



## **AMENDED STAFF REPORT**

### **EFFECTIVENESS OF THE CRAMMING RULES IN DECISION 10-10-034 IN PROTECTING CALIFORNIA CONSUMERS FROM UNAUTHORIZED CHARGES ON THEIR PHONE BILLS, AND RELATED DEVELOPMENTS IN THE WIRELESS INDUSTRY**

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## TABLE OF CONTENTS

|   |           |
|---|-----------|
| <b>Executive Summary .....</b>  | <b>1</b>  |
| <b>I. BACKGROUND.....</b>   | <b>6</b>  |
| A. Definition of Cramming.....  | 7         |
| B. Prior Commission Decisions .....   | 7         |
| 1. D.00-03-020 .....  | 7         |
| 2. D.06-03-013 .....  | 8         |
| 3. D.10-10-034 .....  | 9         |
| 4. D.11-01-009 .....  | 11        |
| C. Legal and Business Developments in the Wireline Industry<br>After D.10-10-034.....     | 11        |
| <b>II. ASSESSING BTCS' COMPLIANCE WITH, THE CRAMMING RULES.....</b>                       | <b>14</b> |
| A. Third-Party Charges Blocking Option.....   | 14        |
| 1. Rules in D.10-10-034.....  | 14        |
| 2. Scope of Review .....  | 15        |
| 3. Deficiencies in Wireless BTCs' Implementation of Blocking Option .....                 | 16        |
| 4. Deficiencies in Wireline BTCs' Implementation of Blocking Option .....                 | 17        |
| 5. Further Monitoring of Compliance with the Blocking Rules Is Appropriate .....          | 18        |
| B. Protocols for Monitoring Billing to Determine Need for Terminations and Suspensions    | 18        |
| 1. Rules in D.10-10-034.....  | 18        |
| 2. Scope of Review .....  | 19        |
| 3. Wireless BTCs Report that They Have Been Terminating and Suspending<br>Providers ..... | 19        |
| 4. Wireline BTCs Report that They Have Been Terminating and Suspending<br>Providers ..... | 20        |
| C. Reporting Requirements .....   | 22        |
| 1. Wireless BTCs Reported Refunds .....   | 22        |
| 2. Wireless BTCs Reported Third-Party Services Suspensions and Terminations .....         | 23        |
| 3. Wireline BTCs Reporting of Cramming Complaints .....                                   | 23        |
| 4. Wireline BTCs Reported Suspensions and Terminations.....                               | 23        |

|  |           |
|--|-----------|
| D. Wireless Refund Policies .....  | 24        |
| <b>III. ASSESSING THE EFFECTIVENESS OF THE CRAMMING RULES IN<br/>    PROTECTING CONSUMERS.....</b>   | <b>27</b> |
| A. New Rules May Have Contributed to the Decline in Wireless Refunds .....   | 27        |
| 1. Wireless Refund Analysis Methodology .....  | 27        |
| 2. Trend in Wireless Refunds.....  | 28        |
| B. New Rules May Have Contributed to the Decline in Wireline Cramming<br>Complaints and the Termination of Third-Party Billing for Enhanced Services by<br>Major Wireline Carriers ..... | 30        |
| 1. Wireline Cramming Complaint Analysis Methodology .....  | 30        |
| 2. Trend in Wireline Cramming Complaints .....   | 30        |
| 3. Termination of Third-Party Billing for Enhanced Services on Wireline Billing<br>System.....   | 33        |
| B. Consumer Reported Complaint Data (CAB Data).....  | 33        |
| 1. Wireless Cramming Complaints Received .....   | 34        |
| 2. Decline in Wireline Cramming Complaints Received.....   | 35        |
| C. Effectiveness of Requirement for Terminations .....   | 35        |
| 1. Wireless Terminations and Suspensions.....  | 36        |
| 2. Wireline Terminations .....   | 37        |
| 3. Assessment.....   | 37        |
| D. Requirement for Quarterly and Yearly Meetings with BTCs Opens Communication<br>Channels and Provides a Valuable Opportunity for Collaboration .....                                   | 37        |
| <b>IV. MARKET TRENDS AND DEVELOPMENTS IN THE WIRELESS INDUSTRY ...</b>   | <b>38</b> |
| A. Short Messaging and Premium Short Messaging Services .....  | 39        |
| B. Double Opt-In .....   | 40        |
| C. Application Stores (app stores); Mobile and Digital Wallets; Political Donations .....  | 43        |
| 1. Application Stores.....   | 43        |
| 2. Mobile and Digital Wallets.....   | 43        |
| 3. Political Contributions via Wireless Phones.....  | 43        |
| D. Smart Phones.....   | 44        |
| E. Circumvention of Third-Party Billing Authorization Procedures .....   | 45        |
| <b>V. CHANGES IN THE FEDERAL LANDSCAPE CONCERNING CRAMMING .....</b>   | <b>45</b> |
| A. FCC Rulemaking Regarding Cramming .....   | 45        |
| B. Federal Class Action & the FTC’s Complaint Against Wise Media .....   | 49        |

|  |           |
|--|-----------|
| C. January 31, 2013 Letter from the CPUC to the FCC.....   | 52        |
| D. FTC Staff Report on Mobile Payments and FTC’s Mobile Cramming Roundtable .....                            | 53        |
| E. FTC’s Complaint Against and Proposed Settlement with Jesta Digital, LLC .....                             | 55        |
| F. FTC’s Complaint Against Tatto, Inc., <i>et alia</i> .....   | 56        |
| <b>VI. FINDINGS AND NEXT STEPS.....</b>  | <b>57</b> |
| A. BTCs’ Compliance with D.10-10-034 Cramming Rules .....  | 57        |
| 1. Third-Party Charges Blocking Option .....   | 58        |
| 2. Establishing Protocols for Monitoring Billing to Determine Need for Terminations<br>and Suspensions ..... | 58        |
| 3. Reporting Requirements .....  | 58        |
| B. Effectiveness of Cramming Rules in Protecting Consumers .....   | 58        |
| C. Next Steps.....   | 59        |
| 1. Reconsider D.11-01-009:.....  | 60        |
| 2. Reporting Requirements for Wireline and Wireless BTCs.....  | 60        |
| 3. Adopt a Default Blocking Opt-In Requirement.....  | 61        |

## **APPENDICES**

**Appendix 1** – Ordering Paragraphs 1 Through 3 from Decision 10-10-03 and Billing Rules Contained in Attachment A, Revised General Order 168, Part 4

**Appendix 2** – Third-Party Bill Blocking Test Plan Questions for Wireless BTCs

**Appendix 3** – Detailed Third-Party Bill Blocking Test Findings for Wireless BTCs

**Appendix 4** – Third-Party Bill Blocking Test Plan Questions for Wireline BTCs

**Appendix 5** – Detailed Third-Party Bill Blocking Test Findings for Wireline BTCs



## Executive Summary

### *Purpose of this Report*

Cramming occurs when an unauthorized charge is placed on a subscriber's telephone bill. On November 2, 2010, the California Public Utilities Commission (Commission), as part of a long-running consumer protection docket, issued Decision (D.) 10-10-034 revising General Order (G.O.) 168 Part 4, *Market Rules to Empower Consumers and to Prevent Fraud – Rules Governing Cramming Complaints*. The revised rules established cramming reporting requirements applicable to all Billing Telephone Corporations (BTCs) and Billing Agents and combined and clarified two previously issued sets of rules (from D.00-03-020, as modified by D.00-11-015, and D.06-03-013) into a comprehensive standard set of rules applicable to all BTCs, including resellers and wireless telephone corporations.

The Commission also directed staff of the Communications Division (CD) and the Consumer Protection and Safety Division, now renamed the Safety and Enforcement Division (SED),<sup>1</sup> to prepare a report on the effectiveness of these rules and other related developments in the wireless industry:

The Communications Division staff must prepare a report, in collaboration with the Consumer Protection and Safety Division, on developments in the wireless industry, including new types of offerings by third-party providers beyond Premium short messaging services. The report must include findings on whether the cramming rules adopted by this decision sufficiently protect customers from unauthorized charges. This report shall be prepared and served on parties to this proceeding by no later than January 1, 2013.<sup>2</sup>

CD and SED issued an initial report on January 4, 2013, which was later withdrawn on January 25, 2013. The report is issued again as this Amended Report and replaces the original report. We will hereinafter refer to the Amended Report as “report.”

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<sup>1</sup> As of January 1, 2013 the Consumer Protection and Safety Division (CPSD) was renamed the Safety and Enforcement Division (SED).

<sup>2</sup> D.10-10-034 at 50, Ordering Paragraph 2.

## ***Caveats***

In gathering information for this report, staff relied on Commission decisions, rules, and orders, data the carriers regularly report to the Commission, and specific data request responses from carriers. The information in these reports and responses has not been audited.

Staff also notes that it is difficult to get an overview of the entire third-party billing system, as the BTCs' primary relationship is with the billing agents, and the billing agents handle their relationships with the service providers separately.

## ***Compliance with Rules***

Staff has worked with wireless and wireline BTCs towards complying with the cramming rules adopted by the Commission in D.10-10-034. BTCs have engaged in an ongoing process with Commission staff, meeting quarterly and annually to discuss recent developments regarding cramming issues. The BTCs have also worked with SED and CD staff to develop consumer education cramming-related materials, such as those used on the Commission's CalPhoneInfo website, to educate consumers on how to avoid becoming victims of cramming.

Consistent with the requirements in the cramming rules, BTCs have implemented measures to educate consumers on their rights to block third-party billing, established protocols designed to prohibit Billing Agents and Service Providers from submitting unauthorized charges, and submitted required reports on cramming-related activities to SED. However, based on a sampling of BTC offerings, consumers do not appear to be receiving adequate disclosure, online or from the BTCs' consumer service representatives (CSRs) of their option to have third-party bill blocking implemented at no charge. Specific details of BTCs' compliance with the cramming rules are contained throughout this report and are compiled in Section II.

## ***Effectiveness of the Cramming Rules***

It is difficult to precisely quantify the effects of the cramming rules instituted by D.10-10-034 because of other possible influences on cramming behavior, and because the telecommunications industry itself, and the legal framework within which it operates, have been changing. Advances in technology, changes in BTCs' business practices, federal regulatory efforts, and class action settlements, all have had possible impacts on post-decision cramming behavior. On July 13, 2011, Senator Rockefeller and the Senate Commerce Committee issued a Report on *Unauthorized Charges on Telephone Bills* that took the wireline BTCs to task for what it portrayed as an epidemic of wireline cramming ("Rockefeller Report"). Thereafter, the two largest BTCs entered into settlements of nationwide class actions which 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, these BTCs announced they would cease billing for a wide range of (but not all) third-party services. For all of these reasons, the effect of D.10-10-034 cannot be exactly quantified.

Staff analyzed the available data and major activities that followed issuance of the decision, as reported by the BTCs, and found positive trends and results in many areas. Results include:

- Wireline cramming complaints, which were relatively stable prior to the issuance of D.10-10-034, decreased steadily following the implementation of the cramming rules, ultimately resulting in a reduction of the number of reported wireline complaints by more than 50%.
- Wireless refunds (which are issued for multiple reasons in addition to cramming complaints) showed a downward trend.
- BTCs reported that they suspended or terminated significant numbers of service providers with questionable activities.
- Collaboration with staff has helped the BTCs understand and implement the cramming rules, and resulted in consumer education materials which staff believes contribute to general consumer awareness about the problem of unauthorized charges.

Details of these trends and results are contained throughout this report.

Staff is unable to determine the precise extent to which the cramming rules alone have been effective in protecting consumers. The numbers staff received from wireline BTCs indicate a downward trend in cramming. Accordingly, staff finds that the cramming rules for customers of wireline BTCs, when viewed with wireline BTCs' changes in business practices and with the climate created by the federal regulatory efforts and class action settlements (discussed fully below in Section I(C)), are helping to protect consumers.

The data for wireless BTCs, however, is inconclusive. While wireline BTCs have been reporting cramming complaints to the Commission since 2000,<sup>3</sup> the Commission only received the first cramming reports from wireless BTCs in 2011 after it implemented D.10-10-034. Therefore, the Commission does not have sufficient historical data to make a determination regarding the impact of the cramming rules on wireless BTCs.

Even though the data wireline BTCs provided the Commission shows a downward trend in wireline cramming, the numbers also demonstrates that wireline cramming is still occurring. While the data staff received from wireless BTCs is inconclusive on wireless cramming (also referred to as "mobile cramming"), recent court cases and other factors indicate that wireless cramming is on the rise. In order to better protect consumers, staff recommends that the Commission reconsider the adoption of a default blocking opt-in requirement, which would allow third-party charges to appear only on the bills of those consumers who had affirmatively chosen to allow such charges onto their bills. Under a default blocking opt-in regimen, all telephone bills would be closed to third-party billing absent subscriber authorization (which could be obtained at point of sale, or afterwards). Staff is mindful of the fact that the Commission chose not to adopt a default blocking opt-in regime, and instead adopted an opt-out

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<sup>3</sup> See D.00-03-020, as modified by D.00-11-015.

requirement, bill blocking (blocking on request), in D.10-10-034. However, the information on cramming that staff has gathered and received indicates that while the cramming rules, including bill blocking, have likely had an impact on the lower incidence of cramming on the telephone bills of wireline BTCs, cramming still remains a problem for consumers in both the wireline and wireless marketplaces. Therefore, staff suggests that the Commission reexamine whether to adopt a default blocking opt-in requirement at this time.

### ***Developments in the Wireless Industry***

Wireless BTCs report that they now use at least two different means to shift third-party charges away from wireless bills onto credit cards, although the extent of that shift has not been measured. When unauthorized third-party charges are not added to wireless bills, then cramming does not occur. In these circumstances, any unauthorized charges and fraud are resolved via the billing credit card company. Application stores and mobile/digital wallets are two means that typically employ billing via credit cards rather than phone bills.

For Premium Short Message Service (SMS) / text accounts, wireless BTCs report that they have relied on double opt-in processes to reduce and prevent cramming, as discussed in Section IV(B) of this report. However, the Commission found in D.10-10-034 that the double-opt in process alone was not sufficient to protect consumers from cramming.<sup>4</sup>

As suggested above, the Rockefeller Report, two nationwide class-action settlements of wireline cramming claims, and the carriers' own curtailment of some third-party billing have probably all driven change in the wireline marketplace, although, again, such change is difficult to quantify.

