

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of)	
Empowering Consumers to Prevent and Detect)	CG Docket No. 11-116
Billing for Unauthorized Charges (“Cramming”))	
Consumer Information and Disclosure)	CG Docket No. 09-158
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
_____)	

COMMENTS OF THE INTERNET SEARCH OPTIMIZATION COMPANY

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The Internet Search Optimization Company (“ISO”), by and through its attorneys, submits these comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.¹ ISO relies upon LEC billing services as a low-cost way to provide services to small business customers. ISO verifies each and every order submitted, and is committed to the Commission’s goal of ensuring that all services billed on local telephone bills are knowingly and fully authorized by the billed customer.

The bulk of the NPRM discusses proposals to improve the information available on telephone bills and to clarify procedures for the offering of blocking of third-party charges. ISO does not oppose these proposals in concept, provided they can be implemented without increasing the cost of LEC billing and that customers are able to freely choose whether to block third party charges. However, ISO is troubled by suggestions that go beyond the format of telephone bills and intrude upon the terms of third-party billing services. There are several

¹ See *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, CG Docket No. 11-116, Notice of Proposed Rulemaking, FCC 11-106 (rel. July 12, 2011) (“NPRM”).

proposals under consideration in the Commission's NPRM that raise this potential concern, but none more alarming to ISO than the suggestion that the Commission could prohibit third-party charges on telephone bills altogether.

I. INTRODUCTION

ISO provides Internet marketing services and resources to the public, primarily small and medium sized businesses. These services include web design and search engine optimization techniques, such as keyword tagging. The availability of billing through the customer's existing local telephone invoice is a key convenience for small businesses that typically do not have dedicated accounts payable departments and employees. Customers' access to these affordable services is facilitated by an arrangement to invoice charges through each customer's local telephone company, thereby reducing the number of invoices to be managed each month.

Indeed, the convenience of a single bill is becoming increasingly important to consumers and competition. Many providers bill a "triple play" of services on one invoice, combining regulated telephone services with non-telephony products such as Internet access and television programming. Carriers also bill for affiliated service providers' services such as voicemail, inside wire maintenance, alarm monitoring and similar services. The availability of third-party billing for these services provides an important vehicle for unaffiliated providers to compete with the cost and convenience telephone companies offer to their own subscribers. More recently, newer forms of third-party billing are becoming accepted, such as "text to give" campaigns, games, ringtones and apps downloads. Consequently, the convenience of third party billing on telephone bills is a critical benefit for consumers and the market as a whole. ISO thus has a considerable interest in ensuring that the Commission preserves third-party billing as a viable option.

ISO is wholly committed to the Commission's goal in this proceeding – to prevent billing of unauthorized charges to consumers, a practice commonly referred to as “cramming.” Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. These guidelines continue to be improved, with telephone companies and third-party billing agents introducing a variety of new measures in the past year alone. ISO supports and adheres to these guidelines in its services.

Unfortunately, the NPRM upsets this balanced approach and intrudes upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction. In doing so, the Commission not only encounters a host of legal problems in implementing its “solution,” but also would impose substantial burdens on telephone carriers, third-party Billing Agents and Service Providers without achieving the anticipated benefits for telephone customers. For these reasons, ISO opposes the NPRM in part.

II. THE COMMISSION DOES NOT HAVE AUTHORITY UNDER THE COMMUNICATIONS ACT TO REGULATE BILLING AND COLLECTION SERVICES

Since 1986, the Commission has recognized that it does not have authority pursuant to Title II of the Communications Act to regulate billing and collection services, which are not communications, but rather financial and administrative services. Further, while the Commission can regulate the format and content of telephone bills, it may not extend its authority via Title I ancillary jurisdiction to encompass the terms and conditions of billing and collection services themselves.

A. The Commission Has Determined That It Does Not Have Title II Authority to Regulate Billing and Collection Services

The NPRM asserts that the Commission’s authority to adopt cramming rules lies in Section 201(b) of the Act, which requires that “all ‘practices...in connection with’ common carrier services be ‘just and reasonable.’”² However, Title II of the Communications Act only permits the Commission to regulate interstate communications offered on a common carrier basis. It does *not* give the Commission authority to regulate billing and collection services subject to private contracts between carriers and third-party service providers.

In 1986, the Commission specifically determined that “carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act.”³ In making this finding, the Commission concluded that “[b]illing and collection service does not employ wire or radio facilities and does not allow customers of the service...to ‘communicate or transmit intelligence of their own design and choosing.’”⁴ The Commission correctly found that billing and collection is a “financial and administrative service” that is “not subject to regulation under Title II of the Act.”⁵ Accordingly, the Commission in 1986 deregulated telephone company billing and collection services. LECs, therefore, no longer were required to offer billing and collection, and were given discretion to determine the terms and conditions upon which they would offer the service.

The Commission again confirmed its lack of authority in 1998. At that time, at the urging of the Commission, the telecommunications industry developed new anti-cramming

² NPRM, ¶ 83.

