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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion To Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities	R.00-02-004 (filed February 3, 2000)

OPENING COMMENTS OF VERIZON CALIFORNIA INC. (U 1002 C) ON THE ASSIGNED COMMISSIONER RULING REQUESTING COMMENTS ON NEW CRAMMING RULES

JESÚS G. ROMÁN
112 Lakeview Canyon Road, CA501LB
Thousand Oaks, CA 91362
Tel: (805) 372-6233
Fax: (805) 373-7515
jesus.g.roman@verizon.com

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Attorney for Verizon California Inc.

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INTRODUCTION

No government entity has sought to outright prohibit third party billing—not Congress, not the Federal Communications Commission, not the Federal Trade Commission, not the California Legislature and not this Commission. There is a recognition that customers want to enjoy the convenience that third party billing offers. Third party billing currently allows carriers such as Verizon to include local charges and charges for long distance telephone service, internet services, and TV services on a single bill—including services from companies such as DirecTV, AOL and Earthlink. In the future, among other things, third-party billing could allow United States consumers to wave their wireless handsets over turnstiles to board mass transit trains, as is currently done in Japan.[1]

The goal in this proceeding should not be to prohibit or discourage legitimate third-party billing. The California Legislature and Commission goal has long been and should continue to be the adoption of safeguards to protect customers from the financial effects of unauthorized charges. The Commission and the government entities listed above have all implicitly recognized that some level of imperfection will exist in a system that allows third-party billing in that some unauthorized charges may appear on customers' bills.[2] In addition to other safeguards, California's Legislature has addressed this issue by requiring refunds within 30 days.[3]

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1 *See* D.06-03-013 at 74.

2 Indeed, unauthorized charges appear not only on bills issued by companies such as Verizon, but on all manner of consumer bills including credit card statements.

3 *See* Cal. Pub. Util. Code § 2890(e).

The Commission has over the years tried to strike a balance between allowing third-party billing for the benefit of consumers and imposing safeguards that protect consumers. It appeared to have finally achieved that balance in this proceeding in D.06-03-013, when it repealed the rules for third-party billing for non-communications-related charges, once the evidence showed that rules requiring Billing Telephone Corporations (BTCs) to guarantee unauthorized third-party charges never appear on bills were so onerous that no California carrier offered such third-party billing for non-communications products and services.[4] In their place, the Commission adopted rules applicable to all third-party charges—communications-related charges and non-communications-related charges—that made clear that BTCs are responsible for monitoring access to their bills to minimize cramming, as opposed to guaranteeing that cramming will never occur, and for providing redress to customers who contact BTCs claiming that they were crammed.

Having adopted substantive cramming rules after striking this balance between protecting consumers from cramming and preserving the benefits of third-party billing, the Commission in D.06-03-013 directed staff to work on creating a reporting regime related to cramming complaints. Yet, for unexplained reasons, the Assigned Commissioner Ruling (ACR)[5] seeks not only to create that reporting regime, but to also substantially revamp existing substantive cramming

[4] See D.06-03-013 at 85 ("We find it significant that in the four years that the Interim Rules have been in place, we have no evidence that a single carrier in California has elected to offer this billing service pursuant to requirements imposed by the Non-Com Rules.").

[5] See Assigned Commissioner's Ruling Requesting Comment on Proposed California Telephone Corporation Billing Rules, February 12, 2010.

rules and expand the applicability beyond third party charges. There is no need to do the latter and, indeed, the provision of completely new safeguards could threaten the balance the Commission achieved earlier in this proceeding, and impose obligations so onerous that the financial incentives for third-party billing are lost. The threat to the balance is increased in that the ACR—based on the "advanced stage" of this proceeding—seeks to limit discussion on the entirely new rules it proposes.

Besides the procedural issues, as discussed below the ACR presents a set of rules that are vague, internally inconsistent, unnecessary and unworkable.

DISCUSSION

I. THE ACR INAPPROPRIATELY SEEKS TO LIMIT DIALOGUE ON NEW SUBSTANTIVE RULES.

The ACR limits opening comments to 35 pages and instructs that "due to the advanced stage of this proceeding, Comments should focus closely on the proposed rules and include specific remedies for identified deficiencies or alternatives that better meet the stated objectives." ACR at 7. This limitation threatens full discussion of new issues. While this proceeding has certainly been open for a long time, the issues raised by the ACR are not "advanced" and, in fact, implicate entirely new substantive matters.

Until the ACR was issued, the current phase of this proceeding has focused on cramming complaint reporting, as required by Ordering Paragraph 7 of D.06-03-013. After hearings and several rounds of comments, substantive cramming rules were adopted in D.06-03-013. The recently assigned

Commissioner filed a concurrence praising the new rules for their reach and simplicity, stating that:

> I believe that this decision is significantly better than the proposed decision that was issued in December of 2005. . . . First, the inclusion of a rule that prohibits the placement of unauthorized charges on consumers' bills is a key component of this decision. This decision makes it clear that it is the billing telecommunications companies' responsibility to not allow unauthorized charges, and further clarifies that it is the responsibility of the billing carriers to immediately suspend collection of any charges that consumers say were not authorized. . . . *Such a clear and simple responsibility means that the consumer's risk is minimized, and more closely aligns the consumer's interest with that of the carriers.*[6]

While it dealt with the substantive cramming rules, D.06-03-013 left for workshops, staff recommendation, and a further decision "cramming-related reporting requirements that direct carriers to provide, among other items, the number and percentage of cramming complaints that take more than thirty days to resolve."[7] Workshops were held in 2006 and a workshop report focused only on reporting of cramming complaints was issued on October 13, 2006.[8]

Given this history, the substantive and broad reach of the rules proposed in the 2010 ACR should come as a surprise to many of the participants in this proceeding. D.06-03-013 adopted GO 168 Part 4 (Cramming Rules), a comprehensive regime to address cramming. These Cramming Rules require that BTCs "bill subscribers only for authorized charges," which the Commission described as a "responsibility to avoid placing unauthorized charges on [ ]

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6 *See* D.06-03-013, Commissioner Bohn's Concurrence on the Consumer Bill of Rights Decision at 4 (emphasis added) (footnotes in original omitted).

7 *See id.* at Ordering Paragraph 7.

8 *See* Assigned Commissioner's Ruling Requesting Comment and Briefing on Cramming Reporting Requirements, February 22, 2008, attaching Workshop Report as Appendix C.

customers' phone bills.[9] The rules also provide that "[i]n the case of a complaint, there is a rebuttable presumption that an unverified charge for a product or service was not authorized by the user" and created standards by which BTCs may establish that a disputed charge was authorized.[10] Finally, the rules afford significant remedies to consumers who have been crammed, including a requirement that BTCs either verify authorization or provide a credit within 30 days of receiving a complaint.[11] Notwithstanding these rules, the ACR puts all of those issues back into play by, among other things: (1) proposing new definitions of "customer complaints," "service provider," "Billing Telephone Corporation"

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9 D.06-03-013 at 92 ("The cramming rules we adopt today establish, first and foremost, that '[t]elephone companies may bill subscribers only for authorized charges.' P.U. Code § 2890(a) does not put any qualifications on its statement that a telephone bill may only contain subscriber-authorized charges. Thus a carrier's responsibility to avoid placing unauthorized charges on its customers' phone bills extends to situations where a charge may originate with a billing agent or third party vendor. This responsibility is the same regardless of whether the charge at issue is communications-related or non-communications-related.").

10 *Id*. at 79 ("The cramming rules also reiterate and establish guidelines regarding the 'rebuttable presumption that an unverified charge for a product or service was not authorized by the user.' The rules identify evidence that a carrier may use to prove that a user provided authorization. In particular, the rules state that user authorization may be established with '(i) a record of affirmative user authorization, (ii) a demonstrated pattern of knowledgeable past use, or (iii) other persuasive evidence of authorization.' The rules also echo § 2890 and declare that 'evidence that a call was dialed is prima facie evidence of authorization' with respect to direct dialed telecommunications services.'").

