all in" pricing disclosures on an individual basis before

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[55] 47 U.S.C. § 562(b).

a consumer finalizes a purchase and directly afterwards, whereas the FTC's proposed rule would regulate advertising to the general public. In fact, Congress rejected language in the original proposed version of the TVPA that would have required all-in pricing in advertising,[56] instead electing to require it only when a consumer is actively considering purchasing a specific service package. This distinction is important because consumers do not jump immediately from advertising to monthly bills. To obtain service, they go through a sales process or online checkout during which providers disclose the total price that the consumer would pay, inclusive of discretionary charges and any relevant fees. The TVPA reflects Congress's determination that disclosure of the all-in price *at the point of sale* ensures that consumers are fully informed and do not "face unexpected and confusing fees when purchasing video programming."[57]

Second, for the point-of-sale disclosure, the TVPA requires a good-faith estimate of *all* government charges within the monthly charge for a covered service, including taxes assessed on the consumer ***and*** taxes assessed on the provider. It then requires itemization of all charges, including government charges, in monthly bills. In contrast, as noted, the FTC's proposed rule would require including in the Total Price only those government charges imposed on businesses but not passed through to customers. These are meaningful distinctions that send contradictory messages to the industry as to how to provide applicable pricing disclosures. They would also confuse consumers, who may see different price information in advertising, disclosures, or billing statements depending on applicable regulatory obligations – perhaps even an "FTC price"

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[56] *See* Television Viewer Protection Act of 2019, H.R. 5035, 116th Cong. § 4 (2019), https://www.congress.gov/bill/116th-congress/house-bill/5035/text/ih (as introduced in the House but not enacted) (requiring all-in pricing in advertising) ("A provider of a covered service may not advertise the price of the covered service unless the advertised price is the total amount that the provider will charge for or relating to the provision of the covered service, including any related taxes, administrative fees, equipment rental fees, or other charges, to a consumer who accepts the offer made in the advertisement.").

[57] H.R. Rep. No. 116–329, at 6 (2019).

and an "FCC price." The FTC should not take action that contradicts Congress's clear intention and directive in the TVPA.

The FCC's All-In Pricing rule proposal would add yet more requirements for cable and DBS services. That proposal would require providers to specify an "all-in" price for cable and DBS service in promotional materials and on subscriber bills.[58] Under the text of the proposed All-In Pricing Rule:

> Cable operators and DBS providers shall aggregate the cost of video programming that they provide as a prominent single line item on subscribers' bills and in any promotional materials. Cable operators and DBS providers may complement the aggregate line item with an itemized explanation of the elements that compose that single line item.[59]

Under the FCC's proposal, the aggregate cost of video programming would include "any and all amounts that the cable operator or DBS provider charges the consumer for video programming, including for broadcast retransmission consent, regional sports programming, and other programming-related fees."[60] However, "video programming" ***does not*** include taxes, administrative fees, equipment fees, or other charges unrelated to the video programming service itself.[61]

Once again, the FTC's approach is at odds with the FCC's. Whereas the FTC would require one Total Price, the FCC refers to the "all-in" price as the price of the programming itself and allows separate charges to be excluded from that final price. And once again, these two different agency approaches cannot be reconciled and will confuse consumers.

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[58] *See generally,* All-In Pricing Rule, *supra* note 9. NCTA has argued in that proceeding that the FCC is exceeding its statutory authority by proposing that the rule extend to advertising and promotional materials.

[59] All-In Pricing Rule, *supra* note 9, at App. A.

[60] All-In Pricing Rule, *supra* note 9, at para. 6.

[61] All-In Pricing Rule, *supra* note 9, at para. 16.

Finally, the FCC recently proposed a new rule for cable and DBS billing practices that would restrict early termination fees and require prorated credits for cancelling services within a billing cycle.[62] This proposal presents yet another example of FCC regulation that would overlap with the FTC proposed rule. Given the existing mandates of the TVPA, coupled with the FCC's past and pending actions in the area of pricing disclosures, the FTC should exclude MVPDs like cable or DBS providers from its proposed rule.

