

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: May 8, 2006

To: The Commission
(Meeting of May 11, 2006)

From: Delaney Hunter, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **SB 440 (Speier) – Telecommunications: mobile data and telephony services: charges for unauthorized services and contract changes.**
As Amended March 13, 2006

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: No recommendation.

SUMMARY OF BILL:

SB 440 would require providers of mobile data and/or mobile telephony services to give clear and conspicuous written notice of potential customer liability for unauthorized use of the service and the means to notify the service provider if the handset or other wireless device is lost or stolen. Customers must initial or sign their acknowledgement of having received that disclosure. SB 440 also limits customer liability for unauthorized use to \$50 and prohibits service providers from changing a customer's contract to result in higher rates or charges or more restrictive terms or conditions, unless certain conditions are met.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

SB 440 is not needed to protect consumers, would generate unnecessary implementation costs, and almost assuredly would be subjected to judicial challenges. SB 440 would contravene the CPUC's policy position reflected in its Consumer Protection Initiative. The CPUC recognizes that often consumers are better served by the power of choice in a competitive wireless market, rather than through prescriptive regulation. SB 440 would impose prescriptive requirements that may be costly to implement, without any clear benefit to California consumers. The CPUC also is concerned that some of SB 440's provisions may be preempted by federal law.

SUMMARY OF SUGGESTED AMENDMENTS (if any):

None.

DIVISION ANALYSIS:Unauthorized Charges: Policy Concerns

The CPUC recently adopted new rules to protect against cramming, the placement of unauthorized charges on a consumer's phone bill. In D.06-03-013, we enacted provisions establishing (1) a telephone company may not bill subscribers for any unauthorized charge, even if the telephone company did not originate the charge; (2) the burden is on the carrier to establish authorization of a disputed charge; and (3) significant remedies are afforded to consumers who have been crammed. The rules dictate that while a cramming complaint investigation is pending, a subscriber cannot be required to pay a disputed charge or any associated late charges or penalties. The complaint investigation, as stipulated in our rules, must be resolved within thirty days of the date the carrier received the complaint. The CPUC concluded that no further legal protections were needed to protect consumers against unauthorized charges. Thus any more laws or rules may be inefficient and may generate unnecessary consumer confusion and implementation costs.

Also while no CPUC decision specifically addresses disclosure of a customer's potential liability for unauthorized charges, the CPUC determined in D.06-03-013 that existing statutory and regulatory provisions already give sufficient protection for consumers in the area of disclosure. The decision concluded that most consumer protection problems stem not from lack of laws or rules, but instead from lack of consumer knowledge of existing protections and issues with CPUC enforcement of existing laws and rules. As part of D.06-03-013, the CPUC correspondingly mandated numerous consumer-related initiatives, including ones focused on consumer education, enhanced enforcement, and fraud prevention. The CPUC staff is already undertaking to implement these initiatives.

Contract Changes: Policy and Legal Concerns

SB 440 would prohibit mobile service providers from changing a subscriber's contract in a way that results in higher rates unless the subscriber is provided with written notice of the change and is allowed 30 days to decide whether or not to continue service under the changed contract. There is a strong probability that wireless providers would challenge this provision as impermissible rate regulation preempted by federal law.

A significant legal issue raised by SB 400 is whether the state has authority under federal law, specifically, 47 USC § 332(c)(3), to regulate wireless providers in the fashion called for by the bill. Section 332(c)(3) allows the state to regulate the terms and conditions of service of wireless carriers, but not wireless rates. It is unclear whether the

provisions of SB 440 constitute legally permissible state regulation of the terms and conditions of service, or impermissible state regulation of the rates charged by wireless providers.

