

**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 CTIA – THE WIRELESS ASSOCIATION®

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I. INTRODUCTION AND SUMMARY

CTIA- The Wireless Association® (“CTIA”)¹ respectfully submits these comments in response to the Further Notice of Proposed Rule Making (“FNPRM”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding. The Commission should not adopt any new cramming mandates for wireless services. There is no persuasive evidence that cramming is a prevalent issue in the wireless industry. In fact, wireless cramming is such a *de minimis* concern, the Commission did not see fit to place it on its last 36 quarterly complaint reports.

However, unlike wireless cramming, Telephone Consumer Protection Act (“TCPA”) related complaints are a significant consumer issue that the Commission should resolve.

Analysis of the Commission’s most recently released complaint statistics reveals that wireless

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

consumer's TCPA complaints amount to more than 84 percent of all complaints reported by the Consumer and Governmental Affairs Bureau ("CGB") as coming from wireless consumers², [there are 120 TCPA complaints per million wireless subscriber connections]. Rather than expending resources on wireless cramming, the Commission should take steps to address ever-increasing wireless TCPA complaints.

Moreover, FCC action is unnecessary because the wireless industry is already successfully engaged in voluntary initiatives to prevent cramming. For example, Tier I, and other carriers have adopted the Mobile Marketing Association's ("MMA") Consumer Best Practices that *inter alia*, require, wireless consumers to "double opt in" to premium services.³ In addition, individual carriers have implemented rigid third-party service provider standards that enable them to quickly identify and block third-party providers who engage in cramming. Rather than adopt new rules that will inevitably reduce the flexibility of wireless carriers to address billing issues, the Commission should continue to support voluntary industry practices directed toward any cramming concerns – including cramming by third parties.

Finally, as CTIA stated in its previous comments, the Commission lacks authority to adopt the proposed rules. The Communications Act of 1934, as amended, prohibits the Commission from adopting cramming requirements related to short message service ("SMS") and wireless broadband data services or bills for such services. In addition, the cramming proposals would violate the First Amendment because they are unduly burdensome and are not

² See Attachment A.

³ See Mobile Marketing Association, Consumer Best Practices, available at <http://www.mmaglobal.com/policies/consumer-best-practices> (last accessed June 19, 2012).

justified by the record in this proceeding – regardless of whether they apply to voice, SMS, or data services.

II. THE COMMISSION HAS FAILED TO DEMONSTRATE THAT WIRELESS CRAMMING IS A PREVALENT CONSUMER ISSUE.

A. The Commission should address the growing number of TCPA complaints instead of devoting valuable resources to *de minimis* wireless cramming concerns.

Wireless cramming is not a significant consumer concern, and the Commission’s resources would be better spent resolving the growing number of TCPA complaints. Wireless carriers work diligently to combat hundreds of millions of unsolicited telemarketing calls (including live, autodialed, and artificial or prerecorded telemarketing calls), text message advertisements, and unsolicited messages to mobile devices.⁴ Nonetheless, the number of TCPA related consumer complaints continue to grow. Instead of devoting valuable resources to a nonexistent wireless cramming issue, the Commission should develop new strategies to assist carriers in protecting consumers from unsolicited third-party telemarketing.

A detailed analysis of the Commission’s Quarterly Reports on Informal Consumer Inquiries and Complaints reveals the severity of the third-party telemarketing problem.⁵ Most notably, the Commission reported 234,422 wireless TCPA related complaints during 2008-2011.⁶ In comparison, during the same period, the Commission did not report any wireless cramming complaints because they fell below the threshold requirement to be placed on the

⁴ The Commission has promulgated CAN-SPAM rules to protect consumers from “unwanted mobile service commercial messages.” 47 C.F.R. § 64.3100. The CAN-SPAM Act defines “mobile service commercial message” as a “commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service . . . in connection with such service.” *See* CAN-SPAM Act, Section 14(d), *codified at* 15 U.S.C. § 7712(d).

⁵ *See* Attachment A.

