Before the
Federal Communications Commission
Washington, D.C. 20554

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

INITIAL COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

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Introduction

The National Association of State Utility Consumer Advocates (NASUCA)[1] submits these initial comments in response to the Further Notice of Proposed Rulemaking (FNPRM) issued April 27, 2012.[2] NASUCA appreciates the Commission's openness to the adoption of additional measures to prevent cramming, as well as its deliberative approach to assessing what additional measures might prove to be effective in accomplishing this thus far elusive end.

The development of an effective solution requires an accurate identification of the cause of the problem. Although the record in these proceedings amply demonstrates that third-party billing has resulted in pervasive cramming on wireline bills, so much so that a Congressional leader has, with NASUCA's support, called for a ban on third-party billing on wireline bills,[3] it is less obvious whether third-party billing is really the "cause" of the problem.[4]

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[1] NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[2] Report and Order and Further Notice of Proposed Rulemaking, FCC 12-42. See 77 Fed. Reg. 30972 (May 24, 2012).

[3] S. Hrg. 112-171, "Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose," 112th Cong., 1st Sess., Committee on Commerce, Science and Transportation, United States Senate (July 13, 2011) ("S. Hrg. 112-171), p. 121 (closing statement of Senator John D. Rockefeller IV). On June 13, 2012, the Senator introduced S. 3291, the "Fair Telephone Billing Act of 2012." If enacted, the bill would, except as authorized in the bill, prohibit local exchange carriers and providers of interconnected VoIP service from placing third-party charges on consumer phone bills,

[4] See FNPRM ¶ 41.

The Commission is persuaded that some third-party billing is "legitimate" and "beneficial."[5] The Commission also acknowledges that the cramming entity is not necessarily a third party but can also be the customer's own service provider,[6] as has often been the case.[7] There is thus something less than a congruence between third-party billing and cramming. Third-party billing is not inherently contrary to public policy. But cramming – the placement of unauthorized charges on consumer phone bills – is. Recognizing the difference may have important implications for finding an effective solution.

Thirteen years ago, in a rule-making proceeding before a state utility commission, a consultant commented: "The key point here – and you all know this, and I know you want to do this – . . . is to put in place a set of rules that will halt what is a fraudulent, unfair and deceptive practice. We can call them slamming and cramming . . . and whatever we want, but we're dealing here with a classic consumer fraud, trying to get people to pay for something they haven't in fact bought."[8]

The consultant's comment identifies half of the cause of the problem: the widespread entry into the industry of individuals, dubbed "fraudsters" by the *Inc21* court,[9] who seek and find illicit ways to make a profit at the expense of consumers. The

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[5] FNPRM 41, 86, 90.

[6] FNPRM n. 5; Notice of Proposed Rulemaking issued July 12, 2011, n. 2.

[7] See NASUCA's Initial Comments in Response to Notice of Inquiry (Oct. 13, 2009) (NASUCA 10-13-09 Comments), p. 43 n. 78 and accompanying text; Press Release, North Dakota Attorney General, "Stenehjem Halts Phony Yellow Pages Scam: Cease and Desist Order Issued against 'Official Yellow Pages'" (Nov. 18, 2008); note 27 below and accompanying text.

[8] *In re Unauthorized Changes in Telecommunications Service*, Docket No. RMU-99-7, Hearing Transcript (Iowa Util. Bd. 1999), pp. 72-73.

[9] *FTC v. Inc21.com*, 688 F.Supp.2d 927, 929, 939, and 745 F.Supp.2d 975, 997 (N.D. Cal. 2010), *aff'd mem.*, No. 11–15330, 2012 WL 1065543 (9th Cir. 2012).

other half of the cause of the problem is the failure of the industry, over many years, to do anything meaningful to address the resulting illicit commerce and to restore integrity to the customers' bills.

The observations of Senator John D. (Jay) Rockefeller IV, Chairman of the Senate Commerce Committee, could hardly have been stronger: "We moved on to other important issues because we believed the cramming problem was being addressed, which of course, it was not. What we know now is that the cramming problem was not solved, far from it. The minute Congress decided to trust that the industry would fix this problem, the crammers saw that relaxation and they moved right back in. And American families and businesses have been paying the prices ever since then."[10]

I. In order to be effective, a solution to the cramming problem needs to clear several hurdles.

A. An effective solution would avoid exceptions that permit substantial portions of the problem to continue.

NASUCA has previously expressed concern that exceptions to proposed solutions can permit substantial portions of the problem to continue.[11] Industry asks for those

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[10] S. Hrg. 112-171, see note 3 above, p. 2 (opening statement). See also *Order Instituting Investigation into the Operations of Telseven, LLC*, No. I.10-12-010 (Cal. Pub. Util. Com'n Dec. 21, 2011), p. 34 ("As the accompanying Staff Report makes clear, disputed charges assessed by Respondents continue to appear on California phone bills, despite industry's claim that it was adopting 'even more stringent anti-cramming measures' for billing services, and AT&T's recent assertion that it had 'completely discontinue[d] billing' for certain services 'because "cramming complaint rates were notably high"'"); FNPRM ¶ 9 ("Despite these voluntary industry practices, there is strong evidence that they have been ineffective to prevent cramming"), ¶ 35 ("the telephone companies' anti-cramming safeguards have largely failed"); ¶ 43 ("existing incentives are not sufficient to protect consumers").

