

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Consumer Information and Disclosure)	CG Docket No. 09-158
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170
)	
IP-Enabled Services)	WC Docket No. 04-36

**INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
IN RESPONSE TO NOTICE OF INQUIRY**

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The National Association of State Utility Consumer Advocates (“NASUCA”)¹ hereby submits these comments on behalf of itself and its individual members in response to the Commission’s August 28, 2009 Notice of Inquiry (“*NOI*”) in these proceedings, which seek comment “on whether there are opportunities to protect and empower American consumers by ensuring sufficient access to relevant information about communications services.”² NASUCA’s comments address many (but by no means all) of the wide-ranging questions raised by the Commission in the *NOI*. NASUCA reserves the right to address issues raised in response to such questions in its reply or subsequent comments.

¹ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

² *Consumer Information and Disclosure, Truth-in-Billing and Billing Format, and IP-Enabled Services*, Notice of Inquiry, CG Docket No. 09-158, CC Docket No. 98-170 and WC Docket No. 04-36, 24 F.C.C.R. 11380 ¶1 (Aug. 28, 2009).

I. INTRODUCTION

Issues related to the quantity and quality of information that consumers of communications services receive, or should receive, from providers of those services have long been at the forefront of NASUCA's and its members' efforts at both the federal and state level. Indeed, NASUCA was at the center of the Commission's truth-in-billing proceeding regarding carrier line item charges, having petitioned the Commission for a declaratory ruling to address what NASUCA believed were wireless and wireline carrier practices that violated the intent and letter of various Commission rules.³ The Commission ultimately denied that petition but, based on matters raised in NASUCA's petition – and commenters' responses thereto – eliminated one of the exemptions from its truth-in-billing rules that previously applied to wireless carriers and issued a proposed rulemaking to address billing format, billed charges descriptions, point-of-sale disclosures and other matters that clearly continued to vex consumers.⁴

Unfortunately, as discussed below, the Commission also acted to preempt state authority over wireless line item descriptions, which was subsequently overturned by the United States Court of Appeals for the Eleventh Circuit.⁵ Aside from that aborted effort, the Commission has taken no further action on its 2005 Second Further Notice of Proposed Rulemaking (“FNPRM”) in its truth-in-billing docket.

Broadly speaking, in these and other proceedings, NASUCA has consistently urged the Commission to require communications providers to give consumers timely, detailed, accurate

³ *Truth-in-Billing and Billing Format*, NASUCA Petition for Declaratory Ruling, CG Docket No. 04-208 (Filed March 30, 2004).

⁴ *Truth-in-Billing and Billing Format*, Second Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CG Docket No. 04-208 and CC Docket No. 98-170, 20 F.C.C.R. 6448 (March 31, 2005) (“*Second Truth-in-Billing Order*”).

⁵ *Nat'l Ass'n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006), *cert denied sub nom. Sprint Nextel v. Nat'l Ass'n of State Utility Consumer Advocates*, 128 S.Ct. 1119 (2008).

and – most importantly – non-misleading information regarding the rates consumers pay for service, other fees and charges imposed in connection with that service, the terms and conditions that govern their service, the availability and quality of service they can expect to receive from their service provider, and any penalties or other adverse action they may experience if they terminate or modify the communications service they receive. Quite frankly, NASUCA’s arguments and recommendations largely fell upon deaf ears during the administrations of the past two Commission Chairs. So it is with guarded optimism that NASUCA hopes the Commission may, at last, be warming to the notion that consumers of communications services need government intervention in order to be protected from the communications industry, rather than the communications industry needing regulatory forbearance to protect it from consumers or their advocates.

Accordingly, NASUCA appreciates the Commission’s renewed interest in these matters, evidenced by the *NOI*, and looks forward to providing the Commission with input as the Commission at last begins to tackle these issues that have lain dormant far too long.

A. THE NEED FOR COMMISSION ACTION REMAINS GREAT.

1. Complaints Regarding Providers' Billing, Billing Practices And Disclosure Of Terms And Conditions Of Service Remain High.

Complaints regarding communications providers’ billing, billing practices and disclosures regarding their terms and conditions of service have remained high over time.

Certainly this is the case in recent years, as the *NOI* itself notes:

Recent consumer complaint data suggests that consumers continue to experience confusion and uncertainty surrounding the communications services to which they subscribe. For example, a recent survey by the Government Accountability Office (GAO) found that one-third of wireless phone customers who pay their own bills found unexpected charges or had problems understanding their bills. Further, one in five customers who contacted customer service were dissatisfied with their carrier’s efforts to resolve the problem. Notably, billing-related inquiries and

complaints are consistently among the top categories of consumer complaints filed with the FCC and state utility commissions. Consumer complaints at the FCC relating to billing and rates for wireline services increased from 8,965 in 2006 to 13,486 in 2008, an increase of 50 percent, while the number of wireline telephone subscribers decreased 10 percent between June 2006 and June 2008. Consumer complaints at the FCC relating to billing and rates for wireless services increased from 8,822 in 2006 to 10,930 in 2008, an increase of approximately 24 percent, while the number of wireless subscribers during the same period increased by 16 percent.⁶

These trends are also evident over a much longer period and demonstrate an industry in much need of greater scrutiny and government intervention.

According to the Commission's quarterly reports summarizing consumer complaints and inquiries received by its Consumer and Government Affairs Bureau ("CGB"), complaints regarding carriers' billing and rates, early termination fees, marketing and advertising practices (including alleged misrepresentations) have consistently been in the top five categories of telecommunications complaints (both wireline and wireless) since the first quarter of 2002 ("1Q2002") – the earliest quarter available on the Commission's website.⁷ Moreover, given that the *First Truth-in-Billing NPRM* was issued in 1998 to address the large and growing number of complaints associated with wireline service,⁸ it can only be concluded that the high number of billing and disclosure-related complaints received by the Commission goes back a decade and more. Likewise, the difficulties consumers experience in resolving disputes over their bills, cited

⁶ *NOI* ¶15.

⁷ The FCC's quarterly reports on informal complaints and inquiries, going back to 2002, are published on the agency's website at <http://www.fcc.gov/cgb/quarter/welcome.html>. The FCC's reports provide only aggregate totals and do not identify carrier-specific information, nor do the FCC's reports provide any information regarding the resolution of informal complaints submitted to it.

⁸ *See, e.g., Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CC Docket No. 98-170, 13 F.C.C.R. 18176, 18176-77 ¶2 (Sept. 17, 1998) ("*First Truth-in-Billing NPRM*") ("We have seen a tremendous growth in consumer complaints directly or indirectly arising out of the failure of telephone bills to provide end-user customers with necessary information in a clear and conspicuous manner, so as to allow the consumer to understand readily the precise nature of charges appearing on these bills.").

by the Commission in the *NOI*,⁹ was also noted by the Commission in the 1998 *First Truth-in-Billing NPRM*.¹⁰

Complaints regarding cable and satellite providers' billing and rates similarly comprise a substantial portion of the informal complaints received by the Commission for these communications services. For example, from 2002 through the 1Q2009, informal complaints related to cable and satellite providers' billing and rates, as a percentage of total cable satellite complaints received by the Commission, ranged from a low of 16.3 percent in 2006 to a high of 38.9 percent in 2004, and averaged over 25 percent annually for the entire period. These figures probably understate the number of consumer complaints about such providers' rates, billing statements, disclosure of terms and conditions of service and general responsiveness to consumers' questions or disputes, since it does not include "service related" informal complaints, which is broad enough to include such matters. Service related complaints for cable and satellite providers added 13 percent to nearly 42 percent annually to the total number of complaints involving these services received by the Commission since 2002.

Likewise, informal complaints involving cable and satellite service providers' marketing and advertising – a category that was only added to the top five categories of complaints received by the Commission in its 2Q2008 report – comprise an equally significant percentage of total cable and satellite complaints received by the Commission. From 2Q2008 through 1Q2009, such complaints accounted for 1,106 out of the total of 8,409 informal complaints, or just over 13 percent of complaints received during this period.

⁹ *NOI* ¶50 n. 77.

¹⁰ 13 F.C.C.R. at 18177 ¶3 ("Complaints filed with the Commission also demonstrate that consumers are frustrated frequently in their efforts to resolve problems with charges on their bills because the bills themselves do not provide the necessary information for identifying and contacting the responsible company.").

The number of informal complaints relating to billing, rates, marketing and advertising, point-of-sale disclosures and dispute resolution received by the Commission quarterly are likely understated when one considers deficiencies in the Commission's complaint intake procedures. Those concerns were raised in an April 6, 2006 meeting between NASUCA representatives and staff of the Commission's Enforcement Bureau ("EB") and the CGB, as well as in a February 2008 GAO report.

In its April 6, 2006, meeting with EB and CGB staff, NASUCA expressed concerns regarding the Commission's intake procedures for informal complaints and inquiries, the subsequent processing of such complaints or inquiries, and the public reporting of informal complaints and inquiries by the Commission. Specifically, NASUCA expressed its concerns about such things as: (1) how Commission staff determined what contacts it received from consumers were "complaints" and which merely constituted "inquiries," and what, if any, guidelines or policies governed such determinations; (2) what action staff took with respect to informal complaints and whether or how the resolution of such complaints was recorded; (3) how Commission staff determined whether to take further enforcement action against providers that were the subject of informal complaints; (4) measures the Commission took to coordinate its complaint processing with appropriate state agencies; and (5) the lack of granularity in the Commission's quarterly reporting of informal complaints and inquiries. These issues had previously been raised with the Commission in NASUCA comments submitted in response to the *Second Truth-in-Billing FNPRM*.¹¹

Although Commission staff was cordial and forthcoming in responding to NASUCA's concerns, a number of those concerns were never resolved. For example, NASUCA was advised

¹¹ See, e.g., *Second Truth-in-Billing FNPRM*, NASUCA *ex parte* presentation, pp. 4-5 (Feb. 13, 2006); see also NASUCA Letter to Mary Beth Richards, Deputy Bureau Chief/Chief of Staff, Consumer & Government Affairs Bureau (April 5, 2006) (Copy attached).

that there were no clear guidelines for Commission staff in determining whether a consumer contact should be considered a “complaint” or an “inquiry.” More significantly, NASUCA was advised that any contact that included a question about a provider’s service would be characterized as an “inquiry,” even though the consumer was clearly complaining about some aspect(s) of the provider’s service.

The GAO’s February 2008 report noted similar concerns in its review of the Commission’s informal complaint process and enforcement activities from 2003 through 2006.¹²

Based on its investigation, the GAO’s report concluded that:

- While the Commission assesses the impact of its enforcement program by periodically reviewing certain program outputs, it lacked the management tools needed to fully measure its outputs and manage its program.
- The EB had not set specific enforcement goals, developed a well-defined enforcement strategy, or established performance measures linked to its enforcement goals. While the Commission measured some outputs, such as the extent to which it takes enforcement action within its limitations period for assessing fines, or the time it takes to close investigations, it did not measure outcomes such as the effects of its enforcement actions on levels of compliance in certain areas.
- Limitations in the Commission’s approach for collecting and analyzing enforcement data constituted the agency’s principal challenge in providing complete and accurate information on its enforcement program and made it difficult to conduct trend analysis, determine program effectiveness, allocate agency resources, or accurately track and monitor key aspects of all complaints received, investigations conducted, and enforcement actions taken. For example, the Enforcement Bureau used five separate databases and manually searches tens of thousands of paper case files to track and

¹² See GAO Report, “FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions Are Needed,” GAO-08-125 (Feb. 15, 2008). With respect to informal complaints handled by the FCC during this period, the GAO’s report noted that of the approximately 454,000 informal complaints received from 2003-2006, the CGB processed about 95% by sending a letter of acknowledgment to the complainant and, where appropriate, referred them for resolution to the company that was the subject of the complaint. *Id.* at 3 (footnote omitted)

As for investigations undertaken by the EB, the GAO observed that this bureau conducted about 46,000 investigations from 2003-2006, in response to complaints it received directly, complaints referred to it by the CGB, violations detected through audits and inspections, and self-initiated inquiries. Of the 39,000 investigations closed by the EB, roughly 9% (3,400) were closed with an enforcement action, and approximately 83% (32,200) were closed with no enforcement. Roughly 7,200 investigations remained open at the end of 2006 and of these, roughly 19% (1,400) had been open from 1-4 years. *Id.* at 3-4

monitor the extent to which each of its divisions takes enforcement action within its limitations period for assessing fines or the time it takes to close an enforcement case.