Federal appellate court precedent found in *Cellco Partnership v. Hatch* suggests that SB 440's provisions would be preempted under federal law.¹ In its decision last year, the Eighth Circuit struck down a similar state statute that purported to limit wireless carriers' ability to modify their contracts. The Court held that the statute was preempted by 47 USC § 332(c)(3).²

Regulation of Wireless Data Services: Legal Concerns

Wireless data companies may argue that all of SB 440's regulation of their services is preempted by federal law. The companies may contend that their services qualify as interstate information services, and may not be regulated in the manner prescribed by the bill.³ Interstate information services are well within the FCC's scope of jurisdiction over interstate communications, and may not be subjected to any state regulation that interferes with national policy goals.⁴

PROGRAM BACKGROUND:

On March 2, 2006, the CPUC adopted Decision 06-03-013, which establishes market rules to empower telecommunications consumers and prevent fraud. D.06-03-013 states in part:

The purpose of this revised General Order is to chart a new regulatory role for the Commission in the face of swift technological advances; the convergence of voice, data, and video; and increasing competition in the telecommunications marketplace.

¹ *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2005).

² *Id.*

³ Information services are "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). The FCC has further clarified that categorizing a technology as either telecommunications service or an information service depends not on the means of delivery, but instead on the functions provided to the end user. See *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, CS Docket No. 02-52 (Mar. 14, 2002).

⁴ See *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, CC Docket No. 02-33 (Aug. 5, 2005) (concluding that wireline broadband Internet access service provided over a provider's own facilities is appropriately classified as an information service, because its providers offer "a single, integrated service (*i.e.*, Internet access) to end users"); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, CS Docket No. 02-52 (Mar. 14, 2002) (finding that as a "single, integrated service that enables the subscriber to utilize Internet access," cable modem service was an information service, and therefore was not subject to the array of state regulations imposed on common carriers).

The Telecommunications Act of 1996 (“1996 Act”) set the nation on a deregulatory path that encouraged competition at every level of the communications market. A central premise of that framework is the recognition that competitive markets provide the most effective consumer protection: the power of choice.

In the six years since this proceeding opened, the communications industry has undergone a profound transformation. The wireless telephone industry grew at such a rapid pace that by December of 2004 . . . the number of wireless subscriber lines in the United States surpassed the number of wireline subscriber lines.⁵ In that same period, the first Internet-based Voice over Internet Protocol (VoIP) telephone companies made their appearance;⁶ peer-to-peer software allowed free voice communications between any two computer users with broadband Internet access; major cable companies began offering cable-based voice telephony; and high speed advanced Internet service became accessible to ninety-five percent of U.S. households.⁷ Wireless telephones with service may be purchased at not only at carriers’ retail outlets, but also at neighborhood electronics stores, kiosks, and on the World Wide Web via dealers, agents, resellers, and electronic retailers.

Our traditional regulatory approach – which limited carriers in a monopoly or duopoly position to specific services and marketing practices – is ill-suited for this modern telecommunications marketplace. One-size-fits-all rules often cannot effectively address the significant degree of variation among technologies and business models currently employed by modern telecommunications companies, and may stifle innovation. Our traditional regulatory approach may inadvertently cause delay for the introduction of innovative services, beneficial rate plans, and deployment of new technology. It, therefore, is imperative that the Commission,

⁵ Total Universal Service Fund (USF) loops (subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services) for California as of December 2003 was 21,519,678 for the Bell Companies. FCC Statistics of Communications Common Carriers, 2004/2005 Edition, Table 5.7 – Total USF Loops for All Local Exchange Companies (as of December 31, 2003). Wireless subscribers as of December 2003 in California numbered 20,360,454. FCC’s 9th Annual Commercial Mobile Radio Services (CMRS) Competition Report, FCC 04-216, Table 2: FCC’s Semi Annual Local Telephone Competition Survey. Wireless subscribers in California as of December 2004 numbered 23,457,761. FCC 10th Annual CMRS Competition Report, FCC 05-173, Table 2, FCC’s Semi-Annual Local Telephone Competition Survey (September 30, 2005). In December 1999, wireless subscribers in California numbered 8,544,941. *Id.*

⁶ Voice over Internet Protocol began in 1995 as a hobby of Israeli computer enthusiasts who could only communicate by computer. That year marked the first year Internet phone software was sold. In 1998, entrepreneurs began offering VOIP service for free if users listened to an ad at the beginning of the call. Only 1% of phone calls were made by VOIP in 1998. By the year 2000, 3% of calls were made via VOIP. By late 2006, it is expected that 24-40% of international traffic may be completed by VOIP. The History of Voice Over the Internet, by Van Theodorou, <http://ezinearticles.com/?The-History-of-Voice-over-Internet-Protocol&id=143336>.

