

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

In the Matter of	)	
	)	
Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")	)	CG Docket No. 11-116
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

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**INITIAL COMMENTS OF THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES  
IN RESPONSE TO NOTICE OF PROPOSED RULE-MAKING**

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The National Association of State Utility Consumer Advocates (NASUCA)<sup>1</sup> submits these initial comments in response to the notice of proposed rule-making (NPRM) issued July 12, 2011,<sup>2</sup> which seeks to address the long-standing problem of unauthorized charges on phone bills, commonly known as "cramming." In summary, additional consideration and additional measures beyond those set forth in the NPRM are needed in order to solve the problem.

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<sup>1</sup> NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states 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). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

<sup>2</sup> FCC-11-106. See 76 Fed. Reg. 52625 (Aug. 23, 2011).

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## **I. Introduction and Background**

As the Federal Communications Commission (FCC or Commission) observes, cramming is a significant and ongoing problem that has affected consumers for over a decade.<sup>3</sup> This observation is, if anything, an understatement. It is helpful in this context to underscore the nature, breadth and depth of the findings and observations of the 2010 decision of the court in *Federal Trade Commission v. Inc21.com Corp. (Inc21)*<sup>4</sup> and of the 2011 staff report and committee hearing of the U.S. Senate Committee on Commerce, Science and Transportation entitled “Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose.”<sup>5</sup>

### **A. *Inc21***

The court highlighted “the vulnerable underbelly of [the] widespread and under-regulated practice called LEC billing.” Over the years, this “fraud-friendly” practice, originally designed following the breakup of AT&T to allow local phone companies to present customers with a single telephone bill for both local and long distances fees, came to be used as a method of charging and collecting payments for a wide variety of services. From its inception, the practice attracted “fraudsters.”<sup>6</sup>

In response to escalating complaints of cramming, the Commission responded in the late 1990s by adopting principles and guidelines to help consumers understand their phone bills and to deter this fraudulent practice. The approach taken by the Commission

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<sup>3</sup> NPRM ¶ 1.

<sup>4</sup> 688 F.Supp.2d 927 and 745 F.Supp.2d 975 (N.D. Cal. 2010), *appeal pending*, No. 11-15330 (9<sup>th</sup> Cir.).

<sup>5</sup> See [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=d2ba4f0b-6e03-4b23-8046-7dc9ea0d25d2](http://commerce.senate.gov/public/?a=Files.Serve&File_id=d2ba4f0b-6e03-4b23-8046-7dc9ea0d25d2) (Staff Report). An unofficial transcript of the hearing is available on LexisNexis. See note 22 below.

<sup>6</sup> 688 F.Supp.2d at 929, 975 F.Supp.2d at 982.

was and remains, however, premised on the “dubious assumption” that consumers scrutinize their phone bills every month before paying them, and local phone companies are vigilant about allowing only authorized third-party charges to appear on their phone bills. Fraudsters can “easily exploit” this dubious assumption.<sup>7</sup>

The *Inc21* case involved millions of dollars of unauthorized charges tacked onto thousands of phone bills.<sup>8</sup> Telemarketing call centers had “fraudulently manufactur[ed] tens of thousands of invalid sales.” Nearly 97 percent of the “customers” had *not* agreed to purchase defendants’ products. Even more egregious, only five percent of them were even aware that they had been billed.<sup>9</sup>

The court’s findings are, among other things, a case study in most of the many failures of the third-party verification (TPV) process to fulfill its intended role as a reliable means of authentication. Some recordings were inaudible. Others involved charges supposedly authorized by minors. Only the “tail ends” of the conversations were recorded. Based on these “audio snippets,” it was impossible for reviewers to tell whether the recorded voice corresponded to that of the customer being billed.<sup>10</sup>

A staggering number of recordings included misrepresentations. There were numerous declarations from “customers” explaining a host of deficiencies: some

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<sup>7</sup> *Id.*, 688 F.Supp.2d at 929.

<sup>8</sup> *Id.*, 745 F.Supp.2d at 982.

<sup>9</sup> *Id.* at 982, 996, 1000-01 (emphasis the court’s). During execution of a search warrant, a document was found stating: “Never bill more than 29.95 per month. *The average small business sees this as phone charges and does not review for five months.*” *Id.* at 986 (emphasis the court’s). The defendants’ systems administrator testified: “I told them that I was – I was very uncomfortable with the fact that almost none of our customers knew they were our customers. And I believe at one point, I described the business model as ‘Gee, I hope we don’t get caught.’ And they thought that was funny. *They laughed.*” *Id.* at 997 (emphasis the court’s).

<sup>10</sup> *Id.* at 987-93.

declarations confirmed that call centers employed deceptive sales tactics; others reported the supposed “authorizations” came from individuals who either lacked authority or *did not exist*; still others stated the customers had expressly *rejected* the sales offer but were billed anyway.<sup>11</sup>

Perhaps most troublingly, many of the recordings had been “spliced” or “otherwise falsified.” The techniques employed by the call centers included, but were not limited to, digitally recording the consumer’s voice when the verifier was not on line, then playing the consumer’s voice in response to the verifier’s questions when the consumer was not on line, in such a way that the TPV review would classify the call as a valid sale.<sup>12</sup>

The final layer of evidence demonstrating the ineffectiveness of the TPV process in separating “invalid” sales from “valid” sales was the fact that in January 2010 the defendants asked one of their TPV companies to re-examine 10,434 recordings that had supposedly already been screened and “passed.” The TPV company concluded that 4,616 of the recordings actually failed. The court stated: “How these 4,616 customers ‘passed’ the TPV process in the first place is never explained. What is certain, however, is that defendants had been billing these customers on a monthly basis and would have continued to bill them if not for this lawsuit.”<sup>13</sup>

The record contained “mountains of undisputed evidence showing fraud at every step of defendants’ telemarketing process” and a “staggering amount of unauthorized

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<sup>11</sup> *Id.* at 990-92 (emphasis the court’s).

<sup>12</sup> *Id.* The use of “doctored” audio was extremely difficult to detect, particularly in light of the fact that the sales had been deemed valid by the TPV review provider. *Id.*

<sup>13</sup> *Id.* at 992.

charges” placed on the telephone bills of businesses, schools, governmental entities and individual consumers. In short, “the TPV process failed to contain the fraud.”<sup>14</sup>

The defendants also engaged an Internet marketing firm. It supposedly promised up to 2,000 “sales” per day. Again, the “sales” were “almost all illegitimate.” The defendants had sued the marketing firm for fraudulently generating over 78,000 sales, including sales to individuals without Internet access. According to the lawsuit, less than one per cent of the “customers” used the service. An expert survey confirmed: “nearly all of [the] sales had been fraudulently obtained.”<sup>15</sup>

The defendants also mailed “welcome” letters congratulating customers for signing up and warning them they needed to cancel within fifteen days in order to avoid the monthly fees. According to defendants, this “safeguard” was meant to protect customers from being billed for services they did not authorize. The evidence, however, told a different story. At its peak, the volume of “undeliverable” welcome letters reached between 100 and 200 per week, a volume equaled by welcome letters that were mailed back with notes stating “[p]lease cancel this” and “I did not sign up for this.”<sup>16</sup>

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<sup>14</sup> *Id.* at 991-93. Companies are responsible for the actions of their telemarketers. *Silv Communication Inc.*, FCC 10-80, 25 F.C.C.R. 5178, 2010 WL 1936599 (FCC 2010) ¶¶ 7, 14 & n. 18. See also *United States v. Phelps Dodge Industries, Inc.*, 589 F.Supp. 1340, 1359 (S.D.N.Y. 1984) (“corporation which employs an agent in a responsible position cannot say that the [agent] was only authorized to act legally”); *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]”); *In re Canales Complaint*, 637 N.W.2d 236, 240-41 (Mich. App. 2001) (in civil penalty proceedings under slamming statute, company cannot “hide behind the conduct of its employees or independent [contractors]”).

