

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)	CG Docket No. 98-170

**COMMENTS OF CENTER FOR MEDIA JUSTICE, CONSUMER ACTION,
CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NATIONAL
CONSUMER LAW CENTER - ON BEHALF OF ITS LOW-INCOME CLIENTS, AND
NATIONAL CONSUMER LEAGUE**

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SUMMARY

Each month, thousands of customers pay for services they did not ask for and do not use. In its recent *Order* on wireline cramming, the Commission acknowledged that cramming harms consumers and should be prevented. The Commission adopted rules requiring landline telephone companies both to notify consumers if they provide the ability to opt-out of third-party billing and to separate carrier and non-carrier charges on telephone bills. Public Interest Commenters consider this an important first step, but the Commission must take further action to end cramming altogether. The Commission cannot let cramming continue to scam consumers and should take action to ban third-party billing to all wireline (including VoIP) and wireless bills.

No matter what device they use, all telephone consumers are at risk of cramming. The record makes clear that landline telephone cramming is widespread and harms consumers, defrauding the public of as much as \$2 billion each year. However, VoIP and wireless customers are also at risk of the predatory practice. The Commission should support a zero-tolerance policy for all forms of cramming and take action to ban third-party billing to wireless and wireline bills, with limited exceptions. Alternatively, the Commission could institute a requirement to opt-in to wireless third-party billing provided it implements strict and effective requirements on double opt-in mechanisms and transparent recurring charges. Moreover, all wireless carriers must be required to report cramming complaints in order to monitor the incidence of wireless cramming and to determine whether additional measures might be necessary in the future.

Importantly, consumers should have a fair opportunity to dispute erroneous charges. Dispute resolution of cramming charges should be simple and transparent, and consumers should

not be denied access to service for failure to pay disputed charges. Moreover, consumers should have the right to withhold payment without threat of reporting to collection or credit reporting agencies and the right to dispute charges without incurring added costs.

Public Interest Commenters urge the Commission to take action to protect consumers from cramming, rather than rely on voluntary action. Title II, Title III, and ancillary authority all provide the Commission with ample legal authority to protect consumers from cramming. Whether using a wireline or wireless device, consumers deserve protections that the Commission has the authority to implement and enforce.

TABLE OF CONTENTS

I. INTRODUCTION..... 6

II. THE COMMISSION MUST PROTECT CONSUMERS FROM CRAMMING 7

A. Consumers Are At Risk of Wireline Cramming 7

B. Consumers Are At Risk of Wireless Cramming 8

 1. *Consumers have been the victims of wireless cramming 8*

 2. *Ways in which wireless cramming can occur 11*

III. REDUCING CRAMMING REQUIRES ADDITIONAL CONSUMER PROTECTIONS WITH REGARDS TO THIRD-PARTY BILLING 15

A. The Commission Should Prohibit Third-Party Billing, With Limited Exception, on All Wireline Services 15

B. The Commission Should Either Prohibit Third-Party Billing, With Limited Exception, on Wireless Services or Adopt an Opt-in Mechanism 18

 1. *The Commission should prohibit third-party billing for wireless devices, with an exemption for charitable organization giving 18*

 2. *Absent a prohibition on wireless third-party billing, a double opt-in rule should be adopted, with special protections to guard against fraudulent recurring billing 19*

 3. *The Commission should require wireless carriers to report their wireless cramming complaints..... 20*

C. The Commission Must Adopt a Dispute Resolution Process for Consumers 21

IV. THE COMMISSION MUST USE ITS AUTHORITY TO PROTECT CONSUMERS FROM CRAMMING 22

A. The Commission Can Protect Consumers from Wireline Cramming Pursuant to Its Title II and Ancillary Authority 22

 1. *Direct Title II Authority 22*

 2. *Ancillary Authority 23*

B. The Commission May Protect Consumers from Wireless Cramming Pursuant to Its Title III Authority 25

C. The Commission Has the Authority to Implement Third Party Billing Restrictions on VoIP Services 27

V. CONCLUSION 29

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CLIENTS, AND NATIONAL CONSUMER LEAGUE**

Center For Media Justice, Consumer Action, Consumer Federation of America, Consumers Union, National Consumer Law Center, on behalf of its low-income clients, and National Consumer League (Public Interest Commenters) respectfully submit these Comments in response to the Commission’s Report and Order and Further Notice of Proposed Rulemaking in *Empowering Consumers to Prevent & Detect Billing for Unauthorized Charges (“Cramming”)*.¹ Public Interest Commenters urge the Commission to use all of its legal authority to take further actions to protect consumers from cramming on traditional wireline, mobile, and VoIP services.

¹ Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 11-116, (adopted Apr. 27, 2012) (*Cramming Order*).

I. INTRODUCTION

In the *Cramming Order*, the Commission has adopted conspicuous disclosure requirements for traditional wireline telephone carriers that bill for third party services and is requiring carriers to conspicuously notify consumers about opting out of third party billing if the carrier allows it at all.² The cramming rules adopted by the Commission only cover third party billing practices of traditional wireline carriers.³

Public Interest Commenters consider this action by the Commission to be just a first step in preventing these unlawful practices by third party billers. Despite the Commission's actions, consumers are still at risk from cramming and additional protections are needed to protect consumers from this predatory practice. The Commission agrees that further actions may be required also, but seeks more information regarding additional consumer protections and its authority to implement further measures.⁴ Public Interest Commenters urge the Commission to use its legal authority to implement further mechanisms aimed at preventing cramming on traditional wireline, mobile, and VoIP services.

The *Cramming Order's* disclosure only applies to traditional wireline service.⁵ However, consumers who utilize VoIP telephones or wireless devices are also at risk of cramming. Thus, the Commission should adopt cramming rules for all services: wireline, VoIP, and wireless. Additionally, the cramming rules only require wireline carriers to disclose to consumers that there is an option to block third party services from their bills if the carriers provide such an option. Prohibiting third party charges for all services, with narrow exemptions, would be much more effective than the current rule. Alternatively, requiring wireless consumers to opt-in and

² *Cramming Order* at ¶ 115, Appendix.

³ *Id.* at Appendix A.

