

BEFORE THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking on the
Commission's Own Motion to establish
Consumer Rights and Protection Rules
Applicable to All Telecommunications
Utilities.

Rulemaking 00-02-004
(Filed February 3, 2000)

**REPLY COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES
ON CRAMMING COMPLAINT REPORTING RULES
PURSUANT TO FEBRUARY 12, 2010
ASSIGNED COMMISSIONER'S RULING**

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I. INTRODUCTION

The Division of Ratepayer Advocates (“DRA”) files these reply comments in response to comments submitted on the February 12, 2010 Assigned Commissioner’s Ruling Requesting Comment on Proposed California Telephone Corporation Billing Rules (“ACR”).¹ The ACR proposed a set of cramming rules that combined two previously issued sets of rules into one comprehensive set of rules applicable to all California telephone corporations, including resellers and wireless service providers. The proposed rules were designed to achieve three specific objectives: (1) to prevent unauthorized charges from being placed on the subscriber’s bill, (2) to identify promptly any unauthorized billing, bring it to a halt, and obtain refunds for subscribers, and (3) identify “bad actors” and prevent them from presenting further billings in California.²

Despite providing parties another opportunity to comment on the cramming rules, the wireline and wireless carriers offer the same proposals from their previous comments. The current ACR effectively rejected those proposals. Therefore, the Commission should not delay this proceeding any further with unnecessary workshops, and instead adopt the ACR’s proposed rules. They provide the Commission with the best and most effective tools to achieve its ultimate objective – to deter cramming.

II. THE COMMISSION SHOULD ISSUE A PROPOSED DECISION ADOPTING THE ACR’S CRAMMING RULES WITHOUT DELAY

Several carriers complain that the ACR blindsides them with “new” rules that go beyond the scope of what was intended in D.06-03-013 (*CPI decision*), or that the ACR fails to provide justification for its proposals.³ Others propose that the Commission hold further workshops “to allow industry participants to properly vet all of the issues.”⁴ The Commission should dismiss all of these complaints and see them for what they really are

¹ Silence on a particular issue should not be construed as assent.

² February 12, 2010 ACR at 2.

³ See e.g., Small LECs (March 22, 2010) at 2-5; Verizon (March 22, 2010) at 4-5; AT&T and New Cingular Wireless PCS (March 22, 2010) at 2.

⁴ See Citizens (March 22, 2010) at 2-3; see also AT&T (March 22, 2010) at 19; BSG Clearing Solutions (March 22, 2010) at 1 and 5; Small LECs (March 22, 2010) at 1-2.

– thinly-veiled attempts to delay long overdue consumer protection rules focused on monitoring and placing responsibility on all entities in the third-party billing “food chain,” especially Billing Telephone Companies (“BTCs”).⁵

Over the past four years the Commission has given parties ample opportunity to vet the issues involved with implementing Public Utilities (P.U.) Code Sections 2889.9 and 2890 (anti-cramming statutes).⁶ In the *CPI decision*, the Commission interpreted the statutes to require phone companies to be held ultimately responsible for any unauthorized charges placed on their customers’ bills.⁷ The Commission provided the following reason for its interpretation.

Placing this responsibility on carriers ensures that they will actively monitor the entities for whom they provide billing and collection services, and will adopt appropriate safeguards to prevent their bills from being used to facilitate illegal cramming.⁸

The *CPI decision* therefore puts carriers on notice to expect further responsibilities beyond complaint resolution and complaint reporting, namely monitoring and prevention of cramming.

After the Commission issued the *CPI Decision*, it held a workshop to discuss the complaint reporting rules. Based on the workshop, staff of the Commission’s Consumer Protection and Safety Division (Staff) prepared a Report which presented its recommendations on rules to implement section 2889.9(d)’s complaint reporting requirements. Thereafter, the Commission issued a comprehensive ACR (February 2008) incorporating Staff’s recommendations and sought comment from parties. Parties (including numerous industry representatives) submitted extensive comments on the ACR and presented their own proposals for complaint reporting or alternatives to

⁵ DRA intends for “Billing Telephone Company” and “Billing Telephone Corporation” to be used interchangeably.

⁶ All references to Section numbers refers to the California Public Utilities Code unless otherwise stated.

⁷ D.06-03-013 at 95.

⁸ *Id.* at 95.

reporting. After submission of comments in 2008, the Commission had a substantial record from which to issue a proposed decision.

Rather than issue a proposed decision, the Assigned Commissioner gave parties another bite at the apple with a more refined ACR on February 12, 2010. The 2010 ACR combined the two previously sets of cramming rules into a comprehensive one, and sought further comment from parties. The new ACR does not go outside the boundaries of the scope initially proposed by the *CPI Decision*.

Even if there are “new” rules, as some industry parties allege, the ACR affords parties sufficient notice and opportunity to be heard by soliciting comments and granting an extension of time to file them. It is not correct, as alleged by some parties, that the parties have not had ample opportunity to comment.

In response to the current ACR, carriers generally ignored this opportunity to present evidence; instead they presented the same arguments they made in response to the 2008 ACR. There is no reason to believe that another round of workshops would result in anything new or different proposals. The wireless carriers would continue to argue against any inclusion of wireless carriers in any proposed rules. Further workshops, therefore, would be futile in that the parties would continue to advocate the same positions. Consequently, the Commission should proceed with a proposed decision that adopts the new ACR as soon as possible.