<sup>15</sup> 745 F.Supp.2d at 993-994. Although the *Inc21* court did not address the authentication processes supposedly used by the *Inc21* defendants to validate the Internet orders, the Commission in four recent cases involving four other companies found the processes “clearly inadequate.” See text accompanying notes 71-76 below.

<sup>16</sup> 688 F.Supp.2d at 930; 745 F.Supp. at 995-96. The Commission has long rejected the “welcome” letter as a legitimate means of verification. It recently reinforced its position in that respect. See text accompanying notes 82-84 below.

The “sweeping themes”<sup>17</sup> thus developed by the court – fraudulent TPVs, bogus Internet signups, welcome letters evidencing nothing more than a company’s unilateral claim that a consumer had authorized a service – are neither unique to the *Inc21* defendants nor new. NASUCA developed these same themes in its comments two years ago, based on earlier experience with numerous other companies spanning the better part of a decade.<sup>18</sup> The experience continues.<sup>19</sup>

**B. Senate Commerce Committee.**

Overlaying the findings and observations of the *Inc21* court are the similarly sweeping findings and observations in the report of the Senate Commerce Committee staff and at the Committee hearing. The report followed a year-long investigation, which included review of more than three million pages of documents.<sup>20</sup> It was issued July 12, 2011, the same day the Commission issued the NPRM. The Committee hearing was held the next day.

According to the report, cramming is a problem of “massive” proportions. Over the past decade, telephone customers appear to have been scammed out of *billions* of dollars through third-party billing on landline phones. With some exceptions, third-party billing appears to be primarily used by con artists and unscrupulous companies. The evidence suggests that the practice is causing extensive financial harm to all types of

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<sup>17</sup> *Id.* at 983.

<sup>18</sup> NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158 *et al.* (Oct. 13, 2009) at 53-57.

<sup>19</sup> See text accompanying notes 64-66, 78-80 below.

<sup>20</sup> Staff Report, “Unauthorized Charges on Phone Bills,” U.S. Senate, Committee on Commerce, Science and Transportation, Office of Oversight and Investigations (July 12, 2011) (“Staff Report”) at 7. See weblink at note 5 above.

landline telephone customers, from residences and small businesses to government agencies and large companies. The problem likely affects millions of telephone users.<sup>21</sup>

According to the report, telephone companies place approximately 300 million third-party charges, amounting to more than two billion dollars, on their customers' bills each year. While Committee staff could not determine the precise percentage of charges that are unauthorized,<sup>22</sup> the evidence overwhelmingly suggests the percentage is substantial. Staff spoke with more than 500 individuals and business owners; not one person said the charges were authorized. Staff found hundreds of egregious examples of cramming: Deceased persons were enrolled in so-called "services." Charges were billed to fax and data lines and to lines dedicated to fire alarms, security systems, bank vaults, elevators and 911 systems. Consumers were often subjected to abusive and deceptive marketing.<sup>23</sup>

According to the report, third-party billing on landline telephones "has largely failed to become a reliable method of payment that customers and businesses can use to conduct legitimate commerce." Telephone numbers have become a payment method akin to credit card numbers, but without the protections for credit card numbers, creating ideal conditions for fraud. Unlike credit card numbers, telephone numbers are available to anyone with a telephone directory. Some vendors apparently just lift names and

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<sup>21</sup> *Id.* at i-ii, 17-19. The Commission estimates that 15 to 20 million American households a year may experience cramming on their telephone bills. NPRM n. 149.

<sup>22</sup> "[I]t's very difficult to tell what are and are not [authorized charges]." Hearing, "*Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose*," U.S. Senate Committee on Commerce, Science and Transportation (July 13, 2011) (Senate Hearing) at 16 (testimony of Walter McCormick, Jr.). "If it's an online sign-up, for example, there's no way of telling whether the data that was used to charge somebody on their phone bill came from the consumer or it came from a data file that was obtained in some other way without any involvement of the consumer." *Id.* at 15 (testimony of Elliot Burg). Page references are to the Federal News Service, Inc. unofficial transcript, available on LexisNexis.

<sup>23</sup> Staff Report at ii, 11-17.

numbers from telephone directories in order to charge those accounts for non-existent services.<sup>24</sup>

According to the report, many third-party vendors are illegitimate and created solely to exploit third-party billing. The system is complicated. Many vendors are actually “front” companies for “hub” companies. The apparent purpose of hub companies is to game the system. If a large number of customers complain about a particular vendor, the hub company can shift new enrollments to another controlled vendor. The use of multiple vendors “dilutes” the complaint base. It makes it difficult to determine how much cramming is occurring and who is responsible for it. As of November 2010, the Better Business Bureau had given a “D” or “F” rating to at least 250 third-party vendors.<sup>25</sup>

The report concludes: “[T]hird party billing has made telephone customers targets for fraud . . . . [U]nless additional protections are put in place, millions of telephone customers will likely continue to face billions of dollars of unauthorized charges.”<sup>26</sup> NASUCA agrees.

The Committee hearing was replete with references by both witnesses and senators to “crooks,” “scams,” “frauds,” “deceptions,” “phantom billing,” “bogus charges” and “con artist stuff.” Walter McCormick, Jr., president and CEO of U.S.

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<sup>24</sup> *Id.* at i-ii, 2-3, 12, 44.

<sup>25</sup> *Id.* at iv, 9-10, 22-26, 35. After reaching the 250 figure, Committee staff stopped reviewing and counting; had they continued, the figure would have been higher. *Id.* n. 81.

<sup>26</sup> *Id.* at 44.

Telecom Association, acknowledged that cramming “remains a very, very significant, very pervasive problem.”<sup>27</sup>

Chairman Rockefeller spoke of a “pliant Congress, I guess” that in the late 1990s accepted industry claims that voluntary guidelines would be adequate, only to learn later that the problem had not been solved and that there had been no serious effort to solve it. He noted that local exchange carriers make money from third-party billing: Since 2006 the practice has generated more than \$650 million in earnings for AT&T, Qwest and Verizon.<sup>28</sup>

Senator Ayotte noted the Commission was issuing proposed new rules on cramming. She questioned whether the steps proposed in the NPRM would be sufficient to protect consumers and hold wrongdoers accountable. She spoke in terms of “fully addressing this issue” and of an “urgent need to find workable solutions that protect the public.”<sup>29</sup>

Elliot Burg, an assistant attorney general in Vermont, described a recent Vermont law banning third-party billing on wireline phone bills, with limited exceptions. He testified the bill was supported by local phone companies, passed both houses of the state legislature on voice votes, and had produced no negative feedback to date.<sup>30</sup> Attorney General Madigan of Illinois endorsed the measure.<sup>31</sup> So did Senator Rockefeller.<sup>32</sup>

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<sup>27</sup> Senate Hearing at 13.