There is nothing to indicating whether the Commission has addressed either the concerns NASUCA raised in its April 2006 meeting with EB/CGB staff. Nor is there any indication that the Commission has addressed the concerns noted in the February 2008 GAO report. Indeed, the presentations given by the “FCC Restructuring” panel at the National Association of Regulatory Utility Commissioners (“NARUC”) February 2009 meeting suggested that these problems with the Commission's processes for receiving and resolving consumers’ complaints persist.

Finally, the number of informal complaints received by the Commission understates the level of consumer dissatisfaction with providers’ billing- and disclosure-related practices when one takes into account the fact that most consumers do not consider contacting the Commission (or even state commissions or attorneys general) with their complaints. Generally speaking, it is recognized that consumers are reluctant to complain about products or services they purchase.¹³ Moreover, surveys suggest that, even when telecommunications consumers are inclined to complain, they often do not know who to contact. For example, a nationwide survey of wireless customers undertaken in 2006 found that nearly half (forty-eight percent) of all wireless customers surveyed did not know who to contact in case their carrier could not resolve a billing or service problem to their satisfaction.¹⁴ Only seven percent of the survey respondents indicated that they would contact the Commission with their complaints.¹⁵

¹³ See, e.g., Best, Arthur, *When Consumers Complain*, p. 118 (Columbia University Press, 1981).

¹⁴ Christopher Baker, “Cell Phone Service Bills, Long-Term Contracts, and Complaints,” AARP Public Policy Institute, p. 2 (June 2006), available at www.caltelassn.com/Reports06/Wireless/aarp.pdf.

¹⁵ *Id.* Of these, two percent of respondents indicated that they would contact the state’s consumer advocate, two percent indicated that they would contact the state utility commission, and one percent of respondents stated that they would contact the state attorney general’s office.

Indeed, it does not appear that the FCC's rules even require carriers or service providers to inform their customers of the existence of the FCC informal complaint process. Thus consumers are left on their own to discover this forum. The Commission should require all customer bills that include services under its jurisdiction to include contact information directing consumers to the Commission's contact information for initiating the informal complaint process.

2. When It Wasn't Ignoring The Problem, The Commission Seemed Intent On Making It Worse.

More than a decade ago, the Commission adopted its original truth-in-billing rules to address widespread consumer confusion and complaints regarding the billing practices of wireline telecommunications carriers.¹⁶ Because its record was less developed with regard to wireless carriers, the Commission generally elected not to subject such carriers to the full panoply of truth-in-billing standards (*i.e.*, rules) applied to wireline carriers but made it clear that it would seek to develop the record further with respect to this industry segment and that it would apply its rules to CMRS providers if the record warranted.¹⁷ For this purpose, among others, the Commission instituted a further rulemaking to address the wireless industry and other aspects of carriers' billing practices.

Unfortunately, the Commission apparently lost interest in billing-related matters after the *Truth-in-Billing First Order's* release. Although the Commission suggested in the 1999 order that further action would be forthcoming on several issues, including the development of standardized labels for various billed charges, nothing happened. The Commission was goaded

¹⁶ See *Truth-in-Billing*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 F.C.C.R. 7492, 7494-97 & 7501 ¶¶3-5, 15 (May 11, 1999) ("*First Truth-in-Billing Order*").

¹⁷ *Id.* at 7535-36 ¶¶68-70.

into action on truth-in-billing only after NASUCA filed a petition for declaratory ruling regarding carriers' "regulatory" line item charges in March 2004.

NASUCA's March 2004 petition discussed numerous examples of line item charges being assessed by both wireline and wireless carriers that purported to recover carriers' costs of complying with various state and federal regulatory mandates (hence, NASUCA's use of "regulatory" to describe such charges). NASUCA contended that these line item charges violated the Commission's *First Truth-in-Billing Order* and several other Commission orders addressing such things as E911 service, universal service and number portability.¹⁸ Among other things, NASUCA noted that many carrier line item charges were vaguely or ambiguously worded and described, ostensibly recovered regulatory costs imposed by different regulatory mandates – oftentimes of both federal and state origin – and did not appear to bear any direct relationship to the costs imposed by those regulatory mandates or programs. Moreover, carriers often described the charges as being required by government when the carriers were under no such obligation and simply opted to recover their costs of doing business through such line items rather than their rates for service.

Although the Commission acknowledged the abundant evidence in the record of consumers' confusion regarding carriers' line item charges and billing practices, and the significant number of comments filed by individual consumers objecting to such charges and practices, the Commission determined that the carriers' billing practices did not violate either its truth-in-billing rules or any other Commission orders.¹⁹ Somewhat paradoxically, however, the Commission determined that the complaints and confusion evident in the record warranted

¹⁸ *Truth-in-Billing and Billing Format*, CG Docket No. 04-208, NASUCA Petition, pp. 28-36 (March 30, 2004); *Truth-in-Billing and Billing Format*, CG Docket No. 04-208, NASUCA Reply Comments, pp. 4-24 (Aug. 13, 2004).

¹⁹ *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6458-59 ¶23.

eliminating the wireless industry's exemption from the Commission's truth-in-billing rule requiring that billing descriptions be brief, clear, non-misleading and in plain language.²⁰ In addition, the Commission initiated a rulemaking to consider strengthening its current truth-in-billing rules regarding billing format and descriptions, as well as point-of-sale disclosures.

Even more paradoxically, having acknowledged the problems associated with carriers' bills, billing practices, and point-of-sale disclosures to consumers, the Commission first concluded that state laws regulating wireless carriers' line item charges were preempted under 47 U.S.C. Sec. 332(c)(3)(A), and tentatively concluded that **all** state laws governing both wireline and wireless carriers' billing practices could be preempted on other grounds. Although the comment period on the Commission *Second Truth-in-Billing FNPRM* closed over four years ago, no further action has been taken by the Commission. The Commission's ruling on NASUCA's petition, coupled with its inertia with respect to adopting more detailed or stringent rules governing carriers' billing and service disclosures left the impression that the Commission was not seriously interested in pursuing such matters to conclusion.

That sense was reinforced by the overall lack of Commission enforcement under its truth-in-billing regulatory regime. Notwithstanding the tens of thousands of informal complaints regarding providers' practices related to billing and service disclosures that the Commission received during the six years after the *First Truth-in-Billing Order's* release, the Commission had not taken a single enforcement action under its truth-in-billing rules.²¹ Nor has the

²⁰ *Id.* at 6456 ¶16.

²¹ The Commission was taken to task for its lack of enforcement by Commissioner Copps took the Commission to task for its lack of enforcement, writing:

Commission's enforcement record improved much since it issued its *Second Truth-in-Billing Order*. To the best of NASUCA's knowledge, the Commission has taken a grand total of one formal enforcement action related to truth-in-billing – against TalkAmerica associated with its “TSR Surcharge,” and that enforcement action was apparently prompted only by evidence provided to the Commission in connection with NASUCA’s March 2004 petition.²²

The sense that the Commission has not been serious about enforcing its truth-in-billing rules was reinforced by another significant piece of inaction by the Commission associated with the *Second Truth-in-Billing Order*. In connection with the proceeding on NASUCA’s petition for a declaratory ruling, NASUCA noted to the Commission that carriers were imposing line item surcharges to recover their costs of providing Telecommunications Relay Service (“TRS”) for speech and hearing-impaired Americans, in clear violation of a 1993 Commission order.²³ The Commission merely noted the “tension” between carriers’ imposition of line item charges to recover such costs and the Commission’s prior orders, and then expressed its intent “to revisit the prohibition on line items referring to interstate TRS in a future proceeding in a separate docket

The explosion of new services and the line items and fees accompanying them have made it more difficult than ever for consumers to compare rates and shop around. You need an accountant or a lawyer--preferably both--to root out what you're being charged for and why. . . . The majority says that with the states preempted, the Commission will not hesitate to enforce its truth-in-billing requirements. But to date all the Commission has done is hesitate. In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today--the only ones I find involve slamming. Yet in the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.

Second Truth-in-Billing Order, Separate Statement of Commissioner Michael J. Copps, 20 F.C.C.R. at 6499.

²² See *Truth-in-Billing and Billing Format*, NASUCA Petition, at 16; NASUCA Reply Comments, p. 3 n. 15.

²³ *Truth-in-Billing and Billing Format*, CG Docket No. 04-208, NASUCA *ex parte*, p. 2 n. 2 (Jan. 13, 2005), citing *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, CC Docket No. 90-571, 8 F.C.C.R. 1802, 1806 ¶22 (Feb. 25, 1993).

that will take into consideration the policy objectives outlined in this proceeding.”²⁴ More than four years later, the Commission has yet to open such a docket or otherwise take action on carriers’ use of line item surcharges to recover interstate TRS costs.

The one issue during this time upon which the Commission seemed to show some zeal, ironically, did not involve responding to consumers’ many complaints but rather focused on eliminating states’ ability to do anything to provide the relief denied consumers at the federal level. Rather than working to strengthen the Commission’s partnership with states on consumer protection matters, the Commission embarked on a four-year program to preempt state laws that offered relief or respite from communications providers’ unreasonable, misleading or deceptive practices regarding billing, marketing, advertising, etc.

It may seem to the Commission that the foregoing discussion is simply “sour grapes” on NASUCA's part, or that it is “beating a dead horse” to recount the Commission's historic failings on truth-in-billing and related matters. This is not NASUCA’s intent. Rather, NASUCA believes this discussion is absolutely necessary to put the *NOI* in its proper context.

NASUCA is cautiously optimistic that the present Commission administration will, through the proceedings begun with this *NOI*, reverse course in connection with communications providers’ billed charges, billing statements, advertising and marketing practices, point-of-sale and other disclosures of their terms and conditions of service. But, as discussed below, NASUCA's optimism is tempered – based on its prior experience in these proceedings – by a glaring omission in the *NOI*, namely the Commission’s failure, by and large, to mention states’ role in shaping the Commission’s future consumer protection rules. Moreover, the Commission should utilize this proceeding to reject the tentative conclusion, in the *Second Truth-in-Billing*

²⁴ *Truth-in-Billing Second Order*, 20 F.C.C.R. at 6459 ¶23 n. 64; *id.* at 6463 ¶31 n. 86.

Order's FNPRM, that all state laws governing carriers' billing and related practices should be preempted.

3. Changes Within The Communications Industry Have Only Increased The Need For Commission Action.

As noted above, the Commission has never adequately addressed the need for meaningful rules that protect consumers with regard to billed charges, billing statements and descriptions, point-of-sale and post-sale disclosures of terms and conditions of service – and has never seriously enforced such rules that the Commission has adopted. This is problematic enough considering the tens of millions of Americans who subscribe to traditional wireline telephone and wireless service. But the lack of adequate rules and meaningful enforcement of such rules has become more problematic in recent years, as more consumers subscribe to non-traditional telephone and related communications services, such as cable telephony and Voice over Internet Protocol (“VoIP”) service. Likewise, as more consumers subscribe to bundled service offerings from providers of traditional and non-traditional communications services, the Commission's rules and enforcement policies need to address such bundled offerings as well.

The *NOI* clearly signals that the Commission understands these problems but – as with wireline and wireless telephone service – has done little to address them over the past several years. Just as the Commission has not acted on its *Truth-in-Billing Second Order* for wireline and wireless services since March 2005, it similarly has not acted on proposals issued in 2004 and 2005 to adopt consumer protection rules for VoIP or other IP-enabled services and broadband Internet access service.²⁵ Likewise, the Commission is forthright in acknowledging that its rules governing cable operators' billing practices are “limited,” and that no rules apply to

²⁵ *NOI* ¶¶12-13.

satellite television services and none have been proposed.²⁶ Similarly, the Commission notes the “relatively new development [of] the bundling of telephone service with video and Internet services into a single package with a single bill,” and the fact that the telephone service is subject to the Commission's truth-in-billing rules while video and Internet services are not.²⁷

Yet there clearly is a need for the Commission to begin addressing the practices of providers of such services with regard to billed charges and billing format, marketing and advertising of terms and conditions of service, and point-of-sale disclosures. While the Commission does not compile statistics regarding the number of end users subscribed to cable telephony, VoIP and other IP-enabled services, or broadband Internet access, publicly available market information indicates that millions of Americans now subscribe to these services, and that the trend is for subscription to such services to grow in the future.

Thus, not only is the Commission action augured by the *NOI* necessary to address the longstanding problems associated with wireline and wireless carriers’ marketing, advertising, billing and disclosure-related practices, but such action must be expanded to other sectors of the communications industry that have long operated largely free from any constraints on their business practices.