[11] See NASUCA Initial Comments in Response to Notice of Proposed Rulemaking (Oct. 24, 2011) (NASUCA 10-24-11 Comments) , pp. 15, 25-26; NASUCA Reply Comments in Response to Notice of Proposed Rulemaking (Dec. 5, 2011) (NASUCA 12-5-11 Comments), pp. 22-28. The latter comments quoted extensively from NASUCA 10-13-09 Comments, pp. 49-52.

exceptions not because the types of billings sought to be excepted are free from abuse, but rather because, when not abused, they serve legitimate needs or accomplish beneficial ends. The Commission's enforcement actions a year ago against Norristown Telephone Co., LLC and others, for example, involved dial-around long distance services,[12] which would apparently be excepted from many proposed solutions.

As the experience cited in the previous NASUCA comments similarly demonstrates, cramming has often occurred with respect to such pay-per-call usage as collect calls, long distance calls, directory assistance calls, 800 calls, 900 calls, calling card calls, and calls from correctional institutions. The Commission notes an FTC case in which more than $30 million of fabricated collect call charges were placed on the phone bills of millions of consumers.[13] Proceedings are pending in California alleging unauthorized directory assistance charges totaling over $21 million on the phone bills of approximately three million consumers in that state alone.[14]

No solution that excepted alleged abuse of this character and magnitude could be regarded as effective. Yet there is no obvious way for an opt-in mechanism to work with respect to pay-per-call usage.[15]

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[12] See FNPRM ¶ 139, citing *Norristown Telephone Co., LLC*, FCC 11-88, 26 F.C.C.R. 8844 (FCC 2011) ; *Main Street Telephone Co.*, FCC 11-89, 26 F.C.C.R. 8853 (FCC 2011); *Cheap2Dial Telephone, LLC*, FCC 11-90, 26 F.C.C.R. 8863 (FCC 2011); *VoiceNet Telephone, LLC*, FCC 11-91, 26 F.C.C.R. 8874 (FCC 2011).

[13] FNPRM ¶ 24.

[14] See *Order Instituting Investigation into the Operations of Telseven, LLC* No. I.10-12-010 (Cal. Pub. Util. Com'n Dec. 21, 2010).

[15] See FNPRM ¶ 139 ("Industry commenters have already argued that . . . recipients of certain services such as collect calls, directory assistance calls, and inmate facilities calls cannot necessarily be foreseen by the consumer prior to the need for those services, and therefore a consumer would not anticipate needing to opt-in to third-party billing"). Nor would it be reasonable to require consumers to opt in or opt out of such calls generally and then leave them vulnerable to unauthorized charges for bogus collect call scams if they generally opt in.

Recent events intensify the concern. During the Senate Commerce Committee hearing last year, Senator Kelly Ayotte asked Walter B. McCormick, Jr., President and CEO, United States Telecom Association, to provide information regarding the types of billings that should be excepted if Congress enacts a prohibition on third-party billing. Mr. McCormick's response, not publicly available at the time earlier comments were due, was as follows:[16]

> Many consumers find it convenient to have their charges for communications-related services consolidated on one bill. Such services include local voice service, long distance service, Internet access, multi-channel video services, wireless, home security services, and services such as voice-mail and call-answering, call-forwarding, and teleconferencing. Such well-known companies as DirecTV, Dish Network, Verizon Wireless, AOL, EarthLink, Juno, NetZero, and online gaming providers such as Gaia Interactive and Blizzard Entertainment, which offers the popular "World of Warcraft" game, provide their services to many consumers by offering the convenience of third-party billing. In addition, the state of Vermont, in enacting anti-cramming legislation, provided the following exceptions from its general prohibition against third-party billing – presumably based upon its determination that they afforded an important consumer convenience:
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> - Billing for goods or services marketed or sold by a company subject to the jurisdiction of the Vermont Public Service Board;
> - Billing for direct dial or dial-around services initiated from the consumer's telephone;
> - Operator-assisted calls, collect calls, and telephone services that facilitate communication to or from correctional center inmates.

