Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Protecting Consumers From	)	
Unauthorized Carrier Changes and	)	CG Docket No. 17-169; FCC 17-91
Related Unauthorized Charges	)	

To: Ms. Kimberly A. Wild, Esquire
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Comment by

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I. INTRODUCTION

I commend the Federal Communications Commission (the Commission) for its action to protect consumers from the slamming and cramming practices of telecommunications carriers. I am pleased to submit this comment to the Commission regarding its proposed rule, but I understand that the comment period has ended. However, I would like to offer the following in the event that the Commission may still consider these remarks.

My comment will address a number of the questions the Commission promulgated in Federal Register Notice, CG Docket No. 17-169; FCC 17-91. I am interested in this proposed rule as a concerned citizen, and as law student interested in pursuing consumer protection law. Slamming and cramming have impacted my family and friends, and this is an issue that impacts every American who has phone service. My central aim is to provide the Commission with additional legal authority and legal parallels to justify the Commission's proposals to protect consumers.

II. BACKGROUND INFORMATION

Telecommunications carriers who practice slamming and cramming target some of the most vulnerable Americans including the elderly, immigrants, non-English speakers and small-businesses.[1] The Commission reports that it has received 8,000 consumer complaints specifically for slamming and cramming, and 50,000 billing complaints in the past two years.[2] These numbers swell when combined with data from the States that require consumers to report slamming and cramming complaints to their State Public Utility Commission. Additionally, many citizens who experience slamming and cramming may not report out of uncertainty or fear that they will lose service if they do not pay new charges.

The Commission has authority to promulgate procedures to prevent slamming and cramming under 47 U.S.C. § 258(a). § 258(a) states that it is unlawful for a telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service *except* in accordance with such verification procedures as the Commission shall prescribe (emphasis added)."[3] The verification procedures require carriers to take actions such as gaining written consent, electronic authorization, or using third party verification (T.P.V.) to verify a carrier change. Current regulations also allow consumers to freeze their carrier choice if they opt-in, and they are able to bring claims against telecommunications carriers for slamming and cramming. In addition, agencies have acted to cease slamming and cramming such as the $105 million action the Federal Trade Commission (F.T.C.) enforced against AT&T.

Yet, despite current regulations and the Commission's past actions, carriers have managed to bypass procedures, and slamming and cramming continue to impact millions of consumers every year. The Commission has hesitated to tighten rules in the past out of a desire

[1] Protecting Consumers From Unauthorized Carrier Changes and Related Unauthorized Charges, 82 Fed. Reg. 37,830, 37,381 (Aug. 14, 2017) (to be codified at 47 C.F.R. pt. 64).
[2] Federal Communications Commission, FCC 17-91, In the Matter of Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges (Jul. 14, 2017) at 3.
[3] 47 U.S.C.A. § 258(a) (Westlaw 2017).

to not burden carriers, impede competition, and create unnecessary hurdles for consumers who wish to switch carriers. However, the data and enforcement actions continue to show that consumers need additional protections from the Commission in order to prevent slamming and cramming.

However, the Commission's statutory authority to implement new requirements for carrier changes under § 258(a), is similar to the F.T.C.'s ability to regulate telemarketers. § 258 prohibits carriers from executing a carrier change by default. It is only through following the Commission's procedures that a carrier can execute a change. Further, enhanced enforcement and regulation of carriers will not overburden carriers and consumers as the telemarketing industry demonstrates. Therefore, the Commission should adopt rules that, among other proposals discussed below, explicitly ban misrepresentations in sales calls and prevent carriers from placing unauthorized charges on consumer's phone bills to prevent slamming and cramming.

III. DISCUSSION

In this comment, I agree with many of the Commission's proposals and will recommend that the Commission take five steps to provide further protections to consumers against slamming and cramming. First, the Commission should explicitly ban carrier misrepresentations in a sales call. Second, carriers should freeze a consumer's preferred carrier by default. Third, the Commission should adopt a hybrid approach to double-check a consumer's carrier switch. Fourth, the Commission should adopt rules to automatically block third-party billing, and fifth, the Commission should require carriers to fully record sales calls.

