

**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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND THE NEW JERSEY DIVISION OF RATE COUNSEL**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
SUMMARY	ii
I. INTRODUCTION.....	1
II. HALFWAY MEASURES ARE INSUFFICIENT AND CONSUMERS ARE HARMED BY INACTION.....	2
A. The status quo does not protect consumers adequately.....	3
B. Contrary to industry’s assertion, existing industry measures are insufficient to protect consumers from fraudulent charges.....	6
III. ECONOMIC INCENTIVES RUN COUNTER TO CONSUMERS’ INTEREST	12
IV. NEEDED SOLUTIONS FOR CRAMMING PROBLEMS.....	13
A. Prohibit Third-Party Landline Billing with Limited Exceptions.....	13
B. Require Express Authorization for Third-Party Wireless Billing	18
C. Adopt the Proposed Regulation on Better Separation of Third-Party Billings.....	19
V. STATE ROLE	20
A. Enlist the States in Complaint Resolution and Enforcement Activity.....	20
B. The Commission should recognize and preserve the essential role to be played by the states.	22
VI. LEGAL AUTHORITY.....	28
A. The Commission has authority to regulate or prohibit both cramming and third-party billing under 47 U.S.C. § 201(b).....	28
B. Ancillary Authority	34
VII. CONCLUSION	35

Appendix A: Reproduction of selected pages from AT&T’s website.

SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”) and the New Jersey Division of Rate Counsel (collectively, “Consumer Advocates”) urge the Federal Communications Commission (“FCC”) to ban third-party wireline billing, with limited exceptions. If the FCC does not adopt this recommendation, Consumer Advocates urge the FCC to require default blocking of third-party wireline billing (including for VoIP-based services) with a verifiable “opt-in” by consumers. Consumer Advocates further recommend that the FCC require default blocking of third-party wireless billing with a verifiable opt-in by consumers. Others’ initial comments echo these and other recommendations set forth in NASUCA’s initial comments, and initial comments also offer persuasive evidence in support of stringent anti-cramming measures.

Consumer Advocates support other measures, such as improved disclosures, to deter cramming, but these measures should be *in addition to* not *instead of* the dual-approach of (1) banning third-party landline billing and (2) default blocking with an opt-in requirement for wireless customers. Consumer Advocates also support recommendations for improved federal-state collaboration in tracking cramming complaints and in pursuing enforcement actions. Finally, contrary to the assertions of various industry comments, the FCC possesses the requisite legal authority to issue anti-cramming rules. Consumer Advocates also urge the FCC to assist states in addressing legislative solutions, by acting as a clearinghouse for initiatives such as that of the Vermont Legislature and to establish a link to pending and completed enforcement actions.

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I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA") and the New Jersey Division of Rate Counsel (collectively, "Consumer Advocates")¹ hereby reply to the initial comments submitted in response to the notice of proposed rulemaking ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission"),² which seeks to address the problem of unauthorized charges on phone bills, commonly known as "cramming."³

¹ NASUCA submitted initial comments. Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A. §§ 52:27EE-46 et seq.*

² FCC-11-106. See 76 Fed. Reg. 52625 (Aug. 23, 2011).

³ On November 4, 2011, the FCC extended the deadline for filing reply comments by two weeks. 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, *Order*, November 4, 2011.

In initial comments, industry contends that voluntary measures suffice to address the FCC's cramming concerns, and further contends that cramming is far less of a concern than the NPRM would suggest. By contrast, many consumer advocates and regulators emphasize the pervasive and persistent characteristics of cramming, and urge the Commission to impose stringent measures to remedy a long-festering problem that has been plaguing consumers for more than a decade.⁴ NASUCA's initial comments anticipated and addressed many of the points raised in others' comments, and, therefore, Consumer Advocates do not seek to repeat all of NASUCA's original points.⁵ As NASUCA explained in detail in initial comments, cramming is causing substantial monetary harm to consumers through fraudulent charges, and existing measures are sorely inadequate to remedy the problem. Swift and strong FCC rules are essential to prevent further consumer harm.

II. HALFWAY MEASURES ARE INSUFFICIENT AND CONSUMERS ARE HARMED BY INACTION

⁴ The sheer volume of comments submitted by numerous Attorneys General, other consumer advocates, and state regulators underscores the severity of the cramming problem. Furthermore, the detailed comments submitted by enforcement agencies, which have been seeking to stem the tide of cramming, provide credible and persuasive evidence of the magnitude of the problem, as well as of the insufficiency of existing regulations to protect consumers from unscrupulous behavior by third-party vendors.

⁵ Consumer Advocates reviewed the initial comments of: AT&T Inc. ("AT&T"); Attorney Generals of Alabama, Alaska, Arizona, Delaware, Georgia, Indiana, Iowa, Kentucky, Maryland, Mississippi, Nevada, New Hampshire, New Mexico, New York, Oregon, Tennessee and Washington ("17 AGs"); Attorney General of Florida ("Florida AG"); Attorneys General of Illinois, Nevada and Vermont ("3 AGs"); Billing Concepts, Inc. ("Billing Concepts"); Internet Search Optimization Company; California Public Utilities Commission and the People of the State of California ("CPUC"); Consumers Union, Center for Media Justice, Consumer Federation of America, National Consumer Law Center – on behalf of its Low-Income Clients, and Public Knowledge ("Public Interest Commenters"); CenturyLink; CTIA – the Wireless Association ("CTIA"); Federal Trade Commission ("FTC"); Frontier Communications Corporation ("Frontier"); ILD Teleservices, Inc. ("ILD"); Internet Searches Group ("ISG"); Iowa Utilities Board ("IUB"); Massachusetts Office of Attorney General ("MA AG"); Michigan Public Service Commission ("Michigan PSC"); National Consumers League ("NCL"); New England Conference of Public Utilities Commissioners and the Rhode Island Division of Public Utilities and Carriers ("New England Commissions"); PaymentOne Corp. ("PaymentOne"); Preferred Long Distance, Inc. ("Preferred LD"); Securus Technologies, Inc. ("Securus"); Sprint Nextel Corporation ("Sprint"); T-Mobile USA, Inc. (T-Mobile); TCA; U.S. Telecom, Inc. ("UST"); Verizon and Verizon Wireless ("Verizon"); Virginia State Corporation Commission Staff ("Virginia SCC Staff").

A. The status quo does not protect consumers adequately.

Initial comments resoundingly demonstrate that “halfway” regulatory measures are insufficient, and that voluntary industry measures similarly are ineffective at protecting consumers from cramming.⁶ In their comments, Attorney Generals, consumer advocates, state regulators, and the FTC, based on significant experience over a time period of more than ten years, underscore the inadequacy of current measures and market forces to prevent fraudulent charges from appearing on consumers’ telephone bills.⁷ The concerns raised in this proceeding are certainly not hypothetical, but instead are based on ample evidence that the status quo is not working and that, in the absence of government intervention, consumers are being harmed, and will continue to be harmed.

As described by the 17 AGs, cramming costs consumers and business “enormous amounts of money, time, and frustration” and efforts to address cramming have a “whack-a-mole” aspect – a company may be shut down for a day only to reopen the next day in another state under a new name, which impedes consumer protection and the effectiveness of enforcement efforts.⁸ A common theme in the initial comments is that, based on firsthand knowledge and substantial experience of enforcement agencies in seeking to combat cramming, regulatory action is long overdue.⁹ Based on their extensive experience in seventeen different states, the 17 Attorneys General state persuasively that it is “clear that new stronger federal measures are necessary and appropriate.”¹⁰

⁶ See, e.g., 17 AGs, at 10.

⁷ See e.g., 17 AGs, at 6-9; 3 AGs, at 1-5; FTC, at 1-4; Massachusetts Attorney General at 10-13; New England Commissions, at 13-16.

⁸ 17 AGs, at 1.

⁹ See, e.g., 17 AGs, at 6-9.

¹⁰ *Id.*, at 5.

State and federal regulators have not been able to eliminate the practice of fraudulent third-party billing – they have been pursuing crammers for more than ten years.¹¹ Furthermore, after-the-fact enforcement is far less efficient and burdens both consumers and regulators more than would sound, strong preventive policy. Evidence clearly shows that measures that the FCC has proposed are not in and of themselves sufficient to protect consumers; states have implemented many of them and they have proven ineffective.¹² Similarly, the 3 AGs, which have significant experience with cramming,¹³ state that best practices have failed,¹⁴ and that halfway measures are insufficient.¹⁵

Consumer Advocates also urge the FCC to heed the concerns expressed by another federal agency, the FTC, which has been “engaged in a sustained campaign to attack and prevent” cramming for more than fifteen years.¹⁶ The FTC states that it “has brought more than 25 enforcement actions to halt cramming and provide redress to its victims” as well as other anti-cramming activities – such as outreach, education, and working with industry.¹⁷ Among other things, the FTC states that “FTC staff has been able to identify very few legitimate uses of third-party telephone billing.”¹⁸ FTC also states that at its public workshop on cramming, which was held on May 11, 2011, “no third-party merchants presented data showing the legitimacy of their charges or the necessity of having charges placed on a telephone bill”¹⁹ and that the “silence of

¹¹ Id., at 11.