11 *Id*. ("Moreover the cramming rules make it clear that significant remedies are afforded to consumers who have been crammed. The rules dictate that while a complaint investigation is pending, a 'subscriber shall not be required to pay the disputed charge or any associated late charges or penalties; the charge may not be sent to collection; and no adverse credit report may be made based on non-payment of that charge.' This directive is consistent with the presumption that a user did not authorize a charge. As we stated above, the burden is on the carrier to establish authorization of a disputed charge; prior to establishing this authorization, the carrier must treat a charge as if it was unauthorized and may not require the subscriber to make any payment of the disputed charge. The rules further provide that a carrier must resolve a cramming complaint within thirty days of the date the carrier received the complaint. Specifically the rules state that 'the telephone company, not later than 30 days from the date on which the complaint is received, shall either (i) verify and advise the subscriber of the user's authorization of the disputed charge or (ii) undertake to credit the disputed charge and any associated late charges or penalties to the subscriber's bill.' While an argument may be made that this response time is already required by the plain language of § 2890(e), we want to remove any doubt as to what type of response is required of a carrier when its subscriber informs it that an unauthorized

(BTC) and “unauthorized charge”; (2) expanding or modifying the responsibilities of billing telephone corporations in proposed Rule 5; (3) prescribing processes in Rules 6 and 7 to prevent “bad actors” from having access to BTC bills; and (4) ordering processes related to refunds in Rule 7.

The ACR, however, does not explain the need to revisit the substantive cramming rules. In other words, given the history of this proceeding, the ACR does not put the parties on sufficient notice as to what are the Commission’s concerns with the existing cramming rules and—especially in light of the Assigned Commissioner’s concurrence with the cramming rules in D.06-03-013—creates significant confusion among the parties on how to respond to the un-expressed concerns. Moreover, the ACR points to no record evidence to justify the proposed rules. Before the Commission adopts new rules, there should be a clearer understanding of the actual facts underlying their need. For example, has a specific type of cramming increased significantly since 2006?[12] Identifying the facts underlying the ACR’s proposed substantive rules would allow the parties to help craft regulations narrowly tailored to address a specific problem. But the ACR does not identify any specific problem with existing substantive rules, nor any facts or concerns that are not already addressed by existing rules.

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charge was placed on his phone bill. A carrier must provide the same complaint resolution response, regardless of whether the carrier itself initiated the charge in question.”).

[12] FCC statistics, for example, do not show any appreciable concern regarding cramming on wireless phones: for no quarter from 2006 through the first quarter of 2009 were cramming complaints in the top five consumer complaints for wireless service. FCC’s Consumer & Governmental Affairs Bureau Quarterly Reports on Complaints at http://www.fcc.gov/cgb/quarter/welcome.html.

To remedy these problems, the Assigned Commissioner should issue a new ACR or Scoping Memo explaining the Commission's concerns with the existing rules, identifying data to support the proposed rules, holding a further pre-hearing conference, determining whether hearings or workshops are now needed and allowing for further comments on expressed concerns. In the alternative, the 2010 ACR should be modified to follow the dictates of Ordering Paragraph 7 of D.06-03-013 by removing substantive rule changes and focusing only on complaint reporting.

II. THE COMMISSION SHOULD NOT EXPAND REPORTING TO DISPUTES RELATED TO BILLING TELEPHONE COMPANY CHARGES

The operative substantive cramming rules are found in Part 4 of General Order 168. Existing cramming reporting rules imposed on wireline companies, however, pre-date GO 168 and are found in D.00-03-020. BTCs are required to report unauthorized charges that a *third party*, including a corporate affiliate of the BTC, places on an end user bill.[13] The ACR proposes to expand reporting to all carriers and all claims of unauthorized, misleading or deceptive charges including those placed on the bill by the BTC.[14]

BTC charges differ from charges originated by unaffiliated third parties in significant respects that make applying cramming rules and reporting requirements to BTC charges unnecessary and, indeed, counterproductive to the

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[13] D.00-03-020, Appendix A (defining a BTC as: "A telephone corporation that bills a subscriber for products and services provided by a third-party, including corporate affiliates").

[14] ACR at 3 ("these rules also apply to the charges placed on a subscriber's bill by the Billing telephone Corporation for products or services it directly supplied."); *see also id.*, Appendix A, Rule 1.3 (defining service providers to include BTCs that provide products or services)

Commission's stated objectives in proposing new cramming rules. First, the majority of charges are monthly recurring in nature as opposed to one-time charges. Customers order services and these are provided until canceled. There is thus no argument that the customer would fail to notice or miss seeing the charges. Second, BTC authorization requirements for adding or changing services are limited to authorized users, and BTCs (including Verizon) provide customers the option of adding a security code to further secure their account access. Third, BTCs (including Verizon) provide a confirmation letter outlining the terms and conditions or any changes to the account. Fourth, for pay-per-use features, customers are offered a block under both state and federal law[15] and are granted a one-time bill adjustment under PU Code § 2889.4 for pay-per-use features inadvertently activated. Fifth, charges for 900 and 976 can be blocked as required by PU Code § 2884(a). And finally, the majority of other one-time charges that appear on a customer bill are direct dialed, which Section 2890(d)(2)(D) provides is *prima facie* evidence of authorization.

While Section 2889.9 third-party reporting may help identify potential bad actors, it is complaints directly to the Consumer Affairs Branch ("CAB") that may trigger an Order Instituting Investigation regarding a BTC. There is no need to extend cramming reporting to charges imposed by the carriers themselves.

On a practical level, expanding reporting to BTC charges is unwise because it would require reporting of a large number of billing disputes. As we discovered during an earlier phase of this proceeding, complaint data the CAB

[15] 47 USC § 228(c)(5) and Cal. Pub. Util. Code § 2889.4(a) require LECs to offer the option to block pay-per-use features.

receives overwhelmingly relates to billing disputes.[16] To the extent the reporting is meant to ferret out bad actors and assist CPSD in its enforcement duties, expanding the reporting to billing disputes would greatly complicate staff's work. Bad actors would be far more difficult to identify because important data points would be buried in too much information. Moreover, it is unnecessary given that CAB already has this data, as Mr. Maack stated in his testimony during hearings in this proceeding.[17]

In addition to unnecessarily increasing the burden on staff, this expansion would impose a costly and highly burdensome new reporting requirement on carriers. Many billing disputes would fall under the definitions of "customer complaint" and "unauthorized charge" the Commission seeks comment on. The proposed definition for an unauthorized charge includes the placing of charges that resulted from "false, misleading, or deceptive representations." Under this definition, a customer allegation that a call was unauthorized qualifies as a "customer complaint" as defined in proposed Rule 1.2 and is reportable under Rule 12(b) of the proposed rules.[18] Reports regarding allegations that a customer did not make a call will surely add to volume of misleading and

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16 *See* August 5, 2005 Testimony of Lynn A. Maack on behalf of the Division of Ratepayer Advocates (then known as the Office of Ratepayer Advocates), at 4 (Table 2) in R.00-02-004. Table 2 provides the number of complaints the Consumers Affairs Branch received for the five-year period of 2000-2005 in six categories. Lynn Maack concludes from the data that "By far the largest complaint category for both wireline and wireless carriers is 'Billing.'" *Id*. at 3.

17 *Id*.

18 Rule 12(b) requires reporting of all customer complaints (defined as "[a]ny written or oral communication from a subscriber ***alleging*** that an unauthorized charge was included in the Billing Telephone Corporation's bill to the subscriber."). Thus, under Rule 12(b) all allegations of cramming are reportable, whether resolved in the customers' favor or in favor of the BTC or service provider. Contrary to the ACR's statement (at 6), BTCs do not "retain in the ordinary course of business" mere allegations of unauthorized calls or customer charges that the BTC imposes.

confusing data, because experience shows that most of these disputes are resolved when the subscriber recalls that a relative or friend used the phone and actually made the call. That is one reason Section 2890(d)(2)(D) provides that "[w]*ith regard to direct dialed telecommunications services, evidence that a call was dialed is prima facie evidence of authorization*." While proposed Rule 3 also includes a variation of this language, Rule 12(b) does not exclude reporting with regard to direct dialed telecommunications services.