III. CRAMMING REMAINS A PROBLEM FOR CONSUMERS

A. Recent Cramming Actions

Contrary to claims by some carriers,⁹ cramming remains a major problem for consumers. For example, as recent as last month, the Federal Trade Commission (“FTC”) halted a massive cramming operation by a California Internet services company (Inc21). The FTC alleged that Inc21 took \$19 million from thousands of consumers and

⁹ See e.g. Cricket and MetroPCS (March 22, 2010) at 1-2; Small LECs (March 22, 2010) at 4.

small businesses over five years.¹⁰ In 2008, the nation's largest telephone bill aggregators (BSG Clearing Solutions North America, LLC, ACI Billing Services, Inc. d/b/a OAN, and Billing Concepts, Inc. (collectively, "BSG")) agreed to pay \$1.9 million and stop "cramming" to settle FTC charges.¹¹

Other state governmental agencies have also taken recent action against alleged crammers. In Florida, the Attorney General's Office has gone after and reached settlements with key players from each part of the industry, including marketers, billing aggregators, content providers and wireless service providers.¹² For example, in June 2009, the Florida AG reached an agreement resulting in millions of dollars in refunds to Florida Verizon Wireless and Alltel consumers for third-party ringtone charges on their cell phone bills.¹³ Prior to that, in February 2008, the Florida AG retrieved millions for Florida AT&T Wireless customers by getting the company to agree to make full restitution to Florida consumers who were unknowingly billed for "free" cell phone content.¹⁴ In March 2007, a civil suit by the Florida AG against a Florida company

¹⁰ See *FTC Halts Massive Cramming Operation that Illegally Billed Thousands; Alleges Scam Took in \$19 Million over Five Years*, Press Release, March 1, 2010, Federal Trade Commission, found at <http://www.ftc.gov/opa/2010/03/inc21.shtm>

¹¹ See *Nation's Largest Telephone Bill Aggregators Will Pay \$1.9 Million and Stop 'Cramming' to Settle FTC Charges*, Press Release, March 13, 2008, Federal Trade Commission, found at <http://www.ftc.gov/opa/2008/03/phone.shtm>

¹² See http://www.consumeraffairs.com/news04/2009/06/wireless_cramming.html#ixzz0kUTmKyzr

¹³ See *McCollum Reaches Multi-Million Dollar Settlement with Verizon Wireless over "Free" Ringtones*, News Release, June 24, 2009, Office of the Attorney General of Florida, found at http://myfloridalegal.com/_852562220065EE67.nsf/0/385B05C9C8A28D2D852572A300595704?Open&Highlight=0,cramming; see also *Crist Sues Alltel for Auto-Enrolled "Mr. Rescue" Program*, News Release, October 3, 2006, Office of the Attorney General of Florida, found at <http://myfloridalegal.com/newsrel.nsf/newsreleases/02750608EEA6122A852571FC006E413E> (Florida's AG alleged Alltel automatically enrolled thousands of customers for a free trial of a roadside assistance program without disclosing terms of the program at the time of activation and billing customers without their specific consent. More than 520,000 Florida consumers were enrolled in Mr. Rescue over the past five years, and investigators estimate that Alltel made more than \$20 million from the program during that time period. It has not yet been determined what portion of those consumers were signed up improperly.)

¹⁴ See *McCollum Retrieves Millions For Florida AT&T Wireless Customers Billed for "Free" Ringtones*, News Release, February 29, 2008, Office of the Attorney General of Florida, found at http://myfloridalegal.com/_852562220065EE67.nsf/0/4641E1C60FB29763852573FE004E6338?Open&Highlight=0,alltel

(Email Discount Network) that charged more than 250,000 consumers nationwide a monthly fee for shopping coupons and discounts the company advertised on the internet resulted in refunds to consumers and a change in the company's business practices.¹⁵ Moreover, in Illinois, the state's AG filed a lawsuit on May 12, 2009 against a California company, Minilec Warranty ISP, LLC, and its owner for allegedly "cramming" consumers' phone bills with unauthorized monthly charges to cover cell phone repair warranties.¹⁶

In addition to the cramming actions brought by government agencies, several class action lawsuits recently filed underscores the prevalence of cramming. In 2008, AT&T agreed to provide refunds to AT&T wireless customers nationwide to settle a class action suit stemming from unauthorized charges (ringtones, games, graphics and news or other alerts that are generally purchased over the internet), placed by third-party providers, on the bills of its wireless customers.¹⁷ Though not exhaustive, the following are more recently filed class action cases that involved allegations of cramming.

- *Zijdel v. Thumbplay, and M-Cube, Inc.*, (N.D. Cal. July 16, 2009) (Plaintiff alleges fraud, unauthorized mobile content services);
- *Coren v. Mobile Entm't, Inc.* (Santa Clara, Cal. 2009) (Plaintiff alleges fraud for unwanted and unauthorized mobile content services.);
- *Ranger v. T-Mobile USA, Inc.* (C.D. Cal. 2009) (Plaintiff alleges causes of action for breach of contract, CLRA § 1770; violation of California's Unfair Competition Law, Bus. & Prof. Code §§ 17200; violation of California Public Utilities Code § 2890);
- *Amezcuca v. Cellco Partnership d/b/a Verizon* (Santa Clara, CA 2008) (alleged breach of contract, CLRA § 1770; violation of

¹⁵ See *Florida Internet Company Agrees to Reimburse Consumers*, News Release, March 19, 2007, Office of the Attorney General of Florida, found at http://myfloridalegal.com/_852562220065EE67.nsf/0/385B05C9C8A28D2D852572A300595704?Open&Highlight=0,edn

¹⁶ See *Madigan Sues California Company For Phone Bill Cramming*, Press Release, May 12, 2009, Illinois Attorney General, found at http://www.ag.state.il.us/pressroom/2009_05/20090512.html

¹⁷ See *AT&T Settles Charges, Unauthorized charges plagued wireless subscribers*, Article, June 3, 2008, consumeraffairs.com, found at http://www.consumeraffairs.com/news04/2008/06/att_cramming.html

California's Unfair Competition Law, Bus. & Prof. Code §§ 17200; violation of California Public Utilities Code § 2890);

