ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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TABLE OF CONTENTS

Page

SUMMARY iii

I. INTRODUCTION: NO ADDITIONAL INFORMATION DISCLOSURE REGULATIONS ARE NECESSARY AT THIS TIME. 1

II. COMPETITIVE MARKET FORCES SUPPLY CONSUMERS WITH EXTENSIVE PROVIDER AND PRODUCT INFORMATION. 6

III. THE COMMISSION SHOULD NOT IMPOSE GENERAL INFORMATION-DISCLOSURE MANDATES WITH RESPECT TO BILLING, PERSONS WITH DISABILITIES OR POINT OF SALE. 11

A. Designing General Consumer Information Disclosures Regarding Different Carriers' Products and Services Would Be Impractical, Even If It Were Possible. 12

1. Crafting the Comparative Tool Would Require Highly Specialized Expertise in Economics, Social Science and Modeling. 15

a. The Pool of Possible Information. 16

b. Choosing Which Elements To Include in the Comparative Tool. 17

c. The Modeling Challenge. 18

d. The Alignment of the Elements To the Audience. 20

i. The Relevance of Behavioral Economics. 20

ii. The Risk of Information Overload. 22

2. Designing and Implementing a Comparative Tool Regarding Service Providers Would Impose Substantial Costs Both On Industry and the Commission. 25

a. Industry Costs. 26

b. Government Costs. 28

B. Beyond Current *Truth in Billing* Rules, No Additional Government Mandates Should be Imposed Regarding Service Providers' Bills. 29

C. The Commission Should Not Prescribe Point-of-Sale Disclosures. 35

D. There Is No Need For Further Regulation of Information Disclosures With Respect to Customers With Disabilities. 36

E. Governmental-Imposed Information-Disclosure Mandates in Other Industries and Contexts Do Not Support Such Mandates in the Communications Industry. 38

IV. First Amendment Principles Represent A Substantial Constraint On the Commission's Authority. 39

A. First Amendment Considerations Regarding Mandating Content Or Format of Service Providers' Bills. 40

B. The First Amendment Constrains the Commission's Authority To Adopt More General Information-Disclosure Mandates. 42

1. *Central Hudson* Scrutiny Regarding Mandated Information Disclosures Generally. 42

2. Judicial Precedent Does Not Support the Type of Information Mandates Suggested in the *NOI*. 44

V. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO REGULATORY MANDATES 50

A. Industry-Led Self-Regulatory Programs. 51

B. Government Sponsored Efforts. 55

SUMMARY

The *NOI* seeks comment regarding a possible extension of the Commission's existing truth-in-billing rules approach, which clearly has a post-purchase focus, to all stages of the purchasing process: choosing a provider or plan; managing the purchased service plan; and deciding if and when to change providers. Additionally, the *NOI* seeks comment on a potential information-disclosure regime that would involve comparative information about service providers and their products, and about possible prescriptions in the area of point-of-sale disclosures.

It is important that consumers who make communications purchases be knowledgeable about providers and products. Yet beyond making the existing truth-in-billing rules generally applicable to similarly-situated service providers, thus benefiting similarly-situated consumers, there is no need for the Commission to expand its information-disclosure regime that exists through its truth-in-billing rules.

Today's communications market is highly competitive. Consumers have choices about providers ranging from traditional telephone companies to broadband providers to cable operators to wireless providers. And sometimes one company offers services across the provider spectrum.

Service providers voluntarily produce information for consumers, some of whom are existing customers, others potential. They aggressively vie for consumers, touting facts about their own service offerings and often going to great lengths to ensure that consumers are aware of how their services are superior to competing options. As a result, existing market forces and generally-available information about providers and products, combined with the truth-in-billing

rules, provide consumers with more than ample information to make educated choices and to navigate the selection of products among a wide range of service providers.

Not only do consumers have access to provider and product information through the providers themselves, but they have other information-gathering capabilities. Consumers gain information first hand, by interacting with potential products and providers. They obtain information from friends and family by way of recommendations. And increasingly, they have access to private party websites and comparative tools.

But however consumers acquire their information, that which is most meaningful is customized -- not standardized. It is precisely this aspect of personalization or customization that so many customers find appealing.

In such a marketplace, attempts to provide non-standard information in a standardized format could -- at a minimum -- be a fruitless exercise. Even designing a comparative tool that seeks to fill some unproven information void would be challenging. Providers would incur costs in collecting and reporting the information. Creating the comparative model would require determinations regarding what information elements (or metrics) were meaningful. And that decision, itself, would be highly dependent on what consumer segment was meant to be the primary beneficiary of the tool.

Rather than proceed with such a highly interventionist approach, the Commission should rely on collaborative discussions among the Commission, industry and consumer advocates as a starting point. Some common understanding is necessary even to begin outlining a disclosure program. And the Commission could challenge industry to look at whether some kind of best practices approach could promote better consumer understanding.

These efforts should be coupled with increased public education by the Commission and consumer advocate groups. To the extent advocacy groups claim there is insufficient (or insufficiently clear) information available to consumers, they have an obligation to supply some of it themselves and to become more active in their outreach and education efforts. These organizations are well positioned to target their outreach activities to those segments of the population most in need of further help in accessing and understanding provider and product information already in the public domain.

Rounding out a non-prescriptive regulatory approach to consumer access to information, the Commission, along with other governmental agencies, should enhance their enforcement activities to target false, misleading, or deceptive communications to customers. Targeted enforcement allows remedial measures to be directed to a particular provider or providers on the basis of a specific finding of a violation of law or regulation.

Qwest's proposal maintains the core benefits of the current truth-in-billing principles, *i.e.*, service provider discretion and flexibility as disciplined by competitive market forces, while remaining committed to the objective of distributing clear and meaningful information. This approach builds on the fundamental principle that service providers know their audiences, something essential to all providers in a competitive market. At the same time, Qwest's recommendation minimizes potential litigation regarding the limits of the Commission's jurisdiction and the proper role of government in overseeing and prescribing the content or format of service providers' communications. It is also avoids serious First Amendment questions raised both by compelled disclosures and by regulations on the delivery of information (*i.e.*, speech) from providers to consumers.

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

I. INTRODUCTION: NO ADDITIONAL INFORMATION DISCLOSURE REGULATIONS ARE NECESSARY AT THIS TIME.

Qwest submits these comments in response to the Commission's Notice of Inquiry (*NOI*) regarding consumer information, truth-in-billing and point of sale disclosures.[1] The *NOI* acknowledges that the Commission's "approach to information disclosure issues has traditionally focused on the formatting of consumer bills,"[2] a matter relevant only after a consumer has chosen a provider. The *NOI* now seeks comment about extending this information-disclosure regime to "all stages of the purchasing process."[3] Consequently, it asks about the kind of information consumers may need to help them: (i) choose a service provider or plan, (ii) manage their use of the plan, and (iii) decide whether to switch to a competing provider or plan.[4] Additionally, the *NOI* asks "whether consumers need information displayed in a consistent

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[1] *In the Matter of Consumer Information and Disclosure, Truth-in-Billing and Billing Format, IP-Enabled Services,* CG Docket No. 09-158, CC Docket No. 98-170, and WC Docket No. 04-36, Notice of Inquiry, FCC 09-68 (rel. Aug. 28, 2009).

[2] *See id.* ¶ 4. *See also id.* ¶ 17.

[3] *Id.* ¶ 4.

[4] *Id.* ¶¶ 4, 16, 23.

format that allows them to compare their current service with new and increasing offerings of other providers"[5] and "whether consumers are receiving adequate point-of-sale disclosures."[6]

Qwest appreciates the need for consumers to be knowledgeable regarding their communications purchases. Yet beyond making the existing truth-in-billing rules generally applicable to similarly-situated service providers, thus benefiting similarly-situated consumers, there is no need for the Commission to expand its information-disclosure regime that exists through its truth-in-billing rules.

As the *NOI* notes, the communications marketplace is already highly competitive with "new and increasing offerings."[7] As part of that competitive framework, service providers today aggressively vie for consumers, touting facts about their own service offerings and often going to great lengths to ensure that consumers are aware of how their services are superior to competing options. As a result, existing market forces and generally-available information about providers and products, combined with the truth-in-billing rules, provide consumers with more than ample information to make educated choices and to navigate the selection of products among a wide range of service providers.

Information about communications providers and offerings abounds. Providers themselves supply product literature, advertising, and other facts and materials directly to consumers. In addition, consumers gain information first hand, by interacting with potential products and providers. Other times, consumers gather information through personal recommendations. And sometimes consumers obtain information from various private party

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[5] *Id.* ¶ 23.

[6] *Id.* ¶ 31.

[7] *Id.* ¶ 23.

websites and comparative tools.[8] However acquired, the information gathered and communicated does not lend itself to standardization, either from the perspective of the service provider or the consumer.

Standardized information disclosures would be infeasible across different types of service providers (*e.g.*, wireline, wireless and broadband) and even among service providers within a particular service class (*e.g.*, wireless providers). Because the communications market has become so competitive, each provider has its own suite of offerings, often easily tailored or customized. It is precisely this aspect of personalization or customization -- the antithesis of standardization -- that so many customers find appealing.

Each potential customer has his or her own information (and product) needs. How *those needs* are met is critical to establishing a meaningful and fulfilling supplier-customer relationship. In such a marketplace, attempts to provide non-standard information in a standardized format could -- at a minimum -- be a fruitless exercise. More likely, the standardized information would be more confusing than helpful, especially if, after taking the time to peruse it, the consumer determined that she actually preferred "non-standard" offerings that the standardized information did not address.

While the Commission should take the modest step to expand its truth-in-billing rules to similarly situated providers, in light of the currently robust communications marketplace, the Commission should rely on voluntary industry action with respect to the provision of consumer information. Each provider has the incentive to take steps on its own toward the goal of educating consumers.

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[8] Howard Beales, Richard Craswell, and Steven Salop, "The Efficient Regulation of Consumer Information," 24 J.L. & Econ. 491, 501-02, 504-05 (1981) (Beales, Efficient Regulation).

In addition, the Commission should encourage industry members to work with regulators and representatives of consumer groups to explore ways of presenting information in a consumer-friendly and useful form. Such joint efforts, which would need to be undertaken consistent with the antitrust laws, might examine the feasibility of a "best practices" code of conduct akin to the existing Cellular Telecommunications & Internet Association (CTIA) code and the industry-promulgated cramming guidelines.

If a code were successfully developed regarding the issue of consumer access to, and service provider disclosure of, product and service information, companies that chose to could note their adherence to it on their websites or those of trade associations. The Commission and consumer advocates might also create links on their websites to identify companies acting in accordance with the code.

This voluntary industry effort should be coupled with increased public education by the Commission and consumer advocate groups. To the extent advocacy groups claim there is insufficient (or insufficiently clear) information available to consumers, they have an obligation to supply some of it themselves and to become more active in their outreach and education efforts. These organizations are well positioned to target their outreach activities to those segments of the population most in need of further help in accessing and understanding provider and product information already in the public domain.

Rounding out a non-prescriptive regulatory approach to consumer access to information, the Commission should strengthen its informal complaint procedures, as recently recommended by the Government Accountability Office (GAO). In addition, the Commission, along with other governmental agencies, should enhance their enforcement activities to target false, misleading, or deceptive communications to customers. Targeted enforcement is always a preferable regulatory

tool over broad regulatory mandates, especially when the number of providers acting unreasonably is small and the audience affected by the bad conduct is equally limited in scope. Targeted enforcement allows remedial measures to be directed to a particular provider or providers on the basis of a specific finding of a violation of law or regulation.

