

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)	)	CG Docket No. 11-116
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

**COMMENTS OF BILLING CONCEPTS, INC.**

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Billing Concepts, Inc., doing business as BSG Clearing Solutions (“BSG”), respectfully submits the following comments in response to the Commission’s request for additional comment issued in the above-referenced dockets on October 3, 2013.<sup>1</sup> In particular, the Commission seeks comment on additional steps the Commission might take to prevent cramming, including a possible “opt-in” requirement for third-party charges placed on consumers’ wireline telephone bills.

### EXECUTIVE SUMMARY

In the year since the Commission requested comments in response to its Further Notice of Proposed Rulemaking,<sup>2</sup> the continued decline in wireline cramming has only proved BSG’s original comments<sup>3</sup> correct: Millions continue to benefit from third-party telecommunications services, and, given that consumers must already opt in to these services, the harm to these consumers of an “opt-in” requirement for such services far outweighs the benefits. And, as BSG suggested, efforts by the Commission and private parties, including BSG, have been successful in driving cramming rates to new lows. The Commission should not, and, indeed, cannot, take the unnecessary and harmful step of imposing another layer of opt-in requirements where a consumer has already made an explicit choice to use a telecommunications service.

From January 2012 through September 2013, local exchange carriers have placed charges for more than one-quarter of a *billion* long distance calls and more than eleven million collect or operator-assisted calls on consumers’ wireline telephone bills for BSG clients. In using these services, consumers already make affirmative, explicit decisions to use a third-party vendor’s

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<sup>1</sup> *In re Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, Notice of Proposed Rulemaking, CG Docket No. 11-116, 78 Fed. Reg. 61,250 (Oct. 3, 2013).

<sup>2</sup> *In re Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 11-116, 27 F.C.C.R. 4436 (Apr. 27, 2012) (hereinafter “Report and Order” or “FNPRM”).

<sup>3</sup> See Comments of Billing Concepts Inc., CG Docket No. 11-116 (filed June 25, 2012).

services, whether by pre-subscribing to a new long-distance provider, dialing a “10-10” prefix, requesting that an operator place a call, or accepting the charges for an incoming collect call. There continues to be no need for the Commission to create consumer confusion and frustration by imposing a duplicative opt-in requirement for such services.

While the evidence regarding the benefits of third-party telecommunications services continues to grow, the flaws in a proposal to impose an opt-in or other additional requirement remain. First, the Commission continues to lack a sufficient record to impose any such requirement; the anecdotal and flawed data cited in the FNPRM has only become more outdated. Second, the legal landscape applicable to such a proposal continues to show that it would violate the First Amendment, exceed the Commission’s jurisdiction, and constitute arbitrary and capricious agency action. In the face of these factual and legal flaws, the Commission should not impose an opt-in requirement for third-party telecommunications charges placed on consumers’ wireline telephone bills. Further, in light of certain structural changes that have occurred in the third-party billing marketplace, consumer complaints and Local Exchange Carrier and regulatory inquiries are at an all-time low. Accordingly, the Commission should recognize that no additional protective measures are necessary.

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

**I. The Proposed Opt-In Requirement Would Be Entirely Duplicative Because Third-Party Telecommunications Services Already Require Consumers To Explicitly Opt In.**

Every month, over one million consumers take advantage of wireline telecommunications service offerings from third-party providers. Each time, a consumer must take an affirmative, explicit step to use such a service. In other words, by their very nature, third-party wireline telecommunications services already include an opt-in requirement. Although the way in which this happens varies by service, the existence of this affirmative, explicit opt-in is undeniable. Consequently, an additional opt-in requirement for billing for these services would be entirely duplicative. As BSG previously explained, the Commission should not take this unnecessary step.

**A. The Commission’s Slamming Rules Require An Explicit Opt-in For Long-Distance Service Providers.**

The most common third-party charge is for inexpensive long-distance service. Before a consumer may switch to a third-party long-distance provider, however, he or she must affirmatively indicate an intent to do so. The Commission has set out detailed rules governing how this may be accomplished, including independent verification that the consumer fully understands what he or she is purchasing as well as the terms and conditions of such a purchase.<sup>4</sup> Voice-recordings that include verifications of the consumer’s name, address, and phone number help to ensure that only authentic charges are processed. Only after this “opt in” process is complete can a consumer use a third-party long-distance service provider.

