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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 THE
FEBRUARY 22, 2008 ASSIGNED COMMISSIONER'S RULING**

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I. INTRODUCTION

Pursuant to the February 22, 2008 Assigned Commissioner's Ruling Requesting Comment and Briefing on Cramming Reporting Requirements ("ACR"), the Division of Ratepayer Advocates ("DRA") hereby files these Reply Comments to address issues raised by other parties' opening comments filed April 7, 2008. While DRA is not commenting on all issues raised by all parties, silence on a particular issue should not be construed as assent.

The ACR makes clear that the Commission is statutorily obligated by Public Utilities Code Section 2889.9¹ to require carriers to report cramming related complaints made by subscribers.² Section 2889.9 was intended by the legislature to be read together with Section 2890,³ which provides in relevant part that a telephone bill "may only contain charges for products or services, the purchase of which the subscriber has

¹ Unless otherwise specified, all statutory references are to the Public Utilities Code.

² ACR at 6-9.

³ Stats. 1998, ch. 1036 (A.B. 2142), § 1 and Stats. 1998, ch. 1041 (S.B. 378), § 1(e).

authorized.”⁴ Together these sections (the anti-cramming provisions) were enacted to deter cramming,⁵ which, as DRA discussed in opening comments, the Commission could not do without cramming complaint data.⁶ Thus, the central issue here is whether the Commission should limit the number of cramming complaint reports it receives from all carriers, and *not*, as most carriers suggest, whether the Commission should consider eliminating cramming complaint reports altogether. The proposals suggesting elimination are therefore beyond the scope of the ACR’s intended purpose and should be given no weight.

As discussed below, most parties commenting rejected Staff’s proposal to limit cramming complaint reporting to only those unresolved after 30 days (“30-day limitation”).⁷ By virtue of espousing a no complaint reporting rule, the wireless carriers and some wireline carriers rejected the 30-day limitation proposal without much further discussion. All consumer groups also rejected the 30-day limitation proposal, but, for the opposite reason: the anti-cramming provisions obligated the Commission to require reporting of *all* cramming complaints. Moreover, AT&T Companies rejected the 30-day limitation proposal arguing that the Commission has been receiving *all* complaints from AT&T for years and has since never identified any problems with the identification of all complaints.⁸ AT&T Companies further noted that “the Commission would not receive valuable data if the 30-day requirement were adopted.”⁹ DRA agrees with the consumer groups and AT&T Companies on this issue and cautions the Commission against backtracking from its past position to require *all* complaint reporting. The Commission does not have the appropriate legal authority to weaken the anti-cramming provisions nor

⁴ Pub. Util. Code § 2890(a).

⁵ *Id.*

⁶ See DRA Opening Comments at 2-6 and 11-30.

⁷ Of the 13 parties that filed opening comments, only Cox and the Small LECs supported Staff’s proposal to limit reportable cramming complaints to those unresolved over 30 days.

⁸ AT&T Companies Opening Comments at 14.

⁹ *Id.*

is there sufficient evidence to indicate that carriers would be burdened by complaint tracking and complaint reporting of all complaints.

II. TO COMPLY WITH THE ANTI-CRAMMING PROVISIONS THE COMMISSION MUST REQUIRE REPORTING OF ALL COMPLAINTS MADE BY SUBSCRIBERS TO ANY ENTITY IN THE BILLING “FOOD CHAIN”

A. Section 2889.9 Does Not Allow the Commission to Waive The Cramming Complaint Reporting Requirement.

Most carriers, especially those from the wireless industry, oppose any of the complaint reporting proposals set forth in the ACR. Instead, those carriers propose that the Commission eliminate tracking and reporting of cramming complaints altogether and simply allow all carriers to “report to the Commission’s Consumer Protection and Safety Division (“CPSD”) upon the termination of a third party vendor/service provider or billing aggregator for cramming related activities.”¹⁰ “Termination reporting,” however, would not include relevant cramming information such as “information about the circumstances of any particular termination of a third party vendor/billing aggregator identified [],” unless specifically requested by CPSD.¹¹

In opening comments, DRA extensively briefed the complaint reporting mandate of Section 2889.9 and the policy reasons against any attempts to limit the types of cramming complaints that should be reported to the Commission.¹² In short, if the Commission adopted a reporting requirement that permitted every actor in the “food chain” to report anything less than *all* cramming complaints made by subscribers, the Commission would not only violate § 2889.9, but the effects on its enforcement abilities would be crippling – the limitations would hinder the Commission’s identification and swift action against bad actors (particularly here-today, gone-tomorrow vendors), prevent

¹⁰ See Opening Comments of AT&T Companies at 17; Cricket at 2; CTIA- The Wireless Association® (“CTIA”) at 11; Metro PCS at 2; Verizon California at 9; Verizon Wireless at 21.

