

**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 THE COALITION FOR A COMPETITIVE
TELECOMMUNICATIONS MARKET**

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SUMMARY OF COMMENTS OF THE CCTM

The Coalition for a Competitive Telecommunications Market (“CCTM”) opposes an opt-in approach with respect to third-party billing of presubscribed 1+ telecommunications services (“1+ Services”). Third-party billing provides consumers with competitive alternatives, beyond a consumer’s existing LEC, for cost-effective 1+ Services while still retaining the convenience of consolidated billing. The Commission should: (1) find that an opt-in approach to third-party billing of 1+ Services is unwarranted, and specifically exempt such services from any opt-in requirements which may be adopted; (2) ensure that such an exemption specifically protects against anticompetitive practices associated with third-party billing of 1+ Services; and (3) ensure that consumers are provided with accurate information with respect to any exemption of 1+ Services from opt-in.

An additional opt-in approach, particularly at the LEC level, with respect to third-party billing of competitive 1+ Services: (1) is entirely unwarranted because 1+ Services are already subject to stringent FCC regulatory requirements to verify a consumer’s intent to switch service providers; and (2) would create an unnecessary impediment to consumer choice and ability to readily obtain alternative 1+ Services aside from services provided by a consumer’s LEC.

Consumers must already provide affirmative consent to third-party billing of competitive 1+ Services. The FCC regulations, as well as procedures and safeguards followed by competitive 1+ Service providers to verify consumer authorization, essentially serve as an opt-in mechanism. An additional opt-in mechanism, whereby a consumer must also give express consent to the LEC or another entity, is simply unnecessary and overly burdensome. This additional burden would create an impediment to consumer choice in competitive 1+ Service

providers, effectively limiting consumers to the 1+ Service options offered exclusively by the LECs.

Given the current structure of the 1+ Service market, a LEC necessarily would, by default, gain a 1+ Service customer if that customer is unable to obtain competitive 1+ Service from alternative providers. Effective control over the 1+ Service reseller market, customer base and service provisioning creates opportunities for LECs to engage in anticompetitive behavior. This is especially apparent in “winback” programs which leverage LEC control over 1+ Services in anticompetitive and potentially unlawful ways. LECs have also abused existing control over the third-party billing process to further these winback programs, improperly classify and resolve consumer inquiries, and unilaterally block authorized service charges, all to the detriment of 1+ Service providers. These unreasonable and anticompetitive LEC practices stand to impede or terminate the operations of competitive 1+ Service providers, potentially eliminating market competition. An additional opt-in approach that is controlled by the LECs would only exacerbate existing concerns and create opportunities for other anticompetitive abuses.

Even if the Commission specifically exempts 1+ Services from an opt-in approach to third-party billing, misinformation or insufficient information about the opt-in process could still have anticompetitive effects. To protect consumers, the Commission should expressly clarify that misinformation or failure to convey sufficient information about an exemption of 1+ Services would constitute a violation of Section 201(b) of the Act. The Commission should also consider minimum consumer education efforts and disclosure requirements to ensure consumers are aware of the availability of and right to utilize competitive 1+ Services of their choosing.

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**COMMENTS OF THE COALITION FOR A COMPETITIVE
TELECOMMUNICATIONS MARKET**

The Coalition for a Competitive Telecommunications Market ("CCTM"),¹ by its undersigned attorneys, respectfully submits the following comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") *Further Notice of Proposed Rulemaking* ("FNPRM") released on April 27, 2012 in the above-captioned proceeding.² The CCTM previously submitted comments and reply comments in response to the Commission's July 12, 2011 *Notice of Proposed Rulemaking* ("NPRM").³

¹ The CCTM is comprised of various providers of presubscribed 1+ telecommunications services, including the following: Affordable Long Distance LLC; Legent Communications Corporation; Long Distance Access Inc.; Long Distance Consolidated Billing Company; Preferred Long Distance, Inc.; and Twin City Capital, LLC.