¹² Id., at 15.

¹³ 3 AGs, at 1-5.

¹⁴ Id., at 5.

¹⁵ Id., at 7.

¹⁶ FTC, at 1.

¹⁷ Id.

¹⁸ Id., at 3.

¹⁹ Id., at 3-4.

merchants who use third-party telephone billing calls into question the extent of legitimate third-party billing.”²⁰ The FTC also points out that few customers actually use the service for which they are charged and cites an FCC investigation that “discovered that only 20 of 17,384 consumers actually used the third-party service for which they were charged” and that the “figure equates to a 0.1% usage rate.”²¹

The MA AG describes complaints that her office received during 2010, which provide further evidence of consumer harm.²² Furthermore, as the MA AG states: “the scale of the cramming problem in Massachusetts is much greater than the simple sum of consumer complaints because many fraudulent charges go undetected and unreported.”²³

The New England Commissions also continue to receive cramming complaints,²⁴ which they summarize for the time period spanning 2008 through August 2011.²⁵ Furthermore, as they explain, the complaints that they have tallied underestimate the actual volume of cramming instances for several reasons: states do not regulate the wireless industry, and so they do not receive wireless complaints; some New England states are barred from regulating VoIP (Massachusetts and Maine);²⁶ and, as the FCC has stated, the quantity likely substantially understates actual numbers because consumers are unaware that such charges exist, may not

²⁰ Id., at 4. See also Virginia SCC Staff stating that “there is scant evidence of any consumer benefits derived from third-party billing, and the principal beneficiaries (from financial gain) are the aggregators, third-party vendors, and the telephone companies.” Virginia SCC Staff, at 6.

²¹ FTC, at 4, citing FCC Infographic on Cramming, available at <http://transition.fcc.gov/cgb/cramminggraphic.jpg>.

²² MA AG, at 10-13.

²³ Id., at 13.

²⁴ New England Commissions, at 13-16.

²⁵ Id., at 15.

²⁶ Precisely because some states do not regulate VoIP, FCC measures are essential to protect consumers who migrate to new technologies.

know how to file complaints, or may decide it is too much effort to complain.²⁷ New England Commissions also state that their staff have observed various trends in cramming complaints such as consumers disputing that they had authorized or ordered the contested services; being unfamiliar with the provider or service for which they are being billed; not being able to get through to the company assessing the disputed charge; being “confused;” and getting high monthly charges such as \$12.50, \$14.95, \$29.95 or more.²⁸ New England Commissions state that “[c]learly, a problem exists, and the New England Commissions would welcome additional federal safeguards in place.”²⁹

B. Contrary to industry’s assertion, existing industry measures are insufficient to protect consumers from fraudulent charges.

In sharp contrast with the experience that consumer advocates and enforcement agencies describe, industry comments depict different circumstances, and seek to persuade the FCC that industry has taken ample measures to detect and to prevent cramming. For example, AT&T asserts that it “has robust contractual measures in place to prevent cramming by third-party providers.”³⁰ AT&T fails to explain, however, why strong government-designed rules could not co-exist with industry measures.

Furthermore, some industry-initiated measures disproportionately burden consumers. For example, consumers can use AT&T’s “self-service website” to submit and resolve billing disputes.³¹ However, it is difficult if not impossible to navigate AT&T’s web site to learn about

²⁷ New England Commissions, at 14-15, citing NPRM, at para. 19.

²⁸ New England Commissions, at 15-16.

²⁹ *Id.*, at 16.

³⁰ AT&T, at 8.

³¹ *Id.*, at 9.

cramming. Appendix A to these reply comments includes print-outs from AT&T's web site,³² which show the difficulty of locating information about third-party billing and cramming on AT&T's web site. Consumer Advocates started their navigation of AT&T's web site with Wireless Billing and Account Information. The ten pages included in Appendix A include the following:

- Page 1: "Wireless Billing and Account": "Find Answers to Common Billing Questions" – "Begin"
- Page 2: Shows the top 10 questions when "Begin" is selected. There is no information about cramming or even about legitimate third-party billing in the top 10 questions.
- Page 3: Consumer Advocates used the search function in AT&T's web site. This page shows the search results for "third-party billing" - there is no information remotely relevant.
- Page 4: Shows that no results are found for a search on "cramming."
- Pages 5 through 10: show the sample bill that AT&T provides on its web site, yet the sample bill does not include any illustrative third-party charges.

Based upon our review, Consumer Advocates are not persuaded that AT&T's web site provides an effective tool that dispenses with the adoption of the proposed rules.

AT&T also states that a third-party biller has to "pay AT&T a fee of \$150 for each alleged instance of cramming."³³ A fee of this magnitude seems negligible compared with the potential profit that unscrupulous third-party vendors accrue. The fee may not thwart the many unauthorized charges that go undetected or unreported. Furthermore, AT&T receives the fee, not the consumer, yet is it the consumer who has borne the cost and inconvenience of reporting the complaint and seeking resolution through a process that likely is time-consuming. AT&T also

³² http://www.att.com/esupport/billAndAccount.jsp?cv=820&_requestid=598849#, site accessed November 25, 2011.

³³ AT&T, at 9.

describes its use of “a cramming complaint threshold” to filter out the bad actors,³⁴ but the Senate Report thoroughly identifies the weakness in that approach – vendors simply resurface in a different state with a different number.³⁵

Consumer Advocates welcome AT&T’s various voluntary measures such as including third-party charges in a separate section on bills; removing the charge from the bill, if customers allege cramming; and offering third-party bill blocking.³⁶ However, for the reasons described above and in others’ initial comments, these measures are not sufficient. These measures standing alone are inadequate when comprehensive regulations are required.

AT&T also relies on the law enforcement activities of state commissions, the FCC, and the FTC to “play a vital role in reducing cramming.”³⁷ This approach is not an appropriate long-term solution to the problem of cramming because it simply shifts the burden to the wrong place and ties up limited administrative resources to address problems after-the-fact. Furthermore, such an approach does not assist the many consumers who never report the cramming that occurs.

Based on various measures, CTIA asserts that there is not a compelling record to indicate that cramming is a problem for wireless consumers. Among its purported justifications for this view are that the FCC’s last thirty-four quarterly reports on consumer complaints do not include wireless cramming in their analysis of “top consumer issues”,³⁸ because the FCC has not released the wireless complaint data publicly, CTIA cannot analyze the information,³⁹ and even

³⁴ Id.

³⁵ STAFF OF S. COMM. ON COMMERCE, SCIENCE, AND TRANSP., UNAUTHORIZED CHARGES ON TELEPHONE BILLS (July 12, 2011) (“Senate Report”), at 35-37.

³⁶ AT&T, at 9-10.

³⁷ Id., at 11.

³⁸ CTIA, at 3.

³⁹ Id., at 4.

if the FCC's data is accurate (i.e., 16 percent of cramming complaints between 2008 and 2010 relate to wireless service), this would be only 419 complaints per year on average and, by comparison, during this time period, there were 272 million wireless subscribers and so CTIA calculates a 0.00016 percent cramming complaint percentage.⁴⁰ CTIA's reasoning is not persuasive. Also, complaints reported to government agencies represent a miniscule fraction of the harm that is occurring.⁴¹ Furthermore, the economic incentives for cramming are powerful and, unless they are countered by strong measures that enable consumers to control the use of their telephone numbers, these incentives will jeopardize wireless consumers. Rather than await growth in wireless complaints, the FCC should take steps now to *prevent* harm while still providing consumers with the flexibility to permit third-party billing.

CTIA refers to various studies that show that wireless consumers are satisfied with their wireless service,⁴² but the studies' findings do not alter the market place incentive that exists to place unauthorized calls on telephone bills. Consumer Advocates simply seek a consumer-controlled mechanism for opting in to third-party billing. Industry has failed to demonstrate that such a mechanism would prevent consumers from continuing to being "satisfied" with their service.

CTIA also seeks to "change the topic" from cramming to Telephone Consumer Protection Act ("TCPA") complaints (including unsolicited telemarketing calls and messages by third parties).⁴³ CTIA discusses various TCPA statistics to demonstrate that these are far more significant than cramming complaints.⁴⁴ Consumer Advocates welcome efforts to prevent other

⁴⁰ Id., at 4-5.

⁴¹ See, e.g., MA AG, at 9-13.

⁴² CTIA, at 6-7.

⁴³ Id., at 7-10.

