Before the
FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of	)	
Unfair or Deceptive Fees Rule	)	NPRM R207011
(16 C.F.R. Part 464)	)	

SUPPLEMENTARY SUBMISSION OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA")[1] respectfully submits this supplementary submission on the Federal Trade Commission's ("FTC" or "Commission") proposed Rule on Unfair or Deceptive Fees ("proposed rule").[2] This submission responds to the FTC's Notice of Informal Hearing published on March 27, 2024,[3] which provides seventeen commenters, including NCTA, with the opportunity to make an oral statement at the hearing on April 24, 2024, and to file an additional written submission by April 10, 2024.

I. Introduction

NCTA members ("Members") provide consumers with cable, broadband, voice,[4] video streaming, and other services. As NCTA's Comments in response to the NPRM discussed, Members provide consumers with clear information regarding the price of their services in

[1] 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 $325 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] FTC Trade Regulation Rule on Unfair or Deceptive Fees, Notice of Proposed Rulemaking ("NPRM"), 88 Fed. Reg. 77420 (Nov. 9, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf.

[3] FTC Trade Regulation Rule on Unfair or Deceptive Fees, Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants, 89 Fed. Reg. 21216 (Mar. 27, 2024) ("Hearing Notice"), https://www.govinfo.gov/content/pkg/FR-2024-03-27/pdf/2024-06468.pdf?utm_campaign=subscription+mailing+list&utm_medium=email&utm_source=federalregister.gov.

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

advertising, promotional materials, throughout the purchasing process, in order confirmations, and on monthly bills – a necessity in today's highly competitive communications marketplace.[5]

This Supplementary Submission reiterates and updates the key theme in NCTA's Comments: the proposed rule as applied to NCTA Members' services is unnecessary and unwarranted, and would be counterproductive for consumers, businesses, and policymakers alike, because our Members are *already* heavily regulated on these very issues by other federal and state laws and rules. The Federal Communications Commission ("FCC") has adopted rules that regulate price displays on bills and promotional materials for a wide range of communications and video services. These FCC regulations are in addition to existing federal statutory requirements and local regulation. The Commission's proposed rule is thus not only unnecessary, but would also add conflicting requirements that would serve only to complicate compliance and confuse consumers about the price of these services.

Of particular note, since NCTA filed its Comments in February, the FCC has adopted the "All-In Pricing Rule" for cable TV and direct broadcast satellite ("DBS") providers. The FTC rule, if adopted as proposed, will require price displays that create inconsistent, contradictory, and confusing price disclosures compared to the disclosures required by the FCC rule. These dueling requirements will serve only to confound consumers about the prices for communications services. To avoid these harms to consumers and businesses, this Supplementary Submission further supports NCTA's request to remove communications service providers from the scope of the proposed rule. We offer below several alternative approaches the

[5] NCTA Comments on FTC Unfair or Deceptive Fees NPRM (Feb. 7, 2024) ("NCTA Comments"), https://www.regulations.gov/comment/FTC-2023-0064-3233.

FTC could pursue to avoid such negative consequences while still fully protecting consumers and achieving the FTC's key objectives in this proceeding.

II. The FTC's Proposed Rule Is Inconsistent with the FCC's Price Disclosure Rules – Including the Newly Adopted FCC All-In Pricing Rule

As the NCTA Comments discussed, the FTC is on a course to regulate pricing disclosures that are already heavily regulated by federal statutes and the FCC.[6] NCTA Members must comply with the Television Viewer Protection Act of 2019 ("TVPA"), which governs pricing disclosures for the cable and DBS industries; the new FCC All-In Pricing Rule for cable and DBS providers; the Cable Operator and DBS Provider Billing Practices Rule; the FCC Broadband Labeling Rule, which requires certain pricing disclosures for broadband services; and potential expansion of the Truth-in-Billing Rule to VoIP services.[7]

In the brief time since the NPRM comment period closed, the inconsistency between the FTC proposed rule and FCC pricing disclosure regulations for communications services has become even more acute, as the FCC continues to cover the landscape in proposing and adopting new rules in this area.