The Commission has put significant time and energy into developing “slamming” rules,<sup>5</sup> precisely to prevent consumers from being switched to a provider without having affirmatively opted in to such a change. The presence of these rules, however, underscores the duplicative nature of the proposed opt-in requirement here. Indeed, as discussed below, such a duplicative requirement would likely reduce competition and thereby harm consumers.

**B. The Need To Dial A “10-10” Prefix Requires An Explicit Opt-in For Dial-Around Long-Distance Service.**

Dial-around long-distance represents another common third-party telecommunications service, particularly for minorities. As a technological matter, a consumer cannot use a dial-around long-distance service without making an affirmative, explicit decision to do so. The only way to place a call with a dial-around long-distance provider is to first discover, and then dial,

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<sup>4</sup> See generally *In re Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC 94-129, Fourth Report and Order, 23 F.C.C. Rcd. 493, 493 (Jan. 9, 2008).

<sup>5</sup> See *id.* at 495 (“Since the adoption of section 258 of the Act, the Commission has intensified its commitment to eliminating unauthorized carrier changes. In 2004 alone, the Commission resolved a total of 3,642 slamming complaints, resulting in nearly \$775,000 in refunds and credits to consumers.”).

the “10-10” prefix corresponding to the desired dial-around long-distance provider. If a user (intentionally or absent-mindedly) dials a long-distance call simply by dialing 1+, the dial-around long-distance provider is never involved in the call. Just as with switching a long-distance service provider, it is impossible for a consumer to accidentally or unknowingly use a dial-around long-distance service. In other words, an affirmative, explicit opt-in decision is already necessary before a consumer uses this service; an additional opt-in requirement would be entirely duplicative.

**C. Collect Calls and Operator Services Will Not Be Provided Without An Explicit Opt-in.**

There is perhaps no stronger example of a consumer’s explicit opt-in to a third-party wireline telecommunications service than a collect call. Indeed, both parties to this call must take affirmative, explicit steps before it will be connected. In addition, there is already an industry-standard prior opt-in process that utilizes a LEC-maintained industry database (Line Information Data Base, or “LIDB”) that must be checked prior to the completion of any collect call. BSG and the local exchange carrier require LIDB validation prior to the processing of any collect call. The person placing the call must dial the number to be called, and the collect call provider is required to perform a validation against a database maintained by the billing telephone company for the terminating telephone number to ensure that the specific number allows the billing of collect calls. If the collect call provider receives positive verification that the number called can accept collect calls, then the collect call operator will process the call. If the owner of the telephone number has previously indicated to his or her local exchange carrier that he or she is unwilling to accept collect calls, the call will not be placed. If there is not such an indication associated with the terminating telephone number, only then the recipient (who will be billed for the call), is contacted and asked to explicitly confirm that he or she is willing to

accept the charges. Only if both parties take these affirmative steps (dialing a provider and confirming acceptance of charges), will the call be placed. Similarly, operator-assisted calls are only placed when a consumer first dials the operator service and then explicitly requests that a call be placed to a number. As with all of the other services described above, the consumer thus makes an affirmative, explicit choice to use such services, and has the ability to indicate his or her unwillingness to accept such calls. An additional opt-in requirement, as the Commission has proposed, would be entirely duplicative and impractical.

## **II. An Additional Opt-In Requirement Would Destroy Many Benefits Consumers Obtain From Third-Party Billing For Wireline Services.**

Not only would an opt-in requirement be entirely duplicative, but it would deprive consumers of the valuable benefits that third-party billed telecommunications services provide. The most obvious evidence of the benefits is that, each year, millions of consumers explicitly choose to use these services, through the processes described above. Since the Commission adopted new rules to help protect wireline consumers, BSG has facilitated more than 200 million additional calls for alternative long-distance providers, and more than seven million additional calls for collect or operator-assisted services. The total combined value of these long-distance and operator services was nearly \$300 million over this period. The evidence continues to mount that (1) third-party services provide important benefits, and (2) many of those benefits would be lost if the Commission imposed an additional opt-in requirement.

