Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 CENTURYLINK TO
FURTHER NOTICE OF PROPOSED RULEMAKING

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I. INTRODUCTION AND SUMMARY: NO FURTHER GOVERNMENT REGULATION IS NECESSARY REGARDING CARRIER THIRD-PARTY BILLING.

CenturyLink comments here on three issues raised in the Commission's *Further Notice of Proposed Rulemaking*[1] in the above-captioned proceeding. We address: (1) a potential federal regulatory prohibition against carriers engaging in billing for third parties; (2) a possible requirement that carriers secure end user opt-in approval before third-party charges can be put on end-users' bills; and (3) the Commission's authority to regulate the placement of third-party charges on carriers' bills in the first instance.

CenturyLink values its customers and seeks to treat them fairly and equitably in its delivery of products and services, including billing. In that vein, CenturyLink has crafted third-

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[1] *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, FCC 12-42, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 11-116 and 09-158, CC Docket No. 98-170 (rel. Apr. 27, 2012), Erratum (June 7, 2012); 77 Fed. Reg. 30915 and 30972 (May 24, 2012) (*April 2012 Cramming Order* or *Order* and *Further Notice*).

party blocking options and advised our customers of them. We also recently determined to cut back on the scope of our third-party billing, essentially foregoing most third-party enhanced-services billing. Given similar action by other major carriers, and the fact that the Commission's truth-in-billing rule amendments announced in its *April 2012 Cramming Order* have not yet even become effective, at this time CenturyLink opposes further regulatory intervention with respect to third-party charges in carriers bills.

Just in April of this year, the Commission imposed regulations requiring, among other things, that carriers who offer blocking options with respect to third-party billing disclose those options at points-of-sale, affording their customers the opportunity to avail themselves of such options (essentially opting out of third-party billing coextensive with the carrier's blocking options). Before it imposes additional rules on carriers, the Commission should allow some time to pass for both it and affected carriers to assess the effectiveness of the safeguards contained in the earlier *Order*. Most probably, those safeguards, combined with the private decisions of the largest carriers in the country to further limit the scope of third-party billing, will go far to eliminate what the Commission has determined to be the "root cause"[2] of intentional cramming.[3]

Moreover, additional rules are unnecessary given the steady, pronounced decline in the number of cramming complaints filed with the Commission over the past five years, reflecting a

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[2] *See April 2012 Cramming Order* at 41 ("The record . . . demonstrates that it is the wireline telephone companies' practice of placing third-party charges, primarily non-carrier third-party charges, on their own bills to their consumers that is the 'root cause' of the problem, as this practice enables fraud in the form of cramming and attracts 'fraudsters.'") (emphasis added; footnotes omitted).

[3] Cramming, of course, is not always intentional, much less the result of bad intent. Sometimes it occurs inadvertently, such as when a telephone number is incorrectly entered by one carrier or another and, as a result, an individual's carrier is mistakenly changed. If the error is not discovered and resolved before the next billing cycle, there can also be what appears to be a "cram" because the services were not authorized but appear on the bill.

89.7% decrease in informal complaints.[4] All told, CenturyLink does not believe that additional regulation is currently necessary to protect the public; and we believe such regulation would unfairly tip the balance against service providers and carriers who seek to provide lawful and easy-to-do business-with billing services to consumers. The Commission should conclude this proceeding at this time without promulgating further rules.

II. THE SHARP DECLINE IN INFORMAL COMPLAINTS FILED WITH THE COMMISSION OVER THE PAST FIVE YEARS, COMBINED WITH CHANGES TO THIRD-PARTY BILLING PRACTICES BY THE COUNTRY'S LARGEST CARRIERS, SHOWS THAT THERE IS NO NEED FOR ADDITIONAL THIRD-PARTY BILLING REGULATIONS.

Neither an absolute prohibition on including third-party charges in carriers' bills, nor a requirement that carriers refrain from billing such charges absent a customer's affirmative consent, is warranted at this time. The facts show that currently the number of informal cramming complaints filed with the Commission is at an all-time low. When that low number is combined with the safeguards imposed by the Commission in its *April 2012 Cramming Order*, as well as the announcements by the three largest local exchange carriers (LEC) regarding changes to their third-party billing practices, customer dissatisfaction with third-party billing will undoubtedly continue to dampen; and the need for additional government regulation concomitantly wane.

A. Cramming Complaints Have Fallen Significantly Over the Past Five Years.

Cramming complaints have plummeted since 2008, decreasing steadily almost year after year. The Commission's own quarterly tallies demonstrate an almost constant trajectory

[4] Comparing third quarter 2008 to first quarter 2012.

downward over the past five years.[5] *See* Appendix A, attached, that graphically shows the reduction in complaints; and Appendix B, providing information from the Commission's complaint statistics. Overall, the number of complaints and inquiries about third-party charges is now actually quite small, and is likely to decline further.

The downward progression of complaints shows that the problem the *Further Notice* inquires about is already correcting itself, and indeed was doing so even before the *April 2012 Cramming Order*. Consequently, additional regulations beyond those already prescribed in the *Order* would amount to regulatory overkill.

B. Third-Party Billing Can Benefit Consumers; And Recent Carrier Initiatives To Restrict Third-Party Billing Further Reduces Potential Problems.

For over thirty-years,[6] LECs have been billing for third parties. Those parties have included competing interexchange carriers (IXC) (since the divestiture of AT&T), as well as enhanced service providers (ESPs) (in the context of *Computer II/III* and *Open Network Architecture*) who competed with LECs in the provision of services. As a matter of federal regulatory policy, the Commission has generally supported the extension of LEC billing for third parties, only recently confirming that third-party billing can provide benefits to both service providers and their customers alike.[7]

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[5] This decline has continued even in the face of heightened publicity about cramming during the same period.

[6] Comments of CenturyLink to Notice of Proposed Rulemaking, CG Docket Nos. 11-116, 09-158 and CC Docket No. 98-170, filed Oct. 24, 2011 at 15-16.

[7] *See April 2012 Cramming Order* ¶ 41 ("The record reflects that third-party billing can be a convenience for carriers, third parties, and consumers, and there are some legitimate uses for third-party billing by wireline telephone companies, such as billing charges for . . . long distance service on consumers' local telephone bills.").

In an effort to maintain the benefits of third-party billing, while working to further reduce customer complaints and what the Commission has found to be their "root cause," the three largest carriers in the country have each announced policies that will significantly limit the kinds of third-party charges they will allow in their bills.[8] For these carriers -- accounting for the majority of the nation's traditional telephone customers -- most non-telecommunications, enhanced services charges will no long be accepted or allowed to appear on their invoices. Indisputably, these policies will reduce the volume of third-party charges appearing on telecommunications customers' bills, especially those that have received the most criticism.