⁴ *Id.* at ¶ 149.

⁵ *Id.* at ¶ 146.

give their affirmative consent to third party services before being billed also would be much more effective than the current cramming rules. Public Interest Commenters urge the Commission to use its legal authority to implement more stringent and effective mechanisms to prevent cramming on all services.

II. THE COMMISSION MUST PROTECT CONSUMERS FROM CRAMMING

A. Consumers Are At Risk of Wireline Cramming

The Commission's *Cramming Order* represents a significant acknowledgement that wireline cramming is a costly, widespread, anti-consumer problem. In fact, The Commission received nearly 1,700 cramming related complaints in 2011, 63 percent of which were episodes of specifically wireline cramming.⁶ Importantly, the Commission noted that the "overwhelming evidence in the record shows that the volume of complaints received by the Commission understates the extent of consumer frustration with cramming."⁷ The Commission further recognized that voluntary industry efforts adopted in 1998 to prevent cramming have been ineffective and insufficient.⁸ Thus, it is apparent that cramming is a prevalent problem on traditional landlines and few consumers deliberately authorize third-party services or related wireline phone bill charges.⁹

Moreover, the same way cramming occurs on traditional landlines, consumers can also be crammed through a VoIP service. Indeed, the Commission began to require VoIP service providers to report their subscribership information to the Commission since December 2008 due to the rapid growth in VoIP usage and its increasing use to provide local telephone service.¹⁰

⁶ *Id.* at ¶ 21.

⁷ *Id.* at ¶ 22.

⁸ *See id.* at ¶ 43.

⁹ *See id.* at ¶ 27.

¹⁰ Federal Communications Commission, Wireline Competition Bureau: Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2010*, 1-2 (Oct. 2011).

The Commission's October 2011 report on subscribership information includes data collected through December 2010. As of that time, there were 32 million interconnected VoIP subscriptions out of the 149 million total wireline retail local telephone service connections (21.5%), an increase of 22% from the preceding year.¹¹ Thus, the risks of cramming are very real as more consumers use VoIP services.

B. Consumers Are At Risk of Wireless Cramming

Although the majority of complaints thus far have been related to traditional wireline service, cramming is likely to become as significant of a problem for wireless users unless the Commission acts to protect consumers now. Indeed, there is already evidence that wireless cramming is occurring, which can happen in various ways.

1. Consumers have been the victims of wireless cramming.

Not only are consumers being cheated on their landline telephone bills, but evidence suggests that wireless cramming is also a problem. Indeed, in recently introducing legislation aimed at preventing cramming on traditional wireline, VoIP, and wireless services, Senator Rockefeller noted “[i]t has become clear that cramming now extends to wireless bills.”¹² For example, 16% of the cramming complaints received by the Commission have come from wireless consumers.¹³ The Federal Trade Commission (FTC), which also handles cramming complaints, received about 10% of its cramming complaints from wireless consumers.¹⁴ State agencies that assert jurisdiction over wireless service contracts have also noted the impact of

¹¹ *Id.* at 1-2.

¹² “Rockefeller Introduces Telephone Bill Anti-Cramming Legislation, Legislation Introduced in Response to Year-Long Committee Investigation,” Democratic Press Office, Jun. 14, 2012, http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=866363cc-26e0-4243-8ec2-8b7916b99336.

¹³ *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges*, Notice of Proposed Rulemaking, 26 FCC Rcd 10021, 4 FN 11 (2011) (*Cramming NPRM*).

¹⁴ *Id.*

cramming on wireless consumers. Between 2009 and 2010, the California Public Utilities Commission (CPUC) received 5% of its cramming complaints from wireless consumers.¹⁵ From 2006 to 2011, the Florida Attorney General's Office received 24% of its cramming complaints from wireless consumers.¹⁶ Finally, from 2005 to 2011, the Vermont Attorney General's Office received 16% of its cramming complaints from wireless consumers.¹⁷

These numbers indicate that real people are being affected by cramming, and the Commission should be vigilant and support a zero-tolerance policy. In fact, some states have been vigilant already in their fight against wireless cramming. Between 2006 and 2011, the Florida Attorney General received 174 complaints of wireless cramming.¹⁸ Based on those complaints, an investigation by the Florida Attorney General found that thousands of Floridians had been the victims of cramming.¹⁹ The investigation resulted in settlements between the Florida Attorney General and wireless carriers and third party billers worth millions of dollars in restitution to consumers.²⁰ Moreover, there is currently an ongoing dispute in Texas arising out of thousands of consumers being impacted by cramming. The Texas Attorney General has filed a

¹⁵ *Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 127 (2011) (Cramming Hearing); *Cramming NPRM* at 13.

¹⁶ Cramming Hearing at 127.

¹⁷ *Id.*

¹⁸ See Keith Vanden Dooren, *Florida Cramming: Solutions*, Florida Office of Attorney General, slide 2 www.ftc.gov/bcp/workshops/cramming/FloridaCrammingSolutionsToFTC.pps (Florida Solutions).

¹⁹ See Press release, *Florida Attorney General Sues Nationwide Internet Cramming Company*, Florida Office of the Attorney General, Nov. 15, 2007,

<http://myfloridalegal.com/newsrel.nsf/newsreleases/5339829BD555273585257394004E9DEC>.

