

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054**

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 Format)	CC Docket No. 98-170

REPLY COMMENTS OF AT&T INC.

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AT&T Inc. (AT&T), on behalf of its subsidiaries, respectfully submits this reply to the comments filed in this proceeding.

I. INTRODUCTION AND SUMMARY

The salient facts from the record are these: the number of reported cramming complaints is low, especially wireless-related complaints; the “prevalence” of cramming is speculative; available evidence shows that most third-party charges are authorized; and the industry has in recent years implemented cramming-prevention measures that are working. Given these facts, the record does not justify adoption of a ban on carrier third-party billing or a mandatory opt-in requirement for such billing.

The appropriate course of action, as several commenters note, would be for the Commission to take the approach it recently took to address wireless consumer bill shock by working with the communications industry, aggregators, and consumer groups to develop cramming-prevention and detection measures that the industry must commit to follow or face the prospect of regulation. Alternatively, if the Commission determines that some regulatory

intervention is warranted, as the record shows, most carriers would not oppose requirements that carriers disclose the availability of bill-blocking to customers, that they perform (or cause to be performed) due diligence reviews of service providers, or that they separate third-party charges from their own on their bills, so long as carriers are not required to re-engineer billing systems or make other costly changes to billing processes.

Lastly, as the record aptly demonstrates, neither Title I nor Title II provides the Commission the necessary authority to regulate carrier (or non-carrier) third-party billing practices. Such billing is not a common carrier service or practice related thereto, nor is it an interstate communication by wire or radio.

II. DISCUSSION

A. Based on the record in this proceeding, neither a ban on carrier third-party billing nor mandatory opt-in customer consent for such billing is warranted.

1. The record does not justify a ban on carrier third-party billing.

While many of the state commissions and state attorneys generals predictably call for a ban on third-party billing, the data in the record clearly belies claims that cramming is “prevalent,” “widespread,” or affects “tens of millions of customers.”¹ To be sure, cramming occurs. However, for the Commission to even entertain banning carrier third-party billing, the record would need to contain sufficient evidence of a significant problem to warrant such a severe remedy.² It does not. Rather, the record shows that the number of reported cramming

¹ See, e.g., Comments of New York State Attorney General et. al at 6 (hereafter Comments of 17 State Attorneys General); Comments of the Massachusetts office of the Attorney General at 4, 9.

² See Executive Order 13579, Regulation and Independent Regulatory Agencies (July 2011); see also Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, at 3 (February 9, 2011) (stating that the Commission intends to ensure that its policies are fact-based and data driven).

complaints pales in comparison to the number of wireline and wireless customers,³ and that the industry is taking measures to effectively address this issue.⁴

It is telling that the very commenters supporting a ban on carrier third-party billing produced scant evidence of cramming. The Massachusetts Office of the Attorney General, for example, claims in one breath that there is ample evidence of cramming, then states that it has received only 36 cramming complaints thus far for 2011.⁵ The 17 State Attorneys General claim that they have seen a “dramatic rise” in the number of cramming complaints, but provide no complaint data to substantiate this claim.⁶ Rather, they reference a handful of investigations of a few vendors,⁷ a couple of customer surveys involving a *de minimus* number of customers — one involving 356 customers of a single vendor and another involving 562 customers,⁸ and the

³ See, e.g., Joint Comments of the New England Conference of Public Utilities Commissioners at 15 (Maine, Massachusetts, New Hampshire, Rhode Island and Vermont reported a total of 503 cramming complaints in 2009, 443 in 2010, and 297 through August 2011); Comments of the Indiana Utility Regulatory Commission at 2-3 (stating it receives approximately 100 cramming complaints per year); Comments of AT&T at 6 (stating it billed third-party charges to approximately two million wireline subscribers in September 2011 and received approximately 2100 cramming complaints in September 2011); Comments of Billing Concepts, Inc. at 6 (stating its level of cramming incidents is one-quarter of one percent).

⁴ Comments of AT&T at 8-10; Comments of CTIA at 13-16; Comments of Verizon and Verizon Wireless at 3-8; Comments of CenturyLink at 3-4, 12-14; Comments of Frontier Communications at 4-5; Comments of T-Mobile at 3-6; Comments of ITTA at 2; Comments of Sprint at 11-13; Comments of Billing Concepts at 4-6; Comments of ILD at 2; Comments of Payment One at 15.

