

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date : November 7, 2013

To : The Commission
(Meeting of November 14, 2013)

From : Lindsay Brown
Public Utilities Counsel IV

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Subject : Filing of Comments in Response to FCC's Consumer and
Governmental Affairs Bureau Public Notice Seeking to Refresh the
Record on Cramming

RECOMMENDATION: The California Public Utilities Commission (Commission) should file comments in the Federal Communications Commission's (FCC) Further Notice of Proposed Rulemaking (*FNPRM*) on anti-cramming rules¹ in response to the FCC's Consumer and Governmental Affairs Bureau Public Notice issued on August 27, 2013 (Notice), seeking to refresh the record on cramming.² The FCC seeks comment on whether stronger measures to prevent cramming on wireline and commercial mobile radio service (CMRS or wireless) consumer bills are necessary, such as requiring billing telephone companies to obtain consumers' affirmative consent before placing third-party charges on their own bills to consumers ("opt-in") and the "mechanics" of an opt-in requirement for both wireline and wireless carriers.³ Staff recommends that the Commission support a prohibition or an "opt-in" requirement, with limited exceptions, for third-party billing on wireline and wireless bills. Comments are due November 18, 2013.

¹ *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth in Billing and Billing Format; Further Notice of Proposed Rulemaking*, CG Dkt.No.11-116, CG Dkt.No. 09-158, CC Dkt. No. 98-170; (FCC 12-42) rel. April 27, 2012. (*FNPRM*)

² Public Notice of the FCC's Consumer and Governmental Affairs Bureau Refreshing the Record Regarding Cramming, August 27, 2013.

³ *Id.*, at para.136.

INTRODUCTION: Cramming is the placement of unauthorized charges on a customer's telephone bill. Despite efforts by both the federal and state governments, including this Commission, to combat cramming, it still remains a significant and ongoing problem. The highest incidence of cramming occurs when telephone companies allow third parties to place charges on their consumers' telephone bills, enabling consumers' telephone numbers to operate similarly to a credit or debit card account number for vendors.

In Decision (D.) 10-10-034 issued in October, 2010, the Commission revised G.O. 168 Part 4, "Rules Governing Cramming Complaints." The revised rules established cramming reporting requirements applicable to all Billing Telephone Corporations and Billing Agents, and combined and clarified two previously issued sets of rules (from D.00-03-010, modified by D.00-11-015, and D.06-03-013) into a comprehensive standard set of rules applicable to all Billing Telephone Corporations, including resellers and wireless telephone corporations.⁴ The Commission elected to not adopt an opt-in requirement in D.10-10-034.⁵

In the *Report and Order (R&O)* issued April 27, 2012, in this docket, the FCC noted that

its complaint records show that during the period from 2008 to 2010, the [FCC] received between 2,000 and 3,000 cramming complaints each year. Furthermore, cramming consistently ranks among the top billing-related complaints received by the [FCC] involving wireline telephone service. Of the cramming complaints [the FCC] received from 2008 to 2010, 82 percent related to wireline telecommunications and 16 percent related to wireless telecommunications.⁶

The Federal Trade Commission (FTC), which also investigates and brings suits against crammers, confirms that "cramming is a significant area of increasing consumer complaints."⁷

On July 12, 2011, Majority Staff of the U.S. Senate Commerce Committee released the *Senate Staff Report* with the results of its investigation into unauthorized charges on consumer [wireline] telephone bills. In that report, the Senate staff found that despite the

⁴ The Commission first adopted cramming reporting rules for third-party charges on the bills of wireline carriers in D.00-03-020. D.10-10-034 revised these rules for wireline carriers and adopted new rules for wireless carriers. The Commission has not applied the rules it adopted in D.10-10-034 to VoIP carriers.

⁵ D.10-10-035 at 29-30.

⁶ *Id.*, at para. 20. The FCC found that "the record does not demonstrate a need for rules to address cramming for CMRS or VoIP customers at this time." *Id.*, at para. 47.

⁷ *Id.*, at para 24.