1. Video Programming Services

On March 14, 2024, the FCC adopted a Report and Order that finalizes the "All-In" Cable and Video Satellite Pricing Rule.[8] This rule requires operators of residential and multi-

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[6] *See id.* at 9-20.

[7] NCTA Comments in this proceeding address in detail how the FTC's proposed "Total Price" requirement would overlap and conflict with the TVPA, the FCC Broadband Labeling Rule, and pending FCC action on VoIP billing. *Id.* at 8-18. NCTA incorporates those positions by reference here, and focuses this filing on inconsistencies between the FTC's proposed rule and the All-In Pricing Rule recently adopted by the FCC.

[8] All-In Pricing for Cable and Satellite Television Service, Report & Order, FCC 24-29 (adopted Mar. 14, 2024)("FCC All-In Order")(to be codified at 47 C.F.R. § 76.310, Truth in billing and advertising), https://docs.fcc.gov/public/attachments/FCC-24-29A1.pdf.

tenant cable and DBS services to provide an "all-in" price for video programming in their advertisements and other promotional materials and on customer bills.

The FCC's newly adopted All-In Pricing Rule vividly illustrates how the FTC's proposed rule would duplicate and conflict with existing regulatory requirements and add nothing but confusion to the marketplace.[9] As explained below, the FCC "All-In" price for video programming is different from the proposed FTC "Total Price."

Under the FCC All-In Pricing Rule, cable operators and DBS providers that communicate a price for video programming in promotional material "shall state the aggregate price for the video programming in a clear, easy-to-understand, and accurate manner.[10] The FCC "All-In" aggregate price "must be a prominent single line item in promotional materials."[11] Notably, the "All-In" price *includes* all broadcast retransmission fees, regional sports programming fees, and other programming-related fees.[12] Yet the FCC's All-In Pricing Rule *excludes* amounts beyond the cost of video programming itself, such as taxes, administrative fees, equipment fees, and franchise fees (including Public, Educational, and Governmental Access Support Fees or "PEG" fees), or other such charges.[13]

The FCC also recognized that certain costs for *each consumer* (not for *each market*) may vary more than others, such as, for example, taxes and fees that may vary by location. The All-In Pricing Rule requires that, if part of the aggregate price for video programming varies based upon service location, then the provider must state where and how consumers may obtain their

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[9] NCTA does not waive any arguments that it may pursue in other forums about the validity of the All-In Pricing Rule.

[10] 47 C.F.R. § 76.310(b).

[11] FCC All-In Order ¶ 17.

[12] *Id.* ¶ 13.

[13] *Id.* ¶ 14 & n.53.

subscriber-specific "All-In" price (for example, electronically or by contacting a customer service or sales representative).[14] The FCC All-In Order also permits cable operators to provide a "*starting at*" price or a *range of prices* to account for the variation in video programming fees in the locations that the advertisement is intended to reach, with more specific information available once consumers provide their location.[15]

In stark contrast to the FCC All-In Pricing Rule, the FTC's proposed "Total Price" rule would require clear and conspicuous disclosure of the *maximum* total of all mandatory fees or charges, only permitting exclusion of shipping and government charges. And unlike the FCC, the FTC draws a distinction between government charges imposed directly on consumers and government fees or charges that the provider passes through to consumers (without acknowledging government fees the provider is expressly permitted by law to pass through to consumers).[16] Moreover, contrary to the FCC, the FTC's proposed rule does not account for the reality that pricing for these services can vary for each locality and each consumer.

In effect, the FTC would be substituting its judgment for that of the expert sector-specific regulator of communications services and imposing a conflicting broad, blunt rule.

As a result of the agencies' inconsistent price disclosure requirements, cable operators attempting to comply with both sets of requirements would have to present two very different prominent prices in the same advertisement for the very same service offering:

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[14] 47 C.F.R. § 76.310(b). The FCC All-In Order further explains that any advertised price must include all video programming fees that apply to all consumers in the market that the advertisement is targeted to reach. At the time the potential consumer provides location information, online or otherwise, then the provider must state the "all-in" price. FCC All-In Order at ¶ 30.

[15] FCC All-In Order ¶ 30.