These carriers' industry-leading policies, combined with the safeguards incorporated in the *April 2012 Cramming Order* (safeguards including the reformatting of carrier bills to reflect telecommunications versus non-telecommunications charges, the disclosure requirements regarding third-party billing blocking options at the point of sale, and the ability of end users to avail themselves of those third-party billing options offered by carriers), reflect a landscape that accommodates legitimate commerce and consumer protection. The Commission should not prescribe additional regulations that would disturb that current balance.[9]

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[8] In its *Order*, the Commission noted these carriers' actions with approval and briefly described their determinations regarding the types of third-party charges they would/would not accept for billing. *Id.* ¶ 42 and n. 132 (noting AT&T's limitation on third-party billing into the future would preclude third-party charges for voicemail, email, and Web hosting services, as well as Internet-based directory assistance). *See also id.* ¶ 44 (noting that (a) Verizon had advised the Commission that it intended to cease placing charges for "miscellaneous" or "enhanced" services, such as web hosting, voicemail, and email on its bills; (b) AT&T was using a phased approach to cease billing for enhanced services, where at the end AT&T would be billing only for third-party services or goods where the third party had a contractual arrangement with AT&T for the joint or cooperative sale of such services or charitable contributions; and (c) that CenturyLink had announced its commitment to a similar policy).

[9] In its *April 2012 Cramming Order*, the Commission concluded that the "pro-consumer" decisions of the major carriers were insufficient to cause the Commission to pass on prescribing additional third-party billing safeguards at that time. *Id.* at ¶¶ 45-46. Having now prescribed such additional safeguards, the "positive steps" (¶ 46) taken by these carriers have mitigated the

C. An "Opt-In" Requirement Regarding Third-Party Billing Is Unwarranted And Unwise.

Like other commentors in the underlying proceeding, and the Commission itself, CenturyLink realizes that third-party billing is a valid commercial exercise that can benefit both legitimate businesses and consumers alike. That benefit would be lost if the Commission were to impose an end user opt-in regime for third-party billing in place of the disclosure and opt-out methodology it recently adopted in its *April 2012 Cramming Order*.

Because there are a variety of ways to design an opt-in model regarding third-party billing, the *Further Notice* asks for comment on what type of opt-in design might be the most appropriate. For example, should a customer be afforded a default position of "no third-party billings;" or should there be a default where third-party billings for telecommunications services are permitted but not for other charges, absent customer affirmative approval; or is some other model more ideal. CenturyLink believes that an opt-in model of any kind regarding third-party billing will not appropriately balance the legitimate interests of service providers and consumers; and that the Commission struck more than the right balance in its *April 2012 Cramming Order* where it required carriers to disclose their blocking options at points of sale (among other places) and allow their customers to choose such options, if they desire.

Moving from a model consonant with the earlier *Order* to one where affirmative customer approval is required for the placement of third-party charges on a carrier's bill creates considerable complexity and could unreasonably shift the balance between reasonable commercial decisions and consumer choice. This is true *regardless* of (a) how an "opt-in" regime might be set up, whether it was an "all or nothing" opt-in, or an opt-in by type of offering

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need for any further Commission rules, such as an absolute prohibition of third-party billing or the imposition of an opt-in regime.

(*e.g.*, a person could opt-in separately to telecommunications and non-telecommunications charges); (b) whether it applied only to new customers or existing ones; *or* (c) what kind of (if any) verification of the opt-in might be required (*if* the LEC is the entity required to secure the verification).[10] Stated plainly, there is likely no opt-in model that can constitute a reasonable and balanced approach to third-party billing.[11]

The fundamental lack of balance in an opt-in model begins with the point-of-sale communication. The communication would share the same problems as point-of-sale communications about third-party billing and blocking in the context of a disclosure and opt-out environment.[12] But those problems would be worsened by the fact that more communication

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[10] *See Further Notice* ¶ 141 inquiring about various verification alternatives, but with all having the "theme" that the LEC -- not the service providers or billing aggregators -- would be responsible for the verification. With respect to the verification proposal associated with a customer's ANI, it is correct that the Commission allows such option in the context of IXC changes. But it should be noted that the Commission more recently rejected this kind of authentication in the context of confirming a caller's identity with respect to CPNI disclosures, suggesting that the Commission may no longer favor such means of verification. *See In the Matter of the Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 n.49.

[11] CenturyLink says "likely" because it is possible that the one area where opt-in approval *might be able to be secured* is with respect to billing for pre-subscribed services. While it may be possible that LECs might be able to secure such consent (despite the fact that the consent would be solicited in a context unrelated to the choosing of a 1+ carrier), it is more likely that consent could be obtained if it were acquired by the IXC selling the services at the time of the sale. Indeed, CenturyLink's strategic business partners secure affirmative customer approval for their billing to be done through CenturyLink's bill.

[12] As CenturyLink stated in its earlier-filed comments:

> Point-of-sale or point-of-contact verbal disclosures are the most expensive kinds of disclosures for providers to deliver. They are also the most fact-filled communications for callers to absorb. There is only so much time that any caller wants to spend on the phone with a service provider when ordering service for the first time or over time. The more the conversation is packed with government-mandated caveats and disclosures, the less meaningful communication time is available between the provider and its customer. The mandated speech limits not only the provider's speech opportunities about its

would likely be necessary to secure an opt-in approval. A carrier would strive to engage a customer in a communication long enough to outline the benefits of such billing (some of which might be *potential future* benefits, especially for 1+ and un-anticipated calling transactions) so that the consumer truly appreciates the consequence of declining such billing now despite the fact that *potential future* transactions might make it desirable.[13]

> products and services but also the customer's hearing opportunities about offerings that could benefit the consumer from a technical, economic or quality of life perspective.
>
> Point-of-sale disclosures about third-party blocking, however, will clearly not be immediately relevant to some consumers, since sometimes (such as a new connect) there will not have been any billing at all to the consumer (even by the exchange carrier). Even if some billings have occurred, the customer may never have encountered a third-party billed charge. And if some customers do see third-party charges on their bills, the charges might be of the more traditional IXC type, could be expected and unobjectionable, or might otherwise be billing that has been specifically requested (such as wireless or television partners of carriers). In these latter situations, disclosures regarding bill blocking will not be relevant even with respect to some third-party billing transaction that might take place sometime in the future.
>
> Requiring a point-of-contact disclosure to every calling party, when only a fraction of those callers might be impacted by the content of the disclosure, creates a material impact on the communication opportunity available to the carrier. It lessens the time the provider has available to engage in speech that may be more meaningful and of interest to the consumer, unless the provider is willing to incur additional costs to communicate its full message and then include the government-mandated speech over and above that.
>
> For these reasons, CenturyLink believes that the Commission should not mandate point-of-contact disclosures regarding third-party billing activities or blocking functionalities. First of all, the conversation regarding this matter raises a potentially confusing issue in the context of what should be a call involving a commercial transaction (*i.e.*, the selling and buying of goods and services). Secondly, it is predictable that the conversation will not be short. Questions from the caller can be anticipated. Such questions might include: "What is third-party billing?" "Does it include abc, xyz?" "What if I block the billing, will I still get billing from my IXC?" "Yes, I want the block; but, oh no I don't if it will block my 1+ carrier who might bill through an aggregator." This dialogue will surely increase the contact time on the call, likely materially. And the nature of the information sought to be disclosed is easier and more efficiently done through a written communication than an oral one.
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> CenturyLink October 2011 Opening Comments at 7-9 (footnotes omitted).