### **A. Third-Party Billing Provides Numerous Benefits To Consumers.**

The reasons that consumers choose to use third-party telecommunications services are varied, but clear. Alternative long-distance providers are often selected because they provide more competitive rates for the particular services that a consumer wants. Dial-around long-distance providers are particularly beneficial to minority communities because of their lower

rates for international dialing. For example, BSG client Americatel offers long-distance service to Mexico for only 1.5 cents per minute, evidencing the great benefit the Hispanic community derives from third-party billing. The overall data are compelling: from January 2012 through September 2013, over a quarter of a million consumers made nearly nine million calls to or from over twenty Spanish speaking countries, including Mexico, Puerto Rico, Cuba, Guatemala, Costa Rica, Chile, Argentina, the Dominican Republic and Spain. Consumers continue to choose providers such as these precisely because of the benefits they offer.

Similarly, collect and operator-assisted calls provide consumers with necessary access to telecommunications. Whether stranded with a dead mobile phone battery or trying to place a call to an unknown number, consumers know they can rely on these third-party billed services when they need them. And, as mentioned above, collect call services are particularly important for the more than 1.5 million individuals currently imprisoned.<sup>6</sup> For security reasons, coin-operated pay-phones are not permitted, but collect calling allows these individuals to remain in touch with their friends and family. As the Commission has recognized, “family contact during incarceration is associated with lower recidivism rates. Lower recidivism means fewer crimes, decreases the need for additional correctional facilities, and reduces the overall costs to society.”<sup>7</sup> The nearly 4.5 million collect and operator-assisted calls that BSG has processed in the twelve-month period that ended September 30, 2013 underscore their value to consumers.

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<sup>6</sup> See E. Ann Carson & Daniella Golinelli, *Prisoners in 2012 – Advance Counts*, U.S. Dep’t of Justice, Bureau of Justice Statistics (July 25, 2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>

<sup>7</sup> *In re Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-113, at 3 ¶ 2 (Sept. 26, 2013) (footnote omitted); see also *id.* at 60, ¶ 110 (“We find that debit or prepaid calling yield significant public interest benefits and facilitate communication between inmates and the outside world.”) Notably, the billing-related call blocking the Commission so strongly criticized had much the same effect that the imposition of an additional opt-in requirement would have, “degrad[ing] the nation’s telecommunications network” and “pos[ing] a serious threat to the ubiquity and seamlessness of the network.” *Id.* 60-61, ¶ 111.

These significant benefits should come as no surprise to the Commission. In the Report and Order, the Commission concluded that legitimate third-party billing provides important “consumer choice and benefits . . . for consumers, carriers, and third parties.”<sup>8</sup> Moreover, “third-party billing can be a convenience for carriers, third parties, and consumers.”<sup>9</sup> Indeed, the Commission singled out long-distance service as an important service often provided by third parties.<sup>10</sup> The Commission should work to preserve these important consumer benefits.

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

If third-party telecommunications services were subject to a uniform opt-in requirement, not only would many consumers lose these benefits, many more would be actively harmed. Initially, due to the problem of “default bias,” untold numbers of consumers will fail to opt-in to third-party service options, and thereby be deprived of alternative telecommunications options.<sup>11</sup> As psychologists have frequently shown, consumers have a propensity to select the default option (a lack of access to third-party services under the proposed opt-in requirement), even when that option is less beneficial. There is every reason to expect that the default bias problem would recur with respect to the Commission’s proposal, to the detriment of consumers. At the same time, other consumers would be deprived of the most competitive long-distance rates, because the time spent opting-in with their LEC (and then opting-in again when they dial 10-10 or provide a pre-subscription change request) is not worth the perceived savings. Additionally,

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<sup>8</sup> Report and Order, 27 F.C.C.R. at 4469, ¶ 90.

<sup>9</sup> *Id.* at 4452, ¶ 41.

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Nikhil Dhingra, et al., *The default pull: An experimental demonstration of subtle default effects on preferences*, 7 JUDGMENT AND DECISION MAKING 69, 69 (Jan. 2012) (“People choose options presented as defaults more often than they otherwise would, even for important decisions that would seem to require careful thought, such as choosing health care or retirement plans.”); William Samuelson & Richard Zeckhauser, *Status Quo Bias In Decision Making*, 1 JOURNAL OF RISK AND UNCERTAINTY, 7 (1988).

the consumer's user experience would dramatically change and lead to further confusion, frustration and, almost certainly, additional complaints.