⁶ *Id.*

quarterly report. In fact, the number of cramming complaints has not been reported by the Commission since 2002.⁷

Unlike wireless cramming, third-party telemarketing continues to be a tremendous consumer concern. In fact, analysis of the FCC's most recently-released complaint statistics reveals that TCPA complaints by wireless consumers comprise more than 84 percent of all complaints reported by the Consumer & Governmental Affairs Bureau in connection with wireless consumers.⁸ That amounts to 120 complaints per million subscriber connections.

Without any evidence of a significant cramming problem, the Commission's resources would be better spent addressing issues that are of actual concern. TCPA violations impose significant costs on consumers and carriers and divert industry resources away from developing innovative new services. The sheer volume of complaints also increases the administrative burden on Commission staff.

B. Voluntary industry action will continue to prevent wireless cramming from becoming a significant consumer issue.

The wireless industry is engaged in voluntary initiatives that will continue to sufficiently deter the expansion of wireless cramming concerns. For example, multiple carriers voluntarily have adopted the MMA's Consumer Best Practices as a requirement for direct carrier billing.⁹ These carriers serve more than 90 percent of wireless subscribers. This voluntary industry initiative offers significant consumer protection by directing mobile marketing campaigns to obtain double opt-in verification for premium text services, to promote clear disclosure of costs at the time of sale, and to participate in industry wide auditing efforts. MMA's Consumer Best

⁷ *Id.*

⁸ *Id.*

⁹ See Mobile Marketing Association, Consumer Best Practices, available at <http://www.mmaglobal.com/policies/consumer-best-practices> (last accessed June 19, 2012).

Practices promote “consumer protection and privacy” and seek to bring “together numerous stakeholders in the mobile ecosystem in an ongoing effort to improve the mobile subscriber experience in North America.”¹⁰

Individual carriers, including, but not limited to, Sprint Nextel, Verizon, T-Mobile, and U.S. Cellular have practices that meet or exceed the protections envisioned in the *Report and Order* (“R&O”) and *Further Notice of Proposed Rule Making* (“FNPRM”) – for example, offering consumers, blocking of third-party charges. Many carriers have adopted practices that go beyond the R&O and FNPRM, demonstrating wireless carriers’ strong interest in addressing cramming issues. As one example, carriers enter into contracts with aggregators and their customers for billing and collection services associated with premium content. In addition, carriers increasingly have adopted a model that rewards those marketers that have a low rate of customer complaints. If a marketer is not generating complaints to customer care, it will receive a larger revenue share from the carrier than those services that generate more complaints.¹¹ Moreover, carriers are voluntarily engaged in consumer education and awareness initiatives.¹²

As another example, Sprint Nextel has created a system of financial rewards and penalties through its contracts with messaging aggregators that incentivizes aggregators to work only with reputable content providers.¹³ Sprint Nextel’s approach rewards aggregators who

¹⁰ Mobile Marketing Association, *U.S. Consumer Best Practices*, Version 6.1, at 6 (Apr. 1, 2011), available at <http://www.mmaglobal.com/bestpractices.pdf>.

¹¹ See Transcript of FTC “Examining Phone Bill Cramming” Workshop (May 11, 2011) (comments by Michael Altschul, Senior Vice President and General Counsel, CTIA-The Wireless Association®).

¹² See, e.g., AT&T Smart Controls, Increase Safety – Cramming, available at <http://www.att.net/smartcontrols-Cramming> (last accessed June 19, 2012).

¹³ See Comments of Sprint Nextel, CG Docket No. 11-116 at 7 (filed Oct. 24, 2011), available at <http://apps.fcc.gov/ecfs/document/view?id=7021717708> (last accessed June 19, 2012).

work with content providers that demonstrate compliance with the Best Practice Guidelines and Sprint Nextel's internal guidelines, and penalizes aggregators that work with content providers who commit multiple infractions. Sprint Nextel's approach also penalizes aggregators for failing to identify or report billing incidents requiring refunds, and monitors aggregators' and content providers' track records so it can take appropriate remedial action where necessary.

The Commission should continue to favor flexible, evolving industry initiatives such as the MMA Consumer Best Practices, and individual carrier initiatives for addressing consumer cramming concerns, rather than prescriptive and inflexible regulations.