²⁰ See *Mobile Content Providers Settle Cramming Suits*, CONSUMERAFFAIRS.COM, Sept. 20, 2010, http://www.consumeraffairs.com/news04/2010/09/mobile_content_providers_settle_cramming_suit.html; *Wireless Carriers Agree To \$1.5 Million Cramming Settlement*, CONSUMERAFFAIRS.COM, Jun. 24, 2009, http://www.consumeraffairs.com/news04/2009/06/wireless_cramming.html; *Verizon Signs Florida Anti-Cramming Agreement*, CONSUMERAFFAIRS.COM, Jul. 12, 2007, http://www.consumeraffairs.com/news04/2007/07/fl_verizon.html.

lawsuit claiming that the defendants' text message cramming scheme has led to "millions of dollars in unauthorized mobile phone charges," impacting thousands of Texans.²¹

In addition to the sheer number of cramming incidents that occur throughout the United States, there is significant anecdotal evidence about people's experiences with cramming, demonstrating the issue's national scope, affecting many walks of life:

- Monique Eigenbauer, a 21-year-old attending the University of Central Florida, was charged nearly \$60 on her cell phone during five months for "long life love tips," a service she never requested or authorized. After contacting AT&T, who credited her account for the amount, the third-party vendor resumed charging her a month later for an additional four months. "AT&T took care of everything, but it was a hassle," she said. "My problem is not specifically with the carrier, but with the practice. How many people are being defrauded by these third-party companies and not even know about it?"²²
- Janie Smoter of Bonney Lake, Washington immediately starting receiving text messages after she went to a coupon website that required her to enter her cell phone number. The texts were varied ranging from daily horoscopes to love lines. Smoter declined every single offer of service from the texts. Nevertheless, when she checked her wireless bill she found a "premium text message" charge of \$9.95 for that day. "It's infuriating," Smoter said. "I spent hours trying to get this resolved. And I was lucky because I caught it right away. I was reading stories of people online and some of them had hundreds of dollars on their bills from this company and they weren't able to get any resolution."²³
- Senator Tom Udall of New Mexico described how one of his constituents from Santa Fe contacted him after finding \$170 in fraudulent, unauthorized premium text message charges on his wireless bill for a trivia game he did not want and did not sign up to receive. The founders of the company billing the constituent had previously been involved in a class action lawsuit for a separate landline cramming scam. After receiving a refund, the constituent told the Senator, "My

²¹ *Texas v. Eye Level Holdings*, Cause No. 0-1-Gv-11-000268, Pl's Pet. 28-29 (45th Judicial District Court, Travis Cnty.); Press release, *Texas Attorney General Seeks Halt to Fraudulent Text Messaging Scheme*, Attorney General of Texas, Mar. 10, 2011, <https://www.oag.state.tx.us/oagnews/release.php?id=3663>.

²² See Walter Pacheco, "Mysterious 'cramming' charges anger cellphone users," *Orlando Sentinel*, Feb. 24, 2012, http://articles.orlandosentinel.com/2012-02-24/business/os-cramming-cellphone-20120227_1_third-party-charges-carriers-verizon-wireless (Pacheco Article).

²³ See Herb Weisbaum, "FCC proposes crackdown on phone-bill cramming," *MSNBC.com*, Jul. 12, 2011, www.msnbc.msn.com/id/43728825/ns/business-consumer_news/t/fcc-proposes-crackdown-phone-bill-cramming/#.T3yOPdkZm9s (Weisbaum Article).

main goal [is] to get this practice stopped. It was nice to get the money back, but the bigger deal by far is to put these scams out of business.”²⁴

- A resident of Port St. Lucie, Florida found an unauthorized charge from Voicemail Solutions for \$13.97 on her AT&T phone bill. After getting no results from AT&T, she called the third party billing company, Enhanced Services Billing, Inc., who said that her husband had ordered the services over the Internet on a given date. She responded that it was impossible; her husband had died three months before the date.²⁵
- Richard Mooney, an AT&T subscriber from Oklahoma found \$9.99 charges on his and his wife’s wireless bill after he replied to a text message asking users if they knew why flamingos are pink.²⁶
- Hamid Shojaee of Scottsdale, Arizona was billed \$9.99 per month for ten months after he failed to respond to text messages from a service he was unfamiliar with and never authorized. “I don’t expect charges on my cell phone bill that I did not authorize,” said Shojaee.²⁷
- In an eight-month “ordeal,” Grace Freeman, a T-Mobile subscriber from Orlando, Florida had to obtain a new service contract and a new phone number in order to resolve \$80 in cramming charges related to a game her ten-year old brother accidentally downloaded. “I blocked the number, and the [third-party vendor] just charged me from another number,” said Freeman.²⁸

2. *Ways in which wireless cramming can occur.*

Wireless cramming can occur by crammers locating active cell phone numbers which they can later charge. To initiate their unauthorized billing of mobile devices, crammers usually make contact with consumers to confirm that the mobile device’s telephone number is active. Crammers do this typically in two ways, by text spamming or individually acquiring a consumer’s cell phone number. Only the text spamming method is illegal under current law.

²⁴ See Cramming Hearing at 116-17 (statement of Sen. Tom Udall).

²⁵ See Florida Solutions at slide 5.

²⁶ See Sarah Stewart, *Cramming raising your cell phone bill?*, KFOR-TV, May 22, 2012, <http://kfor.com/2012/05/22/cramming-raising-your-cell-phone-bill/>.

²⁷ See Joe Ducey, *FTC goes after bogus cramming charges on phone bills*, KNXV-TV, ABC15.com, May 28, 2012, <http://www.abc15.com/dpp/money/consumer/alerts/ftc-goes-after-bogus-cramming-charges-on-phone-bills>.

²⁸ See Pacheco Article.

The Commission currently prohibits anyone (spammers) from making a call or sending a text message to a cellular phone using an automatic dialing device without express prior consent of the targeted party.²⁹ Nevertheless, spammers still utilize automatic dialing devices to spam many mobile devices at once and try to connect with consumers. Many times, text spam will include a message like: “HoroscopeGenie Alert: 3 horoscopes/wk for \$9.99/mo Reply HELP for help, STOP to cancel. Msg&data rates may apply.”³⁰ If a consumer does not reply “STOP,” then the spammer assumes that the consumer wants the service and bills the consumer despite never receiving any affirmative consent. Sometimes, even when a consumer tells the crammer to stop, the crammer will continue to charge the consumer.³¹

Any response by the consumer also confirms that the number is active and can lead to further text messaging by the spammer/crammer or others to whom the spammer/crammer sells the consumer’s confirmed active number.³² Consumers can respond in multiple ways. Consumers can reply to the text itself or call the spammer’s number. Additionally, if the spam includes a website address to visit, consumers’ visits while submitting their cell phone numbers will confirm the spam’s successful connection. Having confirmed that a consumer’s number is genuine, the spammer/crammer can now initiate third party charges on that number.

²⁹ See 47 C.F.R. § 64.1200(a)(1)(iii). See also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call”).