⁵ Comments of the Massachusetts Office of the Attorney General at 10.

⁶ Comments of 17 State Attorneys General at 6.

⁷ *Id.* at 6-8. It is not clear from the comments whether these vendors actually engaged in cramming. While the comments reflect that some customers received refunds, that does not necessarily mean a cram occurred. AT&T often gives credits to customers that dispute charges when in fact the disputed charges were authorized or when authorization has not been determined.

⁸ *Id.* at 7-8.

Senate Commerce Committee Report.⁹ Indeed, their comments are in many cases not based on facts at all, but instead on what they “suspect”¹⁰ or “speculate.”¹¹ Others provide no independent evidence of cramming, but merely reference the data in the NPRM.¹² Taken together, this data on cramming is insubstantial,¹³ especially when compared to the millions of consumers that are billed third-party charges,¹⁴ and certainly cannot justify the complete eradication of carrier third-party billing.¹⁵

Indeed, despite arguments to the contrary, the record shows that most third-party charges are authorized. While the FTC and other commenters claim that there is a scarcity of evidence of legitimate third-party billing, numerous commenters that use carrier third-party billing services, both providers of traditional and enhanced services, assert that their charges are legitimate and authorized.¹⁶ For example, Billing Concepts states that the majority of its clients submit charges

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 15.

¹² *See, e.g.*, Comments of the National Consumers League and Comments of Minnesota Attorney General Lori Swanson.

¹³ Further, the complaint numbers in the record reflect *allegations* of cramming. The record does not reflect whether those alleged crams were actually unauthorized charges. In AT&T’s experience, many customers have alleged that third-party charges were not authorized but subsequent investigation revealed that the charges were in fact authorized.

¹⁴ Billing Concepts, for example, states that it placed third-party charges on approximately 8 million consumer bills in 2010. Comments of Billing Concepts at 7.

¹⁵ In fact, many of the commenters that support a ban recognize that some limited exceptions may be appropriate. *See, e.g.*, Comments of 17 States Attorneys General at 23; and Comments of the National Consumers League at 7-8.

¹⁶ *See, e.g.*, Comments of US Online Listings; Comments of Morre Local Reach; Comments of Nationwide Long Distance Service; Comments of NetPage Now.com; Comments of Accucharge; Comments of 976 Services; Comments of Network Service Billings; Comments of Integrated Services; Comments of MLD Multiline Long Distance.

for legitimate goods authorized by consumers¹⁷ — conclusions supported by audits and ongoing monitoring efforts. Carriers such as AT&T, CenturyLink, and Frontier Communications explain that the vast majority of third-party charges on their bills are authorized, conclusions supported by audits and/or complaint monitoring processes.¹⁸ Moreover, AT&T, Payment One and Billing Concepts provide data showing that the number of cramming inquiries they have received in recent years has declined substantially, which shows both that most third-party charges are in fact authorized and that the industry is addressing cramming effectively.¹⁹ Given this data, the Commission must reject unfounded claims that the overwhelming majority of third-party charges are unauthorized or that cramming affects tens of millions of consumers.²⁰

This is especially so in the case of wireless services. The undisputable fact, based on the record, is that cramming is not a significant issue for the wireless industry. Not one party provides any data demonstrating that cramming has affected a material number of wireless customers. Rather, virtually every commenter that supports cramming regulations for wireless carriers say the same thing: cramming *may* become a problem at some point in the future so the Commission should act now to address the issue.²¹ But regulation — as Chairman Genachowski

¹⁷ See Comments of Billing Concepts at 7; Comments of ILD at 8-9.

¹⁸ See Comments of AT&T at 7; Comments of CenturyLink at i; and Comments of Frontier Communications at 9-10.

¹⁹ See Comments of AT&T Comments at 9; Comments of Payment One at 15; Comments of Billing Concepts at 6.

²⁰ See, e.g., Comments of 17 State Attorneys General at 6.