More extensive information concerning market trends and developments in the wireless industry is in Sections IV and V of this report.

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<sup>4</sup> D.10-10-034, at. 28-29.

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## I. BACKGROUND

D.10-10-034, issued on November 2, 2010, revised G.O. 168, Part 4, *Market Rules to Empower Consumers and to Prevent Fraud – Rules Governing Cramming Complaints*. The revised rules established cramming reporting requirements applicable to all BTCs and Billing Agents and combined and clarified two previously issued sets of rules (from D.00-03-020, modified by D.00-11-015, and D.06-03-013) into a comprehensive standard set of rules applicable to all BTCs, including resellers and wireless telephone corporations.<sup>5</sup> Cramming occurs when an unauthorized charge is placed on a subscriber’s telephone bill.

The Commission also directed CD staff, in collaboration with the Consumer Protection Safety Division (CPSD), as of January 1, 2013, renamed the Safety Enforcement Division (SED), to prepare a report on “developments in the wireless industry, including new types of offerings by third-party providers beyond Premium Short Message Services (SMS). The report must include findings on whether the cramming rules adopted by this decision sufficiently protect customers from unauthorized charges.”<sup>6</sup>

The terms “Billing Telephone Corporation,” “Telephone Corporation,” “Billing Agent,” and “Service Provider” as used in this report are terms of art defined in G.O. 168 Part 4 Section 2. The terms are defined as follows:

**Billing Telephone Corporation:** A telephone corporation that bills a Subscriber for products and services provided by a third party, including corporate affiliates.<sup>7</sup>

**Telephone Corporation:** Any telephone corporation (as defined in Pub. Util. Code § 234) operating within California. This term includes resellers and wireless telephone service providers.

**Billing Agent:** Any entity which provides billing services for Service Providers directly or indirectly through a Billing Telephone Corporation.

**Service Provider:** A person or entity, other than a Billing Telephone Corporation, that originates the charge or charges that are billed to the Subscriber of the Billing Telephone Corporation.

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<sup>5</sup> The Commission has not applied the cramming reporting rules to Voice over Internet Protocol (VoIP) providers.

<sup>6</sup> See D.10-10-034, at 50, Ordering Paragraph 2.

<sup>7</sup> This is the definition of Billing Telephone Corporation as modified by D.11-01-009, Order Correcting Error in and Granting Extension of Time to Comply with D.10-10-034.

## **A. Definition of Cramming**

G.O. 168 Part 4 states, “Cramming occurs when an unauthorized charge is placed on a Subscriber’s telephone bill.”<sup>8</sup> G.O. 168 later defines “unauthorized charge” as:

Any charge placed upon a Subscriber’s telephone bill for a service or goods that the Subscriber did not agree to purchase, including any charges that resulted from false, misleading, or deceptive representation. Charges that relate to a change in a subscriber’s selection of a provider of telecommunications service are excluded from these rules and are subject to Part 3 (Rules Governing Slamming Complaints) of this General Order.<sup>9</sup>

G.O. 168 Part 4 Rule 2.7 defines “subscriber” as one of the following:<sup>10</sup>

- (1) The person or entity identified in the account records of a carrier as responsible for payment of the telephone bill;
- (2) Any person authorized by such party to charge services to the account;
- (3) Any person lawfully in possession of a wireless handset where the subscriber of record, after being fully informed of the optional nature of this feature and the associated responsibilities has authorized the Billing Telephone Corporation to place third-party charges on the Subscriber’s bill for the line serving the handset. This provision does not relieve the subscriber of any obligation to (sic) under their service agreement to promptly report a lost or stolen wireless handset to the Billing Telephone Corporation.

## **B. Prior Commission Decisions**

### **1. D.00-03-020**

In 2000, the Commission, in D.00-03-020, as modified by D.00-11-015, adopted quarterly cramming reporting requirements applicable to wireline carriers and their billing agents. Specifically, the Commission ordered all billing telephone companies and billing agents to create and submit to the Director of SED a calendar month summary report which shall include the following information:

- a. The total number of consumer complaints received each month for each service provider and billing agent;

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<sup>8</sup> G.O. 168 Part 4 Rule 1.

<sup>9</sup> G.O. 168 Part 4 Rule 2.6.

<sup>10</sup> This is potentially important because of the incidence of charges incurred by minors, among other reasons.

- b. The name, address, and telephone number of each entity for which complaints were received;<sup>11</sup>
- c. The total number of working telephone numbers billed for each entity for which complaints were received;
- d. For billing agents, the total number of subscribers billed by each service provider for which complaints were received; for billing telephone companies, the total number of subscribers billed by each service provider for which the billing telephone company directly bills and each billing agent;
- e. For billing agents, the total dollars billed by each service provider; for billing telephone companies, the total dollars billed by each service provider for which the billing telephone company directly bills and each billing agent.<sup>12</sup>

## 2. D.06-03-013

Six years later, on March 2, 2006, the Commission adopted D.06-03-013, *Decision Issuing Revised General Order 168, Market Rules to Empower Telecommunications Consumers and to Prevent Fraud*. The purpose of D.06-03-013 and revised G.O. 168 was to chart a new regulatory role for the Commission in the face of technological advances, the convergence of voice, data, and video, and the increasing competition in the telecommunications marketplace.

In D.06-03-013, the Commission adopted rules to protect consumers from cramming by defining a BTC's responsibilities for unauthorized charges placed on its subscribers' telephone bills and for establishing related complaint resolution procedures. The cramming rules established that:

- a. BTCs may bill subscribers only for authorized charges.
- b. The burden is on BTCs to establish authorization of a disputed charge.
- c. Prior to establishing this authorization, the BTC must treat a charge as if it was unauthorized and may not require the subscriber to make any payment of the disputed charge.
- d. If a BTC receives a complaint of an unauthorized charge, the BTC must either verify the authorization of the charge or credit the disputed charge and associated penalties to the subscriber's bill.<sup>13</sup>

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<sup>11</sup> This requirement pertains to BTCs only. Billing agents are exempt from this requirement.

<sup>12</sup> D.00-11-015, Attachment A, p. 4.

<sup>13</sup> D.06-03-013, Appendix A at A-8.

The Commission emphasized in D.06-03-013 that BTCs are responsible for all charges placed on their bills and for policing their bills. In this decision the Commission also directed staff to hold a workshop to determine appropriate cramming-related reporting requirements.<sup>14</sup>

### 3. D.10-10-034

On November 2, 2010, in D.10-10-034, *Final Decision Adopting California Telephone Corporation Billing Rules*, the Commission revised G.O. 168 Part 4, “Rules Governing Cramming Complaints.” The revised rules established cramming reporting requirements applicable to all BTCs and Billing Agents, and combined and clarified two previously issued sets of rules (from D.00-03-010, modified by D.00-11-015, and D.06-03-013) into a comprehensive standard set of rules applicable to all BTCs, including resellers and wireless telephone corporations.<sup>15</sup>

In addition to the rules established in the earlier proceedings, the Commission established the following cramming rules in D.10-10-034<sup>16</sup>:

- a. BTCs must adopt protocols for prohibiting Billing Agents and Service Providers from submitting unauthorized charges on phone bills, and BTCs must monitor each Service Provider’s continuing compliance with this requirement.
- b. The BTC bears the ultimate responsibility for all items presented in a Subscriber’s bill, and must do the following to ensure only authorized charges appear on a Subscriber’s phone bill:
  - i. Conduct an inquiry into a Service Provider’s or Billing Agent’s history of violations prior to providing billing services.

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<sup>14</sup> D.06-12-042, issued Dec. 14, 2006, disposed of applications filed by the California Attorney General, the Utility Reform Network, and the Division of Ratepayer Advocates for a rehearing of D.06-03-013. D.06-12-042 also modified D.06-03-013 to clarify that the CPUC has primary jurisdiction to interpret G.O. 168 cramming rules.

<sup>15</sup> The Commission first adopted cramming reporting rules for third-party charges on the bills of wireline carriers in D.00-03-020. D.10-10-034 revised these rules for wireline carriers and adopted new rules for wireless carriers. The Commission has not applied the rules adopted in D.10-10-034 to VoIP carriers. The CPUC's Consumer Affairs Branch (CAB) has assisted consumers who have contacted the CPUC about cramming complaints, including complaints from some subscribers of VoIP services. SB 1161, codified as PU Code 710, recognized the CPUC's jurisdiction to “continue to monitor and discuss VoIP services, to track and report to the Federal Communications Commission and the Legislature, within its annual report to the Legislature, the number and type of complaints received by the commission from customers, and to respond informally to customer complaints, including providing VoIP customers who contact the commission information regarding available options under state and federal law for addressing complaints.” (Pub. Util. Code § 710(f).)

<sup>16</sup> See Appendix 1, G.O. 168 Part 4.

- ii. Inform Subscribers at service initiation that the BTC provides third-party billing services.
  - iii. Inform Subscribers of their options to block third-party charges.
  - iv. Resolve all Subscriber complaints of unauthorized charges.
- c. BTCs must monitor their billings to prevent and detect unauthorized charges, and terminate billing services to Billing Agents and Service Providers that present unauthorized charges.
- d. BTCs may not require a Subscriber to pay disputed charges while a complaint investigation is pending.
- e. BTCs bear ultimate responsibility for refunding all unauthorized charges, including charges to Subscribers who may have mistakenly paid the unauthorized charges and not requested a refund.
- f. BTCs and Billing Agents must maintain 24 months of records of all billings and Service Providers sufficient to demonstrate compliance with the cramming rules and to facilitate customer refunds.
- g. BTCs and Billing Agents must fulfill the following reporting requirements to the CPSD:
  - i. Calendar month summary report every quarter listing refunds made to California Subscribers (Wireless BTCs)
  - ii. Calendar month summary report every quarter listing third party services suspended or terminated (Wireless BTCs)
  - iii. Calendar month summary report every quarter listing number of consumer [cramming] complaints, entities receiving complaints, and number of telephone numbers billed, subscribers billed, and dollars billed for entities for which complaints were received (Wireline BTCs and their Billing Agents)
  - iv. Identity of any Service Providers or Billing Agents terminated for any reason (Wireless and Wireline BTCs)
  - v. Yearly report documenting the means offered to Subscribers for blocking third-party billing (Wireless and Wireline BTCs)
- h. BTCs must meet periodically with Commission staff to discuss recent wireless industry developments regarding cramming issues and any

Commission concerns regarding cramming. Additionally, BTCs must cooperate with Commission staff in developing materials to educate consumers on how to avoid having unauthorized charges placed on their bills.

These rules became effective on January 29, 2011 and the first wireless refund reports, covering the first quarter of 2011, were submitted to SED on April 30, 2011.

#### **4. D.11-01-009**

In response to a notification from the California Association of Competitive Telecommunications Companies (CALTEL) of an omission in D.10-10-034, the Commission's Executive Director issued D.11-01-009<sup>17</sup> revising G.O. 168 Part 4 Rule 2.4 to change the definition of a BTC as follows: "A telephone corporation that bills a Subscriber for products and services provided by a third party, including corporate affiliates." The original definition of a BTC contained in D.10-10-034 read simply: "A telephone corporation that bills a Subscriber for products and services." Using the definition the Commission adopted in D.10-10-034 would have meant that telephone companies would have to comply with the reporting requirements in D.10-10-034 even if they did not offer third-party billing.

The effect of the new definition of BTC established by D.11-01-009 is that if the cramming complaint does not regard a third-party charge, but regards services for which the BTC itself provides, then the BTC is not required to report such non-third-party cramming complaints or refund rates. Staff notes that this change in the definition of BTC made in D.11-01-009 does not appear to be consistent with the Commission's intent in D.10-10-034.<sup>18</sup> Staff recommends that the Commission revisit this definition of BTC so that the BTCs are required to report cramming complaints for services the BTCs themselves provide.

#### **C. Legal and Business Developments in the Wireline Industry After D.10-10-034**

Important legal and business developments have occurred in the wireline market concurrent with and since the Commission issued D.10-10-034. The effectiveness of D.10-10-034 cannot be assessed without consideration of these other developments.

First, the Federal Trade Commission's (FTC) major cramming case, *FTC v. Inc21.com*, has ended successfully. The several reported decisions gave the cramming issue a higher profile, and described a concrete case of how cramming occurs.<sup>19</sup>

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<sup>17</sup> D.11-01-009, *Order Correcting Error In and Granting Extension of Time to Comply with Decision 10-10-034*, issued January 13, 2011.

<sup>18</sup> See D.10-10-034, Appendix A, G.O. 168 Part 4 § 2.4.

<sup>19</sup> D.10-10-034, Slip Op. at 3-4, citing Memorandum Opinion and Findings In Support of Preliminary Injunction, Feb. 19, 2010, *FTC v. Inc21.com Corp.*, No. C 10-00022, subsequently reported at 688 FS2d 927 (N.D. Cal. 2010); see also *FTC v. Inc21*, 745 FS2d 975, 1001 (ND Cal, September 21, 2010 Order). Judge Alsup described the *Inc21* scheme as "highlight[ing] the vulnerable underbelly of a widespread and under-regulated practice called LEC billing ... Since its institution, LEC Billing has attracted fraudsters." *FTC v. Inc21*, 688 FS2d at 929.

Secondly, the Rockefeller Report on *Unauthorized Charges on Telephone Bills* (Rockefeller Report) issued on July 13, 2011,<sup>20</sup> painted a picture of a third-party wireline billing system that was out of control and harmful to consumers. The Rockefeller Report noted that:

Committee staff has spoken with more than 500 individuals and business owners whose telephone bills included third-party charges. Not one person said the charges were authorized. Law enforcement agencies have reported similar findings ....<sup>21</sup>

The Rockefeller Report also observed that even with recent efforts to stop cramming, it was not difficult for a third party to place unauthorized charges on customer's bills:

Despite the telephone companies' decision to enact voluntary anti-cramming guidelines and the FCC's Truth-in-Billing requirements, it still takes minimal effort for a company engaged in cramming to place unauthorized third-party charges on consumers' bills, while it remains difficult for customers to find and remove those charges from their telephone bills.<sup>22</sup>

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 telephone customers, as telephone companies promised it would, third-party billing has made telephone customers targets for fraud."<sup>23</sup> While focused on cramming on landline telephone bills, the Rockefeller Report also noted that, "cramming on wireless telephone bills appears to be a problem as well."<sup>24</sup> The Rockefeller Report reached the same conclusions as D.10-10-034, the Commission's Cramming Decision, that additional protections were needed to protect consumers from cramming.<sup>25</sup>

The third development in the wireline industry is settlements in two nationwide class actions, which call for refunds to consumers, and reform of the carriers' conduct. The two cramming cases were filed in the United States District Court for the Northern District of California in

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<sup>20</sup> The Senate Report with all its Appendices is available at [http://commerce.senate.gov/public/index.cfm?p=Reports&ContentRecord\\_id=ea101f28-4df5-4a3f-a63c-0eca043789be&ContentType\\_id=6a6fef64-34f1-4348-b965-ec03a1dcadfe&Group\\_id=a89b0b93-3242-4d2a-82da-5e916a62b6a9](http://commerce.senate.gov/public/index.cfm?p=Reports&ContentRecord_id=ea101f28-4df5-4a3f-a63c-0eca043789be&ContentType_id=6a6fef64-34f1-4348-b965-ec03a1dcadfe&Group_id=a89b0b93-3242-4d2a-82da-5e916a62b6a9); the Report itself is at [http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=3295866e-d4ba-4297-bd26-571665f40756](http://commerce.senate.gov/public/?a=Files.Serve&File_id=3295866e-d4ba-4297-bd26-571665f40756).

