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

Advance Notice of Proposed Rulemaking for 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 on the Advance Notice of Proposed Rulemaking (ANPR) in the above-captioned proceeding.[1] NTCA represents approximately 850 small, locally operated rural broadband providers. In addition to broadband internet access services, these facilities-based entities also provide, variously, telephone, fixed and mobile wireless, and video communications services. As explained below, NTCA submits that many of the operations of its member companies and similarly situated firms fall within the common carrier exemption of the Federal Trade Commission (FTC) Act. Moreover, certain aspects of those common carrier operations are already bound to Federal Communications Commission (FCC) regulations governing billing and other notices. In addition, detailed and comprehensive rules govern sales information for the non-common carrier operations of NTCA members, specifically, their broadband internet access service offerings.

[1] "Unfair or Deceptive Fees Trade Regulation Rule," Federal Trade Commission Matter No. R207011, 87 Fed. Reg. 67413 (2022).

Here, too, additional FTC regulations would be redundant and unnecessary. Accordingly, NTCA recommends that to the extent the FTC implements measures to address "unfair or deceptive" fees, the FTC include a clear and unambiguous exemption for firms that are already subject to industry-specific Federal regulatory oversight by other expert agencies.

II. DISCUSSION

A. FEES CHARGED BY TELECOMMUNICATIONS AND OTHER HIGHLY REGULATED INDUSTRIES INCLUDE CHARGES ARISING OUT OF MANDATORY GOVERNMENT PROGRAMS.

The FTC proposes to address what it characterizes as "certain deceptive or unfair acts or practices relating to fees."[2] The ANPR targets so-called "junk fees," which the FTC defines as "unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price."[3] The FTC seeks input on whether and how it can invoke its authority to address "junk" and other "hidden" fees. The FTC cites administrative proceedings in which it has acted to address misrepresentation or failure to disclose such matters including, *inter alia,* (a) "the total cost of any good service," (b) costs or fees that are not reasonably avoidable, and (c) delineation of optional fees.[4] Among the threshold questions upon which the FTC seeks comment are inquiries about potential rules requiring disclosure of "all-in pricing" and how any contemplated rules might "intersect with existing industry practices, norms, rules, laws, or regulations."[5] NTCA addresses these issues as they relate to its member companies, and reserves comment on other items raised in the ANPR.

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[2] *Id.*

[3] *Id.*

[4] 87 Fed. Reg. 67416.

[5] 87 Fed. Reg. 67421.

In its introduction, the ANPR cites a 2019 Consumer Reports (CR) poll, namely, the "WTFee Survey."[6] The ANPR notes, "respondents cited telecommunications and live entertainment as sources of hidden fees more than any other industries."[7] For example, the notes fees added to calling cards and "mobile cramming," defined as "charges on mobile phones that consumers did not order or authorize."[8] Turning to other industries, the ANPR cites "resort fees" levied by hotels and processing fees added by ticket-issuing firms in the sports and entertainment industries.[9]

As a threshold matter, NTCA submits that the *form* of the CR survey, *i.e.,* the questions asked (or not asked) leaves open important questions about *impressions* conveyed by the CR survey report. For example, among its initial questions, the survey asked: (1) Did users encounter an unexpected or hidden fee at sign-up or during use of the service, and (2) Did users encounter unexpected or hidden fees when they used or received a bill from enumerated services? These enumerated services included, *inter alia,* credit cards, gas and electric utilities, telecommunications providers, rental cars, live entertainment/sporting events, and college tuition. The survey then characterizes the respondents' reactions to such fees. The survey report, however, does not disclose or otherwise indicate the *specific fees* that respondents identified as "unexpected or hidden." And while telecommunications providers were cited as the highest

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

[7] 87 Fed. Reg. 67414.

[8] 87 Fed Reg. 67414, 67415, fn.24.

[9] 87 Fed. Reg. 67415.

source of such fees, gas and electric utilities ranked second highest. This result is instructive, and warrants explanation.

As noted above, it is not clear from the survey report that the CR survey asked respondents to enumerate specifically the fees that they characterized as "junk" or "hidden." But it is apparent from reviewing a standard bill for telecommunications services that many fees that could be perceived as "hidden" are actually rooted in mandatory assessments levied by state and Federal entities that are passed through to the subscriber. For example, a typical telecommunications bill can be expected to include line-item charges for Federal Universal Service Fund assessments, county line charges, state 911 surcharges, and state sales tax. Even if these fees would be initially unexpected, they can hardly be characterized as "junk fees" that "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.

[10] 87 Fed. Reg. 67413.