[16] *Compare* FCC All-In Order ¶ 14 & n.54 (citing with approval NCTA's assertion that "[f]ranchise fees and PEG fees should be explicitly excluded from the all-in price" because "[l]ike taxes, the fees would be impractical to include in an all-in price"), *with* FTC NPRM, 88 Fed. Reg. at 77439, 77484 (defining too narrowly the "Government Charges" that may be excluded from the "Total Price" in proposed 16 C.F.R. § 464.1(d)).

(1) A clear and conspicuous FTC maximum "Total Price," excluding only government charges imposed on consumers; and

(2) A *different* prominently displayed FCC "All-In Price" excluding all government and other non-programming-related charges, *i.e.,* taxes, administrative fees, franchise fees, PEG support fees, and other such charges. Pursuant to the FCC All-In Order, if the price varies by location, the advertisement (a) could include a "starting at" or range of prices to account for such variations, and (b) must provide a website or customer service phone number for consumers to obtain their subscriber-specific "all-in" price – none of which is addressed by the FTC's proposed rule.

The disparity between the prominent pricing disclosures required by the FTC's proposed rule and the FCC's All-In Pricing Rule will undoubtedly confuse consumers and frustrate their efforts at comparison shopping. Consumers will be unable to discern the reason that an advertisement is showing multiple prices, or the reasons for the difference in those prices. If they contact the provider to obtain their subscriber-specific price (as directed in the ad, pursuant to the FCC All-In Rule), they could receive yet another price.

Attempts to create advertisements that comply with both sets of requirements also would be difficult and would pose an enforcement risk for operators. For example, disclosures in compliance with the FCC All-In Rule that are inconsistent with the FTC Total Price arguably would not comply with the FTC's proposed rule, which requires that the FTC Total Price "must not be contradicted or mitigated by, or inconsistent with, anything else in the communication." FTC proposed rule § 464.1(c)(7). The FTC should avoid this ludicrous result.

2. Broadband Service

In an additional development since the NCTA Comments were filed, the FCC's Broadband Labeling Rule takes effect as of the date of this Supplementary Submission (April 10, 2024). If the FTC's proposed rule is adopted, the monthly price broadband providers must disclose on their Broadband Labels may not conform to the FTC-required "Total Price" displayed in other promotional materials and advertisements. On the FCC's Broadband Labels, the monthly price may *exclude* 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.[17] Moreover, at the FCC's April 25, 2024 Open Meeting, the FCC will vote to reclassify broadband services under Title II of the Communications Act.[18] If adopted, the FCC reclassification would remove broadband services from FTC jurisdiction given the common carrier exception in the FTC Act.

III. Recommendations for Avoiding Harm and Confusion for Consumers and Businesses

The FTC has several options to avoid application of the costly, conflicting, and confusing regulations as described above. Specifically, if the FTC adopts a final rule, the Commission could do any of the following:

1. Exempt from the FTC's proposed rule services that are subject to the price disclosure rules discussed in this Supplementary Submission and NCTA's Comments. For example,

[17] *See* NCTA Comments at 12-13.

[18] Press Release, *FCC to Vote on Restoring Net Neutrality; Proposal Would Reaffirm the Importance of a National Standard of Broadband Reliability, Security, and Consumer Protection* (Apr. 3, 2024), https://docs.fcc.gov/public/attachments/DOC-401616A1.pdf.

the final FTC rule could exempt providers subject to FCC price disclosure rules from the definition of "business," like the FTC's treatment of motor vehicle dealers.[19]

2. Deem compliance with the applicable FCC price disclosure rules to be compliance with the FTC rule, consistent with regulatory practice in other areas with overlapping requirements.[20]
3. Focus the FTC's final rule narrowly on only the industries where the FTC has sufficient data to quantify the benefits and costs in the NPRM, without resorting to highly speculative assumptions.[21]
4. Fully harmonize the proposed rule's requirements with those of FCC price disclosure rules governing cable, broadband, and voice services as that would ensure consistent

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[19] *See* NPRM, 88 Fed. Reg. at 77438, 77483 (proposed 16 C.F.R. § 464.1(b)).

