

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Protecting Consumers from
Unauthorized Carrier Charges and
Related Unauthorized Charges**

CG Docket No. 17-169

**REPLY COMMENTS OF
THE ARIZONA CORPORATION COMMISSION¹**

I. INTRODUCTION.

The Arizona Corporation Commission (the “Arizona Commission”)² supports many of the Federal Communications Commission’s (the “FCC”) proposals to strengthen the federal slamming and cramming rules.³ Between January 2015 and December 2016, the FCC states that it received 8,000 slamming and cramming complaints.⁴ Recent FCC enforcement actions indicate that these scams oftentimes focus on the most vulnerable groups including the elderly and non-native English speaking populations.

¹ The Arizona Commission, pursuant to 47 CFR § 1.46, requests that the FCC accept these late-filed comments in this proceeding for good cause. Because of limited staff resources and the internal procedure required for approval of comments, the Arizona Commission was unable to timely file these comments. No other party has provided the unique perspective of the Arizona Commission. Permitting these late filed comments will provide a better basis for informed FCC action in this proceeding. In the alternative, the Arizona Commission would request that the Commission consider these comments as written ex parte comments, under § 1.1206(b) of the FCC’s rules. 47 C.F.R. § 1.1206.

² The Arizona Commission is the regulatory agency of the State of Arizona with jurisdiction over public service corporations doing business in the State. This includes corporations furnishing gas, oil, electricity, water, and telephone services for the purposes defined in the Arizona Constitution. *See* Ariz. Const. art. 15, § 2.

³ Protecting Consumers from Unauthorized Carrier Charges and Related Unauthorized Charges, 82 Fed. Reg. 37,830 (Sept. 13, 2017) (to be codified at 47 C.F.R. pt. 64) (hereinafter, “NOPR”).

⁴ This number does not include customers that simply do not file a complaint or who do not realize that they have been victimized; instances where the problem is classified as a billing or other issue by the FCC; or instances where the complaints are filed with another entity such as the state public utility commission, the Federal Trade Commission (“FTC”), State Attorney General’s Offices, or the Better Business Bureau.

In response to the NOPR, the Arizona Commission supports the following actions:

- 1) codify an express ban on sales call misrepresentations with service provider liability for violations, applicable to all providers regardless of technology;
- 2) greater customer education with respect to Preferred Carrier ("PIC") freezes and their availability;
- 3) continue to apply PIC freezes (where available) to individual services, except when the provider offers all-distance services only;
- 4) double checking a request to switch carriers with the consumer should utilize a simple cost-effective process and be done in a manner which minimizes the possibility of retention marketing;
- 5) require that certain mandatory disclosures be made on sales calls;
- 6) continue to allow third-party verification ("TPV") which has been an effective tool for many carriers;
- 7) codify a prohibition against cramming;
- 8) allow customers to opt-in to blocking of certain third-party charges;
- 9) apply the cramming rules to all telecommunications service providers regardless of the technology used;
- 10) apply slamming rules to Voice-over-Internet-Protocol ("VoIP") providers, and, to wireless providers where it is appropriate; and
- 11) make the federal consumer complaint database for individual states accessible to state public service commissions and state attorneys general to more effectively combat fraudulent activity in the telecommunications marketplace.

II. DISCUSSION.

A. The Arizona Commission Supports Additional Protections to More Effectively Address Slamming Violations in Vulnerable Populations

1. The FCC should modify its rules to expressly prohibit misrepresentations made by sales agents on sales calls preceding the verification process.

As discussed, the FCC has found that misrepresentations on sales calls are behind many slamming complaints that it has recently investigated. Recent enforcement actions have revealed the extent that some carriers will go to make money from unsuspecting customers.⁵ While the FCC

⁵ Examples of misrepresentations referenced in the NOPR included sales agents misrepresenting who they are and why they are calling; in some cases representing that they are calling about a package delivery; and sales agents misrepresenting that they work for AT&T or the consumer's current provider. The consumers' responses in the verification process were based upon the misrepresentations; in other cases their responses were actually "coached"; and in still other cases the consumers' responses were edited to support the unlawful slam or cram.

has found such misrepresentations to be an unjust and unreasonable practice and unlawful under Section 201(b) of the Communications Act, its rules do not expressly ban carrier or carrier-agent misrepresentations on the sales calls that typically precede the verification process.