C. Wireless carriers recognize that consumers may choose from a number of wireless service providers, therefore, carriers possess an extraordinary incentive to expeditiously resolve any consumer complaints.

The FCC's cramming rules are unnecessary in the wireless context because wireless customers have a choice of multiple service providers¹⁴ and the ability to port their number to a new provider if they are not satisfied with their carrier's customer service, including their carrier's billing policies. The ability of consumers to switch carriers provides strong incentives to ensure that cramming does not occur. In fact, according to a recent American Customer Satisfaction Index, the four largest carriers are now within two points of each other on a 100 point scale.¹⁵ This attention to customer service reflects the industry's recognition that many consumers are choosing their service provider based on customer service.¹⁶

¹⁴ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fifteenth Competition Report, WT Docket No. 10-133, FCC 11-103, rel. June 27, 2011, at paras. 44-45, Table 5 (indicating more than 76% have a choice of 6 or more, almost 90% have a choice of 5 or more, etc.).

¹⁵ See Peter Svensson, Associated Press, USA Today Tech, Study: Phone companies even on satisfaction (May 15, 2012), <http://www.usatoday.com/tech/news/story/2012-05-15/cellphone-satisfaction/54965546/1>.

¹⁶ See JD Power and Associates, 2012 U.S. Wireless Smartphone and Traditional Mobile Phone Satisfaction Studies – Volume 1 (Mar. 14, 2012), <http://www.jdpower.com/content/press-release/py6kvam/2012-u-s-wireless-smartphone-and-traditional-mobile-phone-satisfaction-study--v1.htm>.

A wireless carrier that fails to quickly address its customers' cramming concerns runs a high risk of losing its customers to a competitor, and experiencing higher operating costs. According to a J.D. Power Study on wireless customer care, "[w]ireless customers who indicate that they have had a positive customer care experience are more loyal and are, therefore, less likely to switch carriers in the future"¹⁷ Moreover, carriers incur tremendous costs when customers place calls to customer care representatives. As a result, carriers closely monitor calls they receive about cramming and other consumer complaints, and quickly discontinue billing for any third-party that generates too many complaints.¹⁸

The considerations discussed above demonstrate that there is no need for the Commission to impose cramming regulations on wireless carriers. Doing so will disrupt a system that effectively resolves consumer concerns. Moreover, such action would be contrary to President Obama's Executive Order calling on federal agencies to "reassess and streamline regulations."¹⁹

¹⁷ See J.D. Power and Associates, J.D. Power and Associates Reports: Interaction with Agents May Significantly Elevate Satisfaction with the Wireless Customer Care Experience, Press Release (Feb. 3, 2011), <http://www.jdpower.com/news/pressrelease.aspx?ID=2011010>.

¹⁸ See Transcript of FTC "Examining Phone Bill Cramming" Workshop, Comments by Michael Altschul, Senior Vice President and General Counsel, CTIA-The Wireless Association®, 127 (May 11, 2011) ("FTC Workshop Transcript") (stating that calls to a customer care representative cost carriers an estimated \$7 to \$10 per call, much higher than the revenues from premium content, "so a few calls to customer care can erase any incentive to carry premium messages very quickly"), *id.* (stating that carriers "monitor on a daily basis all of their calls to their customer care and customer service representatives . . . so they can quickly detect any spikes in any particular issue that is causing customers to call customer care"), 128 (discussing carrier actions to suspend or not carry "programs that result in either too many complaints on a carrier's network or . . . are not found to be compliant with the industry best practices"); *see also* FTC Workshop Transcript, Comments by Glen Reynolds, Vice President of Policy, U.S. Telecom, at 123-34 (discussing the importance of continuously monitoring cramming complaints "to identify potential problems that require implementation and remediation of the billing aggregators" and stating that companies have "exercised their authority to terminate or suspend either multiple service providers or even aggregators).

¹⁹ See Exec. Order No. 13579, 76 Fed. Reg. 41587 (Jul. 11, 2011).

