Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY 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

Parul P. Desai
Policy Counsel
Consumers Union
1101 17th Street, NW
Suite 500
Washington, D.C. 20036

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SUMMARY

Initial Comments continue to provide evidence for further action against cramming on wireline, wireless, and VoIP services. As the expert agency, the Commission has had ample experience with cramming and how cramming has developed in the traditional landline industry. The Commission now has evidence of consumers being victims of wireless cramming, and from a caller's perspective, a VoIP service acts the same as a traditional landline telephone service.

In this proceeding, several states and public interest groups have provided the necessary facts for why the Commission should act to impose restrictions not just on traditional wireline services, but also wireless and VoIP services. It is logical for the Commission to rely on its expertise to determine that these predatory practices will continue to explode on wireless and VoIP services and should use its predictive judgment to impose cramming restrictions on all carriers.

The recent rules should not prevent further action since additional, more protective measures will complement the Commission's action to provide further disclosure. Despite industry calls for voluntary measures to protect consumers, history has shown that reliance on industry efforts have not succeeded in protecting consumers. The Commission should be skeptical in relying on promises to self-regulate; these promises have been made before, yet consumers are still victim to the predatory practice.

In addition to the measures suggested in initial Comments by Public Interest Commenters, there are other measures provided in the record that Public Interest Commenters agree should be taken. For example, we agree all providers must offer a free blocking option for third-party charges. We also agree that carriers must obtain a consumer's affirmative consent before placing third-party charges customer phone bills. Additionally, we agree that

authentication of third-party services should require a Personal Identification Number, which would strengthen the current voluntary steps taken by the industry, particularly the lackluster Mobile Marketing Association's "double opt-in" verification process. Moreover, unless authentication of charges is made foolproof, consumers cannot be held responsible for unauthorized charges no matter whether or not they were "authenticated."

Finally, despite arguments to the contrary, the Commission has the necessary authority to adopt cramming rules for wireline, wireless, and VoIP services. Neither Commission nor judicial precedent prevents the Commission from adopting cramming rules. Rather, both the Commission and the Courts have determined the Commission plainly has the authority to adopt cramming rules as *in connection with* a communication service under 201(b). Moreover, as demonstrated in Public Interest Commenters' initial comments, 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 restrict third-party billing on all services.

TABLE OF CONTENTS

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In the Matter of	)	
	)	
	)	
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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 Reply Comments in the Commission's Report and Order and Further Notice of Proposed Rulemaking in *Empowering Consumers to Prevent & Detect Billing for Unauthorized Charges ("Cramming").*[1]

I. INTRODUCTION

Initial Comments continue to provide evidence for further action against cramming on wireline, wireless, and VoIP services. History has shown that reliance on industry efforts have not succeeded in protecting consumers, and the Commission must act swiftly to protect

[1] *See* 27 FCCRcd 4436 (Apr. 27, 2012) (*Cramming Order).*

consumers from this predatory practice; the recent rules should not prevent further action since any additional protections will complement the recently adopted disclosure rules. Finally, despite arguments to the contrary, the Commission has the necessary authority to adopt cramming rules for wireline, wireless, and VoIP services.

II. THE COMMISSION MUST ACT NOW TO PROTECT WIRELINE AND WIRELESS CONSUMERS FROM CRAMMING

Initial Comments demonstrate the continued need for further Commission to protect consumers from cramming on all services. Additional, more protective measures will complement the Commission's action to provide further disclosure. In addition to the measures proposed by Public Interest Commenters in initial comments, Public Interest Commenters also support a number of other measures proposed in the record. These measures will protect all communities, including communities of color, against the predatory practice of cramming. Despite industry calls for voluntary measures to protect consumers, these same calls have failed in the past, and the Commission should not continue to rely on these empty promises.