3. *The FTC proposed rule overlaps with a pending FCC proceeding on VoIP.*

In early 2020, the FCC initiated a still-pending rulemaking that would extend existing Truth-in-Billing rules to VoIP services and mandate explicit pricing disclosures in telephone bills.[63] Here again, as applied to VoIP, the FTC's proposal would overlap with FCC efforts on pricing disclosures, creating costly regulatory burdens on providers and inconsistent and confusing pricing disclosures for consumers. As long as the FCC's effort is pending, the FTC should exclude VoIP carriers from its proposed rule.

The FTC's failure to acknowledge and grapple with the multiplicity of duplicative, overlapping, or conflicting rules is unreasonable. This and other deficiencies identified throughout this comment make it likely that a court would find that the Commission's actions were arbitrary and capricious and the proposed rule is unsupported by substantial evidence.

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[62] Cable Operator and DBS Provider Billing Practices Proposed Rule, *supra* note 10.

[63] Truth-In-Billing Refresh, *supra* note 33.

IV. THE PROPOSED RULE WOULD MAKE ADVERTISING FOR COMMUNICATIONS SERVICES DIFFICULT IF NOT IMPOSSIBLE, THEREBY UNDERMINING CONSUMER CHOICE AND COMPETITION

The FTC's proposed rule is particularly ill-suited to advertising in our industry. NCTA Members contend with significant taxes and other government mandatory charges (both pass-through and direct) at the federal, state, and local level, including franchise fees, PEG fees, and cable regulatory charges, as well as a myriad of contract-based costs, including costs associated with access to rights-of-way and content for retransmission/broadcast. These costs vary across different regions and localities. For example, franchise, PEG, and cable regulatory fees vary by market, and regional sports fees and broadcast TV fees may vary based on the stations and networks carried in each area. The "all-in" price for any given household may be different from the "all-in" price for a household that may be just across the street or next door, but technically in a different city or county, due to differences in such regulatory fees.

The proposed rule would hamper Members' efforts to advertise pricing nationwide or to a broad audience. To avoid being misleading, advertised prices would need to be very narrowly geo-targeted in accordance with associated taxes and fees, which is highly impractical, technically challenging, and prone to errors. It would also place some Members at a competitive disadvantage vis-à-vis their competitors who advertise on a national basis. Given the impracticality of geo-targeted advertising and the need to be able to advertise on a national basis, NCTA Members could face a perverse incentive to comply with the proposed rule by advertising a Total Price for a particular service option that overstates the price that most consumers would actually end up paying at their service location (i.e., the Total Price would be the maximum price that any potential customer in the provider's footprint would have to pay for the service). This result would plainly confuse consumers and undermine the type of comparison-shopping the FTC is aiming to facilitate. Bundled pricing would be even more challenging to calculate and

represent in advertising, given that each bundled service could have multiple different applicable taxes or surcharges.

Alternatively, companies might respond to the proposed rule by omitting pricing from advertising altogether, an option that would defeat the FTC's goal of ensuring that consumers have access to accurate and reliable cost information as they shop for services. It could also lead to consumers having to spend even more time searching for pricing information, undermining the rule's stated goal of reducing consumers' search time.[64] A lack of price advertising would also act as a disincentive to companies to compete on price as opposed to other service characteristics like speed, content, or reliability. The NPRM discusses the "unintended consequences" of the proposed rule for industries with "complicated pricing structures."[65] This applies aptly to the communications industry.

Requiring that regulatory fees be included in the advertised price would also undermine transparency and political accountability. Separately itemizing regulatory fees that are passed through to consumers allows the provider to highlight for the customer that these charges stem from requirements imposed by its local, state or federal government officials. To the extent that the Total Price requirement prevents or impairs the advertising of truthful price information, it would violate the First Amendment by regulating such speech in a way that is more extensive than necessary to achieve the government's goal of ensuring truthful cost disclosures. This could effectively require providers to mislead consumers rather than protect them.[66]

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[64] NPRM, 88 Fed. Reg. at 77433.

