

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CENTURYLINK TO NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The Commission seeks comment on proposed rules that might assist customers in detecting and preventing “cramming.” Additionally, the current *Notice of Proposed Rulemaking* inquires about future actions the Commission might take with respect to carriers’ billing for third parties; actions that would be more intrusive than the currently-proposed rules.

CenturyLink appreciates the Commission’s concerns regarding cramming. We believe our contracts and vendor screening provide a solid foundation to build on in crafting additional consumer safeguards against cramming. And, we believe our billing aggregators will partner with us to strengthen due diligence initiatives. Given that the great majority of vendors who bill through aggregators are legitimate, it is in the public interest to maintain a billing model that, through aggregation, can increase transaction volumes and concomitantly lower billing costs.

Still, carriers and aggregators can do more, in collaboration with consumer advocates and regulators, to educate consumers about third-party billing generally and how to express concerns about such billings, should the need arise. In that spirit, CenturyLink plans to send a bill insert to its customers about third-party billing and cramming before the end of the year. And we continue to look at additional ways to inform our customers about third-party billing.

Given CenturyLink’s support for third-party billing as a beneficial and legitimate option – a service that provides cost-effective billing that can be of convenience to our customers – we are pleased that the proposed rules do not prohibit such billing. And we appreciate that the proposed rules are generally modest and carefully measured.

Still, CenturyLink continues to support voluntary industry action as the better approach to increased consumer education about third-party billing and blocking options, as opposed to government rules. The industry, working together and in consultation with consumer advocates

and the Commission, can fashion additional initiatives to mitigate ongoing consumer cramming problems. Such efforts could be especially beneficial with respect to identifying what might be the best ways to craft and deliver information to consumers about cramming. Accordingly, maximizing the use of voluntary, collaborative efforts would be CenturyLink's preferred approach, avoiding a range of serious jurisdictional and constitutional legal questions.

But if rules are to be promulgated, they should retain carriers' flexibility regarding their communications with their customers, both as to type and format. In particular, disclosures about third-party billing or blocking should not be required either at the point-of-sale or on each carrier bill. Such a rule would mandate significant and unnecessary carrier/customer over-communication (at significant cost), given that only a fraction of a carrier's new customers might ever encounter a third-party billed transaction. Communications anticipated to be meaningful to but a fraction of the audience receiving them are better suited to written disclosures such as welcome packets, periodic bill inserts or website communications.

Finally, CenturyLink urges restraint with respect to the issuance of formal rules in the area of third-party billing because the Commission's jurisdiction to act in this area is not as strong as the *Notice* suggests under either the Communications Act or the Constitution. We appreciate the Commission's consideration of and respect for those principles that might constrain its authority in this area.

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I. INTRODUCTION: THE COMMISSION SHOULD LOOK TO INDUSTRY, IN COLLABORATION WITH CONSUMER ADVOCATES AND REGULATORS, TO VOLUNTARILY FASHION ADDITIONAL CRAMMING SAFEGUARDS, FOREGOING FORMAL RULES LIMITING CARRIER DISCRETION AND FLEXIBILITY IN CUSTOMER COMMUNICATIONS.

The recent *Notice of Proposed Rulemaking*,¹ seeks comment on three proposed rules the Commission believes would assist customers in detecting and preventing "cramming," generally referred to as the placement of unauthorized charges on a customer's telephone bills, sometimes fraudulently. Additionally, the *Notice* inquires about actions the Commission might take in the future with respect to carriers' billing for third parties, actions that in some cases would be far more intrusive than the rules being currently proposed (such as prohibiting exchange carriers from engaging in third-party billing altogether).

CenturyLink appreciates the Commission's concerns regarding cramming. The intentional, fraudulent placement of unauthorized charges in its customers' bills is not

¹ *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, FCC 11-106, Notice of Proposed Rulemaking, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170, 26 FCC Rcd 10021 (2011) (*Notice*); 76 Fed. Reg. 52625 (Aug. 23, 2011).

acceptable.² We believe that our current screening criteria and contractual requirements establish a solid foundation on which to craft additional consumer safeguards against cramming.³ And CenturyLink believes that, while there may be unscrupulous vendors in the marketplace, the great majority of vendors who bill through exchange carriers are legitimate businesses, trying to utilize a billing model that allows multiple service providers to aggregate their services through a single supplier. This aggregation can produce transaction volumes from the aggregator to the exchange carrier approximating those associated with long-standing third-party interexchange carrier (IXC) billing.⁴

CenturyLink recognizes that some consumers do have problems with charges on their bill that they do not recognize and which they often believe (sometimes in error) were not authorized. Moreover, customers can be unsure who to call for resolution of their questions, and sometimes are provided with incorrect or inadequate information.

Carriers and aggregators can do more, in combination with consumer advocates and regulators, to make consumers aware of third-party billing⁵ generally and how to raise a billing

² It must be noted that cramming is not always the result of bad intent. Sometimes it occurs inadvertently, such as when a telephone number is incorrectly input and, as a result, an individual is slammed. In the event that the error is not discovered and resolved before the next billing cycle, there will also be an associated cram because the services were not authorized but appear on the bill.