² *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges* ("Cramming"); *Consumer Information and Disclosure*; *Truth-in Billing and Billing Format*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 11-116, CG Docket No. 09-158, CC Docket No. 98-170 (FCC 12-42) (rel. April 27, 2012).

³ *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges* ("Cramming"); *Consumer Information and Disclosure*; *Truth-in-Billing and Billing Format*, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170, Notice of Proposed Rulemaking, 26 FCC Rcd 10021 (2011). The CCTM submitted initial comments (filed in CG Docket No. 11-116) in response to the NPRM on October 24, 2011 ("*CCTM Comments*") and reply comments (filed in CG Docket No. 11-116) on December 5, 2011 ("*CCTM Reply Comments*"). Both of these submissions are hereby incorporated by reference.

As explained below, the CCTM opposes an opt-in approach with respect to third-party billing of competitive, presubscribed 1+ telecommunications services (“1+ Services”).⁴ Such an approach for 1+ Services is unwarranted and not supported by the record. Significantly, the record contains no substantive evidence that competitive 1+ Service providers are contributors to the cramming problem.⁵ On the contrary, the record reflects that third-party billing provides consumers with competitive alternatives, beyond a consumer’s existing LEC, for cost-effective 1+ Services while still retaining the convenience of consolidated billing.⁶ With respect to 1+ Services (and other telecommunications services), the Commission has recognized the “importance of consumer choice and benefits of legitimate third-party billing for consumers,” and that “the record is clear that some third-party charges are very beneficial.”⁷ Without readily available (and reliable) third-party billing services, consumers would essentially be deprived of viable, competitive (*i.e.*, non-LEC) alternatives for 1+ Services.⁸ Accordingly, the Commission should: (1) find that an opt-in approach to third-party billing of 1+ Services is unwarranted, and specifically exempt such services from any opt-in requirements; (2) ensure that such an exemption specifically protects against anticompetitive practices associated with third-party billing of 1+ Services; and (3) ensure that consumers are provided with accurate information with respect to an exemption of 1+ Services from opt-in.

⁴ Although the discussion herein is limited to 1+ Services, the CCTM generally opposes an opt-in requirement with respect to third-party billing of telecommunications services as a whole.

⁵ The record shows that non-telecommunications (*i.e.*, enhanced) services are primarily responsible for cramming.

⁶ *See, e.g., CCTM Comments* at 1-3; *CCTM Reply Comments* at 2-4.

⁷ *FNPRM* at para. 90.

⁸ Third-party billing benefits consumers by facilitating access to a variety of competitive telecommunications services which might not otherwise be readily available. *See, e.g., CCTM Reply Comments* at 3.

I. THE COMMISSION SHOULD SPECIFICALLY EXEMPT 1+ SERVICES FROM AN OPT-IN APPROACH TO THIRD-PARTY BILLING

The Commission should exempt 1+ Services from any additional opt-in requirements with respect to third-party billing. Specifically, an additional opt-in approach, particularly at the LEC level, with respect to third-party billing of competitive 1+ Services: (1) is entirely unwarranted because 1+ Services are already subject to stringent regulatory requirements to verify a consumer’s intent to switch service providers;⁹ and (2) would create an unnecessary impediment to consumer choice and ability to readily obtain alternative 1+ Services aside from services provided by a consumer’s LEC. Consumer choice and the competitive benefits of alternative 1+ Services are legitimate public interests which should be taken into consideration in determining the proper course of action – exempting 1+ Services from an opt-in approach.

A. 1+ Services are Already Subject to a Stringent and Effective Opt-In Mechanism, Rendering an Additional Opt-In Mechanism Unnecessary

An additional opt-in approval mechanism at any level is unnecessary as providers of competitive 1+ Services are already subject to stringent FCC carrier change rules which were implemented to address “slamming” and, in part, cramming concerns.¹⁰ These rules require, among other things, verification of a consumer’s intent, typically through a written letter of authorization or recorded, independent third-party verification (“TPV”), before a competitive 1+ Service provider may provide such services to the consumer. Many competitive 1+ Service providers, including CCTM members, also implement additional industry developed safeguards, such as “callbacks” to a consumer’s primary billing telephone number, to further verify the legitimacy of the consumer’s identity and intent. Additionally, marketing efforts of competitive

⁹ These existing regulatory requirements effectively serve as a *de facto* opt-in mechanism.