<sup>28</sup> *Id.* at 2-3; see Staff Report at iii, 11.

<sup>29</sup> Senate Hearing at 3-4.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Id.* at 21.

Senate Ayotte asked Mr. McCormick to provide information explaining his organization's perspective on the consequences of such a ban.<sup>33</sup>

There was also discussion of cramming on wireless bills, which is currently a problem,<sup>34</sup> but not yet as significant as cramming on wireline bills.<sup>35</sup> Witnesses expressed concern that the pervasive problems with respect to bills for wireline service could spread to bills for wireless service, unless measures adequate to stop such a spread are adopted.<sup>36</sup>

Senator McCaskill questioned Mr. McCormick regarding the use of a PIN number. Mr. McCormick acknowledged the idea may be a very good one. He stated the industry currently has three methods of authentication: voice recordings, "double click" Internet methods and delivery of welcome packages "that are then accepted." The senator expressed concern that two of the three are very easy to do fraudulently. Mr. McCormick undertook to provide information regarding his organization's position on the issue.<sup>37</sup>

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<sup>33</sup> *Id.* at 15. Responses to this and other questions have not yet been made public.

<sup>34</sup> Staff Report at 6; NPRM ¶ 20.

<sup>35</sup> Of the cramming complaints received at the Commission from 2008 to 2010, 82 percent related to wireline consumers and 16 percent to wireless consumers. NPRM ¶ 53. For 2010, 90 percent of the cramming complaints received at the Federal Trade Commission were wireline complaints. *Id.*

<sup>36</sup> *Id.* at 18 (Madigan and Spofford testimony); see NPRM n. 118 ("Concerns about unauthorized charges on wireless bills . . . may well increase as more and more American consumers use their 'smartphones' to pay their phone as well as many other bills").

<sup>37</sup> *Id.* at 16-17. In NASUCA's experience, the "welcome" packages do not require acceptance, and all three of these forms of "authentication" are easy to do fraudulently. See text accompanying notes 54-84 below.

Senator Rockefeller observed that the problem ought to be a “monumental embarrassment” to the telephone companies. He said he plans to introduce legislation in the near future working with senators on both sides of the aisle.<sup>38</sup>

## **II. Needed Solutions for Cramming Problem**

The sweeping findings and observations of the *Inc21* court and the Senate Commerce Committee impel a change in the landscape. Given the breadth, depth and longstanding nature of the problem, the measures proposed in the NPRM, while in part worthwhile, are, standing alone, too weak. NASUCA respectfully offers the following observations and suggestions. Given the urgent need to find workable solutions that protect the public,<sup>39</sup> the Commission should give the matter all feasible priority.

### **A. Expand the Basis for Regulatory Action beyond Truth-in-Billing (All Modes of Telecommunications)**

The NPRM, although ostensibly targeting cramming, focuses primarily and perhaps exclusively on “assist[ing] consumers in detecting and preventing the placement of unauthorized charges on their telephone bills.” Each of the proposed regulatory revisions is a proposed revision to the Commission’s Truth-in-Billing rules. By these proposed revisions, the Commission hopes “to empower consumers to prevent, detect and resolve issues related to the long-standing problem.”<sup>40</sup>

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<sup>38</sup> Senate Hearing at 19, 21.

<sup>39</sup> See text accompanying note 29 above.

<sup>40</sup> NPRM ¶ 1, 5.

This disclosure-focused approach is far too timid. As NASUCA has urged before,<sup>41</sup> disclosure policy, although important, is not by itself an effective solution to the cramming problem.

The *Inc21* court expressed a like concern: “What defense counsel is essentially arguing is that fraudulent sales and unauthorized charges can somehow be cleansed of impropriety through post-hoc disclosures.” According to the court, “the burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with.” Nor should such consumers have to endure “the hassle of obtaining reimbursements,” including the “investments of time, trouble, aggravation and money,” “especially” when offending companies are “uncooperative in providing remedies.”<sup>42</sup>

In its recent enforcement activity against crammers, the Commission has not relied on the Truth-in-Billing rules. The Commission’s notices of apparent liability against Norristown Telephone Co., LLC, Main Street Telephone Co., Cheap2Dial Telephone, LLC, and VoiceNet Telephone, LLC,<sup>43</sup> were not premised on alleged violations of the Truth-in-Billing rules. They were premised on alleged violation of a substantive prohibition against unjust and unreasonable practices, which, as the orders stated, is what cramming is.<sup>44</sup>

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<sup>41</sup> NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158, *et al.* (Oct. 13, 2009) at 44-45.

<sup>42</sup> 745 F.Supp.2d at 1003-05. As similarly noted by the Senate Commerce Committee staff, despite the Truth-in-Billing requirements, it still takes minimal effort for a company engaged in cramming to place unauthorized charges on consumers’ bills, while it remains difficult for customers to find and remove those charges. Staff Report at i, 44

<sup>43</sup> See note 71 below.

<sup>44</sup> “The Commission has found that the inclusion of unauthorized charges and fees on consumers’ telephone bills is an ‘unjust and unreasonable’ practice under section 201(b).” *Norristown Telephone Co., LLC*, FCC 11-88, 26 F.C.C.R. 8844, 2011 WL 2433346 (FCC 2011) ¶ 9.

That substantive prohibition, set forth in statutory law, reads:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 201(b).

For present purposes, this preventative statute is a more effective anti-cramming tool than Truth-in-Billing disclosures. As the Commission seeks to invoke its rule-making power to combat the problem, the Commission should mirror the approach it has taken in its enforcement activity. It should recognize that disclosure policy is not the exclusive, the primary or even the more effective tool available. The Commission should specifically prohibit practices that are unjust and unreasonable, starting with an express regulatory prohibition against cramming.

**B. Prohibit Third-Party Billing with Limited Exceptions (Wireline)**

The Senate Commerce Committee, through its staff report and hearing, has made a compelling case for prohibiting third-party billing on wireline phone bills, with limited exceptions.<sup>45</sup> While it is possible Congress will enact such a prohibition, the Commission may well be able to provide this relief more quickly, and it should do so.

Given the findings in the Senate staff report, including the finding that third-party billing, with some exceptions, appears to be primarily used by con artists and unscrupulous companies,<sup>46</sup> it is proper to conclude that the practice of third-party billing

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<sup>45</sup> See NPRM ¶ 62.

<sup>46</sup> Staff Report at ii.

on wireline phones has become an unjust and unreasonable practice. The Commission therefore has authority to prohibit it under section 201(b).

The essential task is to determine and delineate what the exceptions should be. Senator Ayotte asked Walter McCormick for information regarding which third-party billings are legitimate.<sup>47</sup> The information provided in response to this inquiry has not yet been made public. NASUCA would like an opportunity to review that information before taking a position on the appropriate exceptions.<sup>48</sup>

An outright prohibition on third-party billing would more effectively eliminate cramming than would disclosure-based alternatives (such as requiring companies to disclose whether they do or do not offer a block) or a requirement that companies offer a blocking option.<sup>49</sup> Furthermore, unless blocks are set up as defaults, and unless and until consumers are victimized by con artists, many will not understand the reasons for, or go to the trouble of implementing, a block. A court observes: “[T]he difficulty with [reliance on blocks] is that it would require consumers first to suffer an injury and then to find and implement a solution to avoid being injured again.”<sup>50</sup>

Blocking also presents practical difficulties for consumers. Witness Susan Eppley reported spending about 15 hours, not including the time of her accounting department

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<sup>47</sup> Senate Hearing at 15.

