Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 BILLING CONCEPTS, INC.

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Billing Concepts, Inc., doing business as BSG Clearing Solutions ("BSG"), respectfully submits the following comments in response to the Further Notice of Proposed Rulemaking issued in the above-referenced dockets, adopted on April 27, 2012,[1] in which the Commission seeks comment on a possible "opt-in" requirement for third-party charges placed on consumers' wireline telephone bills.

EXECUTIVE SUMMARY

Millions of wireline consumers find significant value in the telecommunications services facilitated by third-party billing. Each year, local exchange carriers ("LECs") place charges for tens of millions of long-distance calls and millions more collect or operator-assisted calls on consumers' wireline telephone bills for BSG clients. In dialing long-distance or accepting collect calls via wireline phones, consumers are already making an affirmative decision to utilize a third-party vendor's services, whether by dialing a "10-10" prefix, pre-subscribing to a new long-distance provider, requesting that an operator place a call, or accepting the charges for an incoming collect call. In other words: opt-in procedures already exist for these services. The Commission should not impose another layer of opt-in requirements on top of these explicit consumer choices.

In addition, the Commission lacks a sufficient factual basis to impose an opt-in requirement on third-party wireline telecommunications services. The overwhelming majority of evidence cited in the April 27, 2012 Report and Order and FNPRM relates to cramming of charges for non-telecommunications services such as email and voicemail. Rather, long-distance, operator-assisted, and collect calls are charged precisely when a consumer makes an

[1] *In re Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 11-116, 2012 WL 1513775 (Apr. 27, 2012) (hereinafter "Report and Order" or "FNPRM").

affirmative decision to place or accept a call. There is no evidence that consumers are confused that such calls will result in charges on their local phone bills.

Recent industry changes have also rendered the cited evidence of cramming insufficient to support an opt-in requirement for wireline telecommunications services. AT&T, Verizon, and CenturyLink, as well as BSG, have all announced an intention to cease placing *non*-telecommunications third-party charges on consumers' bills. Combined with the Commission's new rules adopted in the April 27, 2012 Report and Order, cramming rates are expected to continue to drop. Faced with a significantly smaller problem, the Commission must adjust its cost-benefit analysis accordingly. An opt-in requirement would not represent a proportionate response to the extremely rare instances of cramming for wireline telecommunications services.

The Commission should also reject an opt-in requirement for wireline telecommunications services because such an outcome would ultimately harm consumers. Many consumers who currently benefit from the increased choice, savings, and convenience of third-party services would no longer have access to them either because the consumers fail to opt-in or because their preferred service provider will be forced to shut down due to a lack of a sufficient customer base. Minority communities, which often rely on dial-around long-distance service for international calls, would be especially hard hit. The Commission should not penalize these consumers, particularly in light of the limited factual record supporting a conclusion that cramming of wireline telecommunications services is a significant problem.

Both separately and collectively, the problems with such an opt-in requirement also render the Commission's proposal unconstitutional. For the same reasons the Commission's opt-in requirement for customer proprietary network information was held unconstitutional in *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), the Commission's current opt-in proposal also would violate the First Amendment. The Commission can show neither that the described harm is real, nor that the proposed response is no more extensive than necessary to address the highly infrequent occurrences of cramming with respect to third-party telecommunications service charges.

Finally, the Commission lacks jurisdiction to impose an opt-in requirement. Unlike the previous cramming rules, which regulated the relationship between a carrier and its customer, the proposed opt-in requirement would regulate the relationship between a carrier and a third-party service provider. Such an outcome would take the proposed regulations beyond what the Commission has attempted before, and beyond its statutory authority. For these reasons, BSG urges the Commission to reject the proposed opt-in requirement for wireline third-party charges for telecommunications services.

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BSG Clearing Solutions ("BSG") is the largest third-party billing aggregator in the United States and has been providing services for over two decades that benefit millions of consumers of third-party wireline telecommunications services. As a billing aggregator, BSG enables third-party service providers to include their charges on the telephone bills of local exchange carriers ("LECs"). Third-party billing increases consumer choice and fosters competition by providing consumers with access to long-distance and collect call services at competitive prices. BSG supports the Commission's efforts to reduce cramming – particularly those measures adopted in the Commission's April 27, 2012 Report and Order. However, for the reasons discussed below, BSG opposes the creation of an opt-in requirement for third-party billing of wireline telecommunications services. Not only is there insufficient evidence in the record of a serious cramming problem related to these services, but such a drastic step would harm consumers and stifle the exact types of competition the Commission has tried to foster in the past.

