

**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

**SUPPLEMENTAL COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

By public notice dated August 27, 2013,¹ the Federal Communications Commission (FCC or Commission) sought to update the record in these dockets, which remain the subject of an April 2012 further notice of proposed rulemaking.² The notice cited two recent developments: (i) implementation by major wireline carriers of “voluntary” commitments to cease “most” third-party billing; and (ii) concerns expressed by the National Association of Attorneys General (NAAG) and forty state and territorial attorneys general about the growth of cramming on commercial mobile radio service (CMRS) bills. On the latter issue, the notice observed that studies indicate that half of all CMRS bills contain unauthorized charges and contend that the number of complaints may substantially understate the magnitude of the problem. The notice referenced workshops held by the FCC and Federal Trade Commission (FTC) last spring,

¹ Public Notice DA-13-1807 (Aug. 28, 2013).

² Report and Order and Further Notice of Proposed Rulemaking (FNPRM), 27 F.C.C.R. 4436 (Apr. 27, 2012).

addressing, among other topics, possible ways to verify consumer consent to charges. These comments supplement previous comments of the National Association of State Utility Consumer Advocates (NASUCA).³

With respect to the “voluntary” commitments by the major wireline carriers to cease “most” third-party billing, NASUCA emphasizes and underscores two prior observations. First, although those commitments were indeed voluntary in the sense that no agency of government ordered them, they were undertaken only after an extensive study by the Committee on Commerce, Science and Transportation of the United States Senate found a problem of “massive” proportions, further concluding that third-party billing, with some exceptions, appeared to be used primarily by con artists and unscrupulous companies to scam consumers. At the Committee hearing held July 13, 2011, the Honorable John D. Rockefeller IV, Chairman, 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, since 2006, the practice of third-party billing had generated \$650 million for the major carriers.⁴ The takeaway for policymakers at all

³ NASUCA Initial Comments in Response to Notice of Inquiry (Oct. 13, 2009), pp. 42-57; NASUCA Initial Comments in Response to Notice of Proposed Rulemaking (Oct. 24, 2011); NASUCA Reply Comments in Response to Notice of Proposed Rulemaking (Dec. 5, 2011); NASUCA Initial Comments in Response to Further Notice of Proposed Rulemaking (June 22, 2012); NASUCA Reply Comments in Response to Further Notice of Proposed Ruling (July 20, 2012); NASUCA *ex Parte* Comments (January 2, 2013); NASUCA *ex Parte* Comments (June 17, 2013).

⁴ See NASUCA 10-24-11 Comments, pp. 7-12, citing S. Hrg. 112-171, “Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose,” 112th Cong., 1st Sess., Committee on Commerce, Science and Transportation, United States Senate (July 13, 2011). In addition to the concerns expressed by the Senate Committee, nationwide class actions were brought against and later settled by two major carriers. These lawsuits alleged that an associated-in-fact enterprise including not only the carriers but also the billing aggregators and third-party providers had violated the Racketeer Influenced Corrupt Organization Act (RICO) by deliberately billing and collecting for millions of dollars of charges they knew were unauthorized and for fraudulently exploiting a billing and collection system they knew lacked sufficient checks and safeguards to prevent unauthorized charges from being added to customer phone bills.

levels is that voluntary industry efforts, although needed and welcome, are no substitute for adequate laws and regulations and steady enforcement activity.

Second, while the cutbacks in third-party billing by the major wireline carriers appear to have halted some of the schemes that were previously used to defraud consumers, that is not to say that the cutbacks are an adequate solution to the problem, even as respects wireline billings. The cutbacks are subject to exceptions that allow substantial swaths of the cramming problem to continue. The exceptions may also invite fraudsters to redirect their illicit activity to the excepted types of billings. In particular, third-party billing for “telecommunications” services continues. Such billing, including billing for such pay-per-call usage as collect calls, long distance calls and directory assistance calls, as well as recurring monthly billing for long distance service, has long been a leading source of cramming violations, at times of shocking proportions.⁵ Thus, as the Commission has observed, the third-party charges that companies continue to bill continue to present a significant risk to consumers.⁶ Nor do the cutbacks on third-party billing do anything to diminish or halt the cramming of unauthorized charges onto a billing company’s own bills⁷ or to attack the problem of wireless or mobile cramming.