These proposed exceptions encompass a wide swath of the cramming violations that experience has demonstrated occur.[17]

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[16] S. Hrg. 112-171, see note 3 above, pp. 109-110.

[17] S. 3291, see note 3 above, would except from the prohibition on third-party billings charges that are "directly related to the provision of telephone service." The bill would also except charges for products or services that a carrier jointly markets or jointly sells with its own service, subject to specified conditions.

More recently still, in the wake of the findings of the Senate Commerce Committee, Verizon settled a private class action[18] upon terms, now preliminarily approved by the court, including, in addition to monetary relief, a number of forward-looking requirements that would be in effect for no more than two years. These requirements, limited to wireline services, would include: (a) notice to consumers of their ability to block third-party charges; (b) a "confirmation process" for third-party charges utilizing (i) "personal information obtained from a customer (e.g. date of birth, social security number or like information)" and (ii) "a confirming opt-in communication with customers that they understand they just placed an order;" and (c) "confirmation letters" from aggregators or fourth parties when customers sign up for new third-party services.[19] These requirements would except "message telephone services ('MTS') usage charges (e.g., usage, set up, monthly service fees)" and hence, apparently, overlook a large part of the problem.[20]

Soon after the Verizon settlement, Verizon, AT&T and apparently CenturyLink announced plans to cease billing for certain third-party services on wireline bills.[21] As the Commission observes, Verizon will continue to place third-party charges on wireline bills if the charges are "[]related to the use of Verizon's network."[22] AT&T will do the

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[18] *Moore v. Verizon Communications, Inc.*, No. CV 09-1823, 2010 WL 3619877 (N.D. Cal. 2010) (upholding as sufficient to survive motion to dismiss claims under the Racketeer Influenced and Corrupt Organizations Act against Verizon and others that the third-party billing and collection system lacks sufficient safeguards to prevent cramming).

[19] *Moore v. Verizon Communications, Inc.*, N.D. Cal., No. C 09-1823, Stipulation and Settlement Agreement filed Feb. 27, 2012, pp. 13-16 ("Verizon Settlement Agreement"). See FNPRM ¶¶ 42, 138, 142.

[20] Verizon Settlement Agreement, note 19 above, pp. 9, 13-16.

[21] FNPRM ¶ 44.

[22] *Id.*

same if the charges are for "telecommunications services" or "services or goods sold by any third party that has a direct contractual arrangement for the joint or cooperative sale of such services or goods with AT&T" or "contributions to charitable organizations."[23]

As the Commission observes, these industry announcements, although encouraging, do not eliminate the need for safeguards against cramming. On the contrary, the third-party charges that the companies will continue to bill will continue to present a significant risk to consumers.[24] In addition to the rationales set forth by the Commission in support of these conclusions,[25] there is a danger that unscrupulous individuals will redirect their illicit activity to the types of billings that are excepted. One need only look to the "modem hijacking" cases to appreciate the potential for that.[26]

The call for exceptions can thus rob a proposed solution of its efficacy or full efficacy. It may therefore suggest a need to look for a different solution, or to regard a solution with exceptions as a partial or temporary solution only, not a full or adequate or final solution.

B. An effective solution would extend across the several modes of telecommunications service.

The Commission needs no reminder that cramming on wireless bills is a serious part of the problem. The Commission recently entered into a consent decree with a major carrier requiring credits or refunds of data usage charges exceeding $50 million to approximately 15 million affected customers, a $25 million voluntary payment to the

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[23] *Id.*

[24] *Id.* ¶ 45.

[25] *Id.*

[26] See NASUCA Comments 10-13-09, pp. 51-52.

U.S. Treasury and a compliance plan designed to eliminate cramming.[27] The Senate Commerce Committee staff report similarly noted multiple lawsuits involving unauthorized third-party charges on wireless bills, including settlements by the Florida Attorney General with the four major wireless carriers.[28]

Press reports of unauthorized wireless billings continue to occur with regularity. Earlier this year, for example, there were reports of thousands of complaints about $9.99 a month charges for "mobile purchases" stemming from allegedly unsolicited and unwanted text messages from a company known as "Love Genie Tips."[29] About the same time, two Better Business Bureaus in another part of the country warned that many people were getting hit with unauthorized charges from another text messaging scam.[30]

The Commission, although disclaiming a present need for rules to address wireless cramming, acknowledges that the percentage of cramming complaints received by the Commission relating to wireless services appears to have "nearly doubled" from 2008-2010 to 2011, from 16 per cent to 30 percent.[31] This is a dramatic increase over a short period of time. It is reflective of trends that are likely to continue.