³ See, e.g., *Notice*, 26 FCC Rcd at 10047-48 ¶¶ 63-64 regarding carrier due diligence. Below at Section III.B, CenturyLink provides general information about its current practices. Those practices are undergoing review at this time, in light of its recent merger activity, and could change in the future.

⁴ See *Moore v. Verizon*, 2010 U.S. Dist. LEXIS 94544 (N.D. CA 2010).

⁵ For the remainder of this filing, references to “third-party billing” means billing on behalf of third-party vendors through billing aggregators. The term does not include billing for IXCs or other carriers who have direct billing and collection contracts with CenturyLink, or billing on behalf of strategic service partners (such as television, wireless or Internet content providers) whether in a bundle or separately. Compare *Notice*, 26 FCC Rcd at 10040 ¶ 47 (noting that the

dispute should the need arise. We agree with the *Notice*'s suggestions that additional customer education regarding third-party billing could be helpful for consumers. In that vein, CenturyLink is working on a bill insert for distribution to its customers in fourth quarter 2011. While not identical to the information found at the Commission's website, the bill insert incorporates ideas and formatting from that site. And we continue to look at additional communication possibilities to better inform our customers of the concept and benefits of third-party billing.

Given CenturyLink's support for third-party billing as a beneficial and legitimate option – a service that provides cost-effective billing that can be of convenience to our customers – CenturyLink appreciates that the Commission's proposed rules are, at this time, generally modest and carefully measured.⁶ Still, we continue to support voluntary industry action regarding consumer education about third-party billing and blocking options, rather than government rules.⁷ Similar to the recent Cellular Telecommunication Industry Association (CTIA) Best Practices regarding consumer disclosures when consumers are about to reach their pre-paid texting-minutes limits, CenturyLink believes that industry, working together and in consultation with consumer advocates and the Commission, can craft additional solutions to mitigate ongoing consumer problems with cramming. This type of effort could be especially beneficial with

Notice did not “propose or intend to change the manner in which charges for bundles [which may contain services provided by others] may be billed under [Commission] rules.”).

⁶ CenturyLink appreciates the fact that, appropriately, the Commission has not sought to prohibit such billing outright at this time. *See* Section III.A below.

⁷ This position is consistent with a CenturyLink filing made in 2009 (through Qwest) in an earlier aspect of the current proceeding where we stated: 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 include examining the feasibility of a “best practices” code of conduct akin to the [CTIA Code in place in 2009] and the [July 22, 1998] industry-promulgated cramming guidelines.” Comments of Qwest Communications International Inc., CG Docket No. 09-51, CC Docket No. 98-170, WC Docket No. 04-36, filed Oct. 13, 2009 at 4 (2009 Opening Comments).

respect to the *Notice*'s inquiry regarding "the best ways to ensure that the forms of disclosure required by [the] proposed rules will actually benefit consumers."⁸ And, if desired, the Commission, and consumer advocates could link from their websites to those companies signing on to the voluntary code.⁹ This would be CenturyLink's preferred approach, as it avoids a range of serious jurisdictional and constitutional legal questions.¹⁰

But if rules are to be promulgated, CenturyLink believes they should be simple enough to retain carriers' flexibility regarding their communications, both as to type and format. In particular, point-of-sale disclosures regarding third-party billing or blocking should not be mandated. By way of example, if one considers "all new connect calls" as 100% of the universe regarding which point-of-sale disclosures about bill blocking might be made, carriers would clearly be over-communicating (at a significant cost), given that only a fraction of such new customers might ever encounter a third-party billed transaction. A communication that is anticipated to be meaningful to but a portion of the audience receiving it is better suited to written disclosures that might take the form of welcome packet communications, periodic bill inserts or website communications.

To summarize, while aspects of the Commission's proposed rules might not be unduly difficult or expensive to deploy (*e.g.*, customer disclosures of *some* kind; *some* type of separation of third-party charges on a bill), there remains the very significant question of whether formal Commission rules are the best means to create additional cramming safeguards. CenturyLink thinks not. Collaboration among carriers, aggregators, consumer advocates and regulators to produce a revised and revitalized set of Best Practices would be easier and quicker to implement

⁸ *Notice*, 26 FCC Rcd at 10051 ¶ 75.

⁹ *Id.* at 10026 ¶ 10.

¹⁰ *See* Section III.D, below.

than formal rules. If the Commission nevertheless believes that rules are necessary at this time, such rules should reflect limited intrusion into the normal and routine communications between carriers and their customers, as well as the content or format of customer billings.

II. ALTHOUGH VOLUNTARY ACTION WOULD BE PREFERABLE TO GOVERNMENT MANDATES, CENTURYLINK DOES NOT OPPOSE REASONABLE DISCLOSURE AND BILL FORMATTING PROPOSALS.

Below CenturyLink addresses the three specific rules proposed in the *Notice*. We believe that Commission mandates regarding carriers' communications with their customers should be spare, taking into account both potential Title II jurisdictional limitations associated with carrier third-party billing, as well as First Amendment constraints. Because carriers are most likely to participate voluntarily in increased disclosures to consumers and some type of bill segregation with respect to third-party billing, we are hopeful the Commission will not needlessly tread too far with respect to mandating content or format of those communications.