¹¹ *Id.*

¹² See DRA Opening Comments at 2-6 and 11-30.

the Commission from effectively uncovering schemes where the amounts are small and automatically refunded only pursuant to customer complaint, but paid by a larger number of unsuspecting victims, and cause the Commission to rely upon incomplete and thereby flawed complaint data from other less comprehensive and competent sources. The same reasons why the Commission should reject Staff's 30-day limitation on complaint reporting equally apply to why the Commission should also reject proposals offered by most carriers to completely eliminate complaint tracking and reporting.

Termination reporting is an inferior and inadequate source from which to gather the relevant cramming data mandated by § 2889.9. Aside from the glaring deficiency in the data itself and the multitude of scenarios, other than cramming, for a billing carrier to terminate a vendor/service provider, the most alarming aspect of "termination reporting" is the self-monitoring by billing carriers in lieu of Commission oversight. Should the Commission rely upon the industry to police itself, any enforcement ability the Commission has would be thwarted by its inability to keep "abreast of the number and types of complaints being made against persons or corporations for charges for services or products that appear on a telephone bill."¹³ That result is inconsistent with the intent of the reporting statute – to ensure that the Commission was informed on an ongoing basis about cramming complaints.¹⁴

1. Consumer Protection Safeguards.

To maintain the integrity of the marketplace, DRA believes that the Commission should expect carriers to immediately notify the Commission of the names of potential "bad actors" upon immediate discovery of cramming practices, irrespective of any Commission directive. This would be consistent with carriers stated commitment to combatcramming.¹⁵ Indeed, the Commission can be assured that a carrier would

¹³ DRA Opening Comments at 27, *citing* Senate Appropriations Committee Fiscal Summary, A.B. 2142, August 6, 1998.

¹⁴ *Id.*

¹⁵ *See e.g.*, Opening Comments of Verizon Wireless Opening Comments at 1; AT&T Companies at 2, CTIA at 2.

voluntarily notify the Commission, whether through petitions for injunctive relief, protective orders, or to seek other protections, from another carrier's wrongdoing if those practices caused the wrongdoer to gain a competitive advantage. The notification standard should, therefore, be no less automatic for the protection of carriers' customers from cramming.

Another shortcoming of "termination reporting" is the limited usefulness of the data – the Commission would only learn about *past* instances of cramming. By the time a carrier notifies the Commission of the identity of a potential "bad actor," the perpetrator already will have been tipped off by the termination of its contract and more than likely will be gone by the time the Commission gathers enough information from the carrier to initiate an investigation. Moreover, because termination is left to the sole discretion of the billing carrier,¹⁶ the potential for abuse is obvious. Because cramming is hard to detect,¹⁷ DRA is concerned about the inclination and frequency of billing carriers to aggressively monitor cramming unless they knew that the Commission was specifically monitoring complaints, especially in cases where customers have not complained, yet cramming has occurred. These concerns underscore the need for the Commission to have comprehensive complaint data to effectively investigate potential "bad actors," as well as to catch and prosecute them before they disappear. Unless the Commission has the proper monitoring tools to detect, prevent, and prosecute cramming, it will be unsuccessful in deterring future violations.¹⁸

All carriers supporting termination reporting also argued that they had adequate protections in place to guard against cramming such that complaint tracking and reporting were unnecessary. For instance, AT&T Companies proffered AT&T Mobility's

¹⁶ See Opening Comments of AT&T Companies at 17; Cricket at 2; CTIA- The Wireless Association® ("CTIA") at 11; Metro PCS at 2; Verizon California at 9; Verizon Wireless at 21.

¹⁷ ACR at 16.