III. THE COMMISSION LACKS AUTHORITY TO REGULATE WIRELESS DATA AND SHORT MESSAGE SERVICE (“SMS”).

A. Title III of the Communications Act does not authorize the Commission to impose cramming regulations on wireless data and SMS.

The Commission does not have authority under Title III to require wireless carriers to comply with cramming requirements for data and SMS. Specifically, Section 332(c) prohibits the Commission from imposing such requirements on non-common carrier services. And even if there were no such prohibition, the other provisions of Title III do not grant the Commission authority to impose cramming rules.

1. Section 332(c) Prohibits the Commission From Imposing Common Carrier Cramming Obligations Related to Carriers’ Own Wireless Broadband Internet Access Service and SMS.

The Commission’s cramming requirements related to carriers’ billing for their own services would constitute Title II common carrier obligations.²⁰ Like the Commission’s truth-in-billing rules, the proposed mandates would be designed to assist consumers in understanding their bills and preventing unauthorized charges.²¹ When it adopted the common carrier truth-in-billing requirements, the Commission noted that it has “jurisdiction under Title II to regulate the manner in which a carrier bills and collects for its services”²² It also stated that the truth-in-billing rules would “deter carriers from engaging in unjust and unreasonable practices in violation of section 201(b).”²³ Those rules related to the provision of voice service. The

²⁰ *NPRM* ¶ 83.

²¹ *See, e.g., NPRM* ¶ 1; *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 ¶ 20 (1999).

²² *See id.* ¶ 25; *see also* ¶ 21 (citing as authority Sections 201(b) and 258(a)).

²³ *See id.* ¶ 24; *see also id.* ¶ 25 (stating that “[b]illing, like all other practices for and in connection with interstate service, must be just and reasonable”); 47 C.F.R. § 64.2401.

Commission's authority, however, to subject wireless carriers to cramming or truth-in-billing requirements related to SMS and wireless broadband data services is distinguishable.

Section 332(c) limits the Commission's ability to impose these types of common carrier billing requirements. It states that for mobile services, common carrier obligations may be imposed only on services that constitute a "commercial mobile service" (*i.e.*, CMRS), defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) such classes of eligible users as to be effectively available to a substantial portion of the public."²⁴ Although voice services are considered CMRS, and therefore subject to common carrier obligations, carrier-provided wireless broadband data services and SMS are not. So applying these billing-related common carrier requirements would not be within the Commission's authority. Moreover, the applications and premium content that carriers may chose to bill on behalf of the parties providing those services are not provided by carriers. Therefore, the Commission is prohibited from promulgating cramming rules that would apply to those services.

The Commission previously has held that wireless broadband Internet access service is not CMRS.²⁵ Specifically, it found that the service is not an "interconnected service" within the meaning of Section 332 and the Commission's CMRS rules because it does not "give subscribers the capability to communicate to or receive communications from all other users on the public switched network."²⁶ Thus, pursuant to the express terms of Section 332(c), the Commission's

²⁴ 47 U.S.C. § 332(d)(1).

²⁵ *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 45 (2007) ("*Wireless Broadband Declaratory Ruling*").

²⁶ *See id.* The term "interconnected service" is defined as "a service that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network" 47 C.F.R. § 20.3.

cramming proposals cannot be extended to wireless broadband Internet access services. The Commission also found that wireless broadband Internet access service is an “information service” under the Act and, therefore, not subject to Title II common carrier requirements.²⁷

SMS services also are not CMRS.²⁸ Like wireless broadband Internet access services, SMS services are not “interconnected services” under Section 332 and the Commission’s CMRS rules. Notably, they do not “give subscribers the capability to communicate to or receive communications from all other users on the public switched network.”²⁹ SMS messages are store and forward IP-based messages that are not transmitted on the public switched telephone network (“PSTN”) (unlike CMRS voice services). Moreover, they are transmitted primarily between mobile phones and do not offer subscribers the capability of communicating with all other PSTN users. Thus, Section 332(c) also precludes the Commission from extending new cramming rules to SMS services.