A. Disclosure Of Third-Party Billing Blocking Options Should Align With Existing Communication Methods For Broad-Based Information Disclosures.

Overall, CenturyLink supports disclosures to customers (and potential customers) regarding matters of general concern or impact to them. Information disclosures calculated to reach a carrier's entire customer base are often made to customers through welcome packages at the time the service relationship is established, and periodically through bill messages and inserts during the course of the relationship. Additional and more detailed information about carrier services, communications tools, and other matter of general interest are often found on providers' websites for anyone to review.

Rather than craft a disclosure model about third-party blocking around traditional carrier-customer communication points, the *Notice* proposes that "wireline carriers that offer subscribers the option to block third-party charges from their telephone bill must clearly and conspicuously

notify subscribers of this option **at the point of sale, on each bill**, and on their website.”¹¹

CenturyLink urges the Commission not to require third-party billing/blocking options¹² be addressed at the point-of-sale or on each bill. The better type of disclosure model would be more like that found in the Commission’s 900 rules. LECs are required to provide information to their customers about 900 blocking, with the method of communication at their discretion.

Specifically, 900 blocking was required one time to all the LECs’ subscriber base (in 1993); going forward, the blocking offer was required to be made within 60 days after the issuance of a new telephone number.¹³ Given the 60-day time frame in which to offer the 900 blocking, LECs clearly could communicate with their subscribers in writing. This type of communication seems the most efficient and economical.

The 900 disclosure regime has proven workable and satisfactory for more than two decades. It is surely a better and more reasonable “starting point” for regulations regarding disclosures about blocking third-party billing, and has the benefit of reflecting the lowest speech and cost impacts to carriers and customers alike. 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,”¹⁴ the Commission should allow carriers the greatest flexibility in how information about third-party billing and blocking is communicated to their customers, provided

¹¹ *Notice*, 26 FCC Rcd at 10038 ¶ 40 (emphasis added).

¹² CenturyLink currently has two types of blocking functions (reflecting one blocking option available before its merger with Qwest and an additional one after) that it offers its customers for free: one involves a blocking option made available to a customer at the point a third-party billing dispute is raised regarding a particular vendor, and involves CenturyLink advising the billing aggregator to no longer send billings from that particular vendor (meaning that the block does not stop charges from other vendors associated with that or other billing aggregators); the other involves a block of all third-party charges (including any 1+ carrier charges) associated with all billing aggregators, which is activated through billing codes.

¹³ *See* 47 C.F.R. § 64.1508.

¹⁴ *Truth-in-Billing First Report and Order*, 14 FCC Rcd 7492, 7499 ¶ 10 (1999).

the information is communicated in some outreach fashion and is otherwise readily available for review.

B. Government-Mandated Point-Of-Sale Disclosures Are Highly Speech Intrusive As Well As Very Costly For Speakers.

Point-of-sale or point-of-contact verbal disclosures are the most expensive kinds of disclosures for providers to deliver. They are also the most fact-filled communications for callers to absorb. There is only so much time that any caller wants to spend on the phone with a service provider when ordering service for the first time or over time. The more the conversation is packed with government-mandated caveats and disclosures, the less meaningful communication time is available between the provider and its customer. The mandated speech limits not only the provider's speech opportunities about its products and services but also the customer's hearing opportunities about offerings that could benefit the consumer from a technical, economic or quality of life perspective.

Already, common carriers are required to make a variety of point-of-contact disclosures. The actual value of these disclosures to consumers is unknown. But to the extent the disclosures are meant to capture the "full" price of the product/service (*i.e.*, the base price as well as taxes and fees both privately and publicly required), they are presumed to provide value to every caller that receives them. Other types of disclosures might also fit into this category.

Point-of-sale disclosures about third-party blocking, however, will clearly not be immediately relevant to some consumers, since sometimes (such as a new connect) there will not have been any billing at all to the consumer (even by the exchange carrier). Even if some billings have occurred, the customer may never have encountered a third-party billed charge. And if some customers do see third-party charges on their bills, the charges might be of the more traditional IXC type, could be expected and unobjectionable, or might otherwise be billing that

has been specifically requested (such as wireless or television partners of carriers). In these latter situations, disclosures regarding bill blocking will not be relevant even with respect to some third-party billing transaction that might take place sometime in the future.

Requiring a point-of-contact disclosure to every calling party, when only a fraction of those callers might be impacted by the content of the disclosure, creates a material impact on the communication opportunity available to the carrier. It lessens the time the provider has available to engage in speech that may be more meaningful and of interest to the consumer, unless the provider is willing to incur additional costs to communicate its full message and then include the government-mandated speech over and above that.