⁴⁴ Id., at 8.

consumer problems such as “robo-calling” to wireless phones, but certainly such efforts are not mutually exclusive with the FCC’s anti-cramming efforts. CTIA is not persuasive as to why the FCC should wait for cramming to evolve into a high-complaint line of business in the wireless market before establishing anti-cramming mechanisms.

CTIA suggests that carrier billing provides more consumer protection and oversight than does “in-app” billing.⁴⁵ Consumer Advocates propose a mechanism that maximizes consumer choice,⁴⁶ that is, that the FCC mandate that customers have the *option* to affirmatively *choose* to use their cell phone like a credit card rather than to continue the status quo where the default is that the cell phone is a credit card. As long as consumers have the option to un-block third-party billing, with a verifiable process, those consumers who so wish to can continue to use wireless bills as a way to bill third-party products and services. CTIA is concerned that “[n]ew cramming rules could jeopardize the thriving app ecosystem,”⁴⁷ but the goal of encouraging growth in the “app ecosystem” should be balanced with consumers’ legitimate rights to be able to control the way in which they wish to use their wireless phones and associated bills.

CTIA also asserts that complaints create costs for carriers and so they have incentives to prevent cramming.⁴⁸ However, CTIA fails to provide relevant data in support of this position which makes it impossible for the Commission to assess the accuracy of that assertion. Among other things, CTIA does not provide data comparing the magnitude of the cost to industry of addressing consumer complaints with the magnitude of the revenue stream associated with being a billing agent. Nor does CTIA offer an explanation as to why alleged cost-induced incentives of

⁴⁵ Id., at 11-12.

⁴⁶ Maximizing consumer choice maximizes consumer “utility” which is a barometer of economic efficiency.

⁴⁷ CTIA, at 11.

⁴⁸ Id., at 12-13.

this type have so thoroughly failed in the wireline sector. There is no apparent reason that the carrier costs associated with wireless complaints would differ materially from the carrier costs associated with wireline complaints.

CTIA's discussion of industry initiatives is unpersuasive because the initiatives are "evolving" or tangential to the concerns at issue in this proceeding. CTIA discusses the "evolving" "CTIA Consumer Code for Wireless Service"; the "Wireless Consumer Checklist Initiative"; the "Mobile Marketing Association" guidelines; and individual carrier initiatives.⁴⁹ However, CTIA concedes that the FCC has observed that the "Checklist" does not address cramming, and simply explains that the Checklist is "an evolving document,"⁵⁰ which does not address the FCC's point that this is irrelevant.⁵¹ Furthermore, the MMA may be "flexible," but it is not a substitute for an enforceable mandate. Consumer Advocates certainly welcome carriers' voluntary design of systems whereby some carriers have rewards and penalties to encourage reputable content providers and to penalize unscrupulous ones, but these systems can co-exist with federal rules. Where the economic incentives to do third-party billing are substantial, consumers should not have to count solely on voluntary carrier initiatives to be protected from unauthorized charges on their wireless bills. Ultimately, the FCC's goals should be to ensure that (1) consumers, not industry, choose the way in which consumers use their cell phones and associated cell phone bills and (2) consumers need not rely solely on the good graces of industry to protect them from cramming. Regarding CTIA's assertion that the FCC should rely on

⁴⁹ Id., at 13-16.

⁵⁰ Id., at 14.

⁵¹ NPRM, at para. 54. (The FCC states: "With the exception of three questions in the FAQ that consumers can ask on how they can block third-party charges from their bills, however, these guidelines do not appear to address the specific practices that are the subject of the rules proposed above." Id.)

voluntary industry efforts,⁵² Consumer Advocates reiterate that they welcome voluntary measures to complement regulatory measures and also that industry is welcome to innovate above and beyond baseline consumer protection requirements.

The evidence of widespread cramming, the frustration by enforcement agencies in solving the problem, and market failure all justify strong action by the FCC. Consumer Advocates concur with the New England Commissions that the FCC should “address the ongoing and pervasive cramming issues and disregard arguments against imposition of more stringent and mandatory cramming requirements.”⁵³

III. ECONOMIC INCENTIVES RUN COUNTER TO CONSUMERS’ INTEREST

The combination of industry’s economic incentives and the inadequacy of market pressure leaves consumers insufficiently protected from fraudulent charges. Initial comments demonstrate that it is not in carriers’ financial interest to ensure that third party blocking is offered and implemented,⁵⁴ and that indeed carriers have a “*disincentive*” to address concerns.⁵⁵ Instead, telephone companies maximize their profits at the expense of their own customers.⁵⁶ Initial comments also depict cramming as essentially amounting to theft.⁵⁷

The New England Commissions demonstrate that market forces are insufficient to protect consumers adequately.⁵⁸ Among other observations, they state: “The residential wireline voice market in Massachusetts is essentially a two-provider market served by Verizon, the near-

⁵² CTIA, at 16-18.

⁵³ New England Commissions, at 17.

⁵⁴ See, e.g., 3 AGs, at 8-10.

⁵⁵ New England Commissions, at 5 (emphasis in original).

⁵⁶ See, e.g., 17 AGs, at 10.

⁵⁷ 17 AGs, at 7; see also MA AG, at 15.

⁵⁸ New England Commissions, at 4-16.

ubiquitous ILEC; and cable voice providers, including Comcast, whose franchises are based on a town-by-town basis”⁵⁹ and “strongly urge the Commission to implement more stringent and mandatory federal cramming rules.”⁶⁰

IV. NEEDED SOLUTIONS FOR CRAMMING PROBLEMS⁶¹

A. Prohibit Third-Party Landline Billing with Limited Exceptions

Many urge the FCC to either prohibit third-party landline billing (with limited exceptions) or to require default blocking of third-party landline billing (with limited exceptions).⁶² Observing that “improved telephone bill disclosures are unlikely to prevent the millions of dollars of consumer injury caused by cramming,” the FTC urges the FCC to ban or to require default blocking of some or all third-party billing.⁶³ The FTC explains: “Neither approach would depend on consumers taking affirmative action to prevent injury from a form of billing many consumers are not aware of and routinely fail to notice even as it is occurring, and even if it is disclosed on a billing statement.”⁶⁴ The FTC observes that third-party billing on phone bills is typically “a vehicle for defrauding consumers and businesses.”⁶⁵ The FTC is one of several entities to cite to the Vermont legislation.⁶⁶ The FCC could certainly seek comment on

⁵⁹ Id., at 11.

⁶⁰ Id., at 2.

⁶¹ Consumer Advocates do not repeat all of the topics that NASUCA addressed in initial comments, but stand by NASUCA’s positions that are set forth therein.

⁶² See e.g., 3 AGs, at 11; NCL at 7; 17 AGs at 2; 3 AGs at 8-11; NASUCA at 14; FTC at 5-6; Virginia SCC Staff at 5-6.

⁶³ FTC, at 2.

⁶⁴ Id., at 5.

⁶⁵ Id.

⁶⁶ At 6, footnote 19: the FTC states:

An example of this approach is the law banning third-party telephone billing enacted by the state of Vermont this year. 9 V.S.A. § 2466, available at

which categories (such as long-distance and video charges), if any, should be exempt from a ban.

As the 3 AGs state: “Because phone bill cramming continues after years of enforcement proceedings, best practices, and telephone bill disclosures, the Attorneys General respectfully submits that the only way to protect consumers from being billed on their telephone bills for products and services that they don’t want, don’t use, and didn’t agree to purchase is to ban third party charges from telephone bills.”⁶⁷ The 17 AGs similarly recommend a ban on third-party charges on wireline bill with selective opt-in for certain categories (e.g., for charges from AOL, EarthLink, and Direct TV).⁶⁸ As a second best measure, the 17 AGs recommend blocking with affirmative authorization by consumers *from* the phone number in question (to prevent fake authorizations).⁶⁹ However, the 17 AGs state that a ban is best – that enforcement proceedings, industry best practices and telephone bill disclosures are not sufficient.⁷⁰

An alternative approach would be for the FCC to require that all carriers block third-party charges unless a subscriber specifically authorizes third-party charges on an opt-in basis.⁷¹ With that approach, as the FTC observes, those subscribers that do opt in could benefit from the FCC’s proposed improved billing disclosures.⁷² Clearly industry possesses the ability to block third-

<http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=09&Chapter=063&Section=02466>. The Vermont law excepts three specific categories of third-party billing from the prohibition: (A) billing for goods or services subject to the jurisdiction of the state public service board; (B) billing for direct dial or dial around services initiated from the consumer’s telephone; and (C) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communication to or from correctional center inmates. 9 V.S.A. § 2466(f)(1). As part of consideration of a third-party billing ban, the FCC could seek comments from industry and other interested parties regarding specific categories of third-party billing for which an exemption from such a ban might be warranted.

⁶⁷ 3 AGs, at 10.

⁶⁸ 17 AGs, at 25-26.

⁶⁹ *Id.*, at 2.

⁷⁰ *Id.*, at 23.

⁷¹ FTC, at 6; see also MA AG, at 2.