²¹ See, e.g., Comments of 17 State Attorneys General at 26; Comments of Attorneys General of Illinois, Nevada, and Vermont at 11; Comments of Consumers Union, Center for Media Justice, Consumer Federation of America, National Consumer Law Center, and Public Knowledge at 3-4.

and the President has said — must be based on a demonstrated need, not speculation.²² The record here does not come anywhere close to supporting the overbroad, draconian ban on carrier third-party billing proposed in the NPRM.

2. As the record shows, neither a ban nor mandatory opt-in consumer consent for carrier third-party billing would be appropriate for many services.

Even commenters that support a ban on carrier third-party billing or, in the alternative, a mandatory opt-in requirement for carrier third-party billing,²³ by-and-large recognize that such requirements are not warranted for some services.²⁴ This is particularly so for wireless, traditional, and carrier-affiliated or carrier-alliance²⁵ third-party billed services. For wireless, the record reflects that consumers are increasingly using their handsets for mobile commerce and typically have to “double opt-in” to purchase mobile content and/or charge products to their

²² See fn.2, *supra*.

²³ Many state commissions and state attorneys general support an opt-in consent requirement, pursuant to which a customer would be required to expressly authorize the billing carrier to include third-party charges on the bill *before* any such billing from a specific vendor occurred. See, e.g., Comments of 17 State Attorneys General at 25.

²⁴ See, e.g., 17 State Attorneys General at 23 (“Some limited exceptions [to a ban] for certain telephone services, such as long distance calls, operator-assisted calls, prisoner calls and dial-around services, may be appropriate.”); Comments of FTC at 6 (“Such a ban could apply to all third-party billing or provide exceptions for demonstrated legitimate uses of third-party telephone billing.”); Comments of NASUCA at 14 (“The Senate Commerce Committee . . . has made a compelling case for prohibiting third-party billing on wireline phone bills, with limited exceptions.”); Comments of Illinois, Nevada and Vermont at 10 (stating, “Some limited exceptions for certain regulated services, such as long distance calls, operator-assisted calls, and dial-around services, may be appropriate.”); Initial Comments of New York State Attorney General and 16 Attorneys General at 25 (stating, “Certain limited exceptions to the default block (e.g., prisoner-family calls, operator assistance services like collect calling and dial-around long distance “10-10-XXX calling) should apply....”); Comments of the Virginia State Corporation Commission Staff at 6 fn.12 (stating, “the only possible exception would be for telephone calls that are customer initiated by dialing 1+, 0+, 0-, or 1010XXX, or that a customer accepts as collect; or for products, goods, or services offered by or bundled with the services of a telephone company or its affiliates.”).

²⁵ Alliance services are sold or marketed in cooperation with the billing carrier, although the actual service providers are not directly affiliated with the billing carrier.

wireless bill.²⁶ This existing industry practice as well as other industry and carrier measures are working to ensure that customer purchases are authorized,²⁷ as evidenced by the low number of wireless cramming complaints. Premature regulation, such as a ban or mandatory opt-in requirement, could have the unintended effect of chilling innovation in the wireless sphere. As Verizon aptly states:

In light of the evolving wireless ecosystem, particularly the growing prevalence of mobile content, consumers are increasingly demanding the ability to purchase goods and services over their handset or using their handset to charge these goods and services to their wireless bills. Wireless providers are currently meeting these demands in ways that protect consumers from unauthorized charges. These services, however, are still new in the wireless space. Premature regulation could not only inhibit their development, but also the development of innovative ways to protect consumers from unauthorized charges.²⁸

With respect to traditional services, customers clearly expect that services such as toll, dial-around toll, collect calls, inmate calls and operator and directory assistance services will be billed on their telephone bill. For many providers of these services, a ban or mandatory opt-in requirement could drive them out of business because they rely heavily, and in many instances exclusively, on carrier third-party billing.²⁹ Further, customers simply would not authorize telephone billing for these calls in advance, making it extremely difficult for toll providers to collect for the calls.³⁰ For customers that use directory assistance services or receive collect or inmate calls, an opt-in requirement would also be impractical. As Billing Concepts correctly

²⁶ See, e.g., Comments of AT&T at 9, fn. 16; Comments of Verizon and Verizon Wireless at 6-8; Comments of T-Mobile at 3-6.

²⁷ See, e.g., Comments of T-Mobile at 3-6; Comments of CTIA at 13-16.

²⁸ Comments of Verizon and Verizon Wireless at 11.