¹⁰ See 47 C.F.R. § 64.1100 *et seq.*

1+ Service providers, including CCTM members, generally highlight the benefits and convenience of consolidated billing (*i.e.*, third-party billing of competitive 1+ Services on the consumer's LEC phone bill) as a key component of 1+ Service offerings.¹¹ Further, the independent TPV scripts utilized by competitive 1+ Service providers are typically required (by LECs or aggregators in third-party billing contracts) to specifically include language which states as follows: "Do you understand that charges from [the competitive 1+ Service provider] will appear on the [aggregator] bill page of your [LEC] bill?" Thus, competitive 1+ Service providers already ensure, from the outset, that a consumer is aware that third-party billed 1+ Service charges will appear on the consumer's LEC invoice.¹²

Taking this into consideration, a consumer subscribing to competitive 1+ Services must already provide affirmative consent to third-party billing. In other words, the FCC regulations, as well as procedures and safeguards followed by competitive 1+ Service providers to verify consumer authorization, essentially serve as an opt-in mechanism. An additional opt-in mechanism, whereby a consumer must also give express consent to the LEC or another entity, is simply unnecessary and overly burdensome. If a LEC can accept that a valid independent TPV has been obtained by the 1+ Service provider when switching a consumer's 1+ Service, then it necessarily follows that the consumer's consent to be third-party billed for such 1+ Service

¹¹ See, e.g., <http://www.preferredld.com/PhoneService/LongDistanceOnly/tabid/58/Default.aspx> (describing the benefits of the provider's consolidated billing option for 1+ Services to include: having all long distance calls billed on a local telephone bill; eliminating multiple phone bills each month; and allowing a customer to write just one check for payment).

¹² In fact, many consumers ultimately subscribe to competitive 1+ Services to take advantage of this convenient third-party billing option. As explained in prior submissions, many small competitive providers of 1+ Services, including CCTM members, utilize third-party billing services both out of necessity (due to cost concerns) and because consumers expect (and often demand) consolidated billing of long distance services on their LEC phone bills. See, e.g., *CCTM Comments* at 1-3, 11-13; *CCTM Reply Comments* at 2-4.

charges can be legitimately inferred.¹³ Accordingly, it is appropriate and necessary to specifically exempt 1+ Services should the Commission implement any additional opt-in requirements with respect to third-party billing.¹⁴

B. Safeguarding Consumer Choice and Competitive 1+ Services Requires Exempting Such Services From a Redundant and Costly Opt-In Approach

Subjecting 1+ Services to another opt-in mechanism would not only be redundant and unnecessary, but would also be unduly burdensome for all parties involved in the process (*i.e.*, consumers, 1+ Service providers, billing aggregators, LECs, as well as the Commission and state regulatory agencies). This additional burden would create an impediment to consumer choice in competitive 1+ Service providers, which would effectively limit consumer choice to the 1+ Service options offered exclusively by the LECs. Furthermore, due to the already rigorous carrier change process, consumers of 1+ Services would either (1) not anticipate the need to provide additional opt-in approval to LECs when attempting to subscribe to competitive 1+ Services or,¹⁵ (2) become frustrated with and abandon the carrier change process when learning of yet another opt-in step to be taken.

¹³ This consent should also be considered effective until the consumer selects a different provider of competitive 1+ Services.

¹⁴ Alternatively, the Commission could also treat the 1+ Service provider's verification of consumer intent to change service providers (pursuant to 47 C.F.R. § 64.1100 *et seq.*) as presumptive opt-in consent to third-party billing. If necessary, this intent could be explicitly ascertained through an additional question in a 1+ Service provider's independent TPV script (or letter of authorization).