The Commission should not require reporting of alleged unauthorized BTC charges. There are many scenarios under which a subscriber will allege an unauthorized charge that, if reported, will not provide Commission staff with information useful to identify bad actors. Staff recognized this and in its workshop report listed ten such scenarios that would not be deemed cramming for reporting purposes.[19] While the Commission could include the list of ten in its final decision, that solution is incomplete because other scenarios may arise now and in the future that may require reporting but are nothing more than run-of-the-mill billing disputes.

Moreover, the expansion of cramming reporting rules to BTC charges is contrary to the requirements of Section 2889.9(d), the only cramming-related reporting requirement of the Public Utilities Code, which directs the Commission to establish cramming reporting rules only for charges "for products or services that are charged on [customers'] telephone bills *as a result of the billing and collection services that the billing telephone company provides to third parties,*

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[19] *See* 2008 ACR, Appendix C at C-8 and C-9 (reproducing the "Final Staff Workshop Report on Proposed Cramming Reporting Requirements" dated October 13, 2006).

including affiliates of the billing telephone company."[20] The legislative history of Section 2889.9 demonstrates that the Legislature did not intend for reporting of BTC charges as it specifically rejected a proposal to impose such a reporting obligation.

An early draft of the AB 2142 (which enacted Section 2899.9) included language that did not specifically limit the reporting requirement to third party charges and was broad enough to cover billing disputes.[21] This language, however, was ultimately removed and replaced with language specifically limiting the obligation to billing for services provided by "third parties."[22] As noted above, the existing wireline reporting requirements adopted in D.00-03-020 pursuant to Section 2889.9(d) likewise require only reporting of complaints related to charges for "services provided by third-party vendors."[23] No prior Commission decision has read this section to encompass reporting of carrier-related charges. Nor has the ACR pointed to any evidence or concerns to validate expansion to what is in effect a billing dispute between the BTC and the customer.

Indeed, limiting reporting to unauthorized third-party charges represents sound policy. Section 2889.9 addresses abuses by third parties that consumers and the Commission may have difficulty working with to dispute charges, partly

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[20] Cal. Pub. Util. Code § 2889.9(d) (emphasis added).

[21] *See* Assembly Bill No. 2142, as Amended in Assembly June 17, 1998, at 5 (proposing the following language: "(d) The commission shall establish rules that require each billing telephone company and company that provides products or services that are charged on subscribers' telephone bills, to provide the commission with reports of all complaints made by subscribers regarding the billing for products or services that are charged on telephone bills").

[22] *See* Assembly Bill No. 2142, as Amended in Senate July 13, 1998, at 5 (adding language limiting reporting to charges imposed "as a result of the billing and collection services that the billing telephone company provides to third parties, including affiliates of the billing telephone company").

because third party service providers generally are not Commission-regulated entities. This concern is reflected in the report recommending that the Governor sign the bill: Section 2889.9 "gives the CPUC authority to investigate `cramming' complaints and take action against non-CPUC regulated companies cheating customers in telephone bills."[24] BTCs, however, are subject to the Commission's jurisdiction, and Commission staff interacts with most BTC regulatory staff on a regular basis. Disputes over carrier charges can thus easily be handled through existing legal or administrative procedures.

III. IN LIGHT OF EXISTING SAFEGUARDS, NEW CRAMMING RULES ARE UNNECESSARY

The first key objective of the proposed rules is to prevent unauthorized charges from appearing on subscribers' bills by requiring BTCs and Billing Agents, as defined in the rules, to administer billing operations so as to deny unscrupulous service providers access to subscribers' bills. The proposed rules thus require a BTC, before agreeing to provide billing services, to obtain basic identification information about the service provider and its principals. With this information, the billing telephone corporation must make "a reasonable inquiry into the service provider and principals' history of regulatory compliance and customer disputes" (for simplicity, a background check).

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[23] *See* D.00-03-020 at 16.

[24] State and Consumer Services Agency, Enrolled Bill Report, September 3, 1998; *see also* AB 2142 Bill Analysis prepared for Senate Committee on Energy, Utilities and Communications, June 23, 1998, at 2 (stating that "[t]he opportunity for cramming arises because local telephone companies . . . provide billing services to others" who "are not currently subject to CPUC jurisdiction"); AB 2142 Bill Analysis prepared for Assembly Committee on Utilities and Commerce, April 13, 1998, at 2 ("AB 2142 is intended to provide the commission with limited jurisdiction over persons or corporations that charge subscribers for products or services using the subscriber's telephone company bill.").

Verizon strongly agrees with this first objective as it relates to third-party service providers, but believes the rule is unnecessary. Verizon (and other carriers) have strong financial incentives to voluntarily ensure billing integrity because cramming causes reputational harm, costs to the business and a potential loss of customers. As a result, most if not all BTCs have already adopted prevention protocols or safeguards.

The Commission has recognized that BTCs have a strong financial incentive to avoid cramming. As the Commission stated in D.06-03-013:

> The carriers explain that multiple factors drive them to avoid complaints. First, customer service calls to live representatives are expensive: One such call costs a carrier approximately seven dollars. Second, wireless [and wireline] companies may lose customer goodwill and loyalty. Third, if a charge was indeed unauthorized, the carrier must credit the charge to the bill.[25]
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> * * *
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> We agree with the Wireline Group's assertion that carriers have strong financial incentives to adopt significant security measures. We recognize that it is costly for carriers to resolve complaints, and reducing their complaint levels is to their advantage. Consequently we doubt that a phone company would adopt a business model that easily allows a thief, armed only with a name and phone number, to place unauthorized charges on its customers' phone bills. This model would work against the carrier's own best interest.[26]

Verizon and other LEC BTCs therefore have a relatively long history of addressing cramming and have already developed substantial safeguards to protect themselves and customers from errant vendors by preventing access to BTC bills. And the 2008 comment cycle reveals that wireless carriers also have

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[25] D.06-03-013 (*mimeo*) at 84 (footnotes in original omitted).

[26] *Id*. at 75-76 (footnotes in original omitted).

instituted stringent processes to prevent the placing of unauthorized charges on wireless bills, and quickly address resolution of cramming allegations.[27]

Significantly, much of what the ACR suggests Verizon already performs—such as reviewing principals of third-party service providers. Verizon nonetheless has three issues with the ACR on the rules proposed to carry out the first objective. First, the new cramming rules prescribe exactly how BTCs should assess new vendors. Specifying the manner in which this assessment should be done is problematic because it also provides a road map for truly unscrupulous bad actors to circumvent detection by BTCs, undermining BTC efforts to identify and screen bad actors before they appear on BTC bills. An unscrupulous actor bent on committing fraud will not only try to find ways to place unauthorized charges on customer bills but will also try to find ways to deceive billing agents and BTCs. The level of sophistication of some actors bent on fraud is very high—such as those who perpetrate phishing fraud by replicating legitimate business websites to commit identity fraud or other criminal acts. By providing them a road map of what the Commission requires as a background check will allow them to create fake websites with fake "good" information or otherwise allow them to mask their identities.

Second, cramming is not a new phenomenon and wireline and wireless carriers have instituted mechanisms to prevent unscrupulous service providers from using their bills to commit fraud. Where a carrier has already instituted

[27] *See, e.g.*, April 7, 2008 Opening Comments of Verizon Wireless at 3-8 (describing premium content safeguards to include double opt-in and compliance with Mobile Marketing Association best practices) and AT&T Mobility at 4-6 (same), 8 (describing processes for quick resolution of complaints).

prevention processes, a one-size-fits-all paradigm could undermine processes currently in place, while driving up compliance costs and not achieving any real incremental benefits for consumers. To the extent any rules are adopted, they should be sufficiently flexible to allow carriers who have existing successful prevention processes to avoid unnecessarily changing those processes.