2. Separate From the Prohibition in Section 332(c), the Commission Lacks Authority Under Title III to impose its Cramming Regulations on Data or SMS Services.

As discussed above, Section 332(c) expressly prohibits the Commission from promulgating new cramming requirements for wireless broadband and SMS services. Even if there was no express prohibition, however, the Commission would lack authority under Title III to impose these specific cramming requirements on wireless broadband data services and SMS services.

²⁷ *Wireless Broadband Declaratory Ruling* ¶¶ 22, 41.

²⁸ *See, e.g.*, Comments of CTIA – The Wireless Association®, WC Docket No. 08-7, 40-44 (filed Mar. 14, 2008).

²⁹ 47 C.F.R. § 20.3.

For example, Section 301 grants the Commission subject matter authority to regulate “radio communications” and the “transmission of energy by radio.”³⁰ As the D.C. Circuit held in *Comcast*, however, such grants of subject matter authority do not confer authority to adopt any specific regulations.³¹ Section 303(r) similarly does not contain an independent grant of regulatory authority; it only authorizes rules where the Commission has separate authority and where such rules are “not inconsistent with the law.”³²

Sections 307(a) and 316 are also inapplicable. Section 307(a) authorizes the issuance of licenses “if public convenience, interest, or necessity will be served thereby”³³ and has effect only before a license is granted. In this proceeding, the Commission proposes to extend new cramming mandates to existing wireless licensees and service providers. And Section 316 provides authority to modify licenses, but it is concerned with individual licenses and licensee action, not broad rulemaking proceedings.³⁴ For that reason, it includes certain individualized licensee protections such as written notification, a reasonable opportunity to protest, and potentially a hearing.³⁵ Both Section 307(a) and Section 316 are also too vague to be reasonably interpreted as providing authority for the Commission’s specific cramming proposals.

The proposed cramming rules and other billing proposals have no substantive connection to spectrum management or usage. Although Section 303(b) authorizes the Commission, subject to what the “public interest, convenience, or necessity requires,” to “[p]rescribe the nature of the

³⁰ 47 U.S.C. § 301.

³¹ *Comcast Corp. v. FCC*, 600 F.3d 642, 647-49 (D.C. Cir. 2010).

³² 47 U.S.C. § 303(r).

³³ *Id.* § 307(a).

³⁴ *See, e.g., WBEN, Inc. v. United States*, 396 F.2d 601, 618-19 (2d. Cir. 1968).

³⁵ 47 U.S.C. § 316.

service to be rendered by each class of licensed stations and each station within any class,”³⁶ this authority does not extend so far as to support the Commission’s cramming requirements.

Instead, Sections 303(a), (b), and (c) grant authority for the Commission to identify spectrum to be allocated, designate the nature of services for those allocations, and assign the spectrum to classes of radio stations.³⁷ Here, the Commission is not deciding allocation or assignment issues, or defining which services should be offered in a particular spectrum band. Thus, Section 303(b) is inapplicable to the Commission’s proposed rules.

B. The Commission lacks authority under Title I and II to adopt cramming rules for data and SMS services and for billing services provided to third parties.

Like Title III, Titles I and II do not provide sufficient authority for the Commission to adopt common carrier cramming requirements for wireless broadband data services and SMS services or for billing services provided to third parties.

The Commission already has determined that the billing and collection service provided by carriers to third parties is not subject to regulation under Title II.³⁸ The Commission stated that “carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act,” adding that it “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.’”³⁹ Instead, billing and

³⁶ *Id.* § 303(b).

³⁷ *See, e.g., Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769, 4791 (1995).

³⁸ *See Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150 ¶¶ 30-34 (1986) (“1986 Detariffing Order”). The Commission reaffirmed this decision in 2007 when it declined to impose safeguards addressing the billing and collection practices of Bell Operating Companies. *Section 272(F)(1) Sunset of the BOC Separate Affiliate And Related Requirements*, 22 FCC Rcd 16440 ¶ 113 (2007).