A. Initial Comments Demonstrate the Need for Stronger Consumer Protections

Numerous Commenters continue to urge the Commission to take further, stronger action to protect consumers from cramming on all wireline and wireless services. Numerous Commenters agree the Commission's *Cramming Order* was just a first step, but the evidence demonstrates that more must be done.[2] Not only must more be done to protect wireline cramming, but consumers should also be protected from cramming on all services. Public Interest Commenters agree "[t]here simply is no discernible reason for the FCC to allow one

[2] *See e.g.*, Initial Comments of the National Association of Regulatory Utility Commissioners (Comments of NARUC); Comments of the Massachusetts Department of Telecommunications and Cable; Initial Comments of the National Association of State Utility Consumer Advocates in Response to Further Notice of Proposed Rulemaking (Comments of NASUCA); Comments of the Virginia State Corporation Commission Staff; Comments of the Michigan Public Service Commission.

category of competing service providers to engage in abusive behavior not tolerated in others and thereby leave a host of consumers unprotected merely because of their technology choices."[3] Public Interest Commenters urge the Commission to quickly act to implement more stringent rules against wireline and wireless cramming.

B. The Commission Should Adopt Wireline and Wireless Cramming Rules Based on the Current Record

The Commission and numerous Commenters have recognized that wireline cramming continues to plague consumers. Nonetheless, some Commenters continue to suggest that voluntary efforts will suffice.[4] As the Commission and the Senate *Cramming Investigation* have observed, previous voluntary efforts were not successful, and the Commission should not rely on promises this time around. Instead, the Commission must rely on the ample evidence in the record to protect consumers from cramming on traditional wireline services.

Moreover, despite arguments to the contrary,[5] there is also sufficient evidence of the need to protect consumers from cramming on wireless services. As the Massachusetts Department of Telecommunications and Cable noted, "the record does, in fact, establish adequate evidence of wireless cramming to support the need for cramming rules applicable to wireless providers."[6] For instance, initial comments note various class action settlements resulting from wireless cramming and a double-digit increase in wireless cramming complaints.[7]

Plus, "[s]ubstantial evidence does not require a complete factual record—[the Courts] must give appropriate deference to predictive judgments that necessarily involve the expertise

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[3] Comments of the NARUC. *See also,* Comments of the Massachusetts Department of Telecommunications and Cable; Comments of the NASUCA; Comments of the Michigan Public Service Commission.

[4] *See, e.g.,* Comments of CTIA – The Wireless Association; Comments of AT&T, Inc.; Comments of Verizon and Verizon Wireless.

[5] *See, e.g.,* Comments of CTIA; Comments of Verizon and Verizon Wireless.

[6] Comments of the Massachusetts Department of Telecommunications and Cable at 5. *See also* Comments of NARUC; Comments of NASUCA at 10.

[7] *See* Comments of the Massachusetts Department of Telecommunications and Cable at 6-7; Comments of NARUC.

and experience of the agency."[8] The Supreme Court has noted that "complete factual support in the record for the Commission's judgment or prediction is not possible or required" when adopting rules to protect its mission of protecting the public interest.[9] Moreover, the Commission's use of its predictive judgment has been upheld by the D.C. Circuit when there is not a full factual record because of newer technologies.[10]

As the expert agency, the Commission has had ample experience with cramming and how cramming has developed in the wireline industry. The Commission now has evidence also of consumers being victims of wireless cramming. It is logical for the Commission to use its predictive judgment to determine that these predatory practices will continue to explode on wireless services and should use its predictive judgment to impose cramming restrictions on wireless carriers.

Similarly, the Commission may use its predictive judgment to apply cramming rules to VoIP services. As noted in the record already, there are over 30 million VoIP subscribers. From a caller's perspective, a VoIP service acts the same as a traditional landline telephone service and the same cramming abuses can occur on a VoIP service. In the case of VoIP services, the Commission can certainly rely on its current experience with cramming and expertise to determine that consumers must be protected from this predatory practice.