To the extent the Commission will issue new substantive rules—which it should not—proposed Rule 6 requiring BTCs to conduct background checks on service providers must be modified to include the same obligation on billing aggregators. BTCs have direct contracts with billing aggregators, not with the customers of the billing aggregators. Billing aggregators thus play an important role in ensuring that charges are properly authorized and their inclusion in the rules recognizes that role. Proposed Rule 6, however, would require BTCs but not Billing Aggregators to perform background checks of service providers. Keeping in mind the need to avoid providing a road map to bad actors, the obligation to perform "a reasonable inquiry into the service provider's and principals' history of regulatory compliance and customer disputes" should also be extended to billing aggregators, who are the direct contacts with service providers. In addition, the requirement that BTCs should maintain the current identity and contact information of vendors should also be extended to billing aggregators.[28]

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[28] The failure of Rule 6 to require Billing Aggregators to perform background checks and keep contact information of service provides appears to be inadvertent, insofar as the ACR states that these obligations would be extended to them. *See* ACR at 2-3 ("The proposed rules require a *Billing Agent* or Billing Telephone Corporation, before agreeing to provide billing services, to obtain basic identification information about the service provider and its principals. With this information, the billing telephone corporation or *billing agent* must make a reasonable inquiry into the service provider and principals' history of regulatory compliance and customer disputes.").

IV. RULES DESIGNED TO "QUICKLY" SUSPEND OR TERMINATE PRESUMED BAD ACTORS ARE UNWORKABLE AND IGNORE EXISTING BTC PROTOCOLS

Another ACR objective is to identify bad actors and prevent them from presenting further billings in California. To accomplish this goal, the ACR proposes new Rule 7, which requires each BTC and Billing Agent to have protocols for suspending and terminating service providers.[29] This rule appears to be unnecessary in that the April 2008 comments reveal that most carriers—wireline and wireless—already have such protocols.

Indeed, Rule 7 appears to ignore currently implemented protocols that BTCs have shared with staff and the Commission in prior comments for addressing repeated instances of cramming by a third party. For example, Verizon has adopted three different thresholds—a percentage of monthly billings or 150 complaints in a month or 15 escalated complaints—to trigger specified consequences. If one of the thresholds is reached, Verizon will notify the Billing Agent immediately (by phone or e-mail). Because Verizon's protocols do not presume that all allegations of unauthorized charges are due to service provider culpable conduct,[30] the protocols allow for a cure process: Verizon requires that

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[29] Pursuant to proposed Rule 1.3, a service provider includes a BTC. As to BTCs themselves, the suspension/termination provisions of Rule 7 make little sense. Literally applied, a BTC would have to suspend or terminate itself if it received allegations of unauthorized charges that reached 10% of its billing within a period of time that the Rule does not specify but which is presumably a one month period. It is unrealistic to expect a BTC to suspend or terminate itself, especially if the BTC is a carrier of last resort.

[30] Reasons for customers' complaints about unauthorized charges run the gamut. Some customers simply forget that they authorized a charge. Others forget that they authorized a third person—a relative or representative—on their accounts, who in turn authorized the charge. Others may simply have had buyers remorse and seek to reverse a properly submitted charge. Indeed, there is reason to believe that service providers are largely legitimate businesses providing products and services that consumers willingly purchase. There is no basis to assume that because these businesses receive complaints they are unscrupulous or bad actors.

the Billing Agent obtain a written "action plan" from the service provider to reduce the number of complaints to fall below the thresholds. An Action Plan must be received by Verizon from the Billing Agent within ten (10) days of the written request. If there is no response within the ten (10) days, Verizon refuses to accept Billing Records for the service provider.

The Action Plan must include a detailed account of the following:

- Investigative steps taken to determine the cause of elevated Cramming inquiries.
- Findings of the investigation into the Cramming complaints that triggered the request for the Action Plan.
- Remedial actions implemented to reduce Cramming inquiries in Verizon regions to acceptable levels.
- Explanation of how the service provider plans to maintain acceptable levels of inquiries.

Upon receipt of an Action Plan acceptable to Verizon, Verizon continues to monitor cramming complaints and may terminate billings if complaint levels continue to exceed acceptable levels. Verizon reserves the right to reject an Action Plan if not satisfied that the proposed plan adequately addresses the problem causing the level of cramming complaints or offers a realistic remedy to eliminate, or substantially reduce, the complaints. If rejected, Verizon provides five (5) days to revise the Action Plan. If Verizon is still not satisfied with the revised Action Plan, the service provider is terminated without further action.

Verizon's protocol allows no more than ninety (90) days from the date of the request for the Action Plan to bring the complaint levels below the applicable threshold. If after ninety days the complaint levels are not below the threshold, Verizon refuses further Billing Records from the service provider.

Proposed Rule 7, which would require BTCs to have in place protocols for "quickly" identifying unauthorized billings, creates considerable uncertainty as to whether these long-implemented protocols will be deemed sufficiently "quick" to satisfy the rule. In addition, the rule is unworkable as written because data is not necessarily available in "real time" to establish whether a third-party is submitting unacceptably high levels of unauthorized billings.

While Verizon's safeguards are more stringent than the proposed Rule—in that the threshold triggering consequences is less than 10% of monthly billings,[31]—they are not entirely consistent with the strict language of the new rules. Given other BTC and Verizon's established procedures for addressing cramming, the Commission should provide flexibility in the rules to allow BTCs to continue their currently implemented safeguards.

V. THE REQUIREMENTS TO RETAIN PAYMENTS FOR POSSIBLE REFUNDS IS UNNECESSARY, BURDENSOME AND UNWORKABLE

BTCs recognize the importance of having a robust billing termination process for third-party vendors, but the refund retention process outlined in proposed Rule 7 is unnecessary, burdensome and unworkable. Rule 7 suggests that BTCs must retain payments to potentially provide refunds to <u>all</u> customers of a third-party vendor if that vendor has been terminated for violating cramming thresholds. This retention policy is simply unnecessary. Cramming rules already require BTCs to refund unauthorized charges within 30 days (unless the charge

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[31] The ACR and Rules' references to 10% is ambiguous, as it does not say from what 10% is being taken. Verizon presumes that the reference in the ACR (at 4) and Rule 7 mean 10% of *monthly billings* for a specific service provider.

is verified as authorized)[32] and separating the terminated vendor's unauthorized charges from authorized charges is a burdensome administrative step that achieves no benefit to anyone. Furthermore, Verizon has no current mechanisms in place to track the customers of service providers to implement this provision. Thus the provision would entail significant IT costs, with no associated benefit.

Indeed, Rule 7 is overbroad as to those customers that have actually authorized their charges. It is impossible to distinguish between authorized and unauthorized charges unless a subscriber complains and identifies an unauthorized charge. It is indeed probable that most charges from a particular service provider are authorized but a BTC still receives sufficient cramming "complaints" on those charges to trigger potential termination.[33] Setting aside funds for potentially refunding all customers of a service provider that has been terminated—even if charges were authorized—is not proper.

VI. REQUIRING INVESTIGATION OF COMPLAINTS—AS OPPOSED TO RESOLUTION OF COMPLAINTS—CREATES UNNECESSARY AFFIRMATIVE OBLIGATIONS

Unlike the existing cramming rules, the proposed rules would impose an affirmative obligation to investigate each and every cramming complaint.[34]

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32 In practice, under Verizon's "first call resolution policy," if a customer complains that a charge on its Verizon bill is unauthorized, Verizon refunds that charge without further inquiry and offers a cramming block to the customer free of charge.

33 *See supra* footnote 30 ("Reasons for customers complaints about unauthorized charges run the gamut. Some customers simply forget that they authorized a charge. Others forget that they authorized a third person—a relative or representative—on their accounts, who in turn authorized the charge. Others may simply have had buyers remorse and seek to reverse a properly submitted charge.").

34 See Proposed Rule 7 (BTCs and Billing Agents "shall immediately investigate any unexplained significant increases in customer complaints") and Rule 8 (entitled "Nonpayment of Charges While an Investigation is Pending").

Where a BTC quickly (within 30 days) resolves a complaint, it makes no policy sense to impose upon BTCs the requirement to actively investigate whether the charge was authorized. This is especially true as to those BTCs that refund customer's third-party charges at the time of an alleged unauthorized charge. For example, Verizon's first call resolution process—to immediately refund a customer who alleges an unauthorized third party charge—is consistent with Rules 8 and 9, which set as the Commission's ultimate goal of the cramming rules—to verify authorization *or credit the disputed charge*. It is also consistent with Section 2890, existing cramming rules and D.06-03-013, all of which require a cramming complaint to be resolved "within 30 days of the date the carrier received the complaint."[35] The ACR offers no explanation of why a requirement to investigate possible cramming charges is needed and no evidence of such a need exists. Indeed, requiring BTCs to actually investigate each customer complaint would create an affirmative burdensome obligation, with little or no benefit to the customer and potentially create burdens on the customer who would need to substantiate his or her claim during an investigation.[36] The rules should therefore instead require *resolution* of complaints within 30 days.