I. <u>Background.</u>

A. Third-Party Billing For Wireline Telecommunications Services Provides Important Benefits To Consumers.

Every day, thousands of consumers take advantage of wireline telecommunications service offerings from third-party providers. Whether utilizing long-distance services, collect calling, or operator services, consumers have come to know and rely on many third-party service providers as trusted resources for their telecommunications needs. The prevalence of these services is no accident: Consumers select third-party providers precisely because they offer better rates, better service, or increased convenience. In fact, over the past four years, BSG has processed more than 600 million long-distance and collect call transactions.

1. Long-Distance Providers

The most common third-party charge is for inexpensive long-distance service. Consumers can select an alternative to their local telephone provider for long-distance services either as a permanent, pre-subscribed option, or on a case-by-case basis using dial-around ("10-10") calling prefixes. Either way, consumers make an explicit choice to receive telecommunications services from a long-distance provider different than their local carrier.

Millions of consumers are taking advantage of these options. The most recent data available indicate that more than thirty percent of all residential customers of incumbent LECs do not receive long-distance service from their local service provider.[2] With respect to BSG clients alone, LECs placed nearly 180 million long-distance transactions over the last sixteen months, on over 16 million consumer bills.

These easily available options, and the increased competition they provide, have resulted in lower prices for consumers. For instance, Americatel advertises rates as low as 1.9¢ per minute to Mexico using its 10-10 dial-around service, and DAR Communications offers rates as low as 3¢ per minute to Brazil. Consumers who make frequent long-distance calls to friends and family in these countries can choose the specific carrier that best serves their needs. In this way, third-party long-distance service provides a particular benefit to minority populations, and absent such services, these consumers would face substantially higher costs and fewer choices communicating with friends and family.

The ability for consumers to easily choose an alternative long-distance provider has existed since the Modification of Final Judgment Order in 1982.[3] Indeed, the lower prices and

[2] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2011*, Table 7 (June 2012).
[3] *See United States v. AT&T Co.*, 552 F. Supp. 131, 197 (D.D.C. 1982).

increased competition described above are precisely the goals the Commission was hoping to achieve with its equal-access and "slamming" regulations.[4] In short, millions of consumers continue to rely on the ability to easily access alternative long-distance providers.

2. Collect Calls and Operator Services

As with long-distance, millions of consumers also rely on collect call[5] and operator service[6] capabilities every year. Over the past sixteen months, BSG facilitated nearly 13 million transactions of these types on over 2.3 million consumer bills. Furthermore, collect calls are the backbone of inmate facilities' telecommunication systems, which, for security reasons, prohibit the use of coins to place calls and the possession of mobile phones by inmates. BSG customers such as Telewest and Inmate Calling Solutions provide telecommunications services to correctional facilities, allowing inmates to contact friends, family, and attorneys as necessary. These facilities, with populations exceeding 1.6 million,[7] require collect calling abilities in order to function. Indeed, a portion of the revenues generated by calls placed with these companies are allocated to inmate programs and law enforcement agencies.

Additionally, collect calls and operator services present a problem of particular significance with respect to any opt-in requirement: Most often, the need for these services cannot be anticipated in advance. A consumer placing a collect call or requesting operator assistance is often doing so because of an unanticipated emergency. The recipient of a collect

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[4] *See, e.g., 1998 Slamming Order*, 14 F.C.C.R. 1508, 1519 (1998) ("We emphasize that the rules we adopt strike a balance between our goals of protecting consumers and of promoting competition."); *MTS and WATS Market Structure, Phase III,* 100 FCC 2d 800 (1985).

[5] A collect call is a call in which the recipient of the call is billed, rather than the caller. To place a collect call, the caller first contacts the company through which the call should be placed. This company contacts the requested recipient to determine whether the recipient will accept the call and associated charges. Only then is the connection between caller and recipient made.

[6] Operator services calls typically require an operator to be involved in order for the call to be completed. For instance, if a consumer asks an operator for a number to a local restaurant, the operator will often offer to place the call, after providing the number to the caller.