³⁰ See e.g., David Segal, *What’s Your Sign? It Could Be a Cram*, N.Y. Times, Mar. 24, 2012, <http://www.nytimes.com/2012/03/25/your-money/beware-of-cramming-on-your-cellphone-bill-the-haggler.html>.

³¹ See Pacheco Article.

³² See *Cell phone cramming will cost you*, KARE 11, May 3, 2012, <http://www.ksdk.com/news/article/318649/3/Unwanted-text-You-may-have-been-crammed-and-itll-cost-you> (KARE Article); Will Oremus, *Hell Phone: Is there any way to stop the scourge of text message spam?*, SLATE, Apr. 13, 2012, http://www.slate.com/articles/technology/technology/2012/04/how_to_stop_text_spam_why_cellphone_spam_is_on_the_rise_and_what_you_can_do_about_it_single.html#pagebreak_anchor_2.

In addition to confirming a number through spam, third party service providers may legally learn of a consumer's active mobile number through the actions of the consumer. When consumers fill out forms which include their cell phone numbers, the website owner can then use the number or sell it to others to initiate third party charges on their wireless bills.³³ Once a crammer has a consumer's cell phone number, the crammer can then initiate unauthorized charges on the consumer's bill.³⁴ The crammer may also send a text message to the consumer to confirm the phone number in a similar manner as a text spammer.

Crammers can charge consumers for multiple supposed services. Some services are actually provided, such as "premium" text message horoscopes which crammers send to consumers' cell phones. However, many times crammers simply place charges on a consumers' bill without providing any real services and use vague terms like "service fee," "other fees," "voicemail," or "calling plan."³⁵ It is especially difficult to differentiate authorized from unauthorized third party charges on cell phone bills.³⁶ If consumers want third-party services such as ringtones, weather updates, and sports scores, they can purchase them directly from the vendor using payment mechanisms such as credit or debit cards for those services. Payments through credit cards are not prone to cramming fraud and regulations governing those payments better protect consumers from fraudulent charges.

³³ See e.g. Press release, *Texas Attorney General Seeks Halt to Fraudulent Text Messaging Scheme*, Attorney General of Texas, Mar. 10, 2011, <https://www.oag.state.tx.us/oagnews/release.php?id=3663> (Texas Attorney General).

³⁴ See e.g., Weisbaum Article.

³⁵ MONEY SMART: Is Your Cell Phone Being 'Crammed?' KTLA News, May 14, 2012, www.ktla.com/news/landing/ktla-money-smart-cell-phone-cramming,0,5142186.story.

³⁶ See Weisbaum Article.

Wireless carriers claim that their “double opt-in process” prevents most unauthorized charges from ever happening.³⁷ When a “customer enters a wireless phone number seeking third-party content...the content provider sends the customer a password which the customer then enters into the content provider’s purchase page.”³⁸ It supposedly takes these two separate conscious actions to initiate any third party charges. However, as discussed above, wireless cramming is still prevalent, despite these “safeguards.”

It is “clear that many third-party providers are cramming, rather than walking a straight-and-narrow ‘double opt-in’ path.”³⁹ Even in instances where consumers tell their wireless carriers to block all third party charges from their bills, the charges may still appear.⁴⁰ In one particularly heinous case of cramming on a massive scale, crammers operated

hundreds of websites through which they advertise paid monthly subscription services and other items... featur[ing] a bold eye-catching text box directing customers to enter their cell phone numbers. The websites unlawfully failed to provide customers clear and conspicuous disclosures revealing that the defendants charged for the subscription service – and that charges would be billed to the customer’s mobile phone account. The defendants’ websites disclose a price only in very small, virtually unreadable one-line caption in a dark grey font on a black background.⁴¹

When the crammers sent customers text messages containing a password to enter on the defendants’ website, the texts hid references to the costs of the service. The crammers arranged for inquiries about unwanted charges to be directed to a “dummy” website. Although Verizon Wireless, the consumers’ wireless carrier, is fully cooperating with government investigations of

³⁷ See e.g., David Segal, *To Stop Cellphone Cramming, Don’t Let It Start*, N.Y. Times, Apr. 7, 2012, <http://www.nytimes.com/2012/04/08/your-money/cellphone-cramming-gets-a-second-look.html> (Segal Article).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See e.g., KARE Article.

⁴¹ See Texas Attorney General.

and has initiated a lawsuit against the crammers,⁴² this extreme example of wireless cramming shows the need for consumer protections to prevent such occurrences from happening again.

III. REDUCING CRAMMING REQUIRES ADDITIONAL CONSUMER PROTECTIONS WITH REGARDS TO THIRD-PARTY BILLING

Rather than relying on voluntary industry efforts, Public Interest Commenters recommend that the Commission ban third-party billing, with limited exceptions, on all wireline (including VoIP) and wireless services. Alternatively, the Commission could adopt an opt-in mechanism for third-party billing on wireless services. Moreover, the Commission should collect data directly from the carriers and report its findings on wireless cramming. Finally, the Commission must adopt measures to protect consumers from losing their service while disputing an unauthorized charge.

A. The Commission Should Prohibit Third-Party Billing, With Limited Exception, on All Wireline Services

In its *Cramming Order*, the Commission adopted anti-cramming rules that continue to rely on consumers to identify and report suspicious charges on their telephone bills as a primary means for alerting carriers, and ultimately, regulators to possible cramming. As multiple commenters in this proceeding have noted, consumers typically do not understand that their telephone numbers may be used to bill them for services unrelated to their telecommunications service.⁴³ This consumer vulnerability is compounded by the practice of crammers using shell companies, deceptive descriptions of their services and active blocking of carrier anti-cramming

⁴² See *id.*; Jeff Neuburger, *Verizon Wireless Files RICO Suit against Mobile Marketers, Alleges Deception and Fraud in Evasion of MMA Guidelines Requirements for Short Code Campaigns*, PROSKAUER, Mar. 14, 2011, <http://newmedialaw.proskauer.com/2011/03/articles/electronic-direct-marketing/verizon-wireless-files-rico-suit-against-mobile-marketers-alleges-deception-and-fraud-in-evasion-of-mma-guidelines-requirements-for-short-code-campaigns/>.