NASUCA 7-20-12 Comments, p. 13 n. 49, citing *Moore v. Verizon Communications, Inc.*, No. CV 09-1823, 2010 WL 3619877 (N.D. Cal. 2010) (denying motion to dismiss RICO claim); see also *Nwabueze v. AT&T Inc.*, 2011 WL 332473 (N.D. Cal. 2011).

⁵ See NASUCA 6-22-12 Comments, pp. 5-11; NASUCA 7-20-12 Comments, pp. 7-8, 15-16. The Commission notes, for example, an FTC case in which more than \$30 million of fabricated collect call charges were placed on the phone bills of millions of consumers. FNPRM, ¶ 24,

⁶ FNPRM, ¶ 45.

⁷ See, for example, *Verizon Wireless Data Usage Charges*, 25 F.C.C.R. 15105 (Enf Bur. 2010) (consent decree requiring credits or refunds of data usage charges exceeding \$50 million to approximately 15 million affected customers, \$25 million voluntary payment to U.S. Treasury and compliance plan designed to eliminate cramming).

As indicated by NASUCA's January 2013 *ex parte* filing, NASUCA shares the concerns expressed by NAAG, 37 state attorneys general and three territorial attorneys general in recent comments to the FTC regarding the cramming of unauthorized charges onto wireless phone bills. Among other particulars, the NAAG FTC comments highlight:

- a “voluminous” and increasing number of complaints, consistent across the industry, the country and time, typically involving unwanted and unused premium text messaging subscription services billed at \$9.99 or more per month;
- reports from consumers that they (i) received text messages telling them to text “STOP” to cancel or “YES” to confirm, and texted “STOP,” but were billed anyway; (ii) ignored such text messages because they never requested them and did not know what they referred to, but were billed anyway; and (iii) had no knowledge of the content provider or its goods and services until they were billed;
- a survey undertaken by the Office of the Vermont Attorney General and the University of Vermont showing that more than sixty percent of the consumers surveyed reported that neither they nor anyone in their household or business had authorized *any* of the third-party charges listed on their bills;
- settlements by the Florida Attorney General in 2008, 2009 and 2010 with the four major wireless carriers requiring, among other things, payments to the State of Florida totaling \$5.9 million, together with injunctive relief.

NAAG and the attorneys general conclude there is a “need for concerted, industry-wide changes to protect consumers.”⁸ NASUCA agrees.

⁸ NAAG, *et al.*, letter to FTC re May 8, 2013 Mobile Cramming Roundtable (June 24, 2013), see <http://www.naag.org/eliminating-mobile-cramming-is-a-consumer-protection-priority-say-attorneys-general.php>, pp. 2-3, 4-5, 7-8, 11-12.

As also observed by NAAG, consumer complaints and surveys show that mobile cramming resembles landline cramming to an alarming degree.⁹ A series of press reports reinforces this observation.¹⁰ According to these reports, carriers receive substantial revenues from third-party billings, and those revenues give the carriers an incentive to do less than is necessary to stop the illegitimate practices. When consumers complain, carriers may refund the charges and implement blocks. These refunds and blocks, however, do nothing to address the numerous situations where consumers do not realize they are being charged for unauthorized, unwanted and unused services. These refunds and blocks similarly do nothing to stop the cramming from occurring in the first place.

Finally, a core problem is the absence within the industry of adequate processes to verify or authenticate that the person to whom an item is billed has in fact authorized the billing.¹¹ As observed by the Senate Commerce Committee, the telephone bill has become the functional equivalent of a debit or credit card, but without equivalent protections.¹² Most recently, the detailed allegations of a lawsuit filed by the Texas Attorney General against four mobile content providers and their billing aggregator

⁹ *Id.*, pp. 10-12.