[13] As one commentor noted, consumers cannot always anticipate their need for certain services such as accepting collect calls, needing directory assistance, or even receiving a call from an

And a carrier might have a difference of opinion with its own customer as to the "proper scope" of the customer's opt-in choices. With a blocking-disclosure and opt-out model, the carrier describes the bill-blocking options it offers and the customer chooses to block or not in line with those options. With an opt-in model, a consumer might want more "choices" than the carrier offers and be disappointed or dissatisfied with its service provider if the choices offered are not coincident with the choices the customer believes *should* be available. For example, if a carrier always allowed third-party billings for telecommunications charges to appear on its bills, giving a customer only the option to block non-telecommunications charges from appearing, the customer might not deem that a sufficient "opt-in" choice. She may want to refuse permission for any third-party billing -- an option the carrier might not provide. In such situation, an opt-in choice regarding third-party billing could potentially exacerbate a possible friction between the carrier and the end user over what choices are available.

It is not only the content of the communication between the carrier and the customer that would be additionally burdened by an opt-in approval regime regarding third-party billing. The additional communication would come with additional carrier costs, due to the predictable increased length of the communication. The exact amount of these additional costs is not known at this time, but the costs would undoubtedly be more than the $3 million annually that CenturyLink previously advised the Commission.[14] And even more costs would be associated

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incarcerated friend or family member." Billing Concepts, Inc. at 2-3, referenced in the *Further Notice* ¶ 139, n. 390.

[14] This figure is referred to by the Commission in the *April 2012 Cramming Order* at n. 158 and ¶ 58. The Commission did not find CenturyLink's cost information "convincing" (*id.* ¶ 56), apparently, because CenturyLink "did not account for the reduced labor costs associated with having the same customer service representatives handling fewer cramming calls from consumers and therefore may [have] overstate[d] [its] net costs." But the dollar figure CenturyLink provided was the cost of speaking to every customer at every point of sale about a topic that might only be relevant to a fraction of its customer base. Similarly, complaints from

with the opt-in communication if carriers determined that opt-in choices needed to be segregated and separately offered (*e.g.*, a separate choice for 1+ than for other telecommunications charges).

There would be other costs, as well, to implement an opt-in mechanism beyond those associated with more extensive points-of-sale discussions. An opt-in regime would require significant changes to billing and customer care systems, on top of those changes already required by the *April 2012 Cramming Order*, affecting the cost/benefit analysis. For example, to the extent carriers would have expended funds to modify their billing systems to reflect "telecommunications" versus "non-telecommunications" charges (as required by the formatting prescriptions contained in the *Order*), those sunk costs would have been made in the context of a certain level of anticipated future third-party billing revenue. If the volume of billing transactions is significantly reduced under an opt-in third-party billing model, the sunk costs could reflect a negative financial impact due to the inability to secure off-setting revenue.

While no one can predict with any certainty at this time what the ultimate cost/benefit relationship associated with an opt-in approval regime would be for carriers, it is not beyond imagination that some carriers might be driven to cease providing third-party billing altogether, even for the most beneficial of services, such as telecommunications ones.[15] Such a decision would undoubtedly cause some service providers to cease doing business, while others would

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customers about unauthorized charges represent only a fraction of its base. Thus, even taking into account some cost savings from fewer complaints cannot make up for the over-communication required in the first instance, which would still remain in the millions of dollars. Again, while complaints might decrease, that would not reduce the ongoing costs of over-communicating disclosures at points-of-sale.

[15] Even if an opt-in regime were limited to new customers, if the vast majority of new customers -- after a potentially lengthy and expensive point-of-sale discussion (a cost) determined *not* to allow such billing, within a relatively short period of time the revenue associated with engaging in such billing would decrease, ultimately resulting in a cost/benefit analysis that might no longer support such billing for anyone, including existing customers.

revert to the legally-compelled alternative of securing billing name and address information from carriers.[16]

III. THE COMMISSION'S ANALYSIS OF ITS STATUTORY AND CONSTITUTIONAL AUTHORITY OVER THIRD-PARTY BILLING IS FLAWED.

In its *April 12 Cramming Order*, the Commission concluded that it has jurisdiction under the Communications Act over carriers billing for third parties; and that the mandates it imposed in that *Order* were consistent with the First Amendment. CenturyLink continues to disagree with the Commission on both of these conclusions. CenturyLink incorporates by this reference, and through the attached Appendix C, our earlier arguments on these two serious legal issues.

A. The Communications Act.

As CenturyLink explained in its earlier comments, the Commission's exercise of its Section 201(b) authority over carrier billing historically has been almost exclusively in the context of a carrier's billing for its own charges.[17] The Commission clearly has Title II authority (within constitutional limits) to regulate aspects of the carrier's billing practices. However, Title II does not provide a jurisdictional foundation for the Commission to promulgate billing rules with regard to carriers' billings on behalf of third parties.

Nearly 25 years ago, the Commission recognized that billing by a common carrier for third parties does not constitute a common carrier service and therefore is "not subject to regulation under Title II of the Act."[18] No subsequent Commission decision has found otherwise.

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[16] 47 C.F.R. § 64.1201.

[17] *April 2012 Cramming Order* ¶¶ 115-16, 120-22, 128-35.

[18] *Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150, 1169 ¶ 34 (1985), *recon. denied*, 1 FCC Rcd 445 (1986).

To the contrary, the Commission has repeatedly affirmed its determination that billing for third-parties falls outside the scope of Title II.[19]

Courts also have long reached this same conclusion based on the same legal interpretation.[20] As recently as 2010, a federal district court re-iterated those legal propositions in resolving issues associate with a Verizon class action. In *Moore v. Verizon*, the court granted a Verizon motion to dismiss, based in part on the Commission's series of third-party billing *Detariffing Orders*, other Commission precedent to that effect, and consistent rulings from the Fifth and Second Circuits.[21]

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[19] *See, e.g.*, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16496 ¶ 113 (2007) (noting that "billing and collection services provided [to third-parties] by LECs are not subject to regulation under Title II of the Act . . ."); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 1632, 1645 ¶ 31 (1997) ("carrier billing or collection for the offering of another unaffiliated carrier is not . . . for purposes of Title II . . . a common carrier communication service."); *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5448 ¶ 96 (1994) ("We have previously determined that LEC billing and collection services for non-affiliated IXCs should not be regulated as a common carrier service under Title II of the Communications Act."); *Audio Communications, Inc.*, 8 FCC Rcd 8697 ¶ 1 (CCB 1993) (a carrier's "900 billing and collection service is not a common carrier offering").

[20] *See Chladek v. Verizon N.Y. Inc.*, 96 Fed. Appx. 19, 22 (2nd Cir. 2004) (finding that billing and collection services provided by a telecommunications carrier to a pay-per-call information and entertainment service provider "are not 'telecommunications services' as defined by Title II of the Communications Act"); *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 905 (5th Cir. 2002) (subsequent history omitted) ("billing and collection services provided by LECs to unaffiliated long-distance providers fall outside the scope of Title II"); *Moore*, 2010 U.S. Dist. LEXIS 94544, *28 ("the services being billed for are those of a third-party, which are not subject to Title II").