B. THE COMMISSION NEEDS TO MAKE BEST USE OF RESOURCES AVAILABLE TO CONSUMERS.

In addressing the issues raised in the *NOI*, and to ensure that – this time at least – the Commission's action produces meaningful improvements in consumers’ experience with communications providers, the Commission must make the best use of resources available to it, and to consumers around the country. The Commission, as noted above, does not have a terribly

²⁶ *Id.* at ¶14.

²⁷ *NOI* ¶39.

impressive record on developing rules regarding truth-in-billing and similar consumer protection rules, let alone enforcing those rules that it has adopted.

To the extent consumers have received protection or redress from carriers' misleading, deceptive or abusive billing practices or charges, that relief has come chiefly at the state level. State utility commissions or similar agencies, state attorneys general, and state courts have generally been far more accessible to the country's consumers of communications service, and far more responsive, than the Commission. States have also generally been more nimble than the Commission in responding to evolving industry practices that are unreasonable, misleading or deceptive. Consumers have benefited from a strong federal-state partnership in the past, as former Commissioner Adelstein noted over five years ago in dissenting from the majority's preemption finding in the *Second Truth-in-Billing Order*:

Unfortunately, from the consumer's perspective, the most tangible result of this Order will likely be less oversight of consumers' bills, not more. *By preempting States, our historic partners in consumer protection, this Order curtails States' ability to moderate line items on consumers' wireless phone bills.* The merits and timing of this preemption are questionable, and I cannot support this portion of the Order. *The result for consumers, who routinely turn to state public utility commissions for help with billing issues, is very likely less oversight and more confusion, which is hardly the result sought by consumer advocates.*²⁸

Disturbingly, the *NOI* appears to reflect a continuation of the Commission's tendency to exclude input from state regulators or law enforcement officials. For example, with respect to consumer education and outreach, the Commission seeks input regarding the following question:

Should the Commission consider hosting a workshop with academics, other federal agencies, consumer advocacy groups and industry members to better determine the current state of consumer awareness about the issues discussed in

²⁸ *Second Truth-in-Billing Order*, 20 F.C.C.R. at 6500 (emphasis added). As noted above, the Commission's preemption determination was ultimately overturned on appeal by the Eleventh Circuit. See p. 2 n. 5, *supra*. However, the tentative conclusion that all state laws governing carriers' billing practices contained in the *Second Truth-in-Billing FNPRM* has not been acted upon and, until rejected, remains the Commission's last word on the subject.

this Inquiry as well as finding ways to better inform consumers about issues critical to them throughout the purchasing process?²⁹

In a similar vein, the Commission asks “how [it] and industry [can] work together to educate consumers about the information available to them.”³⁰ Similarly, with respect to addressing consumer confusion over the plethora of regulatory line item charges, the Commission asks for “comment on . . . how we, and the industry, can better educate consumers about the nature and purpose of such charges.”³¹ And with respect to disability and access issues, the *NOI*'s emphasis again is on the Commission and industry – with no mention of states.³²

The emphasis on the Commission's work with industry in addressing the issues raised in the *NOI* – with little or no mention of states capabilities – is likewise reflected in some of the individual Commissioners' separate statements accompanying the *NOI*. For example, Commissioner Clyburn notes that “we not only need information directly from consumers and groups that represent their interests, but from industry as well,” and that “industry can provide the Commission with potential solutions to consumer confusion by sharing its own best practices.”³³ Similarly, Commissioner Baker notes that she “look[s] forward to working in a renewed spirit of cooperation with Congress, the Chairman, my fellow commissioners, Commission staff, consumers, and industry in the days and months ahead.”³⁴

²⁹ *NOI* ¶58. Granted, the Commission in the next sentence asks whether there are “things the FCC should be doing in terms of outreach with other federal agencies, as well as state, local, and tribal governmental entities to help identify ways to educate consumers and better address consumer confusion.” *Id.* However, this is, as far as NASUCA can tell, the only explicit reference to state, local and tribal governments in the *NOI*.

³⁰ *Id.* ¶45.

³¹ *Id.* ¶38.

³² *Id.* ¶¶53-54.

³³ *NOI*, Separate Statement of Commissioner Mignon L. Clyburn, 2009 FCC LEXIS at *86-87

³⁴ *NOI*, Separate Statement of Meredith A. Baker, 2009 FCC LEXIS at *91.

NASUCA does not take issue with any of these observations, and generally agrees that industry's input will be important and must be considered in moving forward on the issues identified in the *NOI*. But NASUCA cannot help noting that the state agencies and officials who are often on the frontlines when it comes to reining in abusive or unreasonable billing and related practices in communications industry, who often have information and expertise at least equally as critical and enlightening as industry's, seem largely absent from the Commission's inquiry or consideration. Perhaps NASUCA it goes without saying that states' input and involvement are so central to the Commission's proceeding forward that it does not need mention – but NASUCA's sensitivity and concern derives from hard experience in these matters.

Accordingly, the Commission should strive to make clear, in future statements and actions that flow from the *NOI*, that the historic federal-state partnership in consumer protection matters affecting communications services will remain a cornerstone of any future Commission action and policy. State regulatory commissions and similar agencies, state law enforcement officials, and local, state and national consumer advocate groups' input and involvement in crafting workable, yet meaningful, consumer protections are vital.

In addition, one other group whose assistance and input will be invaluable to the Commission in going forward with the issues raised in the *NOI*, but which is nowhere mentioned in it, is the Commission's Consumer Advisory Committee ("CAC"). The CAC includes representatives of consumer advocacy organizations, state commissions, industry and consumer stakeholders. Moreover, the CAC has assisted the Commission on other major consumer initiatives, most recently the transition to Digital Television. More significantly, the CAC is familiar with some of the issues related to the *NOI*, having deliberated regarding some of the truth-in-billing issues raised in NASUCA's March 2004 petition in that docket. NASUCA urges

the Commission to use the CAC to the fullest as it moves forward on the issues raised in the *NOI*, particularly with respect to consumer education and outreach, and recommends that many of these issues should be taken up by the CAC for further development and submission of recommendations to the Commission.

II. COMMENTS

A. SERVICES ADDRESSED BY THE *NOI*.

1. The Commission Should Extend Its Rules To Other Service Providers.

The first question raised in the *NOI* is, perhaps, the most important:

Whether the Commission's existing truth-in-billing rules and/or consumer information-related rules that might develop out of this proceeding should be applied to other services, such as broadband Internet access service and subscription video services.³⁵

The simple answer to this question is, emphatically, "yes."

There is no compelling reason not to extend the Commission's truth-in-billing rules (currently in effect or as modified as a consequence of this proceeding) and any consumer information-related rules that might develop out this proceeding. On the other hand, there are numerous, compelling reasons for extending such rules to all communications services.

For one thing, all parties recognize the convergence that characterizes the communications industry. Multiple platforms can be, and are being, utilized to provide voice telecommunications services to all users. Voice communications are provided via wireline and wireless technologies, often in combination. Wireline technologies utilize either metallic cable, fiber optic cable, or some combination of the two. Wireline providers may be traditional telephone companies, cable providers, or sometimes a combination of the two. Communications channels are created using either the legacy public switched telephone network ("PSTN") that

³⁵ *NOI* ¶17.

has served Americans for generations or selective routers based on IP-protocol technologies, or some combination of both. Most analog voice signals used to communicate between users are converted to digital signals and sent in packets to their intended destination, whether those packets are routed through the PSTN (such as via Asynchronous Transfer Modalities or “ATMs”) or through the Internet (via selective routers). And the networks utilized to carry voice conversations between end users also can accommodate the transfer of data, video services and a host of other broadband-dependent technologies.

Regardless of multitudinous means by which communications may now occur, one thing remains constant: The voice conversation is still the standard method of communication among end users. To end users, the service is generally indistinguishable regardless of the technology or medium used by the provider to connect the end users' communications: most end users use a phone, or something that is made to look very much like a phone; most end users hear a dial tone when they pick up the phone – whether that tone is supplied by a switch on the PSTN or is a facsimile created by a router utilizing the Internet.

Meanwhile, the service being provided is typically referred to in providers marketing and advertising as “telephone” service (albeit some providers use adjectives like “Internet,” “broadband,” “high-speed” or “digital,” etc.). Moreover, the voice component of these services “looks, feels, and sounds” like telephone service (complete with artificially-generated dial-tone). Likewise, many of the enhanced services being provided are virtually indistinguishable from the “bells and whistles” features that telephone customers use (such as (voice mail, email, call forwarding, usage monitoring, Caller ID, etc.) and that, generally speaking, are add-ons to the basic voice service.

Finally, there is convergence not only in the technologies being utilized to provide voice and other components of communications service, but also in the businesses providing those services especially Verizon Communications (“Verizon”) and AT&T Inc. (AT&T”). For example, Verizon Communications is the nation’s second largest incumbent local exchange carrier, serving over 36 million access lines and 10 million broadband connections as of December 31, 2008.³⁶ It is also one of largest long distance telephone companies. Meanwhile, Verizon is one of the two largest CMRS providers in the United States, with over 80 million customers in the wake of its acquisition of Alltel.³⁷ And Verizon has become a major provider of video services to customers in the United States – singly, through its FiOS network or in a joint venture with DirecTV, a satellite television provider.

AT&T occupies a similar, horizontally- and vertically-integrated position atop the telephone market, serving over 77 million wireless customers and 53 million wireline access lines.³⁸ Between the two of them, Verizon and AT&T control approximately 57.5 percent of the country’s telephone access lines,³⁹ over 58 percent of the country's mobile telephone market,⁴⁰ and a significant percentage of America's broadband and video markets. The other major telephone companies (such as Qwest, CenturyLink, Frontier) – while not the leviathans that Verizon and AT&T have become – are hardly small fry, controlling millions of landlines, mobile

³⁶ According to Verizon’s most recent SEC Form 10-K (Feb. 24, 2009), available at http://investor.verizon.com/sec/sec_frame.aspx?FilingID=6435582.

³⁷ *Id.*

³⁸ See AT&T’s most recent SEC Form 10-K (Feb. 25, 2009), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irol-sec>.

³⁹ Based on figures contained in Verizon and AT&T SEC Form 10-Ks for year ended Dec. 31, 2008, compared to wireline access lines as of June 30, 2008 referenced in *NOI* ¶15 n. 40.

⁴⁰ Based on figures contained in Verizon and AT&T SEC Form 10-Ks for year ended Dec. 31, 2008, compared to wireline access lines as of June 30, 2008 referenced in *NOI* ¶15 n. 41.

telephones and capable of providing high-speed broadband and video services, either singly or in partnership with another provider.

Verizon and AT&T's major rivals – they do not much compete with one another, at least in the mass market – consist primarily of four cable giants: TimeWarner, Comcast, Cox and Charter.⁴¹ And like AT&T and Verizon, the cable giants do not compete with each other, either. These companies' core service market, of course, is cable television service. But over the past decade, the cable giants have gained significant shares of the voice and data communications markets by coupling their video services with voice and data service, provided over their cable networks via cable modems and IP-enabled services.

America's communications sector appears more and more to be characterized by a duopoly: one of the giant telephone companies generally competes with one of the giant cable providers. Each offers customers a bundle of services (telephone, Internet, wireless, and/or video) that is marketed as providing more features and hence greater value for the money.

In view of the convergence and consolidation that characterizes America's communications landscape, it simply makes no sense for different carriers to be regulated differently when it comes to truth-in-billing and information disclosure rules. No doubt one argument that the Commission will hear is something like, "burdensome government regulation of companies' billing and consumer disclosure practices will interfere with innovation and stymie growth in the market." Such arguments are easily rejected.

First, the existing truth-in-billing rules are fairly broad, general guidelines that any reasonable business should be able to understand and comply with. While NASUCA hopes a bit more detail and specificity will be added to these rules, it doubts that future rules will be unreasonably complex or prolix and instead will remain akin to general business rules or best

⁴¹ See <http://www.ncta.com/Stats/TopMSOs.aspx>.

practices that any provider should be able to comply with. The same holds true for any disclosure-related rules that the Commission may also adopt in the future.