¹⁰ D. Lazarus, "FCC needs to stop 'cramming' on cellphones," *Los Angeles Times*, Mar. 28, 2013, http://www.latimes.com/business/la-fi-lazarus-20130329,0,2277464.column?page=2&utm_medium=feed&utm_campaign=Feed%3A%20ConsumerConfidential%20%28Los%20Angeles%20Times%20-%20Consumer%20Confidential%29&utm_source=feedburner&track=rss; D. Rockricks, "Cell Phone companies need to get out of cramming," *Baltimore Sun*, Sept. 3, 2012, http://articles.baltimoresun.com/2012-09-03/news/bs-md-rodricks-0904-20120903_1_third-party-charges-verizon-obtains-verizon-customer; D. Segal, "To stop cellphone cramming, don't let it start," *New York Times*, Apr. 7, 2012, http://www.nytimes.com/2012/04/08/your-money/cellphone-cramming-gets-a-second-look.html?_r=0; D. Segal, "What's your sign? It could be a cram," *New York Times*, Mar. 24, 2012, ; "Look out for third-party charges on cellphone bills," S. Salisbury, *Palm Beach Post*, Feb. 24, 2012, <http://www.palmbeachpost.com/news/business/look-out-for-third-party-charges-on-cellphone-bi-1/nL4Nh/>.

¹¹ NASUCA 6-22-12 Comments, pp. 11-17; NASUCA 10-24-11 Comments, pp. 17-27; NASUCA 10-13-09 Comments, pp. 53-57.

¹² S. Hrg. 112-171, note 4 above, p. 7.

appear to buttress further NASUCA's point that the authentication processes utilized by the telecommunications industry are inadequate.¹³ The industry needs to replace methods of authentication that do not authenticate with methods that do, thus establishing what the Senate Commerce Committee referred to as "a reliable method of payment that customers and businesses [can] use to conduct legitimate commerce."¹⁴ While a PIN number or its equivalent will not stop every fraud, it is probably an essential piece of the solution. While there is a cost-benefit analysis that needs to be done, it has already been done in the payment card industry.¹⁵

Conclusion

The recent developments reinforce NASUCA's previous submissions and urgings. As NASUCA has said before,¹⁶ this rulemaking proceeding offers 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. There are win-win solutions that benefit everyone except those who seek to profit from ill-gotten gains. As unanimously stated by the nation's highest Court, "[t]he best element of business has long since decided that honesty should govern competitive enterprises,

¹³ *State of Texas v. Mobile Messenger U.S. Inc., et al.*, District Court of Travis County, Texas, filed Nov. 6, 2012. A copy of the petition is linked to the press release at <https://www.oag.state.tx.us/oagnews/release.php?id=4576>.

¹⁴ S. Hrg. 112-171, note 4 above, p. 4.

¹⁵ See S. Thaker and T. Ramos, *PCI [Payment Card Industry] Compliance for Dummies* (2011) (observing there are many points of vulnerability in a payment system, and explaining the numerous steps that need to be taken in order to protect against them, including the use of a PIN number or its equivalent).

¹⁶ NASUCA 10-24-11 Comments, pp. 33-34.

and that the rule of caveat emptor should not be relied upon to reward fraud and dishonesty.”¹⁷

For reasons NASUCA has previously stated,¹⁸ the Commission should: (i) adopt a rule explicitly and directly prohibiting the placement of unauthorized charges on phone bills, regardless of the technology used to provide the service, including a provision that a claimed “authentication” or “verification” is not a defense to an enforcement action if the charges at issue were in fact unauthorized, and including a provision reaching not only third-party providers who assess unauthorized charges but also billing companies and billing agents who pass such charges along to consumers; (ii) continue to bring appropriate enforcement actions at the federal level, including but not limited to actions seeking fines or penalties sufficient to deter such conduct and restrictions on or forfeiture of offending providers’ operating authority; (iii) encourage the states to bring appropriate enforcement actions, with like remedies and for like purposes; and (iv) look to the Federal Trade Commission for supportive enforcement actions, when and as needed.

This proposed solution is congruent with the problem. It would not disable any legitimate or beneficial commerce or activity, but it would supply a needed accountability. It would provide the impetus for the telecommunications industry to develop and implement authentication processes that in fact authenticate, as the payment card industry has done before it. It would do so without being prescriptive about the specific processes to be developed and implemented and without imposing an undue cost or burden on the industry. Moreover, it would give needed protection to consumers.

¹⁷ *Federal Trade Com’n v. Standard Education Soc.*, 302 U.S. 112, 116 (1937).

¹⁸ NASUCA 7-20-12 Comments, pp. 15-18; NASUCA 6-22-12 Comments, pp. 17-22.

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