¹⁵ Overlooking this additional opt-in step would effectively render moot the consumer's already clear intent to subscribe to the competitive 1+ Services, thereby potentially creating unnecessary confusion on the part of the consumer.

An opt-in process also creates an additional burden for competitive 1+ Service providers, which must incur substantial costs to obtain a new customer.¹⁶ Efforts and costs could be expended by the 1+ Service provider only to ultimately find that the consumer was not able to successfully complete the additional opt-in process, or that the opt-in was somehow thwarted by the LECs.

LECs would not be immune from the additional burdens of an opt-in approval mechanism for third-party billing of 1+ Services. If such a mechanism utilized a similar independent TPV process, LECs would likely incur many of the same costs and burdens as those incurred by competitive 1+ Service providers.¹⁷ At each step of an opt-in process, these costs and efforts would be redundant and wasteful, ultimately increasing the costs associated with competitive 1+ Services which could eventually be reflected in higher rates to consumers.¹⁸

Finally, even the Commission and state regulatory agencies would be subject to additional burdens. Enforcement of a superfluous, mandated opt-in process for 1+ Services would incur additional resources, potentially at both the federal and state level. Already limited government resources would be expended to establish (and refine) a new dispute resolution

¹⁶ A competitive 1+ Service provider's costs just to process new customer sign-ups include, among other things: independent TPV provider charges; the cost of personnel time involved in reviewing each recorded TPV and daily reports of TPVs obtained in order to ensure accuracy; additional time and costs to conduct "callbacks" to further verify the customer's identity and intent; as well as labor, printing, material and postage costs involved in sending confirmation letters and welcome packages to each new customer. This does not even take into account the marketing efforts and other costs involved prior to the customer sign-up process.

¹⁷ See note 16, *supra*.

¹⁸ An additional opt-in mechanism which duplicates an existing process, creates impediments to ease of consumer choice, and potentially increases costs to consumers of 1+ Services, is unwarranted. On the other hand, an efficient third-party billing process for 1+ Services (unburdened by a duplicative opt-in approval requirement) would afford consumers easy access to competitive 1+ Services, thereby promoting competition. Unburdened third-party billing also ensures the continued viability and cost effectiveness of competitive 1+ Service providers, allowing such providers to pass cost savings to consumers in the form of reduced rates.

process for opt-in, train staff on the issues involved, and then to evaluate and resolve potential disputes. These efforts would be wasteful and unnecessary, and duplicative of the existing federal and state system for resolving “slamming” complaints.

Accordingly, if the Commission implements an additional opt-in mechanism, it should exempt competitive 1+ Services in the interest of protecting consumer choice and other benefits of competitive 1+ Services, as well as preventing wasteful, duplicative efforts which, in light of the stringent verification requirements already in place, do not offer any significant added benefits in accomplishing the goal of reducing cramming.

II. EXEMPTING 1+ SERVICES FROM AN OPT-IN APPROACH IS NECESSARY TO PROTECT AGAINST ANTICOMPETITIVE ABUSE

Anticompetitive practices currently permeate the 1+ Service market because LECs, which have ultimate control over third-party billing, are often competing directly with many of the 1+ Service providers utilizing third-party billing. Given the current structure of the 1+ Service market, a LEC necessarily would, by default, gain a 1+ Service customer if that customer is unable to obtain competitive 1+ Service from alternative providers. Unreasonable LEC third-party billing practices can impede or completely terminate the operations of many competitive 1+ Service providers, potentially eliminating market competition. An additional opt-in approach to third-party billing of competitive 1+ Services that is controlled by the LECs would only exacerbate these existing concerns and create opportunities for other anticompetitive abuse. Under the Communications Act of 1934, as amended (the “Act”), the Commission must consider the effects on competition when determining whether a regulatory approach is warranted.¹⁹ As

¹⁹ See, e.g., 47 U.S.C. § 160 (directing the Commission to consider whether forbearance from enforcing provisions of the Act or any regulations “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of

shown below, the Commission should exempt 1+ Services from an opt-in approach to third-party billing in the interest of protecting against anticompetitive abuse and promoting a competitive market for 1+ Services.