⁴³ See *e.g.*, Comments of the Federal Trade Commission. CG Docket 11-116 (filed Oct. 24, 2011) at 4; Comments of Attorneys General of Illinois, Nevada and Vermont, CG Docket 11-116 (filed Oct. 24, 2011) at 6.

security audits. Absent a dramatic change in the number of consumers who are able to understand this practice, it likely that cramming fraud will continue to harm consumers despite the Commission's more stringent disclosure rules.

Despite recent voluntary actions by some carriers, Public Interest Commenters believe a prohibition on third-party billing for unaffiliated non-telecommunications-related services is the most effective solution to cramming on all wireline (which includes VoIP) bills. Indeed, numerous commenters in this proceeding have noted that a prohibition on third-party billing on wireline telephone bills would be an effective solution to the problem of cramming.⁴⁴ Pending Congressional legislation would also prohibit third-party billing for traditional landline and VoIP services that have historically proven most prone to cramming fraud.⁴⁵

Some carriers have recently decided to cease billing for unaffiliated third-party services. In March and April 2012, the three largest local-exchange carriers (LECs) - AT&T, Verizon and CenturyLink - voluntarily agreed to cease billing for enhanced third-party services on their landline telephone bills.⁴⁶ However, these voluntary carrier actions are not a substitute for

⁴⁴ See e.g., Comments of the Federal Trade Commission, CG Docket 11-116 (filed Oct. 24, 2011) at 5; Comments of Attorneys General of Illinois, Nevada and Vermont, CG Docket 11-116 (filed Oct. 24, 2011) at 11; Reply Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, CG Docket No. 11-116 (Filed Dec. 5, 2011) at 13.

⁴⁵ See *Rockefeller Introduces Telephone Bill Anti-Cramming Legislation*, U.S. Senate Committee on Commerce, Science and Transportation, Press Release, Jun. 14, 2012, http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=866363cc-26e0-4243-8ec2-8b7916b99336.

⁴⁶ See *Rockefeller Hails Verizon Decision to Shut Down Unwanted 3rd-Party Charges on Telephone Bills*, U.S. Senate Committee on Commerce, Science & Transportation, Press Release, Mar. 21, 2012, http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0f27e67a-1225-465a-8393-2256266939c8&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd69d; *Another Major Phone Company Agrees to End Third-Party Billing on Consumer Phone Bills*, U.S. Senate Committee on Commerce, Science, & Transportation, Press Release, Mar. 28, 2012. Online: http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0245033e-6fe4-420d-8ed3-cdb39ed6537f&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=4b968841-f3e8-49da-a529-7b18e32fd69d&MonthDisplay=3&YearDisplay=2012; *Klobuchar: CenturyLink Joins AT&T and*

Commission action. The Commission would not be able to enforce a violation of the carriers' own policy, and if these voluntary actions prove ineffective at significantly reducing cramming fraud, subscribers of these LECs will not have the benefit of Commission rules for redress. Moreover, millions of consumers are not subscribers of these three carriers and will remain vulnerable to cramming fraud. Therefore, a Commission prohibition on all third-party billing charges, with limited exceptions, for all VoIP and LEC services would protect all consumers, not simply the customers of the three largest LECs.

Specifically, the Commission should adopt rules that are broadly modeled on successful state legislation in Vermont which prohibits wireline third-party billing with certain exceptions.⁴⁷ This would entail a prohibition of third-party billing services by all wireline carriers to service providers whose products and services are not under the jurisdiction of the Commission. Such a prohibition would cover so-called "enhanced" services that bear little, if any, relation to the underlying telephone service. Services mentioned in the record which could fall into this category would include, but not be limited to, electronic facsimile, enhanced voicemail, website hosting, web design, search engine optimization, identity theft protection and "technical support."

Such a prohibition should not apply to services that are related to the underlying telephone service, such as dial-1 and dial-around long distance calling services, collect calling, directory assistance, operator-assisted telephone calls and inmate calling services. In addition, a prohibition on third-party billing should not apply to service providers who have a direct, contractual relationship with underlying wireline provider (as opposed to an indirect relationship

Verizon in Putting a Stop to Cramming on Phone Bills, Press Release, Apr. 3, 2012, http://klobuchar.senate.gov/newsreleases_detail.cfm?id=336476&.

⁴⁷See 9 V.S.A. § 2466(f) (as amended by 52 Vermont Laws § 78 (2011)), <http://www.leg.state.vt.us/docs/2012/bills/Passed/H-287.pdf> at 105.

via a billing aggregator) and which are marketed to consumers as part of a bundled service package. Service providers covered by this exemption would include, but not be limited to satellite television providers, competitive DSL providers and certain dial-up Internet service providers.

B. The Commission Should Either Prohibit Third-Party Billing, With Limited Exception, on Wireless Services or Adopt an Opt-in Mechanism

In response to the *Cramming NPRM*, a number of Commenters called on the Commission to consider stronger measures to prevent cramming from becoming a larger problem on wireless telephone bills.⁴⁸ As discussed above, there continues to be evidence of wireless cramming, and Public Interest Commenters continue to fear that crammers are increasingly shifting their fraud from wireline to wireless bills. The Commission must address this fraud before it achieves the epidemic levels seen on wireline telephone bills.

1. *The Commission should prohibit third-party billing for wireless devices, with an exemption for charitable organization giving.*

Public Interest Commenters believe that wireless cramming is poised to become a major consumer fraud issue and requires Commission action before more consumers become victims of this predatory practice. Some Commenters have suggested that compliance with the Mobile Marketing Association's Consumer Best Practices Guidelines for Cross-Carrier Mobile Content⁴⁹ is sufficient to protect consumers from wireless cramming.⁵⁰ However, Public Interest

⁴⁸ See e.g., Comments of Consumers Union *et al.* CG Docket 11-116 (Filed Oct. 24, 2011) at 4; Reply Comments of the National Consumers League *et al.*, CG Docket 11-116 (Filed Dec. 5, 2011) at 8; Reply Comments of National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, CG Docket 11-116 (Filed Dec. 5, 2011) at 18; Comments of U.S. Senator Amy Klobuchar, CG Docket 11-116 (Filed Apr. 19, 2012).