Second, the notion that government truth-in-billing or disclosure information rules will stymie growth in this or that market is simply ridiculous given the consolidation that has occurred in the wireline, wireless, cable telephony, VoIP and IP-enabled services sectors in recent years. Consider the wireless sector, for example. In 1993, Congress authorized the Commission to take a lighter hand in regulating CMRS providers – and preempted some aspects of state regulation of such providers – in order to foster the wireless sector's growth. In one respect, that goal has been wildly achieved. As the Commission notes in the *NOI*, the wireless market in America had over 270 million subscribers in 2008 – considerably more than the 154 million wireline subscribers at that time (wireless subscribership surpassed wireline subscribership several years ago).⁴² On the other hand, the consolidation in the wireless market that has occurred, primarily in the wake of the 1996 amendments to the Communications Act of 1934 (“Act”), has resulted in far fewer wireless carriers serving far larger numbers of users. Giants like Verizon, AT&T, Sprint Nextel and T-Mobile control over 90 percent of the wireless market. Such consolidation and market concentration promises to stymie new entrants, smaller providers and innovation far more than any government regulation the Commission can craft. There certainly, at least, is no reason to exempt the wireless sector from truth-in-billing rules that apply to wireline carriers.

Third, adopting rules that apply uniformly across all communications providers and technologies may actually benefit smaller providers that are less able to compete with the giants because they are unable to provide existing or potential customers with bundles of services.

⁴² *NOI* ¶15 nn. 40-41.

Finally, end users should have a single, consistent regulatory regime that applies across all communications players and services. Inconsistent regulation not only creates artificial distortions in the marketplace, but also confuses and frustrates consumers who are unlikely to understand or appreciate nuanced differences among their current or potential providers. A telephone bill ought to look roughly the same to end users, regardless of whether service is provided by a landline telephone company, a cable telephony company, or an “over-the-top” VoIP provider. Bill formats should be generally similar, charges should be identified and described in roughly the same fashion, and dispute resolution information should be provided in relatively uniform fashion. If this is done, a consumer is better able to shop among competing providers and technologies, obtain proper price and service signals and make a rational economic choice among those providers.

2. None Of The Commission’s Rules Should Be Considered Unnecessary.

The Commission asks commenters to “identify the specific rules that are no longer necessary given the current marketplace.”⁴³ Frankly, NASUCA cannot conceive of a single consumer protection rule that is currently in effect that could be considered unnecessary in the current market. Given that many of the providers in question have been exempt from, or never subject to, the current truth-in-billing rules, coupled with the fact that the Commission has not properly enforced these rules since their promulgation, it is difficult to see how any evidence could be gleaned demonstrating that the rules have “worked” so well as to no longer be necessary.

⁴³ *NOI* ¶17.

3. The Same, Improved Processes For Handling Complaints Should Be Utilized Across All Services.

In addition, the Commission seeks comment whether it should handle complaints against other providers of communications service (*i.e.*, cable, VoIP, Internet access) regarding compliance with truth-in-billing and information disclosure rules in the same way that it currently handles complaints against wireline and wireless carriers.⁴⁴ NASUCA's answer to this question is both "yes" and "no."

With regard to NASUCA's "yes" answer, if the Commission extends its truth-in-billing rules to such providers (either the current rules or the rules as modified in this proceeding), as well as any information disclosure rules that it may adopt, then the Commission should utilize the same complaint process for these providers as it uses for wireline and wireless carriers. If the Commission possesses jurisdiction to apply its consumer protection regulations to these additional communications providers, whether under Title I or II of the Act, then it has authority to take all reasonable and appropriate actions to enforce those rules. Consumers would likely only be confused and frustrated if the Commission were to adopt one or more sets of processes and procedures for handling complaints involving cable, VoIP, etc. communications services and another for wireline and wireless carriers. Moreover, given the increasing use of "bundling" of services, it is difficult to conceive of how Commission staff would process or respond to a complaint involving charges, billing descriptions or format, or other terms and conditions of service, that involved different services on a single bill from a single or even multiple providers. The same criticisms leveled at the Commission by the GAO (and concerns raised by NASUCA in its April 2006 meeting with CGB/EB staff) would likely apply, and would probably be exacerbated, by creating different processes and procedures for different services.

⁴⁴ *NOI* ¶20.

With respect to its “no” answer, NASUCA does not support the Commission applying the same processes and procedures to other providers unless the Commission improves those processes and procedures first. Both the GAO and NASUCA have raised significant concerns about the current processes and procedures for responding to complaints from wireline and wireless customers. The Commission should first fix its current handling of informal complaints and consumer inquiries, rather than simply extending that flawed process to additional services not heretofore subject to that process.

4. The Commission’s Rules Are Unlikely To Violate Providers’ First Amendment Rights.

The Commission is right to note that some companies have raised concerns that Commission truth-in-billing and disclosure-related rules may violate their freedom of speech rights under the First Amendment of the U.S. Constitution. This was certainly the case in connection with the *First Truth-in-Billing Order* and was the subject of a lengthy separate statement by then-Commissioner Harold Furchtgott-Roth.⁴⁵ Such concerns were likewise raised again in response to NASUCA’s March 2004 petition for declaratory ruling,⁴⁶ and again in response to the NPRM in the *Second Truth-in-Billing Order*.⁴⁷

NASUCA has previously submitted lengthy comments in the Commission’s truth-in-billing docket explaining why the First Amendment generally is not an impediment to the rules

⁴⁵ 14 F.C.C.R. at 7578-85.

⁴⁶ See, e.g., *Truth-in-Billing and Billing Format*, Docket No. CG 04-208: Verizon Wireless Comments, p. 15; CTIA Comments, pp. 20-21; Nextel Comments, p. 24.

⁴⁷ See, e.g., *Truth-in-Billing and Billing Format*, CC Docket No. 98-170: AT&T Comments, pp. 7-8 (June 24, 2005); Cingular Comments, pp. 48 & 54 (June 24, 2005); Sprint Comments, pp. 21-22 (June 24, 2005). Interestingly, Sprint disavowed to some extent former Commissioner Furchtgott-Roth’s First Amendment analysis in its comments.

proposed or under contemplation in these earlier proceedings.⁴⁸ The Commission too, recognizes in the *NOI* what is and is not prohibited by the First Amendment and NASUCA concurs in the agency's analysis and reasoning, not in the least because it accords with NASUCA's prior analyses and responses to First Amendment arguments raised by various commenters. That is not to say that any rule the Commission wishes to adopt will always be constitutionally sound – but the Commission has not actually proposed any particular rule in its *NOI* and certainly NASUCA anticipates that the Commission will ensure that any rules it does adopt will not infringe communications service providers First Amendment rights.

B. IDENTIFYING THE INFORMATION CONSUMERS NEED.

NASUCA has previously commented in these proceedings regarding the extent and type of information consumers need to make rational decisions regarding the best provider and service that meets their financial needs. Those comments generally can be summarized as follows.

As an initial matter, the Commission should recognize and reaffirm the principles and rationales set forth in the joint policy statement it issued in conjunction with the Federal Trade Commission (“FTC”) in 2000,⁴⁹ regarding long distance advertising and the role of marketing and advertising in adequately informing consumers or misleading them regarding critical aspects of their service. Many of the agencies' observations and concerns about long distance carriers' advertising are as salient today concerning advertising regarding the multitude of services offered by all communications providers. These observations and concerns apply not only to

⁴⁸ See, e.g., *Truth-in-Billing and Billing Format*, CG Docket No. 04-208: NASUCA Reply Comments, pp. 31-55 (Aug. 13, 2004); see also *Truth-in-Billing and Billing Format* CC Docket No. 98-170: NASUCA Comments, pp. 15-16 (June 24, 2005); Reply Comments, pp. 17-18 (July 25, 2005) (concurring with NAAG's First Amendment analysis as well).

⁴⁹ See *Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers*, Policy Statement, File No. 00-72, FCC 00-72, (March 1, 2000) (“*Advertising Joint Policy*”).

providers' marketing materials, advertising and websites, but also to the providers' billing statements sent to customers.

In the *Advertising Joint Policy*, the Commission noted the critical importance of accurate information in long-distance carriers' advertising of services and rates and offered the following observations regarding what ought to constitute misleading or deceptive billing and related practices:

*A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances about a material fact. Material facts are those that are important to a consumer's decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. The cost of a product or service is an example of an attribute presumed material.*⁵⁰

Price, the Commission noted, is the "central characteristic" of the cost of a product considered by consumers, "*not just the per-minute rate, but rather how that rate, along with all additional fees and charges, will ultimately be reflected in the charges [consumers] see on their monthly phone bills.*"⁵¹ In determining what advertising or disclosures are unreasonable or misleading, "the issue," the Commission wrote, "is whether the act or practice is likely to mislead, rather than whether it causes actual deception."⁵²

In order to make this determination, the Commission looks to the "net impression" conveyed to consumers by the advertisement in question, "the entire mosaic, rather than each tile separately." Under this standard, the entire advertisement, transaction or course of dealing is considered, and "even if the wording of an ad may be literally truthful, the net impression

⁵⁰*Id.* ¶5 (emphasis added).

⁵¹*Joint Advertising Policy*, ¶13 (emphasis added).

⁵²*Id.* ¶6.

conveyed to consumers may still be misleading.”⁵³ The Commission further observed that “in many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.”⁵⁴ Accurate information contained in the text of the advertisement, the Commission noted, may not remedy a misleading impression created by a headline. Moreover, disclosures in the fine print or legalistic or ambiguous disclaimers likewise do not cure the problem. Providers’ disclaimers on websites or in monthly billing statements are unlikely to actually be noticed by the customers, and even if noticed, are often too vague to be understood.⁵⁵

NASUCA concurs with the Commission’s observations in the *NOI* regarding the kind of information consumers need at each stage of choosing and using telecommunications services and services provided in conjunction, and often bundled, with those services.⁵⁶ The Commission should extend the “net impression” analysis articulated in the *Joint Advertising Policy* in adopting rules extending to any communications provider’s billing practices and any marketing or other disclosures directed at consumers and designed to induce them to subscribe to the

⁵³*Id.*

⁵⁴*Id.* ¶8; *see also FTC v. City West Advantage, Inc.*, 2008 WL 2844696 (D. Nev. 2008) (the “testimony suggests that the net impression of the [telemarketing] call was misleading”).

⁵⁵*See, id.* ¶20.

⁵⁶ *NOI* ¶23.

provider's service, to remain subscribed to that service, or make material changes to that service that have a material, adverse effect on the consumer.⁵⁷

In addition, the Commission should consider those studies that have been conducted that point out the increasingly “noisy” marketing, pricing and billing practices of communications providers that overwhelm consumers with details and make it difficult to make apples-to-apples comparisons of services and prices in choosing a provider or in choosing to change providers or service plans.⁵⁸ The Commission should also consider the analysis of such phenomena in America's wireless market by AARP, together with recommendations for policies to deal with communications providers' incentives to discourage their customers from switching providers and services.⁵⁹

Even though the number of full-service communications providers has declined over the past decade through market consolidation, the number of service plans, rates, usage requirements, options, features, line item charges, etc. offered by providers, especially when services are bundled together by one or more providers, makes it difficult – if not impossible – to craft “one-size fits all” disclosure requirements, except in fairly broad terms. That does not mean that the Commission should not make the attempt. The fairly broad truth-in-billing

⁵⁷ Another source of guidance that the Commission should consider in going forward in these proceedings are the Assurance of Voluntary Compliance (“AVC”) agreements negotiated between the attorneys general of more than thirty states and three of the largest wireless carriers at that time (Sprint, Verizon Wireless and Cingular Wireless) in settlement of law enforcement investigations into the carriers' billing and disclosure practices. While NASUCA believes that the AVC agreements could be improved, they represent a good starting point and conceptual framework for addressing material issues that communications service providers should be required to be disclosed to consumers at each step of the commercial transaction. See www.nasuca.org/VERIZON%20WIRELESS%20AVC%20FINAL%20VERSION.pdf (copy of the Verizon AVC).

⁵⁸ See, e.g., Xavier Gabaix and David Laibson, “Shrouded Attributes, Consumer Myopia and Information Suppression in Competitive Markets,” *The Quarterly Journal of Economics*, p. 505 (Harvard Univ., May 2006); Xavier Gabaix, David Laibson and Hongyi Li, “Extreme Value Theory and the Effects of Competition on Profits,” Unpublished Paper (March 2005), available at <http://time.dufe.edu.cn/wencong/gabaix/download14.pdf>.

⁵⁹ Christopher A. Baker, “Breaking Up Is Hard to Do: Consumer Switching Costs in the U.S. Marketplace for Wireless Telephone Service,” AARP Public Policy Institute #2007-18 (Oct. 2007), available at http://www.aarp.org/research/ppi/cons-prot/telecom/articles/inb147_wireless.html.

guidelines and standards previously crafted by the Commission are a fair starting point, though there is certainly room for improvement and greater specificity. The main problem is not with framing rules but rather with enforcing those rules.