Beyond the actions outlined above, regulatory prescriptions should be avoided. Competitors in the communications industry should not be forced to speak a standard language. Standardized prescriptions regarding how provider and product information are communicated or displayed could depress the range of available offerings and cause the creation of "standard offerings" that few consumers really care about. Mandates could also require service providers to spend as much time explaining or disclaiming the standardized information presented as they spent providing and publicizing it. This is a recipe for costly government intervention that would not only decrease competition but increase consumer costs.

On the other hand, Qwest's proposal outlined above maintains the core benefits of the current truth-in-billing principles, *i.e.*, service provider discretion and flexibility as disciplined by competitive market forces, while remaining committed to the objective of distributing clear and meaningful information. This approach is more consumer-focused than a government-prescribed information-disclosure regime because it builds on the fundamental principle that service providers know their audiences, something essential to all providers in a competitive market. At the same time, Qwest's recommendation minimizes potential litigation regarding the limits of the Commission's jurisdiction and the proper role of government in overseeing and prescribing the content or format of service providers' communications. It is also avoids serious First Amendment questions raised both by compelled disclosures and by regulations on the delivery of information (*i.e.*, speech) from providers to consumers.

Moreover, Qwest's proposal more equitably balances the costs and benefits of a workable information-disclosure regime. Government attempts to create and format standardized information mechanisms across the wide range of competitors that make up the communications industry would be extremely costly, would likely operate in an anticompetitive manner, and would ultimately benefit few individuals. In essence, a regulatory regime that seeks to swim upstream against the market trend of customization would be very costly to create and unlikely to provide sustained public benefit.

II. COMPETITIVE MARKET FORCES SUPPLY CONSUMERS WITH EXTENSIVE PROVIDER AND PRODUCT INFORMATION.

Competition has increased substantially since 1999 when the Commission issued its first *Truth-in-Billing Order*.[9] This is in line with the Commission's prediction a decade ago that, "as competition develops for the provision of local telephone service, all carriers, including those upon which we impose requirements here will seek to distinguish their services by providing clear, informative, and accessible [information] to their customers."[10]

These competitive forces, and the information flow associated with them, make standardized information-disclosure mandates unnecessary, unjustified, and infeasible. As noted in the OECD Report cited by the *NOI*, "[t]he majority of consumers seem aware of alternative providers of communications services. In those areas where knowledge and understanding is lower, growing competition is expected to lead naturally to an increased awareness of alternative providers."[11]

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[9] *See In the Matter of Truth-in-Billing Format,* First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492.

[10] *Id.* at 7497 ¶ 6. Above Qwest substituted the word "information" for "bills" which is used in the original quote.

[11] *See* Organisation for Economic Co-Operation and Development: Enhancing Competition in telecommunications: Protecting and empowering consumers, June 2008 (OECD Report) at 40.

The *NOI* acknowledges that "the intervening years [since the issuance of the *Truth-in-Billing Order*] have been characterized by extraordinary ferment in the marketplace,"[12] citing "growing evidence of consumers substituting interconnected VoIP [Voice over Internet Protocol] for traditional voice telephone service,"[13] and noting shifts to broadband services and video.[14] Customers can even use cable telephony, wireless,[15] email, and instant messaging as replacements for traditional wireline services.

This communications convergence and explosion has resulted in radical customization -- rather than standardization -- being the order of the day, and in the creation of service packages and bundled billing which often combines local, long-distance, wireless, and data services. In fact, the vast majority of Qwest's customers purchase combined service offerings, with relatively few opting for basic local exchange or long distance services alone.

Bundled packages are created not only by service providers but by their customers. Bundles may come pre-established or they may be the result of consumers' picking and choosing services and features to suit their individual tastes. For example, Qwest customers can select among a large number of different landline services and features, VoIP, high-speed Internet, home WiFi networks, and access to public WiFi hot spots (using AT&T's WiFi network). Our

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[12] *NOI* ¶ 3.

[13] *Id.* ¶ 18.

[14] *Id.* ¶¶ 3, 13, 17.

[15] A recent survey by the United States GAO found that the use of wireless phone service in the U.S. has risen dramatically and that Americans increasingly rely on wireless phones as their primary or sole means of telephone communications. U.S. GAO, "Telecommunications: Preliminary Observations about Consumer Satisfaction and Problems with Wireless Phone Service and FCC's Efforts to Assist Consumers with Complaints," Testimony before the Committee on Commerce, Science, and Transportation, U.S. Senate, GAO-09-800T (June 17, 2009) ("GAO Report"). According to the GAO data, wireless subscribership has grown from about about 3.5 million subscribers in 1989 to about 270 million today, and about 35 percent of households use wireless phones as their primary or only means of telephone service. GAO Report at 1.

customers can also choose to have DIRECTV® and Verizon Wireless services as part of Qwest's bundled packages. Accordingly, for many customers, Qwest's bills reflect not only our services but those of our business associates as well.

Consumers can choose not only among a broad range of offerings from a single provider (and fans of "one-stop shopping" often take this route), but some may prefer to mix and match services from different providers either on an *a la carte* or multiple-bundles basis. Consumers may even forego a particular feature when purchasing from a new supplier because they already have that feature in an existing package.

Clearly, nothing is standard about this kind of pattern. Nor are the communications of providers responding to these purchasing patterns standard. Providers variously craft product brochures, advertisements, and newly-developed information-disclosing tools to communicate with potential customers and to facilitate consumer customization of their own packages. For instance, potential Qwest customers need only type their zip codes into Qwest's online tool in order to discover the various communications products and services available to them in their area.[16] At the same time, dozens of other providers in Qwest's territory compete for the same customers, providing readily-available information about their offerings through every conceivable medium of advertising and promotion, both online and off.

What is more, the driving trend toward customization has fostered a new entrepreneurial environment where ever-increasing online tools and other services make it easier for consumers to compare and contrast their communications options. These "technological advances may also

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[16] *See* https://myaccount.qwest.com/MasterWebPortal/appmanager/home/Shop?_nfpb=true&_pageLabel=ShopResidentialLandingPage.

make it easier to get needed information into the hands of consumers," as the *NOI* correctly notes.[17]

As an example, today a consumer who Googles "telephone service" will find a growing number of sites that present comparison data for different communications providers: www.connectmyphone.com; www.myrateplan.com; www.phonedog.com; www.saveonphone.com; www.calling-plans.com; www.bettertelephonerates.com; www.steelecommerce.com. Wireless phones and rates can be compared at a number of sites as well, including: www.wirefly.com; www.mobiledia.com; www.letstalk.com; www.phonescoop.com; www.telecombeacon.com.[18]

Likewise, "there is a large industry of experts and other informational intermediaries from whom consumers can purchase valuable marketplace information. Agents such as newspapers and shopping guides provide general information at low cost about a variety of competing products."[19] Indeed, third parties such as J.D. Power & Associates and Consumer Reports offer comparative and rating information for interested reviewers.[20] Overall, today there is extensive information available to consumers regarding how to choose a service provider or plan, how to manage their use of the plan, and whether to switch to a competing provider or plan.

And it is far from clear that more information would be beneficial to consumers or materially aid their decision-making processes. For example, the OECD Report references a

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[17] *NOI* ¶ 48.

[18] *See* OECD Report at 15 ("Market solutions can emerge to address information asymmetries. For example, there are Internet-based companies that provide price comparison information to assist consumers to make informed decisions, including whether to enter into a contract with a supplier.) (footnote omitted).

[19] Beales, Efficient Regulation, 24 J.L. & Econ. at 508-09.

[20] OECD Report at 37. *See also id.* at 13 ("The media in the United States frequently compare and publicise differences in service, quality and price.").

United Kingdom (UK) survey inquiring about service quality differences among providers. That survey observed that "a majority of consumers indicated that they were unlikely to use such information even if it were easily available to them."[21] As trenchantly observed in one of the academic articles referenced in the *NOI*, "[i]f information is readily available elsewhere, then required disclosure is unnecessary."[22]

Equally important as the amount of information currently available to consumers is the critical fact that *if* a consumer's decision *not* to switch providers is *not* the result of an information deficiency, then making additional information available is immaterial as a remedy. In this vein, the OECD Report notes that lack of information was not one of the primary reasons respondents in the UK gave for not switching providers. Rather, the number one and two reasons that respondents gave for not switching was the possibility of getting locked into a contract with a new supplier and the reluctance to leave a known and trusted supplier.[23] Following these reasons, respondents cited the complexity of the process of switching, which did involve access to and understanding of information. Tellingly, though, close to half the respondents indicated <u>they did not have time</u> to pursue information (presumably that was already available) relating to switching.[24] Information disclosure mandates will not address or affect these predispositions.[25]

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[21] OECD Report at 17.

[22] Howard Beales, Richard Craswell, and Steven Salop, "Information Remedies for Consumer Protection," 71 Am. Econ. Rev. 410, 413 (1981) (Beales, Information Remedies).

[23] OECD Report at 30-33, 38 (this was true for landline, wireless and broadband customers).

[24] *Id.* ¶ 31. The Report adds: "intervention may not be justified if consumers are aware of the risk, can respond to it relatively easily and at little cost, but fail to do so, since this could suggest that consumers view the detriment as insignificant." *Id.* ¶ 39. *And see* Beales, Efficient Regulation, 24 J.L. & Econ. at 538 (a "decision-making body ought to analyze the cause of the market failure or the reason why the information has not been voluntarily disclosed in the course of selecting an information remedy. Such consideration is also useful in deciding whether to

In short, competitive market forces today provide consumers with extensive provider and product information and with ample ability to design their purchases to meet their individual needs. In such an environment, making more information more available is a questionable remedy, especially when consumers may not have the inclination or time to access the information already at their disposal. In that environment, further regulatory mandates are not only unnecessary but unwise.

III. THE COMMISSION SHOULD NOT IMPOSE GENERAL INFORMATION-DISCLOSURE MANDATES WITH RESPECT TO BILLING, PERSONS WITH DISABILITIES OR POINT OF SALE.

Across the United States, many goods and services present pricing and other questions similar to those that arise in the communications field and are the subject of the *NOI*. But the norm in this country, with its free enterprise economy, is that the government does not control communications between providers of services and consumers. Nor does it decree the format of consumer information, including bills, service or product information, or speech at the point of sale. The Commission's regulatory strategy regarding the provision of consumer information should align with the norm, continuing reliance on market-based solutions.

Below in section A, we first discuss why the Commission should not adopt additional consumer information-disclosure requirements as a general matter. In section B, we discuss why the Commission should decline to adopt further mandates with respect to carriers' bills in particular; in section C why point-of-sale disclosure mandates are unwarranted; and in section D

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intervene at all, of course. Merely finding that consumers lack certain information does not imply that that information ought to be disclosed in some way, for it could be that the information has not been disclosed because it is expensive to produce and of little value to consumers.").

[25] *See* note 24 immediately above. *And see* Beales, Efficient Regulation, 24 J.L. & Econ. at 514 (noting that information remedies are only a preferable solution "where inefficient outcomes are the result of inadequate consumer information") and *NOI* ¶ 5 (citing to this article for the proposition that "[if] designed correctly, disclosure policies are among the least intrusive regulatory measures at the Commission's disposal.").

why additional information rules regarding customers with disabilities are unnecessary. Section E addresses information-disclosure mandates in other industries, and why they do not justify such mandates in communications markets.

A. Designing General Consumer Information Disclosures Regarding Different Carriers' Products and Services Would Be Impractical, Even If It Were Possible.

The *NOI* asks about extending the Commission's truth-in-billing information-disclosure regime to "all stages of the purchasing process."[26] While Qwest supports the extension of the current rules to all similarly-situated service providers, beyond that, no extension of the rules is necessary.