- *Sims v. Verizon* (N.D. Cal. 2007) (alleged violations of 47 U.S.C. § 201(b); breach of contract; California's Unfair Competition Law, Bus. & Prof. Code §§ 17200 et seq.; California Public Utilities Code § 2890; and violation of California's Unfair Competition Law, Bus. & Prof. Code §§ 17500 et seq., class estimated as "tens of thousands"; settled 2009);
- *Bradberry v. T-Mobile USA, Inc.* (N.D. Cal. 2006)(alleged violation of 47 U.S.C. § 201(b); California Public Utilities Code § 2890; breach of contract; California's Unfair Competition Law, Bus. Prof. Code § 17200 et seq.; and violation of California's Unfair Competition Law, Bus. Prof. Code §§ 17500 et seq.; class size estimated 180,000; settled 2009);
- *Valdez v. M-Qube et al., 4:07-CV-6496-CW, Valdez v. M-Qube, Verisign, Buongiorno USA, Inc. et al; Valdez v. Sprint* (N.D. Cal. 2006) (allegations of unlawful, unfair and deceptive business practices under California Business and Professions Code § 17200 et seq., class size in tens of thousands, settled in 2009);
- *Stern v. Cingular Wireless Corp.* (C.D. Cal. 2005) (Plaintiff alleges customers charged for services that the customers had not authorized, totaling approximately \$9 per month.)

With respect to cramming, the Commission is the regulatory agency charged by statute with authority to oversee billing telephone companies, billing agents, and third-party service providers. As such, the ACR correctly concludes that "[t]his Commission has the responsibility to protect consumers in California from unscrupulous business practices of entities and utilities that we regulate."¹⁸ To do that, the Commission acknowledged that it needs to "step up its efforts in the enforcement area."¹⁹ Adopting the ACR's proposed cramming rules will provide the Commission with the data it needs to fulfill its responsibilities.²⁰

¹⁸ ACR (Feb. 12, 2010) at 7.

¹⁹ ACR (Feb. 22, 2008).

²⁰ The 2008 ACR, at 6, acknowledged that "[d]ata provided to Commission staff from carriers pursuant to a reporting requirement is an essential tool in the Commission's enforcement efforts."

B. Recent Cramming Actions Cast Doubt on the Efficacy of Industry “Safeguards”

AT&T, Verizon Wireless, and CTIA claim that the “rules” promulgated by the Mobile Marketing Association (MMA) are adequate to protect consumers.²¹ AT&T describes the MMA guidelines with regard to marketing, sale, and monitoring of third-party content charges, stating “[c]arriers’ certification, auditing, and monitoring programs typically reflect an extremely engaged approach towards self-regulation.”²² AT&T and Verizon also argue that their internal practices sufficiently address cramming issues.²³ Similarly, BSG alleges that their best practices program (“BSG Program”) is effective and achieves the Commission’s objectives.²⁴

DRA believes that the MMA guidelines and carriers’ and billing agents’ internal practices are necessary. The MMA guidelines do not currently require cramming reporting by the wireless carriers, and thus, alone, they are insufficient to protect consumers from increasingly sophisticated cramming schemes perpetrated today.²⁵ The recent cramming cases cited above shows that the Industry cannot adequately regulate itself, even while members of the MMA, like AT&T and Verizon Wireless, operate under their own best practices and follow the MMA’s voluntary guidelines.

C. Cramming Is Not Limited to Residential Customers

DRA strongly disagrees with The California Association of Competitive Telecommunications Companies (“CALTEL”) suggestion that small businesses do not need the Commission’s protection. As DRA, TURN, and UCAN noted in opening comments, cramming is still an enormous problem affecting millions of consumers on a

²¹ AT&T (March 22, 2010) at 15; Verizon Wireless (March 22, 2010) at 15; CTIA (March 22, 2010) at 6-9.

²² AT&T (March 22, 2010) at 15.

²³ AT&T (March 22, 2010) at 3-7; Verizon Wireless (March 22, 2010) at 4-9.

²⁴ BSG (March 22, 2010) at 2.

²⁵ See DRA (March 22, 2010) at 3-7, discussing *FTC v. Inc21.com Corp.*, No. C 10-00022 (N.D. Cal. March 16, 2010).

daily basis, and is on the rise again.²⁶ CALTEL argues that the Commission should not be concerned with whether business customers such as Sleep Train, Wine.com, or any other business or wholesale customers engage in transactions that would subject them to third-party billing.²⁷ In other words, CALTEL believes that cramming is not a problem for business and wholesale customers because of “their relative level of sophistication” to thoroughly review contracts in advance and to resolve their own issues (if any exist) directly with their service providers.²⁸

While CALTEL alleges that cramming problems are limited to residential customers so as to exempt their members from the proposed rules, DRA found complaints from business customers in CAB that contradict this contention. A few examples of recent cramming complaints are provided below.

- This letter is written with outrage due to the recurrent bills from AT&T. AT&T has repeatedly allowed third party charges from random companies no reason without any service, nor have we agreed to participate in! Every time we called AT&T regarding these charges they claim there is nothing they are able to do about these charges that they are mandated by the California Public Utilities Commission to never block third party charges. (A Ph.D. M.D. from the American Board of Internal Medicine)²⁹
- My phone bill has been repeatedly crammed with bogus charges from all sorts of third parties. I’ve had four false charges to my bill in less than four years in business...they told me that the CPUC requires them to pass any charges onto their customers –without any verification beforehand whatsoever.³⁰
- I want CPUC to stop Payment One and Ameritel Communications from cramming the charges in the phone

²⁶ See eg. DRA (3/22/10) at 14, TURN (3/22/10) at 2; UCAN (3/22/10) at 2.

²⁷ CALTEL (3/22/10) at 2.

²⁸ *Id.* at 4.

²⁹ CAB Complaint #82556 (Jan 20, 2010).