1. Choosing a Provider.

NASUCA will focus its comments on one aspect of the *NOI* on this topic, namely the Commission's request for "input what information helps consumers assess the service quality being offered by each provider and the different dimensions of service quality."⁶⁰ In the experience of NASUCA's members, the number and length of provider service outages in a consumer's area is a critical piece of information that helps determine whether to subscribe to, or remain subscribed to, a provider's service. Recent actions by the Commission have denied consumers access to this important information, however.

In 2004, the Commission adopted an order extending mandatory outage-reporting requirements to include all communications providers (cable, satellite, and wireless providers, in addition to wireline providers) that provide voice and/or paging communications.⁶¹ Among other things, the Commission adopted a common metric to apply across all communications platforms in determining the general outage-reporting threshold criteria and accounting for the unique technical aspects of each communications platform, and required electronic filing of all outage information through a "fill in the blank" template.

Expanding the network outage reporting service ("NORS") requirements was certainly, in NASUCA's opinion, a needed improvement. Unfortunately, the Commission eliminated any consumer benefit from the expanded NORS requirements by removing all information obtained

⁶⁰ *NOI* ¶26.

⁶¹ *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-35, 19 F.C.C.R. 16830, 16833-34 ¶2 (Aug. 19, 2004).

through such reports from the public's purview. Citing concerns about terrorism and homeland security needs, the Commission concluded that "[t]his information will be withheld from disclosure to the public," noting that "[t]his action is the most significant revision to our original proposal that we have adopted in this Report and Order."⁶² The Commission's observation regarding the significance of removing outage information from the public's view was interesting, since the possibility of such action was not mentioned by the Commission in the Public Notice that preceded the NORS order. The public consequently had no opportunity to comment on the scope of the Commission's action, its impact on consumers or state commissions interested in knowing which providers experienced significant and extended service outages, or to offer alternatives to the total blackout imposed by the Commission.

If the Commission is serious about getting information regarding service quality out to consumers to assist them in deciding what providers to select, it should revisit its 2004 NORS order and make revisions that will permit consumers to see, on a state-by-state basis, which providers are particularly susceptible to lengthy service outages. Moreover, the Commission should consider expanding the outage reporting requirements to VoIP providers and Internet access providers as well.

2. Choosing a Service Plan.

With respect to advertising, promotional pricing and point-of-sale disclosures, NASUCA refers the Commission to its earlier comments concerning extending the "net impression" standard articulated in the 2000 *Joint Advertising Policy* to all communications providers' communications with consumers. In addition, the Commission should consider NASUCA's comments in prior proceedings, particularly its comments in response to the *Second Truth-in-Billing Order*'s NPRM regarding point-of sale disclosures.

⁶² 19 F.C.C.R. at 16834 ¶3.

One additional point that the Commission should consider is adopting something similar to the “Schumer box” that now accompanies a credit card contract and clearly sets forth, in an outlined section and in bold face type, such material terms of the credit agreement such as the applicable APR, the billing cycle, late fees, etc., so that consumers can easily compare one card to another without having to shift through tomes of legalese and terms of service. Similarly, carriers would be required to provide all rates, fees, surcharges, penalties, usage limits, service term, and similar material terms and conditions of the service contract to customers in an initial confirmation of the terms and conditions of service. The notice should be signed or otherwise acknowledged by the consumer.

In addition, with respect to broadband Internet service, a Schumer box should be required that provides consumers with accurate and verifiable information regarding the characteristics and capabilities of the service to which the consumer is subscribing. Contained within the box would be such indicators of broadband service quality as information regarding minimum expected speed and latency to the Internet Service Provider’s border router, service uptime, a common description of the technology used to provide the services, and any service limits such as a bandwidth cap or the application of any traffic management techniques.

a. Voluntary industry codes are meaningless.

In the *NOI*, the Commission also seeks comment regarding the utility of voluntary industry codes such as CTIA’s Consumer Code as the “most effective way to ensure that consumers are protected” from unscrupulous providers’ unreasonable, misleading or fraudulent billing and marketing practices.⁶³ The short answer to this query is another emphatic “no.” Codes such as CTIA’s wireless Consumer Code are glaringly deficient in many respects, at least from the standpoint of consumers. The CTIA Code may ultimately be adopted by

⁶³ *NOI* ¶32.

communications providers as a model – but not for consumers seeking protection from unscrupulous or unreasonable carrier practices, but rather for communications providers seeking “cover” under which to carry out such practices while holding themselves out as complying with industry “best practices.”

Based on NASUCA’s experience with a wide variety of voluntary industry standards over the years (from different segments of commerce), any assessment of the likely effectiveness of industry voluntary standards must at a minimum examine factors such as the following:

- Whether there is full participation by the industry as a whole;
- Whether there is some effective and externally-extended carrot and stick used as leverage over the industry;
- Whether there is an independently-designed and -operated Seal of Approval program or its equivalent with adequate enforcement and investigatory procedures and objective decision-making authority; and
- Whether the industry’s standards are sufficiently objective, verifiable and enforceable.

Examining such factors makes it clear that CTIA’s Consumer Code falls far short of being a “effective” means of protecting consumers compared to having standards established by the Commission or state commissions that are enforceable, by regulators, law enforcement officers or citizens themselves, in administrative or judicial proceedings.

(i) *Full participation by the industry.*

Full participation by industry as a whole is critical because, in the absence of full industry participation, providers may perceive a competitive advantage to non-participation. Unless and until the consuming public makes decisions based on which providers adopt the voluntary standards, industry non-participants can too easily build market share without having to honor the pro-consumer promises reflected in voluntary standards, and this also insulates non-

participants from incurring any costs of adhering to such voluntary standards. Rational non-participation leads to a domino effect of increasingly widespread non-participation, which in turn has the eventual (if not nearly immediate) effect of rendering the voluntary standards largely ineffectual.

According to the Commission's reports, and CTIA's own industry surveys, there are hundreds of wireless providers, yet only 31 wireless carriers are listed as signatories to its Code – and of these, several have been absorbed by other carriers through market consolidation (*e.g.*, Highland Cellular, Easterbrooke Cellular, ALLTEL). Thus, a large number of wireless carriers apparently do not participate in the Code, without any apparent negative effect (upon them in any case). In addition, there is always the opportunity for a Code signatory to operate through a partner or affiliate that is not a signatory to the Code, and CTIA's description of the Code provides little information regarding how such evasions are prevented.

(ii) Whether there is an effective and externally extended carrot and stick used as leverage over the industry.

The industry trade association (or other entity that develops and monitors the standards) must be in a position to create – and then effectively deliver – some version of a policy that can reasonably be demonstrated to ensure widespread industry compliance with the voluntary standards. For example, a trade association that develops the standards might require participation as a precondition of association membership, which in turn is an effective incentive only if association membership provides one or more advantages that are perceived as outweighing the benefits of non-participation in the voluntary standards process. One factor to examine is whether the trade association sponsors a well-thought-out, effective and persistent public education campaign about its voluntary standards. If it succeeds in persuading participants to market their product on the basis of adherence to those voluntary standards,

prospective purchasers might be expected to use that as a factor in making their marketplace selection. Such consumer behavior in turn serves as an indirect marketplace incentive for industry participation in the voluntary standards program. As far as NASUCA can tell, participation in the Consumer Code is not a condition of membership in CTIA, but rather is only required to display CTIA's seal of compliance.

(iii) Whether there are adequate and "transparent" enforcement and investigatory procedures and objective decision-making authority.

The Commission must also examine whether CTIA has assumed the cost and operation of an independently designed and monitored Seal of Approval-type program by which the voluntary standards are monitored and enforced among participating companies. The existence of such program must be widely and persistently marketed so that a critical mass of the consuming public develops the "habit" of seeking out participating providers. This is effective only to the degree that consumers conclude they can trust that providers that display such a "seal" in their advertising are being held accountable to some defined standard of wireless consumer satisfaction. Thus, key to the effectiveness of CTIA's Consumer Code is consideration of whether CTIA retains the authority, and then exercises that authority, to impose sanctions for non-compliance. Moreover, the sanctions must be an effective deterrent against non-compliance. Finally, the consuming public must be able to access current and accurate information as to any providers that have been found in violation of the Code's standards, including the timing and specific nature of the violation(s) and enforcement action taken.

In any event, there are at least two caveats regarding a Seal of Approval program. *First*, as a practical matter, such a Seal of Approval program does not typically become quickly established in the public consciousness. Therefore, its salutary effects may not be realized soon

enough to dissuade some providers from taking their chance at building or maintaining market share without pledging to abide by the practices/standards of excellence necessary to earn such Seal of Approval, or having taken the pledge, truly abiding by it. As a result, other providers may drop out of (or never join) the voluntary standards program. *Second*, critics have cited dissatisfaction with some industry standards programs that apparently were created to – or evolved into being – a captive of the largest players in that particular field of commerce. Such programs may evolve into a crony culture that makes it all but impossible for new or small providers to succeed in earning the Seal of Approval. Moreover, the Commission must consider whether the circumstances in which the determination is made whether to award the seal, especially in light of certain subjective “quality” factors, is routinely bestowed only on the largest and dominant players in the market, and consistently withheld from “upstarts” perceived as competitors to the old guard.

CTIA’s website provides little information that would allow the Commission to conclude that the Consumer Code meets such criteria, and such information as there is, suggests that such criteria are largely unsatisfied. For example, with regard to enforcement and investigation, the Code relies entirely on an “honor code” system, whereby carriers “annually re-certify that they are in compliance with the Code” and where those “not in compliance will not be permitted to display the Seal of Wireless Quality/Consumer Information.”⁶⁴ CTIA provides no information regarding independently verifying participants’ compliance. Instead, as the association’s website makes clear, the Consumer Code depends entirely on carriers “ratting out” other companies – there is no mention of acting on consumer complaints, state or federal agencies’ inquiries, etc.

⁶⁴ Consumer Code: Questions and Answers – Who Will Enforce The Voluntary Consumer Code?”, available at http://www.ctia.org/consumer_info/index.cfm/AID/10549.

Another critical deficiency in the CTIA's Consumer Code is the lack of objective standards governing disclosures, changes in service, imposition of early termination fees and other penalties, etc. Carriers are able to determine whether and when obligations apply by having complete discretion to decide what is a "material" charge (Item 5), a "material" term or condition of service (Item 3), a "material" change in service that is "materially adverse" to the subscriber (Item 7), or what constitutes "reasonable advance notice" of such changes (Item 7).⁶⁵

A good illustration of the arbitrary actions wireless carriers may take in the absence of objective or independently enforceable standards, and yet apparently remain in compliance with the Consumer Code, was provided by the fairly infamous experience with Sprint's increases to its text message charges. When Sprint first increased its text messaging charge (from \$0.10 to \$0.15/message) in October 2006, the carrier declared the change to be "material" and allowed customers to terminate service without incurring an ETF.⁶⁶ Yet when Sprint Nextel increased the same charge (from \$0.15 to \$0.20/message) again just 10 months later, it declared the increase to be "non-material" and that customers who terminated service in response would be subject to its \$200 ETF.⁶⁷

b. Bundled services can and should be separately priced on all bills.

The Commission seeks comment regarding whether consumers receive adequate information in connection with bundled services. NASUCA will address one Commission question in particular, namely whether "bills [are] sufficiently clear and detailed for consumers to compare the price for bundled services to the price for the same services purchased

⁶⁵ CTIA Consumer Code, available at <http://files.ctia.org/pdf/ConsumerCode.pdf>.

⁶⁶ See Kelly Hill, "Sprint ups text messages to 15 cents," RCR Wireless News (Oct. 16, 2006).

⁶⁷ See Kelly Hill, "Sprint Nextel hikes text fee again, ETF remains in effect," RCR Wireless News (Aug. 21, 2007).

individually.”⁶⁸ In at least one instance, the answer is “yes” – though the clarity provided was the direct result of state regulatory action.

In West Virginia, the state commission has adopted a billing format for Frontier Communications that the Commission should consider for use as a model in crafting rules dealing with bills for bundled service. In response to Frontier’s 2006 petition for authority to bill for bundled services as a single line item, the West Virginia Public Service Commission – consistent with its rules⁶⁹ – authorized all telecommunications carriers to bundle service prices on their billing statements provided that the carrier also provided a separate itemization of all service options for which a flat monthly charge was applied.⁷⁰ The West Virginia commission approved an eighteen-month test period, during which carriers could show total bundled prices on their billing statements so long as they continued to provide the itemization required by the state’s rules, and required Frontier to file a new petition at the end of the period. In response, Frontier proposed a revised billing format in which all services are itemized and priced separately, the discount for bundled service is likewise shown separately, and all current and

⁶⁸ *NOI* ¶33.