¹⁸ The imposition of fines and penalties is often used by the Commission as a form of deterring future wrongful behavior not only by the offending utility, but also for other utilities. See *e.g.*, D. 93-05-062, D.98-12-084; D.01-05-098; D.02-10-73; D. 02-10-059; D.04-09-062.

leadership role “along with other wireless carriers, billing aggregators, and third-party content providers” in developing the Mobile Marketing Association (“MMA”) Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs as an example of consumer protection safeguards. However, recent investigations by Florida’s Attorney General into AT&T’s practice of placing unauthorized charges on AT&T Mobility’s customers’ cell phone bills for certain third party services¹⁹ reveal the inadequacy of these “safeguards.”

Often these charges were for ringtones or other services which were advertised as “free,” but resulted in customers unwittingly being signed up for costly monthly subscriptions for third-party content, including horoscopes, wallpaper and other cell phone-related content. Examples of the bill charges often appear under the following indiscernible names:

- “Direct Bill Charges”
- “3rd Party Downloadable Content”
- “Premium SMS Messages”
- “Premium Text Messages”
- “M-Qube”
- “M-blox”

More troubling is that “[t]hese misleading practices are common in the industry and wireless companies often receive a percentage of the charges paid by customers.”²⁰

2. The Relationship of Credits and Complaint Tracking

“Termination reporting” also begs the question: what evidence does the billing carrier rely upon to take such serious action as terminating a contract with a vendor/service provider? One would presume such evidence would need to be substantial and based upon systematic data collection to ensure that the termination is justified, otherwise the billing company could itself be in breach of contract. In order to understand more about the contractual relationship between billing telephone companies

¹⁹ Press Release, *McCollum Retrieves Millions for Florida AT&T Wireless Customers Billed for “Free” Ringtones*, February 29, 2008, Office of the Attorney General of Florida, Bill McCollum *found at*

²⁰ *Id.*

and the billing agents and third party vendors who currently are allowed to place charges on utility consumer bills, DRA drafted and served a set of data requests specifically addressing this topic.²¹ Because some of the carriers submitted responses to DRA data requests on a confidential basis, DRA will not discuss with identifying detail the individual responses, but will attempt to convey the aggregate impression of the responses.²²

As DRA discussed in our opening comments, the contractual relationship between billing carrier and third party vendors/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.²³ Moreover, at least one wireless carrier indicated that its current credit tracking system allowed it to track the reason for the credit, thereby undermining some carriers' assertions that they cannot track cramming complaints.

3. “Costs” of Reporting All Complaints is Neither Substantiated by Any Evidence, Nor Unduly Burdensome.

Wireless carriers oppose complaint reporting for several “cost” reasons: 1) their systems are not designed to “...categorize each customer call or systematically log call classification and other related information about individual customer interactions,”²⁴ 2) the costs of implementing complaint tracking systems and to retrain staff would be astronomical and outweigh any benefits,²⁵ and 3) the national nature of their operations

²¹ The Commission, in general, and the Division of Ratepayer Advocates in particular, have plenary authority under Sections 309.5, 311, 314, 581-2, and 584 to require utilities to provide the Commission information relating to their operations in California.

²² If requested, DRA can provide specific responses to decisionmakers, under seal.

²³ DRA Opening Comments at 13-17.

²⁴ Verizon Wireless at 14.

²⁵ AT&T Companies Opening Comments at 11.

would make it very difficult to handle California only cramming reporting requirements.²⁶

Wireline telephone companies offering voice services currently provide reports on all cramming complaints to the Commission. However, wireless carriers argue that the cost of providing cramming complaint information would be extraordinarily expensive, citing a one-time implementation cost of approximately \$39,000,000 and an annual cost for tracking and reporting of about \$85,000,000.²⁷ CTIA alleges that these estimates were based on aggregated data received by an outside consultant from each of the four major wireless carriers; however, these estimates were unverified and unaccompanied by any corroborating analysis, calculations, or any other objective evidence. DRA requests discovery and evidentiary hearings to determine the veracity of these alleged costs. DRA also agrees with the Utility Consumers' Action Network ("UCAN") that "[t]he carriers should meet a very high standard to show why reporting of all cramming complaints is so onerous that the Commission should only receive a tiny fraction of total cramming complaints."²⁸

The Utility Reform Network ("TURN") also points out that wireless telephone companies are bound by Section 2885 to provide the Commission with information concerning service quality and customer complaints.²⁹ DRA agrees with TURN's rationale for rejecting carriers' costs arguments because carriers should have already borne those costs in their obligations to comply with existing reporting statutes and to investigate and combat fraud for the protection of their customers.³⁰

Moreover, training employees, regardless of the training subject, is a usual cost associated with conducting a business. One would expect the training costs to be

²⁶ *Id.* at 10.