³⁰ CAB Complaint #89818 (Feb 22, 2010).

bills of small business like us. In this tough economic times [sic], it is one more battle we have to fight. Please help.³¹

From the examples cited, it is clear that even “sophisticated business customers” get crammed, as well as being unable to successfully resolve their own issues directly with their service providers. Like residential customers, these customers are also frustrated that they cannot control the unauthorized charges put on their business bills and need to turn to the Commission for help.

IV. TO EFFECTIVELY ENFORCE THE PROVISIONS OF SECTION 2889.9 AND 2890, THE COMMISSION NEEDS CRAMMING COMPLAINT DATA FROM ALL TELEPHONE CORPORATIONS, INCLUDING WIRELESS CARRIERS (ACR Proposed Rule 12)

A. Section 2889.9(d) Mandates Complaint Reporting By Wireless Carriers

Wireless carriers seek to avoid providing the Commission with cramming complaint data,³² despite the Commission’s clear intent to apply the cramming rules to wireline carriers, billing aggregators, reseller, and wireless telephone service providers on a non-discriminatory and equal basis.³³ More importantly, section 2889.9(d) does not allow the Commission to waive the complaint reporting requirement for any billing telephone company. Therefore, the Commission should reject these obvious attempts by the wireless industry to undermine the Commission’s enforcement efforts to combat cramming.³⁴

As background, ten years ago when the Commission first implemented the reporting mandates of section 2889.9(d), the Commission noted that the term “Billing

³¹ CAB Complaint #83207 (Jan 22, 2010).

³² Rather than report cramming complaints as required by Section 2889.9(d), wireless carriers propose to only notify the Commission after a carrier terminates its billing and collection service for a third-party service provider it finds responsible for cramming. See AT&T (Mar. 22, 2010) at 16; Verizon Wireless (Mar. 22, 2010) at 24; CTIA (Mar. 22, 2010) at 12.

³³ In D.06-03-013, the Commission defined a *telephone company* as a telephone corporation within the meaning of P.U. Code § 234, and made it explicit that the term included resellers and wireless service providers. See D.06-03-013, GO, Part 4 –Rules Governing Cramming Complaints, at A-20.

³⁴ Many of the recent cramming actions cited in these comments involved wireless carriers.

Telephone Company” was a new statutory term that referred to those companies that provided third-party billing.³⁵ At that time, only Incumbent Local Exchange Carriers (“ILECs”) provided such service. Therefore, the *Subscriber Complaint Reporting Rules* adopted in D.00-03-020, as modified by D.00-11-015, applied only to wireline carriers. Of significance, however, was the Commission’s recognition that the term “Billing Telephone Company” was a more inclusive term because other carriers might provide third-party billing in the future.³⁶ Indeed, all wireless carriers are now providing billing and collection services to third parties, thereby making them *Billing Telephone Companies*.

Section 2889.9(d) is clear with respect to the Commission’s obligation to require reporting of all cramming complaints from each *Billing Telephone Company*. The plain language of section 2889.9(d) does not provide for any exceptions or qualifications to reporting. Section 2889.9(d) directs the Commission to do the following:

The commission *shall* establish rules that require each billing telephone company, billing agent, and company that provides products and services that are charged on subscribers’ telephone bills, to provide the commission with reports of complaints made by subscribers regarding the billing for products or services that are charged on their telephone bills 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.³⁷

Since wireless carriers are billing telephone companies within the meaning of section 2889.9(d), the reporting obligations of this section equally apply to them.

B. There is No Substitute for Cramming Complaint Data from Billing Telephone Companies and Billing Agents

Unable to provide any legal basis for the Commission to deviate from the clear complaint reporting mandates of section 2889.9(d), wireless carriers simply offer the

³⁵ D.00-03-020 at 13, fn. 5.

³⁶ *Id.* (“This [Billing Telephone Companies] is the new statutory term that refers to those companies that provide third-party billing. Currently, only incumbent local exchange carriers provide such service but this fact may change in the future; hence, the more inclusive term of Billing Telephone Companies.”)

same weak arguments they made two years ago – that complaint reporting rules are unnecessary and too costly.³⁸ The current ACR appropriately rejected these claims and the Commission should do the same by adopting the ACR’s proposed cramming rules.

1. Data Suggests That the Number of Cramming Complaints Received by CAB is Less than 2% of Cramming Complaints Received by BTCs

Cricket and MetroPCS argue that there is no evidence to show that the ACR’s proposed rules would reduce cramming, citing their lack of complaints in CIMS (CAB’s complaint database).³⁹ DRA disagrees. While an important source of cramming complaints, CAB only captures a small fraction of the complaints made by consumers.

DRA compared the number of cramming complaints received by CAB against the number of cramming complaints reported by wireline carriers and billing aggregators pursuant to the current reporting rules. For 2009, CAB received 1,697 complaints. In stark contrast, wireline and billing agents reported 106,333 complaints. This enormous discrepancy shows that cramming is a much larger problem than the CAB data suggests. Indeed, the Commission recognized this phenomenon back in 2002 in its cramming and slamming report to the Legislature.

Since consumers call their billing telephone companies and/or billing agents first to resolve their complaint issues, these entities receive a significantly higher volume of complaints than the Commission. Many consumers either resolve their complaints with these entities or choose not to escalate the matter to the Commission.⁴⁰

Cricket is a case study that illustrates why the Commission should not rely upon CAB data alone. CAB representatives instruct customers to first contact their billing

³⁷ P.U. Code § 2889.9(d). (Emphasis added).

³⁸ See eg. AT&T and New Cingular Wireless PCS (March 22, 2010) at 7; Cricket and MetroPCS (March 22, 2010) at 1, 9; Verizon Wireless (March 22, 2010) at 9-10.