A. LEC Control of the 1+ Service Chain and Provisioning Process Facilitates Anticompetitive Abuse and Statutory Violations With Respect to Winback Programs

1+ Service providers operate in a market environment littered with anticompetitive hazards and obstacles. In addition to navigating costly and burdensome federal (and state) regulations in order to simply obtain a customer,²⁰ 1+ Service providers must compete directly with LECs, the gatekeepers of 1+ Services and the associated customer-base. Third-party billing is the most direct and convenient gateway to the realm of competitive 1+ Services (for both consumers and service providers), but the LECs hold all the keys and, more often than not, have locks on both sides of the door. An opt-in approach to third-party billing of 1+ Services, which would give LECs even more control, would run contrary to statutory directives, and create possibilities for even more anticompetitive abuse.²¹

Generally, in providing competitive 1+ Services, a service provider must, among other things: (1) contract with a LEC (directly or indirectly through another reseller) in order to obtain such services for resale; (2) rely on the LEC to properly effectuate an authorized change to a customer's service provider; and (3) depend on the LEC to facilitate legitimate consumer

telecommunications services.”); 47 U.S.C. § 151 (establishing the Commission “to make available, so far as possible, to all the people of the United States... wire and radio communication service with adequate facilities at reasonable charges...”).

²⁰ See, e.g., 47 C.F.R. § 64.1100 *et seq.*

²¹ An additional opt-in process requiring consumers to give approvals to LECs for third-party billing of 1+ Services would be akin to requiring that a purchaser of a retail product contact and provide a separate affirmative approval to a product manufacturer (which also sells direct to consumers) before being allowed to complete and pay for the purchase.

requests to lift primary interexchange carrier (“PIC”) freezes.²² In the CCTM’s experience, a LEC’s effective control over these processes provide opportunities for anticompetitive behavior through “winback” programs that improperly restrict consumer choice or discourage consumers from switching to competitive 1+ Service providers by marketing the LEC’s own bundled service offerings utilizing unlawful methods.²³

Especially troubling is the apparent violation of Section 222 of the Act which occurs when a LEC utilizes knowledge that a customer has subscribed to the competitive 1+ Services of another carrier (or is seeking the services of a competitive 1+ Service provider) for conducting winback marketing efforts.²⁴ Section 222 of the Act defines customer proprietary network information (“CPNI”) to include “information that relates to the... type... of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship[.]”²⁵ With limited exceptions, the Commission’s rules implemented under Section

²² There have been instances where LECs have placed a PIC freeze on a customer’s account without any such request from the customer. *See CCTM Reply Comments* at 9.

²³ For example, CCTM members have experienced numerous instances where LECs have unilaterally imposed PIC freezes, or solicited a customer for services when the customer contacts the LEC to lift a PIC freeze for purposes of switching 1+ Service providers. *See CCTM Reply Comments* at 8-10. A 1+ Service provider has no option but to trust that individuals employed by the LECs to implement the provisioning of competitive 1+ Services will do so without also engaging in anticompetitive behavior. It is possible that such behavior is not necessarily authorized by the LECs. However, the conduct ultimately occurs, possibly due to lack of complete oversight over a LEC’s numerous functions (some of which may possibly be outsourced, such as customer service or sales divisions) and/or competing business objectives (*e.g.*, the need for commissioned sales representatives to meet sales quotas or generate additional revenue, etc.).

²⁴ 47 U.S.C. § 222 (requiring every telecommunications carrier “to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers,” including resellers, and prohibiting the use of proprietary information obtained from another carrier for a carrier’s own marketing efforts).

²⁵ 47 U.S.C. § 222(h)(1)(A).

222 of the Act would specifically prohibit LECs from using, disclosing or permitting access to CPNI (*e.g.*, the fact that a consumer is subscribed to 1+ Services of another carrier) in order to market 1+ Services to a customer already subscribed to the 1+ Services of another provider.²⁶ In fact, winback programs operated in such a manner would be in apparent violation of the Act and the Commission’s CPNI rules. In other words, LEC winback tactics potentially infringe upon an obligation to protect the CPNI of consumers, as well as the proprietary information of 1+ Service providers.

