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 CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA

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I. INTRODUCTION AND SUMMARY

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these supplemental comments in response to the Federal Communications Commission's (FCC or Commission) Public Notice dated August 27, 2013,[1] (Public Notice) seeking to update the record in these dockets, which remain the subject of the April 27, 2012 *Further Notice of Proposed Rulemaking* (*Further Notice*)[2]. The Public Notice seeks to refresh the record because of three recent developments: (1) implementation by major wireline carriers of "voluntary" commitments to cease "most" third-party billing; (2) concerns expressed by the National Association of Attorneys General and forty state and territorial attorneys general about the growth of cramming on commercial mobile radio service (CMRS) bills; and (3) workshops the FCC and Federal Trade Commission (FTC) held in April and May, 2013, respectively, which brought to light additional information on the extent of the cramming problem.

In the *Further Notice*, the FCC indicated that cramming is a persuasive problem for consumers. The FCC stated that:

> its complaint records show that during the period from 2008 to 2010, the [FCC] received between 2,000 and 3,000 cramming complaints each year. Furthermore, cramming consistently ranks among the top

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

[2] *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"); Consumer Information and Disclosure; Truth in Billing and Billing Format; Further Notice of Proposed Rulemaking*, CG Dkt.No.11-116, CG Dkt.No. 09-158, CC Dkt. No. 98-170; (FCC 12-42) rel. April 27, 2012.

> billing-related complaints received by the [FCC] involving wireline telephone service. Of the cramming complaints [the FCC] received from 2008 to 2010, 82 percent related to wireline telecommunications and 16 percent related to wireless telecommunications.[3]

The FTC, which also investigates and brings suits against crammers, confirms that "cramming is a significant area of increasing consumer complaints."[4]

On July 12, 2011, Majority Staff of the U.S. Senate Commerce Committee Senate issued a Report on *Unauthorized Charges on Telephone Bills* that took the wireline carriers to task for what it portrayed as an epidemic of wireline cramming ("Rockefeller Report").[5] In that report, the Senate staff found that despite the FCC's existing Truth-in-Billing requirements, thousands of consumers still regularly complain to the FTC and the FCC about cramming, while state and federal authorities continue to bring law enforcement actions against individuals and companies for cramming. The Rockefeller Report noted that, over the previous five years, telephone companies had placed more than $10 billion worth of third-party charges on their customers' landline telephone bills, strongly suggested that a high percentage of these charges were unauthorized, and concluded that billing carriers are profiting from these third-party charges.[6] While focused on cramming on landline telephone bills, the Rockefeller Report also noted that,

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[3] *Id.*, at para. 20. The FCC found that "the record does not demonstrate a need for rules to address cramming for CMRS or VoIP customers at this time." *Id.,* at para. 47.

[4] *Id.*, at para 24.

[5] The Rockefeller Report may be found at the following link: http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=9d4113ed-7e9f-40be-9e57-e65016d370de

[6] *Id.*, at para. 33-34.

"cramming on wireless telephone bills appears to be a problem as well."[7] The Rockefeller Report reached the same conclusions as the CPUC's Cramming Decision, (D.) 10-10-034, namely that additional protections were needed to protect consumers from cramming.[8]

Thereafter, the two largest landline carriers entered into settlements of nationwide class actions that alleged that the billing telephone companies engaged in third-party billing knew or should have known that most third-party charges were unauthorized. Those settlements have now been approved (or preliminarily approved) by the United States District Court in San Francisco, *Moore v. Verizon* and *Nwabueze v. AT&T*. At about the same time, AT&T and Verizon announced they would cease billing for a wide range of (but not all) third-party services.

In March 2013, the FTC issued a staff report titled, "Paper, Plastic . . . or Mobile" on mobile payments ("FTC Mobile Payments Report").[9] The report followed an April 26, 2012 workshop, the purpose of which was to "learn more about the mobile payments industry and its effects on consumers."[10] The FTC Mobile Payments Report focuses on three key areas where concerns are likely to arise with the increasing use of mobile payments: dispute resolution, data security, and privacy.[11]

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[7] *Id.* at 6.

[8] *See* Rockefeller Report at 44.

[9] The Mobile Payments Report is available at http://www.ftc.gov/os/2013/03/130306mobilereport.pdf.

[10] Mobile Payment Report, p. 4.

[11] *Id.*

Referencing the comments it filed with the FCC on cramming, the FTC states in its Mobile Payments Report that ". . . crammed charges on mobile phone bills are a significant problem that appears to be on the rise."[12] The FTC reasons that "[t] his development should cause concern for all stakeholders in the mobile payments marketplace because it threatens to undermine mobile carrier billing as a legitimate and trusted payment option."[13] In its Mobile Payments Report, the FTC also reiterated its position on basic protections consumers should have to protect them from receiving crammed charges on their mobile phone bills. The FTC provided in its Mobile Payments Report:

> First, consumers should have the ability to block *all* third-party charges on their mobile accounts, including the ability to block third-party charges on individual accounts operated by minors in the household, in order to ensure that cramming does not occur. Second, mobile carriers should clearly and prominently inform their customers that third-party charges may be placed on customers' accounts and explain how to block such charges at the time that accounts are established and when they are renewed. Third, mobile carriers should establish a clear and consistent process for customers to dispute suspicious charges placed on their account and obtain reimbursement. The comment stated that such measures should be mandated by law or regulation to ensure that consumers have baseline protections.
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> Other potential approaches have been suggested in various contexts. Some of these approaches focus on enhancing disclosures and facilitating disputes. For example, while improved disclosures may not be sufficient alone to fully address mobile cramming, mobile carriers could standardize and prominently

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[12] *Id.* at 8 (citing Reply Comment of the Federal Trade Commission in Federal Communications Commission CG Docket No. 11-116 (July 20, 2012), at pp. 5-7, *available at* http://www.ftc.gov/os/2012/07/120723crammingcomment.pdf).

