

111TH CONGRESS
1ST SESSION

H. R. 2902

To authorize the Federal Trade Commission, in consultation with the Federal Communications Commission, to review volume usage service plans of major broadband Internet service providers to ensure that such plans are fairly based on cost.

IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 2009

Mr. MASSA (for himself, Mr. PERRIELLO, and Mr. HINCHEY) introduced the following bill; which was referred to the Committee on Energy and Commerce

A BILL

To authorize the Federal Trade Commission, in consultation with the Federal Communications Commission, to review volume usage service plans of major broadband Internet service providers to ensure that such plans are fairly based on cost.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Broadband Internet
5 Fairness Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) Increased deployment and adoption of
2 broadband, including high-bandwidth uses of
3 broadband, is key to allow broadband stimulus funds
4 to produce maximal economic recovery and growth,
5 and is key to the network effects of economic benefit
6 associated with the Internet.

7 (2) No volume usage service plan for broadband
8 Internet access can be just and reasonable unless
9 charges are fairly based on the cost of the usage.

10 (3) Volume usage charges for broadband Inter-
11 net access that are substantially above cost in a
12 market without sufficient competition constitute an
13 unfair and unconscionable practice, as substantially
14 above-cost pricing has anti-competitive and anti-con-
15 sumer effects on Internet use, including in particular
16 Internet use for online video delivery.

17 (4) The market for video delivery is effectively
18 controlled by companies operating both traditional
19 cable delivery and broadband Internet access serv-
20 ices, increasing incentives to raise prices for Internet
21 use in high volumes, to discourage consumers who
22 may wish no longer to subscribe to traditional cable
23 services.

24 (5) The Federal Trade Commission Act author-
25 izes the Federal Trade Commission to investigate

1 and remedy consumer pricing practices that it deter-
2 mines to be unfair or anti-competitive, including
3 pricing practices by Internet service providers, as
4 Internet services are not provided on a common car-
5 rier basis and therefore are not subject to the com-
6 mon carrier limitation on Federal Trade Commission
7 jurisdiction.

8 **SEC. 3. UNJUST, UNREASONABLE, OR UNREASONABLY DIS-**
9 **CRIMINATORY VOLUME USAGE SERVICE**
10 **PLANS.**

11 (a) PROHIBITION.—It shall be unlawful for major
12 broadband Internet service providers to offer volume usage
13 service plans imposing rates, terms, and conditions that
14 are unjust, unreasonable, or unreasonably discriminatory.

15 (b) SERVICE PLAN ANALYSIS FILING REQUIRED.—
16 Major broadband Internet service providers offering, or
17 proposing to offer, volume usage service plans to any por-
18 tion of their service territory are required to file with the
19 Federal Trade Commission a service plan analysis that—

20 (1) identifies the different service tiers of
21 broadband Internet service to be offered on the basis
22 of different data transmission volumes;

23 (2) specifies the different rates, terms, and con-
24 ditions to be imposed for such tiers;

1 (3) provides an analysis of the economic reason-
2 ableness and necessity for imposing such tiers—

3 (A) based on assigning the capital costs of
4 deploying the facilities needed to provide such
5 different service tiers;

6 (B) based on assigning different operating
7 costs, if any, that are attributable to the provi-
8 sion of different service tiers; or

9 (C) based on other factors and costs speci-
10 fied by the provider as a justification for the
11 proposed volume usage service plan;

12 (4) assess the impact of such service tiers on
13 the ability of residential consumers to access widely
14 used Internet services, including uses for agricul-
15 tural, medical, educational, environmental, library,
16 and nonprofit purposes; and

17 (5) specifies the basis upon which the different
18 rates of charges under the service plan will be re-
19 vised over the following 3 years, and inflation factors
20 or other variables that will be used to calculate or
21 limit such revisions.

22 **SEC. 4. ENFORCEMENT BY THE FEDERAL TRADE COMMIS-**
23 **SION.**

24 (a) ENFORCEMENT BY FTC.—The Commission shall,
25 in consultation with the Federal Communications Com-

1 mission, review each service plan analysis submitted under
2 section 3(b) in order to determine whether the volume
3 usage service plan is in violation of section 3(a). A viola-
4 tion of section 3(a) shall be treated as a violation of a
5 rule defining an unfair or deceptive act or practice pre-
6 scribed under section 18(a)(1)(B) of the Federal Trade
7 Commission Act (15 U.S.C. 57(a)(1)(B)). The Federal
8 Trade Commission shall enforce this Act in the same man-
9 ner, by the same means, and with the same jurisdiction
10 as though all applicable terms and provision of the Federal
11 Trade Commission Act were incorporated into and made
12 a part of this Act.

13 (b) REVIEW AND REMEDIATION.—After an initial re-
14 view of any service plan analysis submitted under section
15 3(b), if the Commission identifies any elements of such
16 plan that appear to constitute a violation of section 3(a),
17 the Commission shall notify the provider submitting such
18 plan of such elements and of the steps the provider may
19 take to correct such violations. The Commission shall,
20 prior to initiating any action under subsection (e), review
21 the steps taken by the provider to correct such violations.