A. The Commission Should Ban Carriers From Making Any Misrepresentations in Sales Calls to Consumers.

The Commission should explicitly ban carrier misrepresentations because current verification procedures do not expressly account for the misrepresentations that lead to unauthorized carrier changes. While the rules do provide for confirmation of a consumer's authorization, they do not account for the contingency of carriers misrepresenting themselves to obtain that authorization. FCC 17-91 states, "the Commission thus proposes to codify a new § 64.1120(a)(1)(i)(A) of its rules banning misrepresentations on the sales calls and stating that any misrepresentation or deception would invalidate any subsequent carrier change, even where the submitting carrier purports to have evidence of consumer authorization."[4] Such a change would provide clarity regarding misrepresentations and would be consistent with other areas of law.

Many other areas of law ban misrepresentations outright. 14 C.F.R. § 399.80 bans misrepresentations that may lead consumers to believe a ticket agent is an airline carrier, or to misrepresent the size of the plane, the departure time, or the quality of service on the aircraft.[5] 16 C.F.R. § 18.7 makes it unlawful for a nursery business to misrepresent itself as a grower or propagator of the products that it sells.[6] In addition, 24 C.F.R. § 203.255(c)(7) authorizes the

[4] 82 Fed. Reg. 37,830, 37,831
[5] Policy Statements, 14 C.F.R. § 399.80 (2016).
[6] Guides and Trade Practice Rules, 16 C.F.R. § 18.7 (2017).

Secretary of Housing and Urban Development (HUD) to nullify or delay an application for mortgage insurance for a misrepresentation. [7]

As the Commission is aware, this is a small sampling of the regulations and statutes that exist to ban misrepresentations of items and services sold to the public. If ticketing agents, plant nurseries, and mortgage brokers cannot misrepresent themselves and their services, then phone carriers should not either. Further, the enabling statute gives the Commission the authority to pursue such a ban. The statute makes a carrier switch illegal except those in "accordance with such verification procedures as the Commission shall prescribe."[8]

A more stringent and bright line rule will create even less ambiguity so as to ensure carriers know slamming is wrong and give the Commission stronger language with which to defeat it. The Commission has brought actions against slammers who misrepresented themselves in the past. Last year, the Commission won a $6 million enforcement action against Birch Communications of Atlanta for deceptively switching consumers' phone carriers.[9] The Commission received complaints that Birch had been calling consumers claiming to be their current carrier in order to convince those consumers to switch to Birch.[10] The compensation from this enforcement action was relatively small, but nonetheless incredibly important as it sends clear signals that the Commission will not tolerate this behavior.

Further, significant parallels exist between the sales calls of telemarketers and phone carriers Therefore, the Commission should adopt a rule that is similar to the F.T.C.'s regulation of telemarketing. The F.T.C. is authorized under 15 U.S.C. § 6102 to regulate telemarketing and the relevant rule provides:

> (a) It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:
> (1) Before a customer consents to pay for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:
> (i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[11]

The F.T.C. rule also requires oral disclosures when the company sells goods or services. The rule states that it is an abusive practice to fail to disclose the identity of the seller "truthfully and promptly," the purpose of the call, and the nature of the goods and services.[12] These are express requirements of telemarketers that have been in place since 2010, while the business of telemarketing continues to be strong.

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[7] Single Family Mortgage Insurance, 24 C.F.R. § 203.255(c)(7) (2012).
[8] § 258(a).
[9] Federal Communications Commission, DA 16-1458, Order (Dec. 29, 2016) at 4.
[10] *Id*.
[11] Regulations Under Specific Acts of Congress, 16 C.F.R. § 310.3(a)(1)(i) (2016).
[12] Regulations Under Specific Acts of Congress, 16 C.F.R. § 310.4(d) (2016).