The FCC proposes to adopt a rule that expressly bans carrier or carrier-agent misrepresentations on sales calls that precede a slam. The rules would also provide that a subscriber's authorization provided in reliance on false or misleading statements should be deemed void and should subject the service provider to liability. The Arizona Commission supports both of these proposed rules and does not believe these rules would impose any burden on legitimate marketing.

Multiple parties filed initial comments objecting to what they perceive to be the potential creation of a strict liability standard on service providers that generally act in good faith but which, despite their due diligence, are responsible for isolated incidents of non-compliance.⁶

The Arizona Commission believes the statute on this point is clear. The statute on penal provisions and forfeitures for violations of the slamming rules specifically, 47 U.S.C. § 503(b)(1)(B) imposes liability on persons who have "willfully or repeatedly failed to comply with . . . any rule, regulation or order issued by the Commission [over Common Carriers]" such as those found under 47 U.S.C. § 201(b) and § 258.⁷ A knowing standard and the requirement of repeated offenses eliminates the possibility of good faith providers involved in isolated incidents of misconduct being held strictly liable.

Nevertheless, in response to the comments noted above, the FCC could add a sentence in the rules which clarifies when carriers are subject to liability. As the law currently stands, however, a good faith carrier's isolated mistake that occurs despite risk-mitigating procedures and training being in place cannot be held strictly liable.

⁶ See, e.g., CTIA Comment at pp. 6-7; Verizon Comments at p. 10; US Telecom Association Comments at pp. 3-4.

⁷ 47 U.S.C. § 503(b)(1)(B) (emphasis added).

2. **Greater customer education on opt-in preferred carrier freezes should be required.**

The FCC's current slamming rules allow customers to "freeze" their current provider if a local exchange carrier offers this capability. A preferred carrier freeze prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express consent.

The FCC seeks comment on making "freezes the default so that consumers are automatically afforded additional protection against slamming, rather than requiring them to take extra steps to do so." While the Arizona Commission supports measures that will prevent slamming in the future, the record is not developed enough to know whether making freezes the default will actually benefit many customers.

Taking additional steps to ensure informed customer consent may be more effective. A customer should have the right to decide whether to be subject to a freeze or not. PIC freezes are not without downsides. As commenters point out, PIC freezes can delay and restrict consumers from switching carriers, may be confusing to some customers, and place significant costs on companies other than the perpetrator of the scams.⁸ The NOPR contains other alternatives that may be more effective and that could be applied more broadly.

To make opt-in PIC freezes effective and meaningful, carriers must adequately notify consumers of the option. Other commenters, including the FTC and Western Telecommunications Alliance ("WTA"), have stressed the importance of advertising such protections to consumers, which has been effective in past opt-in consumer protection programs.⁹ Indeed, the FTC's Do Not Call Registry is well-known and widely utilized by the public, with over 200 million numbers registered as of July 2010.¹⁰ The availability of preferred carrier freezes should likewise be advertised to consumers. Finally, to the extent the notices are not provided in Spanish, a

⁸ Verizon Comments at 1-2; AT&T Services, Inc. Comments at 2-3.

⁹ See WTA – Advocates for Rural Broadband Comments at 4; FTC Comments at 21.

¹⁰ FTC, 10 years of National Do Not Call: Looking back and looking ahead, <https://www.ftc.gov/news-events/blogs/business-blog/2013/06/10-years-national-do-not-call-looking-back-looking-ahead> (last checked Dec. 28, 2017).

requirement to this effect should be considered where Spanish is the customer's language of preference.

The truth-in-billing rules, in the context of third-party charges, already require carriers to notify consumers of their option to block third-party charges at the point of sale, on each carrier's website, and on each telephone bill.¹¹ Similarly, the FCC should require carriers to notify consumers of their ability to implement a preferred carrier freeze at the point of sale, on carriers' websites, on all bills (paper and paperless), and, given that some consumers never view their bills because they are enrolled in auto-pay programs, provide a notification on consumers' receipt of payment.

Additionally, the FCC should consider requiring all carriers to distribute a Notice of Subscriber Rights to all consumers on an annual basis. While some carriers provide their own Notice of Subscriber Rights, it is unclear how prevalent this practice actually is. The FCC should require that those notices contain certain basic facts and information. In Arizona, there is currently a requirement that carriers provide consumers with a Notice of Subscriber Rights that informs consumers of their ability to place a freeze on their account, of their rights to a refund for unauthorized charges, and information on reporting violations to the appropriate regulatory agencies.¹² Carriers must currently provide the notice to consumers (in English and Spanish) at the time service is initiated, upon a consumer's request, in carriers' annual telephone directories, and on carriers' websites.¹³

Finally, local exchange carriers that offer freezes currently must do so for each individual service offered (local, intraLATA and interLATA services) and must get separate freeze authorizations from consumers for each of these services.¹⁴ The FCC proposes that one freeze be applied to all services in a bundle and to all-distance services. The Arizona Commission believes,

¹¹ 47 C.F.R. § 64.2401(f).