⁷² FTC, at 6, footnote 21.

party billing. Verizon describes its Bill Block service that it provides at no charge.⁷³ On its website, the service comes with the following caveat: “Bill Block does not prevent associated toll charges, operator service charges, monthly fees, 900/976 calls, or dial-around charges from your long distance provider.”⁷⁴

By contrast, AT&T states: “While additional, narrowly targeted regulatory measures may be appropriate in some circumstances, a complete ban on carrier third-party billing would be grossly excessive and wholly unjustified for several reasons.”⁷⁵ Among the reasons that AT&T opposes a ban on third-party billing are the following:⁷⁶ (1) reported instances of cramming are in thousands versus tens of millions of consumers with third-party billed charges; (2) there is nothing in the record to suggest that there is much wireless cramming; (3) claims about widespread and pervasive cramming are speculative; (4) concerns about billing of “traditional” third-party services (toll, dial around and operator-assisted) (5) there are “less draconian solutions”⁷⁷ (among others, AT&T points to the investigation and imposition of penalties by agencies with law enforcement responsibilities such as the Commission); and (6) a “ban on carrier billing would adversely affect the economy.”⁷⁸ AT&T’s reasoning is not persuasive, and, if adopted, would leave the burden on consumers and enforcement agencies to detect, deter, and remedy fraud and also would allow undetected and unreported consumer harm to continue. Consumer Advocates respond as follows to each of AT&T’s six broad points: (1) complaints

⁷³ Verizon, at 5.

⁷⁴ Verizon website accessed November 3, 2011. See <http://www22.verizon.com/residentialhelp/phone/billing/privacy+and+security/unauthorized+charges+on+your+tele+phone+bill+cramming/95446.htm>.

⁷⁵ AT&T, at 2.

⁷⁶ Id., at 2-6.

⁷⁷ Id., at 2.

⁷⁸ Id., at 2-3.

represent a small portion of the consumer harm that is actually occurring;⁷⁹ (2) 16% is not an insignificant percentage, and, furthermore, as various initial comments observe, the wireless industry is likely to be a “growth” area for unscrupulous behavior (particularly if the FCC’s remedies for wireline cramming are effective, fly-by-night companies may shift to the wireless world); (3) contrary to AT&T’s view, initial comments describe ubiquitous and persistent cramming, as does the Senate Report; (4) a selective ban would address AT&T’s concern about legitimate third-party billing; (5) the numerous comments by enforcement agencies clearly demonstrate that “halfway” measures (i.e., less “draconian” ones) are ineffective, and also it would be poor public policy to rely on government agencies to pursue, investigate, and impose penalties (rather than to prevent fraud in the first place); and (6) the FCC should not be seeking to “prop up” a fraudulent industry in the name of economic growth, but instead should establish clear, strong rules that allow an industry to flourish that is based on legitimate transactions. Indeed, it is disappointing to see so little recognition within the industry of the illegitimate transactions that have so often occurred, even after the president and CEO of U.S. Telecom Association acknowledged that “cramming remains a very, very significant, very pervasive problem.”⁸⁰

AT&T’s opposition to a ban on wireline carrier billing of third-party charges is not persuasive,⁸¹ and its blocking proposals are not a substitute for an outright ban on third party landline billing.

A default of blocking would be better than the status quo, but not as effective as would be an outright ban on landline third-party billing. AT&T states that AT&T Mobility already offers

⁷⁹ Consumers may not detect problems; consumers may not expend the effort to report problems; and state agencies may not regulate the services in question (e.g., wireless and VoIP services).

⁸⁰ See NASUCA at 10-11, quoting from Senate Hearing.

⁸¹ AT&T, at 21.

blocking and provides notices regarding its availability on its website and at point of sale in the Wireless Customer Agreement and the Customer Service Summary, but does not indicate whether AT&T offers this option for its landline customers.⁸² AT&T states that it does not oppose a requirement that carriers offer third party blocking, so long as “carriers are not required to block traditional third-party services” and provided that it retains the ability to determine the format of disclosing availability.⁸³

Regardless of the specific decisions that the FCC renders regarding customer disclosure, the FCC should find that improved customer disclosure alone will not suffice to remedy cramming concerns. Consumer Advocates recommend that the FCC heed FTC’s concerns about the limitations of consumer disclosure. FTC asserts that the FCC’s proposal to require the disclosure of consumers’ option to block third-party billing is not likely to be effective because consumers typically are unaware of the option for third-party billing and therefore are unlikely to look for or understand the importance of the information that is disclosed.⁸⁴ Consumer Advocates concur that because the amounts may be relatively small, consumers may not notice them.⁸⁵ Furthermore, the increasing use of paperless bills, which consumers are less likely to scrutinize, limits the potential effectiveness of improved disclosures. Paperless bills mean customers are less likely to scrutinize their charges – with the increased use of automatic bill

⁸² Id., at 13-15. Although, as is discussed earlier in these comments, a search on the keyword “cramming” using AT&T’s search tool on its web site does not yield any information, one can “tour” the web site for a while and eventually locate information on cramming on the “Smart Controls” portion of AT&T’s web site. AT&T’s web site states: “AT&T Smart Controls is the all-in-one destination to get the most from AT&T services for your mobile phone, computer and TV. With information and tools to manage content, spending, safety, time and your location, Smart Controls lets you take control of the technology in your life.” <http://www.att.net/smartcontrols>. Site visited December 5, 2011. On the bottom right of this page, AT&T includes information about cramming, but the Smart Controls does not appear to apply to landline service, and furthermore Smart Controls are fee-based services. “AT&T Smart Limits for Wireless” is \$4.99 per month per line. <http://www.att.net/smartcontrols-SmartLimitsForWireless>. Site visited December 5, 2011.

⁸³ AT&T, at 14.

⁸⁴ FTC, at 4.

⁸⁵ Id., at 4-5.

payment, consumers often pay without even checking the details of the charges.⁸⁶

B. Require Express Authorization for Third-Party Wireless Billing

Initial comments provide further support for NASUCA's recommendation that third-party wireless billing require affirmative consent by consumers, with free blocking.⁸⁷ This measure is needed now, because, among other things, wireless use is increasing and landline use is decreasing, and it makes good sense to prevent a replication of the pervasive wireline problem in the wireless sector.⁸⁸ Consumer Advocates agree with the 17 AGs that wireless customers should have the option of having all third-party charges blocked from their account.⁸⁹ FTC limited its comments to the wireline industry, but indicates that it monitors wireless complaints.⁹⁰

A requirement for an affirmative opt-in for third-party wireless billing would address AT&T's concern that a ban would harm the economy⁹¹ and similarly would be consistent with Sprint's view that third-party billing to wireless accounts is easy and convenient for consumers.⁹² Those customers that seek the ease and convenience of such billing would still have the option to affirmatively select that mechanism.

⁸⁶ *Id.*, at 5, citing FTC Cramming Forum, May 11, 2011, at 209-210. <http://www.ftc.gov/bcp/workshops/cramming>. See also, 17 AGs, at 19-20; MA AG, at 9; California PUC, at 2.

⁸⁷ See, e.g., 17 AGs, at 3, 27-28; Michigan, at 2-3; Florida AG, at 2; Public Interest Commenters, at 2-3; MA AG, at 18 (stating: "If wireless customers wish to bill third-party charges (such as for applications and ringtones) to their wireless bills, they should be given the option to elect to do so, but the option should be consumer-initiated rather than industry-determined").

⁸⁸ 17 AGs, at 27.

⁸⁹ *Id.*, at 27-28. (The 3 AGs recommend that the Commission ban wireline as swiftly as possible and then turn to wireless. 3 AGs, at 11. Consumer Advocates concur that the first priority should be to address wireline cramming, but also urge the FCC also to adopt a required opt-in for third party wireless billing now.)

⁹⁰ The FTC explains that its law enforcement experience is primarily in the landline area, that mobile platforms may necessitate a different approach, and that it limits its comments to landline but recommends that the FTC and FCC "should vigilantly monitor cramming complaints." FTC, at 2, footnote 5. As these comments demonstrate, Consumer Advocates, by contrast, recommend that the FCC not only "vigilantly monitor" wireless cramming complaints, but also establish now a requirement for consumers to affirmatively opt-in to third-party billing.

⁹¹ AT&T, at 11-13.

⁹² Sprint, at 5.