[13] *Id.*

> highlight billing descriptions of third-party charges, in a format that makes clear why the consumer is being billed for a third-party charge, the provider or merchant that placed the charge, and the good or service being provided. Mobile carriers could also consider notifying consumers of any recurring charges on their mobile phone bills (such as subscriptions) in advance of each such charge and provide the opportunity to cancel the subscription before the charge is imposed.
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> In addition, mobile carriers could consider contractually requiring aggregators and other third parties to maintain sufficient and accessible records of consumers' authorizations of individual charges, in order to allow disputes to be efficiently resolved. They also could continue to standardize their consumer dispute policies to more closely align with statutory protections accorded in the context of credit cards or debit cards. Further, mobile carriers could allow consumers to delay payment for good faith charge disputes, without the possibility that their mobile phone service will be cut off or they will receive an adverse credit report, until the dispute is resolved.[14]

On May 8, 2013, the FTC also held a Mobile Cramming Roundtable with three panel discussions: (1) "Understanding Third Party Mobile Billing and Cramming; (2) "Current Strategies to Reduce Mobile Cramming"; and (3) "Other Possible Strategies to Reduce Mobile Cramming." The transcript from this workshop provides a useful insight for staff to better understand mobile cramming and how best to protect consumers from mobile cramming.[15] The FTC will issue a report on the roundtable.

On June 24, 2013, the National Association of Attorneys General (NAAG) submitted comments addressed to Secretary Clark of the FTC in connection with the May 8, 2013 Mobile Cramming Roundtable ("AG Comments"). Forty attorneys general,

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[14] *Id.*, at 8-10 (citations omitted).

[15] Transcript of FTC Mobile Cramming Roundtable, 5/8/13, available at http://www.ftc.gov/bcp/workshops/mobilecramming/30508mob.pdf.

including Kamala Harris for California, representing 37 states, two territories, and the District of Columbia, signed the comments. The AG Comments highlight the increase in mobile cramming, noting that "the complaints from consumers that the Attorneys General continue to receive, as well as the enforcement actions taken by the Attorneys General, provide ample evidence that the types of unfair and deceptive practices that affect landline consumers are also now being felt by consumers of mobile phone services."[16]

Cramming continues to be an on-going concern in California. As we noted in our October 24, 2011 Comments in this docket, the California Legislature and the CPUC have taken several proactive steps to combat cramming and to protect California consumers from receiving unauthorized charges on their phone bills, yet cramming remains a problem for California consumers.

The CPUC supports the FCC's efforts to strengthen federal rules and establish additional safeguards to enable consumers to protect themselves from cramming, and was pleased that the FCC adopted cramming rules in its April 12, 2012 decision. However, the CPUC has two initial concerns. First, the April 2012 decision did not go far enough to protect consumers from unauthorized charges. The FCC adopted cramming rules only for wireline carriers, for example, instead of adopting rules for all carriers, including Commercial Mobile Radio Service (CMRS) and Voice over Internet Protocol (VoIP) providers. Second, the CPUC strongly urges the FCC to not preempt existing state laws

[16] AG Comments at 2, available at www.naag.org/assets/files/pdf/signons/Final%20FTC%20Comment%20Mobile%20Cramming.pdf

that are consistent with any regulations ultimately adopted by the FCC. States such as California that have made a strong commitment to protecting consumers against cramming should be free to devise additional safeguards to protect their citizens against such unlawful activity. Moreover, since enforcement of consumer protection laws is a key function of state government, state commissions should be the entities which adjudicate consumer complaints, and states should have the right to enforce federal cramming regulations, just as they do with slamming regulations. As discussed below, we support a dual enforcement regime for the FCC's cramming rules, recognizing that consumer protection is a primary duty of the state commissions.

The CPUC accordingly offers the comments set forth below in response to the FCC's Public Notice.

II. DISCUSSION

A. Need for an Opt-In Requirement

1. The FCC Should Adopt an Opt-In Requirement for All Carriers Except for Affiliates and Long Distance Service

The Public Notice requests comment on whether the FCC should adopt a default blocking opt-in requirement.[17] As noted above, notwithstanding efforts at the state and federal levels, cramming remains a problem. On the wireline side, despite settlements with AT&T and Verizon that prompted them to eliminate most third- party billing on landline telephone, cramming continues. Moreover, mobile cramming is a growing

[17] Public Notice, at 2.

problem. The CPUC now is seeing some of the same actors that perpetrated cramming schemes on the wireline side become active in mobile cramming.[18]

As the FCC stated in its Public Notice, there have been several recent developments related to cramming. For example, forty attorneys general sent a letter to the FTC asserting that cramming is a problem at the state level and that the FTC should take action on cramming. The FTC is on record supporting default blocking, at least as to wireline service.[19] As it said in its recent "amicus" filing criticizing the *Nwabueze* settlement:

> Given the paucity of legitimate third party charges and the insignificant percentage of consumers aware that their phone bill can be used by third parties to bill them for a wide variety of good and services, <u>the most effective way to protect consumers and prevent a recurrence of the conduct alleged in this lawsuit is to prohibit third-party charges altogether, unless consumers affirmatively request that AT&T permit such charges on their bills</u>**.**[20]

The oft-observed fact is that most consumers are not aware of third-party charges on their bills. A default blocking arrangement, which would require the consumer to “opt in” at point of sale (or later) by affirmatively stating that they wish to use their phone for third-party purchases, at a minimum, would alert customers explicitly to this

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[18] *See e.g., Plaintiff’s Original Petition* filed on July 11, 2013 in *The State of Texas v. Cellzum, et al.,* case No. D-1-GV-13-000629 Travis County, Texas, 200th Judicial District, naming Harvey Berg as a defendant. Harvey Berg has been a person of interest in the *Commission’s Order Instituting Investigation into the Operations, Practices and Conduct of Telseven, LLC and Calling10, LLC* , I.10-12-010. In I.10-12-010, the Commission uncovered evidence that Harvey Berg was involved in a wireline cramming scheme that affected California consumers.

[19] July 23, 2012 Comments to FCC, article and link here http://www.ftc.gov/opa/2012/07/cramming.shtm.

