

**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
_____)	

REPLY COMMENTS OF ONLINE BUSINESS ASSOCIATION, INC.

Online Business Association, Inc. (“OBA”),¹ by and through its attorneys, submits these reply comments in response to the comments submitted on the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.²

The record shows that there are significant consumer benefits to third-party billing and that the vast majority of third-party billing is legitimate. Further, commenters agree that the Commission’s authority to regulate third-party billing arrangements is limited. In particular, the Commission may not prohibit third-party billing due to statutory and constitutional restrictions. Finally, local exchange carriers (“LECs”) that permit third parties to include charges on their bills impose strict application, monitoring and remedial regimes to curb instances of cramming.

¹ 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. OBA relies upon LEC billing services as a low-cost way to provide services to small business customers.

² 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”).

These measures are effective and much less restrictive on legitimate third-party billing than many of the NPRM's more burdensome proposals.

In light of the important consumer benefits of third-party billing and collection, the true scale of the problem and the limits on the Commission's authority to regulate in this area, the Commission should not adopt the proposals in the NPRM. Instead, it should work with the industry to improve the voluntary measures in place to reduce instances of cramming.

I. CONSUMERS BENEFIT FROM LEGITIMATE THIRD-PARTY BILLING AND COLLECTION

LECs have strong incentives to protect their customers against instances of cramming. According to AT&T, “[b]ill quality is a major driver of overall customer satisfaction and it is not in AT&T’s best interests for its long-term and valued ILEC customers to have unauthorized third-party charges placed on their AT&T bills.”³ Further, LECs are in the best position to know and understand the demands of their customers.⁴ LECs know that their customers do not want to see unauthorized charges on their bills; they also understand that their customers realize important benefits from including charges for third-party goods and services on a single LEC monthly bill.⁵

Specifically, LEC customers enjoy the ability to purchase the low-cost third-party goods and services that result from the fact that the third-party service providers do not have to set up onerous billing and collections departments. In addition, LEC customers enjoy the ease and

³ Comments of AT&T Inc., CG Docket No. 11-116 at Attachment A FTC Workshop Comments by AT&T at 1 (filed Oct. 24, 2011) (“AT&T Comments”).

⁴ See Comments of Frontier Communications Corporation, CG Docket No. 11-116 et al. at 3 (filed Oct. 24, 2011) (“Frontier Comments”) (LECs have a “unique understanding of their customer base”).

⁵ The incentive for LECs to permit third-party billing is not financial, but customer demand. According to one LEC, “[t]hird-party billing is not a significant revenue stream for Frontier. Rather, Frontier offers it to allow consumers the broadest choice possible in purchasing and paying for telecommunications-related products and services.” Frontier Comments at 7.

convenience of third-party billing, which allows them to pay for many different goods and services on a single bill. As an example, Verizon stated that it permits third-party charges to be placed on its bills because “customers prefer to review and pay a single bill for these services”⁶ and “customers prefer one-stop shopping for these services and it is an easy, efficient way to make certain types of purchases.”⁷ Further, Frontier confirmed that, “[t]hird-party billing offers a convenient and efficient payment method for many customers.”⁸

Because of the cost savings that result from third-party billing and collection, without the availability of LEC billing, many third-party service providers would be unable to provide the services consumers enjoy today.⁹ Therefore, if the Commission were to ban third-party billing, or impose such onerous regulations as to increase costs and effectively ban the practice, consumers would be denied the low-cost goods and services that they can currently purchase with the ease and convenience of a single monthly bill.