<sup>21</sup> *Id.* at ii (emphasis added).

<sup>22</sup> *Id.* at 44.

<sup>23</sup> *Id.* 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.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *See* Rockefeller Report at 44.

2009, *Moore v. Verizon*, C V09-1823 SBA, and *Nwabueze v. AT&T*, C 09-cv-1529 SI, and allege that the BTC defendants violated the Racketeer Influenced Corrupt Organization (RICO) statutes by operating a third-party billing system in a way likely to defraud customers.

After those allegations survived demurrer,<sup>26</sup> Verizon and AT&T entered into nationwide settlements with plaintiff consumers.<sup>27</sup> The *Moore v. Verizon* settlement calls for: 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.<sup>28</sup> The Court gave preliminary approval to the settlement on February 12, 2012.<sup>29</sup> 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.<sup>30</sup>

There are, however, potential shortcomings in these settlements. They do not include the wireline BTCs’ wireless affiliates. They do not include what some consumer advocates believe to be the best remedy for wide-spread cramming – opt-in default blocking. However, the Commission decided not to adopt a default blocking opt-in mechanism in D.10-10-034, as described further below.<sup>31</sup> The settlement also excluded from the “Released Claims” and the “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.”<sup>32</sup>

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<sup>26</sup> 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.

<sup>27</sup> 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.).

<sup>28</sup> 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.

<sup>29</sup> *Moore v. Verizon*, Case No. 09-cv-1823 SBA, U.S. Dist. Ct. for No. CA.

<sup>30</sup> Information contained in a January 7, 2013 Class Action Fairness Act (CAFA) notice provided to the Commission.

<sup>31</sup> The Commission stated “While it is clear that an opt-in option would provide subscribers with more protection from unauthorized charges, this would represent a major operational change from current third-party billing practices and may result in customer confusion and dissatisfaction.” (D.10-10-034 at 29.)

<sup>32</sup> Paragraph 40 of the settlement excludes MTS or message telephone services usage charges, but does so without further definition.

Soon after entering into this settlement, Verizon announced that it would stop providing third-party billing services by the end of the year, although on closer scrutiny this new policy is subject to the same limitations as the *Moore* settlement, in that it appears to not apply to Verizon's wireless affiliate or to MTS usage charges.<sup>33</sup> Shortly after Verizon's announcement, AT&T followed suit.<sup>34</sup> 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.

If nothing else, the Rockefeller Report and the class action settlements, like D.10-10-034, reflect a heightened awareness of the extent of the cramming problem and consumer injuries resulting from it. It is difficult to determine precisely what role D.10-10-034, standing alone, has had in this development, though it likely contributed to AT&T and Verizon's shift in policy regarding third-party billing.

## II. ASSESSING BTCs' COMPLIANCE WITH, THE CRAMMING RULES

To assess BTCs' compliance with Commission cramming rules, staff reviewed BTC actions in the areas of third-party charges blocking option, protocols for monitoring billing to determine the need for terminations and suspensions, and reporting requirements. Staff's review included analysis of information provided by BTCs and testing of bill blocking provisions.

### A. Third-Party Charges Blocking Option

#### 1. Rules in D.10-10-034

The Commission found that the statutory requirement for subscriber authorization of third-party charges can be met by Service Providers for telephone lines where the BTC has informed the subscriber that the subscriber's line is open to third-party charges and that the subscriber has been provided and declined the option to block this access. As stated in D.10-10-034:

A subscriber giving a Billing Telephone Corporation permission to place third-party charges on the subscriber's bill after having been informed and not opting to block access satisfies the requirement found in Public Utilities Code section 2890 that the subscriber authorize the purchase because the subscriber is affirmatively indicating a willingness to be responsible for charges originating from Service Providers other than the Billing Telephone Corporation.<sup>35</sup>

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<sup>33</sup> 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](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 SED 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."

<sup>34</sup> See Senator Rockefeller statement at [http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord\\_id=0245033e-6fe4-420d-8ed3-cdb39ed6537f](http://commerce.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=0245033e-6fe4-420d-8ed3-cdb39ed6537f).

<sup>35</sup> See D.10-10-034 at 31-32.

In order to inform subscribers of their option to block third-party charges, the Commission determined that BTCs must explain at service initiation, in clear and concise written terms, that the subscriber's line is open to charges from third-party service providers and that the subscriber has the option to block these charges. Full explanations of this option must be presented in the BTC's website, tariffs, and customer brochures.

Specifically, G.O. 168 Part 4 Rule 5 states that:

- At service initiation, BTCs shall disclose to subscribers if third-party billing is provided and that charges may be placed on a bill – absent action by subscriber.
- At service initiation, BTCs shall explain in written terms that subscriber has the option to block charges.
- Blocking option must be free.
- BTCs must allow subscribers to add or remove blocking feature quickly and easily.
- BTCs must remind subscribers in writing no less than each calendar year that third-party charges may be placed on the bill, and of the blocking option and that it is offered at no cost.
- BTCs must explain blocking option in neutral terms.
- BTCs shall not state that the law or regulations require them to provide third-party billing.
- For wireline BTCs, the option to block third-party services does not extend to services they are required by law to provide, such long distance services from a competitor, or services or products offered by their affiliates.

In addition, G.O. 168 Part 4 Rule 8 states that if a BTC or Billing Agent receives a complaint, it must offer the complaining subscriber the option of blocking all future third-party billings at no charge.

## **2. Scope of Review**

SED staff conducted random, non-scientific tests on wireless and wireline BTCs to determine if they are following G.O. 168 Part 4 Rule 5 requiring them to offer to their subscribers the option to block third-party charges from their bills at no cost. Staff assessed compliance with G.O. 168 Part 4 Rule 8 through its review of BTC responses to Implementation of Billing Rules Data Request No. 01. To test the implementation of the blocking requirements, staff reviewed the information on carriers' websites and customer guides, and spoke to customer service and wireless retail store sales representatives about the availability of third-party blocking. When

performing the tests, staff asked each BTC specific questions for each category of review (websites, customer guides, retail store, customer service call center, etc.). These questions are provided in Appendices 2 and 4. This staff test does not assess whether BTCs appropriately offer the blocking option during their receipt of a disputed charge or cramming complaint. Thus, it is unknown whether there are deficiencies related to the offering of third-party blocking following a consumer initiated dispute. Regardless, results show that improvement is needed by most BTCs to more effectively inform and assist consumers with third-party charges blocking option.<sup>36</sup>

### 3. Deficiencies in Wireless BTCs' Implementation of Blocking Option

Based on the test results, SED staff found deficiencies in the following five areas in how wireless BTCs are implementing the rules of third-party charges blocking option:

- a. **Terminology confusion:** When CPSD staff asked customer service representatives (CSRs) if they offer third-party bill blocking, many CSRs said “no” and sounded confused. However, when staff explained what third-party bill blocking was, most CSRs were able to thereafter assist them. In addition, staff found no mention of “third-party bill blocking” on many wireless BTC websites. Through further questioning and website searches, CPSD staff discovered that other terms are used, such as “block premium messaging” and “content blocking.”
- b. **Bill blocking disclosure and information is not easily located:** Only two wireless BTCs mention the option to block in all of their materials (tariffs, terms of service, terms and conditions, and consumer guides). The other wireless BTCs mention the option to block in some of their materials, but not all. In fact, with three out of five wireless BTC website searches, “third-party bill blocking” or “premium messaging blocking” is offered, but one needs to search extensively to actually locate the information.
- c. **Lack of upfront disclosure that blocking option is “free”:** Most wireless BTCs do not state that the blocking option is free in all of their materials. Most wireless BTCs that mention the blocking option on the website do not state that it is at no cost to the subscriber. At times, CSRs do not know if it is free or not. In addition, CSRs do not disclose to the customer that it is “free” unless the customer asks. One wireless BTC mentions blocking in the Terms and Conditions, but does not state that it is “free.” The service agreement for another wireless BTC states that third-party charges will appear on the bill absent use of parental controls to block it. It does not mention that the blocking is offered for free. One must go to the “Wireless Parental Controls” page to find out that it is free.

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<sup>36</sup> See Third-Party Bill Blocking Test Plan Questions for Wireless and Wireline BTCs in Appendices 3 and 5, respectively.

- d. **Subscribers are not able to add or remove the blocking feature readily and easily:** Many wireless BTCs offer the blocking option online for existing customers, or inform customers on their websites how to perform this task on their phones. However, it is often difficult to find the blocking option online. Attempts to contact customer service have mixed results because most CSRs do not appear to know about free blocking and end up transferring the caller from one CSR to another. Staff also discovered that one wireless BTC offers subscribers the option to add or remove blocking if they call a CSR. However, this BTC does not offer the option to block online or in the store.
- e. **Wireless BTCs must explain the blocking option in neutral terms:** Testing revealed instances where CSRs for wireless BTCs promote the fee based version of their blocking options instead of the free version. Staff found three examples where CSRs sell or market a \$4.99/month service that they say has better features than the free blocking option. In other cases, the customers are not informed that a free option even exists.

Detailed third-party bill blocking test findings for wireless BTCs can be found in Appendix 3.

There is certainly a need for improvement in wireless BTCs' overall implementation of the third-party charges blocking option. Based on the information staff gathered, it appears that many wireless consumers are not receiving adequate disclosure, online or from wireless BTC CSRs, of their option to block and to have third-party bill blocking implemented at no charge. Staff's general assessment is that a subscriber has to know what to look for and know to ask about third-party bill blocking or "premium messaging blocking" in order to receive the free blocking service. Even then, many CSRs are not knowledgeable about free third-party bill blocking, and are unable to satisfactorily assist a subscriber who inquires about blocking third-party charges. Thus, it seems that wireless BTCs are complying with some but not all third-party bill blocking requirements set forth in G.O. 168 Part 4.

#### **4. Deficiencies in Wireline BTCs' Implementation of Blocking Option**

Based on the test results, SED found the following deficiencies in how wireline BTCs are implementing the rules of third-party charges blocking option:

- Thirty-eight percent (38%) of wireline CSRs were unable to assist customers with requests for bill blocking.
- When staff asked the BTCs' CSRs if they offer third-party bill blocking, twenty-two percent (22%) of CSRs responded "no" and seemed confused. However, when staff explained what third-party bill blocking was, these CSRs were able to subsequently assist them.

Detailed third-party bill blocking test findings for wireline BTCs can be found in Appendix 5.

Some wireline BTCs are not offering adequate disclosure upfront to consumers about their option to have third-party charges blocked at no charge. A subscriber has to know what to look for and know to ask about third-party bill blocking in order to receive information on the free blocking option. Even then, many CSRs themselves are not sufficiently knowledgeable about the free blocking option, and are thus unable to satisfactorily assist subscribers who inquire about blocking third-party charges.

## **5. Further Monitoring of Compliance with the Blocking Rules Is Appropriate**

Staff discussed these findings with each of the wireless and wireline BTCs and offered recommendations specific to each of them. SED staff will follow up with the respective carriers to verify that actions have been taken to correct the identified deficiencies. If deficiencies persist, SED will take further actions to ensure that the third-party bill blocking rules are implemented in accordance with D.10-10-034.

It should also be noted that the Rockefeller Report found that “bill blocking” was an “imperfect safeguard” precisely because it is “not a default option for telephone customers.”<sup>37</sup> Staff agrees with the Rockefeller Report’s conclusion. Staff recommends that the Commission reconsider adopting a default blocking opt-in requirement for third-party billing because cramming is still occurring on the telephone bills of wireline and wireless BTCs.

### **B. Protocols for Monitoring Billing to Determine Need for Terminations and Suspensions**

#### **1. Rules in D.10-10-034**

The Commission requires BTCs to adopt protocols which prohibit Billing Agents and Service Providers from submitting unauthorized charges and to monitor each Service Provider’s continuing compliance to G.O. 168.<sup>38</sup> BTCs are required to conduct a reasonable inquiry of the Service Provider’s or Billing Agent’s history of violations of state or federal law or rules relating to consumer protection and current ability to operate lawfully.<sup>39</sup>

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<sup>37</sup> Rockefeller Report at 34. The Federal Trade Commission explicitly made this recommendation in its subsequent Comments in the FCC’s Cramming, Consumer Information, and Truth in Billing dockets. *See* 2011 Comment of the FTC in dockets; CG-11-116, 09-158, and 98-170 (“the FTC therefore respectfully urges the FCC to ban or require default blocking of some or all third-party billing”), available at <http://www.ftc.gov/os/2011/12/111227crammingcomment.pdf>.

<sup>38</sup> G.O. 168 Part 4 Rule 4.

<sup>39</sup> G.O. 168 Part 4 Rule 5.

BTCs are required to promptly terminate billing services to Billing Agents and Service Providers that present unauthorized charges.<sup>40</sup> BTCs that terminate a Billing Agent or Service Provider for any reason are required to notify the Director of the SED of such termination within 10 business days of the termination date.<sup>41</sup> As an added measure, wireless BTCs are also required to report all third-party services that have been suspended and/or terminated on a quarterly basis.<sup>42</sup> BTCs' compliance with the required reporting and notification is discussed below in Section C, Reporting Requirements.

## **2. Scope of Review**

SED staff obtained and reviewed protocols adopted by the BTCs to comply with D.10-10-034. Staff also reviewed BTCs' reports and notices regarding terminations and suspensions.