[21] *Moore* at *24-*28, *51 (Brittan/Chladek).

The *Further Notice* cites to the Commission's decision in the case of *LDDI* as supporting its authority under 201(b).[22] It is correct that that statutory provision was referenced in *LDDI*, but it was not for the broad scope of authority the Commission concludes it has in the *April 2012 Cramming Order*. In *LDDI*, the Commission found that it had jurisdiction under Section 201(b) over unauthorized third-party charges not simply because the carrier included those charges on a long distance service bill, but rather because the Commission concluded that the cramming was "inextricably intertwined" with the carrier's long distance service.[23] Exerting jurisdiction over third-party billing in such a case is not inconsistent with the Commission's direct exercise of jurisdiction over a carrier for its own billing practices under Section 201(b). However, most carrier third-party billing fact patterns are unlike those of *LDDI*. It is rare that the third-party billed services are "inextricably intertwined" with the carrier billing for the service.

Just as the Commission actually lacks jurisdiction to exercise Title II jurisdiction over carrier's third-party billing practices (even with respect to the rules it adopted in the *April 2012 Cramming Order*), it also lacks jurisdiction to intervene in those practices by mandating an opt-in approach. With respect, CenturyLink believes the Commission should rethink its position and reverse its prior conclusions regarding the extent of its 201(b) jurisdiction over third-party billing in the *Further Notice* aspect of the proceeding.

B. First Amendment Considerations.

In its *April 2012 Cramming Order*, the Commission also concluded that the mandates incorporated in that *Order* did not violate the First Amendment, in large part due to the Commission's conclusion that it was pursuing a compelling state interest. It is true that the issue

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[22] *See Long Distance Direct, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3302 ¶¶ 13-15 (2000) (*LDDI*).

[23] *Id.*

of unauthorized third-party charges appearing on LECs' bills is a matter of public, regulatory and legislative interest. But as the attached Appendices A and B demonstrate, the number of cramming complaints continues a steady decline -- one that is only certain to continue in light of the decisions by the country's largest carriers to limit the scope of their third-party billing and the mandates already reflected in the *April 2012 Cramming Order*. Accordingly, the matter is not one needing any additional aggressive government action.

Requiring affirmative approval before an entity can communicate with another entity (whether that communication be marketing, billing information or even slander) is a matter of genuine concern under the First Amendment. Moreover, the Commission is mistaken to continue to rely on the notion that the government may mandate speech, so long as it is mandating "accurate" speech.[24]

CenturyLink addressed this matter in detail in its October, 2011 comments, and demonstrated there, that it is simply *not true* that regulations that compel factual and uncontroversial commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech (relevant pages of those comments attached here as Appendix C). Indeed, the *Zauderer* Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment[.]"[25] Moreover, as CenturyLink has also stated previously, the Second Circuit's *New York State Restaurant Association* case was decided on a theory never supported by the Supreme Court. Specifically the *New York State*

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[24] For this proposition, the Commission continues to rely on *N.Y. State Rest. Ass'n. v. N.Y. City Bd of Health*, 556 F.3d 114 at 134-35 (2d Cir. 2009) and *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

[25] *Zauderer*, 471 U.S. at 673.

court analyzed that case under a rational basis theory not properly applicable in First Amendment review.[26]

CenturyLink values its customers and shares the Commission's interest in taking appropriate steps to protect consumers. We and the Commission have each taken steps to address third-party billing concerns. Accordingly, for the reasons outlined above, CenturyLink believes that policy, legal, and constitutional reasons both separately and in combination argue against any further government mandates with respect to carrier billing of third-party charges.

Respectfully submitted,

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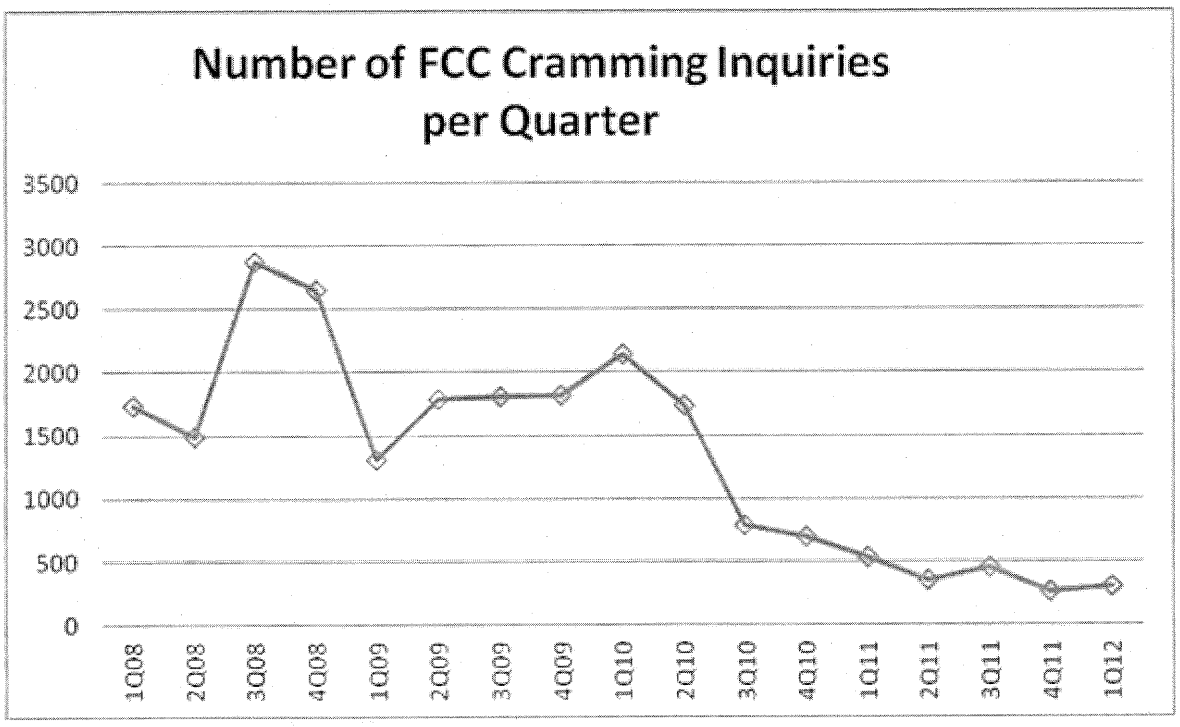
[26] The Second Circuit misinterpreted the Supreme Court's *Zauderer* test as amounting to no more than a "rational basis" standard. *N.Y. State Rest. Ass'n. v. N.Y. City Bd of Health*, 556 F.3d at 134-35. In fact, the Supreme Court in *Zauderer* did not use the term "rational," and that word does not appear in the opinion.