²⁷ See e.g., CTIA Opening Comments at 9; *see also* Verizon Wireless Opening Comments at 17.

²⁸ UCAN Comments at 16-17.

²⁹ TURN at 14.

³⁰ *Id.*

significant for businesses selling goods and services in an industry heavily reliant on customer service representatives (“CSRs”), like that of telephone companies. With competition expected to increase, telecommunications goods and services must constantly change to meet consumer demands resulting from the rapidly evolving telecommunications marketplace.³¹ In addition to keeping CSRs apprised of new products and services, companies must also ensure that CSRs are trained to comply with regulatory mandates.³²

For instance, as one of its “safeguards” to protect consumers from unauthorized charges, Verizon Wireless trains its CSRs to address any issues relating to claims of unauthorized charges so that problems are resolved on the first call. CSRs are also trained to instruct customers how to opt out of services.³³ AT&T Mobility CSRs are also trained to address customer issues on the first call. According to AT&T Mobility, “the goal of one-call resolution is to ensure each customer’s concern is addressed upon first contact with AT&T Mobility, whether they are calling to request assistance in setting up their voicemail or inquire about a specific feature or charge on their bill.”³⁴ AT&T California’s “CSRs are also trained to resolve cramming complaints about charges from a third party or affiliate on a first-call basis.”³⁵ Comments from these two competitors show that they both already provide extensive training to their CSRs to make them experts at resolving the customer’s problem. Therefore, it is unlikely that carriers would incur added expense to train CSRs on how to distinguish cramming complaints from other inquiries for purposes of complaint tracking.

Wireless carriers also argue that since they operate on a regional or national basis, and not state-by-state, state-specific requirements create significant operational

³¹ See e.g., AT&T Companies Opening Comments at 4.

³² See e.g., D.05-04-005 (“Tariff Rule 12” case).

³³ Verizon Wireless Opening Comments at 16.

³⁴ AT&T Companies Opening Comments 8.

³⁵ *Id.* at 9.

challenges.³⁶ Wireless carriers would prefer to be subject only to federal regulation. One major problem with this approach is that the Federal Government through the FCC does not do an adequate job of identifying and logging complaints, as described in the GAO report.³⁷ States are better equipped than the FCC to respond to consumers and provide them with individual relief for their complaints. State vigilance over cramming is beneficial to customers in other states, as seen in a recent important cramming case initiated by the Florida Attorney General against Verizon. As part of that agreement, Verizon will implement an early warning system to help detect cramming that will benefit customers in the 28 states in which Verizon serves.³⁸

B. Most Parties Did Not Agree With Staff’s Proposal to Limit Reportable Cramming Complaints to Those Unresolved After 30 Days.

Only Cox and the Small LECs supported Staff’s recommendation to limit reportable cramming complaints to only those unresolved after 30 days.³⁹ Cox argued that any reporting requirement should be consistent with Section 2890(e) and states that “reporting entities that satisfy this section are engaged in resolving consumers’ disputes;” therefore those “entities should not be required to report complaints resolved within the 30 day timeframe granted in the statute.”⁴⁰ Cox also recommended quarterly, rather than monthly, reporting. Surewest and the Small LECs argued that “complaints that are resolved within a reasonable time frame do not convey useful information to the Commission about areas where potential enforcement or oversight might be appropriate.”⁴¹

³⁶ AT&T Companies Opening Comments at 10.

³⁷ GAO-08-125 (February 2008), *FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions are Needed*. The GAO oversees the Federal Communications Commission (FCC).

³⁸ *Verizon Signs Anti Cramming Agreement* (July 10, 2007), Press Release, Attorney General of Florida, found at <http://myfloridalegal.com/newsrel.nsf/newsreleases/D2C4EE152FB210918525731400560395>.