## **3. Wireless BTCs Report that They Have Been Terminating and Suspending Providers**

Staff obtained and reviewed wireless BTCs' protocols to monitor Service Providers and Billing Agents, including the process to suspend Service Providers and/or their product offerings.<sup>43</sup> Wireless BTCs report that their protocols for preventing unauthorized charges are in their contracts, and they require Billing Agents and Service Providers to comply with the Mobile Market Association (MMA) Consumer Best Practices Guidelines, discussed in detail in Section IV(B) below, as well as the wireless BTC's own guidelines or standards.<sup>44</sup> Most wireless BTCs stated that they employ agents to provide ongoing monitoring of Service Providers or Billing Agents while others perform this function themselves.<sup>45</sup> Elements monitored include marketing materials, authorization processes, verification records, content, and compliance with MMA

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<sup>40</sup> G.O. 168 Part 4 Rule 6.

<sup>41</sup> G.O. 168 Part 4 Rule 11.4.

<sup>42</sup> G.O. 168 Part 4 Rule 11.2.

<sup>43</sup> Staff received responses to the Implementation of Billing Rules Data Request No. 1, dated January 12, 2011, from AT&T Mobility, Verizon Wireless, Cox Wireless, Credo Cricket, MetroPCS, Sprint, T-Mobile, US Cellular, and Verizon Wireless.

<sup>44</sup> AT&T Mobility Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 1, 2, 6 MetroPCS Response to Implementation of Billing Rules Data Request No. 01, February 23, 2011, at 24; Sprint Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 3-4; T-Mobile Response to Implementation of Billing Rules Data Request No. 01, March 2, 2011, at 2-4; Verizon Wireless Response to Implementation of Billing Rules Data Request No. 01, March 9, 2011, at 2-3.

<sup>45</sup> AT&T Mobility Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 2, 13; Cox Wireless Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 2; MetroPCS Response to Implementation of Billing Rules Data Request No. 01, February 23, 2011, at 7; Sprint Response to Implementation of Billing Rules Data Request No. 01 dated February 9, 2011, at 7; T-Mobile Response to Implementation of Billing Rules Data Request No. 01, March 2, 2011, at 9-10; Verizon Wireless Response to Implementation of Billing Rules Data Request No. 01, March 9, 2011, at 4-5.

Guidelines.<sup>46</sup> Wireless BTCs also report that they have internal procedures in place to manage non-compliance and contractual language that authorizes them to suspend or terminate Service Providers or Billing Agents.<sup>47</sup> In D.10-10-034, the Commission noted that wireless BTCs have “. . . suggested that these proposed rules are not needed due to the adoption of the MMA’s best practices guidelines by most of the wireless carriers.”<sup>48</sup> The Commission responded that it did not agree with this statement of the wireless BTCs because “. . . we do not believe the MMA guidelines sufficiently meet the requirements of §§ 2889.9 and 2890.”<sup>49</sup>

In some cases, wireless BTCs said that they may terminate a Service Provider on a first offense or some may have a graduated process where fines are imposed first but repeat offenses usually result in termination. In either case, wireless BTCs have suspended over 1,000 Service Providers and terminated more than 480 since January 2011, in compliance with D.10-10-034.

It is unclear if wireless BTCs have changed or needed to change their protocols since the issuance of D.10-10-034, or how well they enforce these protocols. Regardless, as shown below in Section III, the available data indicates some improvement.

#### **4. Wireline BTCs Report that They Have Been Terminating and Suspending Providers**

Staff obtained and reviewed wireline BTCs’ protocols to monitor Service Providers and Billing Agents, including processes to suspend Service Providers and or their product offerings.<sup>50</sup> Wireline BTCs report that their protocols for preventing unauthorized charges are in their contracts with Service Providers and Billing Agents. The protocols include: authorization requirements applicable to all third-party billing and Internet purchases; restrictions on deceptive

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<sup>46</sup> AT&T Mobility Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 2-3; Cox Wireless Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 2; MetroPCS Response to Implementation of Billing Rules Data Request No. 01, February 23, 2011, at 8; Sprint Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 3; T-Mobile Response to Implementation of Billing Rules Data Request No. 01, March 2, 2011, at 2, 4, 10; Verizon Wireless Response to Implementation of Billing Rules Data Request No. 01, March 9, 2011, at 4-5.\*

<sup>47</sup> AT&T Mobility Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 2-3, 13. Cox Wireless Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 3-4; MetroPCS Response to Implementation of Billing Rules Data Request No. 01, February 23, 2011, at 18; Sprint Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 7; T-Mobile Response to Implementation of Billing Rules Data Request No. 01, March 2, 2011, at 2-4, 10; Verizon Wireless Response to Implementation of Billing Rules Data Request No. 01, March 9, 2011, at 5-6.

<sup>48</sup> D.10-10-034 at 28-29.

<sup>49</sup> *Id.* at 29.

<sup>50</sup> Staff received responses to the Implementation of Billing Rules Data Request No. 1, January 12, 2011, from AT&T, CalOre, CALTEL, Cox, Ducor, Foresthill, Frontier, Kerman, Ponderosa, Sierra, Siskiyou, Sure West, TDS, Verizon, and Volcano.

marketing; self-reporting of cramming complaints; fees for each cramming complaint received by the BTC; and cramming complaint thresholds for each Billing Agent and Service Provider.<sup>51</sup>

Wireline BTCs report that they perform the initial and ongoing compliance review of Billing Agents and Service Providers and also require Billing Agents to monitor Service Providers as part of their contractual obligations.<sup>52</sup> Specifically, wireline BTCs require Billing Agents to review marketing materials, authorization processes, customer verification records, and complaint thresholds.<sup>53</sup> Wireline BTCs said that they have procedures and escalation processes in place to manage noncompliance and the contractual language that authorize them to suspend and/or terminate Service Providers and Billing Agents.<sup>54</sup> Most wireline BTCs report that they have graduated enforcement based on severity of noncompliance, where concerns are first raised with the Service Provider or Billing Agent, then possibly a second warning, then penalties, and, finally, possible suspension or termination.<sup>55</sup>

Billing Agents report that they have dedicated employees assigned to respond and cooperate with Commission staff and investigators who have access to all customer database records.<sup>56</sup> Billing Agents also stated that they have processes in place to resolve complaints within 30 days.<sup>57</sup> Billing Agents said that CSRs receive inquiries or complaints and obtain authorization information from a Service Provider the same day or within a week to verify charges with the subscriber and then submit a refund to the appropriate BTC.<sup>58</sup> In addition, Billing Agents also indicated that they will offer the subscriber the option to block all future third-party billings at no charge.<sup>59</sup>

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<sup>51</sup> AT&T Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 1-2; Cox Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 1; Verizon Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 2-4.

<sup>52</sup> AT&T Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 4-5; Verizon Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 2, 5, 7.

<sup>53</sup> AT&T Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 4-5; Verizon Response to Implementation of Billing Rules Data Request No. 1, February 9, 2011, at 6.

<sup>54</sup> AT&T Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 2, 5; Cox Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 4; Verizon Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 6.

<sup>55</sup> AT&T Response to Implementation of Billing Rules Data Request No. 01, February 28, 2011, at 2; Cox Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 4; Verizon Response to Implementation of Billing Rules Data Request No. 01, February 9, 2011, at 5, 7.

<sup>56</sup> ILD Response to Implementation of Billing Rules Data Request No. 01, February 22, 2011, at 1.

<sup>57</sup> BSG Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, at 2; ILD Response to Implementation of Billing Rules Data Request No. 01, February 22, 2011, at 1-2; PaymentOne Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, pages 1-3.

<sup>58</sup> ILD Response to Implementation of Billing Rules Data Request No. 01, February 22, 2011, at 1-2; PaymentOne Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, at 1.

<sup>59</sup> ILD Response to Implementation of Billing Rules Data Request No. 01, February 22, 2011, at 2; PaymentOne Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, at 1.

According to Billing Agents, they maintain accurate and up-to-date records of all billings and Service Providers, and retain such records for no less than twenty-four months. Billing Agents stated that they maintain an electronic copy of all exchange message interface (EMI)<sup>60</sup> records submitted to the BTCs for more than twenty-four months and they maintain financial and data records, including amounts refunded, related to each Service Provider.<sup>61</sup>

It is unclear if wireline BTCs have changed or needed to change their protocols since the issuance of D.10-10-034, or how well they enforce these protocols. Regardless, as shown in Section III, the available data indicates complaint trend improvement.

## **C. Reporting Requirements**

### **1. Wireless BTCs Reported Refunds**

G.O. 168 Part 4 Rule 11.1 requires all wireless BTCs to create a calendar month summary report every quarter listing refunds for all services made to subscribers with California area codes for charges originated by Service Providers or Billing Agents. Wireless BTCs are required to submit quarterly reports of refunds summarized by Service Provider that contain the following information: Service Provider name, Billing Agent name, description of service provided, total number of purchases by subscribers, total amount billed by the BTC on behalf of the Service Provider, total number of refunds to subscribers, and total amount refunded by the BTC.<sup>62</sup> Wireless BTCs do not report the number of service providers for which they provide billing services. Because cramming reporting is a relatively new requirement for wireless BTCs, staff lack sufficient historical data to identify a definitive industry refund trend.

Wireless BTCs have submitted quarterly reports to SED on time during the review period of January 2011 to January 2013, with the exception of a few minor delays. It is noteworthy that the term “refunds” is defined very broadly in G.O. 168 Part 4 to include all refunds, not just those resulting from cramming. Staff also points out that some of the information that the Commission receives from wireless carriers is different from the wireline carriers. Per G.O. 168 Part 4 as adopted in D.10-10-034, the wireless carriers provide refund data, while the wireline carriers provide cramming complaint data.<sup>63</sup> Staff recommends the Commission reconsider requiring wireless BTCs to report cramming complaints, as discussed in Section VI(C) of this report.

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<sup>60</sup> The Exchange Message Interface (EMI) document is a message exchange guideline for the telecommunications industry. It is used as a standard method of interface between companies providing various services in the industry. The EMI is used to support customer billing and various customer and company support functions needed by the industry (e.g., account summary and tracking analysis).

<sup>61</sup> ILD Response to Implementation of Billing Rules Data Request No. 01, February 22, 2011, at 2; BSG Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, at 2; PaymentOne Response to Implementation of Billing Rules Data Request No. 01, February 8, 2011, at 3.

<sup>62</sup> G.O. 168 Part 4 Rule 11.1.

<sup>63</sup> G.O. 168 Part 4 Rules 11.1, 11.3.

## **2. Wireless BTCs Reported Third-Party Services Suspensions and Terminations**

G.O. 168 Part 4 Rule 11.2 requires that all wireless BTCs create a calendar month summary report every quarter listing all third-party services that have been suspended or terminated, grouped by Service Provider. The report must include the name and contact information of the Service Provider, a description of the service, whether the service was suspended or terminated, and the reason for suspension or termination. If the service was suspended, the wireless BTC should include the date or conditions for reinstatement. G.O. 168 Part 4 Rule 11.4 requires that if a BTC terminates a Billing Agent or Service Provider for any reason, it shall notify the Director of SED within ten business days of the termination date.

According to the data SED received, wireless BTCs have submitted suspensions and terminations reports to SED during the review period of January 2011 to January 2013. In addition, wireless BTCs have submitted notification letters to the Director of SED within ten business days of terminations of Service Providers. Wireless BTCs have submitted these reports in a timely manner, with the exception of a few minor delays.

## **3. Wireline BTCs Reporting of Cramming Complaints**

G.O. 168 Part 4 Rule 11.3 requires that all wireline BTCs create a calendar month summary report every quarter and submit it to SED. Rule 11.3 requires that the Billing Agent and/or wireline BTC include in the quarterly report the total number of consumer complaints<sup>64</sup> by service provider/billing agent, total number of working telephone numbers billed for each entity for which complaints were received, total number of subscribers billed, total billed amount, and updated contact information.<sup>65</sup> This data is broken down by month to provide SED with a means of analyzing potentially rapidly changing cramming trends in specific entities. Wireline BTCs have submitted quarterly reports to SED during the review period of January 2011 to January 2013 on time, with the exception of a few minor delays.

## **4. Wireline BTCs Reported Suspensions and Terminations**

G.O. 168 Part 4 Rule 11.4 requires that if a BTC terminates a Billing Agent or Service Provider for any reason, it shall notify the Director of SED within ten business days of the termination date. Such notifications shall include the identity of the Service Provider or Billing Agent and any principals, as well as the reason(s) for termination. Wireline BTCs have submitted notifications of Service Provider terminations within ten business days.

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<sup>64</sup> G.O. 168 Part 4 Rule 2.2 defines complaint as: “Any written or oral communication from a Subscriber alleging that an unauthorized charge was included in the Billing Telephone Corporation’s bill to the Subscriber.”

<sup>65</sup> G.O. 168 Part 4 Rule 11.3.

#### D. Wireless Refund Policies

AT&T and Sprint (Verizon did not respond to this question) told staff that they have “liberal refund policies”.<sup>66</sup> They explained that when customers contact them regarding dissatisfaction with a charge, they tell the customer they will promptly issue credits or refunds.<sup>67</sup> In other words, if a customer calls the wireless BTC to complain about a charge for content that he or she does not recall purchasing, AT&T and Sprint said they have policies to simply refund or credit the customer.<sup>68</sup>

In telephone discussions with staff, at least one wireless BTC told us that after refunding the customer, the wireless BTC investigated the individual transaction to determine whether the customer requested the content and confirmed the purchase.<sup>69</sup> The extent, regularity, and effectiveness of such investigations are not known. After a refund is given to a customer, Sprint reported that they automatically “opt-out” the customer from the disputed Premium short code campaign or subscription in question.<sup>70</sup> It is not known whether wireless BTCs explain to customers at this point that they can block all third-party charges. Staff has not investigated compliance with third-party blocking during the dispute process.<sup>71</sup>

Sprint told staff that if a customer re-subscribes and disputes the charge a second time, barring extenuating circumstances, the wireless BTC typically issues a second credit/adjustment.<sup>72</sup> If the customer continues to subscribe to the same product after receiving two refunds, she will be held responsible for the future charges.<sup>73</sup> Sprint reported that they explain this to the customer when she receives the first two credits.<sup>74</sup>

With respect to the issuance of a credit, if the customer has already paid his or her bill, Sprint reported that they issue a credit on the next invoice.<sup>75</sup> If the customer has not paid his or her bill, Sprint reports that they will adjust the balance due.<sup>76</sup>

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<sup>66</sup> AT&T Response to Billing Rules Data Request No. 01, May 10, 2012 at 17: Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>67</sup> AT&T Response to Billing Rules Data Request No. 01, May 10, 2012 at 17: Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>68</sup> AT&T Response to Billing Rules Data Request No. 01, May 10, 2012 at 17: Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>69</sup> Telephone interviews conducted with Sprint, AT&T Mobility and Verizon Wireless by member of Communications Division Staff (Michael Pierce).