⁷ At the end of 2004, the FCC reported that there was one high speed service subscriber in 95% of the nation’s zip codes. The FCC’s analysis indicates that 99% of the country’s population lives in these zip codes. A “high-speed line” is defined as connections that deliver services at speeds exceeding 200 kilobits per second (kbps) in at least one direction. See FCC News Release, “FCC Releases Data on High-Speed Services for Internet Access,” p. 2 (July 7, 2005).

whose regulatory tools were initially designed to regulate monopolies, periodically calibrate its rules to adjust to this newly competitive environment.

Additionally overly rigorous state regulations may inadvertently hinder advances in communications by imposing “a patchwork quilt” of fifty different state regulatory regimes on carriers who provide service in more than one state. For example, if various states require different billing formats, different font requirements on consumer bills, and different variations on promotional offers, this increases costs on the carriers, and these costs may be passed on to consumers.

Consequently we believe that we must proceed cautiously when considering the imposition of new regulations in this modern milieu. The Commission must be sure that any new rules that we adopt, or any existing rules that we extend to new market participants, address clear problems and are narrowly crafted. The rules that we adopt today are consistent with this regulatory philosophy.

LEGISLATIVE HISTORY:

Unknown.

FISCAL IMPACT:

None.

STATUS: Since this bill is a “gut and amend,” it is awaiting assignment to a policy committee by the Assembly Rules Committee.

SUPPORT/OPPOSITION:

Unknown.

STAFF CONTACTS:

Pamela Loomis
Deputy Director, CPUC-OGA

pcl@cpuc.ca.gov
(916) 327-8441

Date: May 8, 2006

BILL LANGUAGE:

BILL NUMBER: SB 440 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY MARCH 13, 2006
AMENDED IN ASSEMBLY JUNE 14, 2005
AMENDED IN ASSEMBLY JUNE 6, 2005
AMENDED IN SENATE MAY 2, 2005
AMENDED IN SENATE APRIL 21, 2005

INTRODUCED BY Senator Speier

FEBRUARY 17, 2005

An act to add ~~Section 1798.21.5 to, and to add Title 1.81.23 (commencing with Section 1798.90.5) to Part 4 of Division 3 of, the Civil Code, relating to personal information.~~ Article 6 (commencing with Section 2899) to Chapter 10 of Part 2 of Division 1 of the Public Utilities Code, relating to telecommunications.

LEGISLATIVE COUNSEL'S DIGEST

SB 440, as amended, Speier ~~Personal information.~~
Telecommunications: mobile data and mobile telephony services: charges for unauthorized services.

Under existing law, the Federal Communications Commission licenses and partially regulates providers of commercial mobile radio service, including providers of cellular radiotelephone service (cellular), broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR) services (collectively, mobile telephony service providers). Under existing law, no state or local government may regulate the entry of, or the rates charged by, any commercial mobile radio service, but a state or local government is generally not prohibited from regulating the other terms and conditions of commercial mobile radio service.

Existing law authorizes the Public Utilities Commission to regulate telecommunications services and rates of telephone corporations, except to the extent regulation of commercial mobile radio service is preempted by federal regulation, and to require telephone corporations to provide customer services. Existing law requires a provider of mobile telephony services to provide subscribers with a means by which a subscriber can obtain reasonably current and available information on the subscriber's calling plan or plans and service usage.

This bill would require that providers of mobile data service, as defined, or mobile telephony service, as defined, give clear and conspicuous written notice of a subscriber's potential liability for any unauthorized use of the service and the means for a subscriber to notify the service provider in the event of theft or other loss of a mobile data or mobile telephony communications handset or other device. The bill would require that the written disclosure contain a

blank space for the customer to initial or sign, to acknowledge having been advised of their potential liability for unauthorized use of the service. The bill would limit a subscriber's liability for unauthorized use to usage occurring prior to notification of the service provider, not to exceed \$50. The bill would prohibit a mobile data or mobile telephony service provider from changing a subscriber's contract in a way that results in higher rates or charges or more restrictive terms or conditions, unless specified conditions are met.