For these reasons, CenturyLink believes that the Commission should not mandate point-of-contact disclosures regarding third-party billing activities or blocking functionalities.¹⁵ First of all, the conversation regarding this matter raises a potentially confusing issue in the context of what should be a call involving a commercial transaction (*i.e.*, the selling and buying of goods and services). Secondly, it is predictable that the conversation will not be short. Questions from the caller can be anticipated. Such questions might include: “What is third-party billing?” “Does it include abc, xyz?” “What if I block the billing, will I still get billing from my IXC?” “Yes, I want the block; but, oh no I don’t if it will block my 1+ carrier who might bill through an aggregator.” This dialogue will surely increase the contact time on the call, likely materially.¹⁶

¹⁵ While this discussion primarily focuses on point-of-sale communications, the argument is meant to extend as well to bill-blocking disclosures on **each** carrier bill. In 2009, Qwest advised the Commission that it alone produced “over 100 million bills a year, two-thirds of which are consumer bills.” 2009 Opening Comments at 34. Providing a disclosure on each of these bills regarding third-party billing is certainly over-communication about a matter of interest to only a small fraction of the customer base.

¹⁶ CenturyLink cannot determine with certainty at this point the additional communication time that would be necessary to fully and fairly describe third-party billing, its value to consumers, and a consumer’s opportunity to block. It can estimate that if the point-of-contact

And the nature of the information sought to be disclosed is easier and more efficiently done through a written communication than an oral one.

As discussed above, CenturyLink believes it is appropriate to provide information about third-party billing (and any associated blocking features) in welcome packages, on websites and in bill inserts (perhaps annually), as well as offering the blocking feature to customers who report disputed billings.¹⁷ We urge the Commission to at least begin any regulatory disclosure mandate within a model that makes use of bill inserts and website information, devoid of unnecessary Commission prescriptions regarding the “wording, placement, font size, and other relevant factors.”¹⁸ In the event these types of disclosure mechanisms (coupled with any other disclosure vehicles providers decide on privately) prove unsatisfactory, the Commission will have future opportunities to engage in more speech-intrusive regulations, supported at that time by evidence of a more reasonable fit between the governmental interest and the method chosen to advance that interest.

communication went from 600 seconds per call to 720 seconds (a two-minute increase), for its Qwest affiliate alone, the additional headcount required would be 85 consultants (to respond to calls at Qwest’s current service level objective). This would result in an increase in expense of over \$3M a year for the consumer segment alone. And while the communication might be shortened if there were no discussion of consumer benefit, such decision would very likely bias the conversation against a decision to allow for third-party billing, a decision adverse to the carrier’s third-party billing interests due not necessarily to a fully-informed consumer decision but a partially-informed one.

¹⁷ Currently, CenturyLink is preparing a bill insert on cramming that we expect to send to customers yet this year. That insert provides information about third-party billing and a blocking mechanism that will give customers the option to decline third-party billing through aggregators. In line with legacy CenturyLink company models, the block would allow customers to request that aggregator-submitted billings, including 1+ carriers that might bill through them, stop. See also note 12, *supra*.

¹⁸ *Notice*, 26 FCC Rcd at 10038-39 ¶ 42. Such government action would implicate not only the First Amendment (*see* discussion below) but also would be contrary to the Commission’s earlier recognition that carriers should be afforded significant discretion regarding the content and formatting of their communications. *Truth-in-Billing First Report and Order*, 14 FCC Rcd at 7499 ¶ 10.

C. Separation Of Third-Party Charges In The Carrier's Bill.

The *Notice* proposes “that charges from third-party vendors that are not carriers be placed in a section separate from charges assessed by carriers and their affiliates on wireline telephone bills.”¹⁹ CenturyLink cannot speak for all carriers but it already segregates third-party billing into a section clearly separate from its own or other carrier billings. Within the third-party billing section, each billing aggregator has its own branded space under which the charges associated with its vendors are shown. Within that section, different billing aggregators are distinctly separated by spaces or lines.

The *Notice* also inquires about whether “[i]t would . . . be useful to consumers to have charges from third-party vendors separately listed or highlighted on the first page of the telephone bill.”²⁰ CenturyLink already provides information alerting consumers to the existence of third-party charges at the beginning of its bills (in the Summary section),²¹ as well as the page of the bill on which those charges can be found.

While CenturyLink currently accommodates the general notions raised in the *Notice*, we believe it remains as critical today as when the Commission first formulated its Truth-in-Billing Guidelines that the Commission avoid “detailed regulations [that] could increase [service

¹⁹ *Notice*, 26 FCC Rcd at 10040 ¶ 45.

²⁰ *Id.* at 10040 ¶ 48.

²¹ The Summary information is presented differently as between the legacy CenturyLink companies and its Qwest-acquired affiliate. Qwest's bills breaks out each third-party billing aggregator (or company) by name that has a direct billing and collections contract with Qwest, and the total amount billed by those companies within the “Other Companies” category in the Summary section of the bill. Alternatively, the legacy CenturyLink billing model does not itemize each third-party billing company but rather aggregates all such companies included in the bill as a single line item.

providers'] costs," including "rigid formatting rule[s] that require separate pages, or produce 'dead space' on the bill, [which] may frustrate consumers and . . . [increase] billing expenses."²²

III. COMMENT ON OTHER TOPICS RAISED IN THE NOTICE.

A. The Commission Should Not Prohibit Exchange Carrier Third-Party Billing.

CenturyLink is pleased that the current proposed rules would not prohibit third-party billing outright.²³ Carriers have been billing for third parties for almost three decades now. While billing through aggregators is a more recent development, third parties have sought access to carriers' billing envelopes as far back as *Computer II* and *Open Network Architecture*. Third-party service providers (particularly those offering services similar or comparable to carriers themselves) often argued that the provision of Billing Name and Address (BNA)²⁴ was not a sufficient substitute for inclusion in the carrier billing envelope, on the theory that BNA did not provide the kind of economy of scale (with attendant lower billing costs) that was available when billing was done through the carriers' operations.