If wireless complaints already constitute nearly a third of a problem that the record "overwhelming demonstrates . . . to be . . . a significant problem," resulting "in millions of fraudulent charges being placed on consumer bills," as the Commission is

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[27] *Verizon Wireless Data Usage Charges* (Consent Decree), 25 F.C.C.R. 15105 (Enf. Bur. 2010).

[28] S. Hrg. 112-171, see note 3 above, pp. 9-10.

[29] "Look out for third-party charges on cellphone bill," *Palm Beach Post* (Feb. 24, 2012).

[30] "BBB Issues APB Regarding Text Messages, Bogus Charges," Better Business Bureau of Minnesota and North Dakota (Feb. 1, 2012); "Consumer Alert: Text Messages that Cost You!," Better Business Bureau of Western Michigan, Inc. (Jan. 19, 2012) ("Replying STOP is a waste of keystrokes, you still get charged").

[31] FNPRM ¶ 47; see FNPRM ¶¶ 20-21.

saying,[32] the time to take action is now, while both the background of this formidable record and the essential policy considerations are squarely before the Commission, and before more consumers are victimized.

A solution, to be effective, must have a scope commensurate with the scope of the problem. It must account for prevailing trends. Here, a solution focused solely on wireline services would not address a sizeable chunk of the problem. Nor would it be lasting. The enduring part of what the Commission does now will concern modes of service other than wireline.

C. An effective solution would prompt the industry to replace methods of verification or authentication that do not actually verify or authenticate with methods that do so.

NASUCA has devoted considerable previous attention to addressing the defective verification or authentication processes employed by the industry.[33] The earlier comments are relevant to the Commission's current request for comment on the structure and mechanics of an opt-in mechanism.[34]

The earlier comments, based on experience within the states, and largely reinforced by Commission and court rulings, document the frequency with which the third-party verification and Internet processes commonly used by the industry, as well as the unilateral "welcome" or "confirmation" letters that require no acceptance or acknowledgement from consumers, have been the subject of fraudulent misuse and have otherwise failed to verify or authenticate.

[32] FNPRM ¶ 116.

[33] NASUCA 10-24-11 Comments, pp. 17-27; NASUCA 10-13-09 Comments, pp. 53-57.

[34] FNPRM ¶ 137.

The problem is that the industry has accepted forms of "authentication" that do not authenticate. Supposed orders pass supposed validation tests even when the supposedly validating information is incorrect. In a recent Iowa case, for example, the consumer reported he "graduated from high school the year before the supposed date of birth" on the alleged order. The order was not rejected. It went through.[35] The Commission has similarly noted supposedly validated orders in which birth dates and other information have been incorrect.[36]

Contrast a PIN number system in which, if a *wrong* PIN number is entered, the system bounces back "invalid PIN number," and the transaction is *rejected* rather than approved. This is the direction in which the telecommunications industry needs to move. It is not at all encouraging to see a continued reliance on birth dates.[37] The same may be said of a continued reliance on apparently unilateral "confirmation letters" neither acknowledged nor accepted by consumers.[38]

Nor does it help when additional but derivative measures are layered on top of a form of authentication that is in the first instance lacking. If an order is submitted using a birth date as a supposed means of validation, for example, the fact that the submitter (fraudster?) also sends a "confirming opt-in communication" indicating an understanding that an order has just been placed[39] adds nothing to the supposed validation.

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[35] Complaint filed Oct. 23, 2009, file no. FCU-2010-0004 (VoiceNet Telephone, LLC).

[36] See, for example, *Cheap2Dial Telephone, LLC*, note 12 above, ¶ 12 ("The name, address, email, and birth date were all false"). See also FNPRM ¶ 7 ("proof of authorization is not generally provided to or required by the billing carrier").

[37] See text accompanying note 19 above, referencing Verizon Settlement Agreement, pp. 15-16.

[38] See *id.*, referencing same. See also NASUCA 10-24-11 Comments, pp. 24-25.

[39] See text accompanying note 19 above, referencing Verizon Settlement Agreement, p. 16.

Carriers have reportedly adopted a "double click"[40] or "double opt-in"[41] process. The relevant transcript concerning the "double click" provides no detail, however, and the same may be said of the several letters of record concerning the "double opt-in." The letters provide only this summary description: "[t]he majority of third-party charges billed by wireless providers are ordered directly from the handset itself, and the end user must complete a double opt-in or equivalent verification process, . . . [as] required by the Mobile Marketing Association's Consumer Best Practices Guidelines for Cross-Carrier Mobile Services."[42]

The referenced guidelines appear to be just that – guidelines. They are stated to be "a compilation of accepted industry practices, wireless carrier policies, and regulatory guidance that have been agreed upon by representative member companies from all parts of the off-deck ecosystem."[43] As the Commission observes, the guidelines establish an "opt-in" or "double opt-in" mechanism in the context of short codes for text messaging.[44] "Opt-in" is apparently used for "standard rate" billings, "double opt-in" for "premium rate" billings.[45] It is not clear why authentication processes should differ as between the two. For web-based opt-ins, the use of a PIN number is suggested but "not required."[46]

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[40] See S. Hrg. 112-171, note 3 above, pp. 102, 113 (statement of Walter B. McCormick, Jr.).