⁴⁹ See Mobile Marketing Association. *U.S. Consumer Best Practices*. Version 6.0, Mar. 1, 2011, <http://www.mmaglobal.com/bestpractices.pdf> (MMA Guidelines).

⁵⁰ See e.g., Reply Comments of CTIA-The Wireless Association, CG Docket 11-116 (Filed Dec. 5, 2011) at 5.

Commenters are not convinced that the wireless industry's reliance on the MMA Guidelines is sufficient to protect consumers from fraud.

Thus, Public Interest Commenters recommend a prohibition on third-party billing for wireless devices, with an exemption for charitable organization giving, as the preferred method to protect consumers from wireless cramming. As in the case of wireline third-party billing, Public Interest Commenters believe that the most effective solution would be to simply prohibit most third-party billing for wireless phones. However, Public Interest Commenters strongly urge that an exemption be made for charitable giving – so-called “text to donate” services. Such services can provide a valuable and useful service to many non-profit organizations as well as to political campaigns and should be preserved.

2. *Absent a prohibition on wireless third-party billing, a double opt-in rule should be adopted, with special protections to guard against fraudulent recurring billing.*

Alternatively, the Commission should strengthen and codify and strengthen the MMA Guidelines for third-party services. Such action would give the MMA Guidelines the force of law and enable the Commission to enforce violations. The MMA Guidelines provide a number of rules for premium text-messaging services. For example, to comply with MMA Guidelines, wireless carriers must obtain double opt-in for premium text services, offer clear disclosure of costs at the time of sale, and participate in industry-wide auditing efforts. The MMA Guidelines also prohibit content providers from redirecting subscribers from one type of program (*i.e.* ringtone subscription) to another type of program (*i.e.* horoscope alert subscriptions).⁵¹ Content providers must also provide an opportunity to cancel services at anytime and provide certain customer service and dispute resolution services. These guidelines would also need to be strengthened to ensure there is an effective verification and authentication process.

⁵¹ MMA Guidelines at 32.

In addition to improving the opt-in process laid out by the MMA, Public Interest Commenters urge the Commission to require third-party services that bill on a recurring basis obtain repeated consent to such billing on a consistent schedule. Specifically, the Commission should require third-party service providers to obtain affirmative consent from a subscriber before a recurring charge may be assessed at whatever interval such a recurring charge would occur (*e.g.* if the charge is assessed monthly, monthly consent would be required). Subscribers to such services could be allowed to opt out of the necessity of such repeated affirmative consent should they so choose. These requirements would address the consumer harm created when crammers bill small amounts over an extended period of time to hide their fraud. Such a requirement would also be effective in combating cramming since consumers would need to opt in for each charge, instead of opting in once and then being charged repeatedly without their knowledge or consent.

3. *The Commission should require wireless carriers to report their wireless cramming complaints.*

In October 2010, the California Public Utilities Commission adopted new cramming rules, including a reporting requirement. The CPUC reporting rule requires wireless carriers to submit quarterly reports of refunds for unauthorized charges made to subscribers with California area codes. The rule also requires wireless carriers to report third-party services that have been suspended or terminated, grouped by service provider. The CPUC uses these reports to determine the extent of cramming in the state and whether additional consumer protection measures are necessary.⁵²

⁵² See California Public Utilities Commission, “CPUC Strengthens Consumer Protections Against Cramming and Fraud on Telephone Bills,” Press Release, Oct. 28, 2010, http://docs.cpuc.ca.gov/word_pdf/NEWS_RELEASE/125716.pdf (CPUC Press Release).

Similarly, regardless of whether new anti-cramming rules are adopted, the Commission should require wireless carriers to report their wireless cramming complaints to the Commission. The current mechanisms available to the Commission to evaluate the scope of wireless cramming – namely, cramming complaints that the Commission collects and consultations with carriers – are insufficient. Instead, Public Interest Commenters recommend that the Commission adopt federal rules modeled after the CPUC rules to require wireless carriers to share cramming complaint data with the Commission on a regular basis. The Commission can use this data to evaluate the scope of wireless cramming and should issue a report on the scope of wireless cramming and the effectiveness of carrier efforts to curb cramming on their third-party billing platforms.

C. The Commission Must Adopt a Dispute Resolution Process for Consumers

The Commission must also take further action to ensure that consumers who find and wish to dispute erroneous wireline or wireless charges are provided a straightforward, standard dispute resolution process and are not denied access to service during the dispute resolution process. These important consumer protections against cramming were implemented by the CPUC in 2010⁵³ and mirror rules governing dispute resolution set out in the past by the Commission on slamming⁵⁴ and the FTC on pay-per-call billing.⁵⁵

Specifically, Public Interest Commenters recommend that wireless and wireline providers print and follow a clear, transparent dispute resolution process that is explained to customers and the point of sale and in an attachment included with their bills. As part of the process, customers must have the right to withhold the disputed charge amount pending an investigation without threat of service termination or late fees. Additionally, providers should not charge customers

⁵³ See CPUC Press Release.

⁵⁴ See 47 CFR § 64.1150.

⁵⁵ See 16 CFR § 308.7.

for entering the billing review process. During dispute resolution, providers should not be allowed to report or threaten to report non-payment to credit reporting agencies, collection services, or any other person or corporation. Finally, if a customer has paid the charge and then reports it as cramming, the customer should be entitled to a full refund paid within a reasonable time frame, such as within two billing cycles.

IV. THE COMMISSION MUST USE ITS AUTHORITY TO PROTECT CONSUMERS FROM CRAMMING

The Communications Act clearly provides the Commission with the authority to ensure that all wireline and wireless providers (including in the context of VoIP and data providers) engage in practices that are honest, consistent, and easy to understand. Title II, Title III, and ancillary authority all provide the Commission with the legal authority to protect consumers from cramming. Thus, the Commission has the authority to adopt rules that not only prohibit third-party billing, but to alternatively adopt an opt-in mechanism for third-party billing.