The Courts have already determined that "[w]hen . . . an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer,' [the court requires] only that the agency 'so state and go on to identify the considerations it found

[8] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001).
[9] *FCC v. National Citizens Committee*, 436 U.S. 775, 815 (1978)
[10] *See Melcher v. FCC*, 134 F.3d 1143, 1151, 1152 (D.C. Cir. 1998) ("[O]ur review of the FCC's exercise of its predictive judgment is particularly deferential, [especially when] the FCC must make judgments about future market behavior with respect to a . . . new technology, [where] certainty is impossible'').

persuasive.'"[11] In this proceeding, several states and public interest groups have gone beyond that threshold and given persuasive reasons *and* facts for why the Commission should act to impose restrictions not just on traditional wireline services, but also wireless and VoIP services. Therefore, the Commission should extend its rules to wireless and VoIP carriers to prevent cramming from becoming as widespread of a problem for wireless and VoIP consumers as it has become for wireline consumers.

C. Prior Voluntary Promises Have Not Been Successful

Some Commenters request rulemaking delays and leeway to implement voluntary standards to combat cramming on wireline and wireless services.[12] They suggest that these voluntary efforts will sufficiently protect consumers against cramming. However, the Commission should be skeptical in relying on these promises; these promises have been made before, yet consumers are still victim to the predatory practice.

For example, in 1998, US Telephone Association president Roy Neel sat before Congress and said, "[g]ive us a chance to make this work, these voluntary guidelines, come back and look at this in a year or so, or whenever. If these complaints continue unabated after these guidelines are put into place, then we have got another issue to deal with."[13] The Association for Local Telecommunications Services wrote also in 1998, "[a]t the very least the Commission ought to allow time for these practices to be implemented before considering the adoption of rules."[14] In 1998, CTIA filed comments with the Commission stating, "[g]iven the market incentives for

[11] *AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987).
[12] *See, e.g.,* Comments of CTIA; Comments of Verizon and Verizon Wireless; Comments of AT&T.
[13] Hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, "'Cramming': An Emerging Telephone Billing Fraud," at 32 (July 23, 1998) (*Cramming Hearing)*.
[14] Comments of the Association for Local Telecommunications Services at 4, FN 3 (Nov. 13, 1998).

voluntary industry compliance, stringent, detailed billing regulation for CMRS providers is simply unwarranted on a cost-benefit basis."[15]

However, we have heard these very same promises and arguments before. For instance, just as in 1998, CTIA states now that the "Commission should continue to support voluntary industry practices directed toward any cramming concerns – including cramming by third parties."[16] Also, just as the industry asked in 1998 for time to implement current rules and practices, today, "AT&T urges the Commission to give its new rules time to go into effect.[17]

Nonetheless, despite the Commission's review of this issue for nearly fourteen years, cramming persists. Indeed, the Commission has expressly recognized that voluntary industry efforts adopted in 1998 to prevent cramming have been ineffective and insufficient.[18] While these Commenters may have every reason to want to protect third-party billing, given profits of as much as $2 billion each year, consumers are losing significant cash for services they never asked for and simply do not want.[19] "We are working hard. We have been working hard to try to get these bad actors off the bill and to have a system, where consumers can have confidence," Neel said in 1998.[20] However, his promises never materialized. The "hard" work was voluntary and it failed. The Commission should not permit the very same rhetoric to persist today.

D. Commenters Provide the Commission With Additional Detailed Methods to Prevent Cramming

Public Interest Commenters have detailed in their initial comments measures the Commission should take to protect consumers from cramming. We suggested that prohibiting

[15] Reply Comments of the Cellular Telecommunications Industry Association at 7 (Dec. 16, 1998).
[16] Comments of CTIA at 2.
[17] Comments of AT&T at 8.
[18] *See Cramming Order* at ¶ 43.
[19] *See* United States Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations, Majority Staff, Staff Report for Chairman Rockefeller, "Unauthorized Charges on Telephone Bills" at p.11 (July 12, 2011) (*Cramming Investigation*).
[20] *Cramming Hearing* at 28.

third party charges for all services, with narrow exemptions, will be much more effective than the current rule. Alternatively, requiring wireless consumers to opt-in and give their affirmative consent to third party services before being billed also would be much more effective.