[41] See FNPRM ¶¶ 40 and 141, citing Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.1 (May 2, 2011) ("MMA Guidelines").

[42] See Letters from Ian Dillan, Vice President, Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC, dated March 23, April 13 and April 19, 2012.

[43] MMA Guidelines, Introduction. "Off-deck" refers to "services that exist outside of the carrier network." *Id.*

[44] FNPRM ¶ 141.

[45] According to the guidelines, "standard rate" content providers, or at least those with "recurring" standard rate programs, must obtain "opt-in approval" before sending "any SMS or MMS messages or

Especially in light of the persistent history of cramming within the industry, the effectiveness of these guidelines in preventing the abuses cannot be presumed. Indeed, the continuing reports of unauthorized wireless charges suggest that the guidelines have not been effective.[47] Last month, under the current spotlights of ongoing Congressional and Commission activity, CTIA announced a new partnership to vet organizations that "market to wireless consumers using premium short code campaigns."[48] The need for this vetting further suggests that the guidelines have not been effective.

The potential use of a PIN number or password is an important advance.[49] That, too, however, depends on how it is done. In the *New York Times* on April 7, 2012, under caption "To Stop Cellphone Cramming, Don't Let It Start," writer David Segal quoted an AT&T spokesperson as saying that carriers require a "double opt-in process" in which a *third-party content provider* sends a consumer a password, which the customer then

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other content from a short code." The consumer "initiates opt-in" to a recurring standard rate program by responding to a "call to action (CTA)." This can done by sending "a Mobile Originated (MO) message from the handset to the short code" or by utilizing a "web interface," "WAP interface," "IVR system," or "paper-based consent form." When opt-in occurs "via the web or other non-mobile point of origination," the content provider "must obtain verification that the subscriber is in possession of the handset." MMA Guidelines 1.5. For "premium rate" services, "double opt-in" can be "Web-based, IVR [or] handset-based." The consumer "must take affirmative action to signify acceptance of the program criteria, and the content provider or aggregator should record and store the acceptance." Examples of affirmative double opt-in responses include "YES, Y, GO, OKAY, OK, K, SURE, YEP, YEAH." If the second opt-in is from the Internet, the content provider must confirm that the consumer is "acknowledging the opt-in." This can be done "by the user inputting on the website a PIN code sent via a mobile terminating (MT) message to the mobile phone number that the consumer has provided on the website . . . or by the consumer responding via an MO message, such as replying Y or YES, to an MT message that is sent to the mobile phone number the consumer has provided." Separate provisions apply to "premium rate double opt-in" via "IVR," "Participation TV" and "Mobile Web/WAP." MMA Guidelines 2.6. It is not clear exactly how all of this works in practice.

[46] *Id.* 1.5. The purpose of using the PIN number, according to the guidelines, is "to confirm possession of the handset." *Id.*

[47] See text accompanying notes 29 and 30 above.

[48] See Press Release, CTIA, "CTIA-The Wireless Association® Announces Short Code Verification Process with Aegis Mobile" (May 16, 2012).

[49] See NASUCA 10-25-11 Comments, pp. 11, 26-27.

enters into the content provider's purchase page.[50] To be effective, passwords or PIN numbers must originate not with an alleged third-party provider but rather with the billing company, or the consumer.[51]

In response to questioning by Senator Claire McCaskill, Mr. McCormick balked at the use of PIN numbers. He wrote they are sometimes cumbersome, frustrating or confusing for consumers and are sometimes lost or forgotten.[52] Other industries, however, have developed easy and secure means of recovering lost or forgotten PIN numbers, without confusing customers.[53] The minor inconvenience of entering a PIN number is a small price to pay for restoring integrity to this industry's bills.

PIN numbers, Mr. McCormick added, will not stop fraudulent marketing or additional unauthorized charges after a crammer once obtains a PIN number.[54] That may be.[55] It is more difficult, however, for a crammer to obtain a PIN number than a birth date, and a consumer's ability to change a PIN number diminishes the potential for recurrent cramming once it does start.

The fact that PIN numbers will not stop every abuse does not undermine their potential role as a more reliable means of authentication. Other industries have

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[50] The industry guidelines appear to confirm that the PIN number originates with the third-party content provider. MMA Guidelines 2.6.2-1 ("PIN entry pages must only be controlled by the content providers").