II. THE RECORD SHOWS THAT THERE ARE VERY FEW ALLEGED INSTANCES OF CRAMMING WHEN COMPARED TO OVERALL THIRD-PARTY BILLING AND COLLECTIONS

The NPRM sets forth incomplete evidence regarding the scope of the cramming problem.¹⁰ Each instance of alleged cramming is certainly a concern that should be promptly addressed. However, the parties that are on the front lines of customer billing inquiries, have offered some important perspective on the alleged cramming problem. An analysis undertaken by Billing Concepts, Inc., which serves as a billing aggregator for approximately 80 percent of

⁶ Comments of Verizon and Verizon Wireless, CG Docket No. 11-116 et al. at 1 (filed Oct. 24, 2011) (“Verizon Comments”).*Id.*

⁷ *Id.* at 2.

⁸ Frontier Comments at 8.

⁹ See Comments of Billing Concepts, Inc., CG Docket No. 11-116 et al. at 10 (filed Oct. 24, 2011) (“BSG Comments”).

¹⁰ See NPRM, ¶ 19 (the Commission has received between 2,000 and 3,000 cramming complaints each year between 2008 and 2010).

the market, showed that it has reduced cramming incidents to approximately *one-quarter of one percent*.¹¹ Over 99% of the third-party billing is undisputed and legitimate.

The LECs agree with this analysis. According to the LECs, the instances of alleged cramming (much less proven cramming) are a small drop in the bucket when compared to total third-party charges that are placed on LEC customer bills. According to AT&T, “[c]ramming is certainly an issue that must be dealt with, but when viewed in context, the reported instances of cramming, which number in the thousands annually, pale in comparison to the number of consumers with third-party billed charges, which number in the tens of millions.”¹² Further, “[i]n AT&T’s experience, the overwhelming majority of third-party charges on its wireline bills are legitimate.”¹³ AT&T’s experience with alleged instances of cramming is similar to the numbers that the Commission is seeing in complaints (a few thousand annually), however, when compared to the tens of millions of third-party billed charges annually, the scope of the alleged problem shrinks dramatically.

While cramming is an important issue for the industry to address, the scope of the problem is not nearly as broad as the NPRM makes out. The Commission should keep this perspective in mind when considering the necessity for, and scope of, regulatory requirements when weighed against the effective voluntary industry practices discussed below that have been undertaken by the LECs, billing aggregators and service providers to curtail instances of cramming.

¹¹ See BSG Comments at 6.

¹² AT&T Comments at 2.

¹³ *Id.* at 7.

III. COMMENTERS AGREE THAT THE COMMISSION'S AUTHORITY TO REGULATE THIRD-PARTY BILLING AND COLLECTION IS LIMITED

In its comments, OBA argued that the Commission should be mindful that its authority over third-party billing services is limited.¹⁴ Indeed, for the past two decades, the Commission has recognized that it does not have authority pursuant to Title II of the Communications Act to regulate billing and collection services.¹⁵ Further, the LECs agree that Commission's Title I ancillary jurisdiction does not extend to third-party billing and collection.

Other commenters agree that the Commission does not have authority under Title II to regulate third-party billing and collection services.¹⁶ Further, the courts have agreed that the Commission's Title II authority does not extend to regulation of third-party billing and collections. For example, the Court of Appeals for the Fifth Circuit held that Title II of the Communications Act did not give a long distance provider a right of action against Southwestern Bell when the LEC ceased third-party billing for the long distance provider due to cramming and slamming complaints.¹⁷ The Court agreed with the district court because "[a]fter reviewing the pertinent FCC decisions, the district court determined that the relevant principle that can be extracted from these FCC decisions is that billing and collection services that do not utilize communications over the common carrier's wire or radio facilities are not 'communications

¹⁴ See Comments of Online Business Association, Inc., CG Docket No. 11-116 et al. at 3 (filed Oct. 24, 2011) ("OBA Comments").

¹⁵ See *Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007 (1986) ("Billing and Collection Services Order").

¹⁶ See e.g., AT&T Comments at 17 ("Section 201(b) only applies to common carrier 'practices...for or in connection with *common carrier services*.' Third-party billing services provided by carriers, however, are not common carrier services.") (emphasis added); and Verizon Comments at n.13 ("It has long been established that carrier billing or collection for third parties falls outside Title II of the Communications Act").