Unless 1+ Services are specifically exempted, an opt-in mechanism with respect to third-party billing simply provides yet another opportunity for LECs to interface with consumers (when obtaining opt-in consent) to further advance these winback efforts and potentially circumvent important FCC requirements (*i.e.*, CPNI) in the process. An additional opt-in mechanism would be yet another way for LECs to “lock both sides of the gate,” preventing 1+ Service providers from servicing customers and preventing customers from accessing alternative providers. In specifically exempting 1+ Services from an opt-in requirement for third-party billing, the Commission should also prohibit LECs from further utilizing their control over the 1+ Service provisioning and third-party billing processes, including access to proprietary information derived from that control, for anticompetitive purposes.

B. LECs Engage in Anticompetitive Abuses of the Existing Third-Party Billing Process Which Would be Exacerbated Under an Opt-In Approach

An opt-in approach to third-party billing of competitive 1+ Services is likely to exacerbate existing anticompetitive practices and create even further opportunities for anticompetitive behavior. With respect to third-party billing, 1+ Service providers are already at

²⁶ 47 C.F.R. §§ 64.2005(a), (b)(2) & (d).

the mercy of LECs due to: (1) generally unilateral third-party billing contracts (whether entered into with service providers or aggregators) which give LECs unfettered control over the entire process; (2) reliance entirely on the LECs to properly bill, account for, collect and remit to the service provider (or aggregator) legitimate charges due for 1+ Services rendered;²⁷ and (3) reliance upon the LECs to fairly and properly adjudicate (and classify) any consumer complaints with respect to the billing of a 1+ Service provider's charges.²⁸

In the CCTM's experience, LECs are already engaging in anticompetitive abuse of their exclusive control over the third-party billing of 1+ Services in various ways. As with control over the 1+ Service chain and provisioning process, LECs have utilized opportunities for customer contact generated by the third-party billing process to operate winback programs or, even worse, improperly classify customer inquiries as "slamming" or "cramming" complaints in order to take punitive actions (under the guise of preventing cramming),²⁹ with no apparent guidelines, against competitive 1+ Service providers utilizing third-party billing services. CCTM members have encountered countless examples where a LEC has improperly classified a customer inquiry as a cramming complaint,³⁰ issued full credits to the customer for years of

²⁷ On top of fees charged for third-party billing services, LECs also exercise unilateral discretion in withholding large (and often excessive) sums of a competitive 1+ Service provider's billed charges for various purposes including, for example, offsets due to possible disputes or chargebacks.

²⁸ Consumers may mistakenly contact LECs directly to inquire about third-party charges (including competitive 1+ Service charges) on their LEC invoices. When this happens, LEC customer service agents may take actions – such as crediting a customer for charges which were actually incurred – without even providing the 1+ Service provider the opportunity to address the legitimacy of the inquiry. Furthermore, these inquiries are then classified, at the LEC's discretion, as "cramming" or "slamming" even though no such violations truly occurred.

²⁹ *See id.*

³⁰ At worst, some of these inquiries would be properly classified as slamming complaints, for which the LECs would be required to operate within the Commission's carrier change

legitimate 1+ Services (credits which ultimately get deducted from payments owed to the competitive 1+ Service provider), assessed a LEC-imposed \$150 cramming penalty upon the competitive 1+ Service provider (which is then retained by the LEC), and ultimately switched the affected customer to one of the LEC's own bundled 1+ Service offerings.

Furthermore, throughout this entire course of misconduct, the competitive 1+ Service provider is offered no opportunity to refute any allegations or LEC determinations by, for example, providing evidence of a valid independent third-party verification demonstrating authorization to provide a customer with competitive 1+ Services. In several cases, customers have even admitted to CCTM members that no such inquiry or complaint was placed with the LEC. On several occasions, customers have even voluntarily reimbursed the competitive 1+ Service provider for legitimately billed 1+ Service charges the LEC had inappropriately credited back to the customer. Unfortunately, aside from the unusual instances of customer goodwill, competitive 1+ Service providers have no appropriate mechanism (and often insufficient time and financial resources) through which recourse may be pursued or obtained.