The Commission possesses similar authority under § 258(a) as the F.T.C. retains under § 6102. However, while § 6102 grants the F.T.C. with explicit authority to ban misrepresentations in telemarketing sales calls, § 258(a) is less explicit.[13] Yet, § 258(a) designates carrier changes as illegal by default, and only through Commission procedures may a carrier lawfully execute a change. The Commission has been executing this authority for over a decade. Therefore, the Commission should change one of those prescribed rules to implement a ban on misrepresentations in sales calls.

B. The Commission Should Freeze a Consumer's Preferred Carrier as a Default.

The Commission should freeze a consumer's preferred choice of carrier by default because this step would give the consumer more autonomy over her phone services. The rule will not impair the ability of carriers to advertise their services, and the Commission's action will better ensure market forces cause a change in carrier, like consumer dissatisfaction. Further, the Commission should consider limiting a carrier's ability to offer promotions to the consumer when the consumer initiates a switch by phone.

1. A Default Freeze of a Consumer's Choice of Carrier Gives the Consumer More Control Over Her Phone Services and Improves Competition.

A default freeze of a consumer's choice of carrier will help natural market forces apply to consumer and carrier interactions. When consumers initiate a carrier change it is because they are dissatisfied with their services or they have received a better offer. When carriers initiate the change there remains the likelihood that a consumer is being slammed. As the Commission has noted, under current rules most carriers are required to offer a freeze to consumers, while consumers may opt-in to the offered carrier freeze.

In order to give consumers more autonomy, the automatic freeze rule should apply to all carriers including local exchange carriers. This will chill some carrier changes, but the vast majority of these changes may be the result of slamming from carrier initiated efforts. Carriers often strategically target consumers based on a variety of factors. One such factor, as the Commission has stated in FCC 17-91, involves whether or not the consumer prefers to bundle services.[14] Many consumers bundle services, but many also distinguish between services like local and long distance calling (interLATA and intraLATA services).

Differentiation in services, or other factors, like age and language, make some consumers more vulnerable to slamming than others as carriers identify consumers based on these characteristics. Slamming is highly anti-competitive behavior because it is based on fraud and deception instead of market forces, like consumer satisfaction. In the ideal market, consumers are free to bundle or not bundle services, and carriers compete to provide them with services that meet their preferences. Slamming prohibits that natural process from occurring.

[13] 15 U.S.C.A. § 6102 (Westlaw 2017).
[14] Federal Communications Commission, FCC 17-91, In the Matter of Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges (Jul. 14, 2017) at 6.

However, nothing about freezing a consumer's carrier alters the ability of carriers to advertise in numerous and traditional forms. Instead, a rule freezing a consumer's choice of carrier will better direct carriers to classical advertising to convince consumers to change services. Therefore, a carrier freeze would create a substantial likelihood that the consumer has spurred a carrier switch, rather than the carrier, which will improve competition among carriers as consumers change services because of carrier advertising, consumer dissatisfaction and other market forces.

2. The Commission Should Limit the Number of Questions a Carrier May Ask a Consumer During a Call to Switch Carriers.

The Commission can further protect consumers and improve competition by regulating the number of attempts a carrier can make to keep a consumer during a call to change carriers. A rule that freezes a consumer's choice of carrier by default will make it more difficult for carriers to execute a change in a consumer's choice of carrier, and carriers may respond with attempts to capture consumers. Thus, the Commission may find it necessary to provide guidelines for carriers to address any possibility of consumer harassment. For example, in 2014, a consumer posted an eight-minute segment of his call with a Comcast customer service representative who continued to ask the consumer questions during a call to end service.[15]

The Commission should seek to avoid such a circumstance as a result of the default freeze rule, and it can do so without violating the First Amendment. The test regarding regulations of commercial speech is found in *Central Hudson*. *Central Hudson* requires that a regulation of a lawful product advance a substantial government interest, and is no more extensive than necessary.[16] In *Lorillard Tobacco*, the Court held that the government's regulations banning point of sale advertisements and restrictions on tobacco advertisements within 1,000 feet of schools violated the fourth step of *Central Hudson*.[17] In addition, in *Hensel*, the court upheld a city ordinance that restricted the size and number of signs that could be posted in a residential area because the restrictions were content-neutral.[18] The court found that the new sign ordinance passed intermediate scrutiny because size and volume restrictions were content-neutral, it was proper to distinguish between commercial and non-commercial zones, and there were ample alternative means of communication.[19]