[7] *See* U.S. Census Bureau, "The 2012 Statistical Abstract: Law Enforcement, Courts, & Prisons," Table 347.

call is even less well-equipped to predict when friends and family will encounter such a situation and need to contact the recipient.

3. The Importance of Wireline Third-Party Billing

Quite simply, these critical services would not be available absent third-party billing. Not only do consumers benefit from the convenience of having these charges placed on a single bill, but third-party billing enables small service providers to maintain lower overhead costs and pass those savings on to consumers. If long-distance providers such as Americatel and DAR Communications were forced to manage their own billing departments, they would be unable to offer their current low rates.

The Commission's April 27, 2012 Report and Order confirms the critical role these services play for many consumers. In the Report and Order, the Commission concluded that legitimate third-party billing provides important "consumer choice and benefits . . . for consumers, carriers, and third parties."[8] Moreover, "third-party billing can be a convenience for carriers, third parties, and consumers."[9] Indeed, the Commission singled out long-distance service as an important service often provided by third-parties.[10] If third-party telecommunications services were subject to a uniform opt-in requirement, competition would diminish and prices would rise. Consumers would ultimately be harmed.

B. Consumers Must Already Opt In To Third-Party Wireline Telecommunications Service.

As discussed above, in order to access a third-party's wireline telecommunications service, consumers must make an affirmative choice. In the long-distance context, this requires explicitly dialing a specific provider's 10-10 access number or providing a voice recording of

[8] Report and Order ¶ 90.
[9] *Id.*¶ 41.
[10] *Id.*

consent to a change in the consumer's pre-subscribed provider. Indeed, pre-subscribed long-distance service changes cannot be processed without independent verification that the end-user fully understands what he or she is purchasing as well as the terms and conditions of such a purchase. Voice-recordings that include verifications of the consumer's name, address, and phone number help ensure only authentic changes are processed. This requirement, combined with BSG's rigorous due diligence and monthly monitoring procedures, have helped keep cramming complaints with respect to long-distance service from BSG clients below 1 in 10,000 transactions.

So, too, with operator-assisted calls, whether collect or otherwise, where a consumer must both dial the operator and request that the call be placed. And with collect calls, both the caller and the recipient must make these explicit opt-in decisions – dialing a collect provider or accepting the call once it is placed. Indeed, consumers already possess the ability to opt-out of such services through their local telephone company.[11] Before a collect call is placed, the operator service provider will access billing information for the terminating number, which reveals whether the recipient has placed a block on such calls. Only if the LIDB query indicates that the terminating number accepts such calls will the call be placed, and, even then, the customer still must authorize the particular call. The effect of these explicit consumer decisions on cramming is clear: cramming complaints for these services from BSG clients remain below 1 in 10,000 transactions.

In light of the important benefits these services provide to millions of consumers, their existing opt-in processes, and for the reasons described below, BSG opposes an additional opt-in requirement for third-party wireline telecommunications services.

[11] Frequently this information is stored in a LEC's Line Information Database (LIDB), which can be queried prior to placing a collect call. Many LECs maintains their own LIDB, although some LECs outsource management of their database to companies such as Transaction Network Services or Accudata Technologies.

II. The Commission Should Not Impose an Opt-In Requirement for Third-Party Wireline Telecommunications Services.

The Commission seeks comment on whether it "should adopt additional measure [sic] to prevent cramming, such as an opt-in approach, and, if so, the best way to implement such measures."[12] In light of the sparse evidence showing a cramming problem with respect to wireline telecommunications services, the significant consumer harm that such a requirement would create, and the constitutional and statutory limitations on Commission action, BSG opposes an opt-in requirement for wireline telecommunications services. Indeed, such an action would be arbitrary and capricious, in violation of the Administrative Procedure Act.

A. The Record Does Not Support Such a Drastic Step by the Commission.

Before altering the relationship between millions of consumers and third-party wireline telecommunications service providers, the Commission should first establish that this burdensome and disruptive action is necessary.[13] In fact, however, the current record contains almost no evidence that cramming is a problem with respect to third-party wireline telecommunications service providers.[14] Moreover, the third-party billing industry is undergoing substantial changes to reduce cramming, including making changes to reflect the Commission's recently adopted rules. The Commission should allow time for these changes to take effect, including its new third-party billing rules, before determining that additional steps are necessary.

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[12] FNPRM ¶ 137.