The better policy, even in situations of imperfect consumer information, is to mandate information disclosures only when there is evidence of significant consumer harm. As noted by the former director of the FTC Bureau of Consumer Protection (writing with other economists):

> It is important to stress that information is inherently incomplete. Every statement can benefit from further elaboration or qualification. . . . Government intervention must be limited to those that entail significant consumer injury and can be efficiently remedied without creating distortions or significant adverse side effects.[27]

It would be a formidable -- if not impossible -- task for the Commission to create "apples-to-apples" product comparisons or information disclosures, given the wide variety of communications service providers combined with the large range of products they offer. As noted above, most consumers no longer buy a simple commodity like traditional fixed voice

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[26] *NOI* ¶ 4.

[27] Beales, Information Remedies, 71 Am. Econ. Rev. at 411; Beales, Efficient Regulation, 24 J.L. & Econ. at 509 ("Information is costly to produce and disseminate, and at some point the provision of additional information is no longer socially optimal."), *id.* at 513 ("the fact that information is costly [means] intervention must be limited to those instances in which information imperfections demonstrably lead to significant consumer injury and which can be corrected in a cost-effective manner"). *Compare* OECD Report at 42 ("Public policy should be concerned only with those [behavioural] biases that lead to significant detriment.").

service. Rather, they purchase service bundles that might include local and long distance service (with charges sometimes flat rated and sometimes calculated on usage),[28] broadband Internet access service of varying quality and speeds, subscription video service with different numbers of standard and premium channels, and wireless voice with various text and data options. Comparisons among the services and bundles available from different providers would require the inclusion of equivalent packages of services, which may be impossible in many contexts.

As a result, crafting an information disclosure regime that chose the right elements to be included in -- and excluded from -- a comparative tool would be extremely difficult. The economics literature cited in the *NOI* confirms this.

> [R]emedying deficiencies in the information market is in some ways a more complex and subtle task than regulating product markets directly. While the goal can be stated simply -- to improve the kind and quantity of information available to consumers -- the technologies involved in producing that effect are still not very well understood.[29]

And in a marketplace hallmarked by bundled communications products, the challenge is even more formidable. As stated in the OECD Report, "comparison of prices for telecommunications services offered by different suppliers is complicated by the wide range of possible consumer usage patterns, detailed variations in price levels and price structures and the large number of possible discount and bundled schemes available."[30] The Report goes on to say that "[i]t is also often difficult to compare bundled packages offered by alternative service

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[28] *Compare* OECD Report at 29 (noting that "in the United States bundled services typically include unlimited local, local toll, and long distance services at a single flat rate," and that it is difficult to compare these bundled offerings with stand-alone offerings because their pricing structure is usually different).

[29] Beales, Efficient Regulation, 24 J.L. & Econ. at 514.

[30] OECD Report at 11. The Report proceeds to identify many of the same type of factors Qwest has outlined above. *Id.* at 11-12.

providers since most packages involve different combinations of services, service features and terms and conditions."[31]

In light of this market phenomena, those businesses that make provider/product comparisons (*see* the discussion above regarding third-party information sources) grapple with considerable design and presentation decisions in formulating their comparative models. In the first instance, they must choose what elements are meaningful to compare. Then they have to decide how fairly to compare elements that may in truth be disparate and not directly comparable (for example, as would be the case of bundled communications offerings). Without exception, the task of creating comparative purchasing tools involves significant design expertise and editorial imagination. Vigilance is also necessary to keep the information reported accurate and up-to-date. This is an initiative better suited to market forces than governmental agencies.

But even if the design and development challenges of creating such a comparative model could be overcome, and the government settled on elements to be reported, it is predictable that service providers would deem it necessary to communicate about the model with potential and existing customers. They would have to explain the information they provided and how it fit into the "whole picture" of the model. They may, in fact, have to dispute or disclaim aspects of the model and the information reported out. The latter communication would be all the more compelling if the providers believe that the elements chosen and reported on were not reasonable or lacked validity or did not fairly reflect their business models or service offerings.

In a marketplace conceded not only to be highly competitive but also rich with technologies, products and services, it is best for the government to leave the communication of product and service information to the providers with the front-line consumer relationship. The

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[31] *Id.* at 19.

success of these providers rides on their knowing what information potential and existing customers want and don't want; and how they prefer to have the information delivered.[32] Accordingly, the creation of comparative tools should be left to service providers (should they want to formulate them) and to independent third parties. Service providers might create such tools to demonstrate their "best in show" positioning. And third parties can design and deliver the information devoid of government involvement, oversight or endorsement. This is the appropriate model for the United States and the competitive communications market.

1. Crafting the Comparative Tool Would Require Highly Specialized Expertise in Economics, Social Science and Modeling.

A regulatory proceeding having an objective to create some kind of service provider comparative-information tool would prove protracted and costly both to the Commission and the industry. Service providers and regulators would have to master new concepts in formulating such a regime, concepts ranging across a variety of disciplines that have not historically been part of common carrier rate and terms regulation. At a minimum, sophisticated economics and modeling expertise would be required to (1) identify the pool of possible information (*i.e.*, all the product and service information across all the service providers), and (2) decide from that pool what elements are reasonable to include. Any decision regarding what elements (or metrics) should be incorporated in a comparative tool would require expertise in the social sciences. Of necessity, a determination would have to be made regarding what consumer segments are the expected audience to benefit from the reporting of any particular element. The difficulty of crafting this kind of comparative model cannot be understated.

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[32] *See* OECD Report at 22, observing that "service providers who are able to articulate their offers clearly and inspire trust in consumers will be at an advantage." *And see* discussion below regarding Qwest's experiences with its bill formats and focus groups.

a. The Pool of Possible Information.

Take a single provider -- Qwest -- as an example. And then imagine that the information below is repeated hundreds of times. The identification and collection tasks and costs to create a comparative tool are significant.

While Qwest continues to offer *a la carte* offerings for those customers with minimal service needs, the large majority of Qwest's customers buy service packages or bundles. The final package configuration, and the price paid for it, can depend on a wide range of factors, including:

- the particular combination of services purchased;
- the States where the services are purchased;
- the speed of the Internet connection desired (dial-up, DSL (of various speeds), T1, DS1, DS3, T3, OC3, MPLS);
- the number of calling features they select for their phone services;
- whether they purchase any long-distance calling option and, if so, what kind;
- whether they opt to purchase video from Qwest business associate DIRECTV® and, if so, how many channels, including premium channels, they select;
- whether they purchase wireless service from Qwest business associate Verizon Wireless and, if so, what wireless package they decide upon, with variations for number of minutes and texts per month, data usage; and
- numerous other factors.

Qwest is hardly unique. For example, in a 2005 filing with the Commission, Cingular Wireless (now merged into AT&T) stated that it maintained the ability to bill in accord with some ***250,000*** different active rate plans.[33] Cingular explained that the reason for the large number of plans is that they are increasingly customized:

> This seemingly huge number of rate plans is the result of a number of factors: many customers remain on their original rate plan on a month-to-month basis long after the end of their contract, after the plan is no longer offered to others, and such plans may differ with respect to treatment of Rollover® minutes, nights and weekends minutes, anytime minutes, and many other plan details; many are corporate plans negotiated to reflect particular customers' needs; and numerous

[33] Comments of Cingular Wireless LLC, *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, CG Docket No. 04-208, at 13 (June 24, 2005).

specialized rate plans have been negotiated over time to retain customers or to respond to competition.[34]

In short, the range of services and prices offered by providers would make a Commission-mandated comparison highly complex and, indeed, impractical.

b. Choosing Which Elements To Include in the Comparative Tool.

Against that backdrop, there would be an additional challenge in deciding what elements would be included in a comparative information tool. This challenge would require the Commission to take into account a wide range of factors, among them:

- When services are bundled, packages are not commensurate unless they contain the same combination of elements with the same features.
- Certain rates and plans may be promotional, available only to new customers, available only to those who agree to a service plan of a particular length, or available only to customers in a certain geographical region.
- Certain fees and taxes vary from State to State.
- Contractual commitments, trial periods, and termination fees vary among providers.
- Service "quality" has many different possible measurements. It can include coverage areas for wireless voice and data service, broadband speeds, and the quality of different video services (cable and satellite).
- Service "quality" may be strongly affected by circumstances outside a carrier's control. For example, a wireless customer's experience may depend on local topography (urban landscapes, tunnels, mountains), the particular equipment the customer is using, the construction materials in a customer's home or workplace, and whether the customer is moving quickly from cell to cell (on a high-speed train, for example). A broadband Internet access consumer's experience may turn on time of day, the number of other users on the network, and whether those users are engaged in video downloads or other activities consuming large amounts of network capacity.
- Service "quality" might be measurable in terms of technical metrics that have little meaning to some consumers, particularly those who are not technologically savvy. For example, wireless networks can be described as 2G, 2.5G, and 3G, and broadband access speeds can be expressed in term of the concepts of "megabytes" and "gigabytes," but

[34] *Id.* at 13 n.42.

these metrics do not necessarily convey meaningful information to many consumers (particularly those who are uninvolved or inactive).[35]

- Service "quality" may have little to do with product attributes, but more with provider responsiveness (time to install or repair, time to answer the phone, friendliness, and so on).[36]

- Some providers may offer free equipment (telephone handsets, satellite dishes, Digital Video Recorders, modems, routers), while others may not.

- Wireless service providers may impose different charges for text and data use, charges that differ by time period such as nights and weekends, roaming or off-network charges, charges for excess or additional minutes, long distance charges, and activation fees.

- Prices and service plans frequently change. Information would need to be updated on a very prompt basis.

Accordingly, the Commission would need to define with great specificity the elements it might determine should be included in any standardized information-disclosure regime. To the extent that price and service quality were among those elements, the Commission would need to be very specific again about the criteria to be used in measuring those elements.

c. The Modeling Challenge.

In addition to determining the potential factors and elements that might be included in any comparative tool, the Commission would need to become expert in the art of creating such a tool. According to experts (such as those referenced in the *NOI*), fashioning disclosure mandates runs the risk that the metric used to measure the attributes will distort the behavior of consumers and suppliers and lead to inefficient outcomes. For example:

- "Imposition of a single metric necessarily requires the exclusion of others."[37] Hence, selecting a metric to measure service quality or other attributes of a service provider

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[35] *See* OECD Report at 19; and compare the Report's later observation that this kind of information might be helpful to sophisticated users. *Id.* at 40. But query whether sophisticated users need the information reported out or whether they can find the information on their own, if they are interested.

[36] *Id.* at 20.

[37] Beales, Information Remedies, 71 Am. Econ. Rev. at 412.

carries the risk that other possible metrics will be excluded or ignored. If the excluded metrics captured attributes that were not important to consumers, the comparative tool would fail to serve as proper basis for consumer decisions.

- "Most metrics measure only a few product attributes. By easing communication about these attributes, the metric may increase the market's emphasis on them, at the expense of others. Particularly where unmeasured attributes are related to the measured one, . . . increased emphasis on a newly observable attribute may lead to an inefficient reduction in other attributes."[38] Providers will focus on whatever metrics are selected for the comparison and will reduce their efforts with respect to others. If a comparative tool measures wireless coverage area and data speeds, providers will focus on those metrics rather than dropped calls or free handsets.

- "[T]here is inevitably a tradeoff between the extensiveness of the measurements and their comprehensibility."[39] The more metrics that are included, the more complex the message to consumers. The more technical the measurements become, the less meaningful they will be to ordinary customers.

- Simplifying disclosures by using "index numbers" or similar tools carries its own risks, including how to weight the various elements. "The usual problems of index numbers are always present when consumer preferences differ." Consumers using Blackberries and smartphones will have different service preferences from those using less sophisticated handsets. In addition, "[c]ollapsing an index into discrete classes may remove any incentive for marginal product improvements; a product that qualifies for the 'best' class has no incentive for further improvements, if only the rating is observable."[40] Hence, a chart that used a crude rating system of "stars" would create the risk that, once a service attained the highest "star" rating, there would be no incentive to improve it.