[65] NPRM, 88 Fed. Reg. at 77441.

[66] *See generally Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) ("First, the restriction [on commercial speech] must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.").

The Proposed Rule would compel businesses to speak a particular message about prices. Compelled speech, however, is inconsistent with the First Amendment.[67] The Proposed Rule also discriminates in favor of government communication about prices by mandating that businesses disclose "Total Price" but exempting government fees from disclosure. Discriminating against speech based on the messages it conveys is constitutionally problematic; the First Amendment does not let the government provide its messages with more favorable treatment, as the Supreme Court explained in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020).

V. THE FTC'S PROPOSED RULE IMPOSES A HOST OF ADDITIONAL UNNECESSARY BURDENS ON CONSUMERS AND INDUSTRY

In addition to all of the above concerns, the proposed rule contains a number of other overly restrictive, confusing, overbroad, and arbitrary requirements that will hamper consumers in making fully informed choices as they shop for services. While the FTC should exclude NCTA Members from the proposed rule entirely for reasons explained above, the Commission should also make the following changes to any rule it does adopt.

A. *The Proposed Rule Takes an Overly Restrictive View of "Government Charges."*

As noted above, the proposed rule defines "Government Charges" that may be listed separately to include only "fees or charges imposed on consumers by a Federal, State, or local government agency, unit, or department."[68] The NPRM explains that this definition refers only to taxes imposed on consumers, and omits hefty taxes and government fees and charges assessed

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[67] *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

[68] NPRM, 88 Fed. Reg. at 77439.

on heavily regulated industries (like the communications industry) that "the government imposes on a business and that the business chooses to pass on to consumers."[69]

This approach to taxes and fees is not transparent. Members are subject to an array of taxes and fees from all corners of the country, including cable franchise fees, PEG fees, and other state or local fees. Private entities should not be required to obscure these fees or the fact that they are imposed by the government by rolling them into one "Total Price" purportedly charged by the service provider.

The FTC's approach to government charges also conflicts with other laws and proposed regulations. Section 622(c) of the Cable Act permits cable operators to identify "as separate line items on each regular bill of each subscriber" franchise fees, PEG fees, and other governmental fees,[70] without making arbitrary distinctions between different types of government fees.[71] As discussed above, the FCC Broadband Labeling Rule and the FCC All-In Pricing proposal also would exclude government taxes and fees from the base or "all-in" fee disclosure, regardless of whether they are imposed directly on consumers or on companies.

The FTC has not developed a record to support its narrow definition of Government Charges. Instead, it simply states that a business cannot "artificially inflate taxes excluded from the Total Price because the definition of Government Charges covers only those charges imposed

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[69] NPRM, 88 Fed. Reg. at 77439.

[70] 47 U.S.C. § 542(c).

[71] The TVPA reflects this same policy judgment that *all* government-imposed fees should be transparently disclosed, requiring "a good faith estimate of any tax, fee, or charge imposed by the Federal Government or a State or local government (whether imposed on the provider or imposed on the consumer but collected by the provider), and a good faith estimate of any fee or charge that is used to recover any other assessment imposed on the provider by the Federal Government or a State or local government."). 47 U.S.C. § 562(a)(1).

by the government on consumers."[72] This conclusory assertion cannot justify the FTC's overly restrictive approach here.