The Commission has a substantial interest in improving competition among carriers, and preventing consumer harassment.[20] Also, regulations reducing the number of questions a carrier may ask are not more extensive than necessary. Adopting this proposal would still allow carriers to attempt to retain the consumer, and would not inhibit their ability to advertise. Further, reducing the number of questions asked is similar to reducing the amount of space an advertiser

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[15] Laura Stampler, *Recording of Man's Attempt to Cancel Comcast Will Drive You Insane*, Time (Jul. 15, 2014), http://time.com/2985964/comcast-cancel-ryan-block/.
[16] *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).
[17] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001).
[18] *Hensel v. City of Little Falls, Minn.*, 992 F.Supp.2d 916, 924 (Minn. Dist. Crt. 2014).
[19] *Id.* at 925.
[20] Harassment defined here as: repetitive questioning that upsets the consumer. Repetitive meaning five questions to persuade a consumer to maintain service after a consumer indicates his or her desire to switch carriers.

has on a sign, like in *Hensel*. There is a foundation in the Commission's regulations as well because third parties are barred from marketing carrier services in the T.P.V. process.[21] Therefore, the Commission should also adopt a rule that limits the number of questions a carrier can ask a consumer in a call to cancel service.

C. The Commission Should Require a Hybrid Double-Check System and Eliminate T.P.V.

In addition to a default freeze, the Commission should have a supplemental requirement for an independent carrier to double-check a carrier switch with the consumer, and eliminate the T.P.V. and electronic authorization procedures under § 64.1120(c).[22] Under this hybrid approach, the Commission should allow the consumer to nullify a carrier switch through written means, oral verification, or in-person at a carrier branch store. This suggestion is a hybrid approach because it combines the Commission's proposals to freeze a consumer's choice of carrier and double-check with the consumer, while including independent third parties to verify a carrier switch in accordance with existing regulations. A hybrid system would not unduly burden carriers, would address anti-competitive effects, would provide additional protection consumers, and would not violate the First Amendment.

1. A Hybrid Approach that Allows the Consumer to Nullify a Carrier Switch Will Not Apply a Substantial Burden on Carriers.

There will be an insubstantial impact on carriers to adopt this hybrid approach because current rules already require some form of affirmative verification from the consumer, and affirmative process from the carrier. Current rules state:

> (c) No telecommunications carrier shall submit a preferred carrier change order unless and until the order has been confirmed in accordance with one of the following procedures:
> (1) The telecommunications carrier has obtained the subscriber's written or electronically signed authorization in a form that meets the requirements of § 64.1130; *or* (2) The telecommunications carrier has obtained the subscriber's electronic authorization to submit the preferred carrier change order (emphasis added).[23]

A third option under current rules is to proceed through T.P.V. However, under these procedures, the carrier is still able to initiate the change, which creates leverage for abuse. A preferred carrier freeze coupled with a double-check mechanism that enables the consumer to nullify a change should address the majority of situations in which the consumer did not initiate the carrier switch. Consumers should have fourteen days to nullify a carrier switch because companies like Verizon Wireless give their customers fourteen days to cancel a line of service before applying a cancellation fee. [24] Thus, any burden on carriers should be minimal.

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[21] Common Carrier Services, 47 C.F.R. § 64.1120(c)(3)(iii) (2008).
[22] § 64.1120(c)(ii)(iii).
[23] § 64.1120(c)(3)(i)-(iv).
[24] *Customer Agreement*, Verizon Wireless, https://www.verizonwireless.com/legal/notices/customer-agreement/ (last visited Nov. 15, 2017).