³⁹ Cox Opening Comments at 7; Surewest and the Small LECs Opening Comments at 7.

⁴⁰ *Id.*

⁴¹ Surewest and the Small LECs Opening Comments at 7.

Section 2890(e) provides a billing entity 30 days within which to either (1) resolve a complaint from a subscriber regarding an unauthorized charge, or (2) verify the subscriber's authorization. The provision states:

If an entity responsible for generating a charge on a telephone bill receives a complaint from a subscriber that the subscriber did not authorize the purchase of the product or service associated with that charge, the entity, not later than 30 days from the date on which the complaint is received, shall verify the subscriber's authorization of that charge or undertake to resolve the billing dispute to the subscribers' satisfaction.

The relevant complaint reporting provision of Section 2889.9 reads:

(d) The commission shall establish rules that require each billing telephone company, billing agent, and company that provides products or 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.⁴²

It is true that §§ 2889.9 and 2890 must be read together, but Cox's interpretation of the statutes would be inconsistent with the legislative intent behind the enactment of those provisions. As discussed in DRA's opening comments (pp. 22-28) the legislature intended those sections to be read together and serve to deter cramming.⁴³ The elimination of reporting those cramming complaints resolved within 30 days would substantially distort the statutory scheme as intended by the Legislature, as well as diminish its deterrence to cramming. Moreover, if complaints are to be resolved in 30 days, pursuant to § 2890(e), then reporting of only those complaints unresolved after 30 days would mean that the vast majority of complaints are not reported. A cramming

⁴² Pub. Util. Code § 2889.9(d). (emphasis added).

⁴³ DRA Opening Comments at 24.

complaint that is resolved within 30 days is no less a cramming complaint than one unresolved after 30 days; the plain language of § 2889.9(d) makes no such distinction in its broad requirement of “reports of complaints.”

To illustrate, if a company crams thousands of people, and only a few hundred complain, with complaint resolution occurring within 30 days for only those complaining customers, the Commission would undoubtedly find a report containing those hundreds of complaints useful; it would allow the Commission to act immediately to protect the majority of unwitting victims who did not complain. On the other hand, if the Commission followed Staff’s proposal to only report complaints unresolved after 30 days, the Commission would receive no information regarding the cramming taking place, and only those victims that complained would receive assistance. Certainly, the legislature did not intend the disparate treatment of customers that would result if resolved complaints were withheld from the Commission.

DRA also disagrees that monthly reporting would be burdensome. Even if reporting occurred only a quarterly basis, DRA presumes that the preparation of the quarterly reports would still require the gathering of monthly data. Therefore, there is no added burden to carriers. Moreover, it would seem to be MORE of a burden for carriers to remove those complaints that have been resolved within 30 days from their reports, rather than to simply generate reports that include every single complaint. DRA is skeptical of any assertion that reporting *all* complaints would be more expensive or burdensome than (1) tracking and monitoring aged complaints, and then (2) having to delete the “resolved within 30 days” complaints from the final reports. Nevertheless, such assertions should be substantiated with specific evidence.

Additionally, DRA believes it is crucial for the Commission to receive cramming data in “real time” so that it may act expeditiously to ameliorate any harm done to consumers and to prevent the harm from continuing. Under Cox’s quarterly recommendation, the potential for receiving outdated information would be too great.

C. Complaints Should Include Billing Carriers' Own Cramming Complaints As Well As Those of Third Party Providers.

Verizon Wireless argues that the Commission should limit any reporting obligation established in this proceeding to charges for services provided by third parties, and not the billing telephone company. Otherwise, Verizon believes every disputed bill would be reported to the Commission as a cramming complaint.⁴⁴ However, because cramming is not exclusive to third party vendors/service providers the Commission must be able to monitor every entity in the billing “food chain.” Moreover, while the focus of attention on cramming issues has shifted to the unscrupulous practices of third party vendors/service providers, cramming by billing carriers is still a reality.⁴⁵

DRA agrees with UCAN’s and TURN’s interpretations of the anti-cramming provisions to confer upon the Commission broad authority to *expand* the parameters of the reporting requirement to include billing carrier’s own cramming complaints in order to carry out the legislature’s intent to deter cramming.⁴⁶ As TURN points out, the Commission has “no authority to *narrow* the requirements in § 2889.9 or to conflict with the statute.”⁴⁷ Moreover, “unlike the [carriers’] proposed narrowing of the statute, the Commission’s choice to expand this language has authority in § 2889.9(i) which allows the Commission to ‘adopt rules, regulations and issue decisions and orders, as necessary, to safeguard the rights of consumers and to enforce the provisions of this article.’”⁴⁸

⁴⁴ Verizon Wireless Opening Comments at 11.