~~—(1) The Information Practices Act of 1977 regulates the collection and disclosure of personal information regarding individuals by state agencies, as specified.~~

~~—On and after July 1, 2006, this bill would require a state agency, or any person contracting with a state agency, to encrypt all personal information, as defined, that is owned by the state and stored or transported on a portable computing or electronic storage device.~~

~~—(2) Existing law prescribes various prohibitions with regard to disclosures of personal information related to, among others, consumer credit reports, credit card transactions, driver's licenses, social security numbers, and direct marketing.~~

~~—This bill would prohibit a business, as defined, from discriminating against or denying an otherwise qualified consumer a product or service, or charging a higher price for that product or service, because the consumer has not provided the consent to disclose or share covered information, as defined, pertaining to him or her, or because the consumer has directed that the information not be disclosed or shared. The bill would except from that prohibition a business that cannot provide a product or service without provision of that covered information and certain institutions already subject to specified federal provisions or regulations. The bill would provide that no liability is created with regard to the above, and that the measure is not intended to prohibit a business from offering incentives or discounts to elicit a specific response pertaining to the disclosure or sharing of covered information.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~yes~~
no . State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Article 6 (commencing with Section 2899) is added to Chapter 10 of Part 2 of Division 1 of the Public Utilities Code , to read:

Article 6. Mobile Data and Mobile Telephony Services

2899. For purposes of this article, the following terms have the following meanings:

(a) "Mobile data service" means the delivery of nonvoice information to a mobile device and includes nonvoice information communicated to a mobile telephony services handset, nonvoice information communicated to handheld personal digital assistant (PDA) devices and laptop computers, and paging carriers offering services on pagers and two-way messaging devices.

(b) "Mobile telephony service" means commercially available

interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radiowave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR). "Mobile telephony services" does not include mobile satellite services or mobile data services used exclusively for the delivery of nonvoice information to a mobile device.

(c) "Subscriber" means any individual or small commercial entity that purchases or subscribes, or may potentially purchase or subscribe, to any product or service provided or billed by a mobile data service or mobile telephony service provider.

2899.1. (a) Every mobile data service or mobile telephony service provider shall give clear and conspicuous written notice of a subscriber's potential liability for any unauthorized use of the service and the means for a subscriber to notify the service provider in the event of theft or other loss of a mobile data or mobile telephony communications handset or other device.

(b) The written disclosure required by subdivision (a), shall contain a blank space for the customer to initial or sign, to acknowledge having been advised of their potential liability for unauthorized use of the service.

(c) A subscriber's liability for unauthorized use is limited to usage occurring prior to notification of the service provider, consistent with the written notice. In no event shall a subscriber's liability exceed fifty dollars (\$50).

(d) (1) In any action brought by a mobile data service or mobile telephony service provider, the service provider has the burden of proof to establish that use of the service was authorized.

(2) In any action brought by a mobile data service or mobile telephony service provider, to recover for services that were unauthorized, the service provider has the burden of proof to establish that the subscriber is responsible for the charges under the agreement.

2899.2. (a) No mobile data or mobile telephony service provider shall change a subscriber's contract in a way that results in higher rates or charges or more restrictive terms or conditions, unless all of the following conditions are met:

(1) The change is permitted by law.

(2) The subscriber is provided with at least 30 calendar days prior written notice before the effective date of the change, during which time the subscriber may terminate service before the effective date of the change. The written notice shall include the following statement in at least 12-point bold face type: "The terms of your contract have changed." Following this heading shall be a clear, concise, and conspicuous statement explaining the change in the rate, charge, term, or condition in the subscriber's contract.