[20] *See, e.g.,* Cal. Civ. Code 1770(a)(29)(B) (operative July 1, 2024) (deeming compliance with FCC consumer broadband label requirements by providers that offer broadband and other bundled services as compliance with the California "junk fee" statute). Similarly, at least a dozen states have exempted from their automatic renewal laws entities that are already regulated by, among others, the FCC, public utility commissions, or local franchising authorities. *See, e.g.*, Cal. Bus. & Prof. Code § 17605; Colo. Rev. Stat. § 6-1-732; D.C. Code § 28A-204; Haw. Rev. Stat. § 481-95; Ky. Rev. Stat. § 365.404; N.Y. Gen. Bus. Law § 527-A; N.C. Gen. Stat. § 75-41(d); N.D. C.C. § 51-37-03; Or. Rev. Stat. § 646A.295; Tenn. Code § 47-18-133(e)(5); Va. Code § 59.1-207.48. And, multiple states' privacy statutes, including but not limited to, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Montana, Tennessee, Utah and Virginia contain entity-level exemptions for financial services entities covered by the Gramm-Leach-Bliley Act. The Commission itself follows similar principles to avoid overlapping regulations. *See, e.g.,* 16 C.F.R. § 314.1(b) (FTC Safeguards Rule applies to financial institutions that are not otherwise subject to the enforcement authority of another regulator under section 505 of the Gramm-Leach-Bliley Act); 16 C.F.R. § 310.6(b) (FTC Telemarketing Sales Rule exempts transactions subject to the Commission's Franchise Rule and Business Opportunity Rule, with certain exceptions).

[21] For example, as the FTC acknowledged in the NPRM, a reasonable alternative to the proposed rule would be to limit a final rule only to the live-event ticketing and short-term lodging industries. NPRM, 88 Fed. Reg. at 77441. In contrast, for the rest of the economy, the FTC NPRM erroneously estimates that 90% of firms (excepting live-event ticketing, short-term lodging, and the restaurant industry) are already complying with the proposed rule. In the Hearing Notice, the FTC incorrectly declares that if the 90% figure is an overestimate, then costs go up but so do benefits. Hearing Notice, 89 Fed. Reg. at 21221. This is not the case with respect to communications service providers and other regulated industries, where the costs of complying with a new conflicting price disclosure rule will increase, but the dueling disclosures will offer *no* benefit for consumers and will instead confuse them.

federal standards and enforcement in this sector as required by longstanding Memoranda of Understanding between the FTC and FCC.[22]

IV. Conclusion

As demonstrated above and in our initial Comments, the FTC's proposed rule would conflict in material respects with the FCC's All-In Pricing Rule and other existing regulatory requirements. The proposed rule therefore would be unworkable for communications service providers and incomprehensible for consumers in this sector – contrary to the goals the FTC is trying to achieve. NCTA again urges the FTC to refrain from adoption of such conflicting price disclosure requirements and to ensure that consumers are presented with understandable price disclosures for communications services by adopting one of the alternatives in Section III above. We appreciate the consideration of the Commission and the Presiding Officer.[23]

Respectfully submitted,

***/s/* Rick Chessen**

Rick Chessen
Joni Lupovitz
NCTA – The Internet & Television Association
25 Massachusetts Avenue, N.W., Suite 100
Washington, D.C. 20001

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[22] Under the 2017 and 2015 Memoranda of Understanding ("MOUs") between the FTC and FCC, the two agencies agreed to continue working together to protect consumers and the public interest in the communications sector and, in so doing, *avoid duplicative, redundant, or inconsistent oversight, including by coordinating on agency enforcement and initiatives where one agency's action will have a significant effect on the other agency's authority or programs*. Restoring Internet Freedom FCC-FTC Memorandum of Understanding (Dec. 2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf; FCC-FTC Consumer Protection Memorandum of Understanding (Nov. 2015), https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf.

[23] Section 18 of the FTC Act requires that "[t]he officer who presides over the rulemaking proceeding *shall* make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence[.]" 15 U.S.C. § 57a(c)(1)(B) (emphasis added). Contrary to the Hearing Notice and the Commission's Rules of Practice, the Presiding Officer's recommendation, under the statute, is not limited to discussion of disputed issues of material fact. Hearing Notice, 89 Fed. Reg. at 21222 (citing 16 C.F.R. § 1.13(d)).