FCC's existing Truth-in-Billing requirements, thousands of consumers still regularly complain to the FTC and the FCC about cramming, while state and federal authorities continue to bring law enforcement actions against individuals and companies for cramming. The report noted that, over the previous five years, telephone companies had placed more than \$10 billion worth of third-party charges on their customers' landline telephone bills, and concluded that billing carriers are profiting from these third-party charges.⁸

After reviewing the record in its proceeding, the FCC found that "...consistent rules for all wireline carriers are necessary to protect consumers. In the R&O, the FCC adopted rules to require carriers that offer blocking of third-party charges to "clearly and conspicuously notify consumers of this option on their bills, websites, and at the point of sale; to place non-carrier third-party charges in a distinct bill section separate from all carrier charges; and to provide separate totals for carrier and non-carrier charges."⁹ The FCC further noted that "the record contains few specifics regarding the appropriate structure and mechanics of an opt-in mechanism."¹⁰

The FTC also held a Mobile Cramming Roundtable on May 8, 2013, which included three panel discussions on cramming issues. The transcript from this workshop provides a useful insight for staff to better understand mobile cramming and how best to protect consumers from mobile cramming.¹¹ The FTC will issue a report on the roundtable. And, on June 24, 2013, the National Association of Attorneys General (NAAG) submitted comments addressed to Secretary Clark of the FTC in connection with the May 8, 2013 Mobile Cramming Roundtable ("AG Comments"). Forty attorneys general, including Kamala Harris for California, representing 37 states, two territories, and the District of Columbia signed the comments. The AGs' Comments highlight the increase in mobile cramming, noting that "the complaints from consumers that the Attorneys General continue to receive, as well as the enforcement actions taken by the Attorneys General, provide ample evidence that the types of unfair and deceptive practices that affect landline consumers are also now being felt by consumers of mobile phone services."¹²

⁸ *Id.*, at para. 33-34.

⁹ *Id.*, at para. 48. Although the FCC did not require that wireline carriers provide a blocking option, the CPUC requires both wireline and wireless carriers to offer customers an option to block third-party charges, with exceptions for affiliates of the billing telephone company and long distance service providers.

¹⁰ *Id.*, at para. 49.

¹¹ Transcript of FTC Mobile Cramming Roundtable, 5/8/13, available at <http://www.ftc.gov/bcp/workshops/mobilecramming/30508mob.pdf>.

¹² AG Comments at 2, available at www.naag.org/assets/files/pdf/signons/Final%20FTC%20Comment%20Mobile%20Cramming.pdf

On August 27, 2013, in response to the FCC's April 2012 *Further Notice of Proposed Rulemaking*, the FCC's Consumer and Governmental Affairs Bureau released a Public Notice (Notice) seeking to refresh the record on cramming.¹³ Prompted by new developments and additional evidence related to cramming for both wireline and wireless consumers,¹⁴ the Notice seeks information to refresh the record on all of the other issues raised in the *Further Notice*, including "the need for an opt-in requirement and the mechanics of an opt-in process for wireline and/or CMRS services."¹⁵

DISCUSSION: In its Notice, the FCC requests comment on whether it should adopt additional measures to prevent cramming, such as an opt-in approach, and, if so, the best means to implement such measures. To adequately evaluate an opt-in approach, the FCC seeks comment on the structure and mechanics of an opt-in approach, as well as how an opt-in requirement could be implemented for existing consumers whose carriers already may be placing non-carrier third-party charges on their telephone bills.¹⁶ The FCC asks the following questions in this regard: (1) whether an opt-in requirement should apply only to new consumers or to all consumers; (2) whether an opt-in requirement, if adopted, should apply to all third-party charges or whether third-party charges for telecommunications services should be exempt; and (3) whether the exemption should apply to all third-party telecommunications services or only certain ones.¹⁷