⁴⁵ See e.g., *MicroNet, Inc. v. Indiana Utility Regulatory Commission*, 866 N.E. 2d 278 (2007) (public utility telephone company found to have engaged in directly billing customers or directory assistance services and other services that were not authorized by the customers.); see also C.07-08-033 (UCAN alleges that AT&T Mobility placed unauthorized international roaming charges on customers bills); see also UCAN and Eric Taylor v. Sprint Solutions, Inc et al., 2008 U.S. Dist. LEXIS 30737 (UCAN alleges that Sprint improperly included taxes, fees, and other charges on monthly invoices to customers who obtained data service or data card plans from Sprint, and improperly charged these customers text messages).

⁴⁶ UCAN Opening Comments at 15-16 and TURN Opening Comments at 15.

⁴⁷ TURN Opening Comments at 15.

⁴⁸ UCAN Opening Comments at 16.

AT&T Companies argue that Section 2889.9 requires reporting of cramming complaints of third parties and not the billing telephone company. However, as Latino Issues Forum (“LIF”) explained, pursuant to § 2889.9(e) “a purpose of the cramming reporting program is so that the Commission may identify and formally investigate *billing telephone companies*, billing agents or third party vendors that have disproportionate numbers of cramming complaints, in order to enforce § 2890. As both §§ 2889.9 and 2890 apply to billing telephone companies, billing agents and third party vendors, the Commission is required by § 2889.9(e) to monitor them all. Therefore, if the Commission is to fulfill its charges of implementing § 2889.9 and enforcing compliance with § 2890, it should apply the reporting requirements to billing telephone companies, billing agents, third party vendors and any third parties responsible for generating a charge on a customer’s bill.”⁴⁹ The ACR also finds support in extending reporting of complaints to billing telephone companies from both the Legislature and the Commission.⁵⁰

D. The Definition of Complaint Should Be Broad

Cox interprets §§ 2890 and 2889.9 to narrow the scope of what should be considered a cramming complaint. Cox argues that cramming should focus on unauthorized “products” and services, and not on unauthorized “charges.”⁵¹ DRA disagrees with Cox and believes that even when products, typically offered by billing telephone companies, such as call waiting or caller I.D. are authorized by the customer, it becomes a cram if the customer is misled about key rates, terms and conditions. The FCC agrees.

The FCC has found that cramming can occur if the billing telephone company “does not clearly or accurately describe all of the relevant charges to you when marketing a service. Although you may have authorized the service, you did not understand or were

⁴⁹ LIF Opening Comments at 10.

⁵⁰ ACR at 13.

⁵¹ Cox Opening Comments at 3.

misled about how much it would really cost. Although the consumer authorized the service, the charge is still considered ‘cramming’ because the consumer was misled.”⁵² In its Consumer Facts, the FCC gives several poignant examples of cramming in which the product or service was authorized but the charges were not authorized.⁵³

Cramming comes in many forms and is often hard to detect, unless you closely review your telephone bill. The following charges would be legitimate if a consumer authorized them but, if unauthorized, these charges could constitute cramming:

- Charges for services explained on the telephone bill in general terms, such as "service fee," "service charge," or "other fees;"
- Charges that are added to a consumer’s telephone bill every month without a clear explanation of the services provided – such as a "monthly fee" or "minimum monthly usage fee;" and
- Other charges from a local or long distance company for a service that it provides but, like the other examples, could be cramming if unauthorized.