[13] *See* FCC, "Statement From FCC Chairman Julius Genachowski On The Executive Order On Regulatory Reform And Independent Agencies" (July 11, 2011) (noting the Commission will "incorporate[] cost-benefit analysis into [its] decision-making").

[14] Despite citing examples of cramming by LECs and relying on estimates including LEC-crammed charges in cramming counts, *see, e.g.*, *In re Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, CG Docket No. 11-116, 2011 WL 2722587 (July 12, 2011) at ¶ 20, the Commission now concludes that "cramming results largely from charges imposed by third-parties." Report and Order ¶ 45. Looking only at third-party placed charges, the scope of the cramming problem becomes significantly smaller.

1. The Senate Commerce Committee Report and *Inc21.com*

In BSG's comments regarding the July 12, 2011 Notice of Proposed Rulemaking, BSG outlined the numerous flaws in the Senate Commerce Committee's report and the expert report submitted in *FTC v. Inc21.com Corp.*[15] regarding the extent of the cramming problem.[16] For instance, the proffered estimate of 15-20 million households being victimized by cramming each year likely equals or exceeds the total number of households on which a wireline third-party charge is placed. Moreover, the estimate is based on an incorrect reading of a survey conducted months after the particular cramming had ceased. In its April 27, 2012 Report and Order, the Commission vaguely concluded that the problem of cramming was "significant," without offering any quantification of its extent.

Despite declining to endorse any of the estimates of the extent of cramming, the Commission favorably cited the Commerce Report and the *Inc21.com* expert report throughout the Report and Order.[17] Notably, however, the Commission did nothing to correct the flaws in these reports' methodology that BSG identified. Indeed, the Commission did not even respond to the criticisms in substance.[18] Before adopting a broad-reaching rule such as the opt-in requirement proposed in the FNPRM, the Commission must "demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant."[19]

More importantly, the Commerce Report and *Inc21.com* expert report are virtually devoid of any discussion of cramming with respect to wireline telecommunications services. The defendants in *Inc21.com* offered "online yellow pages" and other internet services, not

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[15] 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd*, No. 11-15330, 2012 WL 1065543 (9th Cir. 2012).
[16] *See* BSG Comment at 6-7; BSG Reply Comment at 1-3.
[17] *See*, *e.g.*, FNPRM ¶ 137.
[18] *See* Report and Order ¶ 38 (describing BSG's concerns).
[19] *Cement Kiln Recycling Coal. v. EPA.*, 493 F.3d 207, 225 (D.C. Cir. 2007) (internal quotation marks omitted).

telecommunications services, such as long-distance and collect calling.[20] The Commerce Report even highlighted long-distance providers as examples of "legitimate third-party vendors."[21]

These reports offer little evidence to substantiate a claim that cramming is a significant problem with respect to wireline telecommunications services. To be sure, the April 27, 2012 Report and Order also cites certain Commission enforcement actions against third-party telecommunications providers.[22] Without more, these isolated reports of "bad apples" also cannot justify restructuring an industry on which millions of consumers regularly rely.

2. The Wireline Third-Party Billing Industry Has Recently Undergone Significant Changes.

The existing record regarding cramming is insufficient to impose an opt-in requirement for telecommunications services for another reason: Significant industry reforms in recent years have dramatically reduced the scope of the problem. These changes led to substantially reduced rates of cramming complaints, yet much of the data on which the Commission relied pre-dates these reforms.[23]

Particularly given that most of the evidence of cramming stems from non-telecommunications services, the recent announcements by AT&T, Verizon, and CenturyLink to cease third-party billing for these services[24] should be all the more critical to the Commission's evaluation of the scope of the cramming problem. BSG has announced similar reforms effective during the course of 2012.

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[20] 745 F. Supp. 2d at 984-85.
[21] *Unauthorized Charges on Telephone Bills*, U.S. Committee on Commerce, Science, and Transportation, at ii (July 12, 2011).
[22] *See* Report and Order ¶ 23.
[23] *See*, *e.g.*, *id.* ¶ 20 (cramming complaint rates from 2008-2010); *id.* ¶ 28 (CPUC data from 2009); *id.* ¶ 29 (Illinois data from 2003-2008); *Inc21.com*, 745 F. Supp. 2d at 1000 (noting Inc21.com's operations ended in March 2010).
[24] *See* Report and Order ¶ 44.