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[35] *See* Section 2890(e); GO 168, Part 4(C), Rule (d); D.06-03-013 at 79-80.

[36] While there are presumptions that favor the customer, if a service provider provides evidence of authorization, the customer will be required to respond to the evidence. *See* Section 2890(d)(2)(D) (establishing a "rebuttable presumption that an unverified charge for a product of service was not authorized by the user.").

VII. THE REQUIREMENT THAT A BTC NOTIFY CPSD WITHIN THREE BUSINESS DAYS OF DISCOVERY OF SIGNIFICANT UNAUTHORIZED BILLINGS IS VAGUE AND UNWORKABLE

Proposed Rule 7 requires BTCs to immediately investigate any "unexplained significant increases" in customer complaints or refund rates and for internal BTC protocols to include notification to the CPSD within 3 business days of discovery of "significant unexplained unauthorized billings." Yet it is unclear exactly what "unexplained significant increases" and "significant unexplained unauthorized billings" means—whether, for example, they are the same as or different from the 10% trigger in Rule 7. More significantly, Verizon cannot implement the Rule because Verizon lacks the ability to track "spikes" in cramming activity so quickly.

In effect, the requirement to notify CPSD within 3 business days of discovery of "significant unexplained unauthorized billings" implies that cramming activity identification is equivalent to spotting a fire. It is not. Because billings occur approximately 30 days after the third-party provider sells the product or service to the end-user, and most BTCs produce bills in cycles throughout the month (Verizon has billing cycles every 3 days), it is only after the customer receives the bill, notices the unauthorized charge, and contacts the BTC to indicate that cramming has occurred that the BTC recourses the charge and records the event as a cramming complaint. Given the billing process, it is likely that at least 45 days passes before an unauthorized charge generates a cramming complaint. Then, it is only by comparison with prior activity that a determination of "significant" cramming levels can be made. Thus, approximately 60 days on average will have elapsed before monthly cramming data can be compared to prior months to identify significant unexplained cramming activity. A 3 business day reporting requirement is thus unrealistic.

In sum, Rule 7 would impose significant costs upon BTCs with no corresponding consumer benefit. Rule 7 is so onerous that it could in effect prohibit third-party billing to the detriment of consumers who benefit from the convenience of such billing. This would effect a policy that neither Congress nor the California Legislature have found necessary to enact. The Commission should not adopt Rule 7.

VIII. THE COMMISSION SHOULD REMOVE AMBIGUITY FROM THE PROPOSED RULES

While Verizon does not support the wholesale rewriting of the cramming rules presented in the ACR, should the Commission adopt the proposed rules, it should do so only after removing ambiguity and vagueness that cause them to be overly broad or unworkable.

In Rule 5 the Commission requires BTC to take "all commercially reasonable steps" to ensure that only authorized charges from legitimate service providers are included in the bill. Since Rule 7 appears to outline steps that BTCs must take, Rule 7 appears to expand upon Rule 5. But whether the ACR so intends is certainly unclear. The Commission should further explain the interplay, if any, between proposed Rule 5 and proposed Rule 7.

The rules appear to be broad enough that "unauthorized" billings might be deemed as a class of billings belonging to a vendor that has been terminated for cramming, not those that a particular customer has not authorized. A terminated vendor may have caused authorized charges to appear on a bill and no automatic conclusion that all charges of a terminated vendor are unauthorized can or should be made. The rules need to clarify that "unauthorized" billings are those that a particular customer has not authorized, not a class of billings belonging to a vendor that has been terminated for cramming.

IX. THE COMMISSION SHOULD NOT DELETE LANGUAGE REGARDING PRIVATE RIGHT OF ACTION

The proposed rules inexplicably eliminate language in the applicability section of GO 168, Part 4 that would limit private rights of action. That section includes the following provision concerning actions filed in courts:

> "These rules shall not be interpreted to create any new private right of action, to abridge or alter a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing rules."[37]

The Commission included this language in Part 4 "to ensure that individuals with grievances based on the G.O. 168 rules come to the Commission for resolution" rather than going to court.[38] Citing *People ex rel Orloff v. Pacific Bell*,[39] the Commission limited private rights of action because it is "concerned that private litigation may undermine the effectiveness of the Commission," and redress at the Commission allows the Commission to "know how resolution of an individual matter may affect our continuing policies and program."[40] There is indeed no reason to delete the applicability language related to private rights of action and the ACR certainly offers none.

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37 *Id.*

38 D.06-03-013 at 59.

39 31 Cal. 4th 1132, 1155 (2003).

40 D.06-03-013 at 59-60.

CONCLUSION

For the foregoing reasons, the Commission should not adopt the rules proposed in the ACR.

Dated: March 22, 2010

Respectfully submitted,

/s/

Jesús G. Román
112 Lakeview Canyon Road
Thousand Oaks, CA 91362
Telephone: (805) 372-6233
Facsimile: (805) 373-7515
Email: jesus.g.roman@verizon.com

Attorney for Verizon California Inc.

CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 112 Lakeview Canyon Road, CA501LB, Thousand Oaks, California 91362; I have this day served a copy of the foregoing, **OPENING COMMENTS OF VERIZON CALIFORNIA INC. (U 1002 C) ON THE ASSIGNED COMMISSIONER RULING REQUESTING COMMENTS ON NEW CRAMMING RULES** by electronic mail to those who have provided an e-mail address and by U.S. Mail to those who have not, on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of March, 2010 at Thousand Oaks, California.

/s/
JACQUE LOPEZ

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Parties

CHARLES HARAK
NATIONAL CONSUMER LAW CENTER
7 WINTHROP SQUARE, 4TH FLOOR
BOSTON, MA 02110
FOR: NATIONAL CONSUMER LAW CENTER

BARBARA R. ALEXANDER
CONSUMER AFFAIRS CONSULTANT
83 WEDGEWOOD DRIVE
WINTHROP, ME 04364
FOR: AARP

JOHN BEAHN
SKADDEN ARPS SLATE MEAGHER & FLOM, LLP
1440 NEW YORK AVE
WASHINGTON, DC 20005
FOR: VIRGIN MOBILE USA, LLC

TERRANCE A. SPANN
U.S. ARMY LITIGATION CENTER
OFFICE OF THE JUDGE ADVOCATE GENERAL
901 N STUART STREET, SUITE 713
ARLINGTON, VA 22203-1837
FOR: US DEPARTMENT OF DEFENSE AND ALL OTHER FEDERAL EXECUTIVE AGENCIES

HOLLY HENDERSON
MGR, REGULATORY MATTERS
GTE MOBILNET OF CENTRAL CA
ONE VERIZON PLACE, BLDG A
ALPHARETTA, GA 30004
FOR: GTE WIRELESS, INC.

KEVIN SAVILLE
ASSOCIATE GENERAL COUNSEL
CITIZENS/FRONTIER COMMUNICATIONS
2378 WILSHIRE BLVD.
MOUND, MN 55364
FOR: CITIZENS/FRONTIER COMMU ICATIONS

CHRISTINA V. TUSAN
ATTORNEY AT LAW
CALIFORNIA DEPARTMENT OF JUSTICE
300 SOUTH SPRING ST., 11TH FLOOR
LOS ANGELES, CA 90012
FOR: CALIFORNIA ATTORNEY GENERAL

EDWARD J. PEREZ
ASSISTANT DISTRICT ATTORNEY
LOS ANGELES CITY ATTORNEY'S OFFICE
200 N. MAIN STREET, ROOM 1800
LOS ANGELES, CA 90012
FOR: CITY OF LOS ANGELES

ANDREW W. SONG
MUNGER, TOLLES & OLSON
355 SOUTH GRAND AVE, 35/F

MICHAEL J. HARTIGAN
PRESIDENT
COMMUNICATIONS WORKERS OF AMERICA LOCAL

LOS ANGELES, CA 90071-1560
FOR: VERIZON WIRELESS

7844 ROSECRANS AVENUE
PARAMOUNT, CA 90723
FOR: COMMUNICATIONS WORKERS OF AMERICA
LOCAL 9400

JESUS G. ROMAN
MCIMETRO ACCESS TRANSMISSION SERVICES
112 LAKEVIEW CANYON ROAD, CA501LB
THOUSAND OAKS, CA 91362
FOR: VERIZON

JACQUE LOPEZ
VERIZON CALIFORNIA INC.
CA501LB
112 LAKEVIEW CANYON ROAD
THOUSAND OAKS, CA 91362-3811

CARL HILLIARD
WIRELESS CONSUMERS ALLIANCE, INC.
PO BOX 2090
DEL MAR, CA 92014
FOR: WIRELESS CONSUMERS ALLIANCE, INC.