³ *Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007, ¶ 31 (1986) (“Billing and Collection Services Order”); *Billing and Collection Services (Reconsideration)*, Memorandum Opinion and Order, 1 FCC Rcd 445 (1986).

⁴ Billing and Collection Services Order, ¶ 32 (quoting *Nat’l Ass’n of Regulatory Util. Com’rs v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (quoting *Indus. Radiolocation Serv.*, Docket No. 16106, 5 FCC 2d 197, 202 (1966)).

⁵ Billing and Collection Services Order, ¶¶ 32, 34.

guidelines.⁶ The voluntary guidelines include procedures for comprehensive screening of products being charged to local telephone bills, LEC scrutiny of service providers, verification of end user approval of services being charged to their bills, customer dispute resolution procedures and other protections for consumers. With respect to verification of orders, the voluntary guidelines affirm that it is the service provider's responsibility to inform end users of all rates, terms and conditions of service and to obtain and retain the necessary end user authorization.⁷

Importantly, the Commission deliberately chose not to implement mandatory obligations, much like it did last week in connection with the "bill shock" proposal. In the News Release announcing the voluntary industry guidelines, the Commission noted that the guidelines had been developed quickly and "had traditional regulatory rulemaking processes been used, the project would have taken much longer to complete."⁸ The Commission's role, the News Release continued, is to educate consumers and to help them understand their telephone bills (the latter role ultimately leading to the *Truth-in-Billing* rules).⁹ The Commission did not express a role in regulating the terms of the billing relationship between LECs and third party providers.

Finally, one distinction is important to understanding the Commission's limited jurisdiction. The NPRM does not address a telephone company's billing for its own services. The Commission recognized in 1986 that "[b]illing and collection for a carrier's own communications offering is an incidental part of the provision of a communication service."¹⁰ The Commission surely can regulate how a telecommunications carrier bills for its own services.

⁶ *FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998) ("News Release").

⁷ *Anti-Cramming Best Practice Guidelines*, July 22, 1998, at 14 (available at http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.pdf).

⁸ *See* News Release at 1.

⁹ *Id.* at 1-2.

¹⁰ *Billing and Collection Services Order*, ¶¶ 2-3.

However, this proceeding concerns billing and collection for unaffiliated entities. Such billing services “would not be incidental to any service offered by the local exchange carrier, but would be a service offered to another carrier.”¹¹

There have been no changes to Section 201(b) of the Act since 1986 to alter the Commission’s well-reasoned conclusion that billing and collection services are not subject to the its Title II authority.

B. The Commission Does Not Have Title I Ancillary Authority to Regulate Third Party Billing and Collection Services

Perhaps recognizing its tenuous claim of authority pursuant to Title II, the Commission also seeks comment on its ability to regulate cramming under its Title I ancillary authority.¹² The Commission restates the two-part test to exercise its Title I jurisdiction pursuant to last year’s *Comcast* decision, but does not provide an analysis of those factors.¹³

The Commission’s assertion in the NPRM of ancillary authority to regulate third party billing and collection services fails both parts of the two-part test for exercise of such jurisdiction. First, the Commission’s general jurisdictional grant under Title I does not “cover the regulated subject...” of third-party billing services.¹⁴ Billing and collections is not a communication service because, as the Commission previously determined, it “does not employ

¹¹ *Id.*

¹² *See* NPRM, ¶ 85.

¹³ *Id.* (citing *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)). The two-part test discussed further below states that the Commission “may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.” *Comcast*, 600 F.3d at 646 (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

¹⁴ NPRM, ¶ 85. In the *Comcast* decision, Comcast conceded that this first test was satisfied because its Internet service qualified as a “interstate and foreign communication by wire.” *Comcast*, 600 F.3d at 646.

wire or radio facilities.”¹⁵ Therefore, the billing and collection arrangements between local exchange carriers and carrier or non-carrier third-party service providers are not a regulated subject pursuant to Title I of the Act and the Commission’s assertion of Title I ancillary authority to regulate cramming fails the first part of the two-part *Comcast* test.

Second, even if third party billing services were within the subject matter of Title I, the proposals to regulate the content of those services are not “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹⁶ Here, there is no connection between the substantive terms of third party billing and any area of the Commission’s authority. The Commission has not established a record finding that its proposed regulation of the third party billing relationship is ancillary to any statutorily mandated responsibility. Oddly, the NPRM only cites to the Billing and Collection Services Order, in which the Commission determined *not* to exercise its ancillary jurisdiction because “no statutory purpose would be served by continuing to regulate billing and collection service....”¹⁷ This statement confirms that the Commission may not reach beyond the form and content of bills to regulate the third party billing relationship itself.