³⁹ Cricket/MetroPCS (March 22, 2010) at 11, 14.

⁴⁰ *Report to the Legislature on Cramming and Slamming*, April 10, 2002, California Public Utilities Commission.

telephone corporation to resolve problems such as cramming. This is impossible if customers are unable to reach the company, as appears to be the problem of many Cricket customers, for a variety of different types of complaints.⁴¹ Some other reasons why complaints to CAB are not sufficient to quantify the scope of the cramming problem include the following:

a) People Are Unaware of CAB

Customers that report to CAB must be sufficiently well-informed to know of the existence of a state Public Utilities Commission, and that one of its purposes is to collect and handle complaints. It is unrealistic to assume that an average consumer would be aware of the Commission or to whom to complain to regarding confusing third-party charges.⁴² For example, in an April 2009 complaint to CAB wherein the complainant alleged Verizon Wireless crammed her for an internet access charge, the complaint wrote:

- “I worked for Pac Bell 13 years and even I can’t understand Verizon’s bill.”⁴³

⁴¹ CAB Complaint Numbers: 2991(November 6, 2008); 8735 (December 4, 2008); 9448 (December 9, 2008); 13462 (December 30, 2008); 13575 (December 30, 2008); 16959 (January 15, 2009); 18314 (January 22, 2009); 26633 (February 26, 2009); 28301 (March 9, 2009); 28487 (March 9, 2009); 30523 (March 17, 2009); 30632 (March 16, 2009); 34878 (April 8, 2009); 35485 (April 13, 2009); 37272 (April 20, 2009); 39637 (May 5, 2009); 41055 (May 11, 2009); 41320 (May 12, 2009); 45068 (June 1, 2009); 45291 (June 3, 2009); 47550 (June 15, 2009); 47904 (June 17, 2009); 47999 (June 17, 2009); 61227 (September 4, 2009); 65561 (September 29, 2009); 65870 (October 1, 2009); 71639 (November 4, 2009); 86782 (February 9, 2010); 86938 (February 10, 2010); 90952 (March 2, 2010); 94855 (March 19, 2010).

⁴² See DRA (April 7, 2008) at 19, fn 57.

⁴³ CAB complaint # 39504 (April 29, 2009)

The same complainant then described her interaction with the carrier:

- I spoke to T (identities withheld by DRA) and then her supervisor A (employee #xxxxxx). After they both told me I'd been charged since Dec. 2007 for some sort of internet charge, T first offered a 2 month refund and then both T and then A upped it to 6 months. I said I wanted the full 15 months, but A informed me their computer would refuse any refund past 6 months! I asked for her supervisor but she conveniently wasn't there. I asked A if Verizon is regulated by the PUC and she said NO! that the FCC regulated them. I asked for the FCC's # but she didn't have it! I told her I wasn't sure it was quite legal for her not to have the # of the agency that regulated them.⁴⁴

This complaint exemplifies problems customers have about getting accurate information about where to file complaints, even for an aggrieved customer with work experience in the telecommunications industry and some familiarity with the CPUC's role. While this customer did finally manage to contact CAB, her experience is indicative of the obstacles facing less-informed customers. Therefore, the lower CAB complaint numbers reflect a skewed accounting of cramming complaints, only capturing those that are well-informed about the Commission or who have not been discouraged to contact the Commission.

b) Wireless Carriers' "One Call Policy"

The one-call policy and automatic credits for cramming complaints reduces the number of customers complaining to CAB. For every instance of cramming reported and resolved, many more go unnoticed.⁴⁵ However, those few that are disputed are quickly resolved through the one-call policy and automatic credits are rarely reported due to the quick resolution. The result is that neither the unnoticed cramming instances, nor the noticed cramming instances are reported, which further skews the accounting of actual cramming trends and numbers. It would only be through implementation of the proposed cramming complaint reporting rules that the Commission will begin to get a more accurate account of the cramming problem.

⁴⁴ *Id.*

⁴⁵ See DRA (April 7, 2008) at 18-19.

c) Cultural barriers to complaining to CAB

CBOs have identified cultural characteristics, such as a communities' inherent distrust of government, utilities or corporations or a reluctance to complain, which can also lead to difficulties in resolving complaints.⁴⁶ In addition to these cultural barriers leading to difficulties in resolution, it also leads to lowered CAB complaints in comparison to actual cramming instances.

d) Complaints Labeled As Disputed Bills in CAB That Are Actually Cramming

As discussed in Attachment B of DRA's Opening Comments, cramming complaints are often counted as disputed bill complaints. The following examples show cramming problems of Cricket customers that were mis-categorized as billing disputes.⁴⁷

- "Customer states that services were charged to his account without his authorization."⁴⁸
- "Cricket added a feature to my plan without notifying me."⁴⁹
- "Consumer being billed for feature never ordered, ringback tone called eo, ..." ⁵⁰
- "Billed for 2 ringtones never ordered."⁵¹
- "Complaint/Concern: adding things to my phone bill like ring tone, extra charges."⁵²

CAB complaints are useful in providing anecdotal evidence, such as presented in these comments. They are also not available in the summary reports proposed in the ACR.

⁴⁶ *Challenges Facing Consumers with Limited English Skills In The Rapidly Changing Telecommunications Marketplace*, Prepared by: Consumer Services and Information Division Telecommunications Division Consumer Protection and Safety Division, Oct. 5, 2006, at 78.

⁴⁷ These quotes are either from end users or notes taken by CAB reps.

⁴⁸ CAB Complaint # 51881 (July 9, 2009).

⁴⁹ CAB Complaint # 22089 (Feb. 6, 2009).

⁵⁰ CAB Complaint # 17637 (Jan. 20, 2009).

⁵¹ CAB Complaint # 21183 (Feb.4, 2009).

⁵² CAB Complaint # 64146 (Sept. 21, 2009).