With exclusive control over an opt-in process for third-party billing, LECs would be afforded yet another opportunity to make unqualified and potentially anticompetitive decisions regarding the legitimacy of complaints or inquiries from consumers regarding the opt-in approval process. Accordingly, the Commission should exempt competitive 1+ Services from any additional opt-in process, as well as prohibit LECs from making arbitrary and self-serving decisions about complaints or inquiries regarding the third-party billing of competitive 1+ Services, without providing any opportunity to 1+ Service providers for recourse.

authorization procedures. *See* 47 C.F.R. § 64.1100 *et seq.* More likely, many of the inquiries in question could simply be a customer seeking additional information regarding his or her invoice.

C. Unilateral LEC Measures, Even Absent a Mandated Opt-In Requirement, are Already Resulting in Significant Anticompetitive Effects

As a result of the Commission's *NPRM* and the ongoing regulatory efforts to prevent cramming, another anticompetitive concern in the third-party billing process has been brought to the attention of competitive 1+ Service providers, including CCTM members. This involves the ability of competitive 1+ Service providers to recover legitimate monthly recurring charges (including regulatory assessments).

Charges submitted for third-party billing by LECs are generally coded in two ways.³¹ The first type of coding represents usage-based charges, such as those associated with the placing of a typical 1+ long distance call. The second type of coding represents non-usage-based charges which typically include monthly recurring fees and surcharges associated with a customer's presubscribed 1+ Service account, such as federal and state regulatory assessments or universal service fees which 1+ Service providers are lawfully permitted to recover from customers. However, the second type of coding is also utilized by LECs to identify the monthly recurring fees associated with non-telecommunications services (*e.g.*, enhanced services), which the record shows are primarily responsible for the cramming problem. LECs, in a zealous effort to eliminate this source of cramming through optional blocking of third-party charges and,³² subsequently, through the phasing out of third-party billing for enhanced services, have also wrongfully blocked the legitimate monthly recurring charges of a consumer's authorized 1+ Service provider. In an era where regulatory assessments are expanding and at all-time highs (*e.g.*, federal universal service fund contributions have recently been as high as 17.9%), the

³¹ Numeric codes are utilized in third-party billing to identify the types of charges being submitted for billing by the LECs.

³² The CCTM also believes that the Commission should take appropriate action to ensure that blocking of third-party billed charges, whether mandated or offered on a voluntary basis by LECs, should not apply to 1+ Services. *See CCTM Reply Comments* at 7.

inability of competitive 1+ Service providers to fully recover these federal and state regulatory obligations results in a significant (and unfair) competitive disadvantage – especially when nearly all telecommunications providers, LECs included, recover such assessments from consumers through additional line-item billing.³³ Although the LECs may possibly attribute this to simple oversight, failure to address this issue – either by the LECs or by the Commission in any carefully considered regulatory solution to cramming – creates an unequal, anticompetitive playing field which could destroy the viability of competitive 1+ Services.

Accordingly, the Commission should exempt 1+ Services from an opt-in approach to third-party billing, and ensure that such an exemption also explicitly prohibits LECs from (deliberately or effectively) blocking any legitimate charges – including monthly recurring fees – associated with competitive 1+ Services.