Even those consumers who did successfully clear the hurdle of the Commission's proposed opt-in requirement would still be harmed. First, because many third-party services depend on economies of scale to offer savings to consumers, prices (for all consumers) would likely rise as fewer consumers used the services. Numerous third-party service providers that survive on thin profit-margins may be forced to close, decreasing the competition the Commission has sought to foster in the telecommunications industry. The overall result—higher prices and less competition—would hurt consumers most.

Collect calls present a particular problem for the Commission's proposed opt-in requirement because, by their nature, they are placed when least expected. No one can predict when a friend or relative may need to place a collect call to them, and thus it would be impossible for consumers to make an informed choice about whether to opt in to third-party billing in advance. As previously described, there is already an industry-agreed solution for the management of collect calls that is handled by the LECs, and further requirements would be superfluous. If the Commission were to adopt its proposed opt-in requirement, stranded consumers needing telecommunications service would be acutely harmed.

Finally, an opt-in requirement would degrade consumers' experience with long-distance services. Presumably, such a requirement would be structured much like the LIDB database for collect calls, which is dependent upon the LECs for accuracy. But requiring that a 10-10 provider query this database before connecting a long-distance call could delay call placement significantly, deterring consumers from using the service. Consumers today are accustomed to nearly instant call connections, but checking the opt-in status of a customer before every call

could eliminate this ability. Moreover, database lookups before placing a call could add a transaction cost to each call, much like the costs associated with queries for whether a wireline phone number has been “ported” to a wireless carrier.<sup>12</sup>

As the Commission has acknowledged,<sup>13</sup> the decision whether to impose the proposed additional opt-in requirement ought to be made by balancing the costs and benefits of that proposal. In performing that balancing, the harms and lost benefits to consumers described above weigh heavily on the cost side of the equation. Higher prices, less consumer choice, and decreased access to services would be the price of an additional opt-in requirement. Because, as described below, the current evidence regarding a cramming problem in third-party billed wireline telecommunications is speculative at best, the inescapable conclusion is that the Commission should decline to impose an additional opt-in requirement.

### **III. Existing Measures To Prevent Cramming Are Successful.**

The measurable and very real harms that consumers would suffer if the Commission imposed an opt-in requirement stand in sharp contrast to the speculative assertions regarding the prevalence of cramming with respect to third-party wireline telecommunications services. BSG previously explained the flawed data the Commission cited in its original FNPRM.<sup>14</sup> In the Public Notice, the Commission does not offer any new data that would suggest a wireline cramming problem exists. Rather, BSG’s efforts, the Commission’s previous rules, and changes throughout the industry, including voluntary commitments made by wireline carriers, all suggest that existing measures are adequate to combat cramming for third-party wireline telecommunications services.

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<sup>12</sup> Cf. *Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding*, Public Notice, CC 95-116, 20 F.C.C.R. 8616 (Apr. 22, 2005).

<sup>13</sup> See FNPRM, 27 F.C.C.R. at 4485-87, ¶¶ 139-142.

<sup>14</sup> See Comments of Billing Concepts, Inc., *supra* at 6-9.

**A. BSG Imposes Rigorous Requirements On Its Clients To Prevent Cramming.**

BSG takes the prevention of cramming extremely seriously. In addition to recognizing the detrimental impact of cramming on consumers, preventing cramming is in BSG's own interest. BSG needs to protect its strong business reputation in order to maintain agreements with LECs to place charges on a customer's bill. Furthermore, for BSG's service providers to attract customers and succeed in the marketplace, consumers must have confidence in the legitimacy of third-party services. In order to further these goals and to protect consumers, BSG employs a comprehensive due diligence and monitoring process for its prospective and existing service providers that is unprecedented in the industry.

Each prospective service provider must complete a rigorous due diligence process that includes more than 100 different steps to examine the service provider's operations and legitimacy. This due diligence process includes purchasing and using the service provider's product in the same manner as the consumer, performing background checks, as well as completing on-site visits to the service provider's premises. In addition, when BSG receives a prospective client's first billing file, BSG identifies a random sample of charges from the file and confirms the authorization for every charge in the sample. If *any* authorization in the sample cannot be confirmed, BSG rejects the service provider and no charges are submitted to the LECs.