In short, designing any comparative tool presents a large number of difficult practical hurdles and would demand specialized expertise that the Commission may not possess. The enterprise presents a great danger of interfering with competitive market forces and causing more consumer harm than benefits.

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[38] *Id.*

[39] *Id.*

[40] *Id.*

d. The Alignment of the Elements To the Audience.

i. The Relevance of Behavioral Economics.

Reflecting an understanding that any information-disclosure model would involve human factors, the *NOI* references academic literature addressing the field of behavioral economics[41] and information economics.[42] According to the OECD Report cited in the *NOI*:

> Behavioural economics predicts that for various reasons some consumers (or consumers in some circumstances) may act in ways that are inconsistent with their "ex ante" preferences. Consumers may use information in ways not predicted by neoclassical theory or they may, for various reasons, not use available information. Thus, while in some cases providing more information or providing information in a different form may remove or reduce the risk to consumers, this will not always be the case.[43]

Undoubtedly the field of behavioral or information economics has much to offer in understanding factors that move persons to act one way or another, including ways that might seem irrational under traditional economic theory. As such "[i]t is important for policy and regulation to recogni[z]e [behavioural] biases and develop a fuller understanding of the needs and motivations underlying consumer behaviour in telecommunications markets."[44] This better

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[41] Qwest is not in a position to present a full blown attack or defense of behavioral economics. We do note, however, that some experts caution its embrace too enthusiastically. For example, in Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue & Matthew Rabin, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism,'" 151 U. Penn. L. Rev. 1211, 1214 and n.41 (2003) (Camerer, Asymmetric Paternalism), it is stated: "This article . . . reflect[s] trepidations shared among all of the authors about the use of behavioral research to justify paternalistic policies."

[42] Beales, Efficient Regulation, 24 J.L. & Econ. at 509 ("At the outset, the reader is cautioned that information economics is perhaps the most confusing branch of the dismal science.").

[43] OECD Report at 43.

[44] *Id.* at 42; at 5 ("Policy makers and regulators should develop a better and fuller understanding of the needs and motivations underlying consumer behaviour in telecommunications markets, especially those of vulnerable consumers (such as those in rural areas, the elderly, minors, disabled, those on low incomes, the unemployed).")

understanding "would assist consideration of whether and if so what regulatory (or other) intervention is warranted."[45]

But the teachings associated with these academic branches remain sufficiently fluid today such that they are ill suited to support aggressive government intervention in the realm of the communication of information. This is particularly true in the absence of a common understanding of terms or how the principles of these economic theories apply to a range of consumer segments.

The principles of behavioral economics suggest that different segments of consumers would want (or benefit) from different information in different ways.[46] Some segments would have no need for government-compelled information tools, since they are quite capable of securing the information themselves directly from providers or through existing third-party tools. Other segments of the population characterized by inertia, passivity, inactivity or inattention might require more (but more likely simpler) information.[47] But even if such simpler information were available, these consumers would likely not access it very often, since they are not highly motivated to switch providers.[48] Each of these consumer segments will have different information needs.

The need to balance divergent consumer preferences would make it very difficult for the Commission to craft a one-size-fits-all solution to the customer information issues generally or

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[45] *Id.* at 48.

[46] The OECD Report classifies consumers into four categories: Inactive consumers (those having no past involvement in communications purchase and having low interest); Passive consumers (those having some involvement and some current interest); Interested consumers (those having littled past involvement but more likely to pay attention); and Engaged consumers (the most active group in terms of interest and behavior). OECD Report at 31.

[47] *Id.* at 31, 33, 34, 38. *And see id.* at 33 ("Lack of confidence, heuristics, and information overload also appeared to play more of a role in decision-making among inactive consumers.")

[48] *Id.* at 31-32, 33, 34, 38.

billing formats specifically. All the same, the Commission should avoid fashioning a costly information-disclosure regime that seeks primarily to benefit inactive or uninterested consumers. As the OECD Report warns, information mandates should not necessarily be tailored to the least informed or least sophisticated segments of the consumer population:

> An important insight provided by behavioural economics is that often only some groups of consumers (or all consumers but only in particular circumstances) are likely to be at risk. This highlights an important policy consideration, namely whether policy initiatives to protect particular groups of consumers (such as undisciplined or unsophisticated consumers) may impose such costs on not-at-risk consumers that aggregate welfare or well-being is reduced.[49]

Thus, under the approach of the sources cited by the Commission itself in the *NOI*, a standardized information mandate should be rejected in the communications industry.

ii. The Risk of Information Overload.

A significant reason the Commission should refrain from imposing additional information-disclosure mandates is the risk of information overload.[50] As demonstrated above, in our highly competitive communications marketplace, there is no lack of information available to consumers about both service providers and their products. Consumers are free to seek out information at whatever time and in whatever format they desire. Commercial advertising, promotions, online websites, and third-party sources provide an easily accessible reservoir of information about available services, prices, and quality. In this context, government mandates for further disclosures or additional information are not necessary, would not manifestly be helpful, and could even prove counterproductive.

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[49] *Id.* at 39.

[50] *Id.* at 9; at 42 ("a situation of . . . information overload could be aggravated by a requirement for more information disclosure"); Camerer, Asymmetric Paternalism, 151 U. Penn. L. Rev. at 1235.

In fact, providing information through government-mandated disclosures at a time and in a manner ***not*** of a customer's own choosing risks information overload. The literature cited in the *NOI* warns that providing additional information does not always improve consumer decision-making because consumers faced with limited time and numerous options often operate on the basis of heuristics,[51] or rules of thumb, to simplify their decision-making. In such circumstances, providing further information does not improve the process or lead to better outcomes, particularly when it is communicated at a time or in a manner that the customer herself has not selected.[52] Indeed, overwhelming consumers with details (some or many of which may be irrelevant to the consumer) only further discourages rational calculation and reinforces the tendency to make decisions based on inertia, loss aversion, framing biases, and other less-than-rational bases.[53]

Other social science literature reinforces the point. For example, a study in the health care area found that, "[i]n a good-faith effort to be comprehensive," disclosures relating to health insurance financial responsibility "are likely to fail to communicate because of simple information overload effects. Consumers have difficulty encoding and using information when

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[51] OECD Report at 10. *See also* Richard Thalen and Cass Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS, CHAPTER 1 (2005); Camerer, Asymmetric Paternalism, at 1215 and n.15, 1232, 1251.

[52] *See* discussion below regarding "educable moment," associated with note 141.

[53] *See e.g.*, Beales, Information Remedies, 71 Am. Econ. Rev. at 413 ("The message must be consonant with the information processing capacities of the target audience, and must consider the limitations of the medium in which it will be placed."). Loss aversion and risk aversion are similar concepts, essentially reflecting the notion that a move from the *status quo* is a risk and can result in a loss of satisfaction or comfort after the move. A framing bias is when a "consumer choice is influenced by the 'frame' in which information is presented." OECD Report at 10. This concept is reflected in the discussion in the *NOI* ¶¶ 46-47.

too much information is densely presented."[54] A nutrition labeling researcher has found, "[e]ven the knowledgeable, educated, and skeptical consumer's desire to be fully informed can come into conflict with information overload."[55]

The OECD Report confirms the danger of information overload in the communications industry context. It notes a poll regarding information about service quality differences among providers which found that "a majority of consumers indicated that they were unlikely to use such information even if it were easily available to them."[56] The Report concludes that

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[54] Paula Fitzgerald Bone, *et al.*, "On Break-up Clichés Guiding Health Literacy's Future," 43 Journal of Consumer Affairs 185 (Summer 2009). *See also* Barry Schwartz, THE PARADOX OF CHOICE 133 (2004) (noting a retailer who sold more jam by offering six varieties instead of twenty-four); Katherine E. Jocz and John A. Quelch, "An Exploration of Marketing's Impacts on Society: A Perspective Linked to Democracy," Journal of Public Policy & Marketing, p. 202 (Fall 2008) ("An aggregate marketing system that provides free flows of information is desirable, but information overload may impede consumer decision making."); Maureen Morrin, *et al.*, "Saving for Retirement: The Effects of Fund Assortment Size and Investor Knowledge on Asset Allocation Strategies," 42 Journal of Consumer Affairs 206 (2008) ("Researchers have found that large assortments can create confusion and information overload for consumers, some of whom delay their choice, or simply decide not to make a decision, and walk away from the choice task at hand."); Anjala Krishen, "Perceived Versus Actual Complexity For Websites: Their Relationship To Consumer Satisfaction," Journal of Consumer Satisfaction, Dissatisfaction & Complaining Behavior (2008), p. 104 ("In empirical settings, many researchers have explored how the presentation of too many choices or product attributes leads to negative outcomes for individuals, such as suboptimal decisions or negative subjective mental states (frustration or dissatisfaction) due to information overload."); John Gourville and Dilip Soman, "Overchoice and Assortment Type: When and Why Variety Backfires," 24 Marketing Science 382 (Summer 2005) (citing danger of "cognitive overload"); N.K. Malhotra, "Information Load And Consumer Decision Making," 8 Journal of Consumer Research 419-30 (1982) ("[I]f consumers are provided with 'too much' information at a given time, such that it exceeds their processing limits, overload occurs leading to poorer decision making and dysfunctional performance. This proposition derives considerable theoretical and empirical support from several disciplines. It is now well accepted that the processing capacity of the human memory is limited."); Jacob Jacoby *et al.*, "Brand Choice Behavior as a Function of Information Load," 11 J. Marketing Res. 63 (1974) (describing an experiment tending to show that consumers make poorer purchase decisions with more information).

[55] Herbert Rotfeld, "Health Information Consumers Can't or Don't Want to Use," 43 Journal of Consumer Affairs 373 (Summer 2009).

[56] OECD Report at 17.

> information disclosure may have its limits. A demand-side -- behavioural -- perspective warns that if consumers have limited cognitive abilities, either generally or in a particular situation, then adding more information may result in information overload and hence in worse decision making. Excessive disclosure can confuse consumers (as evidenced in the case of mobile phone and Internet tariffs options) and can also discourage firms from providing useful information through their advertising.[57]

At the same time, it is important to recognize that there are some consumers for whom additional information is desirable. For example, some customers in Qwest's focus-group research have indicated a preference for a highly detailed bill over a simpler, summary version.[58] Typically such customers are those with a specific need to track their long distance or wireless calls on an itemized basis, either to monitor their expenses closely or to monitor the calling behavior of their employees or children. These information seekers are well positioned to secure the information they want.

The Commission should rely on providers, responding to market forces, to tailor information to these various segments of consumers and should refrain from imposing a standardized mandate.

2. Designing and Implementing a Comparative Tool Regarding Service Providers Would Impose Substantial Costs Both On Industry and the Commission.

The Commission could not craft a comparative service provider information tool without imposing considerable costs on both the Commission and the industry, which costs would inevitably be passed on to consumers (the supposed "beneficiaries" of the tool). The cost burden would involve not only direct monetary and lost opportunity costs for the Commission and

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[57] *Id.* at 40.

[58] *See* Section III.B., below, for further information on the formatting and presentation of Qwest's bills.

industry, but also misplaced administrative costs, *i.e.*, those moving from private enterprise to the government.

And there would be indirect costs as well. One form of such costs could be possible depression of competition as a result of involuntary publicity or migration to standardized offerings and pricing. Another could be associated with consumer over-reliance on a government-sponsored information disclosure regime.

a. Industry Costs.