³⁹ *Id.* ¶ 32.

collection “is a financial and administrative service.”⁴⁰ It encompasses “the recording and aggregation of the billing data . . . , the application of the [third party’s rates] to create a customer invoice, the mailing of bills, the collection of customer deposits and bill payments, the handling of customer inquiries concerning their bill, and the investigation of customer fraud or billing evasion activities.”⁴¹ The Commission also stated that even if billing and collection for another carrier is assumed to be a “communication service” (now called telecommunications service under the Communications Act), it is “doubtful” that such activities for third parties could be described as a “common carrier” service.⁴²

Section 153(44) of the Act provides that a telecommunications carrier shall be treated as a common carrier and therefore regulated under Title II “only to the extent that it is engaged in providing telecommunications services.”⁴³ As noted above, the Commission already has determined that wireless broadband Internet access services are information services regulated under Title I, not telecommunications services regulated under Title II. And as CTIA has previously explained to the Commission, SMS services are also information services subject to Title I of the Act.⁴⁴ For example, SMS services contain all of the key characteristics of other services like email and voice storage and retrieval that have long been classified as information

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² For example, the Federal Elections Commission recently issued an Advisory Opinion that permits candidates for federal office to utilize wireless carriers’ premium messaging services to collect campaign contributions. See FEC [AO 2012-17, Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.](#), (June 11, 2012), available at: <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3438> (last visited June 22, 2012).

⁴³ 47 U.S.C. § 153(44).

⁴⁴ *See, e.g.*, Comments of CTIA – The Wireless Association®, WC Docket No. 08-7, 32-40 (filed Mar. 14, 2008). “Information service” is defined as a service that provides the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

services. SMS services involve the storage and forwarding of IP-based messages, data conversion, and data retrieval functions. Just as with email, SMS messages are not sent directly to the recipient, but rather to computers that store the data until it is ready to be received. SMS also offers the capability for “subscriber interaction with stored information,” consistent with other information services.⁴⁵ In addition, computers regularly act on the form and content of an SMS message, and SMS messages routinely involve “address translation, protocol conversion [and] billing management.”⁴⁶ Because wireless broadband Internet access services and SMS services are information services regulated under Title I, the Commission cannot subject them to the proposed Title II common carrier cramming requirements.

The Commission also cannot use its ancillary jurisdiction under Title I to enact new cramming mandates. As the D.C. Circuit recognized in *Comcast*, an assertion of ancillary jurisdiction must further a statutorily mandated responsibility or specific Commission power found elsewhere in the Act.⁴⁷ As demonstrated above, no such direct statutory responsibility exists in the area of cramming. Moreover, the Commission cannot rely on ancillary jurisdiction to impose common carrier regulations on services that are expressly exempt from such regulation.⁴⁸ Here, wireless broadband Internet access services and SMS, as non-CMRS information services, are expressly exempt from common carrier regulation under both Section

⁴⁵ *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 FCC 2d 384 ¶ 97 (1980) (prior and subsequent history omitted); *United States v. W. Elec. Co.*, 578 F. Supp. 658, 659 (D.D.C. 1983) (finding time and weather information announcements to be information services) (subsequent history omitted).

⁴⁶ *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 75 (1998).

⁴⁷ *See Comcast*, 600 F.3d at 646.

⁴⁸ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-01 (1979); *see also NARUC v. FCC*, 533 F.2d 601, 607 (D.C. Cir. 1976) (stating that courts must review “whether any statutory commandments are directly contravened” by the asserted ancillary jurisdiction) (internal citations omitted). In *Midwest Video*, the Supreme Court struck down a Commission Order imposing common carrier regulations on cable providers because of a provision in Section 3(h) of the Act that prohibits broadcasters from being deemed common carriers.