¹² A.A.C. R14-2-1908(B); *see also* A.A.C. R14-2-2007(C) (notice of subscriber rights pertaining specifically to cramming).

¹³ A.A.C. R14-2-1908(C); *see also* A.A.C. R14-2-2007(D).

¹⁴ NOPR at 6, *citing to* 47 C.F.R. §64.1190.

based upon the record, that the carrier freeze should continue to be applied to individual services, unless the provider offers all-distance services only. Initial comments indicate that application of the freeze to all services will have more serious repercussions for competitors and may make it more difficult for the consumer to ultimately change providers.¹⁵

3. **Double checking a request to switch carriers with the consumer should utilize a simple cost-effective process and be done in a manner which minimizes the possibility of retention marketing.**

Another option raised in the NOPR is to require executing carriers to verify a consumer's change in carrier. Both Arizona and federal law currently restrict an executing carrier's ability to contact consumers that have switched carriers.¹⁶ The FCC, however, has tentatively concluded that federal law creates an exception allowing carriers to re-verify that consumers desire to switch carriers because the practice protects consumers from fraudulent, abusive, or unlawful conduct.¹⁷ We agree that the need to protect consumers from fraudulent, abusive, or unlawful conduct should be an exception to the general rule. However, implementation of the exception should be done in a manner which minimizes the opportunity for retention marketing by the executing carrier.

Requiring an executing carrier to re-verify a consumer's change in providers is not without potential concerns. As commenters note, executing carriers may engage in retention marketing on confirmation calls and otherwise frustrate or confuse consumers that want to switch carriers.¹⁸ Double checking also creates practical issues for executing carriers such as complying with timeframes by which confirmations must be made and developing the infrastructure to support this new function.¹⁹

A simpler means that can accomplish both objectives (minimizing the potential for retention marketing through a simple cost effective process) would be to require executing carriers

¹⁵ *Supra* note 7.

¹⁶ Arizona Administrative Code ("A.A.C"). R14-2-1904(C); 47 U.S.C. § 222(b); NPRM at 10.

¹⁷ NOPR at 11; 47 U.S.C. § 222(d)(2).

¹⁸ Telplex Comments at 17; Coalition for a Competitive Telecommunications Market Comments at 14-15; Verizon Comments at 12.

¹⁹ Verizon Comments at 12; AT&T Services, Inc. Comments at 9; Comcast Corporation Comments at 12-13.

to notify consumers that a carrier switch has occurred in a manner similar to the United States Post Office's mailing notice to consumers who are changing their mailing address, or companies sending email notifications to consumers who access their accounts from a new computer or change an account password.²⁰

The proposed notification would instruct consumers that have not initiated the change indicated to contact the executing carrier to address the unauthorized change in service. The notice could also inform consumers of their ability to request preferred carrier freezes. Retention marketing should be prohibited on such notifications. To make the process effective and convenient for all parties involved, executing carriers should be able to send notifications to consumers via their preferred method of contact, *e.g.*, by email, letter, or text message. Such notices should also be provided in both English and Spanish, if Spanish is the customer's language preference. Change notifications have the benefit of both providing consumers with an additional opportunity to discover fraudulent conduct should an unauthorized change occur to their accounts despite verification procedures already in place *and* they are minimally intrusive. In addition, this alternative may be just as effective, but less costly than some of the other options proposed in the NOPR.

4. **At a minimum, the FCC should require certain mandatory disclosures on sales calls.**

Another option discussed in the NOPR is whether carriers should be required to record and retain sales calls that precede a switch in carriers. Requiring carriers to record sales calls and retain the recordings for a period of two years would provide regulators with an additional enforcement tool in identifying deceptive practices underlying a slamming or cramming complaint. On the other hand, this requirement may be cost-prohibitive for some companies, which the FCC should consider when deciding whether to promulgate such a rule.

²⁰ See United States Postal Service, Change of Address—The Basics, <http://faq.usps.com/?articleId=221220> (last checked Nov. 6, 2017); Google, Security Notification Settings, https://support.google.com/accounts/answer/2733203?hl=en&ref_topic=7189123 (last checked Nov. 6, 2017).