⁶⁹ *W. Va. Code State Reg.* § 150-6-2.1.a (2000). The rule in question provides, in part:

Bills to customers shall be typed or clearly printed, rendered monthly, and shall contain a listing of all charges and the period of time covered by the billing period. . . . This itemization shall list separately all items such as service options for which a flat monthly charge is made. Bills shall show the actual name of each vendor for all charges listed and the toll-free telephone number of the person authorized to resolve disputes relating to those charges.

⁷⁰ See *Frontier-WV*, WVPSC Case No. 06-0092-T-PC, Comm’n Order, p. 11 (April 24, 2007), available at <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?>.

past-due charges (including those for which voice service could be disconnected) are identified clearly for the customer – which the WVPSC subsequently approved for Frontier’s use.⁷¹

NASUCA suggests that the Commission consider the Frontier billing format in West Virginia as a potential model for use in developing rules governing communications providers’ bills for bundled services in connection with this proceeding.

3. Managing Use of the Service Plan.

a. *Traditional truth-in-billing rules.*

NASUCA agrees with the Commission’s observation that the “telephone bill is one of the consumer’s primary sources of information regarding the services rendered by a provider and charges assessed for those services.”⁷² Indeed, this fact has been recognized by the Commission since its *First Truth-in-Billing Order*.⁷³ The Commission asks a series of questions regarding whether its rules are having the desired effect to alleviate customers’ confusion over billed charges and whether carriers are complying with those rules. NASUCA is fairly confident that the answer to these questions is “yes – somewhat.” While some telephone bills have improved since the *First Truth-in-Billing Order* was issued, the continuing high level of complaints and inquiries received by the Commission related to billing and rates, marketing and advertising, contract formation issues, early termination fees, etc. noted previously demonstrates that more must be done. As previously noted, in no circumstances should those rules be weakened or eliminated.

⁷¹ See *Frontier-WV*, WVPSC Case No. 09-0468-T-PC, Comm’n Order, pp. 3-4 (May 29, 2009). A copy of Frontier’s new billing format, which itemizes all services and charges, and shows the bundle discount the customer receives, can be reviewed as Attachment 2 to the WVPSC’s staff initial and final joint staff memorandum, available at <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=265828&NotType..>

⁷² *NOI* ¶36.

⁷³ *First Truth-in-Billing Order*, 14 F.C.C.R. at 7495 ¶3.

The communications market is characterized by the growing use of bundling of various regulated, unregulated and semi-regulated services, often provided through joint ventures between providers subject to varying degrees of regulation. Moreover, communications providers have demonstrated substantial creativity in shaping bills to suit their purposes rather than consumers' needs, and to operate in the gray areas of Commission rules. Finally, the Commission has historically demonstrated a reluctance to aggressively enforce its rules. These trends suggest that Commission efforts to craft ever more detailed and specific rules governing the organization and description of billed charges, fees and surcharges, and services for which charges are imposed may not ultimately be successful.

The Commission should consider, in addition to more specific rules that apply to all communications providers, another approach that may reduce or eliminate many of the complaints the Commission (and state commissions) receives. The Commission should consider addressing unreasonable or unlawful billing and marketing practices by addressing consumers' rights, post-billing, to terminate providers or services that do not meet their expectations based on provider representations contained in such disclosures. The customer's monthly bill may confirm or explode those expectations. As the Commission has recognized, the billing statement is the most significant communication a consumer receives regarding the services provided and charges rendered for those services. Consumers can see the services for which they are being charged, can see how much they are paying for those services, and have a general notion of how much they should be paying and the services for which they should be paying. However, consumers are often locked into lengthy service contracts by ETFs and other penalties and end up paying too much for services they do not want or never authorized because of such penalties.

The Commission could alleviate consumers' frustration and outrage over providers' billing practices by allowing consumers to terminate any service, at no penalty, if the service or charge is not what they authorized. Consumers, however, need sufficient time to review their bill to make that determination. NASUCA suggests that the Commission should consider adopting a rule that permits consumers to terminate any particular service that appears on their bill, or a provider's service entirely, without any penalty or other surcharge, within 60-90 days after the bill on which a disputed service or charge first appears.

b. Cramming issues.

The notice of inquiry seeks comment on the extent to which cramming remains a problem, including specific information about the kinds of unauthorized charges that appear on consumer telephone bills.⁷⁴ The comments here submitted are based largely on experience in Iowa, where the state consumer advocate has been seeking enforcement of a state law prohibition on cramming for the past eight years. Because the Iowa statute excludes wireless services, the examples are largely confined to wireline services. In summary, cramming remains a serious problem for consumers, both individuals and small businesses. Several preliminary comments merit consideration.

First, the definition of cramming should be clarified to include not only unauthorized charges that appear on bills of local exchange carriers ("LECs") but also unauthorized charges that appear on other telephone bills.⁷⁵ Although LEC bills⁷⁶ have been the quintessentially fertile

⁷⁴ *NOI* ¶41.

⁷⁵ In the past, the Commission has defined cramming as "placement of unauthorized, misleading, or deceptive charges on a consumer's telephone bill," without limiting the definition to charges that appear on the bill of a local exchange carrier. *2006 Biennial Regulatory Review*, 22 F.C.C.R. 2965, 2992 (Feb. 14, 2007); *Appropriate Framework for Broadband Access to the Internet*, 20 F.C.C.R. 14853 n. 457 (Sept. 23, 2005); *Truth-in-Billing and Billing Format*, 20 F.C.C.R. 6448 n. 163 (Mar. 18, 2005); see also *Office of Consumer Advocate v. Iowa Util. Bd.*, 770 N.W.2d 334, 336 (Iowa 2009) ("[c]ramming refers to charging a consumer for services that were not ordered, authorized, or received"); *Micronet, Inc. v. Indiana Utility Reg. Comm'n*, 866 N.E.2d 278, 282 (Ind. App. 2007)

planting ground for cramming violations, and although the problem is often exacerbated in that context because consumers often do not notice the unauthorized charges due to the length of the LEC bills,⁷⁷ the fundamental problem is the lack of authorization for the charges and the companies' attempt to collect for them. Limiting the definition to unauthorized charges on LEC bills would open a considerable loophole.

Consumers often also complain of unauthorized charges for telecommunications services that are separately invoiced.⁷⁸ While consumers who receive separate bills may not encounter difficulty detecting the unauthorized charges, they are unjustifiably pressured to pay such charges and encounter considerable difficulty attempting to get them reversed. At times, such separate billing occurs because an alleged crammer is dropped by a LEC but continues the alleged cramming.⁷⁹ In such cases, a definitional limitation would disable enforcement as to

("[c]ramming is . . . '[a] practice in which customers are billed for unexpected and unauthorized telephone charges or telephone services, which the [customer] didn't order, authorize or use'"); *OCMC, Inc. v. Norris*, 428 F.Supp.2d 930, 931-32 (S.D. Iowa 2006) ("cramming' . . . occurs when unauthorized charges are placed on consumers' telephone bills"); *Brittan Comm. Intern. Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 n. 2 (5th Cir. 2002) ("[c]ramming' refers to charging a customer for services that were not ordered, authorized or received"). The present notice of inquiry at one point tracks these earlier definitions. *NOI* ¶8 n. 13. At another point, however, it appears to limit the definition to charges on "local" telephone bills. *Id.* ¶40.

⁷⁶ The customer's local service bill is an option that serves the collection objectives of the companies that use them. One company observes: "We principally bill for our . . . services through LECs and, in the case of a . . . portion of our services, through billing aggregators, which . . . bill through the . . . LEC [M]any of [our current billing collection agreements] are terminable at will Should the Company lose the ability to bill via LEC billing agents, there is no assurance the Company will be able to maintain historical collection rates and this could materially impact the Company's operations." *Securus Technologies, Inc.*, SEC Form 10-K, FYE 12-31-05, p. 20.

⁷⁷ The Commission should consider giving the consumer an ability to prevent third-party billing by the LEC unless the consumer has confirmed to the LEC that a third-party billing is authorized.

⁷⁸ For example, the 00 Operator charges, some of the charges of One Call Communications and other companies in the "modem hijacking" cases, a great many of the Buzz Telecom charges, the UMCC charges and the OYP charges, all discussed below, were separately invoiced.

⁷⁹ See *FTC v. Mercury Marketing, Inc.*, 2003 WL 23277324 (E.D. Pa. 2003) ("*Mercury Marketing*") (SBC stopped billing for company based on thousands of complaints).

major portions of the problem. In addition, unauthorized charges for some types of services referenced by the Commission, such as ringtones,⁸⁰ would not typically appear on LEC bills.

In a marketplace as complex as telecommunications, the definition of cramming should not be limited to any particular type of billing instrument. It should be broad enough to reach the whole problem, which is both unauthorized charges for telecommunications services on any bill and unauthorized charges of any kind on a telephone bill.

Second, although information disclosure policy⁸¹ and voluntary industry standards⁸² are each important, neither by itself is an effective solution to the cramming problem. As the Commission observes, the problem persists despite both the Commission's truth-in-billing regulations and the industry's 1998 code of best practices.⁸³ These efforts notwithstanding, there remains a steady stream of complaints of frauds and abuses as well as negligent practices, all

⁸⁰ See *NOI* ¶40.

⁸¹ Many cramming complaints stem from telemarketed free trial offers. This is one of the topics that should be addressed through disclosure policy. Verification recordings in cases involving free trial offers at times contain defective scripts that omit essential information, such as the need for the consumer to take affirmative action to cancel in order to stop the billing from commencing once the free trial period ends. In one case, the audible portion of the recording referenced "14 days free of charge." The next sentence began "[s]hould you decide to continue." The remainder of the sentence was spoken too quickly to be understood. The words "[s]hould you decide to continue" conveyed to the consumer the consumer would have an opportunity during the 14-day period to evaluate the service and make a decision about whether to continue. There was, however, no audible agreement for commencement of billing following the 14-day period, nor was there any evidence of any subsequent communication from the consumer advising the company that the consumer had decided to continue (or even any evidence the consumer had received any service). There are other difficulties with free trial offers. The verification scripts often mislead consumers into thinking "[t]here are no contracts," when in fact the proper acceptance of a proper free trial offer would create a contract. The verification scripts also at times fail to identify the service the consumer has allegedly agreed to try. Among other particulars, the Commission should adopt regulations, as the FTC has done, prohibiting "negative option" free trial offers. See *Mercury Marketing*, 2004 WL 2677177 (E.D. Pa. 2004).

⁸² The LECs should be encouraged to improve their efforts both to bring the practice of cramming to an end and to alleviate the difficulties consumers report. One ubiquitous problem in the latter category is that, when cramming occurs, it commonly takes two to three billing cycles for credits of the unauthorized charges to appear on the LEC bills. In today's world, when electronic transmission makes virtually instantaneous communication possible, there is no apparent excuse for such delay, and that is true regardless of the number of layers of billing agents. The LECs are probably in a position to address the issue effectively. If they do not, the Commission should address it.

⁸³ *NOI* ¶41 and n. 62.

resulting in unauthorized charges. The problems are often exacerbated by slow and inadequate company responses to complaints.⁸⁴

The reason the problem persists is that some erroneously regard the problem as corrected if and when the offending company issues a credit. Indeed, many companies state in their responses to complaints that they routinely issue credits when consumers complain. The point here is not that the credits are unwarranted. The credits are essential. The point is that the credits alone are not a solution to the problem, at least not if the goal is to curtail and eliminate the cramming, as it should be. When companies face no consequence other than crediting the charges to those who complain, they have little or no incentive to stop the offending practices.⁸⁵

The remedial measure that offers hope of ending the problem, today as yesterday,⁸⁶ is the civil monetary penalty. There is judicial recognition of that reality in the related context of slamming.⁸⁷

⁸⁴ Consumers frequently report they are placed on hold for lengthy periods of time, cut off and otherwise given the runaround. Their correspondence goes unanswered. They are wrongly told the charges complained of are legitimate and must be paid. In one case, the company sent the consumer a form letter advising that it had conducted a thorough investigation and determined the charges were valid, when in fact the charges were invalid. Consumers are threatened with reports, and reported, to credit agencies. If and when issued, credits take months to appear. Many victims are elderly. Some are disabled. They fear loss of essential phone service and damage to credit scores. Some have acute need for telephone service due to life-threatening health conditions. Their conditions are at times exacerbated by stress over phone bills.