ESTHER NORTHRUP
COX COMMUNICATIONS
350 10TH AVENUE SUITE 600
SAN DIEGO, CA 92101
FOR: COX CALIFORNIA TELCOM

KEITH W. MELVILLE
ATTORNEY AT LAW
SEMPRA ENERGY
101 ASH STREET, HQ 12
SAN DIEGO, CA 92101
FOR: SAN DIEGO GAS & ELECTRIC COMPANY

LORI ORTENSTONE
ATTORNEY AT LAW
AT&T SERVICES, INC.
101 W. BROADWAY RM 1300
SAN DIEGO, CA 92101

MICHAEL SHAMES
UTILITY CONSUMERS' ACTION NETWORK
3100 FIFTH AVENUE, SUITE B
SAN DIEGO, CA 92103

MARC D. JOSEPH
ATTORNEY AT LAW
ADAMS, BROADWELL, JOSEPH & CARDOZO
601 GATEWAY BLVD., STE. 1000
SOUTH SAN FRANCISCO, CA 94080
FOR: COMMUNICATIONS WORKERS OF AMERICA

ELAINE M. DUNCAN
VERIZON CALIFORNIA, INC.
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO, CA 94102

MARGARITA GUTIERREZ
DEPUTY CITY ATTORNEY
OFFICE OF SF CITY ATTORNEY
1 DR. CARLTON B. GOODLETT PLACE, RM. 234
SAN FRANCISCO, CA 94102
FOR: OFFICE OF THE SAN FRANCISCO CITY
ATTORNEY

CHRIS WITTEMAN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5129
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SINDY J. YUN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: ORA

MARK SAVAGE
ATTORNEY AT LAW
CONSUMERS UNION OF U.S., INC.
1535 MISSION STREET
SAN FRANCISCO, CA 94103

CHRISTINE MAILLOUX
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104
FOR: THE UTILITY REFORM NETWORK

ROBERT FINKELSTEIN
LITIGATION DIRECTOR
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104

KATHERINE S. RITCHEY
JONES DAY
555 CALIFORNIA ST., 26/F
SAN FRANCISCO, CA 94104-1500

STEPHEN B. BOWEN
ATTORNEY AT LAW
BOWEN LAW GROUP
235 MONTGOMERY STREET, SUITE 742
SAN FRANCISCO, CA 94104-3000
FOR: RHYTHMS LINKS, INC.

DAVID DISCHER
ATTORNEY AT LAW
PACIFIC BELL TELEPHONE COMPANY
525 MARKET STREET, RM. 2027
SAN FRANCISCO, CA 94105
FOR: AT&T

KRISTIN L. JACOBSON, ESQ.
SPRINT NEXTEL
201 MISSION STREET, SUITE 1500
SAN FRANCISCO, CA 94105

MARY E. WAND
ATTORNEY AT LAW
MORRISON & FOERSTER LLP
425 MARKET STREET
SAN FRANCISCO, CA 94105
FOR: GTE WIRELESS, INC.

WALTER MCGEE
WORKING ASSETS FUNDING SERVICE
101 MARKET STREET NO 700
SAN FRANCISCO, CA 94105

JAMES MCTARNAGHAN
ATTORNEY AT LAW
DUANE MORRIS LLP
ONE MARKET, SPEAR TOWER 2000
SAN FRANCISCO, CA 94105-1104
FOR: VERIZON WIRELESS

STEPHEN H. KUKTA
SPRINT NEXTEL
201 MISSION STREET, STE. 1500
SAN FRANCISCO, CA 94105-1831
FOR: WIRELINE GROUP

MARGARET L. TOBIAS
ATTORNEY AT LAW
TOBIAS LAW OFFICE
460 PENNSYLVANIA AVENUE
SAN FRANCISCO, CA 94107

MARILYN H. ASH
DIRECTOR, PUBLIC POLICY
U.S. TELEPACIFIC CORP/MPOWER COMM CORP
620 THIRD ST.
SAN FRANCISCO, CA 94107
FOR: U.S. TELEPACIFIC CORP.

PETER A. CASCIATO
A PROFESSIONAL CORPORATION
PETER A. CASCIATO, PC
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107
FOR: VIA WIRELESS (FORMERLY) CENTRAL
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PETER A. CASCIATO
ATTORNEY AT LAW
A PROFESSIONAL CORPORATION
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107
FOR: ASTOUND BROADBRAND, LLC

PETER A. CASCIATO
A PROFESSIONAL CORPORATION
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107
FOR: AGI PUBLISHING, INC.

CARL K. OSHIRO
ATTORNEY AT LAW
CSBRT/CSBA
100 PINE STREET, SUITE 3110
SAN FRANCISCO, CA 94111
FOR: CSBRT/CSBA

DARREN WEINGARD
REED SMIT LLP
TWO EMBARDERO CENTER, SUITE 2000
SAN FRANCISCO, CA 94111

JEANNE B. ARMSTRONG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111
FOR: CTIA-THE WIRELESS ASSOCIATION

JEFFREY F. BECK
ATTORNEY AT LAW
COOPER, WHITE & COOPER ,L.L.P.
201 CALIFORNIA ST., 17TH FLOOR
SAN FRANCISCO, CA 94111
FOR: EVANS/HAPPY
VALLEY/HORNITOS/KERMAN/PINNACLES/SISIYOU
/VOLCANO/WINTERHAVEN TELEPHONE COS.

LAILA CORREA
LATINO ISSUES FORUM
160 PINE STREET, SUITE 700
SAN FRANCISCO, CA 94111
FOR: LATINO ISSUES FORUM

MARK P. SCHREIBER
ATTORNEY AT LAW
COOPER, WHITE & COOPER, LLP
201 CALIFORNIA STREET, 17TH FLOOR
SAN FRANCISCO, CA 94111
FOR: ROSEVILLE TELEPHONE COMPANY,
CALAVERAS, CAL-ORE, DUCOR, FORESTHILL,
PONDEROSA, SIERRA TEL. CO.

MICHAEL B. DAY
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

PATRICK M. ROSVALL
ATTORNEY AT LAW
COOPER, WHITE & COOPER, LLP
201 CALIFORNIA STREET, 17TH FLOOR

FOR: CELLULAR CARRIERS ASSOCIATION OF CALIFORNIA

SAN FRANCISCO, CA 94111

RAYMOND A. CARDOZO
REED SMITH LLP
TQO EMBARDERO CENTER, SUITE 2000
SAN FRANCISCO, CA 94111

SARAH DEYOUNG
EXECUTIVE DIRECTOR
CALTEL
50 CALIFORNIA STREET, SUITE 1500
SAN FRANCISCO, CA 94111
FOR: CALTEL

THOMAS J. MACBRIDE, JR.
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, 9TH FLOOR
SAN FRANCISCO, CA 94111
FOR: CALIFORNIA ASSOCIATION OF COMPETITIVE COMMUNICATIONS CARRIERS

SUZANNE TOLLER
ATTORNEY AT LAW
DAVIS WRIGHT TREMAINE
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533
FOR: CRICKET COMMUNICATIONS, INC./WIRELESS SERVICES OF CALIFORNIA/CINGULAR WIRELESS

GLENN STOVER
ATTORNEY AT LAW
STOVER LAW
584 CASTRO ST., NO 199
SAN FRANCISCO, CA 94114-2594
FOR: SAGE TELECOM/TRI-M COMM/TMC COMM/ANEW TELECOM/BILLING CONCEPTS, INC.