Any government mandate that requires individual companies to disclose their product, pricing or service quality information on an element-by-element basis would impose substantial collection and reporting costs on the industry overall. This is so not only because of the large number of service plans but because prices change based on the time/date of purchase and the permutation of bundled offerings.[59]

At the same time, some companies would need to collect and verify information from unaffiliated parties on an ongoing basis, as those parties' prices and services change in response to competitive forces. Companies like Qwest that rely on business associates (like DIRECTV® and Verizon Wireless) to round out their service packages would face additional burdens in collecting and verifying data from their business associates. And that information might well vary, as a consequence of the Qwest/associate relationship, from the information that might affect "stand alone" customers of those service providers. Hence, an information mandate could

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[59] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, 18 FCC Rcd 5099, 5140 ¶ 105 (2003) (determining that slamming reports that carriers were required to file should be eliminated given their limited utility and significant burdens associated with filing the reports; carriers had great difficulty in complying with the requirements in an accurate way in large part because mechanized systems did not contain the information in the manner required to be reported).

have discriminatory effects in the market and discourage the kind of partnerships and affiliations that consumers find useful and convenient.

Moreover, service providers likely would also have substantially increased costs of communication that could easily impact their competitive position. First, they would incur costs simply to craft any comparative tool. Then there would be additional explanation costs, many of which the provider would have chosen not to incur in the absence of the government mandate. All of a sudden, not only would providers have to communicate information about their own products and services, they would have to discuss the products and prices of other service providers, likely on a routine basis.[60] While this kind of communication (and its associated expense) might be invited when a competitor "self compares" its offerings with others, it could be quite unwelcome in terms of service delivery costs when it is the result of a government-mandated information-disclosure tool. Any such communication would be especially costly if it did not go well; and the provider failed to secure the sale. And it is conceivable that above and beyond these costs, providers may incur costs to disclaim either the tool itself or some of the elements/metrics in the tool.[61] This would involve further undesired communications with existing or potential customers.[62]

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[60] "[T]he effective communication of required disclosures must always be carefully considered. . . .To complicate matters, the target audience for the disclosure may be different from the [service provider's] marketing target, in which case the disclosure will be directed to the wrong audience." Beales, Efficient Regulation, 24 J.L. & Econ. at 529-30 (footnote omitted; and inserting the words "service provider's" for the word "advertiser" in the original).

[61] "[M]andating disclosure . . . may actually increase the cost of communication. The required disclosure necessarily displaces other information which the [service provider] would rather convey." *Id.* at 528 (inserting the words "service provider" for "advertiser" in the original).

[62] And as the footnote associated with the above text says: "Even if the disclosure replaces only empty space, . . . that empty space was there to facilitate effective communication of the [service provider's] message. [Service providers] do not typically pay for blank space unless they think it serves a useful purpose." *Id.* at note 101 (replacing the words "advertiser" with "service provider"). Empty space is the decision not to speak, of course.

b. Government Costs.

As noted above, any mandated information-disclosure regime associated with collecting and distributing comparative information about service providers and their product offerings would involve amassing expertise not generally found in an agency whose primary focus -- at least with respect to communications providers -- is carriage and the prices for carriage. Acquiring this kind of expertise will be costly.

In addition, any kind of government-mandated information disclosure regime would be saddled with externality costs. One such externality cost would stem from the notion of government sponsorship and the public expectations, rightly or wrongly, that might accompany such notion. Any government-sponsored platform or communication purporting to compare communications providers would likely carry substantial weight in the eyes of consumers -- perhaps too much weight. Carrying that weight would create costs and inefficiencies.

While not necessarily providing a guarantee of accuracy, government oversight of the regime could create a public perception of reliability. Indeed, consumers might rely on the information beyond the intention or expressed statements of the Commission regarding the appropriate use of the tool or despite any disclaimers that the Commission or the industry might make regarding the reported information.

At a minimum, this kind of information-disclosure regime would obligate the Commission, to some extent, to ensure that the information presented was as clear and accurate as possible. While it may be acceptable for a private website to present a comparison of service providers and their offerings that might be incomplete or off the mark, it would be quite another to have the government associated with an information-disclosure regime that was inaccurate.

Thus, the need to verify the information provided by the communications service providers, and to do so on a continuing basis, would impose significant administrative costs on

the Commission. Yet without such ongoing government oversight and verification, a government-mandated program would create an opportunity for unscrupulous companies to win customers by making false or misleading statements regarding features of their offerings or their service quality. For example, a company might overstate its coverage area or the quality of its network; it might tout unrealistic response times for customer inquires or repairs; or it might make other exaggerated claims about its product offerings.

The Commission would need to consider carefully the administrative costs not only of collection and distribution of information but of ongoing verification and compliance. It would need to determine whether it has sufficient resources to ensure that its program supplied only accurate and non-misleading information to consumers. Most likely the costs of such initiative would exceed any public benefits.

B. Beyond Current *Truth in Billing* Rules, No Additional Government Mandates Should be Imposed Regarding Service Providers' Bills.

With respect to the matter of whether service providers' bills should be subjected to additional information or formatting requirements beyond those already reflected in the truth-in-billing rules, the answer is "no." In light of the Commission's recognition that there are "typically many ways to convey important information to consumers in a clear and accurate manner,"[63] the Commission should adhere to its existing flexible approach. But to accomplish competitive neutrality, it should extend truth-in-billing principles to all providers of comparable products and services.

As a matter of fact, it is even more critical today than it was over a decade ago that the Commission "allow [service providers] considerable discretion to satisfy their [billing]

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[63] *In the Matter of Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7499 ¶ 10 (1999) (*Truth-in-Billing Order*).

obligations in a manner that best suits their needs and those of their customers."[64] The flexibility of the existing truth-in-billing rules avoids the dangers "that detailed regulations could increase [service providers'] costs, and that rigid rules might prevent competing [service providers] from differentiating themselves on the basis of the clarity of their bills."[65] By avoiding "any rigid formatting rule that require[s] separate pages, or produce[s] 'dead space' on the bill, [which] may frustrate consumers and substantially, or even prohibitively, increase carriers' billing expenses."[66]

Indeed, since 1999, when the Commission issued its first *Truth-in-Billing Order*, the increased competition anticipated by the Commission has emerged and flourished. Today, competitors seek to differentiate themselves not only on price but "to distinguish their services by providing clear, informative, and accessible bills to their customers."[67] The format, content, and appearance of customer bills have become a significant point of competition among carriers. According to J.D. Power & Associates, "[b]ills and statements are a significant contributor to overall customer satisfaction."[68]

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[64] *Id.* at 7497 ¶ 6 and 7499 ¶ 10 (the Commission sought to "provide carriers flexibility in the manner in which they satisfy their truth-in-billing obligations."); *id.* at 7501 ¶ 15 ("[W]e reject the detailed regulatory approach urged by some commenters, because we envision that carriers may satisfy these obligations in widely divergent manners that best fit their own specific needs and those of their customers.").

[65] *Id.* at 7515-16 ¶ 36.

[66] *Id.* (expressing concerns that "rigid formatting and disclosure requirements would inhibit innovation and greatly increase carrier costs").

[67] *Id.* ¶ 6. *And see similarly* where the Commission determined that it was unnecessary to impose mandates regarding the quality of customer service representatives handling customer billing inquiries because "competition will provide a strong incentive for each carrier to set appropriate standards on its own initiative." *Id.* at 7534 ¶ 67.

[68] Chris Denove, Vice President J.D. Power and Associates, quoted in TransPromo Insights eBook at 9 (published by http://www.dstoutput.com/solutions/print_solutions/transpromo/index.html).

With that in mind, Qwest has devoted substantial resources to developing billing formats and text that are attractive, easily understood, and consumer-friendly. Other service providers have undoubtedly done the same. Over the years, Qwest has redesigned the format and content of its residential customer bills a number of times, most recently in 2007.[69] Much of the specific formatting revisions are in response to focus-group and market research. To this day, Qwest uses such research in its ongoing bill-assessment work.

Qwest provides information about understanding the content of our bills through an online link at http://www.qwest.com/residential/customerService/understand/your_bill_explained.html. While no amount of information about bills will stem all consumer complaints, we believe the way in which we have provided the information is clear and straightforward and provides valuable information for many of our customers.

Qwest's experience is that customers do not want lengthier bills. Our focus-group research shows that customers typically prefer summarized data rather than highly detailed information. Customers complain about what they perceive as unnecessary verbiage on bills and often object to specific break down of information.

Many customers have reacted favorably to the prospect of a single-page bill; and most are willing to forego the size and detail of the full bill so long as they can access additional information on an as-needed basis (*e.g.*, when they note an unusual item on their bill). This attitude is likely the result of the fact (according to Qwest's research) that customers typically

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[69] In 1999, as it issued the first *Truth-in-Billing Order*, the Commission noted that "several carriers recently have undertaken efforts to improve their billing formats, after recognizing that the format of old bills did not meet consumers' needs." 14 FCC Rcd at 7519 ¶ 42. The revising of customer bills is an ongoing process for service providers.

maintain an idea of expected charges for their ongoing bills, wishing to see additional details only when a bill falls outside their anticipated range.[70]

Qwest not only crafts paper bills that are engaging and meaningful for its customers, but we have developed an option for customers to manage their accounts online, including bill reviews, rather than receiving traditional paper bills. A growing number of customers prefer this option and the ease that electronic access allows for any-time management of their accounts. And because online account information and bill payment presents an increasingly important forum for competition among carriers, Qwest has conducted extensive consumer surveys to understand how best to display electronic billing information and to implement electronic payment options (for example, "click and pay" or "auto-debit" methods).

It is clear to service providers that those who can offer consumer billing and other information in clear and convenient formats will enjoy significant advantages in the marketplace; and that competition on price is but one element of overall customer satisfaction.[71] Customers can be expected to switch providers if they are frustrated with the level of information provided by their carrier, if they do not understand their carrier's service plans, or if they believe that the carrier's billing statements are not accurate and clear.[72]

In light of the above, both the passage of time and marketplace developments confirm that the current flexible approach of the truth-in-billing rules reflects the appropriate balance between the needs of service providers to "determine the most efficient way to convey the

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[70] This is in line with what the behavioral economists call heuristics or the "rule of thumb" approach to information assessment. *See* notes 47, 51, *supra*.

[71] OECD Report at 22 ("service providers who are able to articulate their offers clearly and inspire trust in consumers will be at an advantage.").

[72] *Id.* at 31 (noting that some consumers might change carriers only if they "experienced a serious betrayal of trust, that incites a 'revenge value' to switching.").

service provider information, . . . [and] consumers' need for clear, logical, and easily understood charges."[73] The approach promotes service provider innovation and differentiation, minimizes unnecessary costs, and allows providers editorial control over their primary communication tool with their customers.

Informal Consumer Complaints. Finally, a word about relying on filed informal consumer complaints as the basis for erecting an elaborate and costly information-disclosure regime that departs from the existing truth-in-billing rules.[74] It is as true now as it was in 2005 when Qwest previously addressed this issue[75] that making material changes to rules based on the number of informal consumer complaints received by the Commission is misguided. In this case, it is not even clear how many of the informal complaints referenced in the *NOI* involved billing format or presentation issues, as opposed to questions involving rates and other practices.[76] If rates were the source of complaints, however, one can only expect that if the Commission took action that raised consumer prices (as a result of pass-throughs of service providers' costs), consumer complaints would increase, not decrease.

But even if thousands of informal complaints were filed with the Commission (*and* state commissions) regarding the formatting and content of service providers' bills, that number is unlikely to be significant given the billions of transactions annually across the country.[77] The *NOI* observes that in 2008 there were 154.6 million landline subscribers and 270 million wireless

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[73] *See Truth-in-Billing Order*, 14 FCC Rcd at 7515-16 ¶ 36.

[74] *NOI* ¶ 15.

[75] Comments of Qwest Corporation, Qwest Communications Corporation, Qwest LD Corp. and Qwest Wireless, LLC, CC Docket No. 98-170 and CG Docket No. 04-208, filed June 24, 2005 at 14-15, n.35.

[76] *NOI* ¶ 15.