²⁹ See, e.g., Comments of Coalition for a Competitive Telecommunications Market at 12-13; Comments of Business Discount Plan at 3.

³⁰ See, e.g., Comments of Consumer Telecom at 5-6.

explains, “the recipient of a collect call cannot take the time to contact his or her LEC and opt-in....By their nature, a collect or directory assistance [or inmate] call often comes when least expected.”³¹

With respect to the carrier-affiliated or carrier-alliance services, the record in no way reflects that these services are an issue. Consumers expect that charges for these services will be included on one bill. AT&T, for example, includes charges for local, toll, DSL, and DirecTV services — all of which are provided by various AT&T affiliates or AT&T alliances — on a single bill.³² Customers authorized these services through AT&T (including agents or AT&T authorized dealers) and thus would reasonably expect to be billed for these services in a single bill.³³ Further, in AT&T’s experience, neither these nor traditional third-party services are the primary source of cramming complaints.

Moreover, for all of these services, an opt-in requirement would impose substantial operational costs. Most significantly, carriers would have to reprogram billing systems and implement opt-in verification and tracking processes and procedures.³⁴

Thus, any regulations the Commission may adopt in this proceeding should exclude traditional, carrier-affiliated, and carrier-alliance third-party billed services.

³¹ Comments of Billing Concepts at 3.

³² *See also* Verizon and Verizon Wireless Comments at 2-3.

³³ Further, all entities responsible for the sale, marketing and verification of third-party charges – whether the billing carrier, its affiliates, or alliance partners – are directly accountable to authorities, including the FCC, FTC, and/or state commissions.

³⁴ *See, e.g.*, Comments of CenturyLink at 16; Comments of Billing Concepts at 9; Comments of T-Mobile USA at 3-6.

B. The record confirms that there are effective alternatives to prevent cramming.

2. The industry can effectively deter cramming.

a. The industry has implemented cramming-prevention and detection measures that are working.

The positive results of efforts by carriers and billing aggregators to reduce cramming demonstrate that the state attorneys general and various state commissions are simply wrong that the industry cannot effectively prevent cramming. Most notably, Billing Concepts, which claims that it represents 80% of the wireline billing aggregation market, states that as a result of its cramming-prevention measures, it has in recent years seen a reduction in “cramming incidents to levels that approximate one-quarter of one percent.”³⁵ Payment One, another billing aggregator, states that its cramming complaint numbers have dropped 26% between the second quarter of 2009 and the second quarter of this year.³⁶ Similarly, AT&T reports that it has seen a 87% reduction in wireline-related cramming complaints since January 2010 — a direct result of heightened cramming prevention measures.³⁷ Others like ILD (another large billing aggregator), CenturyLink, Frontier Communications and Verizon assert that because of their due diligence efforts, they have identified and terminated many billing arrangements where they suspected fraudulent charges.³⁸ Importantly, these commenters state that they review and update their

³⁵ Comments of Billing Concepts at 6.

³⁶ Comments of Payment One at 15.

³⁷ Comments of AT&T at 9.

³⁸ Comments of ILD at 9; Comments of CenturyLink at 14; Comments of Frontier Communications at 10; Comments of Verizon and Verizon Wireless at 4.

processes to combat cramming.³⁹ In short, the industry is capable of and, based on concrete data in the record, *is* successfully addressing this issue.

b. The Commission has recognized that industry self-regulation can effectively address consumer issues.

The Commission recently agreed to an industry self-regulation approach combined with ongoing Commission oversight. Specifically, based on consumer complaints and consumer surveys, the Commission last year initiated a rulemaking, seeking to impose customer alert and disclosure obligations on wireless carriers to avoid consumer “bill shock.”⁴⁰ However, instead of adopting prescriptive regulatory requirements, the Commission opted to rely on industry self-regulation. In that regard, the Commission worked directly with CTIA and Consumers Union, and together they developed customer alert and disclosure measures that the wireless industry committed to follow. In announcing this collaborative approach, Chairman Genachowski stated:

I am grateful to CTIA and the wireless industry for stepping up, and to Consumers Union for helping ensure that the commitments will protect and empower consumers. From the start, the goal was to change practices to benefit consumers, and we have achieved that goal. Moving forward, the FCC will take a “trust, but verify” approach. Because the wireless industry has taken these steps to help consumers avoid bill shock, we will put our rulemaking on hold. We will, however, be closely monitoring industry practices to make sure that all carriers provide this necessary information to consumers, as promised, and, if we see non-compliance, we will take action.⁴¹

AT&T applauds the Commission for taking this approach, and believes that such an approach would work well here. As the record shows, carriers and aggregators have

³⁹ See, e.g., Comments of Verizon and Verizon Wireless at 5.