[20] FTC’s Motion for Leave to File Brief as Amicus Curiae, and Brief (at 11), filed in *Nwabueze v. AT&T, supra,* on August 30, 2013. Leave granted on September [25], 2013 (emphasis added).

possibility. It would put consumers in charge of their phone bills. Neither wireline nor wireless bills are immune from unauthorized charges. CPUC staff has seen some of the same bad actors move into the wireless world.[21] Just this month, the Texas Attorney General announced a new enforcement action against four wireless crammers and their billing aggregator, Mobile Messenger U.S. Inc.[22]

Given that wireless phone bills may contain an array of third-party charges, that consumers are using wireless phones in ways similar to how they use credit cards, and that cramming remains a significant problem, the CPUC recommends that the FCC adopt symmetrical opt-in requirements for wireline, wireless, and VoIP, as the most effective way to combat cramming, with the exception of affiliates and long distance service. An opt-in requirement would not allow third-party billing unless a customer affirmatively "opts-in", that is, authorizes third-party billing. In this way, the default setting for consumers' telephone bills is to not allow third-party billing. Consumers who choose to allow for third-party billing would be on notice of this possibility. Also, consumers who affirmatively choose to allow third-parties to place charges on their telephone bills likely would be more vigilant in reviewing their telephone bills to ensure that they contain no unauthorized charges.

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[21] *See e.g.*, *Plaintiff's Original Petition* filed on July 11, 2013 in *The State of Texas v. Cellzum, et al.*, case No. D-1-GV-13-000629 Travis County, Texas, 200th Judicial District, naming Harvey Berg as a defendant. Harvey Berg has been a person of interest in the *Commission's Order Instituting Investigation into the Operations, Practices and Conduct of Telseven, LLC and Calling10, LLC* , I.10-12-010. In I.10-12-010, the Commission uncovered evidence that Harvey Berg was involved in a wireline cramming scheme that affected California consumers.

[22] See press release at https://www.oag.state.tx.us/oagNews/release.php?id=4576.

The advantages of an opt-in requirement are significant. An opt-in requirement would protect from cramming those who do not wish to purchase third-party services. Consumers wishing to access third-party services are empowered to access services via opt-in. In addition, an opt-in requirement would protect consumers because the opportunity for fraud and unauthorized charges is diminished when access to the number of consumer bills is limited. At the same time, the opt-in requirement should be technology-neutral, meaning the FCC should apply it to all carriers – wireline, wireless, and VoIP providers. The cases of prepaid and business customers might present different circumstances which the FCC should consider.

2. Mechanics of an Opt-In Requirement

There are several potential options for implementing the opt-in requirement. For example, the requirement could be applied at initiation and renewal of service. This implementation method may cause less customer confusion because consumers would be aware of the shift to opt-in at point-of-sale. This option also may cost less to implement because of the lower incremental expense to explain the opt-in provision to customers at point-of-sale and lower expense to respond to customer confusion. However, this option limits the provision of opt-in information to new and renewing subscribers, and would exclude those customers in existing long-term contracts.

Another alternative would be to phase in an opt-in requirement to all customers. This may provide carriers with more flexibility to identify which customers are informed of the opt-in provision based on their operational structure and customer base. This method may reduce carrier costs by allowing necessary implementation adjustments at different phases of the operational change. However, this alternative may cause customer confusion due to inconsistencies from the timing differences in implementation (some customers would get default blocking while other customers would not). Also, this may leave many customers vulnerable to cramming until the FCC fully implements the opt-in requirement.

Lastly, an opt-in requirement could be implemented for all customers on a date certain. Under this approach, all customers would be provided the option to opt-in at a milestone date, which would result in consistent treatment of all customers. This alternative would also provide regulatory certainty of when the opt-in change is implemented. However, this option may pose operational challenge to carriers to implement because of the sheer volume of notifications that would need to be provided to customers at one time. Carriers may need additional call center representatives to absorb any inquiries and requests in response to the mass notifications concerning a new opt-in requirement.

Implementation of an opt-in requirement should consider the various circumstances of customers, legitimate uses of third-party billing, and the potential for unintended consequences. The CPUC recommends that, should the FCC mandate a default blocking opt-in, the FCC should require billing carriers to communicate to customers the option to unblock third-party billing via clear text disclosure at the point of sale. The default setting for a new account should block third-party billing. While the CPUC believes that the FCC should implement opt-in as the default option for new customers, it does not recommend automatically or immediately implementing a default setting for existing customers to block third-party billing. Rather, the FCC should require carriers to inform all existing customers of this option, particularly a customer contacts his/her carrier, e.g., to add or change a service, renew a contract, call in a complaint or dispute a charge, or purchase a new phone.

In the past, the industry has expressed concerns that a default blocking opt-in requirement would create customer confusion and would lead to customers not having access to third-party billing when they want it. For example, a default blocking opt-in requirement could hinder legitimate uses of third-party billing and also make it difficult to spontaneously respond to a request for charity donations, *e.g.*, donations to help the victims of a devastating hurricane. There are several possible ways to minimize these problems.

The FCC should explore a default blocking opt-in requirement to allow customers to have easy access to third-party billing when they want it, even if they have chosen to block all third-party billing on their telephone bills. The FCC should examine provisional opt-in alternatives to determine if any are feasible and desirable.

One option to explore would be whether carriers could allow customers to use a pin override to provisionally allow third-party billing. We note that this option is used in other venues such as for banking (*e.g.*, ATM withdrawals), debit and credit cards and downloading wireless apps. However, the CPUC is aware of potential problems with this solution, including the burdens of remembering yet another pin, the costs to implement and administer this option, and the possibility that it may be cumbersome for users who frequently use their wireless device for third-party purchases. Furthermore, the carriers have previously indicated in comments before the CPUC that pins restrict innovation and product flexibility.[23]

Alternatively, the FCC or the carriers should explore the possibility of creating a three-digit dial-around, such as the *86 currently used to dial-around call blocking, which would allow consumers to override third-party billing blocking on an individual basis. The CPUC recognizes mechanical and electronic complexities that may be involved in implementing this feature for a wireless system, but the matter deserves further study. Much like *86, a dial-around option for third-party billing would provide those consumers who have already said they do not want third-party billing with an easy way to reverse that decision and access third-party billing on a case-by-case basis.