There are other measures provided in the record that Public Interest Commenters agree should be taken. For example, we agree with those that suggest that all providers must offer a free blocking option for third-party charges.[21] We also agree with the Michigan Public Service Commission that carriers must obtain a consumer's affirmative consent before placing third-party charges customer phone bills.[22]

We note that some innovative ideas provided in the record would strengthen the current voluntary steps taken by the industry, particularly the lackluster Mobile Marketing Association's "double opt-in" verification process. Public Interest Commenters noted that if the Commission chooses to employ an opt-in process, it should strengthen and codify the MMA Guidelines, which recommend a double opt-in process, especially since double opt-in has not prevented wireless cramming, and it does not prevent against unauthorized charges when a mobile device is lost or stolen. In its comments, NASUCA proposes that authentication of third-party services require a Personal Identification Number (PIN).[23] This opt-in solution is not foolproof, but it is a significant suggestion that could be taken to better authenticate third party charges. As NASUCA writes, the "minor inconvenience of entering a PIN number is a small price to pay for restoring integrity to this industry's bills."[24]

Finally, we underscore that unless authentication of charges is made foolproof, consumers cannot be held responsible for unauthorized charges no matter whether or not they

[21] *See* Comments of NARUC.
[22] *See* Comments of Michigan Public Service Commission at 3.
[23] *See* Comments of NASUCA at 12-15.
[24] *Id.* at 15.

were "authenticated."[25] In a recent example, AT&T brought a small business in Massachusetts to court demanding payment of nearly $1.15 million for fraudulent "dial around" calls made to Somalia.[26] Although there was no dispute that the charges were fraudulent, AT&T, the third-party service provider in this case, would not write-off the charges.[27]

Public Interest Commentators stress that a provider's claimed verification or authentication of a charge is not a reasonable excuse in consumer disputes. This is why Public Interest Commenters agree the provider has the primary responsibility to defend an allegation of cramming, and a provider's claimed verification or authentication is not a defense to enforcement or a consumer dispute.[28] Furthermore, providers must be willing to compromise and not bring such frivolous lawsuits in clear instances of abuse.

E. New Rules Would be Consistent with Recently Adopted Rules

Various industry Commenters argue that new Commission rules related to disclosure should be given a chance to work before new rules are implemented. Public Interest Commenters support the new Commission rules but the potential for abuse remains. Disclosure rules work to enable consumers to catch cramming on their phone bills, but the rules do not prevent cramming. As the court in *Federal Trade Commission v Inc21.com Corp.* noted, disclosure does not prevent the aggravation and lost time and money that befall those who fall prey to cramming: "the burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with."[29] The measures proposed in the proceeding to prevent

[25] *See id.* at 18.
[26] Julie Manganis, "A Million-dollar bill," The Salem News, July 9, 2012 *at* http://www.salemnews.com/local/x1501704698/A-million-dollar-bill.
[27] *See id.* Commission scrutiny as part of this proceeding was not enough to deter AT&T's lawsuit, but the article in The Salem News appears to have convinced AT&T to drop the suit. The company dropped the case within hours of the article's publication. *See* Julie Manganis, "AT&T offers to drop suit over bill—with a catch," The Salem News, 10 July 2012 *at* http://www.salemnews.com/local/x1501705766/AT-T-offers-to-drop-suit-over-bill-with-a-catch.
[28] *See* Comments of NARUC.
[29] 745 F.Supp.2d 975, 1003-05 (N.D. Cal. 2010).

cramming abuses would work alongside disclosure to not only identify bill fraud *post-facto* but also to put an end to it before it starts.

F. Communities of Color Will Benefit from Stronger Measures Against Cramming

Some Commenters suggest that an opt-in requirement would harm communities of color.[30] However, a recent national poll confirmed that "because of the especially high rate of cell phone usage among African-Americans and Latinos, these communities are especially hard hit by practices like cramming…. "[31] Specifically, "over a third of both African-Americans (35%) and Latinos (34%) report that they have been victims of cramming…."[32] Importantly, the "survey also reveals that both communities strongly support more government oversight of phone company billing practices and that after learning about cramming…, the importance of telecommunications issues to these communities increases significantly."[33] Thus, restrictions on cramming will not harm, but would help, communities of color.