III. CONSUMERS SHOULD BE PROVIDED WITH ACCURATE INFORMATION AND DISCLOSURES WITH RESPECT TO AN EXEMPTION OF 1+ SERVICES FROM AN OPT-IN APPROACH

Even if the Commission specifically exempts 1+ Services from an opt-in approach to third-party billing, the existence of an opt-in requirement for other services (*e.g.*, non-telecommunications or enhanced services) could still create potential for misinformation which could negatively impact 1+ Services. For example, information disseminated to consumers about the opt-in process could fail to properly inform consumers that competitive 1+ Services are exempt from an additional opt-in requirement. Misinformed consumers would be potentially discouraged from seeking competitive 1+ Services due to the additional opt-in step they perceive

³³ A competitive imbalance is created when LECs are able to fully recover their regulatory assessments but, through their actions, have precluded the same recovery of regulatory assessments by competitive 1+ Service providers. This imbalance places 1+ Service providers at a competitive disadvantage.

to be required. Alternatively, consumers could also be misinformed that obtaining third-party billed competitive 1+ Services would serve as opt-in to all third-party billed charges.³⁴ Thus, a consumer could potentially forego the option of competitive 1+ Service under the misconception that doing so would open up the consumer's invoice for unauthorized third-party charges to be crammed.

The Commission has placed significant importance on providing consumers with truthful and accurate information. In fact, the Commission has found that providing misleading information constitutes a violation of Section 201(b) of the Act,³⁵ which requires that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”³⁶ Indeed, a practice that “convey[s] insufficient information” may also constitute a violation of Section 201(b).³⁷ Competitive 1+ Service providers are well aware of such requirements, especially

³⁴ If 1+ Services are exempt from an opt-in requirement, a consumer would not need to provide a separate opt-in request to the LEC. In other words, a consumer's existing “opt-in status” would be unchanged despite the fact that the consumer has obtained competitive 1+ Services. Thus, the consumer would not be at risk for cramming of charges by other third-party providers simply by virtue of having subscribed to competitive 1+ Services.

³⁵ See, e.g., *Business Discount Plan, Inc.*, Order of Forfeiture, 15 FCC Rcd 14461 (2000) (“BDP”), *recon. granted in part and denied in part*, 15 FCC Rcd 24396 (2000) (finding that the company violated section 201(b) by using unjust and unreasonable telemarketing practices such as misrepresenting the nature of its service offerings); see also Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long Distance Services To Consumers, 15 FCC Rcd 8654 (2000).

³⁶ 47 U.S.C. § 201(b).

³⁷ See *Telecommunications Research & Action Center & Consumer Action*, Memorandum Opinion and Order, 4 FCC Rcd 2157, 2159 (Com. Car. Bur. 1989).

since the Commission’s carrier change rules require that “[a]ny description of the carrier change transaction by a third party verifier must not be misleading[.]”³⁸

Section 201(b) would generally prohibit LECs from disseminating misleading information with respect to an exemption of 1+ Services from an opt-in approach. However, to protect consumers, the Commission should expressly clarify that LEC failure to convey sufficient information about an exemption of 1+ Services would be in violation of Section 201(b). In exempting 1+ Services from opt-in requirements for third-party billing, the Commission should also require specific consumer education efforts and disclosures regarding the opt-in process. Such consumer education efforts and disclosures regarding third-party billing should inform consumers of at least the following: (1) consumers have the right to utilize any available competitive 1+ Service provider of their choosing; (2) competitive 1+ Services subscribed to and utilized by consumers may be third-party billed without any additional opt-in consent provided to the LECs; (3) the billing of third-party competitive 1+ Services to consumers will not affect the status of opt-in approval for non-telecommunications services (*i.e.*, having a third-party billed telecommunications service will not put the consumer at risk for billing by non-telecommunications providers); and, if necessary, (4) that a consumer’s verified consent to change 1+ Service providers serves as presumptive consent to third-party billing of the third-party 1+ Service provider’s charges.

³⁸ See 47 C.F.R. § 64.1120(c)(3)(iii).

IV. CONCLUSION

For the aforementioned reasons, the CCTM respectfully requests that the Commission adopt the positions and recommendations set forth herein. Specifically, the Commission should: (1) find that an opt-in approach to third-party billing of 1+ Services is unwarranted, and specifically exempt such services from any opt-in requirements; (2) ensure that such an exemption specifically protects against anticompetitive practices associated with third-party billing of 1+ Services; and (3) ensure that consumers are provided with accurate information with respect to an exemption of 1+ Services from opt-in.

Respectfully submitted,

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