

State of California

Public Utilities Commission  
San Francisco

MEMORANDUM

**Date :** September 29, 2011

**To :** The Commission  
(Meeting of October 6, 2011)

**From :** Kimberly Lippi  
Public Utilities Counsel IV

Roxanne L. Scott  
Program and Project Supervisor, Communications Division

**Subject:** Filing of Comments in FCC's Notice of Proposed Rulemaking on  
Empowering Consumers to Prevent and Detect Billing for Unauthorized  
Charges (Cramming)

**RECOMMENDATION:** The CPUC should file comments in the Federal Communications Commission's (FCC's) *Notice of Proposed Rulemaking (NPRM)* proposing "rules designed to assist consumers in detecting and preventing the placement of unauthorized charges on their [wireline] telephone bills, an unlawful and fraudulent practice commonly referred to as 'cramming'."<sup>1</sup> The FCC also seeks comment on whether it should extend any of the proposed rules to wireless (Commercial Mobile Radio Service or CMRS) carriers<sup>2</sup> and to providers of interconnected Voice over Internet Protocol (VoIP) service.<sup>3</sup>

**BACKGROUND:** A consumer is "crammed" when a charge for a service, not authorized by the customer, appears on the customer's bill. Cramming is a violation of both state and federal law. The charges are imposed on the customer by the billing telephone company, which may or may not be aware that the charge is unauthorized. A major source of cramming is third-party billing, which occurs when the billing telephone company allows a vendor to place an unauthorized third-party charge on a customer's telephone bill.

Billing through the local telephone company is the preferred billing method for many third-party vendors because it saves them from having to develop and staff a billing and collection

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<sup>1</sup> In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth in Billing and Billing Format; CG Docket No. 11-116; CG Docket No. 09-158; CC Docket No. 98-170, Notice of Proposed Rulemaking, rel. July 12, 2011 (Cramming NPRM), para. 1.

<sup>2</sup> *Id.*, para. 53.

<sup>3</sup> *Id.*, para. 69.

department, which can be complex, time-consuming, and expensive. The customer's local telephone company, the "billing telephone company", which has billing and collection expertise, places the third-party charges on the customer's bill, and the third party then pays the billing telephone company a fee for the billing and collection service. Many third party product or service vendors are very small operators, and as a result, they may choose to contract with an intermediary – a billing aggregator – which in turn processes and sends the billing information to the local (billing) telephone company. Depending on the contractual arrangement between a third-party vendor and its billing aggregator, a billing dispute with the customer could be handled by the billing aggregator or by the third party vendor itself.

The FCC has determined that the practice of cramming is an unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, as amended.<sup>4</sup> In the last decade, the FCC adopted Truth-in-Billing rules designed, in part, to help consumers detect and prevent cramming.<sup>5</sup> In 2009, in light of the changing telecommunications market and the increasing deployment of IP-enabled services such as VoIP, the FCC issued a Notice of Inquiry seeking further comments to build a factual record to identify opportunities for protecting and empowering consumers through policies addressing information disclosure.<sup>6</sup>

Cramming is also an on-going concern in California. In 1998, the California legislature enacted P.U. Code § 2890, which provides "[a] telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized". In the event the customer disputes a charge, § 2890(d) establishes a rebuttable presumption "that an unverified charge for a product or service was not authorized by the subscriber and that the subscriber is not responsible for that charge". At the same time, the Legislature also enacted § 2889.9, which bars entities from misrepresenting an association with a telephone carrier in soliciting sales. In 2006, the CPUC adopted regulations (Part 4, of General Order 168) to implement the new laws.

In 2009, the CPUC filed Comments in the FCC's *Consumer Information NOI*. In the filing, the CPUC urged the FCC to adopt a requirement that all billing carriers offer customers the option of blocking third-party billings free of charge, as well as a requirement that all third-party billings include the name and toll-free telephone number and address of the actual third-party service provider.

Subsequently the CPUC strengthened its cramming regulations in D. 10-10-034, issued October 28, 2010. The CPUC regulations in G.O 168 apply to both wireline and wireless telephone

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<sup>4</sup> *Id.*, para. 3 (footnote omitted).

<sup>5</sup> See *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 FCC Rcd 7492 (1999) ("First Truth-in-Billing Order"), Order on Reconsideration, 15 FCC Rcd 6023 (2000) ("Order on Reconsideration"); *Truth-in-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 20 FCC Rcd 6448 (2005) ("Second Truth-in-Billing Order") vacated in part sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 457 F.3d 1238 (11th Cir. 2006) (invalidating preemption of certain state requirements for CMRS bills).

<sup>6</sup> In the Matter of Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP Enabled Services; CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36; rel. August 28, 2009 (Consumer Information NOI).

corporations, and among other things, require such companies to offer customers the option to block all third-party billings. D.10-10-034 also extended CPUC cramming reporting requirements to wireless telephone companies.

Based on the record in that *Consumer Information NOI*, on investigations by the FCC's Enforcement Bureau, and on customer complaints filed with the FCC and with the Federal Trade Commission (FTC), the FCC has now determined that cramming continues to be a serious problem:

The record compiled in this proceeding to date, including the Commission's own complaint data, suggests that cramming is a significant and ongoing problem that has affected consumers for over a decade. In addition, cramming complaints have drawn the concern of Congress, the states, and other federal agencies. In fact, cramming is the most common billing-related wireline complaint after the categories for rates and for billing credits, refunds, or adjustments that were promised by carriers but not received. The substantial volume of wireline cramming complaints that the Commission, the Federal Trade Commission ("FTC"), and states continue to receive suggests the ineffectiveness of voluntary industry practices and highlights the need for consumer safeguards.

