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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Cramming Forum

Dear Commissioners:

These comments are submitted on behalf of the Office of Consumer Advocate, Iowa Department of Justice. Our office represents utility consumers, including telecommunications consumers, and the public generally, before the Iowa Utilities Board and in the courts.

We appreciate the convening of this forum and more especially the Commission's body of work combating the problem known as "cramming."¹ That includes the Commission's pioneer work in *FTC v. Inc21.com*, 688 F.Supp.2d 927 and 745 F.Supp.2d 975 (N.D. Cal. 2010). The *Inc21.com* case has highlighted both the failure of third-party verifications to stop the telemarketing fraud and the widespread problems with third-party billing.

Although federal actions, including those at the Commission, have at times proven instrumental in the effort to stop cramming, the Federal Government lacks sufficient resources to pursue all known bad actors. State efforts to combat the problem are also needed. In that regard, one of the most notorious apparent slammers and crammers of the past decade was Buzz Telecom. The company plagued a distressingly large number of consumers, particularly seniors, with reportedly fraudulent sales calls and unauthorized billings. Its operations were effectively halted in early 2007 by the efforts of a large number of states. See Iowa OAG press release,

¹See *Office of Consumer Advocate v. Iowa Util. Bd.*, 770 N.W.2d 334, 336 (Iowa 2009) ("Cramming refers to charging a consumer for services that were not ordered, authorized or received"); *Micronet, Inc. v. Indiana Utility Regulatory Comm'n*, 866 N.E.2d 278, 282 (Ind. App. 2007) ("[c]ramming is . . . '[a] practice in which customers are billed for unexpected and unauthorized telephone charges or telephone services, which the [customer] didn't order, authorize or use'"); *Brittan Communications Internat'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 n. 2 (5th Cir. 2002) ("'[c]ramming' refers to charging a customer for services that were not ordered, authorized or received"); U.S. General Accounting Office, "Telecommunications: State and Federal Actions to Curb Slamming and Cramming," Report No. GAO/RCED-99-193 (July 1999), <http://www.gao.gov/archive/1999/rc99193.pdf>, p. 1 ("cramming, involves placing unauthorized charges on a consumer's telephone bill for services and products").

“Consumer Advocate: Beware of Long Distance Charges by ‘Buzz Telecom’” (Dec. 13, 2006), online at http://www.state.ia.us/government/ag/latest_news/releases/dec_2006/buzz.html.

Iowa law prohibits “unauthorized changes in service,” including “cramming.” Iowa Code § 476.103 (2011); 199 Iowa Admin. Code 22.23. Pursuant to this authority, our office has had an active enforcement program since 2002. Because the statute excludes wireless services, our work has addressed primarily wireline services.² We have seen a great many allegations of fraudulent, deceptive, abusive and unfair practices resulting in the placement of allegedly unauthorized charges on consumer phone bills, among them allegations of the following:

- Defective third-party verification recordings, including doctored recordings purporting to show an authorization from the consumer when in fact none was given, recordings from persons other than the consumer to whom services were billed, recordings in which the words voiced by the verifier are spoken too quickly to be understood or are otherwise inaudible, recordings from verifiers that are not independent from the billing company (as required by FCC rules), recordings in which telemarketers remain on the line during the alleged verification (contrary to FCC rules);
- Missing third-party verification recordings;
- Misrepresentations during the unrecorded solicitation portion of a telemarketing call, including misrepresentations that the telemarketer was calling on behalf of the consumer’s local telephone company and that, for example, the local telephone company owed the consumer a refund, necessitating a verification of information;
- Bogus Internet signups, including signups that did not result from any action of the consumer to whom they were billed and signups that resulted from statements on the company’s website asking the consumer to complete a survey or to sign up for a free gift;³
- Free trial offers stating that billing will not commence unless and until the consumer has had an opportunity to review a service and make a decision whether the consumer wishes to continue the service on a billable basis, followed by billings despite the absence of any consumer ability to review the service and

²Wireless complaints are addressed by the Consumer Protection Division of the Iowa Department of Justice through the use of the Consumer Fraud Act.