⁴⁰ Empowering Consumers to Avoid Bill Shock, Consumer Information and Disclosure, CG Docket Nos. 10-207 and 09-158, *Notice of Proposed Rulemaking*, 25 FCC Rcd 14625 (2010).

⁴¹ Chairman Genachowski Remarks at Bill Shock Event, The Brookings Institution, at 2.

strengthened their cramming-prevention measures, particularly in recent years.⁴² Further, carriers and aggregators have expressed a strong commitment to continue reviewing and updating their procedures to reduce cramming.⁴³ Based on the record, a number of the measures proposed by the Commission and others — namely bill blocking, separation of carrier and third-party charges on the bill, and carrier due diligence or pre-screening efforts — have been implemented by many of the leading carriers in the wireline industry.⁴⁴ In AT&T’s experience, these measures have contributed to the substantial reduction in wireline cramming complaints it receives.

AT&T recognizes that the wireline industry in 1998 adopted voluntary “best practices” to combat cramming. What AT&T proposes here is much stronger. Rather than “voluntary” practices, the Commission, wireline carriers, billing aggregators and consumer groups should work together to develop cramming-prevention measures — specifically focusing on measures that have produced results — that the wireline industry must *commit* to follow or else face the prospect of additional regulation. The above-described due diligence measures as well as the Commission’s proposed bill-blocking disclosure and separation of carrier and third-party charges requirements could be the starting point for such measures.

⁴² See Comments of AT&T at 8-10; Comments of Verizon and Verizon Wireless at 1; Comments of Frontier Communications at 1-4; Comments of Billing Concepts at 4-6; Comments of ILD at 7-9; Comments of Payment One at 8-10.

⁴³ See, e.g., Comments of Verizon and Verizon Wireless at 5; Comments of ILD at 9.

⁴⁴ See, e.g., Comments of AT&T at 13-16; Comments of Verizon and Verizon Wireless at 3-5; Comments of Frontier Communications at 2, 4.

3. If the Commission nonetheless determines that regulatory intervention is required, there are appropriately tailored measures that can be implemented to prevent cramming.

As a substantive matter, most commenters in this proceeding generally support notifying consumers of third-party bill-blocking options and separating their charges from third-party charges on the bill.⁴⁵ As AT&T explains in its comments, it does not oppose these requirements,⁴⁶ and in fact already has implemented them as part of its anti-cramming measures. However, most carriers, like AT&T, urge the Commission not to adopt stringent formatting or disclosure requirements in conjunction with these rules, but rather to permit carriers sufficient flexibility to implement these requirements in a cost-effective manner.⁴⁷ Indeed, as ITTA explains, a requirement that carriers notify customers of the blocking option in every bill would,

run counter to ongoing efforts of voice providers to reduce the already significant expense associated with issuing subscriber bills. For instance, some providers currently are moving from single - to double-sided bills as a cost-reduction measure. Requiring voice providers to incorporate information on call blocking options and FCC contact information in each bill could put such efforts in jeopardy. Likewise, a requirement that voice providers disclose third-party billing information at the point of sale would... likely lead to consumer confusion.⁴⁸

Similarly, AT&T agrees with Frontier Communications that requiring carriers to use a specific format or medium for third-party bill-blocking disclosures “would deprive companies of exercising their judgment, based on a unique understanding of their customer base, which is not

⁴⁵ See, e.g., Comments of AT&T, Frontier, ITTA and CenturyLink.

⁴⁶ As noted below, however, AT&T has significant concerns about the Commission’s jurisdiction to adopt rules implementing these requirements.

⁴⁷ See, e.g., Comments of Frontier Communications at 3; Comments of ITTA at 3.