BSG's anti-cramming efforts are not limited to a first-time screening of new service providers. BSG's service providers are also subject to strict monthly performance monitoring requirements. If a service provider exceeds any one of BSG's performance thresholds, then BSG's testing process is triggered. These thresholds measure inquiries to BSG's own call centers, regulators, and LECs, with varying thresholds for each category based on BSG's historical experience with identifying potential issues. For instance, BSG's regulatory inquiry

threshold is set at 0.01%. When the testing process is triggered, BSG identifies and confirms the authorization for the 30 most-recently refunded transactions associated with the service provider. If the service provider is unable to successfully complete the testing process, BSG terminates its relationship with the service provider.<sup>15</sup>

**B. The Commission Has Empowered Consumers to Detect and Prevent Cramming.**

As the Commission is well aware, there have been a number of important recent changes regarding third-party wireline telecommunications services. First, the Commission's April 27, 2012 Report and Order implemented new rules to both prevent cramming and enable consumers to identify potentially unauthorized charges. For example, the Commission now requires that LECs that offer the ability to block third-party charges to notify consumers that this option is available.<sup>16</sup> The Commission also mandated that third-party charges be segregated on the bill, to make them easier for consumers to identify and review.<sup>17</sup> These rules "provide additional protections to consumers,"<sup>18</sup> "enabling consumers to make informed choices about whether to utilize blocking options available to them,"<sup>19</sup> and "mak[ing] it much easier for consumers to identify the charges on their bill that" are possibly crammed.<sup>20</sup>

Second, BSG and other industry participants decided to no longer provide third-party billing for non-telecommunications services (also known as "enhanced" services).<sup>21</sup>

As expected, BSG's own data show that consumer allegations of cramming have reached an all-time low in terms of absolute numbers and as a percentage of transactions. Since January

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<sup>15</sup> In fact, Accenture confirmed BSG's compliance by completing a comprehensive and year-long audit of BSG's monitoring and testing processes to prevent cramming.

<sup>16</sup> 47 C.F.R. § 64.2401(f)

<sup>17</sup> *Id.* § 64.2401(a)(3).

<sup>18</sup> Report and Order, 27 F.C.C.R. at 4456, ¶ 50.

<sup>19</sup> *Id.* at 4459, ¶ 60.

<sup>20</sup> *Id.* at 4462, ¶ 68.

<sup>21</sup> *See id.* at 4454, ¶ 44; FCC, *Public Notice* at 2 n.7 (Aug. 27, 2013).

2012, calls characterized as cramming allegations represented only 0.007% of all long-distance call records, and LEC and regulatory inquiries related to long-distance records averaged 0.0069% and 0.0002%, respectively. Stated differently, an alleged cramming complaint and a LEC inquiry occur less than once every 14,000 calls, and a regulatory inquiry less than once every 500,000 calls. Furthermore, thousands of consumers who actively use the third-party telecommunications services of BSG's clients have voiced their support for third-party billing. These consumers' requests are the exact opposite of a cramming allegation—an explicit acknowledgement that consumers are aware of, and pleased with, the third-party charges on their wireline bill. The continued decline in cramming allegations, as illustrated above, provides an additional reason that the Commission should not impose an additional opt-in requirement for these services.

**C. The Record Does Not Adequately Support Imposition Of An Opt-In Requirement.**

Previously, the Commission has cited a variety of sources that falsely inflate the perceived scope of cramming. BSG has explained why, for instance, the Senate Commerce Committee's report overstates the allegations of cramming, through the study of only a handful of providers of enhanced services that were already suspected of cramming.<sup>22</sup> Moreover, in light of the decision by BSG and other industry members to cease third-party billing for "enhanced" services, evidence of cramming with respect to these types of services has become largely irrelevant.

BSG has also explained the faulty methodology behind the estimate of 15-20 million households being victimized by cramming each year, as that estimate likely equals or exceeds

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<sup>22</sup> See Comments of Billing Concepts, Inc., *supra*, at 7-8.

the total number of households on which a wireline third-party charge is placed.<sup>23</sup> In the interest of brevity, BSG will not repeat these flaws here.