A. The Commission Can Protect Consumers from Wireline Cramming Pursuant to Its Title II and Ancillary Authority.

1. Direct Title II Authority

Section 47 U.S.C. 201(b) states that all “practices... for and in connection with such communication service, shall be just and reasonable.”⁵⁶ Third party billing’s connection with communication services clearly gives the Commission jurisdiction to limit or prohibit the practice of cramming. Indeed, the Commission has previously determined that it has the authority to enact cramming related rules pursuant to section 201(b):

Section 201(b) requires that all carrier charges, practices, classifications, and regulations “for and in connection with” interstate communications service be just and reasonable, and

⁵⁶ *Cramming NPRM* at ¶ 83 (citing *First Truth-in-Billing Order*, 14 FCC Rcd at 7503-04, ¶ 21; 47 CFR §§ 64.2400 -64.2401).

gives the Commission jurisdiction to enact rules to implement that requirement.⁵⁷

Thus, protecting consumers from receiving deceptive and unknown charges on carriers' bills clearly falls within a practice for which the Commission can adopt rules.

Similarly, Title II of the Act further authorizes the Commission to “determine and prescribe what will be the just and reasonable charge ... and what classification, regulation, or *practice* is or will be just, fair, and reasonable....”⁵⁸ Here, the Commission clearly has the authority to determine that it is a reasonable and fair practice for carriers prevent consumers from being charged by third party billers.

2. *Ancillary Authority*

Although the Commission exercised its direct jurisdiction under 201(b) to adopt rules related to third-party billing practices in the *Cramming Order*,⁵⁹ the Commission could have also utilized its Title I ancillary jurisdiction to implement cramming protections.⁶⁰ Pursuant to 47 U.S.C. §154(i), the “Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁶¹ As stated by the D.C. Circuit in *American Library Association v. FCC*, the Commission “may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission’s general jurisdictional grant under Title I covers the regulated subject and (2) the

⁵⁷ *In the Matter of Truth-In-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492 (1999) at ¶¶ 21, 24 (First Truth-In-Billing Order).

⁵⁸ See 47 U.S.C. § 205(a) (emphasis added).

⁵⁹ See *Cramming Order* at ¶117. See also, *supra*, at Part I.B.

⁶⁰ See e.g., *Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C.Cir.1966) (“In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.”).

⁶¹ 47 U.S.C. § 154(i).

regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities”.⁶²

In the past, the Commission has asserted that its ancillary authority extends to regulations on a carrier’s provision of billing-and-collection services to third parties that are not carriers.⁶³ Regulating third party billing satisfies the first prong of the *American Library* test since Title I applies to wireline carriers who are the regulated subject at issue. Although third party billing involves charges that are not originated wireline carriers, once the carrier places the charge on its bill to a consumer, the carrier becomes the target of the proposed regulation.

Third party billing also fulfills the second prong of the *American Library* test by being reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities in 47 U.S.C. §201(b). As stated above, the Commission has explicit statutory authority under 201(b). However, should the Commission assert ancillary rather direct authority over third party billing,⁶⁴ the agency may use 201(b) as basis for its ancillary jurisdiction. Section 201(b) mandates that the Commission prescribe regulations that set out “just and reasonable” practices “for and in connection with” communication services.⁶⁵ The Commission can determine that regulating third-party billing is reasonably ancillary to its statutory responsibility to ensure “just and reasonable” practices “in connection with” communication services.

⁶² *Am. Library Ass’n. v. F.C.C.*, 406 F.3d 689, 691-92 (D.C. Cir. 2005). (The D.C. Circuit derives its *American Library* test from Supreme Court precedent. *See id.* at 700 (citing *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979)).

⁶³ *See Cramming NPRM* at ¶ 85. *See also, In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, 11 FCC Rcd 20730 (Detariffing Order)* at 1169 (finding that the FCC could exercise ancillary authority but that existence of such ancillary jurisdiction was not justified by the current market circumstances).

⁶⁴ *Television Broad. Co.*, 359 F.2d at 284.

⁶⁵ 47 U.S.C. § 201(b).

Although the Commission has the direct authority to implement cramming regulations on traditional landline carriers under 201(b), the Commission may also use its ancillary authority to accomplish the same goal. The Commission could decide that regulating third party billing by traditional landline carriers is reasonably ancillary to the Commission's statutory obligation to impose just and reasonable practices on the carriers. Additionally, the Commission could hold that third party billing is reasonably ancillary to its statutory responsibility to ensure carrier billing parity of contract.

B. The Commission May Protect Consumers from Wireless Cramming Pursuant to Its Title III Authority.

Additionally, the Commission has the authority to extend cramming rules to wireless services. In the Commission's data roaming order, the Commission found that "[s]ection 332 does not bar the Commission from establishing spectrum usage conditions based upon [its] Title III authority."⁶⁶ Imposing a data roaming requirement did not "amount to treating mobile data service providers as 'common carriers' under the Act."⁶⁷ Instead the Commission only required wireless carriers to individually negotiate data roaming arrangements with commercially reasonable terms and conditions other members of the industry.⁶⁸ The Commission held that "Title III of the Act provides the Commission with broad authority to manage spectrum... and modify... spectrum usage conditions in the public interest."⁶⁹ Thus, the Commission was able to require carriers to negotiate data roaming arrangements from its authority under specific provisions in Title III.⁷⁰

⁶⁶ *Reexamination of Roaming Obligations Of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411 (2011) at ¶ 65.

⁶⁷ *Id.* at ¶ 68.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 62 (citing 47 U.S.C. §§ 301, 303, 316).

Similarly, the Commission can use its Title III authority to prevent or restrict third-party charges on wireless services as a condition on the carrier's spectrum use. The Commission may impose or modify conditions on any spectrum license that benefits the public interest under Title III.⁷¹ The Commission could determine that extending cramming rules to wireless carriers are in the public interest and implement cramming restrictions using its Title III authority.