Finally, the Commission's April 27, 2012 Report and Order implemented new rules to both help stop cramming before it happens and enable consumers to identify crammed charges that do occur. These rules "provide additional protections to consumers,"[25] "enabling consumers to make informed choices about whether to utilize blocking options available to them,"[26] and "mak[ing] it much easier for consumers to identify the charges on their bill that" are possibly crammed.[27] If, as expected, these rules have a meaningful impact for consumers, then the Commission's estimates regarding the current extent of the cramming problem should be substantially revised.

As the Commission is well aware, federal law requires that the Commission "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[28] For the reasons explained above, the "relevant data" – data that takes into account recent industry changes – cannot support a finding that such drastic measures are necessary with respect to third-party wireline telecommunications services. Where an agency's explanation for its decision "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," a court will strike down the agency action.[29]

B. An Opt-In Requirement For Wireline Telecommunications Services Would Harm Consumers.

The Commission's proposed opt-in requirement would wreak havoc on consumer expectations and their telecommunications service experience. Psychologists have firmly documented consumers' propensity to select a default option, even when it is less

[25] *Id.* ¶ 50.
[26] *Id.* ¶ 60.
[27] *Id.* ¶ 68.
[28] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (internal quotation marks omitted).
[29] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

advantageous.[30] As a result of "default bias," untold numbers of consumers will fail to opt-in to third-party service options, and thereby be deprived of alternative telecommunications options.

Such a result is particularly problematic for collect calls because these calls are often utilized precisely when the consumer is without meaningful telecommunications alternatives. With respect to correctional facilities, the proposed opt-in requirement would require a drastic – and expensive – restructuring of operations. If inmates are no longer able to utilize collect calling, these facilities will need to offer another alternative in order to comply with the Constitution.[31] Moreover, because third-party collect calling services allocate a portion of the revenues from these calls to the facilities themselves, these facilities will be forced to make these changes in the face of declining revenues. Consumers, along with governments, would be harmed.

With respect to long-distance services, the situation is even worse, because the competitive rates offered by third-party long-distance providers depend upon achieving economies of scale. Initially, a number of consumers will be deprived of the most competitive long-distance rates, because the time spent opting-in with their LEC (and then opting-in again when they dial 10-10 or provide a pre-subscription change request) is not worth the perceived savings. But this decision harms even those consumers who do opt-in, as small third-party long-distance providers must raise prices to remain in business. The result would be a significantly less competitive market for long-distance service and increased prices for consumers.

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[30] *See, e.g.*, Nikhil Dhingra, et al., *The default pull: An experimental demonstration of subtle default effects on preferences*, 7 JUDGMENT AND DECISION MAKING 69, 69 (Jan. 2012) ("People choose options presented as defaults more often than they otherwise would, even for important decisions that would seem to require careful thought, such as choosing health care or retirement plans."); William Samuelson & Richard Zeckhauser, *Status Quo Bias In Decision Making*, 1 JOURNAL OF RISK AND UNCERTAINTY, 7 (1988).

[31] *See, e.g.*, *Valdez v. Rosenbaum*, 302 F.3d 1039, 1048 (9th Cir. 2002) (restrictions on telephone access in a state jail only constitutionally permissible if "it is reasonably related to legitimate penological interests") (internal quotation marks omitted); *Benzel v. Grammer*, 869 F.2d 1105, 1108 (8th Cir. 1989) ("in some instances prison inmates may have a right to use the telephone for communication with relatives and friends")

The Commission's request for comment on whether "an opt-in requirement [should] apply only to new consumers or to all consumers"[32] underscores a significant additional danger of any opt-in requirement: consumer confusion. If the Commission's proposed opt-in requirement is applied to all consumers, millions of customers who miss (or ignore) notifications that they must opt in will suddenly find themselves deprived of their preferred long-distance service. Worse yet, customers may not even realize the change until they try to place a collect call while stranded somewhere without other telecommunications service options. On the other hand, if the requirement is applied only to new customers, consumers will be left confused regarding why some can access certain services that others cannot.[33] Neither option solves the above problems where consumers are deprived of these valuable telecommunications services.