<sup>70</sup> Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>71</sup> One of the authors to this report attests to having been crammed via a personal Sprint bill and that when disputing the charge the Sprint representative appropriately offered third party blocking.

<sup>72</sup> *Ibid.*

<sup>73</sup> Sprint response to the Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

The wireless BTCs report that their contracts require third-party service providers to pay the refunds issued to customers, believing that this helps ensure that very few of the “bad actors” are able to gain financially from fraudulent campaigns.<sup>77</sup> These BTCs state that they may sue “bad actors” for fraud if necessary.<sup>78</sup>

We note that a liberal refund policy, without more consumer protection, could protect fraudulent third-party billers, by preventing consumer complaints from escalating to law enforcement agencies and this Commission. Also, wireless BTCs did not comment on refunds to customers who were not aware that they are victims of cramming. These customers do not complain, typically because they do not notice the unauthorized charge on their phone bills. Under G.O. 168 Part 4 Rules 5 and 6, all victims of cramming, including those who do not complain to the BTCs, must receive refunds of the unauthorized charges.

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<sup>77</sup> Telephone interviews conducted with Sprint, AT&T Mobility and Verizon Wireless by member of Communications Division Staff (Michael Pierce).

<sup>78</sup> *Ibid.*

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### **III. ASSESSING THE EFFECTIVENESS OF THE CRAMMING RULES IN PROTECTING CONSUMERS**

SED staff believes that one way to determine the effectiveness of the Cramming Rules in protecting California consumers is to assess the level of consumer complaints after the Commission adopted the Cramming Rules.<sup>79</sup> Staff reviewed BTCs' quarterly reported data, the complaint data in the Commission's Consumer Information Management System (CIMS), and gathered some information from meetings with BTCs. Although it is difficult to precisely quantify the effects of the cramming rules instituted by D.10-10-034 because of other possible influences on cramming behavior, the rules could have contributed to declining wireline cramming complaints and wireless refunds.

#### **A. New Rules May Have Contributed to the Decline in Wireless Refunds**

##### **1. Wireless Refund Analysis Methodology**

G.O. 168 Part 4 Rule 11.1 requires wireless BTCs to provide, on a quarterly basis summarized by Service Provider, a monthly summary of refunds made to subscribers with California area codes for charges originated by service providers.<sup>80</sup> As a way to comply with the requirements in Public Utilities Code Section 2889.9(d),<sup>81</sup> the Commission allowed the wireless BTCs to use refunds as a proxy for cramming complaints in their reports in order to not overly burden the wireless BTCs' reporting mechanisms. Although such refunds are not entirely attributable to cramming complaints, as some of them are due to consumer complaints such as billing or service dispute, etc., the Commission decided in D.10-10-034 that, over time, such refund data would be useful in showing any unusual increases in customer contacts and thereby form a basis for detecting cramming and conducting further investigations.<sup>82</sup>

SED analyzed the refund data submitted by wireless BTCs from January 1, 2011 to June 30, 2012. SED aggregated the total dollar amounts billed, total dollar amounts refunded, total number of refunds, total number of purchases, total number of suspensions, and the total number of terminations. Staff then compared the amounts of total dollars billed to total dollars refunded

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<sup>79</sup> Since wireless BTCs were not required to provide refund or cramming reports prior to the Commission's adoption of D.10-10-034, staff was only able to measure refunds after the implementation of D.10-10-034.

<sup>80</sup> Wireless BTCs are required to include in the report the Service Provider name, the name of the Billing Agent (if any), a description of the service provided, the total number of purchases, the total dollar amount billed, the total number of refunds issued, and the total dollar amount of refunds.

<sup>81</sup> Public Utilities Code Section 2889(d) states: "The commission shall establish rules that require each billing telephone company, billing agent, and company that provides products or services that are charged on subscribers' telephone bills, to provide the commission with reports of complaints made by subscribers regarding the billing for products or services that are charged on their telephone bills as a result of the billing and collection services that the billing telephone company provides to third parties, including affiliates of the billing telephone company."

<sup>82</sup> D.10-10-034, at 36.

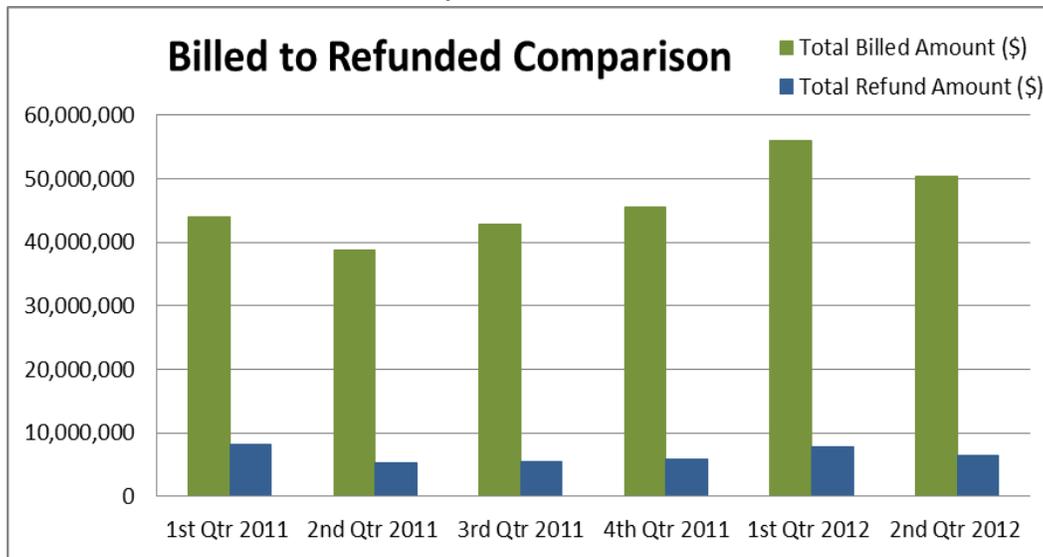
as a gauge to determine the trend of wireless consumer complaints after D.10-10-034 was adopted.

## 2. Trend in Wireless Refunds

In 2011, wireless BTCs billed California consumers almost \$171 million for wireless third-party products and services and refunded \$24.9 million, for a refund rate of 14.5%. During the first half of 2012, wireless BTCs billed \$106.3 million and refunded \$14.4 million for a refund rate of 13.5%, as Graph 3.1 illustrates.

**Graph 3.1**

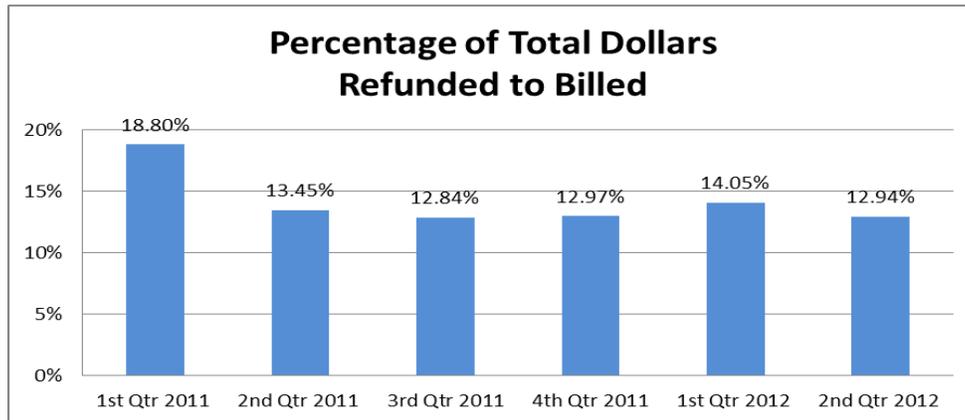
### **Amounts Billed and Refunded by Wireless BTCs for Third-Party Products and Services**



Staff then analyzed the trend in wireless BTCs' rate of refund over time by calculating and comparing the quarterly refund rates (total dollars refunded divided by the total dollars billed). During the first quarter of 2011, the average refund rate was 18.8%. This declined to 13.5% in the second quarter of 2011 and stabilized at an average rate of approximately 13% during the next four quarters.

**Graph 3.2**

**Percentage of Dollars Refunded to Dollars Billed  
by Wireless BTCs for Third-Party Products and Services**



The drop in refund rate from the first to the second quarter of 2011 suggests a decline in the level of consumer contacts resulting in refunds, possibly resulting from the rules adopted in D.10-10-034. The rules did not become effective until the end of January 2011. SED staff presumes that the effect of the new rules trickled down in the months following January 2011. However, other factors were at play during this time period, including the Rockefeller Report and the RICO actions against the wireline BTCs, which may have driven some crammers to move to the wireless realm.<sup>83</sup> The quarterly refund rates remained relatively flat from the second quarter of 2011, from which one could infer that the cramming rules and the related federal developments, discussed in Section I(C) above, contributed to maintaining this lower level.

It should also be noted that wireless BTCs give refunds for a variety of reasons other than cramming (e.g., billing dispute, errors, customer service complaint, etc.). Therefore, a change in the rate of refunds is not necessarily indicative of a change in cramming complaints, per se.

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<sup>83</sup> 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, 200<sup>th</sup> 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.

**B. New Rules May Have Contributed to the Decline in Wireline Cramming Complaints and the Termination of Third-Party Billing for Enhanced Services by Major Wireline Carriers**

**1. Wireline Cramming Complaint Analysis Methodology**

G.O. 168 Part 4 Rule 11.3 requires that all wireline BTCs create a calendar month summary report every quarter listing complaints for unauthorized charges received each month. These reports include total number of consumer complaints for each service provider/billing agent, total number of working telephone numbers billed for each entity for which the wireline BTCs received complaints, total number of subscribers billed, total billed amount, and updated contact information.

SED analyzed monthly complaint and billing data submitted quarterly by the wireline BTCs and Billing Agents from January 2010 to second quarter 2012. Staff noted a significant decline in reported cramming complaints for Verizon from Q4 2010 to Q1 2011. According to representatives from Verizon, it changed its reporting standards for cramming complaints between Q4 2010 and Q1 2011.<sup>84</sup> In 2010, each refunded cramming charge was reported as a stand-alone complaint. Beginning in 2011, multiple refunded cramming charges related to the same complaint were all counted as a single complaint in order to remove what Verizon characterized as inadvertent double counting.<sup>85</sup> This change in the way cramming complaints are reported by Verizon, one of the two largest wireline BTCs, makes it difficult to compare complaint data for the periods before and after the Commission adopted the cramming reporting rules. Instead, SED staff observed the complaint trends (increase and/or decrease) compared to previous quarters both prior to and following the adoption of the new rules in order to discern the possible impact of the new cramming rules.

**2. Trend in Wireline Cramming Complaints**

Graph 3.3 shows cramming complaints received by three of the largest wireline BTCs – AT&T California, Verizon California and Cox Communications, Inc. in California. As the graph demonstrates, the wireline cramming complaint numbers significantly decreased between the first and second quarter of 2010, decreased further between Q2 and Q3 2010 and then increased in Q4 2010. This total decrease from Q1 to Q4 2010 was 29.7%.

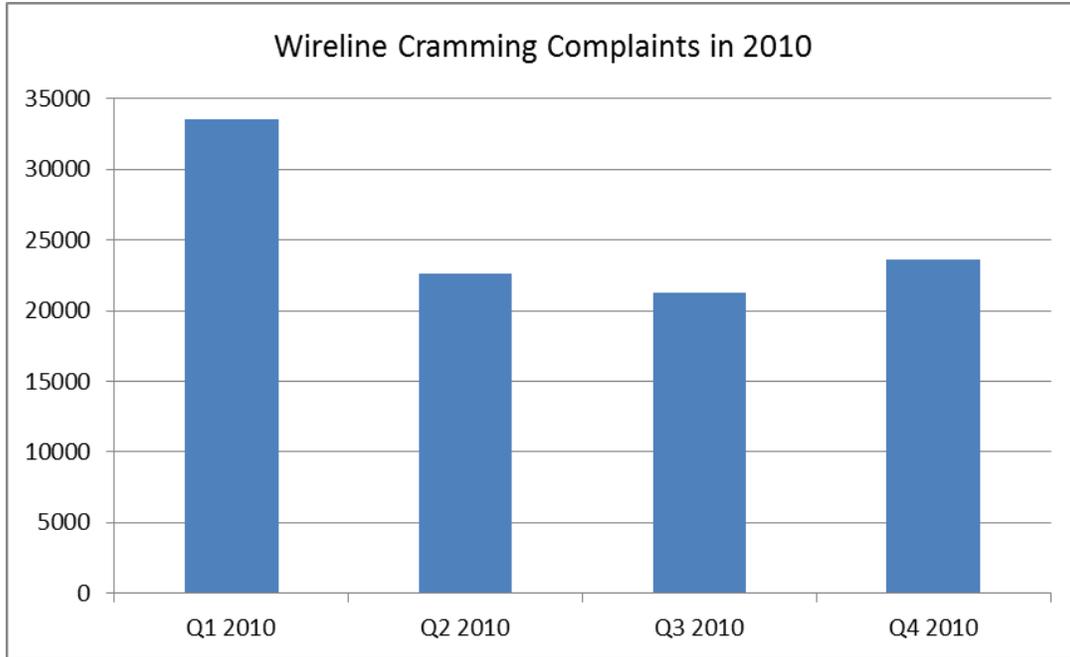
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<sup>84</sup> Information obtained during phone conversation with Verizon staff on November 8, 2012.

<sup>85</sup> Information obtained during phone conversation with Verizon staff on November 8, 2012.