In response to those concerns, and because the third-party billing structure had already been created by some companies (specifically the RBOCs), extending billing operations to others allowed carriers to secure incremental revenue while allowing third-parties to bill their customers with lower costs. (The alternative, as mentioned below, was to provide all third-parties or their agents with BNA information about the carriers' customers.) We believe third-party billing

²² *Truth-in-Billing First Report and Order*, 14 FCC Rcd at 7499 ¶ 10, 7515-16 ¶ 36 (footnotes omitted).

²³ This was proposed by some commentators in earlier aspects of this proceeding and the *Notice* inquires about the proposal. *Notice*, 26 FCC Rcd at 10047, 10053-54 ¶¶ 62 and 82.

²⁴ The Commission's rules require carriers to provide BNA, including non-published and non-listed name and address information, to telecommunications service providers (including, for purposes of this rule, enhanced service providers) or their agents for purposes of billing their customers and other limited purposes. 47 C.F.R. § 64.1201.

remains a legitimate enterprise, bringing benefit to commercial entities as well as customers, and would not support its being prohibited.

B. CenturyLink's Due Diligence Regarding Third-Party Billing.

1. Overview of the Process.

Commercial contracts form the foundation of the relationship between CenturyLink and its billing aggregators, some of which have been billing through CenturyLink companies for over 15 years. Those contracts impose direct obligations on billing aggregators, as well as requiring that billing aggregators impose certain requirements and obligations on any vendor that wants to send charges to CenturyLink for inclusion in the CenturyLink envelope.

CenturyLink has a vendor screening process, over and above that which the billing aggregator has regarding its vendors.²⁵ As part of that process, CenturyLink reviews materials by potential vendors that describe their services, pricing, and post-sale customer fulfillment practices so that CenturyLink can become acquainted with the kind of offering proposed to be billed for. CenturyLink also asks for other information such as the vendor's official business name, address and phone number; state of incorporation and registrations to do business; website URL (if any); and other exchange territories where the vendor may already be doing business.

CenturyLink's contracts also require billing aggregators to pass through requirements to their vendors regarding customer authorization. Specifically, vendors are required to ask potential subscribers: (a) if they are over 18 years of age and are authorized to act on behalf of the account holder; (b) if the called party is authorizing the vendor to bill through the party's local telephone bill charges in the amount of "x" each month (plus additional one-time charges if applicable); and (c) if they understand that there is no relationship between CenturyLink and

²⁵ See generally, Comments of Billing Concepts, Inc., CG Docket Nos. 09-158, *et al.*, filed Oct. 13, 2009 (Billing Concepts Comments).

themselves, but that their charges will be on the bill under the billing section associated with a named aggregator.

Once billing commences, CenturyLink monitors customer inquiries and complaints against particular aggregators and vendors and imposes mitigating requirements on select vendors that produce undue numbers of customer complaints. In certain circumstances, CenturyLink advises its billing aggregators that it will no longer bill for a particular vendor.

CenturyLink's customer inquiry and complaint process focuses on customer satisfaction. As a general rule, only one call is needed to resolve most third-party billing disputes involving monthly-recurring charges. During that call, customers are offered immediate credit for those charges and advised of their available blocking options. CenturyLink also advises the customer that, although credit has been issued, the disputed charges will be returned to the company that initially billed them and that, at that company's discretion, it may pursue independent collection action of the charges.

2. CenturyLink's "Watch List" Criteria.

As recommended in the 1998 Anti-Cramming Best Practices Guidelines,²⁶ CenturyLink has systems that track the number of billing inquiries related to vendors that bill monthly recurring charges (MRCs).²⁷ While the precise criteria are different between the legacy CenturyLink companies and its new Qwest affiliates, both systems are calculated to "warn" vendors when they approach or exceed a threshold that would put them in jeopardy with

²⁶ See *Anti-Cramming Best Practices Guidelines*, available at http://www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html. On occasion, non-recurring charges (NRC) are also captured in CenturyLink's records when those charges are of a telecommunications nature.

²⁷ See *Notice*, 26 FCC Rcd at 10048 ¶ 64 (inquiring "what, if any, thresholds exist with respect to customer complaints . . . as a trigger to adverse action against a third party."); 10049 ¶ 65 (seeking "comment regarding penalties or other measures that carriers . . . employ to deter third-party vendors from engaging in cramming or generating consumer complaints.").

CenturyLink. That jeopardy might generate a probationary opportunity to cure the problem or, sometimes termination is the ultimate outcome.