The FCC also should explore whether it is feasible for carriers to create an easy-to-remember-and-to-use number that customers can call or text if they want to permit or block third-party billing, either on a one-off basis, or a going-forward basis. Carriers will likely propose other ways to address this issue if the FCC declares that it is adopting a default blocking opt-in requirement.

Moreover, the industry's concern with regard to opt-in restricting consumer choice may be obviated to some extent by alternative payment systems offered by CMRS carriers, such as Mobile/Digital Wallets, which are based entirely on the credit card

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[23] D.06-03-013 at 86.

platform and not billed to the customers' phone bills. Hence, customers may still avail themselves of a convenient and quick way to make payment through their mobile phones even if they choose to opt out of third-party billing.

The CPUC urges the FCC to adopt an opt-in requirement for all carriers, including wireline, CMRS and VoIP. The CPUC is certain that once the FCC makes this determination, carriers will help the FCC and the states identify technologically feasible ways to implement an opt-in requirement

B. Wireline Carriers' "Voluntary Commitments" to Cease Including Most Third-Party Charges on Telephone Bills

The Public Notice requests that commenters discuss wireline carrier's "voluntary commitments" to cease including most third-party charges on telephone bills.[24] While no court or government agency ordered AT&T and Verizon to cease including most third-party charges on wireline telephone bills, the carriers only did so after several changes in occurred in the federal regulatory and legal landscape. In July, 2011, the Committee on Commerce, Science and Transportation of the United States Senate issued the Rockefeller Report. The Rockefeller Report painted a picture of a third-party wireline billing system that was out of control and harmful to consumers. And the Rockefeller Report determined that third-party billing has mainly harmed, not helped, wireline consumers. The Rockefeller Report observed that "[i]nstead of creating conveniences for

[24] Public Notice, at 2.

telephone customers, as telephone companies promised it would, third-party billing has made telephone customers targets for fraud."[25]

The carriers' "voluntary" decision to stop billing for a variety of third-party charges also came shortly after class action racketeering complaints against the billing telephone companies were upheld on motions to dismiss.[26] The two cramming cases were filed in the United States District Court for the Northern District of California in 2009, *Moore v. Verizon*, C V09-1823 SBA (*Moore*), and *Nwabueze v. AT&T*, C 09-cv-1529 SI (*Nwabueze*), and allege that the carrier defendants violated the Racketeer Influenced Corrupt Organization (RICO) statutes by operating a third-party billing system in a way likely to defraud customers.

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[25] Rockefeller Report at 44. The Rockefeller Report found that "[t]elephone companies place approximately 300 million third-party charges on their customers' bills each year, which amount to more than $2 billion worth of third-party charges," and that "[o]ver the past five years, telephone companies have placed more than $10 billion worth of third-party charges on their customers' landline telephone bills." *Id*. at ii.

[26] 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. 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).

After the allegations in *Moore* and *Nwabueze* survived demurrer,[27] Verizon and AT&T entered into nationwide settlements with plaintiff consumers.[28] The *Moore v. Verizon* settlement contains the following remedies: restitution of all third-party charges from April 2005 through 2012 which the consumer claims are fraudulent (except as noted below); establishment of an ILEC "Customer List Search Methodology" to identify those charges; institution of more rigorous complaint thresholds; and multiple notices to customers of their right to block all third-party billing.[29] The Court gave preliminary approval to the settlement on February 12, 2012.[30] The *Nwabueze v. AT&T settlement*, which was announced in December 2012 and approved in January, 2013, contains similar terms. The parties to the settlement report that over 23% of the AT&T wireline class members live in California.[31]

The settlements, however, contain potential shortcomings. For example, they do not include the wireline BTCs' wireless affiliates, nor do they include what some consumer advocates believe to be the best remedy for wide-spread cramming – opt-in default blocking. The settlement also excluded from the "Released Claims" and the

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[27] A demurrer is an assertion by the defendant that although the facts alleged by the plaintiff in the complaint may be true, they do not entitle the plaintiff to prevail in the lawsuit.

[28] *See Nwabueze v. AT&T Inc*., C 09-1529 SI, 2011 U.S. Dist. LEXIS 8506, 2011 WL 332473 (N.D. Cal. Jan. 29, 2011) (Ilston, J.), at *22-23, citing Judge Armstrong's earlier decision in *Moore v. Verizon Communications Inc*., C 09-1823 SBA, 2010 U.S. Dist. LEXIS 94544, 2010 WL 3619877 (N.D. Cal. Sept. 10, 2010) (Armstrong, J.).

[29] Like all case documents in the *Moore* and *Nwabueze* cases, the *Moore* settlement is available (as Exhibit 1 to Plaintiffs' February 1, 2012 Motion for Preliminary Approval of Class Action Settlement) online at PACER, https://ecf.cand.uscourts.gov/cand/index.html, under Case No. 09-1823.

[30] *Moore v. Verizon*, Case No. 09-cv-1823 SBA, U.S. Dist. Ct. for No. CA.

[31] Information contained in a January 7, 2013 Class Action Fairness Act (CAFA) notice provided to the Commission.

"Settlement Class" in the *Moore* class (but not the *Nwabueze* class) all claims for "message telephone services (MTS) usage charges," i.e., charges on a "pay-per-call" rather than monthly recurring basis."[32]

Soon after entering into this settlement, Verizon announced that it would stop providing third-party billing services by the end of2013[?], although on closer scrutiny this new policy is subject to the same limitations as the *Moore* settlement, in that it appears not to apply to Verizon's wireless affiliate or to MTS usage charges.[33] Shortly after Verizon's announcement, AT&T followed suit.[34] Both of the major wireline BTCs have stopped third-party billing for recurring charges, but not "message telephone services" such as directory lookup, other operator services, and, based on staff's understanding, all one-off charges.