APPENDIX A

CenturyLink Prepared Chart From FCC Data



APPENDIX B

SUMMARY OF TOP CONSUMER INQUIRY SUBJECTS PROCESSED BY THE FCC'S CONSUMER & GOVERNMENTAL AFFAIRS BUREAU (CGB)

http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints

First Quarter – Calendar Year 2012

	January	February	March	Quarter Totals
Wireline Telecommunications				
Cramming	103	110	83	296
Number Portability	133	160	150	443
Billing & Rates	286	323	276	885
Universal Service Issues	339	360	335	1,034
Telephone Consumer Protection Act	1,308	1,788	1,797	4,893
Totals	2,169	2,741	2,641	**7,551**

Fourth Quarter – Calendar Year 2011

	October	November	December	Quarter Totals
Wireline Telecommunications				
Cramming	91	92	75	258
Number Portability	133	127	131	391
Billing & Rates	253	252	215	720
Universal Service Fund	375	418	358	1,151
Telephone Consumer Protection Act	1,312	1,118	1,122	3,552
Totals	2,164	2,007	1,901	**6,072**

Third Quarter – Calendar Year 2011

	July	August	Sept.	Quarter Totals
Wireline Telecommunications				
Number Portability	125	143	155	423
Cramming	179	139	140	458
Billing & Rates	337	423	248	1,008
Universal Service Fund	286	484	358	1,128
Telephone Consumer Protection Act	1,163	1,364	1,467	3,994
Totals	2,090	2,553	2,368	**7,011**

Second Quarter – Calendar Year 2011

	April	May	June	Quarter Totals
Wireline Telecommunications				
Cramming	80	119	152	351
Number Portability	95	152	173	420
Billing & Rates	116	191	258	565
Universal Service Issues	227	301	285	813
Telephone Consumer Protection Act Issues	1,150	1,323	1,286	3,759
Totals	1,668	2,086	2,154	**5,908**

First Quarter – Calendar Year 2011

	January	February	March	Quarter Totals
Wireline Telecommunications				
Slamming	151	157	159	467
Cramming	207	171	155	533
Billing & Rates	377	395	219	991
Universal Service Issues	366	368	366	1,100
Telephone Consumer Protection Act Issues	1,629	1,791	2,025	5,445
Totals	2,730	2,882	2,924	**8,536**

Fourth Quarter – Calendar Year 2010

	October	November	December	Quarter Totals
Wireline Telecommunications				
Slamming	172	147	128	447
Cramming	259	232	210	701
Billing & Rates	336	299	293	928
Universal Service Issues	373	317	307	997
Telephone Consumer Protection Act Issues	1,829	1,616	1,360	4,805
Totals	2,969	2,611	2,298	**7,878**

Third Quarter – Calendar Year 2010

	July	August	Sept.	Quarter Totals
Wireline Telecommunications				
Slamming	140	138	123	401
Cramming	237	289	263	789
Access-Universal Service	252	320	368	940
Billing & Rates	369	371	333	1,073
Telephone Consumer Protection Act	1,650	1,756	1,787	5,193
Totals	2,648	2,874	2,874	**8,396**

Second Quarter – Calendar Year 2010

	April	May	June	Quarter Totals
Wireline Telecommunications				
Slamming	182	227	193	602
Access-Universal Service	369	343	363	1,075
Billing & Rates	538	542	470	1,550
Cramming	550	711	472	1,733
Telephone Consumer Protection Act	2,457	2,470	2,390	7,317
Totals	4,096	4,293	3,888	**12,277**

First Quarter – Calendar Year 2010

	January	February	March	Quarter Totals
Wireline Telecommunications				
Slamming	230	193	239	662
Universal Service Issues	507	388	411	1,306
Billing & Rates	534	481	585	1,600
Cramming	711	631	800	2,142
Telephone Consumer Protection Act Issues	2,067	1,949	2,381	6,397
Totals	4,049	3,642	4,416	**12,107**

Fourth Quarter – Calendar Year 2009

	October	November	December	Quarter Totals
Wireline Telecommunications				
Slamming	203	156	180	539
Universal Service Issues	483	381	369	1,233
Billing & Rates	555	424	444	1,423
Cramming	663	575	578	1,816
Telephone Consumer Protection Act Issues	2,274	1,944	1,750	5,968
Totals	4,178	3,480	3,321	**10,979**

Third Quarter – Calendar Year 2009

	July	August	Sept.	Quarter Totals
Wireline Telecommunications				
Slamming	256	219	233	708
Universal Service Issues	356	360	393	1,109
Billing & Rates	633	639	521	1,793
Cramming	649	572	588	1,809
Telephone Consumer Protection Act Issues	2,828	2,195	2,312	7,335
Totals	4,722	3,985	4,047	**12,754**

Second Quarter – Calendar Year 2009

	April	May	June	Quarter Totals
Wireline Telecommunications				
Slamming	215	219	198	632
Billing & Rates	622	589	464	1,675
Universal Service Issues	769	568	433	1,770
Cramming	595	621	567	1,783
Telephone Consumer Protection Act Issues	3,421	2,750	2,108	8,279
Totals	5,622	4,747	3,770	**14,139**

First Quarter – Calendar Year 2009

	January	February	March	Quarter Totals
Wireline Telecommunications				
Slamming	179	184	268	631
Universal Service Issues	138	225	406	769
Cramming	314	398	594	1,306
Billing & Rates	329	485	733	1,547
Telephone Consumer Protection Act Issues	1,799	2,598	3,918	8,315
Totals	2,759	3,890	5,919	**12,568**

Fourth Quarter – Calendar Year 2008

	October	November	December	Quarter Totals
Wireline Telecommunications				
Number Portability	103	89	125	317
Universal Service Issues	197	164	160	521
Billing & Rates	339	315	329	983
Slamming	540	424	450	1,414
Cramming	973	771	906	2,650
Telephone Consumer Protection Act Issues	6,454	4,680	4,336	15,470
Totals	8,606	6,443	6,306	**21,355**

Third Quarter – Calendar Year 2008

	July	August	Sept.	Quarter Totals
Wireline Telecommunications				
Number Portability	151	117	134	402
Universal Service Issues	157	141	155	453
Billing & Rates	456	351	408	1,215
Slamming	580	543	470	1,593
Cramming	913	991	973	2,877
Telephone Consumer Protection Act Issues	6,062	6,377	6,002	18,441
Totals	8,319	8,520	8,142	**24,981**

Second Quarter – Calendar Year 2008

	April	May	June	Quarter Totals
Wireline Telecommunications				
Universal Service Issues	55	148	153	386
Billing & Rates	386	405	467	1,258
Slamming	462	457	504	1,423
Cramming	592	560	338	1,490
Telephone Consumer Protection Act Issues	5,849	5,801	5,295	16,945
Totals	7,344	7,401	6,757	**21,502**

First Quarter – Calendar Year 2008

	January	February	March	Quarter Totals
Wireline Telecommunications				
Number Portability	175	154	117	396
Universal Service Issues	175	192	157	524
Billing & Rate Information	364	358	381	1,103
Slamming	487	461	484	1,432
Cramming	576	566	588	1,730
Telephone Consumer Protection Act	5,287	5,133	5,491	15,911
Totals	7,014	6,864	7,218	**21,096**

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 CENTURYLINK TO NOTICE OF PROPOSED RULEMAKING

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providers'] costs," including "rigid formatting rule[s] that require separate pages, or produce 'dead space' on the bill, [which] may frustrate consumers and . . . [increase] billing expenses."[22]

III. COMMENT ON OTHER TOPICS RAISED IN THE *NOTICE.*

A. The Commission Should Not Prohibit Exchange Carrier Third-Party Billing.

CenturyLink is pleased that the current proposed rules would not prohibit third-party billing outright.[23] Carriers have been billing for third parties for almost three decades now. While billing through aggregators is a more recent development, third parties have sought access to carriers' billing envelopes as far back as *Computer II* and *Open Network Architecture*. Third-party service providers (particularly those offering services similar or comparable to carriers themselves) often argued that the provision of Billing Name and Address (BNA)[24] was not a sufficient substitute for inclusion in the carrier billing envelope, on the theory that BNA did not provide the kind of economy of scale (with attendant lower billing costs) that was available when billing was done through the carriers' operations.