With respect to the issue of how a “watch list” would be best designed, the *Notice* inquires about what might be an appropriate “threshold trigger” to apply to vendor billings.²⁸

CenturyLink supports a percentage model as a threshold where the total number of customer complaints for each vendor is compared to the total number of bills rendered for the same vendor within a set period of time. We do not support setting a threshold/adverse-action trigger based on “the aggregate dollar value of the claims in the complaints received[.]”²⁹ Such a model might allow a vendor to have more complaints go unchallenged than might the percentage model described above, particularly if the vendor-billed amounts were each relatively small.

3. CenturyLink’s Adjustment Policies.

CenturyLink has a customer-friendly dispute resolution process to address complaints about alleged cramming. As noted above, it is CenturyLink’s general policy to readily adjust disputed charges when contacted by a customer, a regulator or some other agent of the customer. This is true whether the claim is that the charges are unauthorized, were ordered by someone not authorized to make decisions about the account, or simply that the customer changed her mind. During the course of the conversation with the customer, CenturyLink’s representatives will discuss available blocking options with the customer. While we are aware that our policy is not always accurately described or implemented,³⁰ we believe that in the vast majority of the cases it is correctly applied.

²⁸ *Id.* at 10048 ¶ 64.

²⁹ *Id.*

³⁰ *Id.* at 10038 ¶ 40 and note 94 and 10039 ¶ 43 and note 97 (noting that Qwest employees wrongly advised customers that there was a legal obligation for Qwest to bill for third parties). While there is no excuse for conveying wrong information to customers, the employees’

C. CenturyLink Does Not Oppose The Disclosure Of Limited Vendor Information On The Billing-Aggregator Pages.

The *Notice* suggests that exchange carriers “generating the telephone bill [might be required] to clearly and conspicuously provide the contact information for each third-party vendor in association with that [vendor’s] charges.”³¹ CenturyLink does not oppose this concept in principle, although it would clearly involve programming time and costs. Moreover, while some kinds of vendor contact information might appropriately be included on the bill, other contact information would not be.

In deciding what vendor contact information should be made available, it must be remembered that each character and line of text adds costs to the third-party billing offering. Unless the vendor-contact information would be of material benefit to the consumer, having it printed on the bill is not meaningful either. And the objective of having the information on the bill should be clearly articulated and understood.

CenturyLink’s third-party billing model is not designed such that the customer would be expected to call the vendor in the first instance. On the Summary section of the bill, the billing aggregator’s toll-free number is provided as the contact information; that toll-free number is also found on the aggregator’s bill page. Despite this contact information, CenturyLink’s customers often call CenturyLink to inquire or complain about a third-party bill charge.

Theoretically, at least, this model is easier for a customer to utilize than one requiring direct access to and communication with the vendor in the first instance. Still, CenturyLink (currently through *only* its Qwest affiliate) allows billing aggregators to pass along vendor toll-

comments most likely stemmed from the long-standing legal obligation RBOCs had to bill for other IXC’s if they billed for AT&T, and the later 1996 Telecommunications Act obligation for RBOCs to bill for other IXC’s if they billed for their own (both legal obligations.).

³¹ *Id.* at 10044 ¶ 55.

free number information, as well as vendor website or email address. It is claimed that this information might “alleviate many escalations in the dispute resolution process.”³² But creating this kind of capability for carriers that do not currently have it would involve enhancements to existing billing systems, in some cases significant ones.

Despite the cost of creating this capability, should the Commission determine that this kind of limited vendor-contact information would be helpful to consumers, CenturyLink believes that carriers should be permitted to contractually obligate billing aggregators to collect and pass along this information for inclusion on the consumer’s bill, given that it is the billing aggregators that have the direct contractual relationship with the source of the information – the vendors.³³

D. Legal Considerations.

1. The Communications Act.

The *Notice* inquires about the Commission’s authority under the Communications Act to mandate rules with respect to third-party billing by common carriers. It notes that its “bill format and labeling requirements in the Truth-in-Billing rules are based, in whole or in part, on the Commission’s authority under Section 201(b) of the Act.”³⁴ The *Notice* fails to mention,

³² *Notice*, 26 FCC Rcd at 10045 ¶ 57 (citing to Billing Concepts argument). In reviewing Billing Concepts’ filing, it appears that the “alleviation of escalations” it was focusing on was between the billing aggregator and the vendor, such that a disputing customer might get to a vendor who holds documentary evidence more efficiently. Billing Concepts Comments at 3.

³³ CenturyLink does not support a requirement that exchange carriers provide a physical or mailing address on its bills with respect to vendor charges. Such information would take up more text on the bill, would likely be subject to frequent change (with attendant IT costs to make the changes), and we believe would likely be useful to few customers. *Notice*, 26 FCC Rcd at 10045-46 ¶ 57. In the event that, in the future, the Commission determines that this information should be available to consumers in some fashion, CenturyLink believes that exchange carriers should be able to delegate to billing aggregators, by contract, the obligation to have this kind of address information available upon customer request. Compare the Commission’s 900 rules where IXCs (who, like billing aggregators, are in a direct relationship with service providers) are required to provide this kind of information only upon request. 47 C.F.R. § 64.1509(a)(1), (4).