<sup>48</sup> NASUCA has asked U.S. Telecom Association to release Mr. McCormick’s responses to the senators’ questions at this time, in order to permit their consideration during this rule-making proceeding.

<sup>49</sup> NPRM ¶¶ 40-44, 59, 61-61.

<sup>50</sup> *FTC v. Verity Internat’l, Ltd.*, 335 F.Supp.2d 479, 499 (S.D.N.Y. 2004).

and managers, setting up blocks on all of her company's accounts.<sup>51</sup> The blocking procedures at times do not work and do not stop the cramming.<sup>52</sup>

**C. Require Express Authorization for Third-Party Billing (All Other Modes)**

A prohibition on third-party billing may not be advisable at this time for modes of service other than wireline.<sup>53</sup> As the nation moves increasingly to modes of service other than wireline, however, it is essential that steps be taken now to protect wireless, VoIP, satellite and other consumers from the pervasive cramming that has long plagued wireline consumers.

With respect to all modes of service other than wireline, NASUCA urges the Commission to require that companies obtain the express authorization of a consumer before third-party charges may be incurred. This express authorization should be conspicuous and evidenced separate and apart from general contract language, as, for example, with a separate initial on a contract form.

The means by which such authorization may be evidenced need not necessarily be limited to a written signature or initial. However, if the industry uses other means of verification or authentication, the industry should bear the burden of demonstrating the reliability of such other means of verification or authentication. See D below.

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<sup>51</sup> Senate Hearing at 8.

<sup>52</sup> Staff Report at 33-35.

<sup>53</sup> "It may be that because of the availability of various wireless-related services, apps and ringtones and those kinds of things that can be billed to your wireless account, that people expect can be billed in that way, that an outright prohibition would not be the right way to go." Senate Hearing at 18 (Burg testimony).

**D. Prohibit Defective Forms of Authentication of Third-Party Charges (All Modes)**

One of the main reasons cramming has assumed such widespread and pervasive dimensions is that those who profit from unauthorized charges, including the local telephone companies and the billing aggregators, have accepted forms of “authentication” that do not authenticate a claimed authorization, at least not if “authenticate” is understood to mean having a reasonable capability to separate the invalid from the valid. Indeed, it appears that fraudsters and scammers have developed entire methods of operation based on the defective “authentication” processes.

**Third-party “verification” recordings.** The so-called “third-party verification” voice recording is a prime example. As indicated above, the *Inc21* court decision is a case study of most of the many failures of the third-party verification process to fulfill its intended role as a reliable means of authentication. In a few words, the process, in the court’s eyes, “failed to contain the fraud.” When the TPV company itself is forced to admit that 44 per cent of the “passed” recordings (4,616 of 10,434) should have *failed*, the infirmity of the process is laid bare.<sup>54</sup>

It would be one thing if the source of the problem were isolated to a single malefactor or handful of malefactors. The *Inc21* defendants, however, had contracted with and leveraged around *twenty* different independent telemarketing call centers, all but one located overseas in either India or the Philippines. Most of the call centers had been obtained through brokers, who would collect sales commissions for each “sale”

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<sup>54</sup> See text accompanying notes 10-14 above.

manufactured through the referral.<sup>55</sup> Even in that single instance, the source of the problem was widely and globally scattered.

More broadly, consumers have been complaining for years about “doctored” and otherwise invalid verification recordings. In Iowa, over the course of nearly a decade, the state consumer advocate has filed with the state utilities board scores of petitions seeking civil monetary penalties against numerous companies based on consumer complaints that, among other problems: recordings have been altered to make it appear an authorization was given when in fact an authorization was not given; the voices on the recordings are not the voices of the consumers who were billed; the words on the recordings were voiced too quickly to be understood or were otherwise inaudible; and the recordings contained material misrepresentations or defective free trial offer scripts.

Below is a sampling of what Iowans have stated in their complaints:

- This so-called tape of proof has been . . . edited . . . Randy B\*\*\*\*\* . . . is NOT authorized [to make] any changes . . . in regard to my account . . . I feel the cassette tape was totally a fake. When this call occurred, I could hear a real voice talking to him. This voice on the tape is computer automated which they have inserted Randys voice to fit their needs . . . I was sitting right next to Randy on the sofa when the phone rang . . . He was asked to hold for a few seconds. I asked him who was on the phone and he told me it was someone asking if he would make a donation to the ‘firemans ball’ . . . I asked him at this time why was he telling them his birthday and his mothers maiden name.. . . I told him as he was still on the phone that something was fishy . . . We knew then that the call was not legitimate . . . [Y]ou can just imagine the shock myself and Randy were in when we listened to this tape. We immediately knew it was the conversation Randy (on this end) had with the telemarketer he thought was for the firemans ball . . . This tape is definitely altered to try to justify their proof of change of phone service . . . I truly feel the cassette provided by UKI . . . is phony and was recorded illegally and edited to fit their needs.<sup>56</sup>
- The so-called “proof of authorization” is an apparently doctored audiotape. Although my receptionist’s voice is on this tape, and she does recall speaking with a telemarketer, she denies giving any consent. If you listen to the tape, it is easy to discern that Deb’s one word “yes” has been inserted into a “dummy tape.” Her inflection is exactly the same in all the sections where an answer has been falsely inserted, and the so-called conversation has a very choppy unnatural and contrived sound to it. It does not flow the way that a normal conversation would . . . I have purposely avoided having Internet access at my office. . . . My practice is located in a small town. I rely on word of mouth and in-office recalls. I do not feel that a website would be to my

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<sup>55</sup> 975 F.Supp.2d at 987.

<sup>56</sup> Complaint filed Oct. 3, 2002, file no. FCU-02-27 (UKI Communications, Inc.).

advantage. . . . Please prosecute this fraudulent telephone scam and falsified “proof of authorization.”<sup>57</sup>