Finally, an opt-in requirement would degrade the quality of long-distance service consumers would receive. Presumably, such a requirement would be structured much like the LIDB database for collect calls, which is dependent upon the LECs for accuracy. But requiring that a 10-10 provider query this database before connecting a long-distance call could delay call placement significantly, deterring consumers from using the service. Consumers today are accustomed to nearly instant call connections, but checking the opt-in status of a customer before every call could eliminate this ability. Moreover, database lookups before placing a call could add a transaction cost to each call, much like the costs associated with queries for whether a wireline phone number has been "ported" to a wireless carrier.[34]

In sum, an opt-in requirement for telecommunications services would significantly harm consumers through higher prices and lower-quality service or the inability to contact someone in

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[32] FNPRM ¶ 139.

[33] In addition, BSG is aware of no evidence supporting a conclusion that an opt-in requirement for new customers only would have a significant impact on cramming.

[34] *Cf.* Public Notice, "Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding," CC Docket 95-116, 20 F.C.C.R. 8616 (Apr. 22, 2005).

an emergency. Higher prices and lower quality of service could create a feedback-loop, with more consumers leaving third-party telecommunications providers, requiring yet higher prices (or reductions in quality), until eventually these valuable additions to marketplace competition are eliminated entirely. The Commission should avoid taking steps, such as creating an opt-in requirement for telecommunications services, that would harm consumers.

C. An Opt-In Requirement Would Violate the First Amendment.

As BSG explained in its comments to the July 12, 2011 NPRM, an opt-in requirement is a significant regulation of speech that would likely violate the First Amendment.[35] Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[36] commercial speech regulations must meet a strict test to avoid falling afoul of the First Amendment. The Commission cannot avoid these requirements by claiming that cramming is misleading speech, because "where . . . truthful and non-misleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end."[37] Unquestionably, the proposed opt-in requirement would encompass millions of legitimate charges from third-party telecommunications providers.

Yet the Commission's proposed action here closely parallels the Commission's proposed opt-in requirement for the use of customer proprietary network information ("CPNI") that the Tenth Circuit found to be unconstitutional under *Central Hudson*.[38] In *U.S. West*, the Tenth Circuit first rejected the Commission's claim that its regulations did not restrict speech, thereby

[35] The Commission justified its disclosure rules under the standard in *Zauderer v. office of Disciplinary Counsel*, 471 U.S. 626 (1985). *See* Report and Order ¶¶ 126-35. Because an opt-in requirement would prohibit certain speech, *Zauderer* is inapplicable here.
[36] 447 U.S. 557 (1980).
[37] *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993).
[38] *See U.S. West v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999); *see also Verizon Nw., Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003).

triggering the *Central Hudson* test described above.[39] The court further found that the Commission's opt-in requirement for use of CPNI failed the third and fourth prongs of the *Central Hudson* test, because the requirements did not "advance[] [the government's] interests in a direct and material way," and restricted a disproportional amount of speech.

The same constitutional analysis applies here. The FNPRM offers little to no evidence of a cramming problem with respect to third-party wireline telecommunications services. . Thus, the Commission has no specific data that demonstrates that the harm cited is real.[40] Moreover, the opt-in requirement is not narrowly tailored, because the Commission has so far failed "to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy."[41] Indeed, the Commission declined to require that LECs offer consumers the ability to block third-party charges.[42] The Commission should therefore adopt less burdensome approaches, such as requiring LECs to offer bill-blocking upon request, rather than unconstitutionally trampling on the First Amendment rights of billing aggregators, third-party service providers, and LECs.

D. The Commission Lacks Jurisdiction To Impose An Opt-In Requirement

In the April 27, 2012 Report and Order, the Commission concluded that Section 201(b) granted it jurisdiction to impose disclosure and bill-formatting rules relating to third-party charges because these were communications with customers "for and in connection with" telecommunications services.[43] Regardless of the correctness of this decision, the analysis is inapplicable to the Commission's proposed opt-in requirement. Rather, the Commission lacks jurisdiction to impose such a rule.

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[39] 182 F.3d at 1232.
[40] *Id.* at 1237-38.
[41] *Id.* at 1238.
[42] Report and Order ¶ 94.
[43] Report and Order ¶¶ 114-25.

At its core, the Commission's previous discussions of its jurisdiction create a distinction between regulations that govern the relationship between carriers and customers, and those that govern the relationship between carriers and third-party service providers. While the Commission has concluded that the former are permissible,[44] it has generally avoided the latter.[45] Indeed, the Commission does not appear to dispute that it generally lacks the power to regulate the relationship between a carrier and a third-party service provider.[46] The Commission's recent bill-formatting and disclosure rules continue this trend.