(3) If the subscriber's contract contains any early termination fee or charge provision, any early termination fee or charge is waived and may not be collected by the service provider if the subscriber elects to terminate service pursuant to paragraph (2). If the subscriber's contract contains any early termination fee or charge, the prior written notice shall, in addition to the notice required in paragraph (2), include the following statement in at least 12-point bold fact type: "You have a right to terminate service without penalty." Following this heading shall be a clear, concise, and conspicuous statement explaining the number of days that the

subscriber has to terminate service without incurring a fee or charge.

(b) The requirements of subdivision (a) do not apply to either of the following:

(1) When the subscriber initiates the request to change the terms or conditions of the contract, including a request for additional services not offered under the existing contract.

(2) An increase in a tax or fee that the mobile data or mobile telephony service provider is required to collect from the subscriber and remit to a governmental entity.

~~SECTION 1. Section 1798.21.5 is added to the Civil Code, to read:~~

~~1798.21.5. (a) On and after July 1, 2006, an agency, or any person contracting with an agency, shall encrypt all personal information that is owned by the state and stored or transported on a portable computing or electronic storage device.~~

~~(b) For purposes of this section:~~

~~(1) "Personal information" means an individual's first name or first initial and his or her last name in combination with any one or more of the following data elements:~~

~~(A) Social security number.~~

~~(B) Driver's license number or California identification card number.~~

~~(C) Account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.~~

~~(D) Medical information.~~

~~(2) "Medical information" means any individually identifiable information, in electronic or physical form, regarding the individual's medical history or medical treatment or diagnosis by a health care professional.~~

~~SEC. 2. Title 1.81.23 (commencing with Section 1798.90.5) is added to Part 4 of Division 3 of the Civil Code, to read:~~

~~TITLE 1.81.23. PERSONAL INFORMATION DISCLOSURES TO BUSINESSES~~

~~1798.90.5. (a) A business required by state or federal law to obtain a consumer's consent before disclosing or sharing covered information pertaining to the consumer or to provide the consumer with an opportunity to direct that the information not be shared or disclosed shall not discriminate against or deny an otherwise qualified consumer a product or service sold or leased by the business or charge a higher price for that product or service because the consumer has not provided the business the consent to disclose or share covered information pertaining to him or her, or because the consumer has directed that the information not be disclosed or shared.~~

~~(b) Notwithstanding any other provision of law, nothing in this section shall prohibit a business from denying a consumer a product or service, or from charging a consumer a higher price, if the business could not provide the product or service, or a lower price, to the consumer without disclosure of the consumer's covered information, and the consumer has failed to provide consent to that disclosure or has directed that covered information pertaining to him or her not be disclosed or shared.~~

~~(c) A business shall not be liable for failing to offer products~~

~~or services to a consumer solely because that consumer or for charging a higher price for a product or service, pursuant to state or federal law, has failed to provide the business the consent to disclose or share covered information pertaining to him or her or has directed that covered information not be disclosed or shared, and the business could not offer or charge a lower price for the product or service without the disclosure of the consumer's covered information.~~

~~—(d) Nothing in this section is intended to prohibit a business from offering incentives or discounts to elicit a specific response to a choice pertaining to the disclosure or sharing of covered information granted in state or federal law.~~

~~—(e) The requirements of this section shall not apply where a business is subject to paragraph (1) of subdivision (a) or paragraph (4) of subdivision (b) of Section 4053 of the Financial Code, or is a "covered entity" as defined in Section 160.103 of Title 45 of the Code of Federal Regulations of the Standards for Privacy of Individually Identifiable Health Information under the federal Health Insurance Portability and Accountability Act (42 U.S.C. Sec. 300gg et seq.) and is subject to Sections 164.508(b)(4) and 164.530(g) of Title 42 of the Code of Federal Regulations.~~

~~—(f) For purposes of this section:~~

~~—(1) "Business" means a proprietorship, partnership, corporation, or any other form of commercial enterprise, doing business in California.~~

~~—(2) "Covered information" means the information pertaining to a consumer that state or federal law prohibits a business from sharing or disclosing before obtaining a consumer's consent or before providing the consumer with an opportunity to direct that the information not be shared or disclosed.~~