[77] Qwest made this argument in 2005 as well. Qwest Comments at 14, n.35.

subscribers in the U.S.[78] Qwest itself produces over 100 million bills a year, two-thirds of which are consumer bills. And while the numbers likely have changed since 2004-2005, in a prior aspect of the *Truth in Billing* proceedings, Sprint reported that it processed approximately 1.2 billion call detail records a month or roughly 15 billion per year.[79] Verizon Wireless reported that it processed 23 million new or change orders in 2004.[80] Given these figures, it would take consumer complaints on a far greater level than reported in the *NOI* to provide *evidence* that the current marketplace information-disclosure regime is not working satisfactorily.

Qwest is not minimizing the importance of consumer complaints. They are to be taken seriously; and we do so. Indeed, competitive forces require all carriers to pay close heed to issues of consumer satisfaction. But it would be misguided to assume that a broad mandate to craft an "information-disclosure regime" should rest on informal complaint filings, at least at the level reflected in the *NOI*.

Rather, targeted enforcement actions involving particular billing questions offer a more appropriate solution for those numbers than a radical change to the approach of the truth-in-billing rules. Indeed, the Commission has cautioned that it will "not hesitate to take action on a case-by-case basis under Section 201(b) of the Act against carriers who impose unjust or unreasonable line-item charges."[81] Similar use of targeted enforcement actions under Section 201(b), where bills are not presented in a clear and accurate manner, is far preferable to broad mandates that impose excessive costs and fail to provide necessary flexibility among carriers.

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[78] *NOI* ¶ 15, nn. 40 & 41.

[79] Comments of Sprint Corporation, CC Docket No. 98-170, CG Docket No. 04-208, filed June 24, 2005 at 15.

[80] Comments of Verizon Wireless, CC Docket No. 98-170, CG Docket No. 04-208, filed June 24, 2005 at 11.

[81] *Truth-in-Billing Order*, 14 FCC Rcd at 7528 ¶ 58.

C. The Commission Should Not Prescribe Point-of-Sale Disclosures.

For similar reasons -- cost, feasibility, and the need to avoid disrupting an already competitive market -- the Commission should refrain from adopting point-of-sale disclosure requirements.[82] Many of the point-of-sale concerns outlined in the *NOI* relate to wireless carriers; but there has been no showing that these carriers have failed to comply with their duties under their voluntary settlements. In fact, the voluntary CTIA Code of Conduct, discussed further in Section V, below, already addresses many of the point-of-sale disclosure issues raised in the *NOI*.

Further, there is no material evidence that the wireline industry currently fails to communicate adequately with its customers regarding prices, terms, and conditions. Many service providers likely already make such disclosures in their marketing and sales activities, as accommodations to consumer protection and fair trade practices principles generally. Qwest does.[83]

For example, using software designed to calculate estimated charges, Qwest's local service representatives are able, on inbound calls, to provide the customer with a point-of-sale recap identifying (a) the non-recurring (one-time) charges, (b) the monthly recurring charges, (c) any carrier-imposed charges and fees, (d) an estimate of the governmental taxes and surcharges, and (e) an estimated prorated amount for partial month billing. In addition, Qwest follows up its sales with "Welcome package" mailings that provide more extensive product information than can be conveniently provided in an interactive sales communication.

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[82] *NOI* ¶¶ 31 and 32.

[83] Qwest Comments at 15-16; Reply Comments of Qwest Corporation, *et al.*, CC Docket No. 98-170 and CG Docket No. 04-208, filed July 25, 2005 at 7-8.

Not only the content but the mechanics of how point-of-sale disclosures are accomplished likely varies across providers, since there are a variety of ways in which such information could be disclosed. Disclosures could be done by live service representatives or through third parties acting on behalf of providers. They may be given through electronic voice response units or through follow-up communications. Whatever communication vehicle is chosen will necessarily depend on the provider's business plan, cost structure, and competitive assessment. But whatever mechanism is chosen to provide such disclosures, changing the scripting or content of the communication would likely involve software changes[84] and training. Both could be costly.

And finally, as important as the burden of additional point-of-sale disclosures would have on service providers, consumers would be burdened by a sales process even more time-consuming and legalistic than it presently is. Many customers already find sales calls too lengthy. They would not want to hear additional details delivered at the point of sale. Surely, then, additional content would be burdensome not only for the provider to deliver but for consumers to listen to. Most likely, any government mandate requiring additional point-of-sale communications will increase rather than decrease the volume of consumer complaints.

D. There Is No Need For Further Regulation of Information Disclosures With Respect to Customers With Disabilities.

The *NOI* seeks comment on the experience of consumers with disabilities with respect to information about available communications services, as well as the manner in which those services are provided and billed.[85] Based on Qwest's experience, there is no need for governmental intervention in this area.

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[84] Whether a disclosure is made through a voice response unit or a live representative, the text is likely scripted. This removes an element of error in the live delivery of the information.

[85] *NOI* ¶ 54.

On Qwest's basic website (www.qwest.com), there is a link targeted to persons with special needs -- **Center for Customers with Disabilities** web site, http://www.qwest.com/residential/disabled/. There consumers can find specific product solutions for mobility, speech, cognitive, vision, and hearing challenges. Information is provided about Telecommunications Relay Service, TTY users' access to 911, and various telephone assistance plans such as Lifeline and Link Up. Phone, mail, fax, or TTY contact information for customers with disabilities is provided.

Qwest also publishes a brochure, **Qwest Disabilities Solutions**, available at Qwest retail stores.

Beyond basic information, Qwest offers alternate bill formats, upon request, for customers with disabilities. We offer Braille, large font, audio tape, and e-mail (compatible with screen readers) bills. When Qwest issued its new bill format approximately three years ago, there were increased requests for Large Font bills. Qwest's Center for Customers with Disabilities screened those inquiries to ensure Qwest issued large font bills for qualifying customers.

The *NOI* also seeks information on the experience of consumers with disabilities when contacting their service providers with questions or complaints.[86] Qwest has not received any complaints from customers with disabilities in the past couple of years regarding a lack of accessibility or responsiveness.[87]

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[86] *NOI* ¶ 52.

[87] The last inquiry (which came directly from the customer to Qwest, not through a Commission or state commission contact) was due to the customer's move out of region where he/she signed up for Qwest's long distance service. Qwest's out-of-region service representatives lack access to Qwest's local service records. As a result, the customer's previous request to receive a Braille bill was not carried over after the move. Qwest remedied this situation and set up Braille billing for the customer.

Based on Qwest's experience, there is no need for the Commission to prescribe mandatory information-disclosure rules to aid persons with disabilities in getting the information they want or need with respect to service providers or offerings. Not only is that information available from their current providers but technology (such as screen readers) makes third-party information, such as comparative tools, available as well.

E. Governmental-Imposed Information-Disclosure Mandates in Other Industries and Contexts Do Not Support Such Mandates in the Communications Industry.

As noted above, the norm in the United States' free enterprise economy is that providers of goods and services are free to distribute truthful, non-misleading information to consumers in any form they desire. As a general matter, the government does not prescribe the content of such communications or require that information be disseminated in any particular format.

To be sure, in some very narrow and limited contexts the government has imposed disclosure requirements or rules regarding the manner in which consumer information must be provided. The Commission cites examples in the *NOI*.[88] Typically, however, these mandates are limited to factually uncontroversial information that consumers are not in a position to obtain on their own, such as drug safety information or nutritional content based on laboratory testing.

In the instant case, rather than being factually uncontroversial, mandated information disclosures regarding the large variety of service offerings and the range of communications service providers might prove misleading or even inaccurate. The disclosed information might focus on metrics that consumers do not understand, fail to capture important differences among services, and create a risk of unverified claims by unscrupulous providers.

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[88] *NOI* ¶ 16.

Coupled with the fact that consumers of communications products already have access to a wealth of information, and that crafting uniform and standardized disclosures in the communications field would be impractical, the necessary conclusion is that the limited disclosure requirements in other areas of consumer protection and consumer safety provide little support for regulatory mandates here.

IV. First Amendment Principles Represent A Substantial Constraint On the Commission's Authority.

The *NOI* recognizes that "some parties have raised First Amendment concerns in this area" and invites further comments on the issue.[89] Undoubtedly, free speech principles are relevant to the analysis of the issues raised in the *NOI*.[90] Indeed, those principles constrain the Commission's authority to prescribe general information-disclosure mandates, to adopt more aggressive content or format mandates with respect to carriers' bills, and to prescribe point-of-sale disclosures.

The *NOI* acknowledges that, under the framework established by the Supreme Court in *Central Hudson*,[91] a regulation of commercial speech will be found compatible with the First Amendment if and only if: (1) there is a substantial government interest, (2) the regulation directly advances that interest, and (3) the proposed regulation is not more extensive than necessary to serve that interest. However, the *NOI* suggests that any First Amendment issues involved with the concept of Commission mandates in the area of service-provider speech were resolved in the *Truth-in-Billing Order*.[92] That is untrue.

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[89] *Id.* ¶ 21.

[90] In a separate statement, Commissioner McDowell praised the inclusion of this issue in the *NOI*.

[91] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

[92] *NOI* ¶ 21.

The crux of the current truth-in-billing rules is their nature as guidelines, allowing for discretion and flexibility for service providers with regard to both the content and the format of their bills. Therefore, in adopting those rules, it was unnecessary for the Commission to resolve issues pertaining to government prescriptions regarding service providers' bills, let alone broadly-framed governmental mandates regarding information disclosures about providers and products. Those issues, as well as potential bill content or format prescriptions, make up the proposals in the *NOI*. Accordingly, the truth-in-billing rules do not resemble the regulations of speech discussed in the *NOI*, and a thorough First Amendment analysis is warranted.

A. First Amendment Considerations Regarding Mandating Content Or Format of Service Providers' Bills.

The *Truth-in-Billing Order* was a narrow solution to a specific problem. It created a flexible guideline rather than a strict mandate; and the resolution reached in that context does not justify further restrictions on customer billing format or presentation or support broad information-disclosure prescriptions. Quite the contrary. Having ensured that customer bills are clear, truthful, and non-misleading, the Commission has no justification to adopt broader mandates.

The Commission was careful to stress the limited nature of its regulation of service provider bills in the *Truth-in-Billing Order*. There, the Commission concluded that its flexible regulatory approach did not raise substantial First Amendment difficulties because it did not mandate specific disclosures or communications by service providers; nor did it impose particular billing formats.[93] The Commission's reasoning, however, would not extend to more

[93] 14 FCC Rcd at 7530 ¶ 60 (explaining that proposed labels regarding charges related to federal regulatory actions would be consistent with the First Amendment because "we have not mandated or limited specific language that carriers utilize to describe the nature and purpose of these charges; each carrier may develop its own language to describe these charges in detail");

intrusive government mandates regarding particular billing formats or compelling service providers to make specific disclosures to consumers in their bills.

As discussed above in Part I, service providers such as Qwest exercise significant editorial control over the format, look, and presentation of their bills, within the limits of the *Truth-in-Billing Order*. This editorial discretion is consistent with sound First Amendment and intellectual property values (a bill format could be protected by copyright, patent, or trademark law),[94] as well as with consumer protection and the public interest in market competition.

A communication provider's bill is not "government speech;" nor is it a vehicle to be appropriated for such speech at the government's wishes. Beyond government-proposed speech that is voluntarily carried by service providers,[95] the protections of the First Amendment pertain to the remaining portions of the bill. After all, the Supreme Court has already held that First Amendment protection extends to customer billing communications. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Calif.*[96] Lower courts have also recognized the important free speech principles implicated by consumer billing regulations. In *BellSouth Telecommunications,*

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id. at 7532 ¶ 63 ("Our standardized label requirement is even less onerous, requiring carriers to use the labels, but otherwise leaving them free to determine how best to describe charges related to federal regulatory action in a truthful and nonmisleading manner.").