- There is not a Ms. Dawn Thompson that has ever worked or been employed by me. She was called my so-called “office manager.” I am it, the owner. No one else is employed here.<sup>58</sup>
- We have listened to the tape you enclosed. There is no one named Monica Durham in our company. We do not recognize the voice on the tape. We did not authorize Business Network Long Distance to make any changes to our phone service.<sup>59</sup>
- After listening to the tape several times, it became very clear to me that the Official Small Business Association inserted their questions to Sharon B\*\*\*\*\*, our assistant. The answers they inserted regarding our mailing address and Sharon’s birth date were incorrect.<sup>60</sup>
- [W]e have reviewed the taped interview with Kevin C\*\*\*\*\*. The tape is fraudulent. Kevin will swear that the recorded conversation never took place. The giveaway is that Kevin is project manager and head of the drafting department. He has never been or ever uses the term “administrative assistant” when referring to himself . . . . The tape refers to “internet dial-up services.” Why would we order “dial-up,” when we have had high speed DSL for years?<sup>61</sup>
- They played us the tape where Sandy supposedly authorized the service and you could tell the tape was doctored. Sandy denied having the conversation as it was presented on the tape.<sup>62</sup>
- We have listened to the cassette tape provided, and agree it is Kim M\*\*\*\*\*’s voice, but we feel there has been some “dubbing” as the woman’s voice on the tape was nothing she heard when she had the phone conversation – only the man’s voice, which has a strong accent, was what she heard. She remembers she thought she was verifying our information for a free yellow pages listing, and when they asked if she would be interested in the website, she told them no. She said he told her he would have to connect her with his supervisor to confirm that she did not want that. She then had to go over all the information again, but thinks she may have hung up because it was taking so long. We have no record of receiving a “Welcome Aboard” letter as follow-up. Kim remembers that she did not want to give her birthdate, so he told her to just say “01/02” which is what she said. We also question how he kept asking her to repeat her answer “yes.” She feels sure there was no mention of the cost per month, as she would have had no authority to approve those charges and therefore would not have accepted any charges for the service offered. Kim’s title is Personnel Coordinator, and she cannot think why she would have said she was Personnel controller.<sup>63</sup>
- They played a recording for me that was supposed to be me authorizing these charges. At the beginning of the recording it did sound like me stating my name, company name and address.

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<sup>57</sup> Complaint filed June 9, 2003, file no. FCU-03-44 (Mercury Internet and Wireless Service).

<sup>58</sup> Complaint filed Dec. 15, 2003, file no. FCU-04-13 (National Access Long Distance).

<sup>59</sup> Complaint filed June 23, 2004, file no. FCU-04-38 (Business Network Long Distance, Inc.).

<sup>60</sup> Complaint filed Nov. 20, 2008, file no. C-2008-0134 (Official Small Business Ass’n, Inc.).

<sup>61</sup> Complaint filed Apr. 10, 2009, file no. FCU-2010-0011 (Online Business Ass’n, Inc.).

<sup>62</sup> Complaint filed June 29, 2009, file no. FCU-2010-0011 (FastWebPages.com).

<sup>63</sup> Complaint filed July 16, 2009, file no. FCU-2011-0005 (C-2009-0216) (BestWebUSA.com).

Then toward the end it asked me for position and the response was “office manager.” I am the owner and do not use that for my title. But the worst is that it then asked for me to state either my birth date or last four of my social, the response was “0413.” That is neither my dob nor last four of social. These last responses did not sound like me. And the last response authorizing \$39.95 charge to phone bill is just a short “yes” and I know I never agreed to any charge. It appears the tape has been altered.<sup>64</sup>

- My wife denies ever having this conversation . . . . I believe changing my account was against the law and . . . taping a fraudulent conversation is, too.<sup>65</sup>
- My wife and I have cell phones, which we use for long distance and I am shocked that I can just be billed for a service like this without any prior consent or approval . . . . The [recording] is completely doctored . . . . The conversation never happened . . . .<sup>66</sup>

An additional excerpt was included in NASUCA’s comments two years ago.<sup>67</sup>

As indicated by the results of the *Inc21* investigation,<sup>68</sup> the consumers who lodge complaints represent only a tiny fraction of the consumers who are actually victimized by unscrupulous cramming practices. Results in other similar investigations suggest a like conclusion.<sup>69</sup> As stated at the Senate hearing, “you have a huge disparity between the number of complaints that are filed and the number of victims that you have.”<sup>70</sup>

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<sup>64</sup> Complaint filed Nov. 2, 2009, file no. C-2009-0279 (Internet Business Association).

<sup>65</sup> Complaint filed Aug. 10, 2010, file no. C-2010-0080 (Teledias Communications, Inc.).

<sup>66</sup> Complaint filed May 15, 2011, file no. FCU-2011-0018 (Cytel, Inc.).

<sup>67</sup> NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158 et al. (Oct. 13, 2009) at 53-54 n. 104.

<sup>68</sup> See text accompanying note 9 above.

<sup>69</sup> In 2005, a relatively small number of Iowans, each disputing a bill between \$5.00 and \$8.00 for a single domestic collect call, lodged complaints against two companies. A Federal Trade Commission press release later revealed a “massive” fraudulent billing scheme that collected more than \$30 million in bogus charges from millions of consumers. “Phone Bill ‘Cramming’ Defendant Settles FTC Charges,” at <http://www.ftc.gov/opa/2007/10/nationwide.shtm> (FTC 2007). In 2004 and 2005, the Iowa consumer advocate sought civil penalties on 13 “modem hijacking” complaints. See text accompanying note 100 below. Discovery later revealed that, over a five-month period, the company had billed Iowans more than \$40,000 for calls to three United Kingdom numbers. Of the total billed, 55.9 percent was refunded to customers. Senator Klobuchar reported that Cheap2Dial charged 2,567 Minnesotans for long distance service fees, but only 9 of them used the service. Senate Hearing at 4.

<sup>70</sup> Senate Hearing at 14 (Burg testimony).

**Internet “authentication” processes that lack needed security features.** In four recent notices of apparent liability, the Commission addressed the Internet “authentication” processes of Norristown Telephone Co., LLC, Main Street Telephone Co., Cheap2Dial Telephone, LLC and VoiceNet Telephone, LLC. In each case, the Commission found the processes “clearly inadequate” to confirm that the person who “enrolled” in the company’s plan, *i.e.*, the one who was charged for the service, in fact authorized the service.<sup>71</sup>

According to the Commission, the complainants consistently stated they did not sign up for the company’s service and did not have any contact with the billing company prior to discovering the charges. In most cases, they stated they did not even know the person whom the company alleged had authorized the service.<sup>72</sup> The Commission found no evidence that, as the companies suggested, consumers commonly signed up for the service but then did not read the information presented to them during the sign-up process or had forgotten that they signed up. The Commission similarly found no evidence that someone else in the household had signed up for the service.<sup>73</sup>

In many cases, the name and address in the company’s enrollment records did not match the name and address of the customer who was billed for the service. Often, the e-mail address used to sign up for the service did not belong to the customer who was

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<sup>71</sup> *Norristown Telephone Co.*, LLC, FCC 11-88, 26 F.C.C.R. 8844, 2011 WL 2433346 (FCC 2011) ¶ 14; *Main Street Telephone Co.*, FCC 11-89, 26 F.C.C.R. 8853, 2011 WL 2433347 (FCC 2011) ¶ 16; *Cheap2Dial Telephone, LLC*, FCC 11-90, 26 F.C.C.R. 8863, 2011 WL 2433348 (FCC 2011) ¶ 18; *VoiceNet Telephone, LLC*, FCC 11-91, 26 F.C.C.R. 8874, 2011 WL 2433349 (FCC 2011) ¶ 16. See also *Office of Consumer Advocate v. Iowa Util. Bd.*, 2011 WL 1817846 (Iowa App. 2011) (“Cheap2Dial may have provided some easily obtainable identification information, but there was no evidence Arechavaleta actually authorized the service”; “[f]urthermore, much of the information provided by Cheap2Dial was disputed”).

<sup>72</sup> *Norristown* ¶ 10 & n. 31; *Main Street* ¶ 10 & n. 37; *Cheap2Dial* ¶ 11; *VoiceNet* ¶ 11 & n.28.