In response to those concerns, and because the third-party billing structure had already been created by some companies (specifically the RBOCs), extending billing operations to others allowed carriers to secure incremental revenue while allowing third-parties to bill their customers with lower costs. (The alternative, as mentioned below, was to provide all third-parties or their agents with BNA information about the carriers' customers.) We believe third-party billing

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[22] *Truth-in-Billing First Report and Order*, 14 FCC Rcd at 7499 ¶ 10, 7515-16 ¶ 36 (footnotes omitted).

[23] This was proposed by some commentors in earlier aspects of this proceeding and the *Notice* inquires about the proposal. *Notice*, 26 FCC Rcd at 10047, 10053-54 ¶¶ 62 and 82.

[24] The Commission's rules require carriers to provide BNA, including non-published and non-listed name and address information, to telecommunications service providers (including, for purposes of this rule, enhanced service providers) or their agents for purposes of billing their customers and other limited purposes. 47 C.F.R. § 64.1201.

remains a legitimate enterprise, bringing benefit to commercial entities as well as customers, and would not support its being prohibited.

B. CenturyLink's Due Diligence Regarding Third-Party Billing.

1. Overview of the Process.

Commercial contracts form the foundation of the relationship between CenturyLink and its billing aggregators, some of which have been billing through CenturyLink companies for over 15 years. Those contracts impose direct obligations on billing aggregators, as well as requiring that billing aggregators impose certain requirements and obligations on any vendor that wants to send charges to CenturyLink for inclusion in the CenturyLink envelope.

CenturyLink has a vendor screening process, over and above that which the billing aggregator has regarding its vendors.[25] As part of that process, CenturyLink reviews materials by potential vendors that describe their services, pricing, and post-sale customer fulfillment practices so that CenturyLink can become acquainted with the kind of offering proposed to be billed for. CenturyLink also asks for other information such as the vendor's official business name, address and phone number; state of incorporation and registrations to do business; website URL (if any); and other exchange territories where the vendor may already be doing business.

CenturyLink's contracts also require billing aggregators to pass through requirements to their vendors regarding customer authorization. Specifically, vendors are required to ask potential subscribers: (a) if they are over 18 years of age and are authorized to act on behalf of the account holder; (b) if the called party is authorizing the vendor to bill through the party's local telephone bill charges in the amount of "x" each month (plus additional one-time charges if applicable); and (c) if they understand that there is no relationship between CenturyLink and

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[25] *See generally*, Comments of Billing Concepts, Inc., CG Docket Nos. 09-158, *et al.*, filed Oct. 13, 2009 (Billing Concepts Comments).

themselves, but that their charges will be on the bill under the billing section associated with a named aggregator.

Once billing commences, CenturyLink monitors customer inquiries and complaints against particular aggregators and vendors and imposes mitigating requirements on select vendors that produce undue numbers of customer complaints. In certain circumstances, CenturyLink advises its billing aggregators that it will no longer bill for a particular vendor.

CenturyLink's customer inquiry and complaint process focuses on customer satisfaction. As a general rule, only one call is needed to resolve most third-party billing disputes involving monthly-recurring charges. During that call, customers are offered immediate credit for those charges and advised of their available blocking options. CenturyLink also advises the customer that, although credit has been issued, the disputed charges will be returned to the company that initially billed them and that, at that company's discretion, it may pursue independent collection action of the charges.

2. CenturyLink's "Watch List" Criteria.

As recommended in the 1998 Anti-Cramming Best Practices Guidelines,[26] CenturyLink has systems that track the number of billing inquiries related to vendors that bill monthly recurring charges (MRCs).[27] While the precise criteria are different between the legacy CenturyLink companies and its new Qwest affiliates, both systems are calculated to "warn" vendors when they approach or exceed a threshold that would put them in jeopardy with

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[26] *See Anti-Cramming Best Practices Guidelines, available at* http://www.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html. On occasion, non-recurring charges (NRC) are also captured in CenturyLink's records when those charges are of a telecommunications nature.

[27] *See Notice*, 26 FCC Rcd at 10048 ¶ 64 (inquiring "what, if any, thresholds exist with respect to customer complaints . . . as a trigger to adverse action against a third party."); 10049 ¶ 65 (seeking "comment regarding penalties or other measures that carriers . . . employ to deter third-party vendors from engaging in cramming or generating consumer complaints.").

CenturyLink. That jeopardy might generate a probationary opportunity to cure the problem or, sometimes termination is the ultimate outcome.

With respect to the issue of how a "watch list" would be best designed, the *Notice* inquires about what might be an appropriate "threshold trigger" to apply to vendor billings.[28] CenturyLink supports a percentage model as a threshold where the total number of customer complaints for each vendor is compared to the total number of bills rendered for the same vendor within a set period of time. We do not support setting a threshold/adverse-action trigger based on "the aggregate dollar value of the claims in the complaints received[.]"[29] Such a model might allow a vendor to have more complaints go unchallenged than might the percentage model described above, particularly if the vendor-billed amounts were each relatively small.

3. CenturyLink's Adjustment Policies.

CenturyLink has a customer-friendly dispute resolution process to address complaints about alleged cramming. As noted above, it is CenturyLink's general policy to readily adjust disputed charges when contacted by a customer, a regulator or some other agent of the customer. This is true whether the claim is that the charges are unauthorized, were ordered by someone not authorized to make decisions about the account, or simply that the customer changed her mind. During the course of the conversation with the customer, CenturyLink's representatives will discuss available blocking options with the customer. While we are aware that our policy is not always accurately described or implemented,[30] we believe that in the vast majority of the cases it is correctly applied.

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[28] *Id.* at 10048 ¶ 64.

[29] *Id.*

[30] *Id.* at 10038 ¶ 40 and note 94 and 10039 ¶ 43 and note 97 (noting that Qwest employees wrongly advised customers that there was a legal obligation for Qwest to bill for third parties). While there is no excuse for conveying wrong information to customers, the employees'

C. CenturyLink Does Not Oppose The Disclosure Of Limited Vendor Information On The Billing-Aggregator Pages.

The *Notice* suggests that exchange carriers "generating the telephone bill [might be required] to clearly and conspicuously provide the contact information for each third-party vendor in association with that [vendor's] charges."[31] CenturyLink does not oppose this concept in principle, although it would clearly involve programming time and costs. Moreover, while some kinds of vendor contact information might appropriately be included on the bill, other contact information would not be.