Sprint states that it “maintains a consumer-friendly approach to customer disputes of third-party charges,”⁹³ that it provides customer education of a “double opt-in process,”⁹⁴ and that it has a “liberal refund policy.”⁹⁵ An FCC requirement that carriers establish a default of blocking third-party billing with an opt-in possibility for consumers would be consistent with Sprint’s consumer-friendly policies. Similarly such a requirement would be compatible with the incentive system and consumer protection measures that Sprint describes (e.g., an incentive system with higher revenue shares for aggregators that demonstrate compliance with Sprint Standards and MMA Best Standards and lower revenue shares for those that do not comply and/or that have high refund rates; and Sprint’s reservation of its right to terminate aggregators, content providers or “individual short code campaigns”).⁹⁶ Furthermore Sprint customers already can request the ability to block third-party purchases free of charge, which demonstrates that the capability exists.⁹⁷

C. Adopt the Proposed Regulation on Better Separation of Third-Party Billings

There appears to be no opposition to a requirement that carriers separate third-party charges on bills.⁹⁸ The FCC should adopt a rule that incorporates this requirement. However, it is important that the FCC acknowledge that a separate page requirement is not in and of itself sufficient to deter third-party billing. The FTC cites to two FTC enforcement actions as evidence that a separate page for the third-party billing does not address problem – *Inc21*, 745 F. Supp. 2d

⁹³ Id., at 6.

⁹⁴ Id.

⁹⁵ Id., at 7.

⁹⁶ Id., at 7-8.

⁹⁷ Id., at 11.

⁹⁸ See, e.g., Michigan PSC, at 3; Public Interest Commenters, at 5; Frontier, at 4. The CPUC’s rules already require clear disclosure of third party billing on consumers’ bills. CPUC, at 6-7. Furthermore, carriers already separate third-party charges on their wireline bills and indicate that they would not oppose such a requirement provided that it can format as it chooses. See, e.g., AT&T, at 15-16; CenturyLink, at 10-11.

and *FTC v. Nationwide Connections, Inc.*, No. 06-80180. For example, in *Nationwide Connections*, a convicted felon ran a cramming operation from his jail cell, collecting more than \$34 million even though the charges were on a separate page.⁹⁹ When consumers do not authorize charges, they do not think to scrutinize their bills.

V. STATE ROLE

A. Enlist the States in Complaint Resolution and Enforcement Activity.

Consumer Advocates support a visible and “front-line” role for those states that seek to deter cramming and to enforce anti-cramming measures. ILD suggests that the required placement of Commission contact information on consumer bills will “inundate” the Commission with the day-to-day consumer communications.”¹⁰⁰ Similarly, TCA contends that FCC contact information will “create confusion and be an inefficient method of resolving cramming issues” because consumers are used to viewing the state commission as the first place for complaints.”¹⁰¹ The New England Commissions express concern about possible confusion as to whether consumers should contact a state agency or the FCC.¹⁰² The California PUC states, “In order to successfully enforce cramming rules . . . , a state commission must be informed of complaints and problems.”¹⁰³ As indicated in NASUCA’s initial comments, Consumer Advocates agree with these observations. The overriding concern is that any rules that the FCC adopts regarding contact information not prevent consumers from first contacting their state agencies.

⁹⁹ FTC, at 5.

¹⁰⁰ ILD, at 4.

¹⁰¹ TCA, at 3.

¹⁰² New England Commissions, at 21-23.

¹⁰³ California PUC, at 7.

Furthermore, the FCC and FTC should share complaint data.¹⁰⁴ Consumer Advocates concur with the FTC that to “ensure the most efficient deployment of resources, state and federal regulators and enforcement authorities must readily share their cramming complaints.”¹⁰⁵ Specifically, FTC recommends that the FCC and state regulators submit their cramming complaints to “Consumer Sentinel” and use Consumer Sentinel to search cramming complaints.¹⁰⁶ According to FTC, Consumer Sentinel is secure and enables complaints to be shared quickly among all of its members.¹⁰⁷ Consumer Advocates support and welcome the use of Consumer Sentinel.

Consumer Advocates also concur that the FCC should support the coordination of voluntary sharing of complaints and information with states and also support requiring providers to report “trends and spikes involving specific third-party vendors to appropriate federal and state agencies.”¹⁰⁸ Any reporting requirements that the FCC establishes should include a requirement to file reports with state commissions as well.¹⁰⁹ The diffuse reporting of complaints makes it hard to gauge the overall impact on consumers and makes it difficult to determine where and when to focus enforcement actions. Consumer Advocates concur with New England Commissions:

As part of its federal-state coordination inquiries, the Commission asks whether carriers should report trends or spikes in complaints they receive relating to specific third-party vendors to the “appropriate” federal or state regulatory agency. Because carrier interpretation of what constitutes an “appropriate” agency

¹⁰⁴ 17 AGs, at 20.

¹⁰⁵ FTC, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, citing <http://www.ftc.gov/sentinel/factsheet.pdf>.

¹⁰⁸ New England Commissions, at 25. See also Florida AG, which recommends that the FCC require all telephone companies to submit annual reports detailing complaints regarding third-party billing and that those reports be available to state attorneys general. Florida AG, at 2.

¹⁰⁹ CPUC, at 16.

for reporting third-party vendor data may vary, the New England Commissions urge the Commission to require *all* voice providers (traditional wireline, wireless, and interconnected VoIP) to report such data to specific requesting entities, including the Commission itself, the FTC, state commissions, and state attorney general offices. This requirement should even apply to those providers over which certain states may not currently assert jurisdiction (i.e., wireless and/or interconnected VoIP providers) in order to help assist in their broader consumer protection and public interest obligations.¹¹⁰

This recommendation is particularly important because some states have relinquished authority over VoIP and wireless: regardless of the technology that consumers use for voice traffic, and particularly and precisely because consumers are migrating to new platforms, it is important that the FCC establish adequate consumer protection to prevent anti-cramming for all services.

B. The Commission should recognize and preserve the essential role to be played by the states.

Even a ban on third-party billing will not by itself solve the problem. As NASUCA observed in its initial comments,¹¹¹ such a ban will require exceptions. The exceptions are called for not because the types of billings to be excepted invariably involve an authorized charge but rather because the types of billings to be excepted serve legitimate needs.

AT&T directs attention to “traditional” third-party services, “such as toll, dial around, correctional inmate calls, directory services, operator-assisted services, and other adjunct-to-basic services,” observing that such services “generally are not blocked by . . . blocking options.” AT&T contends that such services “are not the primary source of cramming complaints.”¹¹²

Consumer Advocates disagree. Cramming is a multi-dimensional problem, so it is difficult to label any one type of billing as “the” primary source of cramming complaints.

¹¹⁰ New England Commissions, at 26.

¹¹¹ NASUCA, at 15, 26.

¹¹² AT&T, at 2, 7, 14.

“Traditional” services of the type enumerated by AT&T are, however, one of the primary sources of cramming complaints. As NASUCA observed two years ago:¹¹³

Consumers have frequently complained of unauthorized charges for collect telephone calls. For example, in 2003, there were twenty-four Iowa complaints that 00 Operator Services a/k/a Talk Too Me Ltd. sent unauthorized bills in the amount of \$28.84 for a three-minute collect call from Las Cruces, New Mexico 505-524-4104. In 2005, there were eleven complaints that Access One Communications or Nationwide Connections billed consumers between \$5.00 and \$8.00 for a single domestic collect call. Similar complaints against other companies have been received with regularity, as recently as 2009. The companies commonly respond their systems are foolproof, that the charges could not be incurred unless the calls were accepted, as, for example, by pressing a “1.” Yet consumers are commonly prepared to testify to the contrary, and the number of such complaints, among other factors,¹¹⁴ often lends credibility to their complaints. At times, there is evidence the complaints are symptomatic of a larger problem,¹¹⁵ or reason to suspect they might be.¹¹⁶

There have been frequent complaints about unauthorized charges for other types of traditional telephone services, including billings for long distance calls,¹¹⁷ directory assistance, 800 calls, 900 calls, calling card calls and repair services. In

¹¹³ NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158, *et al.* (Oct. 13, 2009) at 49-52 (footnotes in original but renumbered).

¹¹⁴ In one case, the collect call was supposedly placed to a fax line at a school at 4:12 a.m. on Sunday. In another, a collect call from a sex hotline was supposedly received at the home of a 65-year old grandmother who lived alone; the company produced a voice recording allegedly showing the calls were accepted by a male who identified himself as “Marcus Welby.”

¹¹⁵ In the case of Access One Communications and Nationwide Connections, FTC press releases dated March 15, 2005, September 26, 2006 and October 25, 2007, revealed “a massive fraudulent billing scheme” that collected “more than \$30 million in bogus collect call charges from millions of consumers.” *See* <http://www.ftc.gov/opa/2007/10/nationwide.shtm>.

¹¹⁶ A California private class action against Evercom Systems, Inc. and T-Netix, alleging class members were incorrectly charged for collect calls from correctional facilities as a result of systematic defects in the companies’ inmate calling platforms, was settled on terms including free inmate call minutes up to \$400,000 in retail value to class members. The companies vigorously denied each and every allegation in the case. Securus Technologies, Inc., SEC Form 10-K, FYE-12-31-05, p. 26.