³⁴ *Notice*, 26 FCC Rcd at 10054 ¶ 83 (citation omitted).

however, that when the Commission has exercised its authority in the past its mandates have been limited to carriers' billings of their own charges. Even then, the Guidelines accorded carriers substantial discretion and flexibility.³⁵

The Commission clearly has Title II authority (within constitutional limits) to regulate aspects of the carrier's billing practices. However, Title II does not provide a jurisdictional foundation for the Commission to promulgate billing rules with regard to carriers' billings on behalf of third parties.

Nearly 25 years ago, the Commission recognized that billing by a common carrier for third-parties does not constitute a common carrier service and therefore is "not subject to regulation under Title II of the Act."³⁶ No subsequent Commission decision has retreated from this position. To the contrary, the Commission has repeatedly affirmed its determination that billing for third-parties falls outside the scope of Title II.³⁷ Courts also have relied on this interpretation of the Act to reach the same conclusion.³⁸

³⁵ *Truth-in-Billing First Report and Order*, 14 FCC Rcd at 7497 ¶ 6 (the Guidelines allowed service providers "considerable discretion to satisfy their [billing] obligations in a manner that best suits their needs and those of their customers."); 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.").

³⁶ *Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150, 1169 ¶ 34 (1985), *recon. denied*, 1 FCC Rcd 445 (1986).

³⁷ *See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16496 ¶ 113 (2007) (noting that "billing and collection services provided [to third-parties] by LECs are not subject to regulation under Title II of the Act . . ."); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 1632, 1645 ¶ 31 (1997) ("carrier billing or collection for the offering of another unaffiliated carrier is not . . . for purposes of Title II . . . a common carrier communication service."); *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5448 ¶ 96 (1994) ("We have

The recent District Court decision in *Moore v. Verizon* is particularly instructive. A group of Verizon local telephone customers brought a claim alleging violation of Section 201(b) on the basis that “Verizon’s third-party billing and collection system lacks sufficient safeguards to prevent unauthorized charges from being added to customers’ wireline telephone bills (a practice known as ‘cramming’).”³⁹ Verizon moved to dismiss the action, arguing that Section 201(b) does “not apply to third-party billing services.”⁴⁰ The court agreed, citing the *Detariffing Order* and other Commission precedent to that effect, as well as opinions from the Fifth and Second Circuits.⁴¹

The Commission’s own analysis in *LDDI* – the only case in which it issued a forfeiture for cramming under Section 201(b) – also supports the conclusion that the Commission does not have general authority under Section 201(b) over cramming relating to third-party billing.⁴² In *LDDI*, the Commission found that it had jurisdiction under Section 201(b) over the “unauthorized placement of charges on a telephone bill for enhanced services” offered by a third-

previously determined that LEC billing and collection services for non-affiliated IXC’s should not be regulated as a common carrier service under Title II of the Communications Act.”); *Audio Communications, Inc.*, 8 FCC Rcd 8697 ¶ 1 (CCB 1993) (a carrier’s “900 billing and collection service is not a common carrier offering”).

³⁸ See *Chladek v. Verizon N.Y. Inc.*, 96 Fed. Appx. 19, 22 (2nd Cir. 2004) (finding that billing and collection services provided by a telecommunications carrier to a pay-per-call information and entertainment service provider “are not ‘telecommunications services’ as defined by Title II of the Communications Act”); *Brittan Communications Int’l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 905 (5th Cir. 2002) (subsequent history omitted) (“billing and collection services provided by LECs to unaffiliated long-distance providers fall outside the scope of Title II”); *Moore*, 2010 U.S. Dist. LEXIS 94544, *28 (“the services being billed for are those of a third-party, which are not subject to Title II”).

³⁹ *Moore*, 2010 U.S. Dist. LEXIS 94544 at *4.

⁴⁰ *Id.* at *7-*8.

⁴¹ *Id.* at *24-*28, *51 (Brittan/Chladek).

⁴² See *Long Distance Direct, Inc.*, 15 FCC Rcd 3297, 3302 ¶¶ 13-15 (2000) (*LDDI*).

party not simply because the carrier included those charges on a long distance service bill,⁴³ but rather because, based on its analysis of the facts, it determined that the cramming was “inextricably intertwined” with the carrier’s long distance service.⁴⁴ The third-party enhanced service was effectively part of the carrier’s long distance service itself and thus subject to the Commission’s jurisdiction under Section 201(b).⁴⁵ Most carrier third-party billing fact patterns will not replicate those of *LDDI* or even remotely suggest that the third-party billed services are “inextricably intertwined” with the carrier billing for the service. Based on such precedent, CenturyLink believes the Commission plainly lacks Title II jurisdiction over carrier third-party billing services.

2. First Amendment Considerations.

The Commission seeks comment on whether its proposed rules, as well as other possible regulatory measures it might take in the future regarding carriers’ third-party billing practices are consistent with the First Amendment.⁴⁶ This is not the first time the matter of the First Amendment has come up with respect to carrier billings or other communications with customers, including point-of-sale communications. The matter is routinely and legitimately raised when the government seeks to mandate speech or to interfere with the way in which speech is presented.⁴⁷

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Notice*, 26 FCC Rcd at 10055-56 ¶¶ 86-87. Commissioner Robert M. McDowell expressed his support for this area of inquiry.