332(c) and Section 153(44), as discussed above. With respect to billing and collection for third-party services, the Commission previously found that exercising ancillary jurisdiction was not justified because “there is sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices” and that significant competition “will continue to develop.”⁴⁹

C. Any proposed wireless cramming regulation would likely violate carriers’ First Amendment protections.

Any wireless cramming regulations likely would violate carriers’ First Amendment rights. The First Amendment protects against government compelled speech as well as outright prohibitions on speech; as the Supreme Court stated, “freedom of speech prohibits the government from telling people what they must say.”⁵⁰ In the commercial speech context, the Supreme Court has held that the government may compel the disclosure of “purely factual and uncontroversial information” consistent with the First Amendment only if the disclosure requirements “are reasonably related to the State’s interest in preventing deception of consumers,” and are not “unjustified or unduly burdensome.”⁵¹

The various cramming proposals in the *FNPRM* would create an unjustified and undue burden on wireless carriers because of the significant implementation challenges and costs described above, including costs associated with addressing consumer confusion and frustration created by the new requirements.⁵²

⁴⁹ *1986 Detariffing Order* ¶¶ 36-37.

⁵⁰ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

⁵¹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also Milavetz v. United States*, 130 S. Ct. 1324, 1339-40 (2010).

⁵² Some of the proposals discussed in the *NPRM* would also go far beyond adding a mandated disclosure to a message already in distribution, a form of compelled speech that typically does not offend the First Amendment. *See Zauderer*, 471 U.S. at 651 (upholding a required disclosure to be added to advertisements); *Connecticut Bar Ass’n v.*

In addition to being unduly burdensome, the cramming proposals are also unjustified because the record fails to show that the required disclosures are directed at a harm caused by carriers' misleading statements or actions.⁵³ As discussed above, carriers are vigorously competing to enhance their customer service offerings, prevent cramming from occurring, and address cramming issues when they do occur. Whereas courts may find that the First Amendment permits the government to compel speech that is purely factual as a remedy to fix a misleading or incomplete message,⁵⁴ carriers already make available to consumers all of the information they need to monitor their wireless bills and prevent cramming. Thus, by imposing both an undue and unjustified burden on wireless providers, the Commission's cramming proposals would impermissibly infringe their First Amendment rights.

IV. CONCLUSION

For the foregoing reasons, the Commission should refrain from imposing unnecessary, burdensome, and unlawful cramming mandates on wireless services. Instead, it should support

United States, 620 F.3d 81, 101 (2nd Cir. 2010) (finding no heavy burden when plaintiffs are required to include an additional message in their communications); *United States v. Wenger*, 427 F.3d 840, 851 (10th Cir. 2005) (holding that a disclaimer imposes little burden when it only requires a publicist to disclose, in the course of producing a half-hour broadcast or multi-page newsletter, the amount of consideration he received).

⁵³ See *Ibanez v. Florida Dep't of Bus & Prof'l Regulation*, 512 U.S. 136, 147 (1994) (stating that the state failed to "back up" its claim that the harm the required disclosures were meant to address was created by the speech at issue); *Tillman*, 1996 WL 767477, *4 ("a state must demonstrate that the harms to the public which are addressed by the compelled speech are fostered intentionally or inadvertently, by the underlying speech") *aff'd*, 133 F.3d 1402 (11th Cir. 1998).

⁵⁴ See *Zauderer*, 471 U.S. at 651 ("The State has attempted only to . . . require[] that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."); *United States v. Schiff*, 379 F.3d 621, 630 (9th Cir. 2004) (holding that website operator may be compelled to post factual information about potential criminal liability if patrons utilized the illegal tax schemes posted on his website).

voluntary industry efforts to prevent cramming and work with providers to educate consumers about the variety of account management tools already available. It also should take enforcement action to address the growing number of TCPA complaints filed by wireless consumers.

Respectfully submitted,

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ATTACHMENT A

Cramming & TCPA-Related Extract from FCC CGB Quarterly Reports on Informal Consumer
Inquiries and Complaints (2002 - 2011)¹