<sup>73</sup> *Norristown* ¶ 14; *Main Street* ¶ 16.

billed for the service. In fact, “[t]he only information that consistently belonged to the customer whom the Company charged was, in fact, his or her telephone number.” It thus appeared “that any validation procedure . . . performed simply verified the general existence of the telephone number and that the number was a working number – and in no way verified that an enrollee actually in any way intended to subscribe to [the] service.”<sup>74</sup>

Moreover, much of the supposedly authenticating information could be obtained “through the purchase of aggregated lists of consumers that are commercially sold or from free internet websites such as whitepages.com.” There was nothing in the process that “prevent[ed] the individual who [was] inputting the data from using someone else’s identifying information or otherwise falsifying that data.”<sup>75</sup> Two companies claimed that one of the ways they validated the orders was to verify that the IP address from which the order came was within 100 miles of the customer’s billing address!<sup>76</sup>

Again, findings like these are neither new nor isolated to a handful of companies. On the contrary, consumers have been complaining for years about bogus Internet signups. Beginning in 2003 and continuing through 2011, the Iowa consumer advocate has filed petitions seeking civil monetary penalties against no fewer than 21 different companies, based on complaints of this type.

The following Iowa complaints are illustrative and corroborate the Commission’s findings in the Norristown, Main Street, Cheap2Dial and VoiceNet cases:

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<sup>74</sup> *Norristown* ¶ 14; *Main Street* ¶ 16; *Cheap2Dial* ¶¶ 12-16, 18; *VoiceNet* ¶ 16.

<sup>75</sup> *Norristown* n. 20; *Main Street* n. 41; *Cheap2Dial* n. 29; *VoiceNet* n. 30.

<sup>76</sup> *Cheap2Dial* ¶¶ 8, 12, 18; *VoiceNet* ¶¶ 8, 16.

- These services were not ordered by Mike or me. Mike rarely uses a computer and he travels with his work and was in St. Louis with no computer at the time these charges were originally activated. I asked [the customer service representative] about the . . . charge . . . and she said it was made from Kingston College. (We don't even know where that college is). The attachment they included with their response . . . has our state as Indiana (and it is Iowa) and an e-mail address we have never seen. We do not have a yahoo account. We don't understand who ordered this service.<sup>77</sup>
- In answer to your questions . . . , my husband or I did NOT visit the website [www.savingsfare.com](http://www.savingsfare.com), complete an online registration or receive an e-mail confirming the service. It wasn't until I received a charge on my bill that I was even aware such a company existed. In looking at [the response from the company], it lists our correct address and phone number, but the e-mail listed is not ours, the IP address differs from ours and the maiden name is incorrect.<sup>78</sup>
- That [e-mail] account was one we originally set up approximately fourteen years ago . . . . [S]he [has since] moved out of the house and established her own account. The date of birth provided to cmiprofiles is not Catherine's. Also, her last name is no longer R\*\*\*\*\* and that is not her address or phone number, though they were the ones originally on that account.<sup>79</sup>
- I am 90 years old. I do not use a computer, therefore, I could not have authorized such a charge "online." I received my phone bill with these charges out of the clear blue sky. It was a good thing I checked my bill over carefully – some folks may not have noticed the unauthorized charges. I do not know what these charges are for and no one has been able to tell me what they are for either.<sup>80</sup>

The last of these consumers concluded: "I have been told an individual can give any phone number to purchase these services. This practice is an inviting environment for dishonesty. There has to be a better way!"

NASUCA can only stress once again what it said in its comments two years ago:

[T]he complaint experience in recent years suggests the Internet may be an even more fertile source of . . . mischief [than the sources of mischief addressed in the GAO's 1999 report] . . . . Some of the cases involve minor children. In one case, it 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 . . . .

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<sup>77</sup> Complaint filed May 21, 2009, file no. C-2009-0178 (aDigitalVillage.com).

<sup>78</sup> Complaint filed Oct. 13, 2009, file no. C-2009-0270 (BillviaPhone, LLC).

<sup>79</sup> Complaint filed Jan. 22, 2010, file no. C-2010-0005 (Headwind Media, Inc.).

<sup>80</sup> Complaint filed Oct. 21, 2010, file no. FCU-2011-0023 (US Music Find).

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 . . . .

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. 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. The current processes do not.<sup>81</sup>

**Unilateral “welcome” letters.** The use of “welcome letters,” “welcome packages,” and “welcome e-mails” is ubiquitous in NASUCA’s experience, commonly in tandem with a TPV recording or a claimed Internet authorization. Invariably, such after-the-fact communications require no response or acknowledgment or acceptance from the customer. If and when they are sent, they may or may not have been seen or read. The Commission made similar observations in the recent *Norristown, Main Street, Cheap2Dial* and *VoiceNet* cases.<sup>82</sup>

Years ago, the Commission eliminated the welcome letter as a verification method for telecommunications carrier changes. It did so because the welcome letter “does not provide evidence, such as a written signature or recording, that the [consumer]

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<sup>81</sup> NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158 *et al.* (Oct. 13, 2009) at 55-57 (footnotes omitted).

<sup>82</sup> “The consumer is not required to confirm that the [“welcome”] emails were received or to otherwise respond to the emails before [the company] begins charging for the service.” *Norristown* ¶ 8, *Main Street* ¶ 8, *Cheap2Dial* ¶ 9; *VoiceNet* ¶ 9.

has in fact authorized a carrier change,” because it does not “prevent carriers from sending welcome packages to consumers . . . from whom they have not obtained valid consent,” and because it “fail[s] to provide adequate protection against fraud.”<sup>83</sup>

The Commission reinforced this conclusion in the *Norristown, Main Street, Cheap2Dial* and *VoiceNet* orders, again emphasizing the inadequacy of the current processes:

The process does not require any action on the part of the consumer to confirm either that the consumer received the email or that the consumer signed up for or agreed to be charged for [the company’s] service. Indeed, many of the complainants assert they never received any emails or other communications from [the company] regarding its long distance service. This would not be surprising given that, as noted above, the email address in [the company’s] records is generally not the consumer’s. Even if a consumer did, in fact, receive this welcome material, it is possible, if not probable, that he or she might reasonably discard the material as “junk” mail or spam, given that the consumer did not create a relationship with, or even know of the existence of, [the company].

On these facts, therefore, “if a consumer did not authorize the company’s service, the mere act of sending emails without requiring a response from the consumer is not sufficient ‘verification.’”<sup>84</sup>

**Prohibition.** In light of the foregoing, the time has come for the Commission to propose and adopt a regulation prohibiting the defective forms of authentication or verification discussed above. Such a regulatory prohibition is needed in addition to, and *not* as an alternative to, a prohibition on third-party billing, as recommended above, because NASUCA’s recommended prohibition on third-party billing does not extend to

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<sup>83</sup> *Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 98-334, 14 F.C.C.R. 1508, 1998 WL 1064770 (FCC 1998) ¶¶ 59-61, 89.

<sup>84</sup> *Norristown* ¶ 15, *Main Street* ¶ 17, *Cheap2Dial* ¶ 19; *VoiceNet* ¶ 17.

modes of service other than wireline service and because, even for wireline services, the recommended prohibition acknowledges the need for limited exceptions.