Thus, it appears that there were several factors, including a congressional report and two class action lawsuits and settlements, that played a role in AT&T's and Verizon's decisions stop much, but not all, third-party billing. Moreover, this new policy contains several limitations. Certainly CMRS carriers' actions are not a substitute for

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[32] Paragraph 40 of the settlement excludes MTS or message telephone services usage charges, but does so without further definition.

[33] *See* Senator Rockefeller's press release at http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0f27e67a-1225-465a-8393-2256266939c8&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=505cc3fa-a767-40f4-8ac2-4b8326b44e94. On April 3, 2012 CPSD received a letter from Verizon stating that by the end of 2012 it would stop providing billing services for "Miscellaneous or enhanced services include[ing] items such as voicemail, web-hosting, and email."

[34] *See* Senator Rockefeller statement at http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0245033e-6fe4-420d-8ed3-cdb39ed6537f .

federal land state enforcement efforts and laws and regulations sufficient to protect consumers.

C. Current Extent of Cramming for Consumers of Wireline and CMRS Services

1. Wireline Cramming Complaints

The Public Notices requests information on the current extent of cramming for consumers of wireline and CMRS providers. Based on data that wireline carriers have provided to the CPUC and complaints to the CPUC's Consumer Affairs Branch, cramming is trending downward. In the first quarter of 2011, wireline carriers received approximately 7340 cramming complaints. In the second quarter of 2012, wireline carriers received approximately 3388 cramming complaints. In 2011, CAB received 559 wireline cramming complaints; in 2012 it received 245 wireline cramming complaints; and from 1/1/13 to 8/31/13, CAB received 97 wireline cramming complaints.

There are many reasons for this downward trend in the number of wireline cramming complaints BTCs reported in California. As discussed previously, the RICO actions and resulting *Moore* and *Nwabueze* settlements, the Rockefeller Report, and the *FTC v. Inc21.com* case, all likely contributed to the downward trend in cramming complaints.

Also, CPUC staff has not audited the data from the wireline carriers or the CAB data. Moreover, as the CPUC already noted, the many exceptions to the wireline carrier's third-party billing prohibition, may allow the cramming problem to continue. The exceptions may also invite bad actors to redirect their illicit activity to the excepted types of billings. The Commission has observed that the third-party charges that companies continue to bill continue to present a significant risk to consumers.[35] The limitations on third-party billing also do not stop the cramming of unauthorized charges onto a billing company's own bills.

2. Wireless Cramming Complaints

On January 31, 2013, the CPUC's Consumer Affairs Branch (CAB) and Safety Enforcement Division (SED) sent a letter to the United States Senate Committee on Commerce, Science and Transportation in response to a request for information on wireless cramming complaints the CPUC had received. As adopted in D.10-10-034, the CPUC does not receive data on the number of cramming complaints from wireless carriers as it does from wireline carriers. Rather, the CPUC receives the overall refund rates from wireless carriers, and this is the information SED provided to the United States Senate. CAB also provided complaint information that they receive directly from consumers.

The data provided in the January 31, 2013 letter is shown in Table 5.1 below. It indicates that mobile cramming likely remains a problem in California, although refund rates diminished in the last five months of 2012 – a favorable trend. Moreover, the data

[35] *Final Notice* at 45.

supports what the FTC stated in its report on cramming – that very few consumers complain to regulatory agencies about mobile cramming.[36]

Table 5.1

Wireless Refund Data
Reported to the CPUC in 2011 and 2012

Year	Month	Reported to the CPUC by Wireless Carriers			Cramming Complaints Received by the CPUC Directly
		Total Amount Billed	Total Amount Refunded	Refund Rate	
2011	January	$16,943,810.60	$3,114,281.64	18.4%	5
	February	$14,311,602.62	$2,327,651.90	16.3%	7
	March	$15,055,235.84	$3,050,870.00	20.3%	7
	April	$12,589,613.01	$1,963,785.98	15.6%	8
	May	$13,370,799.94	$1,641,829.30	12.3%	1
	June	$12,902,076.90	$1,606,947.27	12.5%	3
	July	$13,773,648.35	$1,759,761.59	12.8%	5
	August	$14,820,585.91	$1,905,851.72	12.9%	9
	September	$14,284,972.02	$1,825,903.16	12.8%	8
	October	$14,661,075.67	$1,960,493.74	13.4%	9
	November	$14,933,453.38	$1,867,649.65	12.5%	9
	December	$15,997,568.42	$2,070,808.07	12.9%	7
2012	January	$18,803,809.40	$2,514,586.83	13.4%	8
	February	$17,370,248.71	$2,727,785.45	15.7%	7
	March	$19,999,842.45	$2,636,235.68	13.2%	4
	April	$17,166,987.73	$2,068,223.76	12.0%	10
	May	$16,940,517.40	$2,207,149.05	13.0%	6
	June	$16,396,747.30	$2,261,746.89	13.8%	6
	July	$15,878,659.47	$2,333,519.23	14.7%	8
	August	$14,026,380.32	$1,524,248.79	10.9%	4
	September	$13,086,710.07	$1,202,193.17	9.2%	5
	October	$13,732,662.13	$1,350,322.09	9.8%	10
	November	$14,064,305.40	$1,253,922.94	8.9%	2
	December	$13,835,485.01	$1,170,951.58	8.5%	0

[36] *See Paper*, *Plastic . . . or* Mobile, an FTC Staff Report prepared for an FTC Workshop on Mobile Payments, March 2013, p. 10; Transcript of FTC's Mobile Cramming Roundtable, May 8, 2013, p. 6, lines17-25, p. 7 lines 1-10.

In 2011, CAB received 73 cramming complaints from consumers of CMRS providers; in 2012, there were 55 complaints, and as of 8/31/13, there have been 43 complaints in 2013. There are many reasons why consumers may not file complaints about mobile cramming. Most significant among them are that consumers do not realize that they have unauthorized charges on their telephone bills.