Nevertheless, CAB complaints are not the right tool for measuring the extent of cramming.

C. Carriers Consistently Fail to Substantiate Alleged Costs of Cramming Complaint Reporting

To implement the complaint reporting requirements of section 2889.9(d), the Commission had to impose new reporting requirements upon wireline carriers. With respect to costs, the Commission stated that “[t]o the extent any new responsibilities impose costs upon the Billing Telephone Companies, such costs should be either absorbed by the Billing Telephone Companies or passed on to those service providers that purchase billing services.”⁵³ Now that the Commission intends to expand the reporting requirements to wireless carriers, as section 2889.9(d) mandates, the Commission should require the same of wireless carriers. Contrary to assertions by the wireless industry, the complaint reporting rules proposed by the ACR are neither too costly, nor obviously burdensome.

1. Carriers Already Track Cramming Complaints in the Ordinary Course of Business In Order to Give Refunds.

AT&T argues that because the wireless industry has not been required to report cramming data by any federal or state regulator body, wireless operations are not equipped to track the data.⁵⁴ For accounting purposes, however, carriers must already track cramming complaints.⁵⁵ As DRA explained in previous comments, the contractual relationship between billing carrier and third-party service providers necessarily requires that the contracting parties have some system in place to keep track of the credits issued to complaining customers for unauthorized charges. Moreover, at least one wireless carrier indicated to DRA in a data response that its current tracking system allowed it to

⁵³ D.00-03-020 at 16.

⁵⁴ See e.g. AT&T and New Cingular Wireless PCS (3/22/10) at 15-17.

⁵⁵ See DRA (April 7, 2008) at 13-17; see also DRA Reply (April 22, 2008) at 6-7.

track the reason for the credit.⁵⁶ These facts undermine wireless carriers' claim that they do not track cramming complaints.

For instance, Cricket and MetroPCS state that they handle any customer inquiry regarding third-party service or content themselves or coordinate the resolution between the third-party provider and the customer.⁵⁷ Verizon also argues that carriers already have "strong financial incentives" to "voluntarily" ensure billing integrity and that it is already performing much of what the ACR suggests.⁵⁸ Verizon Wireless also argues that it resolves consumer complaints regarding billing for the "Premium SMS" quickly.⁵⁹ These examples show that carriers are already tracking the relevant information regarding cramming complaints. They also demonstrate that they already train CSRs sufficiently to facilitate refunds for unauthorized charges. Thus, it is unlikely that wireless carriers would incur extra training costs for their CSRs.

2. Training Employees to Track Complaints Would Not Be Overly Burdensome.

Verizon Wireless contends that tracking cramming complaints would impose new and massive burdens on their customer service representatives (CSRs).⁶⁰ As DRA explained above, CSRs must already have a sufficient level of knowledge to recognize and track a cramming complaint in order to process refunds for customers. Even so, training employees, regardless of the subject matter, is a usual cost associated with conducting a business.⁶¹

Moreover, training employees to comply with regulatory mandates is common in a regulated industry. Further, one would expect training costs to be significant for businesses heavily reliant on customer service representatives ("CSRs"), like that of

⁵⁶ See DRA (April 7, 2008) at 13-17; *see also* DRA (April 22, 2008) at 7.

⁵⁷ *Id* at 7.

⁵⁸ Comments of Verizon (3/22/10) at 13-15.

⁵⁹ Verizon Wireless (3/22/10) at

⁶⁰ Verizon Wireless (3/22/10) at 14-19.

⁶¹ See e.g. Reply Comments of DRA on Cramming Complaint Reporting Rules Pursuant to the February

telephone corporations. Since the goods and services of telephone corporations are constantly changing, CRS need to continuously be trained to sell those products. Given this reality, the incremental costs for the wireless carriers of adding a component to their training regimen to address the need to report cramming complaints would seem incrementally modest, if not minimal.

3. The Cost of Doing Business in a Competitive Market Must Include the Costs of Consumer Protection Regulations.

Telephone corporations such as AT&T and New Cingular Wireless PCS also argue that the Commission should not move away from relying on competition to protect consumers.⁶² However, they fail to recognize that the cost of doing business in a competitive market must include the costs of consumer protection regulations.⁶³ For instance, Barbara R. Alexander, a consultant on consumer protection and customer service issues associated with utility regulation, correctly noted in her testimony on behalf of the Maryland Office of People's Counsel that additional consumer protection rules do not harm consumers by increasing costs:

The price of food includes the costs of complying with the U.S. Department of Agriculture's Food and Drug Administration's content label that appears on every item of food sold at retail. Insurance premiums include the costs of state-mandated contract disclosures and complaint handling procedures. Industries must build the cost of air and water pollution control and health and safety rules mandated by OSHA into the price of their ultimate product. Telecommunications products and services are no different and, like food, insurance, credit and other goods and services, should also include the costs of proper consumer protections in their prices.⁶⁴

22, 2008 Assigned Commissioner's Ruling (4/28/08) at 7-10.

⁶² AT&T and New Cingular Wireless PCS (3/22/10) at 2.

⁶³ See e.g. Rebuttal Testimony of Barbara R. Alexander on behalf of the Maryland Office of People's Counsel in the Matter of the Inquiry into Certain Unauthorized Practices by Telephone Service Providers (Case No. 8776) at 6-7 (1998).

⁶⁴ *Id.*

While Ms. Alexander’s testimony dates back to 1998, her reasoning equally applies today.

