

**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 ONLINE BUSINESS ASSOCIATION, INC.**

Online Business Association, Inc. (“OBA”), 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.<sup>1</sup> OBA relies upon LEC billing services as a low-cost way to provide services to small business customers. OBA 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.

OBA supports the NPRM’s proposals to improve the information available on telephone bills and to clarify procedures for the offering of blocking of third-party charges. OBA supports 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, OBA 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 proposals under consideration in the Commission’s NPRM that raise this potential concern, but none more

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<sup>1</sup> 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”).

significant to OBA than the suggestion that the Commission could prohibit third-party charges on telephone bills altogether.

## **I. INTRODUCTION**

OBA seeks to make developing and enhancing an online business presence as easy as possible. OBA offers a suite a business services, including an online registry, web design, web hosting and live customer support, for small businesses. OBA's package also includes hosted corporate email accounts and unlimited Internet access, all of which is billed at a monthly rate on the customer's business telephone line. The availability of third party billing through the customer's existing local telephone invoice is a key convenience for OBA's customers, which typically do not have dedicated accounts payable departments and appreciate the reduction in 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 carriers bill for affiliated service providers' services such as Internet access, video programming, 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 such as OBA to compete with the cost and convenience telephone companies offer to their own subscribers.

OBA is committed to the NPRM's goal of enabling subscribers to detect and prevent unauthorized charges on their accounts, 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. OBA 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, OBA opposes the NPRM in part.

**II. THE COMMISSION DOES NOT HAVE AUTHORITY UNDER THE COMMUNICATIONS ACT TO BAN LECS FROM PROVIDING THIRD PARTY BILLING AND COLLECTION SERVICES**

While the Commission's desire to ensure that charges on telephone bills are authorized is laudable, the Commission must be mindful that its authority over billing services is limited. For the past 25 years, 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. 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."<sup>2</sup> 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.'"<sup>3</sup> The Commission correctly found that

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<sup>2</sup> *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 Red 445 (1986).

<sup>3</sup> *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)).

billing and collection is a “financial and administrative service” that is “not subject to regulation under Title II of the Act.”<sup>4</sup> 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 guidelines.<sup>5</sup> 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.<sup>6</sup>

Importantly, the Commission deliberately chose not to implement mandatory obligations in 1998, 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.”<sup>7</sup> The Commission’s role, the News Release continued, is to educate consumers and to help them understand their telephone bills (the latter

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<sup>4</sup> Billing and Collection Services Order, ¶¶ 32, 34.

<sup>5</sup> *FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998) (“News Release”).

<sup>6</sup> Anti-Cramming Best Practice Guidelines, July 22, 1998, at 14 (available at [http://transition.fcc.gov/Bureaus/Common\\_Carrier/Other/cramming/cramming.pdf](http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.pdf)).

<sup>7</sup> See News Release at 1.

role ultimately leading to the *Truth-in-Billing* rules).<sup>8</sup> The Commission did not express a role in regulating the terms of the billing relationship between LECs and third party providers.

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.

Further, the Commission’s Title I ancillary jurisdiction does not extend to the provision of billing and collection services. 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 most recently articulated by the Court of Appeals for the DC Circuit in *Comcast v. FCC*. First, the Commission’s general jurisdictional grant under Title I does not “cover the regulated subject...” of third-party billing services.<sup>9</sup> 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.”<sup>10</sup> In the instant case, however, billing and collections is not a communication service because, as the Commission previously determined, it “does not employ wire or radio facilities.”<sup>11</sup> 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

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<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> NPRM, ¶ 85.

<sup>10</sup> *Comcast*, 600 F.3d at 646.

<sup>11</sup> Billing and Collection Services Order, ¶ 32

Commission's effective performance of its statutorily mandated responsibilities.”<sup>12</sup> In other words, in order for an action to fall within the Commission's ancillary authority, the action must be ancillary to some authority that the Commission does possess. For example, the regulation of cable TV services (prior to the 1984 Cable Act) was found to be ancillary to the Commission's regulation of broadcast TV services, which clearly were within the Commission's jurisdiction.<sup>13</sup> Here, there is no connection between the substantive terms of third party billing and any area of the Commission's authority.

Put simply, the Commission does not have the authority to ban third party billing services as it proposed in to do in the NPRM. The Commission's own precedent establishes that billing and collection services are not communications common carriage subject to its Title II jurisdiction. Further, the Commission has not met either part of the test from *Comcast* to exercise Title I jurisdiction over the services.

### **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**

A “throw the baby out with the bathwater” ban on third party billing also implicates 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.<sup>14</sup> Even if

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<sup>12</sup> 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)).

<sup>13</sup> *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

<sup>14</sup> *See id.*, ¶ 86 (citing *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

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.

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.”<sup>15</sup> A complete ban on third party billing ignores this counsel.

Moreover, a ban would require a showing that bill presentment rules 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.<sup>16</sup> 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.

Finally, any ban on third party billing would have to conclude that voluntary industry guidelines are inadequate. OBA 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,<sup>17</sup> 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.<sup>18</sup> The Administration and the

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

<sup>16</sup> See 47 C.F.R. § 64.2401(c).

<sup>17</sup> 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>).

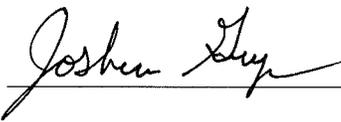
<sup>18</sup> See Chairman Genachowski Speech at the Brookings Institution, Oct. 17, 2011 (available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db1017/DOC-310290A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1017/DOC-310290A1.pdf)).

Commission have recognized the value of voluntary industry guidelines to meet regulatory goals without overreaching.

In summary, OBA 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.

Respectfully submitted,

ONLINE BUSINESS ASSOCIATION, INC.

By  \_\_\_\_\_

Steven A. Augustino  
Joshua T. Guyan  
**KELLEY DRYE & WARREN LLP**  
3050 K Street NW  
Suite 400  
Washington, D.C. 20007  
(202) 342-8400 (voice)  
(202) 342-8451 (facsimile)  
[SAugustino@kelleydrye.com](mailto:SAugustino@kelleydrye.com)

Its Attorneys

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