D. Efficacy of Industry Efforts to Combat Wireline and CMRS Cramming

The Public Notice requests comment on the efficacy of industry efforts to combat cramming.[37]

1. Wireline Cramming

While industry has made efforts to limit cramming, the CPUC has determined that industry actions do not go far enough. On the wireline side, while actions the two largest carriers have taken to limit third-party billing may prevent some cramming, these actions in and of themselves will do little to stop cramming altogether on wireline bills. Fraudsters adapt to changing policies and rules, and will likely find other ways to cram wireline consumers.

2. U.S. Consumer Best Practices Guidelines for CMRS Providers

CMRS carriers have argued at the CPUC that they have extremely effective self-monitoring in place via the Mobile Marketing Association (MMA) Guidelines, and therefore, additional rules and regulations to protect consumers from cramming are not

[37] Public Notice, at 2.

necessary.[38] The MMA published the most recent U.S. Consumer Best Practice Guidelines on October 16, 2012.[39] The CPUC does not believe that the U.S. Consumer Best Practices Guidelines are an effective tool to protect consumers of CMRS carriers from mobile cramming.

According to Cara Frey, MMA General Counsel, the MMA gathered the information for the Consumer Best Practice Guidelines, but CTIA-the Wireless Association (CTIA)[40], an international nonprofit trade association that has represented the wireless communications industry since 1984, is now in charge of "enforcing" the U.S. Consumer Best Practice Guidelines that it helped develop.[41] The scope of CTIA's enforcement of the Guidelines is unclear, as is whether CTIA will make its enforcement practices transparent and its enforcement data available to state and federal regulatory agencies on request.[42]

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[38] See, e.g., Opening Comments of CTIA – the Wireless Association on Assigned Commissioner's Ruling Requesting Comment on Proposed California Telephone Corporation Billing Rules, R.00-02-004, 3/22/10, at 6-9.

[39] U.S. Consumer Best Practices for Messaging, Version 7.0, October 15, 2012. http://www.mmaglobal.com/policies/consumer-best-practices

[40] According to CTIA's website, http://www.ctia.org/, CTIA, "[m]embership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products."

[41] Telephone conference call with Cara Frey on 5/2/13 to prepare for the FTC Mobile Cramming Roundtable on 5/8/13; FTC Transcript of Mobile Cramming Roundtable, 5/18/13, *supra,* at p. 76, lines 10-16, and 106-109..

[42] *Id.* at 109, 110-11.

The cover page of the Consumer Best Practice Guidelines states that the U.S. Consumer Best Practices Committee for Messaging[43] developed the Consumer Best Practices guidelines in collaboration with representatives from the following member companies[44]: 4INFO, Inc., Cincinnati Bell Wireless, CTIA and Mobile Messenger.[45] The MMA website states that it set up the MMA Messaging Rules Compliance Center "to capture the nature of your text messaging issue in regards to compliance with industry." The MMA forwards those complaints to CTIA, and the MMA's website indicates that consumers should expect to hear back from CTIA, not the MMA.[46]

CMRS carriers have reported to the CPUC that they rely on and utilize the U.S. Consumer Best Practices Guidelines to protect consumers from cramming.[47] The MMA's website states that, "[a]lthough the CTIA audit standards are based on the

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[43] The MMA website states that there is a Messaging Committee which is comprised of member wireless companies. The website also provides that there is a "Marketing Best Practices Task Force: Identifying Best Practices in Messaging." This Messaging Task Force is described as follows: "Led by Jeff Hasen of Hipcricket and Michael Levinsohn of Archer. This team is working on the best practices a marketer should follow to be successful with messaging programs. This will, initially, produce a relatively short list of tenets that will give brand marketers and their enabling partners high level guidance on how to conduct high quality messaging programs. This output will have global implications, and may lend itself to regional variations for other parts of the world at a later date." http://www.mmaglobal.com/member-center/committees.

[44] U.S. Consumer Best Practices for Messaging, Version 7.0, October 15, 2012.

[45] Mobile Messenger is a named defendant in the current civil case, *Fields v. Wise Media,* Case No. C 12-05160 WHA, Dist. Ct. of No. CA, June 21, 2013. On November 6, 2013, the Texas Attorney General named Mobile Messenger as a defendant in an enforcement action alleging cramming (see https://www.oag.state.tx.us/oagNews/release.php?id=4576).

Your issue, as summarized in your own words, will be logged by the MMA and forwarded to CTIA with a copy to you. You should expect follow-up directly from CTIA, and not from MMA. Feel free to contact MMA through this site if your issue is not fully addressed or something else needs to be addressed."

(http://www.mmaglobal.com/bestpractice/messaging-rules-compliance-center).

[47] See, e.g., Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, p.2: Verizon Response to Billing Rules Data Request No. 01, May 10, 2012, at 3.

MMA's Consumer Best Practices documents, CTIA and their member carriers enforce strictly against the CTIA Compliance Monitoring and Enforcement Playbook."[48] However, the U.S. Consumer Best Practices are not subject to any independent review and/or enforcement activity of which the CPUC is aware.

The CPUC believes that the U.S. Consumer Best Practices are not an effective substitute for federal and state regulations protecting consumers from cramming.

3. Double Opt-In for CMRS Providers

The Public Notice requests comment on the efficacy of the double opt-in process.[49] The double opt-in process means that "in order for a subscriber to participate in a mobile marketing or premium SMS program, they must not only send in an initial message indicating interest but they must also respond with an affirmative to a second message before premium charges are applied to their (mobile telephone bill) account."[50] In D.10-10-034, the CPUC stated: "Since the current MMA guidelines do not currently limit authorization to the subscriber, use of the double opt-in process to purchase third-party content and services does not, by itself, demonstrate affirmative authorization by the subscriber."[51]

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[48] http://www.mmaglobal.com/bestpractice/messaging-rules-compliance-center.

[49] Public Notice, at 2.