B. *The NPRM Fails to Define "Total Price" with Specificity and Leaves Critical Questions Unanswered for Contingent Fees.*

Section 18 of the FTC Act permits the FTC to issue rules *provided,* among other requirements, that the rules "define with specificity acts or practices which are unfair or deceptive."[73] The proposed rule fails to provide the level of clarity required to meet this statutory standard. Notably, the definition of "Total Price" is ambiguous. For example, it does not clearly address fees that are contingent on later actions by particular consumers. These contingent fees can often arise in the context of recurring subscriptions and continuing services offered by NCTA Members. For example, with respect to cable or broadband service, consumers might incur a fee described in the consumer's contract with the service provider (such as for unreturned equipment or late payment of the consumer's bill). While these and other fees are mandatory if they are incurred, they cannot be incorporated into the Total Price because they are contingent on later actions that may or may not happen. In its Request for Comments, the NPRM makes reference to the idea that Total Price includes only fees or charges that are "not reasonably avoidable,"[74] but it does not define "reasonably avoidable" or include this term in the definition of Total Price. Without the requisite specificity, the Commission may not promulgate a Section 18 rule.[75] The FTC should resolve the ambiguity by, among other things, making clear in the rule

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[72] NPRM, 88 Fed. Reg. at 77439.

[73] 15 U.S.C. § 57a(a)(1)(B).

[74] *See* NPRM, 88 Fed. Reg. at 77482.

[75] Courts have invalidated rules that fail to define the deceptive acts or practices with specificity. *See Katharine Gibbs School v. FTC*, 612 F.2d 658 (2d Cir. 1979).

itself that contingent or avoidable fees are to be excluded from the Total Price.[76] To do otherwise would lead to highly inaccurate disclosures and consumer confusion.

C. *The Proposed Rule Could Eliminate Advertising for Discounted Rates.*

The proposed rule appears to severely limit the advertising of discounted rates, harming both consumers and competition. In particular, the FTC proposes a definition of the Total Price that refers to the "maximum total of all fees or charges a consumer must pay for a good or service."[77] The FTC gives this "maximum total" concept only a cursory explanation: "The use of the phrase 'maximum total' would allow businesses to apply discounts and rebates after disclosing the Total Price."[78] Here again, this ambiguity fails to provide the required specificity necessary to allow covered entities to know what conduct is unfair or deceptive and prohibited by the proposed rule.

In addition, if adopted, this standard would create a stark disincentive to advertise or even offer discounts or promotional rates to consumers. NCTA Members frequently advertise discounted or promotional rates, allowing subscribers to obtain services at lower prices. Discounted rates lead to price competition, which ultimately drives down prices for consumers and also benefit consumers who want to change providers after the rate expires. The FTC's proposal would eliminate this form of advertising and price competition by requiring businesses to advertise a "maximum" Total Price that does not reflect discounts. The FTC should prevent this outcome by making clear that the Total Price can incorporate discounts.

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[76] *See* NPRM, 88 Fed. Reg. at 77484 (defining "Total Price" as the "maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service, except that Shipping Charges and Government Charges may be excluded").

[77] NPRM, 88 Fed. Reg. at 77484.

[78] NPRM, 88 Fed. Reg. at 77439.

D. *The Proposed Rule's Disclosure Provision Is Overbroad.*

Section 464.3(b) of the proposed rule requires businesses to "disclose Clearly and Conspicuously before the consumer consents to pay the 'nature and purpose' of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged."[79] This requirement will lead to information overload and consumer confusion.

As explained in the NPRM, the "nature and purpose" disclosure is required for any fees not included in the Total Price, such as "Shipping Charges, Government Charges, optional fees, voluntary gratuities, and invitations to tip."[80] The NPRM also provides examples of such disclosures that, even for one of these fees, could be lengthy – *i.e.,* requiring an explanation of precisely how service charges and tips are allocated.[81] To compound the problem, the proposed rule's "Clear and Conspicuous" definition (at Section 464.1(c)) does not make clear that companies may use links to make these disclosures, which will potentially lead to dense and cluttered information all presented together. Making such disclosures on mobile devices will be all the more challenging.

The FTC explains that "this provision helps prevent Businesses from omitting mandatory fees from the Total Price… and misrepresenting the nature and purpose of fees."[82] Instead, it seems to be a strategy to force companies to choose between overwhelming consumers with information or eliminating these types of fees altogether.[83] Whatever the FTC's purpose, this

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[79] *See* NPRM, 88 Fed. Reg. at 77484.

[80] NPRM, 88 Fed. Reg. at 77439.