[94] In *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 142 (1994) (*Ibanez v. Florida*), the Supreme Court held that the use of a trademarked designation of "Certified Financial Planner" was a protected form of commercial speech.

[95] The fact that service providers may accede to providing limited regulatory disclosures on customer bills (such as those supplying certain customer education and outreach information), without challenge to the government's authority to mandate such speech does not operate as a legally binding waiver of First Amendment rights. *Cf. New York v. United States*, 505 U.S. 144, 181 (1992) (even support for legislation does not waive constitutional claims). There are many business and political reasons why a service provider might transmit some government-mandated speech.

[96] 475 U.S. 1, *reh'g denied*, 475 U.S. 1133 (1986).

Inc. v. Farris,[97] for example, the Court of Appeals held that a state law prohibiting telecommunications providers from identifying a tax on consumers' bills violated the First Amendment.

Accordingly, it is clear that any further mandates relating to the content or formatting of customer bills would trigger First Amendment scrutiny under the *Central Hudson* test. If anything, the Commission's earlier *Truth-in-Billing Order* has eliminated the First Amendment predicate for further regulations under *Central Hudson* because it has already ensured that consumers must be provided with clear and accurate descriptions of billing information.

B. The First Amendment Constrains the Commission's Authority To Adopt More General Information-Disclosure Mandates.

The Commission should also recognize that the First Amendment places constraints on broader information mandates. Misguidedly, the *NOI* cites language from judicial decisions that it claims indicate that "regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech."[98] However, those decisions do not support information mandates in the communications industry context, such as are suggested in the *NOI*. Such mandates would be unconstitutional in the absence of a documented consumer protection problem and a showing that the proposed regulation was reasonably related to addressing it. These predicates cannot be met in this context.

1. *Central Hudson* Scrutiny Regarding Mandated Information Disclosures Generally.

Any mandates relating to mandated information-disclosures to consumers trigger First Amendment scrutiny under the *Central Hudson* test. The elements of that test could not be

[97] 542 F.3d 499 (6th Cir. 2008).

[98] *NOI* ¶ 21.

satisfied with respect to broad information disclosure prescriptions for a variety of reasons, including:

(1) Vigorous competition in telecommunications markets has diminished any governmental interest since the 1999 *Truth-in-Billing Order*. Given the high volume of information currently being made available (through provider and product information, bills distributed to customers, and point of sale disclosures), as contrasted with the statistically low levels of customer complaints, a governmental interest warranting the regulation of speech cannot be justified.

(2) For the reasons stated in Part III.A, above, it is doubtful that any Commission regulation mandating the disclosure of information to consumers would directly advance an interest in consumer protection not already being accommodated by market forces. Rather, there are powerful reasons to believe that such regulation would cause greater harm than good to consumers on balance. The task of creating a comparative tool would be very difficult, with a danger that it might ultimately reflect too many or too few metrics, or metrics not of interest or value to the majority of consumers.

(3) Disclosure mandates and regulations would also likely fail the "narrow tailoring" requirement because they would be more extensive than necessary to serve any governmental interest. As discussed in Part V, below, there are numerous, more promising alternatives to regulatory mandates that do not trench upon speech at all. The Supreme Court has explained that, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[99]

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[99] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

2. Judicial Precedent Does Not Support the Type of Information Mandates Suggested in the *NOI.*

The Supreme Court has never upheld the constitutionality of a governmentally-imposed factual disclosure requirement in the absence of evidence that the regulation was reasonably necessary to address a potential problem. In *Riley v. National Fed'n of the Blind of N.C., Inc.*,[100] for example, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked. The Court explained that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[101] The Court rejected any distinction between "compelled statements of opinion" and "compelled statements of 'fact'": "either form of compulsion burdens protected speech."[102]

Similarly, in *Ibanez v. Florida*, the Court invalidated the punishment of a Certified Financial Planner (CFP) under a state rule requiring CFPs to disclose in their advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State's "concern about the possibility of deception in hypothetical cases is not sufficient" and demanded actual evidence of harm.[103]

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[100] 487 U.S. 781 (1988).

[101] *Id.* at 796-97 (emphasis in original).

[102] *Id.* at 797-98.

[103] 512 U.S. at 145 n.10 ("Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled" in the absence of the disclosure.) (citation omitted). "Given the state of this record -- the failure of the Board to point

In *Int'l Dairy Foods Ass'n v. Amestoy* (*IDFA*),[104] the Second Circuit invalidated a Vermont statute requiring dairy manufacturers who used a synthetic growth hormone to disclose that fact in the label of their milk. The court of appeals held that the State's asserted justifications for the statute -- "strong consumer interest and the public's 'right to know'" -- were "insufficient to justify compromising protected constitutional rights."[105] The court added:

> We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.[106]

The court noted further that, if the government were not required to adduce a factual predicate for a mandatory disclosure rule, there would be no limit on its authority to impose such mandates:

> Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it.[107]

Mandated information-disclosure requirements are, therefore, unconstitutional in the absence of a documented governmental justification. "[T]he failure . . . to provide direct and

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to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board's action is unjustified." *Id.* at 146.

[104] 92 F.3d 67 (2d Cir. 1996).

[105] *Id.* at 73 (citation omitted).

[106] *Id.*

[107] *Id.* at 74.

concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom [it]."[108]

The decisions cited by the *NOI* do not support a contrary position. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,*[109] for example, the Supreme Court overturned a state court reprimand of an attorney for an advertisement that was neither false nor deceptive.[110] The Court indicated that the government was obliged to proceed with a scalpel rather than a sledgehammer -- by "weed[ing] out accurate statements from those that are false or misleading[,]" rather than by regulating speech generally.[111] The Court held that disclosure requirements are permissible only to the extent they "are reasonably related to the State's interest in preventing deception of consumers."[112] The Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment[.]"[113] The Court upheld the state's requirement that an attorney disclose a contingent-fee client's potential liability for costs only because it found that the possibility of deception was "self-evident" and that "substantial numbers of potential clients would be so misled" without the state's disclosure rule.[114]

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[108] *New York State Assoc. of Realtors v. Shaffer*, 27 F.3d 834, 842 (2d Cir.), *cert. denied*, 513 U.S. 1000 (1994) (citation omitted).

[109] 471 U.S. 626 (1985). This Supreme Court case is referenced in the *NOI* (note 48) as a secondary source cited by the Second Circuit in the case *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

[110] It sustained the reprimand only to the extent the advertisement omitted a disclosure that a client would be liable for costs in the event a contingent-fee lawsuit was unsuccessful.

[111] 471 U.S. at 644.

[112] *Id.* at 651 (footnote omitted).

[113] *Id.*

[114] *Id.* at 652.

In the context of the communications industry, the marketplace already contains an abundance of consumer information. And the practical difficulties in crafting any disclosure rule mean that it would be more likely to confuse and overwhelm consumers than inform them. Against this backdrop, a mandated disclosure rule would be the kind of "unjustified or unduly burdensome" measure that the *Zauderer* Court expressly warned that it was ***not*** approving.

In this respect, mandated information disclosures for communications providers would be the polar opposites of the factually uncontroversial disclosures upheld in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*[115] and *New York State Restaurant Ass'n v. New York City Bd. of Health.*[116] In *Sorrell*, the Second Circuit rejected a First Amendment challenge to a state requirement that manufacturers include mercury warning labels on their products, but only because the state identified an important public "interest in protecting human health and the environment from mercury poisoning."[117] There was no question that the State was pursuing a "significant public goal[];"[118] and there was no dispute that the disclosures were factually accurate and informative.[119]

Similarly, in *New York State Restaurant Ass'n v. New York City Bd. of Health*,[120] the Second Circuit upheld a municipal rule requiring chain restaurants with fifteen or more establishments nationally to make certain statements disclosing calorie content of food on their

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[115] 272 F.3d 104 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002).

[116] *See* 109, *supra.*

[117] 272 F.3d at 115.

[118] *Id.*

[119] *See id.* at 114 n.4 (noting that there was no claim that the mandatory disclosure was inaccurate); *id.* at n.5 ("Our decision reaches only required disclosure of factual commercial information.").

[120] 556 F.3d 114.

menus and menu boards, according to the manner prescribed by the regulation.[121] The Court treated the rule as a "purely factual and uncontroversial disclosure requirement[].",[122]

The Second Circuit decisions do not provide helpful guidance to the Commission for two reasons, and it is unlikely that any other court of appeals would follow the Circuit's approach. First, the Second Circuit misread the Supreme Court's *Zauderer* test as amounting to no more than a "rational connection"[123] or "rational basis"[124] standard. In fact, the Supreme Court in *Zauderer* did not use the term "rational," and that word does not appear in the opinion. As noted previously, *Zauderer* opined that disclosure requirements must be "reasonably related" to an interest in preventing deception of consumers[125] and must not be "unjustified or unduly burdensome."[126] The Court upheld an Ohio disclosure rule only because the state's showing that it would prevent consumer deception was "hardly a speculative one[]" and indeed was "self-evident."[127] The Supreme Court's subsequent reliance on *Zauderer* to strike down (under the *Central Hudson* test) a disclaimer requirement in *Ibanez v. Florida Dept. of Business and*

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[121] A recent study by researchers from New York University found that the New York calorie disclosure rule has had no change on the purchasing behavior of consumers. *See* Brian Elbel, *et al.*, "Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City," 28 Health Affairs 1110 (2009) ("we did not detect a change in calories purchased after the introduction of calorie labeling"), available at http://content.healthaffairs.org/cgi/reprint/hlthaff.28.6.w1110v1.pdf.

[122] 556 F.3d at 132 (brackets, internal quotation marks, and citation omitted); *see also id.* at 134 ("NYSRA does not contend that disclosure of calorie information is not 'factual'[]").

[123] *Sorrell*, 272 F.3d at 115.

[124] *New York State Restaurant Ass'n*, 556 F.3d at 134-35.

[125] 471 U.S. at 651.

[126] *Id.*

[127] *Id.* at 652.

Professional Regulation[128] confirms that the Second Circuit erred in equating the *Zauderer* test with "rational basis" scrutiny.

Next, the Second Circuit decisions in *Sorrell* and *New York State Restaurant Ass'n* are inapposite because those cases involved factually uncontroversial, indisputably accurate disclosures clearly tailored to important public health goals. Here, by contrast, an information-disclosure requirement in the communications industry, given the panoply of providers and service plans, would involve complex questions of how pricing, service and service quality are properly measured. As shown in Part II, above, these matters are controversial, hotly debated and involve the intersection of psychology, social science and economics as much as communications policy. In such environment, a communications-disclosure mandate cannot be justified by *New York State Restaurant Ass'n* or *Sorrell.*[129]

Moreover, there are grave risks that any mandated disclosures would mislead and confuse consumers more than aid them in their decision making, as noted in Part II, above. Such counterproductive effects would render the requirements unconstitutional under any version of First Amendment scrutiny. "If the [forced communication] creates confusion, rather than eliminating it, the only possible constitutional justification for this speech regulation is defeated." *Borgner v. Florida Bd. of Dentistry.*[130]

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[128] 512 U.S. at 136, 142, 143, 146.

[129] *Cf. Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (striking down a disclosure requirement requiring placement of "18" sticker on materials meeting statute's definition of "sexually explicit" because it was "more opinion-based than the question of whether a particular chemical is within any given product[,]" as in *Sorrell*).

[130] 537 U.S. 1080, 1082 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari) (criticizing Eleventh Circuit decision upholding a compelled disclaimer requirement for dentist advertising).

Further, in light of the alternatives to regulation outlined in Part V, below, there would be no warrant for a disclosure mandate. "If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort."[131] Accordingly, before the Commission adopts mandated billing formats, compulsory information disclosures and other regulations of speech, it should consider less speech-intrusive alternatives.