III. THE COMMISSION HAS THE REQUISITE LEGAL AUTHORITY TO PROTECT ALL CONSUMERS FROM CRAMMING

As laid out in detail in Public Interest Commenters' initial comments, the Commission has the requisite legal authority to adopt cramming rules for all services. However, some Commenters continue to suggest that the Commission does not have the authority based on Commission and judicial precedent.

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[30] *See, e.g.,* Letter from Hispanic Leadership Fund (June 25, 2012); Letter from Reverend Dr. Richard Cobble, Pastor, Pastor Omega Holiness Church (June 21, 2012).

[31] Appendix A. The poll of African-American and Latino consumers was conducted by Anzalone Liszt Research between April 25 and May 1, 2012. It consisted of 600 interviews (300 with African-American adults and 300 with Hispanic adults). One quarter of the interviews were conducted over cell-phones and all calls to Hispanics were made with bi-lingual callers. The poll has a margin of error of +/- 4.0% for the full 600 interviews, and +/-5.7% for the 300 interviews with each racial group.

[32] *Id.*

[33] *Id.*

Some Commenters claim the Commission cannot implement cramming rules based on the Commission's 1986 *Detariffing of Billing and Collection Services Order*,[34] which stated "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," but rather a "financial and administrative service" "incidental" to a communication service.[35] Some Commenters also argue that judicial precedent precludes the Commission from exercising 201(b) authority over third party billing.[36]

However, neither the *Detarriffing Order* nor judicial precedent prevents the Commission from adopting cramming rules. The *Detarriffing Order* and the Courts that rely on it focus only on whether billing and collection is an actual communications service. On the other hand, both the Commission and the Courts have determined that under 201(b), billing services are charges or practices made *in connection with* a communications service.

The first major case addressing whether 201(b) applies to third party billing practices was *Int'l Audiotext Network v. AT&T*.[37] In that case, the plaintiff claimed that AT&T's refusal to bill for the plaintiff's service was an unreasonable practice under 201(b).[38] Relying primarily on the Commission's *Detariffing Order* and two Commission adjudications made immediately subsequent to the *Detariffing Order*, the district court held that 201(b) did not apply to billing services.[39]

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[34] Comments of CTIA at 12, Comment of CenturyLink to Further Notice of Proposed Rulemaking.
[35] Detariffing of Billing & Collection Servs., 102 F.C.C.2d 1150, 1168 (1986) (*Detariffing Order*).
[36] Comments of CenturyLink at 12.
[37] 893 F. Supp. 1207, 1223-24 (S.D.N.Y. 1994).
[38] *Id*. at 1223.
[39] *Id*. at 1223, 1224 (citing *Detariffing Order* at 1168l; *Paul Ondulich v. AT & T Commc'ns., Inc.,* 5 FCCRcd 3190 (1990); *AT & T 900 Dial–It Services & Third Party Billing & Collection Servs.,* 4 FCCRcd 3429 (1989) (citing *Detariffing Order*)).

The issue was next addressed in *Brittan Communications v. Southwestern Bell*.[40] There a wireline carrier had temporarily suspended its billing services for the plaintiff's third party long distance service due to allegations of cramming and slamming by the plaintiff.[41] The carrier eventually resumed the billing for the plaintiff's services, and the plaintiff sued the carrier seeking damages from the temporary suspension of service.[42] The plaintiff claimed the defendant's suspension of billing and collection services unlawfully discriminated against the plaintiff in violation of 47 U.S.C. §202(a).[43]

While determining whether the defendant violated §202(a), the Fifth Circuit discussed whether billing and collection services constitute a "communication service" under Title II.[44] The court determined that the Commission had already interpreted that billing and collection services were not communication services in its *Detariffing Order*.[45] Finding no evidence that the Commission adopted a contrary interpretation, the Fifth Circuit went on to find that billing and collection services were not within the scope of § 202(a).[46]