¹¹⁷ In 2006 and 2007, almost three hundred Iowans lodged complaints with the state commission against Buzz Telecom. A significant number were cramming complaints, in which consumers alleged (and, frequently, local carriers confirmed) that Buzz Telecom had been unable to switch their long distance service due to a freeze but had nevertheless billed for the service. In 2007, a second wave of complaints, against the company that succeeded to the accounts of Buzz Telecom, Ultimate Medium Communications Corp. or UMCC, alleged billings for long distance service when in fact no service was provided, after service was terminated, for calls that were not placed and for calls that were previously billed and paid.

one case, the recipient of a calling card call was allegedly billed, without authorization, when the company determined the calling card had expired. In another, directory assistance charges were allegedly billed to a fax line

In 2004 and 2005, there were numerous “modem hijacking” complaints, against multiple companies, in which hackers apparently invaded consumer computers and placed long distance calls, supposedly to remote locations on the globe, often to pornographic websites, then succeeded in having the considerable charges billed to the consumer’s local phone bill. The Iowa consumer advocate sought penalties against a number of companies, among them proceedings on thirteen of the complaints against One Call Communications a/k/a Opticom a/k/a OCMC, Inc.¹¹⁸ The facts in these cases resembled those in *Verity*, in which charges for access to pornographic websites were billed as long distance calls to Madagascar, when in fact the calls were “short-stopped” in London. . . . [D]iscovery revealed that, from July through November 2004, One Call billed Iowans \$40,790.95 for calls to three United Kingdom numbers. Of the total billed, 55.9 percent was refunded to customers. As the court held in *Verity*, such evidence can support an inference that many of the complaints are true.¹¹⁹

Similarly, the California PUC recently noted reports from billing agents of calls from between 89,000 and 125,000 (or more) Californians expressing dissatisfaction with the placement of charges for a directory assistance service on their telephone bills.¹²⁰

Because such “traditional” types of billings may serve legitimate needs, they may need to be excepted from a ban on third-party billings. Because such “traditional” types of billings are a primary source of cramming complaints, however, they will at times need to be policed.

¹¹⁸ One complainant wrote: “I am writing to inform you of a malicious computer virus that has installed itself on my home PC. This virus automatically installs a dial-up access program to a pornographic website, operated out of the United Kingdom. To date, I have received billings for three phone calls, via modem, to the United Kingdom, and a billing for pay-per-view access to the site. This virus appeared while I was on the computer so I can confirm that I never downloaded this program or authorized access to this site. This virus installs a shortcut icon on my desktop, showing the face of a young woman. This is quickly followed by a pop-up showing a pornographic image of the same woman and a paragraph with an ‘I accept’ button on the bottom right corner. I do not know what the paragraph says, as I attempt to delete the pop-up as soon as it comes up. I can say that I never clicked the “I Accept” button I have received billing for the phone numbers 442073350525 and 4420733584. These phone charges were billed by my local and long distance carrier, Qwest, billing on behalf of ‘USBI,’ who was billing on behalf of ‘One Call Comm’ and ‘TELISS’ I have made four attempts to delete the program and its associated shortcut icon. After each deletion, the program re-installs itself.”

¹¹⁹ *FTC v. Verity Intern. Ltd.*, 335 F.Supp.2d at 479, 492, 498 (S.D.N.Y. 2004).

¹²⁰ Order Instituting Investigation into the Operations of Telseven, Inc., No. I.10-12-010 (Cal. Pub. Util. Com’n Dec. 21, 2010), available at http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/128709.pdf.

Billing Concepts questions the Commission’s estimate that 15 to 20 million American households per year may experience cramming. It alleges that its own data indicate cramming levels of approximately 0.25 percent.¹²¹ PaymentOne Corp. asserts the Commission’s estimate is “inflated” and “stale.” It contends “most transactions that are labeled as crams are in fact authorized,” most being cases of “buyer’s amnesia” or “buyer’s remorse.”¹²²

Neither company offers data to support these claims, which contradict not only the Commission’s estimate but also the Senate Commerce Committee staff’s conclusions following an extensive study. It may be that the dual spotlights of a Congressional investigation and Commission enforcement and rule-making activity have produced some recent improvement. But that is no reason to understate the magnitude of the problem. There is also the potential, even likelihood, that the problems will resurge if or when the spotlights are dimmed.

Nor is it possible in most cases to resolve with any acceptable degree of reliability that a consumer is mistaken or lying, or suffering from “amnesia” or “remorse,” except upon investigation and at times hearing and evaluating the evidence. This reality probably helps explain the Commerce Committee staff’s acknowledgement that it could not determine the precise percentage of charges that are in fact unauthorized. The arguments of Billing Concepts and PaymentOne are flawed because they fail to include any like acknowledgement.

Consumer Advocates re-emphasize what NASUCA said two years ago:

Because the companies commonly dispute the consumers’ version of the facts, neither side’s allegations can be reported as adjudicated fact. On the contrary, reflective of the industry’s complexity, the relevant facts are often concealed in a proverbial black box. That is all the more reason why some of the cases should be pursued, and heard if necessary, in order to identify the sources of difficulty and secure appropriate corrections. Alternatively, because the primary responsibility for developing solutions lies with the industry, if the cases are

¹²¹ Billing Concepts, at 5-6.

¹²² PaymentOne, at 8-9.

allowed to proceed, and then settled upon payment of initially modest civil monetary penalties, the companies will have the needed incentive to make the needed corrections.¹²³

Securus alleges that recent intensification of efforts to curb cramming has increased its costs. It alleges that local exchange carrier (“LEC”) billing agreements contain onerous requirements, including a \$150 fee for each customer that simply claims a call is unauthorized.¹²⁴ These allegations highlight a possible difficulty associated with reliance on the private sector to remedy the cramming phenomenon. It is problematical to assume a complaint is true.

It is equally problematical, however, to assume a complaint is false. Securus alleges that it “thoroughly investigate[s]” alleged crams and “unequivocally determine[s] that each and every call was authorized and accepted.”¹²⁵ Consumer Advocates disagree. The Iowa case cited by Securus is instructive.¹²⁶ Securus subsidiary Evercom had responded to a complaining consumer with a form letter stating:

After a thorough investigation, no equipment problems or other billing failures that would result in inaccurate charges were found at the correctional facility where the calls originated. Therefore, no credits will be issued to your account for these particular telephone calls. You may wish to consult with your employees, family members, or others who have had access to this telephone on the dates the calls were accepted to determine who might have accepted the calls.

In fact, the complaint was legitimate. Evercom’s statement that it had conducted a thorough investigation was not true.¹²⁷ As Evercom later admitted, neither the consumer nor anyone at his

¹²³ NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158, *et al.* (Oct. 13, 2009) at 48-49.

¹²⁴ Securus, at 3-6.

¹²⁵ *Id.*, at 5.

¹²⁶ *Evercom Systems, Inc. v. Iowa Util. Bd.*, ___ N.W.2d ___ 2011 WL 4862946 (Iowa 2011). According to the record in the case, Evercom Systems, Inc., is a wholly owned subsidiary of Securus, but without separate financial statements.

¹²⁷ Among other things, Evercom could have checked its own call records. They showed 102 dialing attempts to the consumer’s telephone number on the day in question. That fact would have had to put fraudulent

small business had accepted, or even received, the calls.

On the undisputed facts, Evercom's call processing system had been misconfigured.¹²⁸ The company had failed to take two known measures¹²⁹ that it needed to take in order to prevent a type of inmate fraud it knew about and referred to as "glare."¹³⁰ As a result, inmates were able to game the system, and they did. Not only were the charges complained of unauthorized, but the illegitimate inmate activity jammed the system. On a recording of one of the calls in question, an inmate was heard to say, in vulgar terms, that the inmates were upset about all of the phone calls coming in and the resulting malfunctioning. He said that the other party to the call would need to write letters until "Evercom gets straightened out."

The Iowa Supreme Court's decision turned on the law. Specifically, it turned on an Iowa Utilities Board rule defining "cramming" to exclude "telecommunications services that are initiated or requested by the customer, including dial-around services such as 10-10-XXX, directory assistance, operator-assisted calls, acceptance of collect calls, and other casual calling

inmate activity at or near the top of the list of possible explanations. Evercom could also have checked whether records from the LEC or long distance carrier would substantiate its disputed claim that the calls went through to the consumer's phone. Such a check would have confirmed they did not go through, as no such records would exist.

¹²⁸ The key to Evercom's system is software developed by Evercom. The software has not been certified by any public or accredited private body. The attachment of Evercom's equipment to the public network is unregulated. *In re Biennial Regulatory Review*, 15 F.C.C.R. 24944 ¶ 1 (FCC 2000).

¹²⁹ The first was to ask the LEC to provision the inmate lines for outbound traffic only. The second was to activate a feature known as "dial tone detection" on Evercom's call processor at the correctional facility.