[81] NPRM, 88 Fed. Reg. at 77439–40.

[82] NPRM, 88 Fed. Reg. at 77439–40.

[83] At various places in the NPRM, the FTC asks about strategies to eliminate fees with "little or no value," evidently referring to the fees targeted by this provision. *See, e.g.,* NPRM, 88 Fed. Reg. at 77482.

overbroad disclosure provision will not help consumers comparison-shop and the record does not support it.

VI. THE FTC HAS NOT APPROPRIATELY WEIGHED THE COSTS OF THE PROPOSED RULE AGAINST THE BENEFITS

The FTC has not appropriately weighed the costs of the proposed rule, either generally across the marketplace or specifically for the communications industry. To the contrary, the NPRM admits that the costs of the proposed rule are uncertain, "because it is unclear how, across a variety of industries, firms would adjust prices, change their price displays and disclosures, and upgrade their systems in response to the proposed rule."[84]

Rather than engage in in-depth fact-finding based on feedback from a wide-range of industries, the FTC has focused on the benefits and costs in the live-event ticketing, short-term lodging, and restaurant industries, while summarily estimating, without evidence, a 90% compliance rate and a 10% noncompliance rate for the rest of the economy.[85] The NPRM then estimates compliance costs ranging from 5-10 hours of lawyer time, 40-80 hours of data scientist time, and 40-80 hours of web developer time to become compliant with the proposed rule.[86] Reviewing the footnotes and supporting arguments for these cost estimates shows that the agency has not spent the necessary resources or solicited relevant feedback to develop them. The FTC is simply speculating.[87]

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[84] NPRM, 88 Fed. Reg. at 77448.

[85] *Id.*

[86] NPRM, 88 Fed. Reg. at 77448-77449.

[87] NPRM, 88 Fed. Reg. at 77449 n.268 ("While there may be some firms that have already established the systems necessary to comply with the proposed rule, there may be other firms that will require a large number of hours to re-optimize prices."); NPRM, 88 Fed. Reg. at 77449 n.270 (referencing an assumption of 80 hours of time to "reprogram flight quotation websites," referring only to large firms in a single, specific industry).

This "best guess" approach is inadequate, arbitrary and capricious. It is also inaccurate with respect to NCTA Members, who would need to incur significant costs to comply. Here are some of the drivers of costs that the FTC has overlooked:

- Nationwide footprint – As discussed above, taxes, government charges, and other costs for NCTA Members can vary from one state or locality to another, and determining an accurate Total Price will require countless hours on an ongoing basis with input from legal, business, and technical teams.

- Overlapping regulations –In addition, simultaneous compliance with both the FTC's rule and Federal laws and FCC regulations (both current and proposed) will drive significant costs that require input from legal, business, and technical teams. In some cases, irreconcilable laws will require changing service structures or discontinuing services or practices in a manner that will directly affect revenues.

- Marketing costs – Although the FTC clearly contemplates revisions to advertising campaigns,[88] the analysis of costs wholly discounts these efforts. Revising advertising-related practices across various media and marketing channels would be a massive undertaking, implicating the design and placement of ads, contractual considerations related to ad placements, and re-training of personnel involved in advertising and marketing efforts. These efforts will necessarily also involve ongoing compliance monitoring. Advertising restrictions that limit the ability to convey important information to consumers, including advertising that cannot include certain pricing information, will have competitive and revenue impacts that are both foreseeable and substantial.

- Purchase "Buy-Flow" Processes – In order to reflect the disclosure requirements of the proposed rule, NCTA Members would be required to invest in creating, troubleshooting, and implementing new online "buy-flow" practices and procedures to replace existing ones. Re-engineering user interfaces takes significant time and resources (including from engineering, technical, business, and legal teams), and rushed implementation could result in glitches, service issues, or errors that impact service, frustrate consumers, or run afoul of technical compliance requirements in the proposed rule.