Just as important, the requirement that companies record sales calls may not be as helpful to the consumer as it could be; because it does not require that companies make disclosures necessary to inform consumers about the transaction they are entering into, nor does it prohibit sales representatives from engaging in specific conduct that is a known issue, *e.g.*, coaching consumers on how to answer TPV questions. Required disclosures on sales calls should include information related to the purpose of the call (*i.e.*, to sell merchandise to the consumer), the name and address of the new carrier, whether the new carrier is affiliated with the consumer's current carrier, a description of the merchandise, and the cost of the merchandise. If a consumer elects to switch carriers, the FCC should require switching carriers to mail identical written disclosures to the consumer within a reasonable timeframe (no longer than one billing period).²¹

Companies engaged in telemarketing are generally subject to similar laws. For instance, the FTC enforces the Telemarketing Sales Rule, and Arizona enforces its own Telephone Solicitations Act, which mandate similar disclosures for companies selling merchandise over the phone.²² Mandatory, enumerated disclosures and prohibitions in conjunction with an active consumer complaint process will help minimize instances of slamming and cramming and aid in enforcement efforts.

5. **Third-party verification has been effective for some providers and should not be discontinued.**

The FCC seeks comment on whether TPV is an effective means of providing evidence that a consumer desires to switch carriers. The FCC asks whether eliminating TPV as a verification mechanism would be effective in preventing slamming and provide substantial benefits to

²¹ Arizona law requires switching carriers to "clearly and conspicuously identify any change in service provider" to consumers on their bill, bill insert, or in a separate mailing. A.A.C. R14-2-1906.

²² 16 C.F.R. § 310; A.R.S. §§ 44-1271--1282. The FCC requested comment on whether required disclosures raise First Amendment issues. The FTC's Telemarketing Sales Rule, which requires companies to make affirmative disclosures, withstood First Amendment scrutiny. *National Federation of the Blind v. F.T.C.*, 420 F.3d 331 (4th Cir. 2005).

consumers. The FCC also asks that if it decides to retain TPV as evidence of a consumer's desire to switch providers, how can TPV be made more difficult to falsify.

The FCC has been using TPV as an effective means of verification for many years. Many carriers have come to rely on this form of verification, and it has worked well for them. Simply because some unscrupulous providers have found a way to undermine its effectiveness in some instances does not mean that it should be discontinued altogether. Several parties offered ways to improve the TPV process, which the FCC should consider as part of its current evaluation.

B. The Arizona Commission Supports the FCC's Proposals to Strengthen its Rules to Prevent Cramming Violations.

1. The FCC should amend its rules to codify a ban against cramming.

The FCC proposes to codify a rule against cramming, which it currently enforces under Section 201(b) of the Act. The Arizona Commission agrees that codifying the cramming prohibition would act as a deterrent and supports the FCC's proposal in this regard.

Arizona law also prohibits unauthorized telecommunications charges, or "cramming," which is defined as "any recurring charge on a Customer's telephone bill that was not authorized or verified This does not include one-time pay-per-use charges or taxes and other surcharges that have been authorized by law to be passed through to the Customer."²³ Since not all cramming violations occur when there has been a slamming violation, the Arizona Commission believes that the proposed rule should be codified under separate cramming rules, or the truth-in-billing rules.

Further, while the Arizona Commission generally agrees with the FCC's determination that a prohibition against cramming should be codified, Arizona law goes further than that. The Arizona Commission recommends that, in addition to codifying a general prohibition against unauthorized charges on a consumer's telephone bill, the FCC consider accompanying implementation-related rules similar to those already found in the FCC's rules addressing slamming.

²³ A.A.C. R14-2-2001(E); see A.A.C. R14-2-2006.

2. **The FCC should allow customers to opt-in to blocking of certain third-party charges.**

The FCC seeks comment on whether to require carriers to block certain third-party charges by default. Arizona and federal law do not currently require carriers to block any third-party charges. Governmental enforcement actions and investigations have shown that many types of third-party charges are largely fraudulent. For instance, the FTC previously recommended that the FCC ban or place default blocks on all or some third-party charges, stating that “FTC staff has been able to identify very few legitimate uses of third-party telephone billing.”²⁴

Likewise, an extensive investigation by the Committee on Commerce, Science, and Transportation of the United States Senate which involved reviewing evidence collected from telephone companies and telephone bill auditors, investigating the legitimacy of third-party vendors, and contacting hundreds of consumers, concluded that “[a]lthough it is difficult to determine precisely how many third-party charges are unauthorized, the evidence obtained through this investigation overwhelmingly suggests that it is a substantial percentage.”²⁵ And, responding to this widespread problem, at least two states have restricted carriers’ abilities to place third-party charges on consumers’ wireline telephone bills in order to prevent unauthorized charges.²⁶

The FCC should consider allowing customers to opt-in to blocking of certain third-party charges. However, any program of this type will not be effective without providing information on such a program to customers. Again, education will be critical to ensuring that customers have the information they need in order to make informed choices regarding their telecommunications services. Blocking certain types of third-party charges by default should be done if there is sufficient evidence showing that those types of third-party charges are usually fraudulent.