In deciding what vendor contact information should be made available, it must be remembered that each character and line of text adds costs to the third-party billing offering. Unless the vendor-contact information would be of material benefit to the consumer, having it printed on the bill is not meaningful either. And the objective of having the information on the bill should be clearly articulated and understood.

CenturyLink's third-party billing model is not designed such that the customer would be expected to call the vendor in the first instance. On the Summary section of the bill, the billing aggregator's toll-free number is provided as the contact information; that toll-free number is also found on the aggregator's bill page. Despite this contact information, CenturyLink's customers often call CenturyLink to inquire or complain about a third-party bill charge.

Theoretically, at least, this model is easier for a customer to utilize than one requiring direct access to and communication with the vendor in the first instance. Still, CenturyLink (currently through *only* its Qwest affiliate) allows billing aggregators to pass along vendor toll-

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comments most likely stemmed from the long-standing legal obligation RBOCs had to bill for other IXCs if they billed for AT&T, and the later 1996 Telecommunications Act obligation for RBOCs to bill for other IXCs if they billed for their own (both legal obligations.).

[31] *Id.* at 10044 ¶ 55.

free number information, as well as vendor website or email address. It is claimed that this information might "alleviate many escalations in the dispute resolution process."[32] But creating this kind of capability for carriers that do not currently have it would involve enhancements to existing billing systems, in some cases significant ones.

Despite the cost of creating this capability, should the Commission determine that this kind of limited vendor-contact information would be helpful to consumers, CenturyLink believes that carriers should be permitted to contractually obligate billing aggregators to collect and pass along this information for inclusion on the consumer's bill, given that it is the billing aggregators that have the direct contractual relationship with the source of the information – the vendors.[33]

D. Legal Considerations.

1. The Communications Act.

The *Notice* inquires about the Commission's authority under the Communications Act to mandate rules with respect to third-party billing by common carriers. It notes that its "bill format and labeling requirements in the Truth-in-Billing rules are based, in whole or in part, on the Commission's authority under Section 201(b) of the Act."[34] The *Notice* fails to mention,

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[32] *Notice*, 26 FCC Rcd at 10045 ¶ 57 (citing to Billing Concepts argument). In reviewing Billing Concepts' filing, it appears that the "alleviation of escalations" it was focusing on was between the billing aggregator and the vendor, such that a disputing customer might get to a vendor who holds documentary evidence more efficiently. Billing Concepts Comments at 3.

[33] CenturyLink does not support a requirement that exchange carriers provide a physical or mailing address on its bills with respect to vendor charges. Such information would take up more text on the bill, would likely be subject to frequent change (with attendant IT costs to make the changes), and we believe would likely be useful to few customers. *Notice*, 26 FCC Rcd at 10045-46 ¶ 57. In the event that, in the future, the Commission determines that this information should be available to consumers in some fashion, CenturyLink believes that exchange carriers should be able to delegate to billing aggregators, by contract, the obligation to have this kind of address information available upon customer request. *Compare* the Commission's 900 rules where IXCs (who, like billing aggregators, are in a direct relationship with service providers) are required to provide this kind of information only upon request. 47 C.F.R. § 64.1509(a)(1), (4).

[34] *Notice*, 26 FCC Rcd at 10054 ¶ 83 (citation omitted).

however, that when the Commission has exercised its authority in the past its mandates have been limited to carriers' billings of their own charges. Even then, the Guidelines accorded carriers substantial discretion and flexibility.[35]

The Commission clearly has Title II authority (within constitutional limits) to regulate aspects of the carrier's billing practices. However, Title II does not provide a jurisdictional foundation for the Commission to promulgate billing rules with regard to carriers' billings on behalf of third parties.

Nearly 25 years ago, the Commission recognized that billing by a common carrier for third-parties does not constitute a common carrier service and therefore is "not subject to regulation under Title II of the Act."[36] No subsequent Commission decision has retreated from this position. To the contrary, the Commission has repeatedly affirmed its determination that billing for third-parties falls outside the scope of Title II.[37] Courts also have relied on this interpretation of the Act to reach the same conclusion.[38]

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[35] *Truth-in-Billing First Report and Order*, 14 FCC Rcd at 7497 ¶ 6 (the Guidelines allowed service providers "considerable discretion to satisfy their [billing] obligations in a manner that best suits their needs and those of their customers."); and 7499 ¶ 10 (the Commission sought to "provide carriers flexibility in the manner in which they satisfy their truth-in-billing obligations."); *id.* at 7501 ¶ 15 ("[W]e reject the detailed regulatory approach urged by some commenters, because we envision that carriers may satisfy these obligations in widely divergent manners that best fit their own specific needs and those of their customers.").

[36] *Detariffing of Billing and Collection Services*, Report and Order, 102 FCC 2d 1150, 1169 ¶ 34 (1985), *recon. denied*, 1 FCC Rcd 445 (1986).

[37] *See, e.g.*, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16496 ¶ 113 (2007) (noting that "billing and collection services provided [to third-parties] by LECs are not subject to regulation under Title II of the Act . . ."); *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 1632, 1645 ¶ 31 (1997) ("carrier billing or collection for the offering of another unaffiliated carrier is not . . . for purposes of Title II . . . a common carrier communication service."); *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5448 ¶ 96 (1994) ("We have

The recent District Court decision in *Moore v. Verizon* is particularly instructive. A group of Verizon local telephone customers brought a claim alleging violation of Section 201(b) on the basis that "Verizon's third-party billing and collection system lacks sufficient safeguards to prevent unauthorized charges from being added to customers' wireline telephone bills (a practice known as 'cramming')."[39] Verizon moved to dismiss the action, arguing that Section 201(b) does "not apply to third-party billing services."[40] The court agreed, citing the *Detariffing Order* and other Commission precedent to that effect, as well as opinions from the Fifth and Second Circuits.[41]

The Commission's own analysis in *LDDI* – the only case in which it issued a forfeiture for cramming under Section 201(b) – also supports the conclusion that the Commission does not have general authority under Section 201(b) over cramming relating to third-party billing.[42] In *LDDI*, the Commission found that it had jurisdiction under Section 201(b) over the "unauthorized placement of charges on a telephone bill for enhanced services" offered by a third-

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previously determined that LEC billing and collection services for non-affiliated IXCs should not be regulated as a common carrier service under Title II of the Communications Act."); *Audio Communications, Inc.*, 8 FCC Rcd 8697 ¶ 1 (CCB 1993) (a carrier's "900 billing and collection service is not a common carrier offering").

[38] *See Chladek v. Verizon N.Y. Inc.*, 96 Fed. Appx. 19, 22 (2nd Cir. 2004) (finding that billing and collection services provided by a telecommunications carrier to a pay-per-call information and entertainment service provider "are not 'telecommunications services' as defined by Title II of the Communications Act"); *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 905 (5th Cir. 2002) (subsequent history omitted) ("billing and collection services provided by LECs to unaffiliated long-distance providers fall outside the scope of Title II"); *Moore*, 2010 U.S. Dist. LEXIS 94544, *28 ("the services being billed for are those of a third-party, which are not subject to Title II").