¹³⁰ According to the Alliance for Telecommunications Industry Solutions, "glare" is synonymous with "call collision" and refers to two calls originated at separate points simultaneously seizing the same transmission path. It can be, but is not necessarily, the result of fraud. It all but disappeared on the public switched telephone network in the late 1990s, but it has not disappeared on Evercom's system. Evercom claimed the problem was "rare" in its experience. The Iowa Supreme Court so stated, but the statement was not essential to the Court's decision. Evercom's claim rested on testimony that Evercom was "aware of only about 215 investigated incidents" of glare, so "over 99.99992% of [its] accounts . . . [do] not involve" such fraud. When asked in discovery about other incidents of fraud, however, Evercom had stated "the results of the investigation may not be noted on individual customer's accounts," so Evercom "cannot research its system to provide an answer." Evercom's inability to research its system cast doubt on the meaningfulness of the number of incidents it was "aware of" and hence on its statistical analysis. An Evercom slide presentation cast further doubt on the veracity of the statistical analysis, giving "glare" more prominence than would be justified economically by an issue affecting only .00008% of accounts. See also note 116 above.

by the customer.” The Court held: “a proper reading of the rule excludes all disputes regarding billing for collect calls from the definition of cramming.” This holding reversed the Board’s prior interpretation of the rule, under which a collect call had been excluded from the definition of cramming if and only if the call was accepted. The Court’s holding illustrates Consumer Advocates’ point that efforts to craft exceptions can produce gaps in consumer protections.

The Iowa Court left the Iowa Board free to rewrite the rule. In comparison with the allegedly overzealous measures instituted by the LECs, the \$2,500 civil monetary penalty assessed by the Iowa Board, had it stood the test of judicial review, might have done a more effective and more measured job of giving Securus a needed incentive to take the known actions that will prevent the fraudulent activity and hence the unauthorized billings. Solutions along these lines hold promise of alleviating and eliminating the problem. The states should remain free to continue to work to fashion such solutions.¹³¹

VI. LEGAL AUTHORITY

A. The Commission has authority to regulate or prohibit both cramming and third-party billing under 47 U.S.C. § 201(b).

Relying on the Commission’s 1986 order that detariffed billing and collection services,¹³² industry commenters argue that third-party billing is a financial and administrative service, not a common carrier or communications service, and so the Commission lacks authority to regulate it under 47 U.S.C. § 201(b).¹³³ Under the statute, however, the question is not whether a practice is

¹³¹ 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]”); *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (“scienter never has been required for violations of public welfare regulations”).

¹³² *Detariffing of Billing and Collection Services*, FCC 85-146, 102 F.C.C.2d 607 (1985).

¹³³ See, for example, *AT&T*, at 17-18; *CenturyLink*, at 17-19.

itself a communications service. The question is whether the practice is “in connection with” a communications service.¹³⁴

The Commission proposes to answer the question in the affirmative. As stated in the NPRM, the Commission has determined that the practice of cramming is an unreasonable practice in violation of section 201(b).¹³⁵ The Commission explains:

We believe that we have authority under Section 201(b) to adopt these rules Section 201(b) requires that all “practices . . . in connection with” common carrier services be “just and reasonable.” As the Commission has explained before, “the telephone bill is an integral part of the relationship between a carrier and its customer.” Third-party charges appear on a telephone bill only because the carrier generating the bill has permitted them to be placed there by the third-party or its agent. Furthermore, if it is not clear on the bill specifically what the charge is for and who the service provider is, a consumer may believe that the charge is related to the common carrier service. As explained above, the problem of crammed third-party charges depends on and arises from the relationship between the common carrier and the consumer.¹³⁶

This proposed position conforms with the common meaning of the word “connection,” which is “a relationship in which a person, thing or idea is linked or associated with something else” or “the action of linking one thing with another.”¹³⁷ A telephone company’s billing practices are linked to, and associated with, the its provision of telephone service.

This proposed position also conforms with the Commission’s recent enforcement advisory, which similarly concludes that cramming, including unauthorized third party billing, is

¹³⁴ The statute provides: “All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.” 47 U.S.C. § 201(b).

¹³⁵ NPRM ¶ 3 & n. 2.

¹³⁶ *Id.* ¶ 85.

¹³⁷ *The New Oxford American Dictionary* (2001)

an unjust and unreasonable practice under section 201(b).¹³⁸ The proposed position conforms with the recent notices of apparent liability for cramming, in violation of section 201(b), in the *Norristown, Main Street, Cheap2Dial* and *VoiceNet* cases, each of which involved the placement of third-party charges on consumer phone bills.¹³⁹

Nor is the Commission's reliance on section 201(b) in this context new or surprising. The truth-in-billing regulations, which apply to both wireline and wireless carriers,¹⁴⁰ "were adopted in large part to deter unscrupulous practices, such as 'cramming.'"¹⁴¹

As the Commission explained years ago:

We . . . have seen growing consumer confusion concerning the provision of [new consumer] services and an increase in the number of entities willing to take advantage of this confusion. The most glaring manifestations of consumer confusion may be the dramatic growth in the number of slamming and cramming complaints received by the Commission and the states [O]ur review of the complaints received by this Commission plainly demonstrates that the difficulty consumers experience in trying to understand their bills for telecommunications service has been a significant, contributing factor in the growth of these fraudulent activities Since, for most consumers, the monthly telephone bill is their primary source of information and point of contact with respect to their telecommunications services providers, these complaints are strong evidence that consumers are not getting necessary information in a format that allows them to make informed choices in this market

Nor are we alone in this concern. Virtually every state and consumer advocacy group that commented in this proceeding urges us to take action to address the growing problem of consumer confusion with their telephone bills. Similarly, our colleagues at the Federal Trade Commission assert that intervention on our part is necessary to help consumers avoid "falling prey" to unscrupulous service providers who hide or mislabel unauthorized charges on consumers' telephone bills. Several members of Congress also have identified consumer confusion with their telephone bills as a growing concern that should be addressed

¹³⁸ FCC Enforcement Advisory, 26 F.C.C.R. 8511 (2011).

¹³⁹ See NASUCA, at 21-22.

¹⁴⁰ See *Truth-in-Billing and Billing Format*, FCC 05-55, 20 F.C.C.R. 6448, ¶¶ 14-19.

¹⁴¹ *Truth-in-Billing and Billing Format*, FCC 09-68, 24 F.C.C.R. 11380, (2009) ¶ 40.

by this Commission.¹⁴²

The truth-in-billing rules invoke the authority of section 201(b).¹⁴³ They were intended to,¹⁴⁴ and do,¹⁴⁵ regulate third-party billing. They thus refute the argument that past exercises of Commission authority have been limited to carriers' billings of their own charges.¹⁴⁶

The Commission's current proposed position is reinforced by the observations of the *Inc21* court. The court, expressing dismay at the "vulnerable underbelly of a widespread and under-regulated practice called LEC billing," directed attention to the way in which LEC billing has attracted "fraudsters," who "easily exploit" the "dubious" assumptions that consumers scrutinize their phone bills and that LECs are vigilant about allowing only authorized third-party charges to appear on their phone bills.¹⁴⁷

The Commission's current proposed position is also reinforced by the recent report of the Senate Commerce Committee staff. The report states: "*at its most basic level cramming is*

¹⁴² *Truth-in-Billing and Billing Format*, FCC 99-72, 14 F.C.C.R. 7492, (1999) ¶¶ 3-4 (footnotes omitted).

¹⁴³ *Id.* ¶¶ 24, 29.

¹⁴⁴ "We find that consumers' discovery of fraudulent charges would be prompted by noticing that an unfamiliar service provider has charges appearing on the bill. Indeed, because cramming complaints most commonly emanate from charges levied by service providers that do not have a pre-existing business relationship with the consumer, highlighting the name of a new service provider should prompt a subscriber to examine closely the particular charges billed by that provider and facilitate detection of cramming In our view, clear identification of new service providers will appropriately signal to consumers the need to scrutinize their bills to make sure that they are being billed only for authorized services." *Id.* ¶ 34.

¹⁴⁵ The truth-in-billing rules require that the name of the service provider associated with each charge be clearly and conspicuously identified on the telephone bill; they require that the charges of multiple carriers be separated by service provider; they effectively prohibit the listing of a toll-free number for a billing agent, clearinghouse or other third party unless the billing agent, clearinghouse or other third party possesses sufficient information to answer questions concerning the subscriber's account and is fully authorized to resolve the consumer's complaints on the carrier's behalf. 47 C.F.R. § 64.2401.

¹⁴⁶ See *CenturyLink*, at 16-17.