³There is rarely evidence explaining what happened. Occasionally, there are telling clues. In one case, it appeared the phone number the company claimed the consumer supplied as part of the alleged order had not been the consumer’s telephone number for seventeen months. See Iowa Utilities Board file no. FCU-04-65. From a preventive standpoint, it appears that allegedly offending companies have commonly failed to institute any reasonable processes or procedures or security checks to verify or validate the genuineness of alleged Internet orders billed to the local phone bill. An Iowa complainant laments: “I had to answer five questions to verify my identity in order to even ask about my [phone] bill, but someone else can sign me up and bill me for a service I’ve never heard of without any verification at all?” See Iowa Utilities Board file no. FCU-05-54.

make or communicate a decision regarding continuance of the service on a billable basis; and

- Continued billing after the consumer has terminated services.

The types of services involved have commonly included long distance services, collect calls, directly assistance calls, voicemail services, web hosting services, and online yellow page services. Both individual consumers and small businesses have been victimized.

When consumers complain, they frequently report being placed on hold for lengthy periods of time, cut off and otherwise given the runaround. Their correspondence goes unanswered. They are wrongly told the charges complained of are legitimate and must be paid. In one case, the company sent the consumer a form letter advising that it had conducted a thorough investigation and determined the charges were valid, when in fact the charges were invalid. Consumers fear loss of essential phone service and damage to credit scores. If relief is provided, it commonly takes two or three billing cycles for credits to appear.

The Iowa statute authorizes the Iowa Utilities Board to assess civil monetary penalties for violations. Civil penalties are needed because credits alone do not provide an adequate incentive to stop the violations. *In re Canales Complaint*, 637 N.W.2d 236, 245 (Mich. App. 2001) (“without . . . fines there would be insufficient incentive for . . . providers to stop slamming because they would simply reimburse those customers who complain. . . , but continue to collect fees from the other slammed customers”); see *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 174, 185-86 (2000).⁴

The Iowa statute contains no requirement that the violations be either intentional or numerous. The omission of an intent requirement has helped us advance the statutory goal. Because direct proof of a company’s state of mind is rarely available, requiring proof of intent to violate means that intentional violations easily escape sanction. Even when a violation is caused by unintentional conduct, moreover, such conduct is often the result of negligent and inattentive behavior. Civil penalties are designed to remedy such sloppy business practices, so that such behavior will be policed and cleaned up. *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990); see *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999).

The omission of a pattern requirement has similarly helped advance the statutory goal. Experience shows that complaints represent but a fraction of violations.⁵ Waiting for proof of a

⁴Small claims court is “not an effective remedy because the amounts at issue [are] too small to be worth the time and energy, let alone the nominal filing fee.” *McKee v. AT&T Corp.*, 191 P.3d 845, 858 (Wash. 2008).

⁵In 2005, for example, a relatively small number of Iowans, each disputing a bill between \$5.00 and \$8.00 for a single domestic collect call, lodged complaints against two billing companies. A Commission press release later revealed a “massive” fraudulent billing scheme that collected more than \$30 million in bogus charges from millions of consumers. “Phone Bill ‘Cramming’ Defendant Settles FTC Charges,” online at <http://www.ftc.gov/opa/2007/10/nationwide.shtm> (FTC 2007). More recently, the *Inc2.com* court, in what it described as the “most compelling proof” before it, cited an expert survey offered by the Commission showing that only five percent of billed consumers were even aware that they had been billed, also noting a company document

series of violations routinely delays enforcement. Worse, when enforcement is thus delayed, most of the time there is no enforcement at all. Artful operators are free to use multiple corporate entities in order to mask the scope of their operations. They are free to move from one corporate shell to another, or to other types of violations, once complaints start to gain the attention of regulatory officials. Practical limitations inhibit the development of pattern cases.

The vast majority of our cases have been settled. The penalties appear to have assisted in decreasing the number of complaints.

State and federal officials should continue to work together to develop and implement solutions. At the state level, pursuing consumer complaints will reduce existing abuses and assist in preventing the development of new abuses. Companies that benefit from contractual relationships should be held accountable when they have an ability to prevent abuses but fail to do so.⁶ Third-party verification processes, Internet signup processes and third-party billing processes all merit attention and action. Together we can reduce mistreatment of consumers.

We look forward to participating in the forum. Thank you for the invitation to do so.

Respectfully submitted,

Craig F. Graziano

found on execution of a search warrant stating: “Never bill more than \$29.95 per month. The average small business sees this as phone charges and does not review for five months.” See 745 F.Supp.2d at 982 and 986.

⁶See *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]”).