[39] *Moore*, 2010 U.S. Dist. LEXIS 94544 at *4.

[40] *Id.* at *7-*8.

[41] *Id.* at *24-*28, *51 (Brittan/Chladek).

[42] *See Long Distance Direct, Inc.*, 15 FCC Rcd 3297, 3302 ¶¶ 13-15 (2000) (*LDDI*).

party not simply because the carrier included those charges on a long distance service bill,[43] but rather because, based on its analysis of the facts, it determined that the cramming was "inextricably intertwined" with the carrier's long distance service.[44] The third-party enhanced service was effectively part of the carrier's long distance service itself and thus subject to the Commission's jurisdiction under Section 201(b).[45] Most carrier third-party billing fact patterns will not replicate those of *LDDI* or even remotely suggest that the third-party billed services are "inextricably intertwined" with the carrier billing for the service. Based on such precedent, CenturyLink believes the Commission plainly lacks Title II jurisdiction over carrier third-party billing services.

2. First Amendment Considerations.

The Commission seeks comment on whether its proposed rules, as well as other possible regulatory measures it might take in the future regarding carriers' third-party billing practices are consistent with the First Amendment.[46] This is not the first time the matter of the First Amendment has come up with respect to carrier billings or other communications with customers, including point-of-sale communications. The matter is routinely and legitimately raised when the government seeks to mandate speech or to interfere with the way in which speech is presented.[47]

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Notice*, 26 FCC Rcd at 10055-56 ¶¶ 86-87. Commissioner Robert M. McDowell expressed his support for this area of inquiry.

[47] For example, the Commission addressed the First Amendment back in 1991 with respect to the promulgation of its 900 rules, ruling that it was constitutional to require 900 service providers to include a preamble regarding their service (disclosing their name, service description and price) prior to the commencement of billing. *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166, 6167-69 ¶¶ 6-12 (1991). The

In 2009, in response to a Commission inquiry regarding carrier disclosures in the area of broadband services, CenturyLink provided a detailed analysis of the Commission's authority under the First Amendment to mandate consumer disclosures (including at the point-of-sale), and to dictate the content and format of any such disclosures (including bills).[48] At its most basic, CenturyLink argued the basic premise of *Central Hudson*: "a regulation of commercial speech will be found compatible with the First Amendment if and only if: (1) there is a substantial government interest, (2) the regulation directly advances that interest, and (3) the proposed regulation is not more extensive than necessary to serve that interest."[49] Analyzing the Commission's proposal under that standard, CenturyLink concluded that a number of the Commission's proposals would not withstand constitutional challenge. It is unclear here that the Commission's proposals for point-of-sale disclosures regarding third-party billing or blocking, or a similar requirement for each bill, could withstand constitutional scrutiny as neither is reasonably necessary to achieve the Commission's objective of an educated consumer body.[50]

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issue was raised again in the context of the Commission's *Truth-in-Billing First Report and Order*, where the Commission explained that proposed labels regarding charges related to federal regulatory actions would be consistent with the First Amendment because "we have not mandated or limited specific language that carriers utilize to describe the nature and purpose of these charges; each carrier may develop its own language to describe these charges in detail"), 14 FCC Rcd at 7530-31 ¶ 60; *id.* at 7532 ¶ 63 ("Our standardized label requirement is even less onerous, requiring carriers to use the labels, but otherwise leaving them free to determine how best to describe charges related to federal regulatory action in a truthful and nonmisleading manner."). And as referenced immediately below in the text, in 2009 the matter was raised in the context of possible government-mandated disclosures regarding broadband service offerings and implications of such disclosures for point-of-sale and billing communications.

[48] The filing (Qwest 2009 Opening Comments) became a part of at least two of the above-captioned proceedings. CenturyLink hereby attaches its October 13, 2009 Comments in their entirety, to be incorporated by reference in CG Docket No. 11-116 (the pages from its 2009 submission that address the First Amendment issues are 39 through 50).

[49] 2009 Opening Comments at 39.

[50] While cramming is an ongoing problem in the communications industry, the incidents are not high as a percentage of total billed transactions. *See* note 15; and Comments of Billing Concepts

Moreover, with regard to point-of-sale disclosures, in particular, the government would be requiring not only compelled speech but compelled silence, to the extent a consumer has a fairly-limited tolerance for communication during a sales transaction.[51]

In 1991, as well as in 2009, the Commission relied on the Supreme Court case of *Zauderer* for the proposition that so long as the Commission mandated speakers to only speak truthful, factual information within the context of a commercial-speech setting, it would be in a position to forestall any constitutional challenge; or, if challenged, would prove successful. The current *Notice* makes the same suggestion, citing to *New York State Restaurant Association* and *Zauderer* for the proposition that "regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech."[52]

(at 3-4) that between October 2008 to 2009, it "shipped approximately 25 million records **per month**, and had an average monthly inquiry rate of 1.8 percent" (emphasis added) (footnote omitted). According to the quarterly reports issued by the Commission regarding complaints, the number of cramming complaints decreased each quarter in 2010. In the first quarter, the number was 2142; by the fourth quarter, the number had been reduced by more than two-thirds to 701. For the entire year 2010, the quarterly complaint reports show complaints numbering 5365 and that number was such that cramming complaints were not even among the top 5 complaint categories reported out by the Commission in 2010. FCC Quarterly Reports on Informal Consumer Inquiries and Complaints: http://transition.fcc.gov/cgb/quarter/welcome.html.

[51] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). In *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988), for example, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked. The Court explained that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Id.* at 796-97 (emphasis in original). The Court rejected any distinction between "compelled statements of opinion" and "compelled statements of 'fact'": explaining that "either form of compulsion burdens protected speech." *Id.* at 797-98.

[52] *Notice*, 26 FCC Rcd at 10055 ¶ 86 and note 163.

In our 2009 filing, we addressed both the Commission's cited cases at length.[53] Suffice it to say here that even in *Zauderer* the Court cautioned that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment[.]"[54] Moreover, CenturyLink believes that the Second Circuit's *New York State Restaurant Association* case was decided on a theory never supported by the Supreme Court. Specifically the *New York State* court analyzed the case under a rational bases theory not applicable in First Amendment cases.[55]

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[53] *See* Qwest 2009 Opening Comments at Section IV.B.2.

[54] 471 U.S. 626, 673 (1985).

[55] The Second Circuit misread the Supreme Court's *Zauderer* test as amounting to no more than a "rational basis" standard. *N.Y. State Rest. Ass'n. v. N.Y. City Bd of Health*, 556 F.3d 114, 134-35 (2d Cir. 2009). In fact, the Supreme Court in *Zauderer* did not use the term "rational," and that word does not appear in the opinion.

For each of these reasons, CenturyLink believes that not only do the policy arguments presented above argue against the adoption of point-of-sale and every-bill disclosures, but sound constitutional principles do so, as well. We appreciate the Commission's consideration of and respect for those principles.

Respectfully submitted,

CENTURYLINK

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