The only other federal circuit court that has addressed the issue of whether 201(b) covers third party billing has been the Second Circuit in *Chladek*.[47] However, the court did not engage in a substantive analysis of 201(b). Instead it relied on the *Detariffing Order*, *Int'l Audiotext Network*, and *Brittan* in its holding that the Commission has determined that billing and collection services are not telecommunications services within the meaning of Title II.[48]

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[40] *Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.,* 313 F.3d 899 (5th Cir.2002).
[41] *Id*. at 902.
[42] *Id*. at 903.
[43] *Id*. at 904. 47 U.S.C. 202(a) states "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device."
[44] *Brittan*, 313 F.3d at 904-06.
[45] *Id*. at 904-905 (citing *Detariffing Order* at 1168).
[46] *Id*. at 906.
[47] *Chladek v. Verizon N.Y. Inc.*, 96 Fed.Appx. 19, 22 (2d Cir 2004).
[48] *Id*. (citing *Detariffing Order*; *Brittan,* 313 F.3d at 904-05; *Int'l Audiotext Network Inc.,* 893 F.Supp. at 1224-25).

Recently two district court cases out of California have also addressed issues surrounding third party billing.[49] In addition to addressing whether 201(b) covers third part billing, these courts also examined if the Commission's Truth-In-Billing requirements impact third party billing services.[50] Like in *Chladek*, the district courts in *Moore v. Verizon* and *Nwabueze v. AT&T* both relied on the *Detariffing Order* as well the judicial precedents' reading of that order as discussed above.[51] None of these cases addressed the issue of whether billing is a communication service on the merits or whether billing was "*in connection with*" a communication service.

Section 201(b) plainly states that all "practices… for and *in connection with* such communication service, shall be just and reasonable."[52] Section 201(b) does not require that the just and reasonable practice be a communication service. Rather, the statute only requires that a practice be "in connection with" a communications service.[53]

Each time the courts have held that 201(b) does not apply to third party billing practices, the courts grounded their opinions by deferring to the Commission's *Detariffing Order's* interpretation of "communication service," deferring to other Commission decisions that reference the *Detariffing Order*, and by adhering to precedents which deferred to the Commission.[54] Rather than rejecting other interpretations of 201(b) on the merits, these courts

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[49] *Nwabueze v. AT & T Inc.*, No. C 09-1529 SI, 2011 WL 332473 (N.D. Cal. Jan. 29, 2011);
Moore v. Verizon Commc'ns Inc., No. C 09-1823 SBA, 2010 WL 3619877 (N.D.Cal Sept. 10, 2010).
[50] *Nwabueze*, 2011 WL 332473 at *9-*12; *Moore*, 2010 WL 3619877 at *1, *7-*8.
[51] *Nwabueze*, 2011 WL 332473 at *9-*10; *Moore*, 2010 WL 3619877 at *7-*8 (citations omitted).
[52] 47 U.S.C. § 201(b) (emphasis added).
[53] 47 U.S.C. § 201(b).
[54] *Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899, at 904-905 (5th Cir.2002) (citing *Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C. Rcd. 24, 744 n. 87 (1998)); *Chladek v. Verizon N.Y. Inc.*, 96 Fed.Appx. 19, 22 (2d Cir 2004); *Nwabueze v. AT & T Inc.*, No. C 09-1529 SI, 2011 WL 332473 at *9-*10 (N.D. Cal. Jan. 29, 2011) (citing *TIB*); *Moore v. Verizon Communications Inc.*, No. C 09-1823 SBA, 2010 WL 3619877 at *7-*8 (N.D.Cal Sept. 10, 2010) (citing *TIB*); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 893 F. Supp. 1207, 1223, 1224 (S.D.N.Y. 1994) a*ff'd on other grounds*, 62 F.3d 69 (2d Cir. 1995) (citing *Detariffing Order* at 1168l; *Paul Ondulich v. AT & T Commc'ns., Inc.*, 5 FCCRcd 3190 (1990); *AT & T 900 Dial–It Services & Third Party Billing & Collection Servs.*, 4 FCCRcd 3429 (1989)).

merely found that the individual proponents of different interpretations failed to present enough evidence that the Commission had moved away from its 1986 interpretation of communication service.[55] Similarly, the Commission decisions cited by these courts determined only that billing was not a communication service.[56]