While cramming charges typically appear on consumers’ local telephone bills, they may also be included with bills issued by long distance telephone companies and companies providing other types of services, including wireless telephone, beeper, and pager services.⁵⁴

Verizon Wireless also claims that it would be very burdensome to train its personnel to track cramming complaints effectively. Verizon Wireless points to the difficulty in distinguishing inquiries from complaints.⁵⁵ Cricket suggests that its service representatives would also experience difficulty in identifying appropriate cramming

⁵² FCC Consumer Facts *found* at <http://www.fcc.gov/cgb/consumerfacts/cramming.html>

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Verizon Wireless Opening Comments at 19.

complaints and could wind up over-reporting cramming complaints.⁵⁶ DRA believes identifying cramming complaints becomes complex only when the billing telephone company attempts to differentiate between unauthorized “charges” and unauthorized “products or services.” From the extensive and continual training CSRs receive on the products and services of a company, and the specific training on how to resolve complaints regarding unauthorized charges, it would be reasonable to expect CSRs to easily distinguish a cramming complaint from an inquiry from the straightforward distinction provided by the ACR:

An inquiry can evolve to a complaint and would become reportable if and when the consumer expresses his or her objection to a specific charge or denies a charge or otherwise request the removal or reduction of an unauthorized charge.⁵⁷

III. THE USEFULNESS OF FULL COMPLAINT REPORTING

A. Cramming Complaint Data, Which the Commission Needs to Carry Out Its Enforcement Responsibilities, Yields More Reliable Data Than Any Other Data Source.

Several carriers argue that there is no reason to report cramming data because the data is useless or worthless. For example, CTIA’s Opening Comments claim that “the reporting proposals will not provide useful data,” and that the reports would “yield data of little, if any value.”⁵⁸ This is one of the reasons, the carriers argue that the Commission should not collect the data at all.

However, in several important enforcement cases, the Commission has relied on monthly reports of cramming data in its decisions to initiate investigations, or to ultimately impose fines and sanctions. Commission-initiated investigations are the proverbial “big-stick” in the Commission’s arsenal of weapons to combat fraud, and the cramming reports have been used as an important part of those investigations. Thus,

⁵⁶ Cricket Opening Comments at 8-9.

⁵⁷ ACR at 26.

⁵⁸ CTIA Opening Comments at 9; *See also*, Verizon Wireless Opening Comments at 18.

history has shown that the data (that is currently being collected) is, in fact, useful (if not vital) in pursuing enforcement actions. DRA supports continuing the carriers' existing reporting obligations, along with the expanded requirements contemplated in the ACR.

The Commission has regularly relied upon the cramming data in the past, belying any carrier's argument that the reports are not "reliable" and thus provide no useful data. For example, in the *USP&C* OII (I.99-10-024), the Commission relied upon the large numbers of cramming complaints, contained in Pacific Bell's reports, to initiate the investigation. In the *Accutel* OII (I.99-04-023), the Commission also relied in part on the hundreds of cramming complaints described in the reports in issuing the OII. Moreover, in the *Qwest* OII (I.00-11-052), the Commission noted that the cramming reports indicated that Qwest had received over 6,000 cramming complaints in less than one year. Ultimately, based (in part) on the cramming reports, the Commission found Qwest liable for widespread slamming and cramming and imposed a penalty of \$20 million.

Additionally, in the *Coleman Enterprises* OII (I.99-12-001), which primarily focused on slamming, the Commission also found that Coleman had a significant problem with cramming, as demonstrated by the monthly cramming reports. In the *Vycera Communications* OII, (I.04-07-005), the Commission relied on cramming data in the monthly reports to initiate an investigation. In an application case, the ALJ initiated his own investigation into *New Century Telecom* (A.02-10-007), which resulted in an investigation into the activity and operations of the company; ultimately a final decision imposed fines and cited to the cramming complaint reports submitted by two billing aggregators against the company.⁵⁹

An especially important case was the Commission's investigation into Pacific Bell's cramming of DSL charges on customers' phone bills. In the investigation regarding *Pacific Bell Telephone Company (U 1001 C)*, *Pacific Bell Internet Services*, and *SBC Advanced Solutions, Inc. (U 6346 C)* to determine whether they have violated the laws, rules and regulations governing the inclusion of charges for products or

⁵⁹ D.06-04-048, *mimeo*, at 7.

services on telephone bills, (I.02-01-024), relying upon on cramming complaints contained in the reports, Staff alleged that Pacific Bell had used their billing platform to systematically bill for new DSL charges, although many within the company knew that the service was not ready and would not work. Pacific Bell ultimately settled for \$27,000,000 in penalties, as well as a commitment to improve its customer service. The company also acknowledged that there had been 30,000 to 70,000 reported customer complaints. Thus, without the complaint reporting data from the carrier, the Commission would have had difficulty in detecting the scope and severity of the problem, which would be true in every case of any magnitude.