NCTA Members' recent experiences implementing the TVPA and the investments it required to comply with disclosure obligations are instructive here.[89] To illustrate, a major cable

[88] NPRM, 88 Fed. Reg. at 77449.

[89] *See* Comments of NCTA – The Internet & Television Association, In the Matter of Media Bureau Seeks Comment on Implementation of the Television Viewer Protection Act of 2019, MB Docket No. 21-501 (submitted Feb. 3, 2022), https://www.fcc.gov/ecfs/document/10203181512169/1.

operator and NCTA Member developed, tested, and rolled out a new billing system and other software capable of pulling necessary data from information housed in multiple systems across the cable operator's enterprise. The cable operator also had to develop and provide updated training, scripts, and templates to the company's sales agents, customer service representatives, and technicians. Overall, major cable operators report that it cost approximately $2.5 to $4 million *per company* to comply with the TVPA and took about one year to implement the necessary system upgrades and updates to sales, customer service, ordering, and billing processes and procedures. Compliance with the FTC's proposed rule would require even more resources given that the rule applies to all pricing disclosures, *including price disclosures in advertising and marketing materials*, which are not covered by TVPA. The communications industry would need more than a year to be able to comply with the requirements of any applicable final rule.

As to the benefits of the proposed rule, the FTC cites to preemption and reduction in "search time" and "deadweight loss" as key considerations.[90] As discussed below, the FTC's preemption provision would actually *allow* inconsistent state laws, which negates any potential benefits of preemption. Regarding search costs, the FTC wrongly assumes that consumers' "search time" relates solely to price. In fact, for NCTA Member services, consumers search for the best options that meet their needs, including features like speed, content, convenience, reliability, bundling options, and other factors. Although price is an important competitive factor, there is no evidence that price is the factor that most drives "search time." Moreover, the FTC's argument that the rule will reduce the deadweight loss caused by incomplete pricing information

[90] NPRM, 88 Fed. Reg. at 77447.

fails to acknowledge that the proposed rule could actually *obscure* this information, both by requiring certain fees to be rolled up into a Total Price, and mandating excessive and confusing disclosures regarding the fees not included in the Total Price.[91] (See Section V.D above for further discussion of this issue).

Before moving forward with any regulation, the FTC must revise its cost/benefit analysis to fully anticipate the costs and show substantial evidence of benefits. At this juncture, the FTC has not met this challenge and its inadequate analysis is arbitrary and capricious.[92]

VII. THE PROPOSED RULE'S APPROACH TO PREEMPTION WILL INCENTIVIZE FURTHER COMPLEXITY AND CONFUSION

One of the stated goals of the proposed rule is to create "harmonized, nationwide compliance requirements."[93] As the NPRM explains:

> In the absence of the proposed rule, individual States may pursue enforcement actions against firms using drip pricing or enact their own drip pricing prohibitions. Such regulations could vary from State to State, and firm[s] would incur greater costs to ensure simultaneous compliance with this patchwork of regulations. A single rule at the Federal level would reduce the need for

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[91] One study the FTC cites as supposedly showing the harm "drip pricing" causes recognizes that in some cases it is not beneficial to disclose the total price upfront:

> We stress that drip pricing comes in many flavors, and not all are harmful to consumers or competition. For instance, a firm may engage in drip pricing because disclosing the total price up front is costly and/or would confuse consumers. Product complexity may make it difficult for a firm to initially disclose the total price when the total price depends on the optional or add-on features selected by particular consumers. For these sorts of reasons, many custom home builders do not disclose the total price up front, as this price depends on a plethora of customer-specific options including the structure (brick or vinyl) and other features that vary in price, grade and/or quality (e.g., paint/wall paper, appliances, molding, energy efficiency, and so on). Our analysis does not incorporate these considerations although, in some settings, they may be important.

Michael R. Baye & John Morgan, *Search Costs, Hassle Costs, and Drip Pricing: Equilibria with Rational Consumers and Firms,* at 20-21 (Mar. 2019)(footnote omitted), *http://nash-equilibrium.com/PDFs/Drip.pdf*.