None of these courts addressed whether billing practices are *in connection with* a communication service and therefore subject to 201(b). In fact, the only court that has addressed the issue has found that billing practices are, in fact, in connection with a communications service and are therefore subject to 201(b) restrictions.[57] Similarly, when the Commission has adjudicated carriers for violating 201(b), the Commission found that billing practices are in connection with a communications services.[58]

In *Beattie v. CenturyTel, Inc*., the court certified a plaintiff class alleging that the carrier had crammed consumers by deceptively billing for the unregulated non-common carrier service of maintaining consumers' home telephone wiring.[59] The carrier claimed that 201(b) was inapplicable since the carrier was billing for a non-common carrier service outside of Title II.[60] The court rejected that argument. The court held that the plain language of the statute "that a 'charge [or] practice' made *in connection* with a communications service 'that is unjust or unreasonable is declared to be unlawful'" clearly includes billing practices.[61] Although the court recognized the argument that the statute has not traditionally applied to billing practices may

[55] *See e.g. Brittan*, 313 F.3d at 906.
[56] *Id*. at 904-905 (5th Cir.2002) 905 (citing *Federal-State Joint Bd. on Universal Serv.,* 13 F.C.C. Rcd. 24, 744 n. 87 (1998)); *Nwabueze*, at *9-*10; *Moore*, *7-*8; *Int'l Audiotext Network, Inc.*, 893 F. Supp. at 1223, 1224.
[57] *Beattie v. CenturyTel, Inc.*, 234 F.R.D. 160, 172 (E.D. Mich. 2006) *aff'd in part, remanded in part*, 511 F.3d 554 (6th Cir. 2007) (affirming plaintiff's class certification of federal claims and remanding certification of state law claims).
[58] *See, e.g., Norristown Telephone Company, LLC,* 26 FCCRcd 8844 (2011); *Long Distance Direct, Inc.*, 15 FCC Rcd 3297, 32302 (2000).
[59] *Id*. at 163.
[60] *See id*. at 172.
[61] *Id*. at 172 (citing 47 U.S.C. § 201(b)) (emphasis added).

have been plausible at one time, such an interpretation could not stand in the face of the statute's plain language.[62] The court then applied the Commission's Truth-In-Billing rules promulgated pursuant 201(b).[63]

Just as the *Beattie* court focused on the "in connection with" language of 201(b), so did the Commission in its *Long Distance Direct* Order.[64] As affirmed by the Commission in its final rule, "[o]ver a decade ago, the Commission rejected arguments that its authority to combat cramming is limited to charges for telecommunications services on a carrier's own bill, and that it lacked jurisdiction to enforce its cramming rules against a carrier for non-carrier charges on the carrier's own bill to consumers."[65] In the Order the Commission held that "201(b) of the Act prohibits 'unjust and unreasonable' practices by carriers '*in connection with* [interstate or foreign] communication service'… [The carrier's] practice was 'in connection with' communication service because it was inextricably intertwined with [its] long distance service."[66]

Some Commenters argue that most third party billings are not "inextricably intertwined" with the carrier's service, therefore in the vast majority of cases 201(b) will not apply.[67] However, the plain text of the statute simply requires only that there is a connection between the unreasonable practice and the communications service. The Commission only noted the **"**inextricable intertwining" as merely an aggravating circumstance in the *Long Distance Direct* case to highlight the severity carrier's actions.[68]

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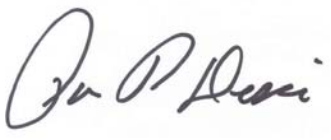
[62] *Id*. (citing *United States v. Boucha*, 236 F.3d 768 (6th Cir. 2001)).
[63] *Id*. (citing 47 C.F.R. § 64.2401)
[64] *Long Distance Direct, Inc.*, at 32302.
[65] *Cramming Order* at ¶ 119 (citing *Long Distance Direct*, at 32302).
[66] *Long Distance Direct*, at 32302 (emphasis added).
[67] Comment of Century Link at 13.
[68] Comment of National Association of State Utility Consumer Advocates at 33 (Dec. 5, 2011).