2. The Hybrid Approach Accounts for the Commission's Concerns with Anti-Competitive Effects.

Adopting both a preferred carrier freeze and a hybrid double-check system takes into account the Commission's concerns with anti-competitive effects for six reasons. First, the carrier freeze significantly improves the likelihood that a carrier switch was initiated by a dissatisfied consumer, and an independent third party initiated double-check would help catch those consumers who did not cause the change. Second, slamming is known to impair competition because, "it not only eliminates the consumer's freedom of choice and saddles the consumer with higher charges, but it also harms the carrier whose customer is slammed, by stealing the carrier's business."[25] Third, double-checking to nullify a carrier switch rather than certify the carrier switch eliminates an anti-competitive hurdle that may keep a consumer locked into a service or frustrated with a requirement to overcome an additional step.

Fourth, independent third parties limited to double-checking with the consumer will add to consumer confidence in the carrier change as third parties would eliminate the appearance of bias. Continuing to use independent third parties to double-check with consumers would also be consistent with the consumer protection rationales of the T.P.V. system. Fifth, eliminating the T.P.V. system and electronic authorization will decrease the opportunity for misrepresentations in sales calls because carriers will be limited in the amount of voice contact carriers they have with consumers wishing to change. Combining an automatic carrier freeze and an independent double-check will fill any gaps in protection. Sixth, a required double-check procedure instead of a freeze to authenticate a carrier switch would not provide the same level of protection because carriers would still have considerable leverage to cause a switch, which would perpetuate issues with misrepresentations, and carriers may still ignore the procedure.

3. A Hybrid Approach Provides Adequate Accountability to Vulnerable Consumers, Including Consumers with Low-Income Levels and Non-English Speakers.

The Commission should also provide consideration for how these rules may impact low-income consumers who do not have permanent addresses, consistent phone numbers, or access to the internet. To remedy potential issues for low-income consumers, or for those who do not respond to switch requests within the fourteen days, the independent carrier should provide the consumer with one reminder over the phone, and the Commission should provide general public notices about these rules in newspapers and magazines. Both reminders should give the consumer the option to visit a local branch of the current carrier, or speak with a live representative of the current carrier to increase the chances of reaching the consumer.

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[25] Lincoln J. Lounsbury, *The Failure of Federal Slamming Policy and the Need for Stronger State Action: A Proposal For a Model State Anti-Slamming Act*. 95 **Nw. U. L. Rev.** 327, 328 (2000) (citation limited to the cited quote).

Any concern with eliminating the T.P.V. would be addressed by limiting a carrier's attempts to keep a consumer in the call to switch carriers as discussed above. The Commission may protect non-English speakers by requiring carriers to double-check in other languages. This requirement would also be insubstantial as current regulations require the T.P.V. process be "conducted in the same language that was used in the underlying transaction."[26]

4. The Hybrid Approach Addresses the Commission's First Amendment Concerns.

As the Commission has found, a regulation requiring independent carriers to double-check with consumers raises free speech concerns. However, the Commission can adopt a valid rule compelling carrier speech to double-check with consumers because of the Commission's authority to regulate common carriers, and the compelled speech is non-ideological speech. The ability to compel speech in this instance is also found in the Commission's broad authority to regulate phone carriers as common carriers in a heavily regulated industry.[27]

Courts have upheld regulations compelling commercial speech because of the regulations relevance to a "valid, comprehensive regulatory scheme and non-ideological content."[28] The court upheld a requirement for mushroom producers to contribute funds to mushroom advertising in *United Foods.*[29] In *CTIA*, the court upheld a city ordinance that compelled phone retailers to inform consumers that "carrying their cell phone could cause them to exceed Commission guidelines for exposure to radio frequency radiation," because it furthered the substantial government interest of promoting health and wellness.[30]

A rule that requires independent carriers to double-check with a consumer is valid because it is a substitution for the Commission's current and highly sophisticated verification process. Additionally, if there are any costs associated with double-checking, carriers already expend resources under existing regulations, and any new costs would be similar to funding advertising for competitors in *United Foods*. Finally, a reasonable requirement to double-check with a consumer in order to protect consumers and the market from slamming is a substantial government interest of similar importance to the interest in *CTIA.* Therefore, the Commission should adopt a hybrid double-check procedure along with a carrier freeze.