22 (c) FACTORS CONSIDERED.—In determining whether
23 a major broadband Internet service provider has violated
24 section 3(a), the Commission, in consultation with the

1 Federal Communications Commission, shall take into ac-
2 count, among other factors—

3 (1) whether the service plan analysis filed with
4 the Commission does not properly assign operating
5 costs to each of the service tiers within the volume
6 usage service plan;

7 (2) whether the rates, terms, and conditions are
8 not justified by the costs of deploying or operating
9 the facilities required to provide and maintain the
10 service tiers within the volume usage service plan;

11 (3) whether the volume usage service plan im-
12 poses unjust, unreasonable, or unreasonably dis-
13 criminatory charges on residential consumers;

14 (4) whether the volume usage service plan de-
15 ters or impedes—

16 (A) the deployment of and access to widely
17 used Internet applications and services; or

18 (B) the participation of residential con-
19 sumers in the growth and development of re-
20 gional, national, and international economies;

21 (5) whether the volume usage service plan un-
22 fairly penalizes consumers choosing to use high
23 bandwidth Internet applications and services, includ-
24 ing those used for one-way or two-way video;

1 (6) whether the volume usage service plan has
2 anti-competitive effects on the market for video de-
3 livery or the markets for Internet applications or
4 services;

5 (7) whether the volume usage service plan im-
6 poses anti-consumer rates, terms, or conditions that
7 reflect insufficient competition in the local market
8 for broadband Internet services; or

9 (8) whether the volume usage service plan fails
10 to comply with such other factors as the Commis-
11 sion, in consultation with the Federal Communica-
12 tions Commission, determines to be appropriate as
13 set forth in the rules prescribed under section 5.

14 (d) HEARINGS.—As a component of its review of each
15 plan submitted under subsection (a), the Commission
16 shall, after the provider submitting such plan has had an
17 opportunity to take steps under subsection (b) to correct
18 any violations identified by the Commission in its notice
19 to the provider under such subsection, provide for the con-
20 duct of a public hearing by a Commissioner or other des-
21 ignated employee of the Commission, and for the collection
22 of public comment and testimony with respect to such
23 plan. Such hearing shall be conducted in a such a commu-
24 nity or communities in such State or States as the Com-

1 mission determines are most directly affected by the vol-
2 ume usage service plan.

3 (e) CIVIL PENALTIES.—

4 (1) Notwithstanding the penalties set forth
5 under the Federal Trade Commission Act, any
6 major broadband Internet service provider who vio-
7 lates section 3(a) shall be subject to injunctive relief
8 requiring the broadband Internet service provider
9 proposing or offering such plan to suspend, termi-
10 nate, or revise such plan.

11 (2) In addition to injunctive relief, any major
12 broadband Internet service provider who violates sec-
13 tion 3(a) may be subject to a fine of not more than
14 \$1,000,000, as the Commission determines is re-
15 quired to ensure ongoing compliance with this Act.

16 **SEC. 5. COMMISSION RULEMAKING REQUIRED.**

17 Within 180 days after the date of enactment of this
18 Act, the Commission shall, by rule prescribed in accord-
19 ance with section 553 of title 5, United States Code, estab-
20 lish procedures for the review of volume usage service
21 plans and for the conduct of public hearings pursuant to
22 the requirements of this Act.

23 **SEC. 6. EFFECT ON OTHER LAWS.**

24 Nothing in this Act shall be construed to limit the
25 authority of the Commission to bring enforcement actions

1 or take other measures under the Federal Trade Commis-
2 sion Act or any other provision of law.

3 **SEC. 7. DEFINITIONS.**

4 (a) IN GENERAL.—For purposes of this Act:

5 (1) COMMISSION.—The term “Commission”
6 means the Federal Trade Commission.

7 (2) BROADBAND INTERNET SERVICE.—The
8 term “broadband Internet service” means an Inter-
9 net protocol-based transmission service that enables
10 users to send and receive voice, video, data, graph-
11 ics, or a combination thereof.

12 (3) BROADBAND INTERNET SERVICE PRO-
13 VIDER.—The term “broadband Internet service pro-
14 vider” means any person who provides or offers to
15 provide broadband Internet service, either directly or
16 through an affiliate.

17 (4) MAJOR BROADBAND INTERNET SERVICE
18 PROVIDER.—The term “major broadband Internet
19 service provider” means a broadband Internet serv-
20 ice provider that, either directly or through an affil-
21 iate, provides broadband Internet service to
22 2,000,000 or more subscribers, as further defined by
23 the rules prescribed by the Commission pursuant to
24 section 5.

1 (5) VOLUME USAGE SERVICE PLAN.—The term
2 “volume usage service plan” means any choice of
3 broadband Internet service offerings to a residential
4 consumer that includes two or more different sets of
5 rates, terms, or conditions that are directly or indi-
6 rectly based upon the amount of data actually trans-
7 mitted to or from the consumer within a fixed period
8 of time.

9 (6) RESIDENTIAL CONSUMER.—The term “resi-
10 dential consumer” includes any individual consumer
11 who subscribes to broadband Internet services pri-
12 marily for purposes other than a for-profit business
13 purpose, and includes subscribers that are nonprofit
14 organizations or institutions of higher education.

15 (b) COMMON TERMINOLOGY.—Except as otherwise
16 provided in subsection (a), terms used in this Act have
17 the meanings provided under section 3 of the Communica-
18 tions Act of 1934 (47 U.S.C. 153) and section 602 of such
19 Act (47 U.S.C. 522).

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