There is no justification for these defective forms of authentication with respect to any mode of service or with respect to wireline billings that are excepted from a general prohibition on wireline third-party billing. A prohibition on defective forms of authentication will address the concern about the migration of problems from wireline billings to billings for other modes of telephone service.<sup>85</sup>

Indeed, with the movement by consumers in recent years away from wireline service and toward other modes of service, coupled with the expectation that such movement will continue, Commission action with respect to other modes of service will probably in the long run prove to be the Commission's more enduring contribution and solution. Title I authority should be invoked as necessary, where Title II authority does not clearly apply.<sup>86</sup>

In considering such a prohibition on defective forms of authentication, the Commission should also address and reach the conduct of companies that provide billing and collection services for third parties and of companies that submit charges for inclusion on telephone bills. Again, Title I authority should be invoked as necessary.<sup>87</sup>

The regulatory prohibition here urged is a focused one. It seeks only to prohibit forms of authentication that have proven themselves to be highly susceptible to fraud and otherwise defective. Such a prohibition should have the beneficial effect of spurring the

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<sup>85</sup> See note 36 above.

<sup>86</sup> See NPRM ¶ 85.

<sup>87</sup> See *id.*

industry to adopt forms of authentication that are not defective, including the use of PIN numbers as suggested by Senator McCaskill. Better forms of authentication are a “win-win” solution for everyone except those who seek to profit from ill-gotten gains.

**E. Prohibit Fraudulent and Deceptive Marketing (All Modes)**

In 1998, the U.S. Government Accountability Office (formerly General Accounting Office) (“GAO”), addressing the related problem of slamming, expressed dismay that unscrupulous providers can use deceptive marketing practices and mislead consumers into providing an authorization.<sup>88</sup> A year later, addressing both cramming and slamming, the GAO reiterated that some companies, or those acting on their behalf, use deceptive contests, surveys and telemarketing to lure consumers into switching their service.<sup>89</sup>

For years, consumers have complained with troubling regularity that telemarketers have misrepresented material facts, often blatantly.<sup>90</sup> These complaints persist.<sup>91</sup> The misrepresentation problem has also arisen in other contexts, such as Internet-based marketing.<sup>92</sup>

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<sup>88</sup> GAO, “*Telecommunications: Telephone Slamming and Its Harmful Effects*,” Report No. GAO/T-OSI-98-11 (April 1998), <http://www.gao.gov/archive/1998/os98011t.pdf>, p. 2.

<sup>89</sup> GAO, “*Telecommunications: State and Federal Actions to Curb Slamming and Cramming*,” Report No. GAO/RCED-99-193 (July 1999), <http://www.gao.gov/archive/1999/rc99193.pdf>, pp. 3-4.

<sup>90</sup> The problem reached epidemic proportions in 2006, when one of the most notorious slammers and crammers, Buzz Telecom, operating in many parts of the nation, plagued a distressingly large number of consumers, especially seniors, with reportedly fraudulent sales calls and unauthorized billings. Many of the complaints alleged false statements by telemarketers that the telemarketers represented the consumer’s local telephone company and false promises that consumers would realize savings if they switched their long distance service. Even when the switches did not materialize, because the consumers had frozen their accounts, the charges appeared on the bills anyway. See, e.g., Press Release, Iowa Office of Attorney General, “Consumer Advocate: Beware of Long Distance Charges by ‘Buzz Telecom’” (Dec. 13, 2006), [http://www.state.ia.us/government/ag/latest\\_news/releases/dec\\_2006/buzz.html](http://www.state.ia.us/government/ag/latest_news/releases/dec_2006/buzz.html).

<sup>91</sup> In a recent Iowa complaint, a consumer alleged that a telemarketer misrepresented himself as being from Qwest and as needing to obtain information from the consumer in order to authorize a switch

The Commission recently addressed the problem in an enforcement proceeding, concluding that unjust and unreasonable marketing practices violate 47 U.S.C. § 201(b).<sup>93</sup> Again, the Commission’s rule-making efforts should parallel its enforcement efforts. The Commission should propose and adopt a rule to the effect that misrepresentations and deceptive conduct in the course of marketing a communications service, or a product or service to be included on a communications bill, is unlawful.

Such a rule should extend to all modes of service. Title I authority should be invoked as necessary.

**F. Adopt the Proposed Regulation on Better Separation of Third-Party Billings (All Modes)**

The NPRM proposes to add a new requirement that charges on wireline bills from third-party vendors that are not carriers be placed in a section of the bill that is separate

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from Qwest to Qwest merger partner CenturyLink. Complaint filed July 26, 2011, file no. FCU-2011-0024 (Preferred Long Distance, Inc.).

<sup>92</sup> As a means of inducing an Iowan’s consent to an e-mail service, an Internet offer displayed a large-type caption “4 FREE Airline Tickets.” The fine print stated: “To qualify for the ticket promotion, you must . . . stay at a participating luxury hotel, resort or resort condominium at the standard rates the minimum number of nights (presently 4-10).” Complaint filed Mar. 3, 2005, file no. FCU-05-22 (Member’s Edge, LLC). See *FTC v. Standard Education Soc.*, 302 U.S. 112, 116 (1937) (“[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced”); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7<sup>th</sup> Cir. 1988); *Book-of-the-Month Club v. FTC*, 202 F.2d 486 (2d Cir. 1953).

<sup>93</sup> *Silv Communication Inc.*, FCC 10-80, 25 F.C.C.R 5178, 2010 WL 1936599 (FCC 2010). In the *Silv* case, a dozen complaining consumers contended that telemarketers had falsely represented that the consumers were changing to another plan offered by their current carrier or that the caller was verifying information regarding their current account. For example, complainant Hohe stated she was told that the telemarketer was from AT&T and that AT&T was lowering her long distance rates, while complainant Murray stated he was told that the caller was from Qwest and was offering a lower rate. See also *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 authorized as a result of that participation could not fairly be considered informed”; the “testimony suggests that the net impression of the call was misleading”); *Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996*, FCC 03-42, 18 F.C.C.R. 5099, 2003 WL 1209690 ¶ 42 (FCC 2003) (“[a] subscriber may be more easily misled in the telemarketing situation than in a face-to-face meeting”).

from charges assessed by carriers and their affiliates.<sup>94</sup> NASUCA supports this proposed new requirement for the reasons stated by the Commission.

**G. Consider the Federal Trade Commission’s Recommendations regarding Advertising Disclosures (All Modes)**

The Federal Trade Commission (“FTC”), in its comments two years ago, recommended that price advertisements for communications services reflect the price the consumer actually pays – including all taxes, fees and associated charges. The FTC also recommended that the Commission consider whether standardized information disclosures would facilitate consumer understanding of competing communications service offers.<sup>95</sup> These are sound recommendations, well grounded in the confused experience of countless consumers. They come from a source that is especially well-equipped to offer them. The Commission should consider and adopt them.

**H. Enlist the States in Complaint Resolution and Enforcement Activity (All Modes)**

Even after the Commission adopts new rules, regardless of how comprehensive and sound they seem at the time, new scams and difficulties likely will emerge. Therefore, complaint resolution and enforcement activity will continue to be essential to protect consumers. In that regard, the proposed regulation would require that telephone bills and carrier websites (i) conspicuously state that the consumer may submit inquiries and complaints to the Commission and (ii) include the Commission’s telephone number

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<sup>94</sup> NPRM ¶¶ 45-46 and proposed rule 47 C.F.R. § 64.2401(a)(2).