**Graph 3.3**

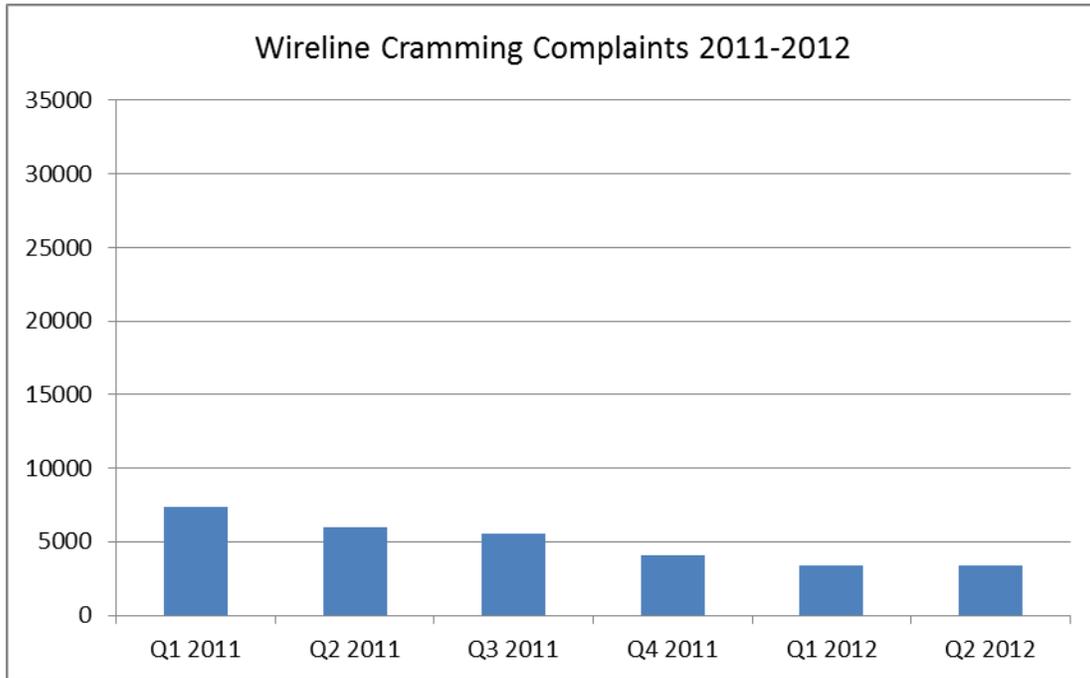
**Numbers of Wireline Cramming Complaints Received by  
Three of the Largest Wireline BTCs in 2010**



As explained above, Verizon changed its reporting standards between 2010 and 2011, resulting in a smaller total count of cramming complaints reported to the Commission in 2011 and onwards. Consequently, SED tallied complaints following 2011 separately from those prior to 2011, and observed their differences over time. As Graph 3.4 shows, following the implementation of the Cramming Rules, wireline cramming complaint numbers decreased every quarter in 2011 and 2012, culminating in a total decrease in wireline cramming complaints of 53.84% between Q1 2011 and Q2 2012.

**Graph 3.4**

**Numbers of Wireline Cramming Complaints Received by  
Three of the Largest Wireline BTCs in 2011-2012**



Staff observed a significant change in the trend of reported wireline cramming complaint numbers before D.10-10-034 (from Q1 2010 through Q4 2010) and after D.10-10-034 (Q1 2011 through Q2 2012). Specifically, complaint numbers were somewhat stable in the three quarters prior to the effective date of the cramming rules, but began decreasing steadily following their implementation, ultimately resulting in complaint numbers in Q2 of 2012 that were half of the complaint numbers for Q1 2011. Although this decrease did not occur at a constant rate each quarter and increased slightly between the first and second quarters of 2012, the number of reported wireline cramming complaints between the first quarter of 2011 and the second quarter of 2012 decreased.

There are many reasons for this downward trend in the number of wireline cramming complaints reported by BTCs 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 a downward trend in cramming complaints. This downward trend could also be a result of Verizon's change in its reporting standard from Q4 2010 and Q1 2011.

We also note that some of the drop in wireline cramming complaints is likely due to a drop in wireline subscriptions. In the Federal Communication Commission's (FCC) Local Competition Report, with data as of June 2012, non-incumbent local exchange carrier (ILEC) end-user

switched access line and VoIP subscriptions in California were 3.1 million in June 2008 and 6.1 million in December 2012.<sup>86</sup> By contrast, in the same category, ILEC lines were 17.1 million in June 2008 and 11.1 million in December 2012.<sup>87</sup> Competitive local exchange carriers (CLECs) appear to have made up some of the short-fall in access line subscriptions, but not all. If we look at all landline fixed voice lines (whether VoIP, fiber or otherwise), subscribership has dropped steadily over the past few years. The statistics on wireline and fixed VoIP combined in California indicate that in December, 2008, there were 20,979,777 fixed voice lines<sup>88</sup> and in December 2012 there were 17,184,900 fixed voice lines<sup>89</sup>, a drop of 3,451,877 lines or 16.45 per cent. Based on the FCC data, it appears that a significant number of consumers have chosen to drop their landlines altogether and migrate entirely to wireless technologies.

Certainly the Commission's cramming reporting rules are an important factor in reducing the number of wireline cramming complaints reported by BTCs in California, but given the other influences, it is difficult to exactly quantify how much the Commission's cramming reporting rules contributed to this downward trend.

### **3. Termination of Third-Party Billing for Enhanced Services on Wireline Billing System**

Prior to D.10-10-034, wireline BTCs allowed many different third parties to bill BTC customers for various services on their wireline telephone bills (for example \$9.99 per month for web hosting services, voicemail services, etc.). Opening telephone bills to third-party billing introduced the opportunity for cramming. After the *Moore* and *Nwabueze* cases, the class action lawsuits filed in Federal District Court, survived demurrer, AT&T California and Verizon California announced that, as of April 2012, they would no longer allow third-party billing for enhanced services on their wireline billing systems. The BTCs' action also followed issuance of the Rockefeller Report and, of course, adoption of the Commission's cramming reporting rules in 2010. Given that many cramming complaints resulted from actions by third parties, elimination of third-party billing likely has significantly reduced cramming on the wireline BTCs' telephone bills.

#### **B. Consumer Reported Complaint Data (CAB Data)**

The Commission's Consumer Affairs Branch (CAB) receives and resolves informal consumer complaints regarding cramming. To help determine the effectiveness of the cramming rules, staff analyzed the number of cramming complaints received by CAB. Although consumers typically call their respective carriers first when a potential cramming issue arises, consumers

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<sup>86</sup> FCC's Report on Local Competition, Status as of December 31, 2012, prepared by Industry Analysis and Technology Division, Wireline Competition Bureau, at 24, Table 13. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-324413A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-324413A1.pdf)

<sup>87</sup> *Id.* at 24, Table 14.

<sup>88</sup> *Id.* at 24-25, Tables 13 and 14.

<sup>89</sup> *Id.* at 20, Table 9.

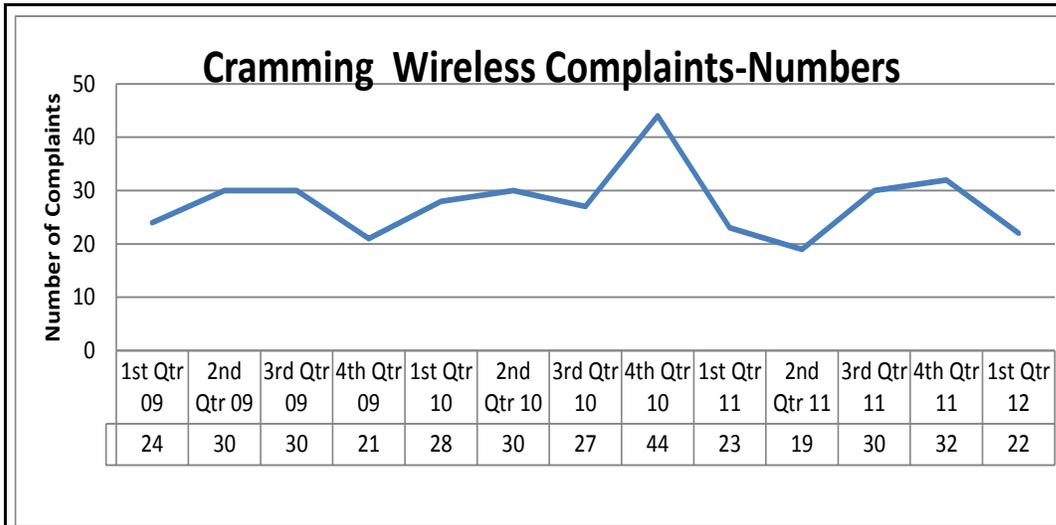
may also report cramming complaints to CAB. Staff analyzed the CAB complaint data on a quarterly basis from January 2009 to March 2012.<sup>90</sup>

### 1. Wireless Cramming Complaints Received

The average number of quarterly wireless cramming complaints received in 2011 was 26 and the average number of quarterly cramming complaints for the first quarter of 2012 was 22. (See Graph 3.5). These numbers show that wireless complaints between first quarter 2009 and first quarter 2012 are variable. Aside from the table reflecting that wireless cramming complaints peaked in the fourth quarter of 2010, complaints immediately prior to and after the fourth quarter 2010 are relatively comparable. Therefore, the data shows no conclusive trend related to the cramming rules.

**Graph 3.5**

**Numbers of Wireless Cramming Complaints Received by CAB in 2009-2012**



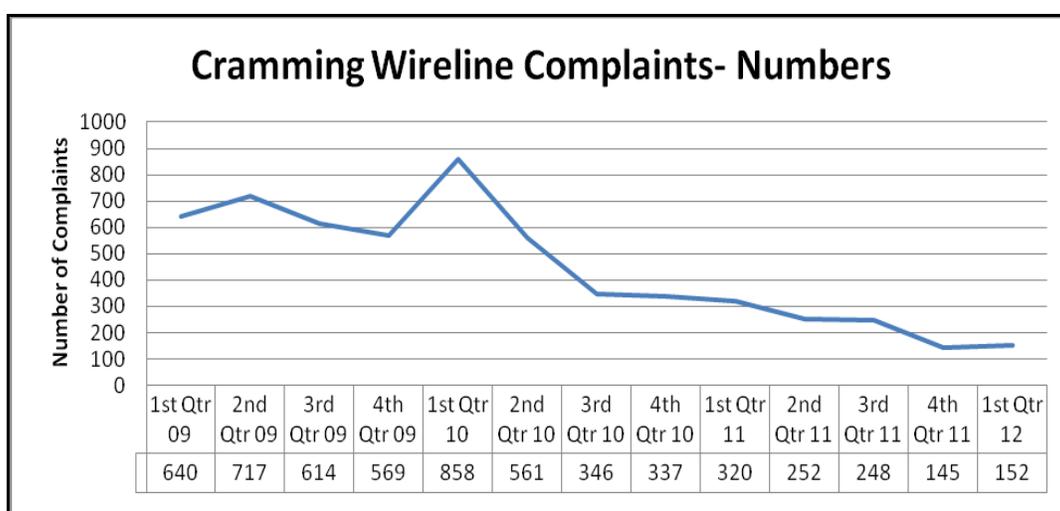
<sup>90</sup> CAB maintains a database of consumer complaints received in its Complaint Information Management System (CIMS).

## 2. Decline in Wireline Cramming Complaints Received

The number of cramming complaints fell from a total of 337 in the first quarter of 2010, to 152 in the first quarter of 2012. (See Graph 3.6). The number of cramming complaints CAB received declined overall. As noted above, some of the drop in wireline cramming complaints is likely due to a drop in wireline subscriptions. SED staff believes that the new rules have also likely contributed to this outcome.

**Graph 3.6**

**Numbers of Wireline Cramming Complaints  
Received by CAB in 2009-2012**



## C. Effectiveness of Requirement for Terminations

BTCs are required to promptly terminate billing services to Billing Agents and Service Providers that present unauthorized charges.<sup>21</sup> BTCs that terminate a Billing Agent or Service Provider for any reason are required to notify the Director of SED of such termination within 10 business days of the termination date.<sup>22</sup> BTCs are required to monitor the performance of Service Providers and Billing Agents and suspend or terminate Service Providers and Billing Agents for reasons such as presenting unauthorized charges, questionable marketing tactics, deceptive advertising, invalid opt-in, bait and switch, questionable acquisition, non-delivery of content, alleged fraud, or unresolved audits.

<sup>21</sup> G.O. 168 Part 4 Rule 6.

<sup>22</sup> G.O. 168 Part 4 Rule 11.4.

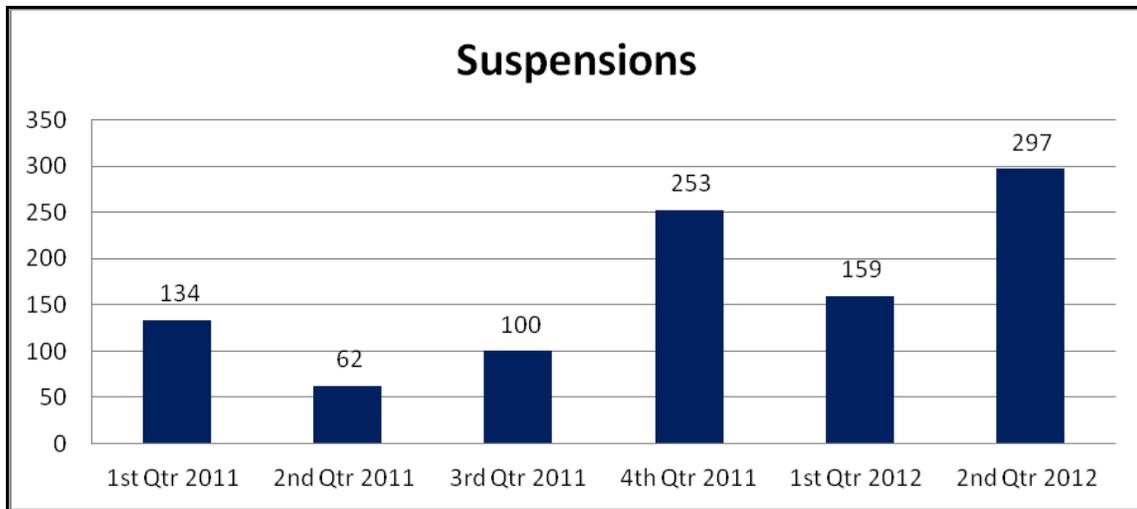
## 1. Wireless Terminations and Suspensions

G.O. 168 Part 4 Rule 11.2 requires that wireless BTCs submit quarterly reports listing all third-party services that have been suspended or terminated, grouped by Service Provider. SED staff reviewed wireless BTCs' termination reports from January 2011 to September 2012 to assess the effectiveness of the termination requirement. SED compared suspensions and terminations to total dollars billed, total dollars refunded, and total number of refunds.