DOUGLAS F. CARLSON
PO BOX 191711
SAN FRANCISCO, CA 94119-1711
FOR: SELF

EARL NICHOLAS SELBY
ATTORNEY AT LAW
LAW OFFICES OF EARL NICHOLAS SELBY
530 LYTTON AVENUE, 2ND FLOOR
PALO ALTO, CA 94301-1705
FOR: ICG TELECOM GROUP, INC.

ALEXIS K. WODTKE
STAFF ATTORNEY
CONSUMER FEDERATION OF CALIFORNIA
520 S. EL CAMINO REAL, STE. 340
SAN MATEO, CA 94402
FOR: CONSUMER FEDERATION OF AMERICA

JOHN A. GUTIERREZ
DIRECTOR, GOVERNMENT AFFAIRS
COMCAST PHONE OF CALIFORNIA, LLC
3055 COMCAST PLACE
LIVERMORE, CA 94551

JOANN RICE
SOUTHWESTERN BELL COMMUNICATIONS SERVICE
5130 HACIENDA DR FL 1
DUBLIN, CA 94568-7598
FOR: SOUTHWESTERN BELL COMMUNICATIONS SERVICES, INC.

BETSY GRANGER
2600 CAMINO ROMAN, ROOM 2W904
SAN RAMON, CA 94583

ISABELLE M. SALGADO
ATTORNEY AT LAW
AT&T CALIFORNIA
2600 CAMINO RAMON, RM. 2W901
SAN RAMON, CA 94583
FOR: SBC CALIFORNIA

LEON M. BLOOMFIELD
WILSON & BLOOMFIELD, LLP
1901 HARRISON STREET, SUITE 1620
OAKLAND, CA 94612
FOR: OMNIPOINT COMMUNICATIONS, INC. DBA T-MOBILE

LESLA LEHTONEN
VP LEGAL & REGULATORY AFFAIRS
CALIFORNIA CABLE TELEVISION ASSOCIATION
360 22ND STREET, NO. 750
OAKLAND, CA 94612
FOR: CALIFORNIA CABLE TELEVISION ASSOCIATION

MELISSA W. KASNITZ
ATTORNEY AT LAW
DISABILITY RIGHTS ADVOCATES
2001 CENTER STREET, FOURTH FLOOR
BERKELEY, CA 94704-1204
FOR: CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTER

WAYNE B. COOPER
ATTORNEY AT LAW
THIRTY OAKLAND AVENUE
SAN ANSELMO, CA 94960
FOR: PRIME MATRIX WIRELESS COMMUNITIES, INC./INCOMNET COMMUNICATIONS CORP

IGNACIO HERNANDEZ
CONSUMER FEDERATION OF CALIFORNIA

NORINE MARKS
LEGAL SERVICES UNIT

428 J STREET, SUITE 400
SACRAMENTO, CA 95814
FOR: CONSUMER FEDERATION OF CALIFORNIA

DEPARTMENT OF CONSUMER AFFAIRS
400 R STREET, SUITE 3090
SACRAMENTO, CA 95814
FOR: CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS

STAN STATHAM
PRESIDENT/CEO
CALIFORNIA BROADCASTER ASSOCIATION
915 L STREET, SUITE 1150
SACRAMENTO, CA 95814

STEVE BLACKLEDGE
CALIF.PUBLIC INTEREST RESEARCH GROUP,INC
1107 9TH STREET, STE. 601
SACRAMENTO, CA 95814

CINDY MANHEIM
NEW CINGULAR WIRELESS PCS, LLC
PO BOX 97061
REDMOND, WA 98073-9761

Information Only

SYLVIA CASTILLO
DIRECTOR, REGULATORY AFFAIRS
BSG CLEARING
EMAIL ONLY
EMAIL ONLY, CA 00000

HARRY N. MALONE
BINGHAM MCCUTCHEN LLP
2020 K STREET, NW
WASHINGTON, DC 20006
FOR: PAETEC COMMUNICATIONS, INC.

WINAFRED BRANTL
KELLEY DRYE & WARREN LLP
3050 K STREET, NW NO. 400
WASHINGTON, DC 20007

ROBERT A. SMITHMIDFORD
VICE PRESIDENT
BANK OF AMERICA
8011 VILLA PARK DRIVE
RICHMOND, VA 23228-2332
FOR: BANK OF AMERICA

CORALETTE HANNON
ESQUIRE
AARP LEGISLATIVE REPRESENTATIVE
6705 REEDY CREEK ROAD
CHARLOTTE, NC 28215
FOR: AARP

MARTIN CHERRY
ACCUCHARGE, LLC
1801 SOUTH FEDERAL HWY., STE. 300
DELRAY BEACH, FL 33483

JEFF SILVA
RCR WIRELESS NEWS
1155 GRATIOT AVE
DETROIT, MI 48207-2732

JOHN G. JACOBS
JACOBS KOTLON, CHTD.
122 SOUTH MICHIGAN AVENUE, SUITE 1850
CHICAGO, IL 60603

KELLI CUBETA
ATTORNEY AT LAW
BILLING CONCEPTS, INC.
7411 JOHN SMITH DRIVE, SUITE 200
SAN ANTONIO, TX 78229

KATHERINE K. MUDGE
ATTORNEY AT LAW
COVAD COMMUNICATIONS COMPANY
7000 NORTH MOPAC EXPRESSWAY, 2ND FLOOR
AUSTIN, TX 78731

MARJORIE HERLTH
REGIONAL DIRECTOR, PUBLIC POLICY
QWEST COMMUNICATIONS CORPORATION
1801 CALIFORNIA ST., 10TH FL.
DENVER, CO 80202

LACEY STEVENSON
AT&T SERVICES, INC.
2535 E 40TH AVENUE
DENVER, CO 80205-3601

GREGORY T. DIAMOND
COVAD COMMUNICATIONS COMPANY
7901 LOWRY BLVD.
DENVER, CO 80230

REX KNOWLES
REGIONAL VICE PRESIDENT
XO COMMUNICATIONS SERVICES, INC.
111 EAST BROADWAY, SUITE 1000
SALT LAKE CITY, UT 84111

NAN JAEGER
2817 VIA ALVARADO
PALOS VERDES ESTATES, CA 90274

PAMELA PRESSLEY
LITIGATION PROGRAM DIRECTOR
FOUNDATION FOR TAXPAYER&CONSUMER RIGHTS
1750 OCEAN PARK BLVD., SUITE 200
SANTA MONICA, CA 90405

HARVEY ROSENFIELD
THE FOUNDATION FOR TAXPAYER AND CONSUMER
1750 OCEAN PARK BLVD., 200
SANTA MONICA, CA 90405-4938
FOR: THE FOUNDATION FOR TAXPAYER AND CONSUMER

DONALD C. EACHUS
VERIZON CALIFORNIA, INC.
112 LAKEVIEW CANYON ROAD, CA501LS
THOUSAND OAKS, CA 91362

BRUCE KAUFMAN
CONTROLEX CORP.
16005 SHERMAN WAY, SUITE 105
VAN NUYS, CA 91406
FOR: CONTROLEX CORP.

KEITH NUSSBAUM
PREFERRED LONG DISTANCE, INC.
16830 VENTURA BLVD., SUITE 350
ENCINO, CA 91436
FOR: PREFERRED LONG DISTANCE, INC.

W. LEE BIDDLE, ESQ.
FERRIS AND BRITTON, APC
401 W. A ST., SUITE 1600
SAN DIEGO, CA 92101
FOR: COX COMMUNICATIONS, INC.

ART NEILL
ATTORNEY AT LAW
UTILITY CONSUMERS' ACTION NETWORK
3100 5TH AVE. SUITE B
SAN DIEGO, CA 92103

LAURIE ITKIN
CRICKET COMMUNICATIONS, INC.
10307 PACIFIC CENTER COURT
SAN DIEGO, CA 92121
FOR: CRICKET COMMUNICATIONS, INC.