²⁴ FTC Comments, CG Docket Nos. 11-116, 09-158, 98-170 at 3, Oct. 2011.

²⁵ Staff Report, Senate Committee on Commerce, Science, and Transportation, *Unauthorized Charges on Telephone Bills*, 11 (July 12, 2011).

²⁶ Illinois and Vermont have, with limited exceptions, prohibited third-party charges. 815 ILCS 505/2HHH; 9 V.S.A. § 2466.

C. The FCC's Consumer Protection Measures Should As a General Rule Apply to all Functionally Equivalent Forms of Telecommunications Services, Whether Classified as Such or Not, to Protect all Consumers.

Several times in the NOPR, the FCC inquires whether the rules should apply to all forms of telecommunications service (whether classified as such or not). For instance, with respect to adoption of a rule against cramming, the FCC notes that “[o]ur cramming rules currently do not apply to interconnected VoIP, and only some of the cramming rules apply to [Commercial Mobile Radio Service] CMRS.” The FCC goes on to inquire whether it should extend this proposed rule to CMRS, pre-paid wireless and interconnected VoIP.

The Arizona Commission believes that all telecommunications service customers should receive the same consumer protections, regardless of the form of technology the customer uses. As the FCC recently recognized, consumers are increasingly turning to wireless services as opposed to wireline.²⁷ As the comments of some point out, simply because service is provisioned via interconnected VoIP and wireless service, does not eliminate the opportunity for cramming. In fact, the FCC, FTC, and state Attorneys General have obtained multi-million dollar settlements with wireless carriers for their alleged practices of mobile cramming.²⁸ Thus, cramming protections should apply to wireline, CMRS, pre-paid wireless, and interconnected VoIP.

This same general principle should apply to slamming consumer protection measures as well. For instance, at para. 12 of the NOPR, the FCC asks whether misrepresentations are enough of a concern for CMRS, pre-paid wireless, and interconnected VoIP to justify extending the rule banning misrepresentations to those services as well. The Arizona Commission believes the ban against misrepresentations should apply to all providers: wireline, CMRS, pre-paid wireless, and

²⁷ Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services 5, WT Docket No. 17-69 (Sept. 26, 2017).

²⁸ See Arizona Attorney General, Attorney General Tom Horne Announces \$90 Million Settlement with T-Mobile, <http://azag.gov/press-release/attorney-general-tom-horne-announces-90-million-settlement-t-mobile>, (last checked Dec. 28, 2017); See also, Arizona Attorney General, Attorney General Tom Horne Announces \$105 Million Settlement with AT&T, <https://azag.gov/press-release/attorney-general-tom-horne-announces-105-million-settlement-att>, (last checked Dec. 28, 2017).

interconnected VoIP. To the extent the other rule amendments make sense in the CMRS and interconnected VoIP context, they should be extended to these providers. Technology and offerings are evolving all the time. CMRS service providers utilize the same technology and products at times. The FCC's objective should be to create a level playing field for all voice technologies and to make consumer protections available to all consumers, as needed. As technologies and markets evolve, what constitutes "slamming" may need to evolve as well. Finally, the FCC should also make clear as it has in the past, that its rules do not preempt state rules to address slamming and cramming violations.

D. The FCC Should Make its Consumer Complaint Database for Individual States Accessible to State Public Service Commissions and State Attorneys General.

The FCC should also consider making its Consumer Complaint Database for individual states available to the state public service commissions and state attorneys general for use. It is the Arizona Commission's understanding that the FTC makes certain of its databases available to law enforcement officials for their use.

III. CONCLUSION.

The State of Arizona is home to large numbers of people within the populations the FCC recognizes as being vulnerable to unscrupulous carriers. The Arizona Commission thanks the FCC for its consideration of the Arizona Commission's Reply Comments and supports the FCC's efforts to reduce the occurrence of slamming and cramming through changes to its rules.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

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