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

In similar vein, the CR survey report lists gas and electric utilities as the category of bills with so-called "junk" fees. It is telling that gas and utilities fees ranked immediately after telecommunications services in the unfavorable ratings. These services, too, reflect charges that emanate directly from government programs. By way of example, a typical bill from Washington Gas in the DC region of Maryland includes a "STRIDE" surcharge, reflecting the Maryland Public Service Commission-approved "Strategic Infrastructure Development and Enhancement Plan" to accelerate replacement of utility pipes.[12] The same bills include a line-item addition for "EmPOWER," which is also a Maryland Public Service Commission-approved program to energy efficiency and conservation programs.[13] Like the line-item charges on communications bills, these too are related directly to the provision of the service and reflected regulatory-authority approved programs; they hardly qualify as "junk" fees. In sum, although highly regulated, capital-intensive infrastructure industries may charge fees that consumers as "annoying" or "hidden" or "unexpected,"[14] 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 the regulators themselves have deemed in the public interest.[15] Accordingly, they should be treated as being beyond any potential FTC action addressing "junk fees."

[12] *See,* MD Pub. Util. Code § 4-210 *et. seq.*

[13] *See, I/M/O Washington Gas Light Company's Energy Efficiency, Conservation and Demand Response Programs Pursuant to the EmPower Maryland Energy Efficiency Act of 2008,* Case No. 9362, Maryland Public Service (filed Sep. 2, 2004).

[14] *See,* CR Survey Report at 5.

[15] *Cf.* 87 Fed. Reg. 67413.

With this, however, NTCA observes that certain fees may present a proverbial "black box" to subscribers. Specifically, 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. Retransmission consent fees refer to charges that cable providers pay for the rights to retransmit commercial television, low power television, and radio broadcast signals.[16] According to FCC data, the compound average annual growth rate in per-subscriber retransmission consent fees over the past nine years is 30.6%, rising from $24.06 in 2013 to $203.03 in 2021.[17] Current regulations governing such fees were promulgated about 30 years ago pursuant to the 1992 Cable Television Consumer Protection and Competition Act.[18] 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 accordingly suggests that this discrete issue, which is separate and apart from (a) common carrier telephone services over which the FTC does not authority and (b) broadband internet access services which are governed by new and detailed broadband label

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

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

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

rules, may be ripe for examination to determine whether greater transparency for consumers can be achieved without imposing burdens in generation of invoices.

B. COMMON CARRIER TELEPHONE SERVICES ARE EXEMPT FROM SECTION 5 FTC RULES.

Notwithstanding the positions above, it must be noted that in all events the FTC lacks jurisdiction to regulate the common carrier operations of NTCA members and other telecommunications carriers. The FTC explains that the ANPR is published "pursuant to Section 18 of the FTC Act."[19] 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 ANPR because Section 5 bars the FTC from regulating common carriers.[20]

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 . . ." These rules 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

[19] 87 Fed. Reg. 67413.

[20] *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).

issues envisioned by the ANPR. As such, any additional FTC requirements would be redundant and unnecessary.

C. BROADBAND INTERNET SERVICE PROVIDERS ARE SUBJECT TO DETAILED AND COMREHENSIVE FEDERAL COMMUNICATIONS COMMISSION RULES.

Having addressed common carrier operations, NTCA now turns to the non-common carrier operations of its members. As described above, in addition to telecommunications services, NTCA members are broadband service providers. According to Federal rules as derived from the Communications Act, broadband internet access service is not a common carrier service.[21] However, since the FCC can regulate certain aspects of broadband internet access services under Title I of the Communications Act (specifically, within the construct of "ancillary regulation") 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.[22]

Specifically, the IIJA requires broadband internet service providers to "display, in the form of labels, certain information regarding their broadband Internet access service plans."[23] This "certain information" includes not only basic price information but also one-time fees, equipment rental fees, and fees "associated with regulatory programs."[24] These rules meet

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

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

[23] *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).

[24] Broadband Labels Order at paras. 32-34.

precisely the concerns articulated in the ANPR.[25] Similar to the Truth in Billing requirements for common carriers, yet even more expansive because the "broadband label" requirements commence at the point of sale, these FCC rules address the concerns articulated by the ANPR by requiring the regulated entities to provide enumerated information about the service and fees charged for it. Moreover, these rules prescribe the precise *form* in which the information must be conveyed.[26] These tailored guidelines 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 ANPR should include a specific exemption for broadband service providers that are subject to the recently promulgated rules.[27]

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 ANPR. 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 ANPR. Accordingly and for the reasons set forth above, NTCA submits that any FTC action arising out the ANPR provide a specific carve-

[25] Although these rules will not be effective until January 17, 2023,[25] 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 ANPR.

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

[27] 47 C.F.R. § 8.1(a) *et seq*.

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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