⁴⁸ Comments of ITTA at 4.

in the best interest of customers.”⁴⁹ As AT&T and other commenters explain, many carriers have implemented these measures in recent years and have spent significant time and resources to do so.⁵⁰ Thus, while most carriers either support or, like AT&T, do not oppose the Commission’s adoption of these proposed requirements, the Commission should ensure that carriers have sufficient flexibility in implementing these requirements and are not required to re-engineer billing systems or make costly formatting changes.

While some commenters support the Commission’s proposal to require carriers to include Commission contact information for disputes on their bills and websites, a number of commenters, including state commissions and consumer groups, agree with AT&T that such a requirement could undermine the Commission’s goal. As NASUCA correctly explains,

Adopting the proposed rule in its present form would probably have the unintended consequence of overwhelming the Commission with complaints. Worse, it would probably have the unintended consequence of directing complaints away from state utility commissions and state attorney general offices and hence thwarting their efforts to protect the citizens of their states.⁵¹

Similarly, the New England Conference of Public Utilities Commissioners states, “If...the Commission implements a Commission contact requirement on voice provider bills, there exists the possibility of consumer confusion on the appropriate entity to contact or frustration of being bounced around until reaching the appropriate entity to help resolve their issues.”⁵² And the 17 State Attorneys General conclude that, the customer may be left with the impression that the

⁴⁹ Comments of Frontier Communications at 3.

⁵⁰ *See, e.g.*, Comments of AT&T at 13-16; Comments of Frontier Communications at 3; Comments of Verizon and Verizon Wireless at 2-5; Comments of ITTA at 2-3.

⁵¹ NASUCA Comments at 30.

⁵² Comments of New England Commissions at 22-24.

Commission will actually mediate the complaint or obtain removal of the charge.⁵³ AT&T fully agrees with these commenters and for these reasons, the Commission should not adopt this proposal.

A few commenters ask the Commission to adopt due diligence requirements, including pre-screening of third-party billers to determine if they have past violations of federal and state laws.⁵⁴ As the record reflects, AT&T and a number of other carriers and billing aggregators have implemented various due diligence measures to detect and prevent cramming, both before permitting third-parties to submit charges on carrier bills and thereafter, including conducting a review of third-party vendors prior to commencement of billing, verifying vendor customer authentication procedures, viewing vendor websites, reviewing vendor marketing and advertising materials, and monitoring cramming-complaint levels.⁵⁵ In AT&T's experience, these measures have been instrumental in reducing the number of cramming inquiries it receives and importantly have been modified as necessary to adjust to new cramming schemes. AT&T would not oppose a requirement that carriers implement these due diligence efforts, but again would urge the Commission not to adopt prescriptive requirements that would prevent carriers from modifying such measures as appropriate to effectively prevent cramming.

⁵³ Comments of 17 State Attorneys General at 20.

⁵⁴ *See, e.g.*, Comments of CPUC at 13-14.

⁵⁵ *See, e.g.*, Comment of AT&T at 7-8; Comments of Verizon at 2-5; Comments of Frontier Communications at 8; Comments of ITTA at 2; Comments of Billing Concepts at 4-5; Comments of ILD at 8-9.

C. Commenters agree that the Commission does not have the requisite authority to regulate carrier third-party billing.

The cooperative, commitment-based approach discussed above is all the more important because, as AT&T and numerous commenters aptly demonstrate, the Commission lacks authority under Title II to regulate carrier-third party billing⁵⁶ — a conclusion the Commission itself reached in 1986.⁵⁷ Indeed, the courts have relied on that legal interpretation in adjudicating billing disputes.⁵⁸ Tellingly, most commenters supporting Commission Title II jurisdiction over carrier third-party billing practices did not even attempt to reconcile the Commission’s proposed actions with these rulings. In fact, virtually none of the commenters that support a ban on carrier third-party billing even address the Commission’s jurisdiction to regulate in this area, and the few that did offer little, if any, analysis. While the 17 State Attorneys General recognize the 1986 Commission finding, they conclude without any analysis that the Commission altered its 1986 decision when it adopted the 1999 Truth-in-Billing rules. Specifically, they state,

Although the Commission stated in 1986 that its rulemaking authority under Title II could not extend to regulation of third-party charges unrelated to telecommunications services, the Commission altered its view in adopting the 1999 Truth-in-Billing

⁵⁶ Comments of Business Online Pages at 4; Comments of Personal Content Protection at 5-6; Comments of CenturyLink at 16-19; Comments of Search Engine Plus at 2-3; Comments of Business Values Online at 3-6; Comments of AT&T at 17-18; Comments of CTIA at 24-25.