V. THE COMMISSION SHOULD CONSIDER ALTERNATIVES TO REGULATORY MANDATES.

Instead of regulatory mandates, the Commission should look to collaborative action to better understand what service-provider or product-information gaps exist and how they might be best addressed. This is a critical first step in any disclosure tool, especially given that the consumer market is not homogeneous. At the same time, industry members can review their existing communication materials and can initiate a voluntary effort to determine if there are "best practices" that might be developed and publicized to provide additional information about providers or their products.

Above and beyond the disclosure of information that service providers make, the Commission can enhance its own education efforts. For example, it could more formally identify for consumers the large variety of information sources currently available. This message could be conveyed through general educational mechanisms and materials and could become more institutionalized in the informal complaint process.

And the Commission should challenge consumer advocate groups to become more involved and engaged in consumer education. While these groups often complain about the absence of meaningful information in the marketplace, it is not clear that they have participated

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[131] *Thompson v. Western States Medical Center,* 535 U.S. 357, 373 (2002) (holding that federal law prohibiting advertising and promotion of particular compounded drugs was unconstitutional restriction of commercial speech).

as actively as they might or should be expected to do in educating consumers about their choices.[132] This is particularly true where those groups focus on persons with particular interests or vulnerabilities.[133]

A. Industry-Led Self-Regulatory Programs.

Qwest agrees with the clear preference for industry self regulation reflected in one of the academic articles referenced by the Commission.

> [T]here is usually an advantage in designing disclosure remedies that leave as large a role as possible to normal market forces, to restrict the market as little as possible. The goal should be not to specify the exact information to be disclosed and the exact manner in which it will be disclosed but to give sellers the proper incentives to make these decisions on their own. This reduces the consequences of a bad decision by the government since it avoids forcing sellers to disclose information in an ineffective manner or to disclose information which, because of a change in circumstances, is no longer desired by consumers. It also increases the effectiveness of the remedy by harnessing sellers' own incentives to develop the most effective ways of informing consumers. Thus, innovation should be encouraged by leaving sellers latitude to experiment.[134]

As a starting point for any industry-led self-regulatory approach, each provider should be expected to review its own information-delivery processes, with a view to making them easier to understand for a range of consumers. In addition, the Commission should encourage industry members to work with regulators and representatives of consumer groups to explore the feasibility of developing a "best practices" code with regard to information disclosures.[135] Those

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[132] *Compare* the remark in the OECD Report at 13 that "Consumers [in the United States] can turn to local and national consumer groups for surveys and other data on mobile services."

[133] *See* Section I, *supra*.

[134] Beales, Efficient Regulation, 24 J.L. & Econ. at 522-23 ("The point is simply that decision makers -- whether courts, public agencies, or legislatures -- ought not to order mandatory disclosures until they have ruled out the possibility that the information would be disseminated voluntarily.").

[135] *Compare NOI* ¶ 58, in the Consumer Education Section, asking about whether the Commission should host "a workshop with academics, other federal agencies, consumer advocacy groups and industry members to better determine the state of consumer awareness

practices should balance the various factors of information availability, cost, feasibility, and consumer convenience. In addition, because consumers increasingly purchase telecommunications services on a bundled basis, any model should ensure that consumers are presented with adequate and appropriate information regarding bundled services.

The Commission should encourage industry representatives and consumer groups to work with regulators in exploring the feasibility of a "best practices" information-disclosure code. Any decision to participate in an industry group would be voluntary, of course, as would the adoption of any finally determined best practices information-disclosure mechanism. However, industry expertise makes a voluntary code preferable to governmental action, given the complexities and practical difficulties in devising an information mandate. As the OECD Report explains in the context of industry codes of conduct, "[w]hen effectively enforced these kinds of measures can be very valuable to improve consumer confidence in the market and arguably are preferable to regulatory intervention."[136]

There is ample precedent for industry initiatives, such as the Consumer Code developed in 2003 by the CTIA. As noted in the *NOI*,[137] the Code is a voluntary scheme under which signatory wireless carriers disclose rates and terms of service to consumers, including calling area plans, charges that may differ by time period such as nights and weekends, roaming or off-network charges, charges for excess or additional minutes, long distance charges, and activation

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about the issues discussed in the" *NOI*. Qwest encourages the Commission to proceed with such a workshop to better identify what might be particular information gaps the Commission wants to focus on and that industry agrees would be meaningful.

[136] OECD Report at 45. *And see id.* at 5 ("Service providers in the communication sector should be strongly encouraged through self-regulation to develop a consumer bill of rights, to provide adequate and accurate information to consumers").

[137] *NOI* ¶ 11.

fees.[138] Over 30 wireless service providers, including many national providers, are signatories to the Code and are allowed to display a special seal if they certify each year that they are in compliance with the Code's provisions.[139]

Another instructive example is the industry-led self-regulation activities regarding the problem of "cramming" -- the placement of unauthorized or deceptive charges on customers' local telephone bills. In 1998, after the Commission raised the issue as troubling from the perspective of consumer protection and fair conduct, industry responded by formulating voluntary guidelines or "best practices" to address cramming. Notably, the industry was able to develop its guidelines in only two months -- a significantly shorter period than a rulemaking proceeding would have required. This swiftness of response was praised in a press release in July 22, 1998:

> The industry completed the guidelines in only two months after the May meeting called by Chairman Kennard. Had traditional regulatory rulemaking processes been used, the project would have taken much longer to complete. . . .

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[138] *Id.* ¶ 11. The Code enumerates ten voluntary industry principles, disclosures and practices:

1. Provide every new consumer a minimum 14-day trial period for new service.
2. Provide coverage maps, illustrating where service is generally available.
3. In every advertisement that mentions pricing, specifically disclose the rates and terms of service.
4. For every rate plan or contract, provide consumers specific disclosures regarding rates and terms of service.
5. On billing statements, carriers will not label cost recovery fees or charges as taxes, and will separately identify carrier charges from taxes.
6. When initiating or changing service, carriers will clearly state contract terms to consumers and confirm changes in service.
7. Provide consumers the right to terminate service for significant changes to contract terms.
8. Provide ready access to consumer service.
9. Promptly respond to consumer inquiries and complaints received from government agencies.
10. Abide by policies for the protection of consumer privacy.

[139] *Id.* and n.27.

> These voluntary industry guidelines should go a long way towards weeding out the bad actors in the telecommunications industry by cutting off access to billing services to those engaged in unfair or deceptive marketing, and providing consumers the ability to recognize and challenge improper charges before they make any payment.[140]

These examples underscore the promise and feasibility of voluntary industry formulation of "best practices" guidelines.

Similarly, in the instant context, it could be that by combining the expertise and talents of communications providers, Commission staff and consumer advocacy groups, some very basic information regarding communications providers' offerings and pricing might be formatted in a fashion meaningful to consumers. While complete standardization and uniformity would be infeasible and undesirable, the effort might result in a work product useful to consumers without unduly burdening industry or the Commission with disproportionate costs.

This common pursuit could also work to ensure that consumers are provided with information at an appropriate time -- at what has been described as an "educable moment."[141] The need to be sensitive to this learning phenomena is confirmed by Qwest's own experience that consumers generally do not wish to be presented with large amounts of highly-detailed information until they are ready to make a decision about which carrier and service plans to select, which services to purchase on a bundled basis, and how to manage their service plan. At that time, the customer will search online, call a carrier's toll-free customer inquiry number, or take other steps to compare services and consider options. Therefore, the "best practices" guidelines should ensure that, rather than inundating customers with unwanted data on an

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[140] http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8050.html.

[141] *See* Tom Messer, "Art & Commerce: Ask the Expert," Adweek, June 4, 2007 (describing an "educable moment" as "a momentary openness to learning" in an otherwise distracted student or consumer).

ongoing basis, relevant information is presented at a time of the customer's choosing, in a manner responsive to the customer's preferences.

B. Government Sponsored Efforts.

The research literature cited in the *NOI* discusses positively public education programs as an alternative to imposing disclosure mandates on industry: "when the information needed is general to a product class rather than brand-specific, . . . a consumer education campaign -- rather than a mandatory disclosure . . . -- may well be the only method of effectively communicating the information to consumers."[142] This is a sound observation.

Along these lines, the Commission's existing public education efforts have garnered praise from the OECD. In its Report it observed that:

> In the United States, the FCC undertakes consumer education campaigns to educate Americans about their options in the telephony market, including the opportunity to switch to operators that may serve them better. There are FCC consumer fact sheets explaining common billing problems, answering basic technical questions, and highlighting the expectations consumers should have of their operators.[143]

The Commission should look into increasing its existing government-sponsored education campaigns, not only through direct Commission outreach but collaborative efforts among the Commission, industry, and consumer advocate groups. "Policy makers and regulators, in conjunction with industry, could assist consumer participation in telecommunications markets by educating consumers about their rights, by raising awareness about new services and options offered by the market, and by making the process

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[142] Beales, Efficient Information, 24 J.L. & Econ. at 531 ("Consumer education is often overlooked as a means of dealing with incomplete information.").

[143] OECD Report at 37. *And see id.* at 42 (noting that the FCC currently "keeps up to date a roster of over 150 consumer fact sheets in over a dozen languages on topics of common complaint from Americans. In addition, a large staff of operators field questions from the public.").

of switching in the fixed line, mobile and Internet markets easier, cheaper and faster."[144]

An "advantage of consumer education over a disclosure approach is that an education campaign can be targeted more precisely to those who need the information. This may make it possible to convey the essential information more effectively."[145] Accordingly, as a part of its consumer education investigation, "[c]onsideration [would] need to be given to how these kinds of educational campaigns could be tailored, in both their message and distribution channel (*e.g.* a leaflet, consumer hotline or web based programmes) to different groups of consumers to provide them with practical guidance to quickly identify the most suitable/cheapest telecommunications plan. . . ."[146]

In line with a revitalized consumer education effort, the Commission could "encourage third parties, including consumer organi[z]ations, to provide price/service-comparison facilities and other relevant information through consumer hotlines, websites, etc."[147] Indeed, consumer organizations should become more aggressive in their outreach and education efforts. Not only can these organizations "identify the main concerns of consumers, [but they can] survey the market for services of good quality and price, and disseminate that information in a way which is useful to consumers."[148] As noted in the OECD Report, "these kinds of initiatives naturally are often more credible with consumers than industry-led or regulator-led approaches."[149]

Moreover, these types of consumer organizations are often better equipped than regulators or even industry participants to target education and outreach efforts to uninvolved

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[144] *Id.* at 5.

[145] Beales, Efficient Regulation, 24 J.L. & Econ. at 531.

[146] OECD Report at 40.

[147] *Id.* at 5.

[148] *Id.* at 20.

[149] *Id.*

consumers, who may require special attention.[150] As noted in the OECD Report (reporting out research information from the UK), these consumers tend to be older, with lower incomes, perhaps without Internet access, and with a "lower than average understanding of new technology terms, a lower than average awareness of alternative suppliers and . . . often lacking in the knowledge of their rights."[151]

Finally, the Commission should also consider strengthening its own consumer complaint and inquiry procedures. The GAO Report cited in the *NOI* offers several concrete recommendations in this regard,[152] and the Commission should explore them for their viability.

All of these efforts can be done without imposing unnecessary, burdensome, and potentially counterproductive regulatory mandates. Such is the better course of action.

Respectfully submitted,

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[150] *Id.* at 47-48.

[151] *Id.* at 48.

[152] U.S. GAO, "Telecommunications: Preliminary Observations about Consumer Satisfaction and Problems with Wireless Phone Service and FCC's Efforts to Assist Consumers with Complaints," Testimony before the Committee on Commerce, Science, and Transportation, U.S. Senate, GAO-09-800T (June 17, 2009).

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October 13, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in CG Docket No. 09-158, CC Docket No. 98-170 and WC Docket No. 04-36, and 2); served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

October 13, 2009