[51] See FNPRM ¶ 141 (according to attorneys general, password should originate with consumer).

[52] S. Hrg. 112-171, note 3 above, p. 114 (statement of Walter B. McCormick, Jr.). The response was not publicly available at the time earlier comments were due.

[53] See, for example, http://www.regions.com/personal_banking/online_banking_help.rf ("If you don't remember your Password, you may reset it by selecting the Forgot Password link located in the login box or call 1-800-4PC-BANK (1-800-472-2265) and a Regions banker will be happy to assist you").

[54] S. Hrg. 112-171, note 3 above, p. 114 (statement of Walter B. McCormick, Jr.).

[55] For suggestions on addressing the marketing abuses, see note 73 below.

developed methods of distributing PIN numbers in such a way as to impress upon consumers the importance of keeping them secret, as, for example, through a separate mailing.[56]

A requirement that an order originate from the consumer's handset, while perhaps beneficial, is not an assurance that a charge is legitimate. Handsets are frequently lost or stolen. Nor can it be assumed that systems are foolproof or immune from manipulation. The history of wireline cramming shows, for example, that while companies commonly insisted that charges for collect calls could only be incurred if consumers accepted the calls by, for example, pressing a "1" on a keypad, consumers were commonly prepared to testify to the contrary that the calls that were billed were not received or accepted, and the number of such complaints, among other factors, often lent credibility to what the consumers were saying.[57]

One of the main reasons the cramming problem has persisted is the fact that the industry has accepted forms of verification or authentication that do not actually verify or authenticate. A key element of the solution is to prompt the industry to replace the

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[56] See, for example, www.usbank.com/checkcard/activate.html ("Your new check card and Personal Identification Number (PIN) will arrive separately in the mail").

[57] NASUCA 10-13-09 Comments, pp. 49-50. Also, as illustrated by the FTC's *Verity* litigation, the fact that a connection is made from a consumer's telephone does not necessarily mean that charges were authorized: "[T]he . . . defendants stoutly argue that every call for which they billed in fact was made from the line subscriber's line to the Madagascar numbers assigned to ACL and that Sprint's call records indisputably so establish. The record at this point is insufficient to determine whether this is so, but in large measure the argument is beside the point. The record is more than sufficient to establish, and the Court finds, that a significant number of line subscribers to whom Verity sent bills did not themselves use, or authorize others to use, their lines to access the services of Verity's clients, even assuming that someone else used their lines to do so." *FTC v. Verity International, Ltd.*, 124 F.Supp.2d 193, 197 (S.D.N.Y 2000). Later in the litigation, the court further concluded the allegedly indisputable records were in fact inaccurate. Calls allegedly connected to Madagascar as shown in the records were actually "short-stopped" in London. *FTC v. Verity International, Ltd.*, 335 F. Supp. 2d 479, 484 (S.D.N.Y. 2004).

defective methods of verification or authentication with methods that do actually verify or authenticate.

II. The Commission should propose and in due course adopt a rule for all modes of telecommunications service that explicitly prohibits cramming.

NASUCA is on record as supporting, among other solutions, a requirement of express consumer authorization – an "opt-in" requirement – before third-party charges may be incurred.[58] NASUCA's initial comments regarding the mechanics and structure of such a requirement are included in the comment sections above.

For reasons also explained above, however, such a requirement will not by itself prove effective in solving the problem. There will be too many exceptions. The Commission may exclude modes of service other than wireline.[59] Difficulties will persist regarding the adequacy of verification or authentication processes.

Additional measures are therefore needed.

A. The most direct solution to the problem is a rule prohibiting the billing of unauthorized charges on phones bills.

A direct prohibition on the billing of unauthorized charges focuses on the core problem. Such a prohibition is easily justified across all modes of service and with respect to both third-party charges and a carrier's own charges.[60] There is no need or justification for exceptions. Such a prohibition offers a congruence between the scope of

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[58] NASUCA 10-24-11 Comments, p. 16.

[59] See FNPRM ¶ 49 (seeking comment on additional potential measures to prevent cramming, including "an 'opt-in' requirement *for wireline carriers*") (emphasis added).

[60] NASUCA has previously addressed the Commission's authority to reach all modes of service, including interconnected VoIP service. NASUCA 12-5-11 Comments, pp. 28-35.

the problem and the scope of the solution. It does not disable any legitimate or beneficial commerce. It is likely to prove resilient over time.

In light of the demonstrated scope of the problem, there is every reason to adopt such a rule, and no reason not to adopt such a rule. The Commission has ample authority to do so.[61] Especially following the groundwork laid by the Commission in the *LDDI* enforcement action[62] and the *Norristown* and other enforcement actions last year,[63] such a rule will not require the Commission to traverse new conceptual territory. Nor need such a rule be lengthy.