In sharp contrast, the proposed opt-in requirements unquestionably relate to the relationship between the carrier and the third-party. If imposed, the Commission would mandate that only in certain circumstances may a carrier contract with a third-party to bill for that party's services. This would run counter to the *1986 Detariffing Order*'s conclusion, "billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act."[47]

Put another way, an opt-in requirement is not a regulation "for and in connection with" telecommunications services.[48] Indeed, the Commission's required separation between third-party charges and carrier charges has further reduced any tenuous relationship that might have

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[44] *See, e.g.*, *First Truth-In-Billing Order*, 14 F.C.C.R. 7492, ¶ 20 (1999) (adopting rules that govern "the manner in which charges and providers are identified" because "the telephone bill is an integral part f the relationship between a carrier and its customer").

[45] *See, e.g.*, *1986 Detariffing Order*, 102 F.C.C.2d 1150, ¶ 31 (1986) ("Although carrier billing and collection for a communication service that it offers . . . is an incidental part of a communication service, . . . carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act."); *First Truth-In-Billing Order*, 14 F.C.C.R. 7492, ¶ 25 ("The guidelines adopted here apply to the carrier providing service to customers, not to those carriers' billing agents.").

[46] *See* Report and Order ¶ 124 ("Our focus has been and remains carriers' practices on their own bills to consumers of telecommunications services.); *see also Chladek v. Verizon N.Y. Inc.*, 96 Fed. App'x 19, 22 (2d Cir. 2004) ("[T]he FCC has determined that billing and collection services are not 'telecommunications services' as defined by Title II of the Communications Act."); *Brittan Commc'ns Int'l Corp. v. Sw. Bell Tele. Co.*, 313 F.3d 899, 905 (5th Cir. 2002) ("[B]illing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act." (internal quotation marks omitted)).

[47] *1986 Detariffing Order*, 102 F.C.C.2d 1150, ¶ 34.

[48] *See* FNPRM ¶ 149.

previously existed. The proposed opt-in requirement would essentially regulate the circumstances under which particular third-party service providers would be granted access to this portion of the carrier's bill. And those conditions (a consumer's explicit opt-in) have nothing to do with the provision of any telecommunications service.

Furthermore, ancillary jurisdiction is not available either. As the Commission held in 1986, a billing and collection service "does not employ wire or radio facilities and does not allow customers of the service . . . to 'communicate or transmit intelligence of their own design and choosing.'" Rather, it is "a financial and administrative service."[49] Thus, the Commission's general jurisdiction under Title I does not cover this subject.[50] Second, the Commission has not identified a single statutorily mandated responsibility under Title II to which its regulations would be "reasonably ancillary."[51] Without primary or ancillary jurisdiction, the Commission lacks the statutory authority to impose an opt-in requirement.

III. Conclusion

The millions of consumers who rely on third-party wireline telecommunications services conclusively demonstrate the value these services provide. With each call, customers are making an explicit decision to use a third-party provider. This explicit step, combined with BSG's rigorous due diligence process and monthly performance monitoring, has pushed cramming complaints to miniscule levels. The Commission should not require consumers to take burdensome additional steps before being able to access these valuable services.

Not only does the record lack sufficient justification for the Commission to impose an opt-in requirement, but, in the end, it is consumers who would be harmed. As a result of "default

[49] *1986 Detariffing Order*, 102 F.C.C.2d 1150, at ¶ 32 (citation omitted).
[50] *See Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (test for ancillary jurisdiction).
[51] *Id.*

bias," many consumers who would benefit from these services will not access them. These consumers may not even realize the problem until it is too late – when they are in the midst of trying to place a collect call to a friend or family member. Moreover, the proposed opt-in requirement would reduce competition in the industry, resulting in higher prices and lower quality service for consumers. To impose such a requirement would be a gross over-reaction to a problem the scope of which, particularly in light of recent industry changes, the Commission lacks a complete understanding. With increased due diligence, bill presentation reforms, and point-of-sale disclosures, customers have never been more empowered to prevent and identify cramming. Drastic steps, such as an opt-in requirement for third-party wireleine telecommunications services, rather than continuing to help these consumers, will cause more harm than good.

Respectfully submitted on June 25, 2012.

s/Kelli Petronis Cubeta

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