No recent studies showing a significant problem with respect to wireline cramming are cited in the Public Notice, and BSG is not aware of any. Instead, BSG has seen, as shown in the data above, a significant *decrease* in cramming allegations since the Commission last requested comment.

Consequently, the record cannot support a finding that there is a significant problem of cramming with respect to third-party wireline telecommunications services. Rather, the record reveals just the opposite; cramming allegations appear to be decreasing to extremely small percentages of call records. The Commission should not (and, as discussed below, cannot) burden the hundreds of millions of legitimate third-party billed calls in an effort to drive this already negligible percentage lower.

As the Commission is well aware, federal law requires that the Commission “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”<sup>24</sup> For the reasons explained above, the “relevant data” – data that takes into account recent industry changes – cannot support a finding that such drastic measures are necessary with respect to third-party telecommunications services. Where an agency’s explanation for its decision “runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,” a court will strike down the agency action.<sup>25</sup>

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<sup>23</sup> *See id.*

<sup>24</sup> *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (internal quotation marks omitted).

<sup>25</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

#### **IV. The Commission Cannot Legally Impose An Opt-In Requirement.**

The legal problems associated with the Commission’s proposed opt-in requirement have not changed since the Commission last requested comment. Indeed, nowhere in the Public Notice does the Commission even suggest that intervening events have altered this analysis. As BSG previously explained,<sup>26</sup> the First Amendment and the Commission’s lack of jurisdiction prohibit the Commission from imposing the proposed opt-in requirement.

##### **A. An Opt-In Requirement Would Violate The First Amendment.**

As BSG previously explained, the proposed opt-in requirement would violate the First Amendment because it would unconstitutionally restrict legitimate speech between LECs and consumers. Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>27</sup> commercial speech regulations must meet a strict test to avoid falling afoul of the First Amendment. The Commission cannot avoid these requirements by claiming that cramming is misleading speech, because “where . . . truthful and non-misleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.”<sup>28</sup> Unquestionably, the proposed opt-in requirement would snare millions of legitimate charges from third-party telecommunications providers.

In addition, the FNPRM offers little to no evidence of a cramming problem with respect to third-party wireline telecommunications services. Thus, the Commission has no specific data

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<sup>26</sup> See Comments of Billing Concepts, Inc., *supra*, at 12-15.

<sup>27</sup> 447 U.S. 557 (1980).

<sup>28</sup> *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993).

demonstrating that the harm cited is real.<sup>29</sup> Moreover, the opt-in requirement is not narrowly tailored, because the Commission has so far failed “to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy.”<sup>30</sup> The Commission should not unconstitutionally trample on the First Amendment rights of billing aggregators, third-party service providers, and LECs.

### **B. The Commission Lacks Jurisdiction To Impose An Opt-In Requirement.**

Congress has also not altered the Commission’s jurisdiction since the Commission last requested comment. As BSG previously explained, the Commission lacks jurisdiction to impose an opt-in requirement because such a rule would regulate the relationship between LECs and third-party billing providers, not between LECs and consumers.

At its core, the Commission’s previous discussions of its jurisdiction create a distinction between regulations that govern the relationship between carriers and customers, and those that govern the relationship between carriers and third-party service providers. While the Commission has concluded that the former are permissible,<sup>31</sup> it has generally avoided the latter.<sup>32</sup> Indeed, the Commission does not appear to dispute that it generally lacks the power to regulate the relationship between a carrier and a third-party service provider.<sup>33</sup> The Commission’s recent bill-formatting and disclosure rules continue this trend.

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<sup>29</sup> *U.S. West v. F.C.C.*, 182 F.3d 1224, 1237-38 (10th Cir. 1999).

<sup>30</sup> *Id.* at 1238.

<sup>31</sup> *See, e.g., In re Truth-In-Billing and Billing Format*, First Report and Order, 14 F.C.C.R. 7492, 7503, ¶ 20 (May 11, 1999) (adopting rules that govern “the manner in which charges and providers are identified” because “the telephone bill is an integral part of the relationship between a carrier and its customer”) (hereinafter “*First Truth-in-Billing Order*”).