In the first quarter of 2011, wireless BTCs' first quarterly reports identified 134 suspensions and 238 terminations of Service Providers and/or their products and services. Since January 2011, wireless BTCs report that they have suspended over 1,000 Service Providers and/or their products and services, and terminated more than 480. The numbers of suspensions and terminations have varied each quarter. (See Graphs 3.7 and 3.8.)

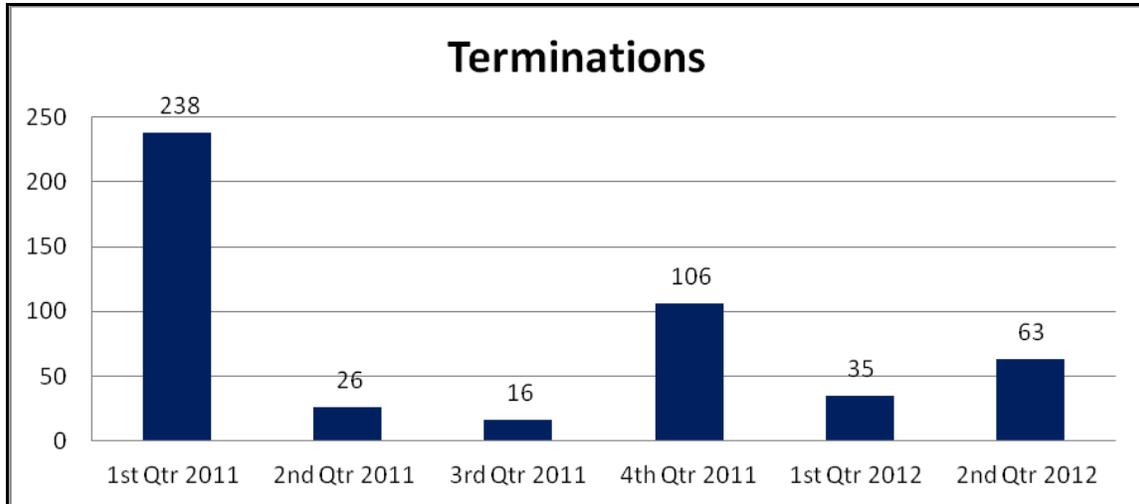
**Graph 3.7**

**Number of Reported Suspensions of Third-Party Service Providers by Wireless BTCs**



**Graph 3.8**

**Number of Terminations of Third-Party Service Providers by Wireless BTCs**



**2. Wireline Terminations**

Since January 2011, wireline BTCs report that they have terminated over 50 Service Providers and, as previously discussed, in a drastic change in policy, AT&T California and Verizon California, Inc. announced that, as of April 2012, they would no longer allow third-party billing for enhanced services on their wireline billing system.

**3. Assessment**

SED staff believes that the termination of a noncompliant Service Provider or its products and services is most effective in curtailing any future consumer harm. Every such noncompliant Service Provider that BTCs refuse to provide access to their billing platforms helps prevent cramming.

**D. Requirement for Quarterly and Yearly Meetings with BTCs Opens Communication Channels and Provides a Valuable Opportunity for Collaboration**

Pursuant to G.O. 168 Part 4 Rules 12 and 13 and D.10-10-034 Ordering Paragraph 3, SED and CD held meetings and workshops with BTCs who offer third-party billing and collection services and crafted language for the Commission's consumer education website and brochures. Under the requirements of G.O. 168 Part 4 Rule 12, staff held its first annual meeting in January 2011 to discuss recent developments in the wireless industry regarding cramming issues. Consistent with the guidelines of Rule 13 and Ordering Paragraph 3, quarterly meetings were held in March, August, and December of 2011, the first year following the decision, and annually thereafter.

Agenda topics in previous meetings included:

- Wireless Recent Developments
- CalPhoneInfo Website
- Consumer Education on Restricting or Blocking Third-Party Charges
- Actions taken by wireless BTCs to inform consumers of the option to block Third-Party Charges
- Termination and Suspension Reports – pros and cons of posting on Commission Website
- Reporting Requirements

SED believes the requirement for meetings with the BTCs helps keep open the communication channels between Commission staff and the BTCs, and provides valuable opportunity for collaboration. These consumer education meetings led to the development of some of the content for the Commission's CalPhoneInfo website, including the brochure: "Unauthorized Third-Party Charges," and updates on tips for buying wireless and wireline services. In addition to the availability of these educational materials online, the Commission's Public Advisor's Office also presents many of these educational materials to consumers in person at outreach activities held throughout California. These educational efforts, which use materials developed during meetings mandated by the Commission's D.10-10-034 cramming rules, help California consumers protect themselves against cramming. See <http://www.calphoneinfo.com/>.

#### **IV. MARKET TRENDS AND DEVELOPMENTS IN THE WIRELESS INDUSTRY**

Many wireless third-party services, such as alerts, ringtones, and interactive voting, were designed for and are integrally tied to cell phone usage. Verizon indicated that there is significant customer demand for wireless third-party billing. Verizon stated: "Strong customer demand for wireless billing combined with relatively low customer complaint rates suggest that wireless third-party billing is a valuable and viable service for our customers, and not one that is fraught with fraud and abuse."<sup>93</sup> Several wireless BTCs told us that they have a number of controls and checkpoints in place to mitigate the risk of unauthorized third-party charges from unscrupulous content providers.<sup>94</sup> For example, AT&T wrote in its May 10, 2012 response to our data request: "The controls include reviewing and certifying each third-party short code marketing campaign prior to allowing the third-party to send it to the public to sell their content /

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<sup>93</sup> Verizon Response to Billing Rules Data Request No. 01, May 10, 2012, at 8.

<sup>94</sup> Sprint Response to Billing Rules Data Request No. 01, May 10, 2012, at 1,2,3 & 4; AT&T Response to Billing Rules Data Request No. 01, May 10, 2012, at 1 & 2.

services. These controls also include routine audits of third-party advertising that could potentially drive unwanted charges, double opt-in for Premium SMS service, and fraud detection metrics to identify unusual revenue volumes.”<sup>25</sup> Staff did not audit the wireless BTCs to determine how these controls and checkpoints have been implemented and how they are functioning.

Wireless BTCs report that they are using several different means to shift third-party charges away from wireless bills and onto credit cards. Any unauthorized charges and fraud are resolved via the billing credit card company and are not reported to the Commission as cramming complaints. Application stores and digital wallets typically employ billing via credit cards rather than phone bills.

#### **A. Short Messaging and Premium Short Messaging Services**

Premium SMS (text messages) allow customers to purchase third-party content (i.e., digital goods) that is delivered to customers via text message. Examples of Premium SMS include “joke of the day” or weather reports. The charges for the Premium SMS content appear on customers’ wireless bills. The word “premium” signifies that it is a fee-based product. Regular SMS text messages do not require fees to be paid beyond the charges that wireless BTCs charge for the transmission of text messages. There is an inherently higher risk of cramming with Premium SMS purchases than content purchases from traditional app stores because Premium SMS fees are charged to a customer’s wireless bill, whereas app store fees are charged to credit card numbers via the app store website. As consumers are increasingly using wireless phones as a form of payment instead of credit cards, Premium SMS may pose additional risks for consumers because there are not yet strong consumer protection laws in place for unauthorized charges on phone bills as there are for unauthorized charges on credit card bills.<sup>26</sup>

Some merchants and content providers advertise Premium SMS products with deceptive incentivized marketing. Such deceptive marketing can lead customers to sign up to receive content that they believe is free when in fact customers are authorizing the merchants and content providers to charge a fee to their wireless bill. An example of this type of improper marketing is when a user wishes to sign-up for a non-Premium SMS product (example: free tablet), and is presented with a Premium SMS offer instead.<sup>27</sup> Any deceptive marketing materials used by Premium SMS providers is not typically included in the materials that are submitted to the wireless BTCs for approval. Cramming occurs when a user clicks through the

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<sup>25</sup> Responses to Billing Rules Data Request No. 01, May 10, 2012 by AT&T, at 1.

<sup>26</sup> The Consumer Credit Protection Act (CCPA) was created in 1968 to help guarantee American consumers fair and honest credit practices. This federal legislation standardized practices to ensure that lenders throughout the country followed the same sets of regulations. As banking and credit reporting evolved, additional laws were developed and put into place under the Consumer Credit Protection Act. Among these specific laws are the Truth in Lending Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act and the Credit CARD Act. These specify, among other things, the dispute resolutions rights of consumers.

<sup>27</sup> Sprint Response to Billing Rules Data Request No. 01, May 10, 2012, at 4.

non-approved / non-compliant marketing material that may include a “come on offer,” such as “you just won a free iPad,” and the customer ends up unknowingly signing up for a Premium SMS subscription.

## **B. Double Opt-In**

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.”<sup>98</sup> In D.10-10-034, the Commissions 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.”<sup>99</sup>

The BTCs referenced the MMA Guidelines in their discussions with staff concerning the double opt-in process.<sup>100</sup> According to the MMA, wireless BTCs began using double opt-in in 2005, when the MMA adopted the first double opt-in guidelines.<sup>101</sup> The most recent version of the Consumer Best Practice Guidelines was adopted October 16, 2012.<sup>102</sup> According to Cara Frey, General Counsel for the MMA, the MMA only gathered the information for the Consumer Best Practice Guidelines, and The Wireless Association (CTIA) is now in charge of enforcing them.<sup>103</sup> The cover page of the Consumer Best Practice Guidelines states that the US Consumer Best Practices Committee for Messaging<sup>104</sup> developed the Consumer Best Practices guidelines in collaboration with representatives from the following member companies<sup>105</sup>: 4INFO, Inc.,

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<sup>98</sup> 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.

<sup>99</sup> D.10-10-034, at 29.

<sup>100</sup> 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.

<sup>101</sup> Leo Scullin, Staff Person at Mobile Marketing Association, e-mail correspondence and telephone conversation.

<sup>102</sup> U.S. Consumer Best Practices for Messaging, Version 7.0, October 15, 2012.

<sup>103</sup> 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, p. 76, lines 10-16, at 107.

<sup>104</sup> 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>.

<sup>105</sup> U.S. Consumer Best Practices for Messaging, Version 7.0, October 15, 2012.

Cincinnati Bell Wireless, CTIA and Mobile Messenger<sup>106</sup>. 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.”<sup>107</sup> 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.<sup>108</sup>

The wireless BTCs we spoke with all 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. Wireless BTCs also stated that they continue to refine their “double opt-in” process. Notwithstanding the wireless BTCs’ assertions, the Commission has not determined that the double opt-in process effectively prevents cramming. The wireless BTCs indicated that they require customers to use the double opt-in process to purchase premium third-party content and have the charges for that content appear on the customer’s wireless bill.<sup>109</sup> Wireless BTCs assert that they believe that the double opt in process prevents almost all unauthorized billing.<sup>110</sup> When there is unauthorized billing perpetrated by a “bad actor,” wireless BTCs claim they almost always refund the customer and have the “bad actor” vendor reimburse the wireless carrier.<sup>111</sup>

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<sup>106</sup> 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>).

<sup>107</sup> <http://www.mmaglobal.com/bestpractice/messaging-rules-compliance-center>

<sup>108</sup> On the MMA’s website, the MMA Messaging Rules Compliance Center Page states: “Thanks for visiting the MMA Messaging Rules Compliance Center. We have set up this site to capture the nature of your text messaging issue in regards to compliance with industry rules. We will then forward this issue on to the CTIA, the industry organization that oversees the monitoring, auditing and enforcement of the Common Short Code (CSC) messaging standards that must be followed to be compliant with most US carriers.

The MMA works very closely with CTIA and is maintaining this site as a convenience to brand marketers and their enabling partners. Although the CTIA audit standards are based on the MMA’s Consumer Best Practices documents, CTIA and their member carriers enforce strictly against the CTIA Compliance Monitoring and Enforcement Playbook (available here: <http://www.wmcglobal.com/faqs.html>).

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>).

<sup>109</sup> 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.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

The wireless BTCs report that they are relying on Guidelines (U.S. Consumer Best Practice Guidelines) that were developed by and for the wireless industry. Furthermore, CTIA<sup>112</sup>, 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 developed. The MMA’s website states that, “[a]lthough the CTIA audit standards are based on the MMA's Consumer Best Practices documents, CTIA and their member carriers enforce strictly against the CTIA Compliance Monitoring and Enforcement Playbook.”<sup>113</sup> However, the U.S. Consumer Best Practices are not subject to any independent review and enforcement of which we are aware. It is also notable that, in contrast to what the BTCs reported to Commission staff about the double opt-in process, the Federal Trade Commission (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.”<sup>114</sup>

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;<sup>115</sup> and in *FTC v. Inc21.com*, the defendants altered and falsified verification recordings for telemarketing calls that purported to show consumers’ consent to charges.<sup>116</sup> 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.<sup>117</sup> Moreover, not all “double opt-in” procedures for premium services require that a consumer affirmatively respond to a confirmation text message – for

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<sup>112</sup> 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.”

<sup>113</sup> <http://www.mmaglobal.com/bestpractice/messaging-rules-compliance-center>.

<sup>114</sup> 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.

<sup>115</sup> *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>.

<sup>116</sup> *Inc21.com*, 745 F. Supp. 2d at 991-92.

<sup>117</sup> 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>.

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.<sup>118</sup>

### **C. Application Stores (app stores); Mobile and Digital Wallets; Political Donations**

D.10-10-034 stated that staff's report on the implementation of the cramming rules should also include a discussion of "developments in the wireless industry, including new types of offerings by third-party providers beyond Premium short messaging services."<sup>119</sup> Below are descriptions of several new developments in the wireless industry.

#### **1. Application Stores**

An application store ("app store") is a web site that enables a user to download free and paid applications to smartphones as well as computers. To purchase from these app stores, customers must use a credit card or some other option offered by the app store provider. Customers may not place charges for these applications on their wireless bills, so there currently is no cramming issue with regard to app stores in today's environment.