Finally, it should be pointed out that while some carriers (CTIA and Verizon Wireless) question whether the cramming data would be useful, most carriers have no such reservations. Several other carriers do not challenge the worthiness or usefulness of reporting, but instead point out various issues regarding full as opposed to partial reporting, implying that they would agree that monthly cramming reports have some usefulness.⁶⁰ Based on the aforementioned cases, cramming reporting has proven to provide reliable information, which the Commission greatly depended upon to carry out its enforcement responsibilities. Consequently, the arguments that a few carriers made, regarding how cramming complaint data from carriers would not be useful, should be given no weight.

B. Reliance on the CIMS Database Alone For Cramming Complaint Data Is Insufficient for Commission Compliance with the Anti-Cramming Provisions.

Many carriers believe that the CIMS database will give the Commission sufficient data to analyze cramming issues, thereby warranting carriers' relief of any reporting obligations for those complaints. While the CIMS database is expected to enhance the

⁶⁰ See *e.g.*, Cox Opening Comments at 10 (Cox expresses concern over "undue burden" but does not challenge overall usefulness.); *see also* Surewest and the Small LECs Opening Comments at 2 (Surewest requests that cramming reporting be limited to third parties, etc., but does not challenge the usefulness of cramming data in general.)

ability of Staff to view complaints and query more specific reports, the fundamental flaw with this alternative will always be the fact that carriers will always receive significantly more complaints than the Commission. This disparity in complaint data is due in part to the Commission's requirement that customers contact their carrier first before the Commission will entertain a complaint, coupled with many carriers' one-call policy and automatic credits for cramming complaints. For example, "while only a few thousand consumers lodged complaints with the CPUC regarding the fraudulent service claims and marketing efforts that led to the \$12 million fine against Cingular, the record showed that nearly 144,000 'trouble tickets' regarding such claims were opened by the carrier during the same period."⁶¹ Moreover, regardless of how much the Commission upgrades CIMS tracking ability, that, in and of itself, will not increase the number of complaints received by the Commission.

IV. CONCLUSION

The Commission is under a statutory obligation to empower itself with the necessary information regarding cramming related complaints to ensure it can effectively carry out its enforcement responsibilities under the anti-cramming provisions. To do so, the Commission must reject Staff's proposal to limit reportable cramming complaints to only those unresolved after 30 days, as well as reject any other proposal that requires anything less than reporting of *all* cramming complaints. This is the Commission's current policy and there is neither legal authority nor substantial evidence in the record to warrant backtracking from this policy. The Commission should not now put on empirical blinders to say that it only wishes to receive only a part of the cramming complaints generated by unscrupulous purveyors of telephone-related products and services.

⁶¹ *Testimony of Patrick Pearlman (Deputy Consumer Advocate Consumer Advocate Division Public Service Commission of West Virginia) Before the Communications Subcommittee Senate Commerce, Science and Transportation Committee on Protecting Wireless Consumers And The Cell Phone Empowerment Act (October 17, 2007) citing, Investigation to Determine Whether Cingular Has Violated the Laws, Rules and Regulations of this State in Its Sale of Cellular Telephone Equipment and Service and its Collection of an Early Termination Fee and Other Penalties From Consumers, 2004 Cal. PUC LEXIS 453, slip op. at 53-65, 69 (2004).*

Adequate consumer protection in a deregulated marketplace requires the Commission to step up its enforcement efforts. For the reasons stated in DRA's Opening Comments and herein, DRA respectfully requests that the Commission adopt its recommendations.

Respectfully submitted,

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April 28, 2008

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 THE FEBRUARY 22, 2008 ASSIGNED COMMISSIONER’S RULING 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, if any.

Executed on the 28th day of April 2008, at San Francisco, California.

/s/ Imelda Eusebio

IMELDA EUSEBIO

N O T I C E

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