¹⁵ Billing and Collection Services Order, ¶ 32

¹⁶ NPRM, ¶ 85. In the Billing and Collection Services Order, the Commission recognized that “[t]he exercise of ancillary jurisdiction requires a record finding that such regulation would ‘be directed at protecting or promoting a statutory purpose.’” Billing and Collection Services Order, ¶ 37 citing *Second Computer Inquiry*, 77 FCC 2d 384, 433 (1979), *aff’d on reconsideration*, 84 FCC 2d 50, 92093 (1980), 88 FCC 2d 512 (1981), *aff’d sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983)).

¹⁷ Billing and Collection Services Order, ¶ 37.

III. PROHIBITING THIRD-PARTY BILLING ALTOGETHER WOULD VIOLATE COMMERCIAL SPEECH RIGHTS BECAUSE SUCH ACTION IS MORE EXTENSIVE THAN NECESSARY TO SERVE THE ASSERTED GOVERNMENTAL INTEREST

In the NPRM, the Commission entertains a recommendation that it prohibit all third-party charges on telephone bills.¹⁸ This “throw the baby out with the bathwater” approach would eradicate all unauthorized *and authorized* third-party charges on carrier bills, ignoring the growing trend toward the customer convenience of placing charges for third-party services on telephone bills. This proposal overreaches and raises important constitutional concerns as a restriction on commercial speech.

The Commission recognizes that such restrictions on commercial speech must not be more extensive than necessary to advance a substantial government interest asserted.¹⁹ Even if one were to conclude that the Commission has a substantial interest in protecting consumers from unauthorized third party charges (which may be undercut by its lack of authority to do so), a complete ban on third party billing would not be permitted. Such a blanket prohibition is far more extensive than necessary to serve that interest. In fact, it is the *most extensive* regulatory approach.

The NPRM is replete with alternative regulatory approaches to address instances of cramming that are less extensive than a complete prohibition on third-party billing. These include the voluntary guidelines employed by the wireline industry in 1998 (and by the wireless industry in a related context earlier this month). These alternatives also include regulation of disclosures given to consumers on carrier bills. The Commission is constitutionally obligated to consider these less restrictive means prior to mandating a total ban on third party billing.

¹⁸ See NPRM, ¶ 62.

¹⁹ See *id.*, ¶ 86 (citing *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

Further, since the Commission’s legitimate concern is *unauthorized* third-party charges on carrier bills, as opposed to all third-party charges, the Commission must show that a ban *directly* furthers the stated goal. Here, such a direct connection would be very difficult to demonstrate. Banning all third party billing would prohibit the billing of both authorized and unauthorized charges, even though the billing of *unauthorized* charges is the only potentially legitimate governmental interest. At a minimum, then, the Commission would have to consider measures designed to sort authorized from unauthorized charges. These types of disputes often are difficult to resolve, as they often involve either (1) factual claims that a person did not agree to authorize services or (2) instances where more than one person has authority or appears to have authority to authorize services. “Liability,” the Commission has said in an analogous context, “must be determined on the facts and circumstances of each individual case.”²⁰ A complete ban on third party billing ignores this counsel.

Moreover, a ban would require a showing that bill presentment rulings could not address the concern over unauthorized charges. The Commission’s truth-in-billing rules already require that carriers separate deniable and nondeniable charges (*i.e.*, charges for which non-payment will result in disconnection of basic service or not) in customers’ telephone bills.²¹ These requirements make it clear to customers which charges are from the carrier issuing the bill and which charges are from a third party service provider. They also make it possible for billed customers to determine whether they have been billed for any unauthorized charges, which is the asserted governmental interest at issue.

²⁰ *Vista Services Corporation*, Order of Forfeiture, 15 FCC Rcd 20646, 20649 (2000) (canceling forfeitures for four incidents where the carrier presented valid verification tapes).

²¹ See 47 C.F.R. § 64.2401(c).

Finally, any ban on third party billing would have to conclude that voluntary industry guidelines are inadequate. ISO believes that the existing voluntary industry guidelines are adequate to avoid the vast majority of unauthorized charges on carrier bills. Such voluntary guidelines are in keeping with the Obama Administration's directive against unnecessary regulation,²² which most recently supported the Commission's decision to put the "bill shock" rulemaking on hold due to the wireless industry's agreement to adopt "Wireless Consumer Usage Notification Guidelines" designed to provide free alerts to wireless customers before they reach certain monthly limits and incur unexpected fees.²³ The Administration and the Commission have recognized the value of voluntary industry guidelines to meet regulatory goals without overreaching.

In summary, ISO urges the Commission to reject any suggestions that it ban all third party billing. The proposal is grossly over inclusive and most likely would be unconstitutional.

IV. CONCLUSION

Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. While not perfect, these guidelines continue to be improved, and have in fact been improved in the past year. ISO urges the Commission to continue to refrain from intruding upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction.

²² See Improving Regulation and Regulatory Review – Executive Order, Jan. 18, 2011 (available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>).

²³ See Chairman Genachowski Speech at the Brookings Institution, Oct. 17, 2011 (available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1017/DOC-310290A1.pdf).

Respectfully submitted,

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