<sup>32</sup> *See, e.g., In re Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, 1168 ¶ 31 (Jan. 29, 1986) (“Although carrier billing and collection for a communication service that it offers . . . is an incidental part of a communication service, . . . carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act.”) (hereinafter “*1986 Detariffing Order*”); *First Truth-In-Billing Order*, 14 F.C.C.R. at 7506, ¶ 25 (“The guidelines adopted here apply to the carrier providing service to customers, not to those carriers’ billing agents.”).

<sup>33</sup> *See Report and Order*, 27 F.C.C.R. at 4480, ¶ 124 (“Our focus has been and remains carriers’ practices on their

In sharp contrast, the proposed opt-in requirements unquestionably relate to the relationship between the carrier and the third-party. If imposed, the Commission would mandate that only in certain circumstances may a carrier contract with a third-party to bill for that party's services. This would run counter to the *1986 Detariffing Order's* conclusion, "billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act."<sup>34</sup>

Put another way, an opt-in requirement is not a regulation "for and in connection with" telecommunications services.<sup>35</sup> Indeed, the Commission's required separation between third-party charges and carrier charges has further reduced any tenuous relationship that might have previously existed. The proposed opt-in requirement would essentially regulate the circumstances under which particular third-party service providers would be granted access to this portion of the carrier's bill. And those conditions (a consumer's explicit opt-in) have nothing to do with the provision of any telecommunications service.

In the April 27, 2012 Report and Order, the Commission concluded that Section 201(b) granted it jurisdiction to impose disclosure and bill-formatting rules relating to third-party charges because these were communications with customers "for and in connection with" telecommunications services.<sup>36</sup> Regardless of the correctness of this decision, the analysis is inapplicable to the Commission's proposed opt-in requirement. Rather, the Commission lacks jurisdiction to impose such a rule.

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

<sup>34</sup> *1986 Detariffing Order*, 102 F.C.C.2d at 1169, ¶ 34.

<sup>35</sup> *See* FNPRM, 27 F.C.C.R. at 4488, ¶ 149.

<sup>36</sup> *Id.* at 4476-80, ¶¶ 114-25.

Furthermore, ancillary jurisdiction is not available either. As the Commission held in 1986, a billing and collection service “does not employ wire or radio facilities and does not allow customers of the service . . . to ‘communicate or transmit intelligence of their own design and choosing.’”<sup>37</sup> Rather, it is “a financial and administrative service.”<sup>38</sup> Thus, the Commission’s general jurisdiction under Title I does not cover this subject.<sup>39</sup> Second, the Commission has not identified a single statutorily mandated responsibility under Title II to which its regulations would be “reasonably ancillary.”<sup>40</sup> Without primary or ancillary jurisdiction, the Commission lacks the statutory authority to impose an opt-in requirement.

## **V. Conclusion**

Third-party billing for wireline telecommunications services provides numerous benefits to consumers, including lower prices, increased competition, and access to telecommunications services on-the-go. Each time consumers elect to use third-party telecommunications services, they already must opt-in through explicit steps; the Commission’s proposed opt-in requirement would therefore be entirely duplicative. Perhaps more importantly, the proposed opt-in requirement would destroy many of the benefits consumers currently enjoy from third-party services, and, in fact, would ultimately harm all consumers, whether they successfully meet the Commission’s additional opt-in requirements or not.

Based on the existing record, there is no basis for the Commission to impose such a burdensome requirement. Since the Commission last requested comment, all signs point to a continued decrease in wireline cramming rates and complaints. In light of the significant protections BSG and LECs already have in place, there is no need for the Commission to impose

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<sup>37</sup> 1986 *Detariffing Order*, 102 F.C.C.2d at 1168, ¶ 32 (citation omitted).

<sup>38</sup> *Id.*

<sup>39</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (test for ancillary jurisdiction).

<sup>40</sup> *Id.* (quotation marks omitted).

an additional opt-in requirement. Indeed, considering the significant collateral harms (and minimal, if any, benefits) to consumers that would result from such a rule, the Commission would be acting arbitrarily and capriciously in enacting such a rule. The Commission would also be violating the First Amendment and acting outside its jurisdiction if it did so. For all of these reasons, BSG urges the Commission to reject any proposed opt-in requirement for third-party wireline telecommunications services, or any additional burdensome protective measures.

Respectfully submitted on November 18, 2013.

s/Bridget Mimari

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