⁵⁷ *Detariffing of Billing and Collections Services Order*, Report and Order, 102 F.C.C.2d 1150, ¶ 32 (1986).

⁵⁸ *Chladek v. Verizon N.Y. Inc.*, 96 Fed. Appx. 19, at 22 (2nd Cir. 2004) (“Moreover, the FCC has determined that billing and collection services 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, 904 (5th Cir. 2002) (“After 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 services’ regulated by Title II of the Communications Act.” Thus, the district court concluded that Brittan had not alleged a cognizable § 202(a) claim. We agree that the FCC has stated a clear position on this issue.”).

Guidelines by asserting that it could regulate any third-party charge appearing on a phone bill pursuant to its Title II powers.⁵⁹

In support of this assertion, they reference, in a footnote, the Commission's Truth-in-Billing guidelines.⁶⁰ But neither those guidelines nor the Truth-in-Billing Order adopting those guidelines even mention third-party (non-common carrier) charges. Simply put, neither the 17 State Attorneys General, nor any other commenter that supports the Commission's asserted Title II jurisdiction, could identify language in any Commission order or court ruling suggesting that the Commission has authority to regulate carrier third-party billing and collection practices. To be sure, these commenters are correct that the Commission has taken recent enforcement action pursuant to Section 201(b) to regulate cramming. However, they fail to mention that in each of those cases, the Commission proposed forfeitures against the carriers that *charged* consumers for unauthorized dial around toll calls, not the carriers that *billed* those charges on behalf of the carriers providing the toll services – the practice at issue here.⁶¹

Likewise, the record confirms that the Commission cannot invoke its Title I jurisdiction to regulate carrier third-party billing. As Business Online Pages aptly states, “the Commission cannot satisfy the *Comcast* [two-prong] standard to extend its jurisdiction to whether and on what terms telephone carriers may offer their third-party billing services.”⁶² Under the *Comcast* test, the Commission can only exercise ancillary jurisdiction if both of the following two

⁵⁹ Comments of 17 State Attorneys General at 24.

⁶⁰ *Id.* fn.46.

⁶¹ Main Street Telephone Company, Notice of Apparent Liability for Forfeiture, FCC-11-89 (rel. Jun. 16, 2011); VoiceNet Telephone, LLC, Notice of Apparent Liability for Forfeiture, FCC-11-91 (rel. June 16, 2011); Cheap2Dial Telephone, LLC, Notice of Apparent Liability for Forfeiture, FCC-11-90 (June 16, 2011); Norristown Telephone Company, LLC, Notice of Apparent Liability for Forfeiture, FCC-11-88 (June 16, 2011).

⁶² Comments of Business Online Pages, Inc. at 4.

conditions are met: (1) the matter to be regulated falls within the agency’s Title I subject matter jurisdiction over “interstate communications by wire or radio” and (2) the regulation at issue is reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.⁶³ As to the first, third-party billing is not an interstate communication by wire or radio,⁶⁴ and thus is not within the Commission’s subject matter jurisdiction. As to the second, “there is no connection between the substantive terms of third-party billing and any area of the Commission’s authority,”⁶⁵ thus, the Commission’s proposed regulation of carrier or non-carrier third-party billing would not be reasonably “ancillary” to any substantive duty of the Commission under the Communications Act.

III. CONCLUSION

For the foregoing reasons, the Commission should not ban carrier billing of third-party charges or require mandatory opt-in for such billing. Rather, the Commission should rely on industry self-regulation combined with continuing Commission oversight. But if the Commission nonetheless determines that regulatory intervention is necessary to prevent cramming, the Commission should take the targeted actions described above.

⁶³ *Comcast v. FCC*, 600 F.3d 642, 646 (2010).

⁶⁴ *See Detariffing of Billing and Collections Services Order*, Report and Order, 102 F.C.C.2d at 1168 (stating, “billing and collection is a financial and administrative service.”).

⁶⁵ Comments of Business Online Pages, Inc. at 7.

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