[50] See http://www.connectivemobile.com/2008/11/why-double-opt-in; Mobile Marketing Association's "U.S. Consumer Best Practices version 6.0," "Guideline 2.6.1-2 Premium Rate Double Opt In via SMS," at 31, March 1, 2011.

[51] D.10-10-034, at 29.

As the CPUC noted above, the U.S. Consumer Best Practice Guidelines, adopted October 16, 2012.[52] CMRS carriers claim that the double opt-in process has been an effective method of preventing unauthorized charges from appearing on wireless bills, as customers must be in possession of their handset and positively acknowledge the acceptance of a third-party charge prior to application of a premium charge to their account. CMRS carriers have also indicated to the CPUC that they require customers to double opt-in to purchase premium third-party content and have the charges for that content appear on the customer's wireless bill.[53] CMRS carriers also assert that they believe that the double-opt in process prevents almost all unauthorized billing.[54]

Notwithstanding CMRS carriers' assertions, the CPUC has not determined that the double opt-in process effectively prevents cramming. As a threshold matter, it remains unclear as to what self-enforcement mechanisms the carriers have put in place through CTIA or otherwise. Also unclear is what kind of an electronic record the double opt-in creates, and who will have access to that data.[55]

Several recent cases involving CMRS carriers appear to indicate that the double opt-in process does not adequately protect consumers because bad actors may simply fabricate calling records or completely bypass the double opt- in requirement. For

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[52] U.S. Consumer Best Practices for Messaging, Version 7.0, October 15, 2012.

[53] AT&T Response to Billing Rules Data Request No. 01, May 10, 2012, at 3; Sprint Response to Billing Rules Data Request No. 01, May 10, 2012, at 4.; Verizon Response to Billing Rules Data Request No. 01, May 10, 2012, at. 2-3.

[54] *Id.*

[55] *See* FTC Transcript, *supra,* at 109-116.

example, on October 12, 2012, a group of civil complainants residing in California, Colorado, Illinois, and Minnesota (Plaintiffs) filed a class action lawsuit in the United States District Court for Northern California (Court) against Wise Media, a third-party provider of a mobile premium text service, and Mobile Messenger Americas, Inc. ("Mobile Messenger"), a billing aggregator, *Fields v. Wise Media*.[56] In its Amended Complaint filed on March 13, 2013, the Plaintiffs added billing aggregators mBlox Incorporated ("mBlox") and Motricity, Inc. ("Motricity") as defendants (collectively "Aggregator Defendants").[57] The Amended Complaint alleges that Wise Media, Mobile Messenger, mBlox and Motricity (collectively "defendants") "enroll consumers—without their knowledge or consent—in short message service ("SMS") text subscription plans with monthly membership fees of $9.99."[58]

Six months after the filing of *Fields v. Wise Media*, the FTC filed a complaint against Wise Media, a provider of third-party content to customers of wireless BTCs. The FTC's complaint did not name any of the billing aggregators as defendants. This marked the FTC's first case concerning mobile cramming. The FTC's complaint alleges

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[56] Mobile Messenger, mBloc and Motricity are all billing aggregators (referred to as "Aggregator Defendants" in the Complaint). Mobile Messenger was named as a defendant in the original complaint filed on 10/4/12, and mBloc and Motricity were added in the First Amended Complaint filed on 3/13/13 The First Amended Complaint alleges that they were SMS aggregators for Wise Media, that "Wise Media could only charge consumers for the Subscription Plans on consumers' mobile phone bills with the assistance of the Aggregator Defendants", and that "the Aggregator Defendants knew about—or recklessly disregarded—the fact that consumers had not voluntarily enrolled in the Subscription Plans [which consumers assert they did not authorize]." (*Fields v. Wise Media*, Case No. 3:12-cv-05160-WHA , U.S. Dist. Ct. No. Dist. CA, First Amended Complaint at p. 8, ¶¶ 48-51.)

[57] *Wise Media v. Fields*, Case No. 3:12-cv-05160-WHA, U.S. Dist. Ct. No. Dist. CA, First Amended Complaint ("Complaint") at p. 1, ¶ 1.

[58] *Id.*

that Wise Media took in millions of dollars by placing charges on consumers' mobile phone bills, many of which were unauthorized charges.[59] According to the complaint, in many instances, Wise Media sent text messages to consumers that suggested they were subscribed to the service, which many consumers dismissed as spam and ignored.[60] Even if consumers responded via text indicating that they did not want the services, the complaint asserts that Wise Media placed charges on their mobile phone bills on an on-going basis.[61]

On August 20, 2013, the FTC filed a complaint against another mobile third-party content provider, Jesta Digital, LLC (Jesta)[62], alleging that Jesta crammed unwanted charges on to consumer's wireless phone bills. According to the FTC's complaint, Jesta ran phony virus-scan ads on consumers' Android mobile devices while they played the Angry Birds mobile app.[63] Through Jesta's deceptions and misrepresentations, customers unwittingly signed up for Jesta's services.[64] According to the FTC's complaint, Jesta charged consumers $9.99 per month directly on their mobile bill for ringtones and other mobile content.[65] If consumers actually attempted to subscribe and download Jesta's "anti-virus software" to their mobile devices, the download often failed. Jesta charged

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[59] *FTC v. Wise Media, LLC*, Case No. 13-CV-1234, US Dist. Ct., N. Ct. Dist. A., Complaint at ¶ 11

[60] *Id.*

[61] *Id.*

[62] Jesta also does business as Jamster.

[63] *FTC v. Jesta*, Complaint for Permanent Injunction and Equitable Relief, Dist. Ct. DC, at 2-3.

[64] *Id.* at 3-4.

[65] *Id.* at 5-6.

unsuspecting consumers by misusing a new billing method known as Wireless Access Protocol (WAP) billing.[66] WAP billing captures a consumer's mobile phone number from the mobile device, which is used to place charges on their mobile phone bill without the need to obtain the information manually from the consumer.[67] The FTC and Jesta have announced a settlement agreement.