⁸⁵ Another common company response to a cramming complaint is to place a block on like future charges to the account of the complaining consumer. Blocks, like credits, help alleviate the problem. They do not, however, provide the industry with the needed incentive to stop the violations in the first place. A court observes: “[T]he difficulty with [reliance on blocks] is that it require[s] consumers first to suffer an injury and then to find and implement a solution to avoid being injured again.” *FTC v. Verity Internat’l, Ltd.*, 335 F.Supp.2d 479, 499 (S.D.N.Y. 2004) (“*Verity*”), *aff’d in relevant part*, 443 F.3d 48 (2d Cir. 2006). Meanwhile, offending companies “profit from this injury, as many consumers who are fearful of incurring damage to their credit ratings pay the bills irrespective of whether they used or authorized use of the services.” *Id.*

⁸⁶ See GAO, “*Telecommunications: State and Federal Actions to Curb Slamming and Cramming*,” Report No. GAO/RCED-99-193 (July 1999) (“1999 GAO Report”), p. 14 (noting that, from 1996 through 1998, in actions affecting nearly 400,000 consumers, state public utility commissions and state attorneys general ordered carriers to pay at least \$13.4 million in customer restitution and at least \$4.1 million in penalties and fines for slamming and cramming violations alone).

⁸⁷ *In re Canales Complaint*, 637 N.W.2d 236, 245 (Mich. App. 2001) (“without . . . fines there would be insufficient incentive for . . . providers to stop slamming because they would simply reimburse those customers who complain of

Third, the Commission should encourage the states to become and remain active in the effort to stop the problem. The states are usually in the best position to do so. Although federal officials, including those at the Federal Trade Commission, have at times proven instrumental in the effort to stop cramming, they are commonly far removed from the victims on whom the deleterious effects of the abuses are visited. They lack the resources to do justice to all the complaints.⁸⁸ Their time frame for action is at times less expeditious than that of the states.⁸⁹ The substantive reach of the laws they administer is at times too narrow to address the real problems.⁹⁰ The remedies available to them may be less effective in halting the abuses than those the states may be able to craft.

On the last point, the Iowa statute, for example, authorizes the state public utility commission to assess a civil monetary penalty for cramming violations, up to \$10,000 per

the switch, but continue to collect fees from the other slammed customers”); *see, generally, Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 174, 185-86 (2000) (“The Court of Appeals . . . misperceived the remedial potential of civil penalties”). Further, small claims court is “not an effective remedy [for consumers] because the amounts at issue [are] too small to be worth the time and energy, let alone the nominal filing fee.” *McKee v. AT&T Corp.*, 191 P.3d 845, 858 (Wash. 2008).

⁸⁸ *See Truth-in-Billing and Billing Format*, separate statement of Commissioner Copps, 20 F.C.C.R. 6448, 6499 (2005): “In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today. . . . Yet in the last year alone, the Commission received over 29,000 non-slammings consumer complaints about phone bills.”

⁸⁹ The most notorious apparent slammer and crammer of the past decade was Buzz Telecom. A long distance company, it plagued a distressingly large number of consumers, particularly seniors, with reportedly fraudulent sales calls and unauthorized billings. Its operations were effectively halted in early 2007 by the efforts of a large number of states. Commission enforcement action against Buzz Telecom, however, were not concluded until August 2009 – and then by settlement, long after states had put Buzz out of business. *In the Matter of Kintzel*, EB No. 07-197 (Aug. 6, 2009) (ALJ order approving settlement).

⁹⁰ In the related area of slamming, many cases stem from the fact that “some telephone companies or their marketing agents have used deceptive . . . telemarketing to lure consumers into switching their service.” *See* 1999 GAO report, p. 3. The federal slamming statute, however, has been held to require only a recorded verification of the consumer’s voiced consent to a switch “and nothing more.” *AT&T Corp. v. FCC*, 323 F.3d 1081, 1087 (D.C. Cir. 2003). As thus interpreted, the federal slamming statute prohibits only non-compliant verifications and does not prohibit slamming. It does not reach the class of deceptive cases reported by the GAO. Yet such cases continue to be reported by consumers with disturbing frequency.

violation.⁹¹ Unlike 47 U.S.C. § 503(b), which requires proof of willful or repeated violations before civil penalties may be assessed, the Iowa statute includes no such requirement. It permits enforcement of the cramming prohibition through assessment of civil penalties in selected individual cases, without the need to inquire into the willfulness of the alleged violation.

Such an approach is better designed to accomplish the remedial goal of ending the cramming. Because direct proof of a company's intent is rarely available, requiring proof of intent to violate means that most intentional violations easily escape sanction. Even when a violation is caused by unintentional conduct, moreover, such conduct is often the result of negligent and inattentive behavior. Civil penalties are indeed designed to remedy such sloppy business practices, so that such behavior will be policed and cleaned up.⁹²

Requiring proof of a series of violations poses problems of a different character. It means enforcement is routinely delayed. Worse, if enforcement agencies must decline to act unless and until they see a pattern of apparent violations, most of the time there is no enforcement at all. Many violations go undetected or unreported.⁹³ Violators move on to other companies or other

⁹¹ See Iowa Code § 476.103 (2009).

⁹²*Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990); see *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999). It is also common for the party caught billing unauthorized charges to seek to transfer the blame to someone else, to claim, for example, that it was defrauded by some other, allegedly more culpable, individual or company, under circumstances in which a solution was well within the company's control. See *Doty v. Frontier Communications Inc.*, 36 P.3d 250, 258 (Kan. 2001) (“[t]o allow Frontier to participate and profit through its contractual agreements . . . – yet insulate itself from any responsibility – flies in the face of the intent of the Kansas Legislature when it enacted [the slamming statute]”). The existence of an obligation to take reasonable preventive actions within a company's control also helps insure that the infrastructure essential to compliance does not deteriorate.

⁹³As one court correctly, and succinctly, observed:

The practical reality here is that many consumers who receive bills simply pay them. Others are not willing to engage in extended debates with billers, as they lack the time or energy or simply are fearful that an alleged creditor will damage their credit ratings and thus limit their access to credit unless they pay as demanded [Companies] capitaliz[e] on the inattention and fear of consumers or on the disparity of power between them and the persons they bill to extract payments which, in many cases, probably are not rightfully theirs.

types of violations. For purposes of comparison, one can easily imagine how safety on the public roadways would plummet if those charged with enforcement needed to wait to accumulate a series of citations before acting on them.

Some companies argue that addressing individual cases is too resource-intensive. Experience proves to the contrary. In Iowa, from August 2003 until August 2006, the state public utility commission docketed each of the petitions for proceedings to consider civil penalties filed by the state consumer advocate, about four per month. About one case per year proceeded to hearing. The rest were resolved by other means, typically settlement on terms including a modest civil penalty. In many instances the complaints dried up following the enforcement activity. States should be encouraged to develop specific processes and procedures that work for them. The worst approach is not to seek to enforce, in a false belief that stopping the violations and securing compliance is not worth the effort.

Finally, because the vast majority of proceedings seeking civil penalties are settled, not pursued to a litigated conclusion, the information acquired from the cases generally cannot be reported as adjudicated fact. The information is rather what consumers report or allege. Because the companies commonly dispute the consumers' version of the facts, neither side's allegations can be reported as adjudicated fact. On the contrary, reflective of the industry's complexity, the relevant facts are often concealed in a proverbial black box. That is all the more reason why some of the cases should be pursued, and heard if necessary, in order to identify the sources of difficulty and secure appropriate corrections. Alternatively, because the primary responsibility for developing solutions lies with the industry, if the cases are allowed to proceed, and then

Verity, 124 F.Supp.2d at 203. This is a truism with which state consumer advocates are all too familiar.

settled upon payment of initially modest civil monetary penalties, the companies will have the needed incentive to make the needed corrections.

Kinds of allegedly unauthorized charges that appear on consumer phone bills. The information reported below is based on complaint experience in Iowa the past eight years. The information is largely confined to those complaint files in which the consumer advocate sought proceedings to consider civil monetary penalties, a fraction of the total.. A partial sampling of that subset of cases is provided.

Consumers have frequently complained of unauthorized charges for collect telephone calls. For example, in 2003, there were twenty-four Iowa complaints that 00 Operator Services a/k/a Talk Too Me Ltd. sent unauthorized bills in the amount of \$28.84 for a three-minute collect call from Las Cruces, New Mexico 505-524-4104. In 2005, there were eleven complaints that Access One Communications or Nationwide Connections billed consumers between \$5.00 and \$8.00 for a single domestic collect call. Similar complaints against other companies have been received with regularity, as recently as 2009. The companies commonly respond their systems are foolproof, that the charges could not be incurred unless the calls were accepted, as, for example, by pressing a “1.” Yet consumers are commonly prepared to testify to the contrary, and the number of such complaints, among other factors,⁹⁴ often lends credibility to their

⁹⁴ In one case, the collect call was supposedly placed to a fax line at a school at 4:12 a.m. on Sunday. In another, a collect call from a sex hotline was supposedly received at the home of a 65-year old grandmother who lived alone; the company produced a voice recording allegedly showing the calls were accepted by a male who identified himself as “Marcus Welby.”

complaints. At times, there is evidence the complaints are symptomatic of a larger problem,⁹⁵ or reason to suspect they might be.⁹⁶

There have been frequent complaints about unauthorized charges for other types of traditional telephone services, including billings for long distance calls,⁹⁷ directory assistance, 800 calls, 900 calls, calling card calls and repair services. In one case, the recipient of a calling card call was allegedly billed, without authorization, when the company determined the calling card had expired. In another, directory assistance charges were allegedly billed to a fax line. In a third, the company allegedly billed a \$95 “trouble” charge, listed as “other charges” on the bill, despite the fact no technician was sent to the premises, and despite the fact the trouble was on the company’s side of the demarcation. There have been repeated complaints, against companies large and small, of continued billing after termination of service. One such recent complaint had complications, including an early termination fee, arising out of the bundled sale of telephone and other services.

⁹⁵ In the case of Access One Communications and Nationwide Connections, FTC press releases dated March 15, 2005, September 26, 2006 and October 25, 2007, revealed “a massive fraudulent billing scheme” that collected “more than \$30 million in bogus collect call charges from millions of consumers.” *See* <http://www.ftc.gov/opa/2007/10/nationwide.shtm>.

⁹⁶ A California private class action against Evercom Systems, Inc. and T-Netix, alleging class members were incorrectly charged for collect calls from correctional facilities as a result of systematic defects in the companies’ inmate calling platforms, was settled on terms including free inmate call minutes up to \$400,000 in retail value to class members. The companies vigorously denied each and every allegation in the case. Securus Technologies, Inc., SEC Form 10-K, FYE-12-31-05, p. 26.

⁹⁷ In 2006 and 2007, almost three hundred Iowans lodged complaints with the state commission against Buzz Telecom. A significant number were cramming complaints, in which consumers alleged (and, frequently, local carriers confirmed) that Buzz Telecom had been unable to switch their long distance service due to a freeze but had nevertheless billed for the service. In 2007, a second wave of complaints, against the company that succeeded to the accounts of Buzz Telecom, Ultimate Medium Communications Corp. or UMCC, alleged billings for long distance service when in fact no service was provided, after service was terminated, for calls that were not placed and for calls that were previously billed and paid.

In 2004 and 2005, there were numerous “modem hijacking” complaints, against multiple companies, in which hackers apparently invaded consumer computers and placed long distance calls, supposedly to remote locations on the globe, often to pornographic websites, then succeeded in having the considerable charges billed to the consumer’s local phone bill. The Iowa consumer advocate sought penalties against a number of companies, among them proceedings on thirteen of the complaints against One Call Communications a/k/a Opticom a/k/a OCMC, Inc.⁹⁸ The facts in these cases resembled those in *Verity*, in which charges for access to pornographic websites were billed as long distance calls to Madagascar, when in fact the calls were “short-stopped” in London.