V. THE COMMISSION HAS AUTHORITY TO REQUIRE BILLING TELEPHONE CORPORATIONS TO REPORT THEIR OWN INSTANCES OF CRAMMING (ACR Proposed Rule 1.3, 12)

A. Section 2889.9(i) Gives the Commission Broad Authority to Adopt Rules It Deems Necessary to Protect Consumers

Industry comments parse out specific phrases of Section 2889.9(d) in order to make the claim that the Commission is precluded from requiring BTC’s to report their own instances of cramming. However, nothing in the language of 2889.9(d) constrains the commission in this manner. Read as a whole, this section merely sets out the minimum requirements, i.e., that all BTCs must report complaints of third-party service providers since it is the BTC’s bill that reaches consumers. The Commission is free to require more. The subsequent section, 2889.9(i), specifically gives the Commission authority to “adopt further rules, regulations and issue decisions and orders, as necessary to safeguard the rights of consumers and to enforce the provisions of this article.”

In fact, in D.06-03-013 the Commission utilized its authority under Section 2889.9(i) to adopt rules that went beyond the express language in the statute so that it could clarify carriers' significant responsibilities as an effort to curb persistent cramming problems. The Commission noted,

[T]he cramming statutes’ account of obligations imposed on third party vendors and billing agents is more detailed than their accounts of obligations imposed on telephone companies that bill on behalf of these entities. Thus, adopting cramming rules that address and clarify carriers’ responsibilities is particularly valuable for consumers.⁶⁵

The Commission found that it should focus on carriers' responsibilities in particular because it recognized in prior decisions that “responsible practices by the billing

⁶⁵ D.06-03-013 at 91.

telephone companies...can prevent most cramming.”⁶⁶ Therefore, the Commission adopted further cramming rules that made telephone companies, regardless of whether they originate a charge, to have the ultimate responsibility for handling customer complaints.

In this respect, the Commission made clear that regardless of whether the carrier itself or a third-party initiated an unauthorized charge, the carrier must provide the same complaint resolution response.⁶⁷ The Commission should take the same nondiscriminatory stance with respect to requiring Billing Telephone Companies to report their own cramming complaints. Just as the expansion of responsibilities of telephone companies in D.06-03-013 was consistent with the authority given to the Commission by 2889(i), the same statutory provision expressly authorizes proposed rules to require reporting of BTC instances of cramming “to safeguard the rights of consumers and to enforce the provisions of [the cramming statutes].”

B. Cramming by Billing Telephone Companies is a Serious Problem

In their Comments, carriers claim that there is no justification for the Commission to extend reporting requirements to include complaints of cramming by BTCs because “no problem” exists.⁶⁸ The current reporting of cramming complaints to CPSD includes only third-party cramming, but not first-party cramming. However, in addition to the continued prevalence of cramming by third party providers, the cases cited above and the complaints discussed below show that cramming by BTC’s is a serious problem.

- *Based on the billing statement, the additional channels ordered after the initial set-up should indicate an inconsistency and Verizon should have made efforts to ‘verify’ these ‘orders.’ There is no waiver for these charges totaling \$42.98. I have disputed these charges to no avail...Verizon seemed to have found another way to generate additional income from unsuspecting customers like me. I*

⁶⁶ D.06-03-013 at 91.

⁶⁷ D.06-03-013 at 93.

⁶⁸ Cox (3/22/10) at 4.

wonder for those customers who do not check their monthly statements. Is there a pattern to this Verizon policy?⁶⁹

- *There is a charge on my bill at \$145.34 regarding internet equipment. First of all, I have never ordered any material when I open an account with them to request service; secondly, the one who is helping to open this account has never explained that they will ship me the equipment which I have not ordered. Plus, fee was never described...When I called into AT&T, they accused that I have ordered a modem and they did deliver...I am frustrated to fight for 'fair' with the largest phone company in California. I have no other resources I can use but to file a complaint. All I can do, I believe, is to submit this letter to you and have you determine shall this phone company continuous to do business in this way. You determine how you want California to be!!⁷⁰*
- *In January of this year I called Sprint to see if our contract was up. I was told that we were no longer under contract. Subsequently the representative asked how they could keep our business. I just told her that it seemed that our bill kept getting higher and higher. When we reviewed the bill, she pointed out a service that I had never authorized. She said that we had internet service added 2 years ago on 2 of our phones. By the way, the bill does not list internet service it is called "Sprint Data Pack..." She said that a "man" called in and requested information about internet access then proceeded to add it to our account. When I asked what his name was, I was told that there was no name listed...I was the only one that called on the telephone service changes or additions (by the way, I'm not a man). We do not have social security number listed on our phones. It is a Fed ID #.⁷¹*
- *We never signed up for this extra \$8.99 and did not even know what it was. Subba from Verizon Customer Service would not tell us why it was on there or who signed us up! This is fraud! ...This sneaky 8.99 charge is not right and consumers should be warned as it was never authorized! Verizon should not be allowed to keep my money for 2 months! The news media would not like hearing about this!⁷²*

⁶⁹ CAB Complaint #94819 (March 18, 2010).

⁷⁰ CAB Complaint #69877 (Oct 23, 2009).

⁷¹ CAB Complaint #87075 (Feb 8, 2010)

⁷² CAB Complaint #52427 (July 9, 2009).

There is no dispute that cramming is extremely harmful to consumers regardless of where the charges originate. The only reason to exempt BTCs from having to report their own instances of cramming would be if it were not possible for a BTC to cram consumer telephone bills with their own services or if it were established that such cramming does not occur. However, as shown above, that is not the reality.

Those that do not agree that BTCs should be included in the definition of a “service provider,” (which would require them to report cramming complaints about themselves) offer no sound legal or policy reasons why the Commission should treat them differently from service providers for complaint reporting purposes. A cramming complaint from a Billing Telephone Company is no less a cramming complaint than one from a third-party service provider. For the Commission to meet its second objective to identify promptly any unauthorized billing, bring it to a halt, and obtain refunds for subscribers, it needs to receive cramming complaints from all entities that originate charges on a subscriber’s telephone bill. As explained above, the best source is from the Billing Telephone Companies and Billing Agents.