D. The Commission Should Ban Third Parties From Billing For Services Without a Consumer's Authorization.

The Commission should prohibit the third parties that contract with carriers from billing consumers by default. This rule would likely have profoundly positive effects on diminishing cramming. In February of 2017, the F.T.C. returned over $88 million to consumers who AT&T had charged $9.99 per month for "premium text message services" that consumers had never

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[26] § 64.1120(c)(3)(iv).
[27] Common Carrier Services, 47 C.F.R. § 63.01 (2017).
[28] *United Foods, Inc. v. U.S.*, 197 F.3d 221, 224 (6th Cir. 1999), *see also Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 473 (1997).
[29] *Id.* at 222.
[30] *CTIA-The Wireless Ass'n, v. City of Berkeley, Cal.*, 854 F.3d 1105, 1110, 1118 (9th Cir. 2017).

agreed to purchase.[31] The enforcement action against AT&T resulted in the reimbursement of over 300,000 consumers.[32]

Despite this settlement, it was a repetition of history. Two years prior, the F.T.C. and the Commission brought another successful enforcement action against AT&T, but this time for $105 million; the largest action at the time against a major telecommunications carrier. AT&T had been charging customers $9.99 for services that they never ordered, like horoscope text messages, flirting tips and celebrity gossip.[33]

In 2015, the Consumer Financial Protection Bureau ("C.F.P.B.") obtained $120 million in an enforcement action against Sprint and Verizon Wireless.[34] Despite that large sum, it was only a piece of the hundreds of millions of dollars that third parties had billed to consumers to the joint benefit of Sprint and Verizon. In its complaint, the C.F.P.B. cited a Commission estimate that between fifteen and twenty million landline customers are crammed each year, and that 300 million third party charges appear on landline bills each year.[35]

Thus, the Commission should write a rule preventing unauthorized charges similar to the F.T.C.'s requirements for telemarketers. The F.T.C.'s rules regarding telemarketing services expressly require telemarketers to state the charges for the promotions and other related services. The rule provides:

> It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call… to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:
> (4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures

[31] *FTC Refunds $88 Million to Consumers*, Federal Trade Commission, https://www.ftc.gov/enforcement/cases-proceedings/refunds/att-refunds (last visited Nov. 15, 2017).
[32] *Id*.
[33] Cristina Miranda, *AT&T's $105 Million "Cramming" Settlement Leads to Refund*, Federal Trade Commission: Consumer Information (Oct. 8, 2014), https://www.consumer.ftc.gov/blog/2014/10/atts-105-million-cramming-settlement-leads-refunds.
[34] *CFPB Takes Action to Obtain $120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming*, Consumer Financial Protection Bureau (May 12, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/.
[35] Complaint at 3, Consumer Financial Protection Bureau v. Cellco P'ship, 15-cv-03268-PGS-LHG (N.J. Dist. Crt. May 12, 2015), http://files.consumerfinance.gov/f/201505_cfpb-cfpb-v-verizon-complaint.pdf.

> listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.[36]

A similar rule will give the Commission a bright line rule to aid enforcement. A similar rule will also provide carriers with the clarity necessary to function within the law while not being unduly burdensome. Ultimately, such a rule would aid consumers because consumers expect to be billed for services they signed up for and for those services they use but have not signed up for. For example, I expect to pay an additional fee for data I use that exceeds my monthly data limit. Additionally, if I did not pay for long distance service as part of my plan, but then made a long distance call, then I would expect to be billed for that call. Consumers do not expect their carrier to charge them for having followed a link or enrolled in a service to receive dating advice through text when no mention is made that charges would result.

The Commission is rightly concerned about placing unnecessary regulatory burdens on carriers, since such burdens can create waste and weaken policy objectives. Carriers, like AT&T, have criticized the Commission for enforcement actions that carriers have called "half-baked and incomplete."[37] The Commission can account for such criticism without placing unnecessary burdens on carriers by reforming federal rules to expressly banning third parties from billing by default. It is not too burdensome for carriers to cease deceptive practices that lead to 300 million third party charges on consumer bills or enforcement actions for hundreds of millions of dollars. Moreover, such a rule will improve competition because it will enable many more carriers to equitably compete with those who currently amass hundreds of millions of dollars in miscellaneous charges.