⁴⁷ For example, the Commission addressed the First Amendment back in 1991 with respect to the promulgation of its 900 rules, ruling that it was constitutional to require 900 service providers to include a preamble regarding their service (disclosing their name, service description and price) prior to the commencement of billing. *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166, 6167-69 ¶¶ 6-12 (1991). The

In 2009, in response to a Commission inquiry regarding carrier disclosures in the area of broadband services, CenturyLink provided a detailed analysis of the Commission's authority under the First Amendment to mandate consumer disclosures (including at the point-of-sale), and to dictate the content and format of any such disclosures (including bills).⁴⁸ At its most basic, CenturyLink argued the basic premise of *Central Hudson*: "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."⁴⁹ Analyzing the Commission's proposal under that standard, CenturyLink concluded that a number of the Commission's proposals would not withstand constitutional challenge. It is unclear here that the Commission's proposals for point-of-sale disclosures regarding third-party billing or blocking, or a similar requirement for each bill, could withstand constitutional scrutiny as neither is reasonably necessary to achieve the Commission's objective of an educated consumer body.⁵⁰

issue was raised again in the context of the Commission's *Truth-in-Billing First Report and Order*, where the Commission explained 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"), 14 FCC Rcd at 7530-31 ¶ 60; *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."). And as referenced immediately below in the text, in 2009 the matter was raised in the context of possible government-mandated disclosures regarding broadband service offerings and implications of such disclosures for point-of-sale and billing communications.

⁴⁸ The filing (Qwest 2009 Opening Comments) became a part of at least two of the above-captioned proceedings. CenturyLink hereby attaches its October 13, 2009 Comments in their entirety, to be incorporated by reference in CG Docket No. 11-116 (the pages from its 2009 submission that address the First Amendment issues are 39 through 50).

⁴⁹ 2009 Opening Comments at 39.

⁵⁰ While cramming is an ongoing problem in the communications industry, the incidents are not high as a percentage of total billed transactions. *See* note 15; and Comments of Billing Concepts

Moreover, with regard to point-of-sale disclosures, in particular, the government would be requiring not only compelled speech but compelled silence, to the extent a consumer has a fairly-limited tolerance for communication during a sales transaction.⁵¹

In 1991, as well as in 2009, the Commission relied on the Supreme Court case of *Zauderer* for the proposition that so long as the Commission mandated speakers to only speak truthful, factual information within the context of a commercial-speech setting, it would be in a position to forestall any constitutional challenge; or, if challenged, would prove successful. The current *Notice* makes the same suggestion, citing to *New York State Restaurant Association* and *Zauderer* for the proposition that “regulations that compel ‘purely factual and uncontroversial’ commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech.”⁵²

(at 3-4) that between October 2008 to 2009, it “shipped approximately 25 million records **per month**, and had an average monthly inquiry rate of 1.8 percent” (emphasis added) (footnote omitted). According to the quarterly reports issued by the Commission regarding complaints, the number of cramming complaints decreased each quarter in 2010. In the first quarter, the number was 2142; by the fourth quarter, the number had been reduced by more than two-thirds to 701. For the entire year 2010, the quarterly complaint reports show complaints numbering 5365 and that number was such that cramming complaints were not even among the top 5 complaint categories reported out by the Commission in 2010. FCC Quarterly Reports on Informal Consumer Inquiries and Complaints: <http://transition.fcc.gov/cgb/quarter/welcome.html>.

⁵¹ *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557, 566 (1980). In *Riley v. National Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), 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.” *Id.* at 796-97 (emphasis in original). The Court rejected any distinction between “compelled statements of opinion” and “compelled statements of ‘fact’”: explaining that “either form of compulsion burdens protected speech.” *Id.* at 797-98.

⁵² *Notice*, 26 FCC Rcd at 10055 ¶ 86 and note 163.

In our 2009 filing, we addressed both the Commission’s cited cases at length.⁵³ Suffice it to say here that even in *Zauderer* the Court cautioned that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment[.]”⁵⁴ Moreover, CenturyLink believes that the Second Circuit’s *New York State Restaurant Association* case was decided on a theory never supported by the Supreme Court. Specifically the *New York State* court analyzed the case under a rational bases theory not applicable in First Amendment cases.⁵⁵

⁵³ See Qwest 2009 Opening Comments at Section IV.B.2.

⁵⁴ 471 U.S. 626, 673 (1985).

⁵⁵ The Second Circuit misread the Supreme Court’s *Zauderer* test as amounting to no more than a “rational basis” standard. *N.Y. State Rest. Ass’n. v. N.Y. City Bd of Health*, 556 F.3d 114, 134-35 (2^d Cir. 2009). In fact, the Supreme Court in *Zauderer* did not use the term “rational,” and that word does not appear in the opinion.

For each of these reasons, CenturyLink believes that not only do the policy arguments presented above argue against the adoption of point-of-sale and every-bill disclosures, but sound constitutional principles do so, as well. We appreciate the Commission's consideration of and respect for those principles.

Respectfully submitted,

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