¹⁴⁷ *FTC v. Inc21.com*, 688 F.Supp.2d 927, 929 (N.D.Cal. 2010), *appeal pending*, No. 11-15330 (9th Cir.).

about obtaining telephone numbers” (emphasis added).¹⁴⁸ The report notes that following the Commission’s 1986 detariffing decision, the telephone companies opened their billing and collection systems to new third-party companies offering a variety of services, some completely unrelated to telephone service, and, for the first time, telephone numbers worked much like credit card numbers. The report noted that many third-party vendors appear to be created solely to exploit the weaknesses of third-party billing.¹⁴⁹

Moore v. Verizon Communications, Inc.,¹⁵⁰ cited by CenturyLink,¹⁵¹ is a private class action. Insofar as the dismissal of the private section 201(b) claim is concerned, the court, based largely on the Commission’s 1986 detariffing order, accepted the defendants’ argument that “third-party billing and collection services provided by LECs are not considered a ‘communications service’ within Title II of the Act.” The court, however, did not address the Commission’s current proposed position that third-party billing and cramming are practices “in connection with” a telecommunications service. That position was not before the court, and the decision includes no substantive consideration of the statutory “in connection with” language. The court is, however, attentive to the Commission’s past guidance on the subject.¹⁵² Were the Commission’s current proposed position finally approved by the Commission and crystallized in

¹⁴⁸ This observation echoes the Commission’s observations in the *Norristown, Main Street, Cheap2Dial* and *VoiceNet* cases. See, for example, *Norristown Telephone Co., LLC*, FCC 11-88, 26 F.C.C.R. 8844 (FCC 2011) ¶ 14 (“The only information that consistently belonged to the customer whom the Company charged was, in fact, his or her telephone number”).

¹⁴⁹ Senate Report, at 1, 3-4, 11-12, 20, 22.

¹⁵⁰ ___ F.Supp.2d ___, 2010 WL 3619877 (N.D. 2010). The court upheld as sufficient to survive a motion to dismiss claims under the Racketeer Influenced Corrupt Organizations Act against Verizon and other defendants that the third-party billing and collection system lacks sufficient safeguards to prevent cramming.

¹⁵¹ CenturyLink, at 18.

¹⁵² See *Brittan Communications Intern. Corp. v. Southwestern Bell Telephone Co.*, 313 F.3d 899, 904 (5th Cir. 2002) (“The district court aptly looked for guidance from the FCC -- the agency charged with administration of the Communications Act”).

a rule or rules, a court would likely be similarly attentive .

CenturyLink argues that most third party billings are not “inextricably intertwined” with the carrier’s service.¹⁵³ Although such inextricable intertwining was an aggravating circumstance in the *LDDI* case cited by CenturyLink,¹⁵⁴ it is not a prerequisite for jurisdiction. As indicated above, the statute simply requires a “connection” between the unjust or unreasonable practice, on the one hand, and the communications service, on the other. In the case of telephone cramming, that connection is supplied by the telephone bill.

The aggravating circumstances also occur more often than CenturyLink is prepared to admit.¹⁵⁵ In the *Verity* case, for example, charges for access to adult web content were disguised as long distance phone calls.¹⁵⁶ That is just one of the ways in which telephone bills have been used as instruments to perpetuate fraud, with resulting billing and collection of unauthorized charges. Also frequent are the occasions on which telephone bills have not contained sufficient information to enable consumers to determine what the charges were for, and have otherwise confused consumers, again with resulting billing and collection of unauthorized charges.

The picture that emerges, and that has emerged for many years, is one of frequent abuse and exploitation of the telephone bill. The only reasonable conclusion that can be drawn is the one the Commission proposes to draw, that the placement of third-party charges on phone bills, often without the consumer’s authorization, is “in connection with” the telephone service.

¹⁵³ CenturyLink, at 18-19.

¹⁵⁴ *Long Distance Direct, Inc.*, FCC 00-46, 15 F.C.C.R. 3297 (2000).

¹⁵⁵ CenturyLink, at 18-19.

¹⁵⁶ “The telephonic system at dispute in this appeal . . . was designed and implemented to ensure that consumers paid charges for accessing pornography and other adult entertainment. The system identified the user of an online adult-entertainment service by the telephone line used to access that service and then billed the telephone-line subscriber for the cost of that service as if it were a charge for an international phone call to Madagascar.” *FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 51 (2d Cir. 2006).

B. Ancillary Authority

For the reasons stated in the previous section, the Commission has jurisdiction under Title II to regulate the third party billing practices of wireline and wireless companies, so there is no need for the Commission to consider or exercise its ancillary jurisdiction under Title I.¹⁵⁷ With respect to interconnected VoIP services, although Consumer Advocates again reiterate their position that VoIP services are telecommunications services which should be treated unambiguously as such, and hence also reached under Title II,¹⁵⁸ it does not matter for present purposes whether such services are telecommunications services or information services under the Communications Act, because in the latter case there is ancillary jurisdiction under Title I.¹⁵⁹

There are two legal requirements for ancillary jurisdiction. First, the Commission's general jurisdiction grant under Title I must cover the regulated subject.¹⁶⁰ This requirement is met, because the provision of interconnected VoIP is "communication by wire or radio" within the general jurisdictional grant of section 2 of the Act.¹⁶¹

Second, the regulations must be reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.¹⁶² The Commission has previously

¹⁵⁷ As the Commission observes, the Commission has taken the position that its Title I ancillary authority extends to a carrier's provision of billing and collection services to third parties that are not carriers. NPRM ¶ 85.

¹⁵⁸ *Connect America Fund, et. al.*, WC Docket No. 10-90, *et al.*, NASUCA and New Jersey Rate Counsel Reply Comments on Section XV of the NPRM (April 18, 2011), pp. ii, 8.

¹⁵⁹ See *Connect America Fund, et. al.*, FCC 11-161 (Nov. 18, 2011) ¶ 63.

¹⁶⁰ *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

¹⁶¹ *Proposed Extension of Part 4 of the Commission's Rules regarding Outage Reporting to Interconnected Voice over Internet Protocol Service Providers and Broadband Internet Service Providers*, FCC 11-74, 26 F.C.C.R. 7166, ¶¶ 68-69 and nn. 137, 139, citing 47 U.S.C. § 152; *Comcast*, 600 F.3d at 646-47; *IP-Enabled Services, Report and Order*, 24 F.C.C.R. 6039, 6045, ¶ 10 (2009); *Wireline Broadband ISP Order and NPRM*, 20 F.C.C.R. at 14914 ¶ 110.

¹⁶² *Comcast*, 600 F.3d at 646.

asserted ancillary jurisdiction over VoIP providers in other contexts,¹⁶³ on multiple occasions extending certain Title II obligations to interconnected VoIP providers.¹⁶⁴

In 2005, for example, the Commission required interconnected VoIP providers to supply E911 capabilities to their customers, on a reasoning that its plenary numbering authority under section 251(e) of the Act gave it ancillary jurisdiction to adopt the rules as a means of protecting the public safety. As noted in the NPRM, that action was upheld.¹⁶⁵ Protecting the public from unjust and unreasonable practices, as provided in section 201(b), is not fundamentally different from protecting their safety.

There is also no reason that consumer protections should vary from one mode of voice service to another. They should rather apply uniformly across the modes. Uniformity would assure that all consumers receive the same protections. It could increase consumer confidence in the entire industry, encouraging more broadband investment and deployment, thus promoting competition in the local telecommunications market. That is another statutory basis for the Commission's exercise of authority, and hence a further basis for ancillary jurisdiction.¹⁶⁶

VII. CONCLUSION

Consumer Advocates urge the FCC to adopt strong anti-cramming rules in a timely manner to prevent further consumer harm. Effective anti-cramming measures also would be entirely compatible with good business practice by the industry. As the Michigan PSC states:

¹⁶³ NPRM n. 160, citing, for example, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCCR, 10245, 10261-66 ¶¶ 26-35 (2005) (rules requiring VoIP providers to supply enhanced 911 capabilities to their customers), *aff'd sub nom., Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2007).

¹⁶⁴ *IP-Enabled Services*, FCC 09-40, 24 F.C.C.R. 6039 (2009) ¶ 5; *Telephone Number Requirements for IP-Enabled Services Providers, et. al.*, FCC 07-188, 22 F.C.C.R. 19531 (2007) ¶ 14.

¹⁶⁵ See note 163 above.

¹⁶⁶ See *IP-Enabled Services*, FCC 09-40, 24 FCCR 6039 ¶ 13 & n. 43 (2009).

The MPSC believes that carriers should already be doing much of what is being proposed in the NPRM as simply good business practice. Any cost estimates that the carriers may submit for complying with the proposed rules should be adjusted to reflect the difference between the cost of implementing the proposed rules and the cost of the practices that the companies already should have been performing to protect their customers from cramming. Currently, the carriers have a monetary incentive to allow third party vendors to use the carriers' bills to charge the carriers' customers, but not for following best practices to prevent cramming.¹⁶⁷

Effective anti-cramming measures would offset the compelling economic incentives that now exist for carriers and vendors to permit unauthorized charges to appear on wireline and wireless bills.

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¹⁶⁷ Michigan PSC, at 6.