Unraveling the truth in the One Call cases proved complicated. When discovery was ordered, One Call commenced an unsuccessful federal court action seeking to thwart the state proceedings.⁹⁹ In the end, One Call was placed in receivership in Indiana. Although discovery was delayed, fragmented and never completed, it showed that the complaints were part of a larger picture. The discovery revealed that, from July through November 2004, One Call billed Iowans \$40,790.95 for calls to three United Kingdom numbers. Of the total billed, 55.9 percent was refunded to customers. As the court held in *Verity*, such evidence can support an inference

⁹⁸ One complainant wrote: “I am writing to inform you of a malicious computer virus that has installed itself on my home PC. This virus automatically installs a dial-up access program to a pornographic website, operated out of the United Kingdom. To date, I have received billings for three phone calls, via modem, to the United Kingdom, and a billing for pay-per-view access to the site. This virus appeared while I was on the computer so I can confirm that I never downloaded this program or authorized access to this site. This virus installs a shortcut icon on my desktop, showing the face of a young woman. This is quickly followed by a pop-up showing a pornographic image of the same woman and a paragraph with an ‘I accept’ button on the bottom right corner. I do not know what the paragraph says, as I attempt to delete the pop-up as soon as it comes up. I can say that I never clicked the “I Accept” button I have received billing for the phone numbers 442073350525 and 4420733584. These phone charges were billed by my local and long distance carrier, Qwest, billing on behalf of ‘USBI,’ who was billing on behalf of ‘One Call Comm’ and ‘TELLISS’ I have made four attempts to delete the program and its associated shortcut icon. After each deletion, the program re-installs itself.”

⁹⁹ See *OCMC, Inc. v. Norris*, 428 F.Supp.2d 930 (S.D. Iowa 2006).

that many of the complaints are true.¹⁰⁰ Following the enforcement activity, complaints of this character have largely dried up, at least for the time being, perhaps attesting to the efficacy of the enforcement effort, which was undertaken in Iowa in conjunction with efforts in other states (including Indiana, Missouri and Pennsylvania) and other nations, with the benefit of the FTC's pioneering work in *Verity*.

There has been a steady stream of complaints about unauthorized charges for voicemail services. One alleged billing to a fax line. There has also been a steady stream of complaints about unauthorized charges for Internet services of various types, including web hosting or web page services, e-mail services and online yellow page services.¹⁰¹ Consumers commonly report they have no need for voicemail or Internet services because they already have such services or, in the case of internet services, because they have no computer. Consumers continue to report billings for services they cannot identify.¹⁰²

¹⁰⁰ *Verity*, 335 F.Supp.2d at 479, 492, 498.

¹⁰¹ The Better Business Bureau gives this report regarding complaints about billings for an online yellow service by OYP Group: "The BBB file contains patterns of complaints and excessive volume of complaints since the file was opened in May 2007. The Bureau has processed over 600 complaints, most alleging misleading sales presentations and high pressure collection efforts. Most complainants claim they were unaware that they were ordering products, or were under the impression they were advertising in their local Yellow Page directory." *See* <http://search.buffalo.bbb.org/codbrep.html?ID=141318644>.

¹⁰² Among other difficulties, some of the smaller LECs reportedly lack the needed capabilities to accommodate all third-party billing and still give consumers adequate notice of who is billing them and for what.

Fraudulent and abusive practices. A significant number of cases, including the most recent cases, involve allegations of fraudulent and abusive practices. One class of cases, discussed below, involves allegations of altered third-party verification recordings. Another, also discussed below, involves allegations of bogus Internet signups for services billed to the local phone bill. The use of “welcome” notices, and the attempted reliance on them as proof of authorization, remains ubiquitous.¹⁰³

Allegedly altered recordings. It is common practice, not only in slamming cases but also in cramming cases, for companies to seek to prove disputed authorizations through use of third-party verification recordings, which are sometimes outsourced to foreign countries such as India. In many cases, as recently as 2009, consumers acknowledge the voice on a recording is theirs but are prepared to swear the recording has been altered or “dubbed,” that the exchange on the recording “had to have been pieced together” in such a way as to make it appear the charges were authorized when in fact they were not.¹⁰⁴

¹⁰³ More than a decade ago, the Commission eliminated the “welcome” notice as a verification method because it “fail[s] to provide adequate protection against fraud.” *Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 F.C.C.R. 1508 ¶¶59-61, 89 (1998). Such a notice contains no acceptance by the consumer. It requires no response or confirmation. It may or may not have been seen or read. It provides no authorization.

¹⁰⁴ One consumer wrote at length: “In answer to your questions, it is Mr. Bontrager’s (Gary’s) voice and he does remember the conversation. His version does not match the tape we received Gary was contacted by phone at Cooley Auto Sales by someone representing WebXites. In the ensuing conversation Gary explained our situation and what we were looking for in terms of information, stressing that he was not only not prepared to make a decision, but also not the decision maker. All of this was conspicuously missing from the recording as was any live voice from WebXites. Gary was told that he needed to answer a few automated questions, after which, he would be re-connected to the representative to discuss our specific needs and give WebXites enough information to give us a quote. After answering a handful of questions, the line went dead. Gary contends that the beginning of the tape, ‘the agreement,’ was never played. The question after one of the obvious audible ‘clicks’ on the tape, establishing him as a decision maker, and the disclaimer at the end of the tape regarding the ‘confirmation of agreement,’ did not occur and his responses were fabricated, or dubbed in, from answers to other questions. He remembered the first question asked was his name . . . , which was spliced in accepting the never played ‘confirmation of agreement’ at the end of the tape. The conversation was witnessed by David Yanecek He confirms Gary’s account of the conversation. We had no further contact with WebXites until receiving our telephone bill. We have received no goods or services. We have signed no contracts. WebXites never determined any of our needs (*i.e.*, memory, photography, links, e-mail, contract information, payment calculators, search engines) to be able to create a proposal, let alone a website for us. It is unfortunate that this type of billing is allowed as it easily may have been

A recent California lawsuit included these allegations:

In the summer of 2007, Inc21 received an influx of customer complaints, both from the actual customers and via several State Attorney Generals informing Inc21 that these customers never received a telephone call, did not agree to an Inc21 subscription, or had no recollection of ever being sent to a TPV service provider after the initial sales call. . . . Inc21 . . . determined it had been defrauded by call centers, brokers and possibly the TPV service provider. . . . Inc21 learned that the call centers employed fraudulent techniques, including, but not limited to, using digitized and recorded responses to the questions posed by the TPV. . . . [I]n most instances, no customer was actually on the telephone line during the TPV process. Instead, the call center would connect to the TPV and simply play the digitized or recorded responses in such a way that the TPV review would classify as a valid sale. The use of “doctored” audio was extremely difficult . . . to detect¹⁰⁵

These allegations reinforce the need to take consumer complaints about inauthentic TPV recordings seriously.¹⁰⁶

missed and inadvertently paid. It also has cost to have Gary and myself (Steve Cooley) take the time to rectify this situation by phone and letter It is also unfortunate that WebXites, if they do offer a legitimate service, made no attempt to offer it to Cooley Auto Sales, as since their initial contact with us we have created a website, and WebXites was never considered as an option, as there was never a complete interview or a proposal from them. This ordeal has cost my business more in man hours and aggravation than paying the bill, however out of principle, I refuse to support a company practicing ‘phone scams.’”

¹⁰⁵ *Inc21.com Corporation d/b/a GlobalYP.net v. Flora*, No. CV 08 2967, Complaint ¶¶ 28-30 (N.D. Cal., filed June 16, 2008).

¹⁰⁶ Consumers also report a variety of other problems with third party verifications. They frequently report being misled during the unrecorded solicitation portion of the call into believing they are speaking with a representative of their local phone company and by misrepresentations of various types regarding the purpose of the call or other material matters. For example, they report being falsely told the local phone company has overcharged them and they need to provide information in order to obtain a credit. *See FTC v. City West Advantage, Inc.*, 2008 WL 2844696 (D. Nev. 2008) (“[t]o the extent misleading statements were made as to the obligations arising as a result of consumers’ participation in the recorded verification session, any charges as a result of that participation could not fairly be considered informed”); *see also Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 5099 ¶ 42 (FCC 2003) (“A subscriber may be more easily misled in the telemarketing situation than in a face-to-face meeting”). Some company names, “Official Small Business Association,” for example, add to the confusion. Occasionally, consumers claim the recording is a complete fraud, that the voice on the recording is not theirs but rather someone pretending to be them. In some cases, it appears the verifier is not independent, and in others it appears the telemarketer stayed on the line during the verification portion of the call. *See* 47 C.F.R. § 64.1120(c)(3). In one case, a statement made by the consumer on the recording indicated both the telemarketer and the verifier had been speaking at the same time when the conversation was live (confusing the consumer), but the telemarketer’s voice had been suppressed and could not be heard on the recording. At times, the verifier’s voice is spoken too rapidly to enable the consumer to understand what is being said. There are cases in which companies claim to have third-party verifications but do not or cannot produce them.

Allegedly bogus Internet signups. In 1998, the U.S. General Accounting Office (now Government Accountability Office) expressed concern that legitimate authorizations can easily be subverted, that unscrupulous providers can use deceptive marketing practices and mislead consumers into signing an authorization, that a written authorization, or letter of agency, can be changed or forged.¹⁰⁷ A year later, the GAO reiterated that some companies or those acting on their behalf, use deceptive contests and surveys to lure consumers into switching their service and even falsify records to make it appear that consumers have agreed verbally or in writing to a switch.¹⁰⁸

There is nothing in reason or experience to suggest that alleged authorizations obtained over the Internet and billed to the local phone bill are any less susceptible to such fraud and abuse than authorizations obtained by other means. Indeed, the complaint experience in recent years suggests the Internet may be an even more fertile source of such mischief. Companies or those marketing their services, through surveys and otherwise, can entice consumers into providing information on one web page and then falsely claim the information was obtained as part of a valid order on another web page.

Many of the details of the complaints are similar. The company claims the consumer authorized a service over the Internet. It produces a list of identifying information concerning the consumer, such as name, address, phone number, e-mail address and mother's maiden name or birth date. The consumer denies having placed an order, at times also complaining of misleading surveys or questionnaires. Some of the cases involve minor children. In one case, it

¹⁰⁷ U.S. General Accounting Office, "*Telecommunications: Telephone Slamming and Its Harmful Effects*," Report No. GAO/T-OSI-98-11 (April 1998), p. 2.

¹⁰⁸ U.S. General Accounting Office, "*Telecommunications: State and Federal Actions to Curb Slamming and Cramming*," Report No. GAO/RCED-99-193 (July 1999), pp. 3-4.

appeared the telephone number the company claimed the consumer supplied when it alleged he completed an Internet sign-up for voicemail service on August 18, 2004 had not been the consumer's telephone number since March 24, 2003. In another case, an order supposedly placed in December 2008 came through an Internet provider the consumer had abandoned in May 2008. In a third case, the e-mail address, birth date and mother's maiden supplied as part of the alleged order were all incorrect.

The processes used for validating the orders are inadequate at best. One consumer writes: "It is . . . obvious that if I wanted to fill out the form and put say your phone number down I could easily do so . . . I could use your or any other number I wanted. Why are they not required to insure the actual Owner is giving the OK?" Another consumer writes: "I had to answer 5 personal questions to verify my identity in order to even ask about my bill, but someone else can sign me up and bill me for a service I've never heard of without any verification at all?" In a third case, the order was reportedly placed by a twelve-year-old in another household, thus illustrating the ease with which the processes presently in place allow the unauthorized charges to find their way to the consumer's local phone bill.

Several years ago, in considering the "modem hijacking" complaints discussed above, the Iowa Utilities Board directed inquiry to whether the billing companies had an ability to prevent the unauthorized charges.¹⁰⁹ A like inquiry is needed here. There is no good reason why a billing company, in consultation with its contracting partners if necessary, should not develop a means of validating that a person apparently placing an order is who the person claims to be.

¹⁰⁹ See *Office of Consumer Advocate v. One Call Communications, Inc.*, No. FCU-05-24, p. 6 (Iowa Util. Board, May 27, 2005), available at www.state.ia.us/government/com/util/docs/orders/2005/0527_fcu0524.pdf; *Office of Consumer Advocate v. MCI, Inc.*, No. FCU-05-56, pp. 4-5 (Iowa Util. Board, Oct. 17, 2005), available at www.state.ia.us/government/com/util/docs/orders/2005/1017_fcu0556.pdf.

This is an issue on which the LECs might be able to help. The companies should be free to employ any solution that achieves the desired end.¹¹⁰ The current processes do not.

III. CONCLUSION

For all the foregoing reasons, the Commission should incorporate NASUCA's comments and recommendations in any future decisions or actions in this proceeding.

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¹¹⁰ One local telephone company in Iowa advises it undertakes in these cases to call the consumer "to confirm that it is an authorized charge, as it has been the experience of the staff that many times these charges are found to be false." That is one solution. There may be others.

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