B. The rule should include a provision that a claimed "authentication" or "verification" is not a defense to an enforcement action if the charges at issue were in fact unauthorized.

A rule prohibiting cramming should include a provision that a claimed "authentication" or "verification" is not a defense to an enforcement action if the charges at issue were in fact unauthorized. Such a provision would recognize that verification is a means to an end, not an end in itself. It would keep the focus where it needs to be, on whether consumers have been "charged for unwanted services that were not ordered" and hence been "victim[s] of genuine cramming."[64]

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[61] See *id.*

[62] *Long Distance Direct Inc.*, FCC 00-46, 15 F.C.C.R. 3297 (2000) ("LDDI").

[63] See note 12 above.

[64] *Lady Di's, Inc. v. Enhanced Services Billing, Inc.*, 654 F.3d 728, 737 (7th Cir. 2011). The case is a helpful study in relevant policy considerations. The court acknowledged the "widespread consumer fraud practice known as 'cramming.'" *Id.* at 732-33. Noting, however, that the consumer before it had in fact ordered the services in question, the court was far from impressed with a claim that the companies did not possess the documentation required by the state's anti-cramming regulations. The greater concern in the court's eyes, absent in the case before it, lay not with the alleged non-compliance with the prescriptive verification requirement but rather with the potential for bottom-line "genuine cramming."

Such a provision would require companies to defend the allegations of consumers that charges were unauthorized. Companies would effectively bear a responsibility to replace authentication or verification processes that do not authenticate or verify with processes that do. They would retain the freedom to adopt such specific authentication processes as they deem optimal, but subject to the need that the processes be effective. The Commission would not be burdened with a need to prescribe the details.

This approach is consistent with the determinations of multiple authorities, including the Commission, in multiple relevant contexts, all recognizing the need in disputed cases to look beyond the alleged verification offered by the company and consider whether authorization or consent was in fact given by the consumer.[65] This approach is also consistent with past Commission authority regarding the evidentiary value of third-party verification recordings in cases of alleged slamming violations.[66]

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[65] *FTC v. Inc21.com*, 745 F.Supp.2d 975, 990 (N.D. Cal. 2010), *aff'd mem.*, No. 11–15330, 2012 WL 1065543 (9th Cir. 2012) ("many TPV recordings . . . had . . . been spliced or otherwise falsified"); *Norristown Telephone Co., LLC*, FCC 11-88, 26 F.C.C.R. 8844 (FCC 2011) ¶ 14 ("[t]o the extent it actually uses them, Norristown's validation and verification processes are clearly inadequate to confirm that the person who 'enrolled' in its plan, *i.e.,* the one whom Norristown will charge for service, in fact authorized the service"); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 98-334, 14 F.C.C.R. 1508 ¶ 60 (1998) ("the argument that the welcome package is a benign form of verification because it merely confirms consent already given begs the question of whether consent in fact has been given"); *Order Instituting Investigation into the Operations of Telseven, LLC, et al.*, No I.10-12-010 (Cal. Pub. Util. Com'n Dec. 21, 2010), p. 35: "We are cognizant of Respondents' possible defense to these allegations under Code § 2890(d)(2)(D), which provides that 'evidence that a call was dialed is prima facie evidence of authorization.' Customer complaints denying authorization or denying all knowledge of Respondents, however, may rebut that presumption."

[66] See *Polices and Rules Concerning Changing Long Distance Carriers*, FCC 93-202, 8 F.C.C.R. 3215 (1993) ¶ 9 ("These verification procedures were not intended to substitute for written authorization from customers as evidence in a PIC change dispute").

C. The rule should not only reach third-party providers but should also hold billing companies and billing agents responsible when they pass unauthorized charges along to consumers.

A rule prohibiting cramming should not only reach the third-party providers but should also hold the billing companies and the billing agents accountable when they pass unauthorized charges along to consumers. As indicated above, one of the main reasons the nation has a cramming problem is that these typically larger billing companies have accepted forms of authentication that do not authenticate.

These companies are not innocent bystanders. They know or should know that defective methods of authentication are often and fraudulently used to victimize consumers. Yet they to continue to rely upon such faulty methods and to approve the resulting charges.[67] They profit from the system and from the defects. They properly bear responsibility for the integrity of the system and in particular for the legitimacy of the authentication processes.[68]

D. The Commission should continue to bring enforcement actions, and to encourage other authorities to bring enforcement actions, when and as needed.

There will be a continuing need for enforcement. The Commission should therefore continue to bring enforcement actions,[69] to encourage the states to bring

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[67] See text accompanying notes 33-36 above.