¹⁷ See *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899 (5th Cir. 2002).

services' regulated by Title II of the Communications Act.”¹⁸ The Commission correctly determined in 1986, and the courts have since agreed, that third-party billing and collection services are not communications services subject to Title II regulation.

Commenters also agree with OBA that the Commission has not met the two-part test from the *Comcast* decision to exercise Title I authority over third-party billing and collection services.¹⁹ OBA contended that even if third-party billing services were within the subject matter of Title I,²⁰ the proposals to regulate the content of those services are not “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”²¹ Verizon agrees that “any claim of ancillary authority under Title I by the Commission would fail, in part, because there is no substantive statutory provision in Title II to which the proposed action would be ancillary.”²² While the Commission can regulate the format

¹⁸ *Id.* at 904 (internal quotation marks omitted).

¹⁹ The two-part test 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 Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (citing *Am. Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

²⁰ See AT&T Comments at 19 (“Title I grants the Commission general jurisdiction over ‘interstate and foreign communications by wire or radio’” and “the Commission has held that carrier-provided third-party billing services are not transmission services, but rather ‘a financial and administrative service.’”) (citing Billing and Collection Services Order, ¶ 32).

²¹ OBA Comments at 5-6 (citing 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)).

²² Verizon Comments at n.13.

and content of a telephone carrier's bills under its Title I authority, it may not extend its authority to prohibit LECs from offering billing and collection services.²³

IV. THE FCC SHOULD CONTINUE TO RELY ON THE EXTENSIVE AND EFFECTIVE INDUSTRY EFFORTS TO REDUCE INSTANCES OF CRAMMING

More than a decade ago, at the urging of the Commission, the telecommunications industry developed new anti-cramming guidelines.²⁴ Carriers continue to update and improve these voluntary efforts.²⁵ As a result, in order to place a charge on a LEC's bill, OBA completes its own verification process and must comply with the detailed requirements imposed by the billing aggregator and the LEC. This generally includes pre-screening, review of marketing materials, monitoring and compliance with complaint thresholds. The charge is then generally placed in a separate section of the LEC bill to avoid customer confusion. If a customer complains that he or she did not authorize the charge, then a refund is provided and the LEC offers the customer third-party bill blocking.

As an example, CenturyLink includes cramming prevention measures in its contracts with third-party providers or billing aggregators. These contractual protections include a vendor screening process, customer authorization requirements, active monitoring of customer inquiries and complaints, and remedial measures to address vendors that exceed the applicable threshold for *alleged* instances of cramming.²⁶ If a customer alleges that a charge was unauthorized, or

²³ In addition, OBA established in its comments that a complete ban on third-party billing would be an unconstitutionally overbroad restriction on commercial speech and the LECs agree. *See* OBA Comments at 6-9; Frontier Comments at 7 and AT&T Comments at 2, 8.

²⁴ *See FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998).

²⁵ *See* Verizon Comments at 3 (“Verizon is revising its template agreement with billing aggregators to enhance the anti-cramming protections”).

²⁶ *See* Comments of CenturyLink, CG Docket No. 11-116 et al. at 12-14 (filed Oct. 24, 2011) (“CenturyLink Comments”).

simply changes his or her mind, CenturyLink removes the charge from the bill and offers that customer third-party bill blocking.²⁷ These measures (and similar measures by other LECs) are adequate to address the limited cramming problem when viewed in the appropriate context of the millions of third-party charges that are placed on bills each month.

In summary, based on the demonstrated benefits of third-party billing for consumers, the limited scope of the problem compared to overall third-party billing and the Commission's limited authority to regulate in this area, the Commission should focus on working with the industry to improve the voluntary code of billing guidelines, which can adequately address instances of cramming.

Respectfully submitted,

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December 5, 2011

²⁷ See *id.* at 14.