Moreover, reports of cramming likely understate the magnitude of the problem because consumers face significant challenges in detecting and preventing unauthorized charges on their telephone bills. Because many consumers are unaware that third parties can place charges on their telephone bills, they fail to recognize the need to review their bills to identify charges for products or services they have not authorized. The growing use of electronic billing and automatic payments exacerbates the difficulties consumers face in detecting unauthorized charges on their telephone bills. In addition, those engaged in cramming often employ practices intended to reduce the likelihood of detection or challenge, such as charging only small amounts or labeling the charges in a way that make them appear to be associated with a subscribed-to telecommunications service. As a result, unauthorized charges can often go undetected for substantial periods of time, resulting in significant costs to consumers.<sup>7</sup>

The FCC finds that "the volume and type of consumer complaints show that additional safeguards are necessary to enable consumers to protect themselves from cramming."<sup>8</sup> In this *Cramming NPRM*, the FCC is proposing to strengthen its cramming rules, including proposed rules "that would require wireline carriers to: (1) notify subscribers clearly and conspicuously, at the point of sale, on each bill, and on their websites, of the option to block third-party charges from their telephone bills, if the carrier offers that option; and (2) place charges from non-carrier third-parties in a bill section separate from carrier charges."<sup>9</sup> In addition, the FCC is proposing

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<sup>7</sup> *Id.*, paras. 1-2 (footnotes omitted).

<sup>8</sup> *Id.*, para 3.

<sup>9</sup> *Id.*

rules that would require both wireline and wireless carriers to include on all telephone bills and on their websites the Commission's contact information for the submission of complaints. The FCC also seeks comment on numerous other proposals suggested in the record, including blocking all third-party charges. It asks whether it should extend any of the other proposed protections to consumers of CMRS<sup>10</sup> and if any of the proposed rules, or similar rules, should be apply to providers of VoIP services.<sup>11</sup>

Staff recommends that the CPUC file comments urging the FCC to adopt cramming regulations that, in most cases, are reflective of and consistent with California's rules. For example, the FCC proposes that wireline carriers that offer subscribers the option to block third-party charges from their telephone bills must clearly and conspicuously notify subscribers of this option at the point of sale, on each bill, and on their websites.<sup>12</sup> Staff recommends that the CPUC urge the FCC to require *all* carriers to *offer* the option to block all third party charges, as the CPUC currently requires of all telephone corporations. (See G.O. 168, Part 4, Rule 5).

Staff also recommends that the FCC apply any new rules to wireless and VoIP providers where feasible. No matter what communications technology consumers adopt, they should not be subject to unauthorized charges on their bills. General fraud laws do not provide subscribers who have been crammed with a remedy for swift redress nor do they give state utility commissions or the FCC adequate ability to monitor the incidences of cramming. Indeed, both federal and state law mandate that regulation be technology-neutral; exempting VoIP and/or wireless providers from cramming rules would thwart that regulatory goal.<sup>13</sup>

However, because consumer protection and enforcement is a key function of state commissions, Staff recommends that, no matter what new rules the FCC adopts, the CPUC should oppose any preemption of existing state cramming laws and regulations. We recommend that the CPUC urge the FCC to adopt a dual system that recognizes this important state role. The CPUC should propose that the FCC find that in states that have already adopted cramming laws or regulations for wireline, wireless, or VoIP providers, the existing state laws and regulations would continue to apply going forward. Any regulations the FCC may adopt would apply in states that have not implemented rules against cramming or where the state's cramming rules are less stringent than the FCC's rules. As an alternate strategy, the CPUC should oppose, any plan to prohibit state

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<sup>10</sup> *Id.*, para. 4

<sup>11</sup> *Id.*, para. 8.

<sup>12</sup> *Id.*, para. 40.

<sup>13</sup> See CA Public Utilities Code section 234, defining "telephone corporation", and 233, defining "telephone line", which includes the words "with or without wires". See also Cal. P.U. Code sections 709.5 and 709.6, intended to spur competition in local telephone markets, which do not distinguish between types of service providers, and include a reference to "all telecommunications service providers" (709.6(b)). See also 47 U.S.C. 153, definition 46 "telecommunications service", which includes the phrase "regardless of the facilities used". See also 47 U.S.C. 254(b)(4), which mandates that all providers of "telecommunications services" should make an "equitable and nondiscriminatory contribution" to support universal service. The CPUC is mindful that VoIP providers assert that they are "information service providers", but absent a declaration of same from the FCC, VoIP providers arguably are providing a telecommunications service, as defined in federal law. The underpinning of both California and federal law is to treat all providers of a like service in a like manner, whether the facilities used are wired or wireless.

adoption of stricter cramming rules. Also, because enforcement of consumer protections is a key state commission function, the CPUC should urge that, if the FCC adopts any carrier reporting requirement that applies to all states, the regulations should require carriers to file those reports with the state commissions – whether in conjunction with filing at the FCC or in lieu of filing with the FCC.

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