Actual Numbers	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Billing/Rates	8,701	10,594	14,546	13,065	8,822	8,811	10,930	13,008	13,055	12,021
Carrier Marketing / Advertising	1,500	2,133	3,104	3,080	1,941	1,598	1,385	1,456	727	0
Contract Termination	1,558	2,386	3,958	3,956	2,051	1,727	2,134	1,748	1,228	1,858
Cramming	92	0	0	0	0	0	0	0	0	0
Equipment	603	633	0	1,832	316	0	768	0	1,030	2,450
Service Related Complaints	1,693	2,166	3,031	4,009	2,578	5,129	4,567	2,777	3,397	6,884
Number Portability	0	3,447	4,839	0	0	0	0	0	0	0
Wireless Telephone Consumer Protection Act Complaints	0	0	0	0	1,707	14,614	42,154	47,842	52,481	91,945
Bill Shock	0	0	0	0	0	0	0	0	416	0
Total	14,147	21,359	29,478	25,942	17,415	31,879	61,938	66,831	71,918	115,158
Non-TCPA Wireless Complaints	14,147	21,359	29,478	25,942	15,708	17,265	19,784	18,989	19,437	23,213

Percentages										
Billing/Rates	61.5%	49.6%	49.3%	50.4%	50.7%	27.6%	17.6%	19.5%	18.2%	10.4%
Carrier Marketing / Advertising	10.6%	10.0%	10.5%	11.9%	11.1%	5.0%	2.2%	2.2%	1.0%	0.0%
Contract Termination	11.0%	11.2%	13.4%	15.2%	11.8%	5.4%	3.4%	2.6%	1.7%	1.6%
Cramming	0.7%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Equipment	4.3%	3.0%	0.0%	7.1%	1.8%	0.0%	1.2%	0.0%	1.4%	2.1%
Service Related Complaints	12.0%	10.1%	10.3%	15.5%	14.8%	16.1%	7.4%	4.2%	4.7%	6.0%
Number Portability	0.0%	16.1%	16.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Wireless Telephone Consumer Protection Act Complaints	0.0%	0.0%	0.0%	0.0%	9.8%	45.8%	68.1%	71.6%	73.0%	79.8%
Bill Shock	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.6%	0.0%
Total										
Non-TCPA Complaints	100%	100%	100%	100%	90%	54%	32%	28%	27%	20%

¹ CTIA- The Wireless Association® compiled all data contained in these charts using data released in the Commission's quarterly complaint reports between 2002 – 2012.

Cramming & TCPA-Related Extract from FCC CGB Quarterly Reports on Informal Consumer
Inquiries and Complaints (Last Five Quarters)²

Quarterly Complaints by Category	1Q 2011	2Q 2011	3Q 2011	4Q 2011	1Q 2012
Billing/Rates	3,443	3,106	2,710	2,762	3,234
Carrier Marketing / Advertising	0	0	0	0	0
Contract Termination	434	361	559	504	539
Cramming	0	0	0	0	0
Equipment	608	556	591	695	643
Service Quality	1,046	1,031	2,294	2,513	2,632
Number Portability	0	0	0	0	0
Telephone Consumer Protection Act	21,964	21,095	23,236	25,650	38,348
Total	27,495	26,149	29,390	32,124	45,396
Non-TCPA related complaints	5,531	5,054	6,154	6,474	7,048
Complaint rate per million subs (less TCPA)	18	17	20	20	22
Total Quarterly Complaints per Million Wireless Subscribers - below by issue	92	85	95	102	142
Billing/Rates	11	10	9	9	10
Carrier Marketing / Advertising	0	0	0	0	0
Contract Termination	1	1	2	2	2
Cramming	0	0	0	0	0
Equipment	2	2	2	2	2
Service Related Issues	3	3	7	8	8
Number Portability	0	0	0	0	0
Telephone Consumer Protection Act	73	69	75	81	120
Categories of Complaints as a Percentage of Total					
Billing/Rates	12.5%	11.9%	9.2%	8.6%	7.1%
Carrier Marketing / Advertising	0.0%	0.0%	0.0%	0.0%	0.0%
Contract Termination	1.6%	1.4%	1.9%	1.6%	1.2%
Cramming	0.0%	0.0%	0.0%	0.0%	0.0%
Equipment	0.0%	0.0%	0.0%	2.2%	1.4%
Service Quality	3.8%	3.9%	7.8%	7.8%	5.8%
Number Portability	0.0%	0.0%	0.0%	0.0%	0.0%
Telephone Consumer Protection Act	79.9%	80.7%	79.1%	79.8%	84.5%

² *Id.*