[68] See *Doty v. Frontier Communications Inc.*, 36 P.3d 250, 258 (Kan. 2001) ("[t]o allow Frontier to participate and profit through its contractual agreements . . . – yet insulate itself from any responsibility – flies in the face of the intent of the Kansas Legislature when it enacted [the slamming statute]"; Press Release, Federal Trade Commission, "FTC Seeks Return of $52 Million Worth of Bogus Phone Bill Cramming Charges; Agency Charges Nation's Largest Third-Party Billing Company with Contempt" (May 8, 2012) ("BSG cannot profit from the fraud of others and then deny responsibility for the harm they made possible"). See also *Hudson v. United States*, 522 U.S. 93, 104 (1997) (civil monetary penalty "can be imposed even in the absence of bad faith"); *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) ("scienter never has been required for violations of public welfare regulations").

[69] See FNPRM 47, 67, 104.

enforcement actions,[70] and to look to the Federal Trade Commission for supportive enforcement actions, when and as needed.

The vast bulk of the enforcement activity should be remedial and hence civil, including assessment of monetary penalties. Egregious cases should be referred for possible criminal prosecution.[71]

Enforcement activity produces desired results. In Iowa, where an enforcement effort has been in place for a decade, the number of cramming complaints has slowed to a trickle. The key to success, nationwide, is to create an environment in which the known potential for, and credible threat of, enforcement exerts a sentinel effect of sufficient weight and force to impel the needed corrections.[72]

E. Such measures will hold the industry accountable, without being prescriptive about means, and without imposing an undue cost or burden upon the industry.

The measures here suggested would address the real causes of cramming. They would hold the industry accountable, without being prescriptive about means, and

[70] The Commission should also encourage the states to continue to act as the enforcement laboratories they are. One state, for example, may elect an enforcement approach based on individual violations that is analogous to the issuance of a traffic citation. Another state may elect to establish a registry of third-party billers, including identification of principals. Experiments such as these may prove vital in eventually accomplishing the desired end.

[71] See Press Release, U.S. Dep't of Justice, "Florida Man Sentenced to Over 21 Years in Prison for Operating Cramming Scheme While Incarcerated – Bilked Telephone Customers for Approximately $35 Million" (Sept. 2, 2010).

[72] See *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 186 (2000) ("a threat [of civil penalties] has no deterrent value unless it is credible that it will be carried out"); *In re Canales Complaint*, 637 N.W.2d 237, 245 (Mich. App. 2001) ("without heavy fines there would be insufficient incentive for . . . providers to stop slamming because they would simply reimburse those customers who complain of the switch, but continue to collect fees from the other slammed customers"); *Merchandise National Bank v. Scanlon*, 408 N.E.2d 248, 253 (Ill. App. 1980) ("Without the imposition of the penalties provided for . . ., the sanction against prohibited practices is weakened"); *Abercrombie v. Clark*, 920 F.2d 1351, 1358-59 (7th Cir. 1990) (penalties "are meant to have a 'self-enforcing' effect").

without imposing an undue cost or burden upon the industry. They would prove resilient over time, as consumers continue to move away from wireline service.[73]

Conclusion

The Honorable Daniel H. Weinstein, who served as mediator in connection with the proposed settlement in *Moore v. Verizon Communications, Inc.*, commented that federal and state regulators, among others, despite well intentioned efforts to combat cramming over the last fifteen years, have been comparatively unsuccessful in achieving relief for consumers.[74] While Judge Weinstein is undoubtedly correct in saying the problem has persisted too long, experience suggests that his aspirations for the future success of the two-year, wireline-only, forward-looking provisions of the proposed Verizon settlement agreement will prove to be overstated.[75]

Success requires decisive action commensurate with the scope of the challenge. Judge Weinstein's statement is the latest call to action. Again, the Commission should seize this historic and landscape-changing opportunity both to protect consumers and to support legitimate commerce, while cracking down on illegitimate, dishonest and widely injurious activities that masquerade as legitimate commerce.

[73] For reasons previously stated, the Commission should also propose and in due course adopt a rule to the effect that misrepresentations or deceptive conduct in the course of marketing a communications service, or a product or service to be included on a communications bill, is unlawful. In addition, the Commission should consider the Federal Trade Commission's recommendations regarding advertising disclosures. See NASUCA 10-24-11 Comments, pp. 27-28, 29.

[74] *Moore v. Verizon Communications, Inc.*, No. Dist. Cal. No. CV 09-1823, Declaration of the Honorable Daniel H. Weinstein (Ret.) in Support of Motion for Preliminary Approval of Class Action Settlement, dated Jan. 26, 2012, ¶ 20.

[75] See notes 20 and 37-39 and accompanying text above.

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