Despite efforts by the CPUC, the FCC, and the FTC, cramming remains a problem. On the wireline side, despite settlements with AT&T and Verizon that prompted them to eliminate most third-party billing on landline telephone, cramming is still occurring. Moreover, mobile cramming is a growing problem. The CPUC now is seeing some of the same actors that perpetrated cramming schemes on the wireline side become active in mobile cramming. Since the Commission adopted the revised cramming rules in D.10-10-034, several developments related to cramming have occurred. For example, recently, 40 attorneys general sent a letter to the FTC asserting that cramming is a problem in the states and that the FTC should take action on cramming. The Rockefeller Report recommends either an opt-in approach, or a complete prohibition on third-party billing. Furthermore, in a recent filing in the *Nwabueze v. AT&T* case, the FTC stated that default blocking, "to prohibit third-party charges altogether, unless consumers

¹³ CG Docket No. 11-116 and 09-158; CC Docket No. 98-170

¹⁴ Public Notice, *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record Regarding "Cramming"*, CG Docket No. 11-116 and 09-158; CC Docket No. 98-170, at 1.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*, at para. 139.

affirmatively request that AT&T permit such charges on their bills” was the only effective way to stop this epidemic.¹⁸

Given that wireless phone bills may have an array of third-party charges on them, that consumers are using wireless phones in ways similar to how they use credit cards, and that cramming remains a significant problem, staff recommends that the FCC should adopt an opt-in requirement as the most effective way to combat cramming. An opt-in requirement would protect from cramming those who do not wish to purchase third-party services. Those who wish to access third-party services are empowered to access services via opt-in. The opt-in requirement protects all California consumers because the opportunity for fraud and unauthorized charges is diminished when access to the number of consumer bills is limited. The opt-in requirement should be technology-neutral, meaning the FCC should apply it to all carriers – wireline, wireless, and VoIP providers.

An opt-in requirement would not allow third-party billing unless a customer affirmatively “opts-in”, that is, authorizes third-party billing. In this way, the default setting for consumers’ telephone bills is to not allow third-party billing. Consumers who choose to allow for third-party billing would be on notice of this possibility. Consumers who affirmatively choose to allow third-parties to place charges on their telephone bills likely would be more vigilant in reviewing their telephone bills to ensure that they contain no unauthorized charges.

Several options exist for implementing the opt-in requirement in regards for existing customers. For example, the requirement could be applied to new and existing customers, or just to new customers. Staff proposes to identify those options and to comment on their relative advantages and disadvantages.

In the past, the industry has expressed concerns that a default blocking opt-in requirement would create customer confusion and would lead to customers not having access to third-party billing when they want it. For example, a default blocking opt-in requirement could hinder legitimate uses of third-party billing and also make it difficult to spontaneously respond to a request for charity donations, *e.g.*, donations to help the victims of hurricane Sandy. Staff would recommend that the FCC explore possible solutions to minimize these problems.

Staff recommends the Commission file comments addressing the following:

- 1) If the FCC does not prohibit third-party billing outright, it should require that all carriers (wireline, wireless, and VoIP) implement an opt-in requirement for all third-party billings, with the exception of billings for

¹⁸ FTC Motion for Leave to file Brief as Amicus Curiae and Memorandum of Law as Amicus Curiae, *Nwabueze v. AT&T*, Case No. CV 09-1529 SI, filed on August 30, 2013. at 11.

the carrier's affiliates and billings for long distance companies. The FTC supports implementation of a default block, which would require consumers to affirmatively opt-in prior to any third-party charges being placed on their telephone bills.¹⁹ Although in its decision adopting the Consumer Protection Initiative (D.06-03-013, as modified by D.06-12-042) the CPUC deferred from consideration of an opt-in approach to prevent third-party cramming, the evidence collected since that decision issued makes clear that such an approach is now necessary.

- 2) Staff recommends that the opt-in requirement should apply to both new and current customers, but carriers should be given a reasonable amount of time to phase in the opt-in approach for current customers. However, staff does not recommend that the FCC implement a default blocking opt-in requirement by automatically or immediately blocking current customers from receiving third-party charges on their telephone bills.
- 3) The FCC should require the billing carrier to obtain customer approval for third-party charges via a written letter of authorization either in hard copy or electronic form, or by verbal recording.

Assigned staff:

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¹⁹ *Id.*