E. The Commission Should Require Carriers and Their Agents to Record the Entirety of the Sales Call.

The Commission should also require full recordings of sales calls because that would further eliminate the possibility of carrier misrepresentations. This rule would create an additional burden on both carriers, the Commission and State Public Utilities responsible for oversight. But the Commission can look to the F.T.C. and the regulation of telemarketers for assurance that the Commission and the phone carrier industry can overcome any new burden.

The Commission should adopt language similar to the F.T.C.'s requirement of telemarketers to, "make and maintain an audio recording of the entire telemarketing transaction."[38] Courts have upheld similar requirements. A recent court decision in *Soundboard Association* found that an F.T.C. notice subjecting the plaintiff to traditional prohibitions on robocalls did not violate the First Amendment.[39] The court found that the prohibition survived intermediate scrutiny because the government's substantial interest in protecting "unwarranted intrusions into a person's home and pocket," outweighed the telemarketer's free speech interest

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[36] § 310.4(d)(4).
[37] Joan Marsh, *FCC Reform: Let's Start with the Enforcement Bureau*, AT&T: Public Policy (Feb. 8, 2017), https://www.attpublicpolicy.com/regulatory-legislative-reform/fcc-reform-lets-startwith-the-enforcement-bureau/.
[38] § 310.4(a)(7)(i)(C).
[39] *Soundboard Ass'n v. U.S. Federal Trade Comm'n*, 251 F.Supp.3d 55, 73 (D.C. Cir. 2017).

as the telemarketer was still afforded many alternative forms of communication.[40] The Commission's regulations of phone carriers also provide numerous alternative forms of communication, and the interest in eliminating slamming and cramming should outweigh the carrier's interest in limiting call records.

Moreover, this F.T.C. requirement has not substantially burdened the telemarketing industry. For example, a 2015 Harvard Business Review article discussed how the top five telemarketers received 44% of the profits from raising $201 million for charitable causes from a single fundraiser, and it discussed the benefits of donating through telemarketing campaigns.[41] Further, the Bureau of Labor Statistics reports that the telemarketing industry employees over 215,000 people who make a mean hourly wage of $13.06, which is almost double the federal minimum wage.[42] Thus, despite the regulation, the industry is still strong.

In addition, the F.T.C. has continued to apply meaningful oversight of telemarketers. Last year, the F.T.C. discussed in a Congressional Testimony its successful action against Caribbean Cruise Line, seven other assisting companies, and four other organizations for illegal robocalls.[43] The Commission has also led many successful enforcement actions against companies for slamming and cramming such as Birch Communications. Therefore, new rules requiring carriers to record the entire sales call, along with the Commission's continued enforcement, should decline instances of slamming and cramming.

IV. CONCLUSION

In conclusion, the Commission should ban misrepresentations in sales calls explicitly, and prevent third parties from billing consumers for unauthorized services by default. These two proposals would significantly reduce instances of slamming and cramming. In addition, freezing a consumer's carrier by default, adopting a hybrid double-check procedure, and recording the entire sales call will not overburden carriers, but will rather decrease opportunities for carriers to change and charge a consumer's phone services without her authorization.

Respectfully submitted,

Adison Richards

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[40] *Id.* at 74.
[41] Dan Pallotta, *The Economics of Charity Telemarketing*, Harvard Business Review (Apr. 15, 2015), https://hbr.org/2015/04/the-economics-of-charity-telemarketing.
[42] Bureau of Labor Statistics: Telemarketers, https://www.bls.gov/oes/current/oes419041.htm (last visited Nov. 15, 2017).
[43] Federal Trade Commission Testimony before the Committee on Commerce, Science, and Transportation, United States Senate. (Sept. 27, 2016), https://www.ftc.gov/system/files/documents/public_statements/986433/commission_testimony_oversight_senate_09272016.pdf.