The *Wise Media* and *Jesta* cases demonstrate that the double opt-in process may not be an effective tool to combat cramming. It is also notable that, in contrast to what the CMRS reported to CPUC staff about the effectiveness double opt-in process, the FTC wrote, in comments to the FCC in July 2012, that, "it is not clear whether the double opt-in requirement is being consistently followed or is otherwise effective at stopping cramming."[68] The FTC continued:

> In the Sentinel complaints that FTC staff have reviewed, consumers often report that they have not even subscribed to premium text message services. Charges are simply placed without any authorization. In the landline context, crammers have shown that they are able to fabricate records and thus circumvent requirements that they prove that consumers have authorized particular third-party charges. For example, in *FTC v. Nationwide Connections*, a convicted felon running a cramming operation from his jail cell was able to charge consumers for collect calls that were fabricated;[69] and in *FTC v. Inc21.com*, the defendants altered and falsified

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[66] *Id.*at 6.

[67] *Id.* at 8.

[68] Federal Trade Commission Reply Comments to The FCC, "In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), CG Docket No. 11-116, July 20, 2012.

[69] *FTC v. Nationwide Connections*, No. 06-80180, First Amended Complaint at 6-9 (S.D. Fla. filed Feb. 27, 2006),

available at http://www ftc.gov/os/caselist/0523141/060921ntwideconnectamndcmplt.pdf.

> verification recordings for telemarketing calls that purported to show consumers' consent to charges.[70] Similar concerns are likely to arise in the wireless context. Indeed, a mobile security firm recently identified malicious software that, when downloaded to a consumer's phone, surreptitiously signed the consumer up for premium services by sending text messages without the users' knowledge.[71] Moreover, not all "double opt-in" procedures for premium services require that a consumer affirmatively respond to a confirmation text message – for example, a user could click through on a website accessed on a mobile device without viewing the full terms and conditions explaining that the user is authorizing a charge to a mobile bill.[72]

E. Applying Cramming Rules to Wireless Service and VoIP Providers

The CPUC strongly urges the FCC to apply cramming regulations to wireless service providers, as well as to VoIP providers where feasible. There is record evidence in this proceeding that CMRS and VoIP consumers have been the target of cramming.[73] No matter what communications technology consumers adopt, they should not be subject to unauthorized charges on their bills. General fraud laws do not provide subscribers who have been crammed with a remedy for swift redress nor do they give state utility commissions or the FCC adequate ability to monitor the incidences of cramming. The principle of competitive neutrality further requires that consumer protection measures

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[70] *Inc21.com,* 745 F. Supp. 2d at 991-92.

[71] The malware would also intercept confirmation messages so that consumers would not know they were being charged. *See* Lookout Mobile Threat Report, Lookout Mobile Security, 16-17 (August 2011), *available at* https://www.mylookout.com/ downloads/lookout-mobile-threat-report-2011.pdf.

[72] Wireless Application Protocol ("WAP") billing enables third-party content to be charged directly to a wireless subscriber account and is used for content purchases via mobile devices. *See* Mobile Marketing Assn., "WAP Billing," available at http://www.mmaglobal.com/wiki/wap-billing. WAP billing transactions can be initiated with several screen taps on mobile websites with no reply to a text message to the device linked to that account required for the consumer to opt-in. *See* MMA Guidelines at 2.18.1.

[73] *See* NPRM discussion at paras. 29, 31, 32, 36, 52.

should not unfairly advantage one service provider over another. Indeed, both federal and state law mandate that regulation be technology-neutral; exempting VoIP and/or wireless providers from cramming rules would thwart that regulatory goal.[74] The CPUC is mindful that VoIP providers assert that they are "information service providers", but absent a declaration of same from the FCC, VoIP providers arguably are providing a telecommunications service, as defined in federal law. The underpinning of both California and federal law is to treat all providers of a like service in a like manner, whether the facilities used are wired or wireless.

Wireless and VoIP service providers can and do engage in cramming, as evidenced by the cramming complaints the CPUC has received.[75] VoIP subscribership is increasing and, as it does so, the inequality of failing to apply the same set of regulations to all classes of providers becomes all the more obvious and inexplicable. Fixed, postpaid, interconnected VoIP is typically billed in the same manner as PSTN phone service is, and thus provides the same cramming opportunities that we have seen in the traditional wireline world. No communications company should be permitted to charge subscribers unauthorized charges, or bill and collect unauthorized charges on behalf of a

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[74] *See* Cal. Pub. Util. Code § 234, defining "telephone corporation", and § 233, defining "telephone line", which includes the words "with or without wires". *See also* Cal. Pub. Util. Code §§ 709.5 and 709.6, intended to spur competition in local telephone markets, which do not distinguish between types of service providers, and include a reference to "all telecommunications service providers" (§ 709.6(b)). *See also* 47 U.S.C. § 153, definition 46 "telecommunications service", which includes the phrase "regardless of the facilities used". *See also* 47 U.S.C. § 254(b)(4), which mandates that all providers of "telecommunications services" should make an "equitable and nondiscriminatory contribution" to support universal service.

[75] *See* NPRM, at para. 29, *citing* Letter from Phillip Enis, Program Manager, California Public Utilities Commission, to Stephen Klitzman, Deputy Chief, Office of Intergovernmental Affairs, Consumer & Governmental Affairs Bureau, FCC (April 5, 2011).

third party (for which the billing company gets compensated by the third party). The take rate for VoIP service is growing and may well become the primary method of voice communication in the foreseeable future. The FCC's goal of consumer protection would be promoted by applying its cramming rules to VoIP providers as well as wireless providers, so long as it does so in a competitively neutral manner.

III. CONCLUSION

California appreciates the opportunity to comment on these important issues, and urges the FCC to consider and adopt the consumer protection proposals described above. We believe, however, that the FCC's primary focus in combating cramming should be protecting consumers of all carriers (wireline, CMRS, and VoIP)by adopting a default blocking opt-in requirement with an exception for affiliates and long distance service providers.

Respectfully submitted,

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