Thus, despite arguments to the contrary, the Commission plainly has the authority to adopt cramming rules as *in connection with* a communication service under 201(b). Moreover, as demonstrated in Public Interest Commenters' initial comments, 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 restrict third-party billing.

IV. CONCLUSION

The record in this proceeding continues to provide evidence for further action against cramming on wireline, wireless, and VoIP services. The Commission should not rely on industry efforts, since they have not succeeded in protecting consumers. Despite arguments to the contrary, the Commission has the necessary authority to adopt cramming rules for wireline, wireless, and VoIP services. Thus, the Commission must act swiftly to protect consumers from this predatory practice.

Respectfully Submitted,



Parul P. Desai, o*n behalf of Public Interest Commenters*
Policy Counsel
Consumers Union
1101 17th Street, NW
Suite 500
Washington, D.C. 20036

July 20, 2012

APPENDIX A

ANZALONE·LISZT RESEARCH
POLLING • ANALYSIS • STRATEGY

June 15, 2012

To: Interested Parties
Fr: Jeff Liszt / Matt Hogan
Re: African-American and Latino Consumers Concerned about Abusive Cell Phone Billing Practices

Every year, millions of Americans are forced to pay higher phone bills as the result of the practices of "cramming" and "bill shock." Cramming refers to the practice of third party vendors adding fraudulent charges to landline or wireless phone bills, where they are typically disguised as necessary charges. According to the FCC, 15 to 20 million Americans are victims of cramming on landline phones alone. The actual number of victims is likely much higher, as there are currently no estimates for the number of cramming victims on cell phones. "Bill shock" is when cell phone customers unexpectedly receive phone bills that are significantly higher than their typical monthly bill. This practice may be even more widespread than "cramming," as a May 2011 survey by Consumer Reports found that one in five Americans had experienced it.

Because of the especially high rate of cell phone usage among African-Americans and Latinos, these communities are especially hard hit by practices like cramming and bill shock. A recent national poll of African-American and Latinos adults confirmed this by finding that half of the respondents reported having experienced at least one of these practices.[1] The survey also reveals that both communities strongly support more government oversight of phone company billing practices and that after learning about cramming and bill shock, the importance of telecommunications issues to these communities increases significantly.

Below are some key findings from the poll, which was conducted on behalf of the Ford Foundation and the Leadership Conference Education Fund.

- **One in two adults within communities of color has experienced cramming or bill shock.** These practices have had a direct impact on a significant number of adults in these communities. Over a third of both African-Americans (35%) and Latinos (34%) report that they have been victims of cramming, and 38% across both groups say they have experienced bill shock, with the percentage rising to 46% among Latinos.

- **Communities of color are especially vulnerable to these practices given their high rates of cell phone usage.** Consistent with other research on cell phone usage rates, our survey found that over 80% of both African-Americans and Latinos used cell phones. Because these communities are even more likely to own cell phones than whites, they are more vulnerable to practices such as cramming and bill shock.

- **Overwhelming majorities of both African-Americans and Latinos support more government oversight of phone company billing practices.** Before hearing any information about cramming or bill shock, 59% of African-Americans and 61% of Latino adults favor the government doing more to monitor the billing practices of phone companies.

- **Information about these practices has a significant impact on views about the importance of telecommunications issues.** Prior to any information on cramming or bill shock, 42% of adults in these communities said that telecommunications issues were "very important" compared to other issues. But after learning about these practices, the percentage rating telecommunications issues as "very important" rose by 17 points, to 59%.

[1] The poll of was conducted by Anzalone Liszt Research between April 25 and May 1, 2012. It consisted of 600 interviews (300 with African-American adults and 300 with Hispanic adults). One quarter of the interviews were conducted over cell-phones and all calls to Hispanics were made with bi-lingual callers. The poll has a margin of error of +/- 4.0% for the full 600 interviews, and +/-5.7% for the 300 interviews with each racial group.