In addition to these specific Title III statutory grants, the Commission held it could also implement data roaming rules by exercising its Title I ancillary jurisdiction to accomplish its Title III mandate to manage spectrum in the public interest.⁷² In this case, wireless carriers bill their consumers for their voice, SMS, and data services on one bill. The Commission should therefore apply uniform standards for each type of service that is present on the bill. As the Commission held in its original Truth in Billing Order, “[i]n a world of bundled packages and multiple service providers, clear and truthful bills are paramount.”⁷³ Since the Commission has the explicit authority under 201(b), as applied by 332(c), to ensure CMS carriers use just and reasonable practices, the Commission could find that imposing the same just and reasonable practices on SMS and data plans is reasonably ancillary to carry out its 201(b) statutory mandate.

Such a mandate easily satisfies the first prong of the *American Library* test as being within the Commission's general jurisdictional grant under Title I.⁷⁴ SMS and data carriers plainly qualify as “persons engaged” in communication by radio.⁷⁵ Imposing cramming restrictions for CMS carriers that also provide SMS and data services also satisfies *American Library*'s second prong.⁷⁶ As stated above, 201(b) mandates that the Commission prescribe

⁷¹ 47 U.S.C. §§ 303(r), 316(a)(1).

⁷² *Id.* at ¶ 63 FN. 176. *See also, supra*, Part II.

⁷³ First Truth-in-Billing Order at ¶ 14.

⁷⁴ *Am. Library Ass'n.*, 406 F.3d at 691-92.

⁷⁵ 47 U.S.C. § 152(a).

⁷⁶ *Am. Library Ass'n.*, 406 F.3d at 692.

regulations that set out “just and reasonable” practices “for and in connection with” communication services.⁷⁷ The Commission has already determined that third party billing restrictions for carriers deter unjust and unreasonable practices in connection with communication services.⁷⁸ Therefore, the Commission could find that imposing the same restrictions on carriers’ billing of their SMS and data services is reasonably ancillary to performing its 201(b) statutory mandate.

C. The Commission Has the Authority to Implement Third Party Billing Restrictions on VoIP Services

The Commission has previously asserted its jurisdiction over VoIP providers.⁷⁹ Similarly, the Commission has jurisdiction to impose cramming regulations on VoIP providers. Public Interest Commenters have previously argued that the Commission has the legal authority to apply cramming rules on VoIP providers.⁸⁰ In addition to these arguments concerning ancillary jurisdiction, adopting third party billing prohibition on VoIP would be consistent with the Commission’s view of its authority pursuant to 201(b).

Although VoIP services “are increasingly being used as a substitute for traditional telephone service,” the Commission has yet to determine whether VoIP providers are communications carriers.⁸¹ Whether or not the Commission makes such a determination, VoIP third party billing practices come under the Commission’s jurisdiction under 201(b). If the

⁷⁷ 47 U.S.C. § 201(b).

⁷⁸ *Cramming Order* at ¶ 117.

⁷⁹ See e.g., *Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17972-74 (2010); *Universal Serv. Contribution Methodology*, 25 FCC Rcd 15651 (2010); *IP-Enabled Servs.*, 20 FCC Rcd 10245, 10261-66 (2005) (rules requiring VoIP providers to supply enhanced 911 capabilities to their customers).

⁸⁰ *In the Matter of Empowering Consumers to Avoid Bill Shock Consumer Information and Disclosure*, Reply Comments of Consumers Union at 5-7 (Dec. 5, 2011).

⁸¹ *Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17974 (2010) (quoting *Tel. No. Requirements for IP-Enabled Servs. Providers*, 22 FCC Rcd 19531, 19547 (2007)). While Public Interest Commenters would disagree that VoIP services are not covered by Title II, we acknowledge that the Commission may be more likely to issue rules or regulation covering data and VoIP practices pursuant to Title I, rather than Title II.

Commission determines that VoIP is a communications service, VoIP's third party billing would be analyzed under the same criteria as a common carrier. If the Commission considers VoIP to be an information service,⁸² VoIP's third party billing would still be sufficiently in connection with a communication service for the Commission to impose 201(b) obligations on a VoIP provider. Since "VoIP services allow end users to receive calls from and/or place calls to traditional phone networks operated by telecommunications carriers,"⁸³ any billing practice, even involving third parties, is in connection with a communication service.

In addition to being directly under 201(b)'s jurisdiction, regulating VoIP third party billing practices could also be considered reasonably ancillary to fulfilling the Commission's mandate under 201(b). Regulating third party billing practices by VoIP providers satisfies both prongs of the *American Library* test.⁸⁴ Regulating VoIP third party billing satisfies the first prong since VoIP providers are plainly "persons engaged" in "communication by wire."⁸⁵ It also satisfies the second prong by being reasonably ancillary to fulfill the Commission's statutorily mandated obligations under 201(b) to impose regulations that that set out "just and reasonable" practices "in connection with" communication services.⁸⁶ Since VoIP services "are increasingly being used as a substitute for traditional telephone service,"⁸⁷ the Commission can assert that regulating VoIP third party practices are reasonably ancillary to the Commission's duty to regulate carrier third party billing.

⁸² Public Interest Commenters would dispute this determination.

⁸³ *Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17993-94 (2010).

⁸⁴ *Am. Library Ass'n.*, 406 F.3d at 691-92.

⁸⁵ *See* 47 U.S.C. § 152(a).


⁸⁶ *See* 47 U.S.C. § 201(b).

⁸⁷ *Preserving the Open Internet Broadband Indus. Practices*, 25 F.C.C.R. 17905, 17972 (2010) (quoting *Tel. No. Requirements for IP-Enabled Servs. Providers*, 22 FCC Rcd 19531, 19547 (2007)).

V. CONCLUSION

Cramming is a problem that affects consumers throughout the telecommunications industry, no matter what type of telephone service they use. The Commission has taken its first steps to prevent these kinds of illegal, unauthorized charges by applying cramming regulations to wireline carriers' billing practices. However, much more needs to be done. There are still a significant number of wireless and VoIP consumers victimized by crammers. As history has shown, this number will surely grow without further action by the Commission. Therefore the Commission should use all of its legal authority to prohibit third-party billing on all wireline and wireless devices, with limited exceptions, or, alternatively, adopt an opt-in procedure for wireless devices, while still banning third-party billing on wireline devices. Finally, the Commission should adopt a dispute resolution process which ensures that consumers can retain service as they dispute a charge.

Respectfully Submitted,



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