<sup>95</sup> FTC, Comments in Response to Notice of Inquiry, No. CG 09-158 *et al.* (Oct. 28, 2009).

and website. The carrier's website would also need to include a direct link to the Commission's webpage for filing complaints.<sup>96</sup>

NASUCA's thinking regarding such a proposed rule has evolved over the past two years. Adopting the proposed rule in its present form would probably have the unintended consequence of overwhelming the Commission with complaints. Worse, it would probably have the unintended consequence of directing complaints away from state utility commissions and state attorney general offices and hence thwarting their efforts to protect the citizens of their states.

The states have long played the central front-line role in receiving complaints and assisting a resolution of them. For example, over the last decade, the Iowa Utilities Board's informal complaint process under state law has resolved hundreds if not thousands of wireline cramming and slamming complaints, commonly by securing credits for consumers who were unable to secure them on their own.<sup>97</sup>

The states have also long played a central role in enforcement. From 1996 through 1998, in actions affecting nearly 400,000 consumers, state public utility commissions and state attorneys general ordered wireline 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.<sup>98</sup>

This role continues. For example, beginning in 2002 and continuing to the present, the Iowa consumer advocate has secured civil monetary penalties under state law

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<sup>96</sup> Proposed rule 47 C.F.R. § 64.2401(d)(3).

<sup>97</sup> See Iowa Code §§ 476.3 (2011) (complaint process), 476.103 (2011) (prohibiting cramming).

<sup>98</sup> 1999 GAO Report, see note 89 above, p. 14.

in over 200 instances of alleged cramming and slamming violations by more than 100 different companies. The enforcement effort appears to have reduced substantially the volume of such complaints in the state.

At times, the coordinated enforcement efforts of multiple states, as well as coordination with federal authorities, including the FTC, have proven essential in thwarting unlawful activity. In 2003, for example, enforcement efforts in multiple states ended the practice of a company known as “00 Operator” of billing bogus charges to numerous consumers for collect calls that the consumers never received or accepted.<sup>99</sup> In 2005 and 2006, enforcement efforts in multiple states played a leading role in stopping widespread “modem hijacking” practices, in which hackers apparently invaded consumer computers and placed long distance calls, supposedly to remote locations on the globe, often to pornographic websites, and then succeeded in having the considerable charges billed to the consumer’s local telephone account.<sup>100</sup> In 2006 and 2007, enforcement efforts in multiple states effectively ended the widely injurious operations of Buzz Telecom.<sup>101</sup>

The Commission should encourage state complaint processing and enforcement efforts such as these. In order for such efforts to continue, however, it is essential that the

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<sup>99</sup> See *Office of Consumer Advocate v. 00 Operator Services*, No. FCU-03-38 (Iowa Util. Bd. 2003), [http://www.state.ia.us/government/com/util/docs/orders/2003/1022\\_fcu0338.pdf](http://www.state.ia.us/government/com/util/docs/orders/2003/1022_fcu0338.pdf).

<sup>100</sup> See NASUCA, Initial Comments in Response to Notice of Inquiry, No. CG 09-158 *et al.* (Oct. 13, 2009), pp. 51-52. In Iowa, when the billing companies sought to avoid accountability for the allegedly unauthorized charges by claiming the billings resulted from third-party frauds, the Iowa Utilities Board directed inquiry to whether the billing companies had an ability to prevent the fraud from victimizing consumers. See *Office of Consumer Advocate v. One Call Communications, Inc.*, No. FCU-05-24 (Iowa Util. Bd. 2005), [http://www.state.ia.us/government/com/util/docs/orders/2005/0527\\_fcu0524.pdf](http://www.state.ia.us/government/com/util/docs/orders/2005/0527_fcu0524.pdf), p. 6. Other states, including Indiana, Missouri and Pennsylvania, were also active in the effort to bring this pernicious practice to an end. The FTC also played a leading role. See *FTC v. Verity Internat'l, Ltd.*, 335 F.Supp.2d 479 (S.D.N.Y.2004), *aff'd in relevant part*, 443 F.2d 48 (2d Cir. 2006).

<sup>101</sup> See note 90 above.

complaints either be made in the first instance to the states or, if made in the first instance to the Commission, referred upon receipt to the states, or to those states that elect to process them.<sup>102</sup>

The Commission observes in a footnote: “Some states also require the inclusion on customer bills of the contact information of their state utilities commissions . . . . In these states, carriers would be required to list both the state and FCC contact information.”<sup>103</sup> This observation does not adequately address NASUCA’s concerns about the potential impact of the proposed regulation on states’ consumer protection efforts. Some states may have effective complaint resolution and enforcement protocols but may not have statutes or rules mandating disclosure of contact information on bills or websites. In such states, adoption of the proposed regulation in its current form could potentially all but grind the states’ efforts to a halt.

Even when states do have such laws or rules, the mere listing on the bills and the carrier websites of the two alternative jurisdictions with which a consumer might lodge a complaint will not result in the consistent lodging of complaints with either jurisdiction. It will therefore inhibit the monitoring and tracking of emerging problems by either.

Finally, and perhaps most importantly, complaint resolution involves more than monitoring and tracking emerging problems. It involves information gathering from both consumer and company and an effort to produce a resolution. At times, enforcement activity is also needed.

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<sup>102</sup> Senate Hearing at 14 (Burg testimony) (“to have that complaint base is a prerequisite to good law enforcement action”).

<sup>103</sup> NPRM n. 111.

Federal enforcement activity has proven to be exceedingly beneficial.<sup>104</sup> It is not, however, enough. Experience shows that the day-to-day and garden variety complaint processing function, and most of the enforcement activity, is better performed at the state level, when the state is willing and able to perform it. The states often have the available personnel. They are closer to the victims upon whom the deleterious effects of the offending practices are visited. As an indication, two of the witnesses before the Senate Commerce Committee, and six of the speakers at the FTC’s cramming forum earlier this year, were from state offices.

The NPRM seeks comment on how to coordinate the sharing of complaints and information with the states.<sup>105</sup> In the related area of slamming, the Commission has upon receipt referred complaints to states that have elected to process them, while itself processing only complaints from states that have elected not to process them. This procedure should be carried over to cramming. Preferably, the procedure would be set out explicitly by rule.

### **III. Conclusion**

This rule-making proceeding, and any further rule-making proceedings that may grow out of it, offer the Commission an historic and landscape-changing opportunity both to protect consumers and to support legitimate commerce, while at the same time cracking down on illegitimate, dishonest and widely injurious activities that masquerade as legitimate commerce. There are “win-win” solutions that benefit everyone except

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<sup>104</sup> The *Inc21* court decision is a prime example. The *Norristown*, *Main Street*, *Cheap2Dial* and *VoiceNet* cases are another.

<sup>105</sup> NPRM ¶ 66.

those who seek to profit from ill-gotten gains. As unanimously stated by the nation's highest court, "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and dishonesty."<sup>106</sup>

The Commission should act decisively and with all deliberate speed to protect consumers from cramming.

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<sup>106</sup> *Federal Trade Commission v. Standard Education Soc.*, 302 U.S. 112, 116 (1937).