[92] Courts may set aside any final rule on the grounds that it is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 57a(e)(3) (stating that any rule may be set aside on "any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5").

[93] NPRM, 88 Fed. Reg. at 77447.

> regulations at the State level and provide a simpler regulatory framework for firms.[94]

The Commission's preemption standard, however, will not achieve this objective. While it purports to preempt "inconsistent" state laws, it specifically *preserves* such laws if they provide "greater protection" than the proposed rule. Far from creating "harmonized, nationwide compliance requirements," this scheme will add complexity to an already confusing regulatory landscape.

Indeed, providing a mere floor for regulation will not achieve consistency. For example, state laws that offer "greater protection" could ban certain fees entirely, restrict pricing for certain taxes or fees, define "Clear and Conspicuously" differently from the proposed rule, or require different labeling formats (similar to the Broadband Labeling Rule described above). Any one of these differences would undermine the NPRM's goals to promote comparison-shopping and consumer choice, while also creating complexity and confusion for companies about their compliance obligations.

Ultimately, the Commission cannot retain this preemption scheme while also creating "[a] single rule at the Federal level [that] would reduce the need for regulations at the State level and provide a simpler regulatory framework for firms."

VIII. THERE ARE DISPUTED ISSUES OF MATERIAL FACT THAT SHOULD BE RESOLVED AT AN INFORMAL HEARING

NCTA has identified disputed issues of material fact that require resolution. Accordingly, the FTC should hold an informal hearing, and NCTA reserves its right to participate by presenting its position orally or by documentary submission (or both).[95] Further, NCTA requests

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[94] NPRM, 88 Fed. Reg. at 77447.

[95] 15 U.S.C. § 57a(c)(2)(A); *see also* 16 C.F.R. §1.11(e).

that it be permitted to present rebuttal submissions and cross examine witnesses in accordance with 15 U.S.C. § 57a(c)(2)(B) as to disputed issues of material fact.[96]

NCTA identifies the following disputed issues of material fact:[97]

- **Do 90% of firms (exclusive of the live-event ticketing, short-term lodging, and restaurant industries) already comply with the proposed rule?**

The NPRM assumes that 90% of firms (exclusive of the live-event ticketing, short-term lodging, and restaurant industries) already comply with the proposed rule.[98] NCTA disputes this assumption; it is inaccurate with respect to the communications industry and, in turn, likely invalid for the economy as a whole. As explained above in Section III.B, numerous members of the communications industry are subject to laws and regulations mandating price disclosures that are different from, and in some cases in conflict with, the proposed rule. Covered communications firms would have to spend significant resources to try to reconcile overlapping FTC price disclosure requirements – a complex and in some cases impossible task.

This is a material issue because the FTC's quantitative analysis of the costs of the proposed rule (outside the live-event ticketing, short-term lodging, and restaurant industries) is based upon this "90% assumption." It is necessary to resolve whether this assumption is correct because the accuracy of the compliance cost estimates and the proposed rule's cost-benefit analysis hinges on it.

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[96] *See also* 16 C.F.R. §§ 1.12, 1.13(b)(2).

[97] NCTA reserves its right to petition for the addition or modification of disputed issues of material fact. Notably, the Commission elected not to provide a rebuttal comment period in this rulemaking. The NPRM requires interested persons to request to make an oral submission at an informal hearing and to identify any disputed issues of material fact that need to be resolved during the hearing in their comment – ***before*** they are able to review the forthcoming submissions of other commenters.

[98] NPRM, 88 Fed. Reg. at 77448.