VI. DEFINITION OF COMPLAINT

In another effort to limit accountability, Verizon Wireless complains that the proposed rules set out a new definition of “unauthorized charge.”⁷³ This proposal is not new. The current ACR proposes to define “unauthorized charge” as:

Any charge placed upon a subscriber’s telephone bill for a service or goods that the subscriber did not agree to purchase, including any charges that resulted from false, misleading, or deceptive representations.⁷⁴

In the previous 2008 ACR, “unauthorized charges” was defined as:

charges for a service that a subscriber never ordered, authorized or received; charges for a service or product where the subscriber was misled about the true cost; and situations involving false or deceptive charges.⁷⁵

⁷³ Verizon Wireless (March 22, 2010) at 28.

⁷⁴ ACR (2010) at A-1.

⁷⁵ See ACR (2008) at 10, *citing* Staff Report at 6-7.

The Commission should reject Verizon Wireless' claim as it is clear that parties already had an opportunity to comment on the definition of an unauthorized charge.

VII. RESPONSIBILITIES OF BILLING TELEPHONE CORPORATIONS: NO DEFLECTION OF CUSTOMERS TO BILLING AGGREGATOR OR THIRD PARTY SERVICE PROVIDER (ACR Proposed Rule 5)

Some carriers argue that customers complaining about unauthorized charges should be deflected to the third-party service provider.⁷⁶ DRA disagrees. To do what these parties suggest would be contrary to the Commission's conclusion in the *CPI decision* to hold BTCs ultimately responsible for cramming charges. The ACR's Rule 5, which states that [t]he Billing Telephone Corporation bears ultimate responsibility for all items presented in a subscriber's bill, is necessary to remove any doubt as to what type of response is required of a carrier when its subscriber informs it that an unauthorized charge was placed on his phone bill. As the following complaints show, some customers are being told by their carriers to resolve their problem with either the billing agents and/or service providers:

- *I noticed I have been being charged \$12.95 since June of 2008 for a Billing ILD...I called Verizon...and told that I was to call ILD \ to discuss this matter...This is a very stressful situation. I am just so glad I read the small print in my 6 pages billing from Verizon. I am disappointed I did not see this error in June when it started. How many other people are they doing this to? How can Verizon let this happen to customers?*⁷⁷
- *I am writing you because you are the government agency to protect consumers. Verizon is a huge company. They bill millions of people. Many people do not study their bills each month...Consider the implications of this kind of business practice when there are*

⁷⁶ See e.g. AT&T and New Cingular Wireless PCS Comments (3/22/10) at 10; AT&T and New Cingular Wireless PCS argue that BTCs do not investigate complaints because they do not have access to the transaction records. Verizon Comments (3/22/2010) at 7; Verizon states that BTC charges are different from charges that are originated by unaffiliated third parties. Therefore, Verizon argues that the cramming rules and reporting requirements to BTC charges are unnecessary and "counterproductive." Verizon Wireless (3/22/2010) at 10; Verizon Wireless claims that the proposed service provider monitoring and approval requirements are unnecessary and counterproductive.

⁷⁷ CAB Complaint # 2863 (Nov 6, 2008).

*millions of subscribers involved. To me, this means a lot of illegal profits for both Verizon and GO LIVE MOBILE. I would suggest that you examine the records of both of these companies to see exactly how many people they are now doing this to, how many accounts they are billing an extra \$9.99 per month, and how many customers, given the detailed, confusing statements Verizon sends out, are paying for a service they did not sign up for and never use.*⁷⁸

- *We have been getting billed from our cellular telephone service company for some unauthorized charges that we have not requested nor used from a 3rd party services, (Digital Content and Predicto Vote). Every time there is a text from this company, we have ignored it because we were too scared to respond and assumed it was similar to SPAM mail and would welcome even more harassment from them and other companies...our request is to inform and file a formal complaint of these 3rd party companies that harass the public and see if your organization can help us get reimbursed for the following because AT&T said they can only reimburse one month.*⁷⁹

Moreover, as DRA explained in opening comments, billings for third parties can be inadequate, misleading, and generally confusing to customers.⁸⁰ See Appendix A for complaint samples. As there are thousands of third-party service providers, some of which are fly-by-night companies, the Commission cannot reasonably expect consumers to track them down in order to get a refund. Additionally, because of BTCs contractual relationships with billing agents and third-party service providers, BTCs are better positioned to locate any potential crammer. Therefore, the Commission should not allow BTC to deflect their customers to the third-party service provider in order to get a refund.

VIII. CONCLUSION

The current ACR provides the Commission with the opportunity to do what it promised to do four years ago in the *CPI Decision* – to step up its enforcement efforts. Indeed, the Assigned Commissioner stated that this was “no idle threat” and that carriers

⁷⁸ CAB Complaint # 23660 (Feb 7, 2009).

⁷⁹ CAB Complaint # 59177 (Aug 24, 2009).

⁸⁰ DRA (March 22, 2010) at 11-12.

should be on notice that the Commission’s enforcement activities will be “focused, effective, and, if necessary, severe, to stop abusive behavior by carriers.”⁸¹ With cramming on the rise again and crammers getting more sophisticated with their schemes, the Commission needs a comprehensive set of cramming rules that will allow the Commission to achieve its stated objectives to prevent, detect, and deter cramming. That is why the Commission should adopt the new ACR’s proposed cramming rules.

Respectfully submitted,

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April 9, 2010

⁸¹ D.06-03-013, Commissioner Bohn’s Concurrence on the Consumer Bill of Rights Decision at 10.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON CRAMMING COMPLAINT REPORTING RULES PURSUANT TO FEBRUARY 12, 2010 ASSIGNED COMMISSIONER’S RULING** to the official service list in **R.00-02-004** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on April 9, 2010 at San Francisco, California.

/s/ NANCY SALYER
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