MICHAEL BAGLEY
VERIZON WIRELESS
15505 SAND CANYON AVENUE
IRVINE, CA 92612

FRED RAMER
PEAK COMMUNICATIONS, INC
1442 EAST LINCOLN AVE., STE. 479
ORANGE, CA 92865

MIKE MULKEY
ARRIVAL COMMUNICATIONS
1807 19TH STREET
BAKERSFIELD, CA 93301

BILL NUSBAUM
MANAGING ATTORNEY
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104

ELAINE WALLACE
JONES DAY
555 CALIFORNIA STREET, 26/F
SAN FRANCISCO, CA 94104

REGINA COSTA
RESEARCH DIRECTOR
THE UTILITY REFORM NETWORK
115 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94104

CRAIG E. STEWART
JONES DAY
555 CALIFORNIA STREET, 26/F
SAN FRANCISCO, CA 94104-1500

ANNA KAPETANAKOS
AT&T CALIFORNIA
525 MARKET STREET, ROOM 2024
SAN FRANCISCO, CA 94105

BURTON A. GROSS
MUNGER, TOLLES & OLSON LLP
560 MISSION STREET, 27TH FLOOR
SAN FRANCISCO, CA 94105
FOR: VERIZON WIRELESS

HENRY WEISSMANN
ATTORNEY AT LAW
MUNGER, TOLLES & OLSON LLP
560 MISSION STREET, 27/F
SAN FRANCISCO, CA 94105
FOR: VERIZON WIRELESS

MARK BERRY
DIR - REGULATORY
AT&T SERVICES, INC.
525 MARKET STREET, RM 1920
SAN FRANCISCO, CA 94105

MICHELLE K. CHOO
AT&T CALIFORNIA
525 MARKET ST., 20TH FLOOR NO.2
SAN FRANCISCO, CA 94105

THOMAS SELHORST
SENIOR PARALEGAL
AT&T CALIFORNIA
525 MARKET STREET, 20TH FLR, RM 2023

SAN FRANCISCO, CA 94105

NANCY E. LUBAMERSKY
VICE PRESIDENT, PUBLIC POLICY
U.S. TELEPACIFIC CORP/MPOWER COMM. CORP
620 3RD ST.
SAN FRANCISCO, CA 94107

PETER A. CASCIATO
ATTORNEY AT LAW
PETER A. CASCIATO, A PROF. CORP.
355 BRYANT STREET, SUITE 410
SAN FRANCISCO, CA 94107
FOR: TW TELECOM OF CALIFORNIA, LP

SARAH LEEPER
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
ONE EMBARCADERO CENTER, 30TH FLOOR
SAN FRANCISCO, CA 94111
FOR: US CELLULAR

JUDY PAU
DAVIS WRIGHT TREMAINE LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

PETER VICENCIO
CUSTOMER OPER SUPERVISOR
METROPCS, INC.
1080 MARINA VILLAGE PARKWAY, 4TH FLOOR
ALAMEDA, CA 94501

JOHN DI BENE
VICE PRESIDENT & GENERAL COUNSEL
SBC LONG DISTANCE
5130 HACIENDA DR FL 1
DUBLIN, CA 94569-7598

ANITA TAFF-RICE
ATTORNEY AT LAW
EXTENET SYSTEMS, LLC
1547 PALOS VERDES MALL, NO. 298
WALNUT CREEK, CA 94597

WILLIAM P. ADAMS
ADAMS ELECTRICAL SAFETY CONSULTING
716 BRETT AVENUE
ROHNERT PARK, CA 94928-4012

JOSH P. THIERIOT
REGULATORY TEAM
PAC-WEST TELECOMM
4210 CORONADO AVE STE A
STOCKTON, CA 95204-2341

LYNNE MARTINEZ
PAC-WEST TELECOMM, INC.
4210 CORONADO AVE STE A
STOCKTON, CA 95204-2341

NANCY GRIFFIN
REGULATORY COMPLIANCE
PAC-WEST TELECOMM. INC.
4210 CORONADO AVE, STE A
STOCKTON, CA 95204-2341
FOR: PAC-WEST TELECOMM INC.

YVONNE SMYTHE
CALAVERAS TELEPHONE COMPANY
PO BOX 37
COPPEROPOLIS, CA 95228

RICHARD H. LEVIN
ATTORNEY AT LAW
PO BOX 240
SEBASTOPOL, CA 95473-0240

CHARLES E. BORN
MANAGER-STATE GOVERNMENT AFFAIRS
FRONTIER, A CITIZENS TELECOMMUNICATIONS
PO BOX 340
ELK GROVE, CA 95759

MICHAEL MORENO
AARP
1415 L ST STE 960
SACRAMENTO, CA 95814-3977
FOR: AARP

PETER LEWIS
SEATTLE TIMES
PO BOX 70
SEATTLE, WA 98111

ADAM L. SHERR
QWEST COMMUNICATIONS CORPORATION
1600 7TH AVENUE, ROOM 1506
SEATTLE, WA 98191

ANDREW O. ISAR
PRESIDENT
MILLERS ISAR, INC.
4423 POINT FOSDICK DRIVE, NW SUITE 306
GIG HARBOR, WA 98335
FOR: SILV COMMUNICATION, INC. / UNITED TELECOM, INC. / PRO SE, AND ITS THIRD PARTY BILLING INTEREXCHANGE TELECOMMUNICATIONS PROVIDER CLIENTS.

State Service

CHRISTOPHER POSCHL
CALIF PUBLIC UTILITIES COMMISSION
UTILITY & PAYPHONE ENFORCEMENT
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

KYLE DEVINE
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC ADVISOR OFFICE
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

MARCUS NIXON
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC ADVISOR OFFICE
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

AMY C. YIP-KIKUGAWA
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 2106
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DALE PIIRU
CALIF PUBLIC UTILITIES COMMISSION
COMMUNICATIONS POLICY BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

HIEN VO
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5135
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DIVISION OF RATE PAYER ADVOCATES

JANE WHANG
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5029
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOEL TOLBERT
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JONATHAN LAKRITZ
CALIF PUBLIC UTILITIES COMMISSION
CONSUMER PROGRAMS BRANCH
ROOM 3203
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JULIE HALLIGAN
CALIF PUBLIC UTILITIES COMMISSION
CONSUMER PROTECTION AND SAFETY DIVISION
ROOM 2203
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KAREN MILLER
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC ADVISOR OFFICE
ROOM 2103
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KAREN P. PAULL
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LINDA J. WOODS
CALIF PUBLIC UTILITIES COMMISSION
UTILITY & PAYPHONE ENFORCEMENT
AREA 2-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LINDSAY M. BROWN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MARIBETH A. BUSHEY
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5018
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MARK CLAIRMONT
CALIF PUBLIC UTILITIES COMMISSION
TRANSPORTATION ENFORCEMENT BRANCH
AREA 2-C
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

NORA Y. GATCHALIAN
CALIF PUBLIC UTILITIES COMMISSION
UTILITY & PAYPHONE ENFORCEMENT
AREA 2-F
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RICHARD MANISCALCO
CALIF PUBLIC UTILITIES COMMISSION
CONSUMER PROGRAMS BRANCH
AREA 3-E
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RISA HERNANDEZ
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROBERT J. WULLENJOHN
CALIF PUBLIC UTILITIES COMMISSION
POLICY ANALYSIS BRANCH
ROOM 3207
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROBERT LEHMAN
CALIF PUBLIC UTILITIES COMMISSION
COMMUNICATIONS POLICY BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ROSALINA WHITE
CALIF PUBLIC UTILITIES COMMISSION
PUBLIC ADVISOR OFFICE
AREA 2-B
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SARITA SARVATE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SHERI INOUYE BOLES
CALIF PUBLIC UTILITIES COMMISSION
TRANSPORTATION ENFORCEMENT BRANCH
AREA 2-F
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SIMIN LITKOUHI
CALIF PUBLIC UTILITIES COMMISSION
POLICY ANALYSIS BRANCH
AREA 3-D
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TERRIE D. PROSPER
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5301
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

XIAO SELENA HUANG
CALIF PUBLIC UTILITIES COMMISSION
COMMUNICATIONS POLICY BRANCH
ROOM 4211
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

GAYLEE ADELL
CALIF PUBLIC UTILITIES COMMISSION
UTILITY & PAYPHONE ENFORCEMENT
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

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