- **Will the proposed rule reduce consumers' search costs? Will the proposed rule facilitate the ability to accurately compare products?**

The FTC states that the rule will "eliminate the need for additional, inefficient amounts of time to determine the total price from sellers" based on the assumptions that (1) consumers' "search time" relates solely to price and (2) price is the only relevant metric when consumers are comparison shopping.[99] NCTA disputes that price is the single factor that drives "search time" and that regulating price disclosures will therefore reduce search time. Consumers who search for products in the communications industry choose options based on features like speed, content, convenience, reliability, bundling options, and other factors in addition to price.[100] For example, in a Leichtman Research Group study, *Broadband Internet in the U.S. 2023*, consumers reported that faster connection and constant connection were some of the most important factors in their decision to subscribe to a broadband service. The NPRM cites reduced search time for the total price of goods and services as a benefit of the rule. Whether the proposed rule will benefit consumers by reducing search time and facilitating comparison shopping is material and necessary to resolve before a final rule can be issued.

- **Do reasonable consumers expect the "total price" "exclusive of government charges" to exclude only government charges imposed directly on consumers?**

The NPRM makes inherent assumptions about the fees or government charges a reasonable consumer would expect to be included or excluded in the Total Price for a good or service, including that consumers expect the total price to include all government taxes and fees

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[99] *See* NPRM, 88 Fed. Reg. at 77,445-47.

[100] *See, e.g.,* Broadband Now, *2020 U.S. Internet, TV & Phone Shopping Study* (May 6, 2022) *("Pricing was the main motivation cited for consumers changing services across all categories. Even so, as many as one-third of consumers were shopping for better quality products, indicating that providers can differentiate on quality in a meaningful way."),* https://broadbandnow.com/research/internet-tv-phone-shopping-study-202.

not imposed directly on consumers. NCTA disputes that reasonable consumers will understand or expect the pricing disclosures proposed in the NPRM. Indeed, the FCC decided not to include an all-in price on its proposed broadband label, finding that "consumers are accustomed to seeing base monthly prices, without additional taxes and fees, when shopping for goods and services."[101] The FCC further noted that requiring all-in pricing to include such taxes and fees "may be potentially misleading to consumers."[102] And the FCC recently affirmed that providers must itemize the fees they add to base monthly prices – including fees related to government programs they choose to pass through to consumers.[103] Consumer expectations are material in assessing whether consumers would understand and benefit from the disclosures mandated by the proposed rule and thus necessary to resolve before a final rule can be issued.[104]

IX. CONCLUSION

NCTA supports efforts to protect consumers from unfair and deceptive pricing practices; however, the record does not contain the substantial evidence necessary to support a finding that such practices are prevalent across the marketplace generally or in the competitive communications industry specifically. The proposed rule is ambiguous and lacks the specificity required by Section 18 of the FTC Act. In addition, the proposed rule's price disclosure framework is directly at odds with existing federal laws, FCC regulations, and related FCC proposed rules. If implemented, the FTC proposed rule will result in overlapping and

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[101] In the Matter of Empowering Broadband Consumers Through Transparency, CG Docket No. 22-2, Report and Order and Further Notice of Proposed Rulemaking at 9 (rel. Nov. 17, 2022).

[102] *Id.*

[103] FCC Recon. Order, *supra* note 50, para. 13.

[104] *See* NPRM, 88 Fed. Reg. at 77442-43. The FTC admits that there may be "adjustment costs or consumer confusion as expectations adjust," but does not quantify these costs for communications services or for the broader economy (except restaurants).

inconsistent requirements that will lead to burden and confusion for consumers and businesses alike, without providing any attendant consumer benefit. If the Commission proceeds with this rulemaking, it must narrowly tailor the rule to cover only those industries it has identified as engaging in widespread unfair or deceptive practices. It must exclude industries, such as the extensively regulated communications industry, where there is no substantial evidence in the record to support additional highly prescriptive requirements that will disincentivize price advertising and undermine consumer choice.

Respectfully submitted,

/s/ Rick Chessen

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Washington, D.C.

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Comment from NCTA - The Internet & Television Association

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General Comment

NCTA - The Internet & Television Association submits the attached comments on the FTC Unfair or Deceptive Fees NPRM R207011. Thank you.

Attachments

020724 NCTA Comments on FTC Unfair or Deceptive Fees NPRM

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

020724 NCTA Comments on FTC Unfair or Deceptive Fees NPRM_Redacted