#### **2. Mobile and Digital Wallets**

Google Wallet is a free Android application (app) that turns a smart phone into a virtual wallet. The Google Wallet mobile payment system was developed by Google to allow its users to store debit card numbers, credit card numbers, loyalty card numbers, and gift card numbers, among other things, as well as redeeming sales promotions, on their mobile phone and then to charge purchases to these accounts.<sup>120</sup> Google Wallet enables users to access their credit card numbers virtually using a PIN. By using a four digit pin, Google Wallet may be more secure than a plastic credit card. The secure encryption technology of the credit card issuing institution protects the customer's payment card credentials as they are transferred from the phone to the reader. On August 1, 2012, Google, and its partner Sprint Nextel, announced a major nationwide expansion of its "mobile wallet" service. Verizon Wireless, AT&T Mobility and T-Mobile are partnering with another vendor, ISIS, to offer a similar mobile wallet service.

#### **3. Political Contributions via Wireless Phones**

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<sup>118</sup> 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.

<sup>119</sup> D.10-10-034 at 50, Ordering Paragraph 2.

<sup>120</sup> From Google website at: <http://www.google.com/wallet/>

On June 2012, the Federal Election Commission (“FEC”) granted limited approval for federal candidates, political committees, and political parties to collect political contributions through text message campaigns. The FEC approval was predicated on complying with 18 requirements. On August 29, 2012, CTIA issued guidelines for the processing of text message-based contributions to political candidates, committees and political parties. The 18 requirements are available on the CTIA website: <http://www.ctia.org/media/press/body.cfm/prid/2205>. Staff is unclear as to the whether wireless BTCs are following the CTIA guidelines and what enforcement mechanisms CTIA uses to ensure compliance with these guidelines.

#### **D. Smart Phones**

Smart phones are small hand held computers that are integrated into wireless telephones. Smart phone usage may expose customers to additional risk to malware, which could possibly increase fraudulent forms of billing, including credit card, bank account, and BTC billing.

Malware is a type of malicious software that includes such things as: viruses, worms, and bugs, that could, among many other things, drive unauthorized charges onto a customer’s wireless bill.<sup>121</sup> AT&T Mobility claims that malware poses a challenge because it is constantly evolving.<sup>122</sup>

Cybercriminals are targeting Android devices more often and using new techniques to distribute malware to phones. These include “malvertising” (ads served up through legitimate apps that lead consumers to a fake Android market and trick them into downloading malware, like GGtracker) and “upgrade attacks” (where the initially downloaded app is clean, but later upgrades deploy malware).

Malware can harm consumers in several different ways. Cybercriminals can rack up charges to consumers’ phone bills through cramming. Malware also can sign up consumers for “premium SMS” text messaging services. Mobile malware and spyware can pull sensitive data from unsuspecting consumers’ phones — credit card numbers, online banking or e-mail account login credentials or contact lists.<sup>123</sup> Infected phones also can become part of a “botnet,” which means consumer’s phones could be used without their knowledge as part of a larger attack scheme. This can also drive up consumers’ data traffic, which can push them toward their data plan’s cap faster.

A fairly new Android Trojan is GGTracker, which is automatically downloaded to a user’s phone after he or she visits a malicious webpage that imitates the Android Market web page.<sup>124</sup>

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<sup>121</sup> <http://operationstech.about.com/od/glossary/g/Malware.htm>

<sup>122</sup> AT&T Response to Billing Rules Data Request No. 01 dated May 10, 2012, at 5.

<sup>123</sup> <http://anti-virus-software-review.toptenreviews.com/mobile-phones-are-under-malware-attack.html>

<sup>124</sup> Android users are shown an advertisement that directs them to a malicious website that resembles the Android Market installation screen. The website entices a user to click-through to download and install an application (in one case, a fake battery optimizer packaged as t4t.pwower.management, and in another a porn app packaged as com.space.sexypic). If the user clicks the install button, the malicious app will begin to download and dialogue appears to direct the user to install via the download notification.

The Trojan is able to sign up a victim to a number of premium SMS subscription services without the user's consent. This leads to crammed charges on the victim's phone bill.<sup>125</sup> Android users are directed to install this Trojan after clicking on a malicious in-app advertisement. If the Trojan is installed, it may subscribe the user to one or several premium rate SMS subscription services.<sup>126</sup>

### **E. Circumvention of Third-Party Billing Authorization Procedures**

Wireless BTCs report that they have been able to discover and address some very elaborate cramming schemes. For example, in early 2011, Verizon Wireless learned of a complex scheme by certain entities, whereby extensive steps were taken, including the use of cloaking software, to prevent Verizon Wireless and their auditing firms from viewing many of the entities' websites, which were used to get customers to opt in to their Premium SMS campaigns.<sup>127</sup> These entities presented campaigns that they stated were compliant with the MMA Guidelines, as well as with the guidelines Verizon Wireless had in place at the time the campaigns were approved by the carrier.<sup>128</sup> Subsequently, these entities used unapproved, noncompliant websites to get customers to opt in to some campaigns and then tried to conceal the websites from detection by the wireless BTCs' monitoring efforts.

Despite these tactics, after a whistleblower tipped off Verizon, Verizon Wireless indicated that it was able to unravel the scheme and shut down all of the campaigns operated by the entities. Verizon Wireless stated that it has fortified its auditing processes based upon this experience. Verizon Wireless claims that these improved processes have helped it to identify and terminate a number of other similar schemes.<sup>129</sup>

## **V. CHANGES IN THE FEDERAL LANDSCAPE CONCERNING CRAMMING**

### **A. FCC Rulemaking Regarding Cramming**

On April 17, 2012, the FCC issued a Report and Order and Further Notice of Proposed Rulemaking (*Further Notice*) addressing the problem of cramming (FCC Cramming Order).<sup>130</sup>

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<sup>125</sup> <http://www.technewsdaily.com/6928-new-android-trojan-hijacks-american-smartphones.html>

<sup>126</sup> <http://www.androidgenes.com/2011/06/23/trojan-malware-ggtracker-sending-premium-sms-from-your-account/>

<sup>127</sup> Verizon Response to Billing Rules Data Request No. 01, May 10, 2012, at 3; <http://newmedialaw.proskauer.com/2011/03/14/verizon-wireless-files-rico-suit-against-mobile-marketers-alleges-deception-and-fraud-in-evasion-of-mma-guidelines-requirements-for-short-code-campaigns/>

<sup>128</sup> Verizon Response to Billing Rules Data Request No. 01, May 10, 2012, at 3.

<sup>129</sup> *Ibid.*

<sup>130</sup> *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, Report and Order and Further Notice of Proposed Rulemaking (released April 27, 2012).

The FCC noted that “The widespread nature of cramming and the fact that the number of wireline cramming complaints received by the Commission, the Federal Trade Commission (“FTC”), and state agencies, such as public service commissions and attorneys general, remains high are strong evidence that the current voluntary industry practices, while well intended, have been ineffective to prevent cramming and make clear the need for additional protection for consumers.”<sup>131</sup> The FCC found that:

The record reflects that third-party billing can be a convenience for carriers, third parties, and consumers, and there are some legitimate uses for third-party billing by wireline telephone companies, such as billing charges for bundled services and for long distance service on consumers' local telephone bills. Nevertheless, the record demonstrates that cramming, primarily of third-party charges, continues to be a significant problem on wireline telephone bills and that existing industry safeguards and Commission rules have proven inadequate to effectively combat it. The record also demonstrates that it is the wireline telephone companies' practice of placing third-party charges, primarily non-carrier third-party charges, on their own bills to their consumers that is the "root cause" of the problem, as this practice enables fraud in the form of cramming and attracts "fraudsters."<sup>132</sup>

Further, the FCC found that “the recent announcements by Verizon, AT&T, and CenturyLink regarding plans to cease billing for certain third-party services do not eliminate the need for the cramming safeguards we adopt in this *Report and Order*.”<sup>133</sup> The FCC Cramming Order requires wireline carriers that currently offer blocking of third-party charges to clearly and conspicuously notify consumers of this option on their bills, websites, and at the point of sale; to place non-carrier third-party charges in a distinct bill section separate from all carrier charges; and to provide separate totals for carrier and non-carrier charges.

The FCC declined in the order to adopt anti-cramming rules for wireless and VoIP providers, finding that “the record does not demonstrate a need for rules to address cramming for CMRS or VoIP customers at this time.”<sup>134</sup> However, the FCC sought further comments on cramming problems in those industries and continues to monitor the situation.<sup>135</sup>

In its October 24, 2011, Comments filed with the FCC in the above proceeding, the Federal Trade Commission (FTC) stated:

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<sup>131</sup> *Id.*, at para. 2 (emphasis added).

<sup>132</sup> *Id.*, at para. 44 (footnotes omitted).

<sup>133</sup> *Id.*, at para. 44.

<sup>134</sup> *Id.*, at para. 47.

<sup>135</sup> *Ibid.*

The provisions of the FCC’s proposed rules discussed in this Comment – those concerning disclosure of the option to block third-party charges and the listing of third-party charges in separate sections – apply solely to landline bills. However, the FCC also requests comment on whether the proposed rules should extend to mobile phone bills. While the FTC has not examined the application of the FCC’s proposed rules in the mobile phone context, the Commission, as a general matter, supports efforts to provide clear disclosures to consumers. That said, with respect to cramming, the FTC’s law enforcement experience lies predominantly in the area of landline bills, which are the subject of the majority of consumer cramming complaints the FTC receives. Additionally, the technologies inherent to the mobile platform and other considerations may require a different analysis than that applied to landline third-party billing. Accordingly, the FTC limits its Comment to landline cramming. As consumers’ uses of mobile telephones, and in particular mobile payments, grows, the FTC and FCC should vigilantly monitor cramming complaints, scrutinize industry anti-cramming measures, and work with state law enforcement to determine whether further action is required. Such monitoring of mobile cramming complaints would be enhanced by the FTC’s recommendation to include the complaints in the Consumer Sentinel database. *See* Section V, Law Enforcement and Regulators Should Submit Complaints to Consumer Sentinel.<sup>136</sup>

In response to the FCC’s request for further comments about wireless cramming, the FTC wrote on July 20, 2012, in their Reply comments to the FCC’s Cramming proceeding in a section titled, “Cramming of unauthorized charges on wireless bills is a significant and growing problem for consumers”:

The FTC and FCC have reviewed thousands of complaints of mobile cramming, including a substantial number in the last few years. The FTC’s review of complaints from the Consumer Sentinel database – which aggregates complaints filed with the FTC, state Attorney General offices, most Better Business Bureaus, and numerous other contributors – shows that consumers have reported over 1800 complaints of unauthorized charges on wireless bills since 2010. [The count is based on unverified complaints reported by consumers and is not based on a consumer survey nor is the count audited by staff.]<sup>137</sup> Similarly, the

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<sup>136</sup> FTC Comments to the FCC “In the Matter of Empowering Consumers to Prevent and Detect Bill for Unauthorized Charges (“Cramming”), CG Docket No. 11-15, October 24, 2011, at 2, footnote 5 (citations omitted).

<sup>137</sup> For this comment, FTC staff reviewed complaints in the Consumer Sentinel database. The Consumer Sentinel Network is a secure online database of millions of consumer complaints, available only to law enforcement, that provides civil and criminal enforcement organization immediate and secure access to fraud, identity theft, Internet, telemarketing (including Do Not Call), and other consumer-related complaints. *See* [www.sentinel.gov](http://www.sentinel.gov). The count is based on unverified complaints reported by consumers, and is not based on a consumer survey. Any investigations of mobile cramming that staff is conducting are nonpublic.

FCC has reported nearly 2,000 mobile cramming complaints, including a growing number in 2011.<sup>138</sup> . . .

This number of reported complaints undoubtedly reflects a small fraction of crammed charges on wireless bills.<sup>139</sup> In the context of landline cramming, court-accepted surveys found that only five percent of consumers were even aware of the unauthorized charges from review of their bills.<sup>140</sup> Given this, the total number of actual wireless cramming complaints could be estimated to be between 36,000 and 40,000 wireless cramming complaints nationwide. As the FCC also has recognized, “it often takes consumers months or years to detect unauthorized charges on their bills – if they detect them at all – because of the way third parties describe the unauthorized charges or the way carriers present the unauthorized charges on their bills.” Many consumers also may be unaware that third-party charges may be placed on their phone bills in the first place. There is little reason to think that the situation is any different for billing to wireless accounts, where these same factors are present. Moreover, of the consumers that do notice, many may not file a complaint with the FTC, FCC, or another government agency.<sup>141</sup>

In light of this data, and the longstanding problems with landline cramming, the FTC stated that it believes that additional consumer protections against mobile cramming are needed.

[T]he FTC recommends that wireless providers be required to offer consumers the ability to block third-party charges and to make this option clear to consumers, so that consumers are empowered to avoid any possibility of unauthorized third-party charges. Whether industry self-regulation in combination with those measures will be sufficient to stop mobile cramming, or whether stronger consumer protections are necessary, requires a harder look at the effectiveness of industry standards.<sup>142</sup>

At a minimum, all wireless providers should offer their customers the ability to block all third-party charges. Wireless providers should clearly and prominently inform their customers that third-party charges may be placed on the consumers’

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The FCC has noted, that from 2008 to 2010, it received between 2000 and 3000 cramming complaint each year, of which 16% related to wireless consumers. FNPRM ¶20. In 2011, it received nearly 1,700 cramming complaints, of which 30% related to wireless communications. *Id.* ¶ 21.

<sup>139</sup> As a reference point, the FCC has received a few thousand landline cramming complaints a year, but as the FNPRM notes, the available evidence shows that at least hundreds of thousands of consumers have been harmed by cramming. *See* FNPRM ¶¶ 20-23; 31-35; Senate Commerce Committee Staff Report at iv.

<sup>140</sup> *Inc21.com*, 745 F. Supp. 2d at 1001.

<sup>141</sup> FTC Reply Comments, *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (Cramming)*, CG Docket No. 11-116, 7/20/12, at 5-7.

<sup>142</sup> *Id.* at.7-8.

accounts and explain how to block such charges at the time accounts are established and when they are renewed. And wireless providers should provide a clear and consistent process for customers to dispute suspicious charges placed on their accounts and obtain reimbursement. The FTC believes that such measures should be mandated by law or regulation to ensure that consumers have baseline protections. Additional information is needed, however, to determine whether more extensive regulatory measures are warranted, such as default blocking of all third-party charges for wireless provider accounts.<sup>143</sup>

We note that the Commission, in D.10-10-034 and earlier Commission decisions, has already adopted many of the key consumer protections against cramming that the FTC recommended in its comments.

On August 27, 2013, in response to the FCC's April 2012 *Further Notice of Proposed Rulemaking*, the FCC's Consumer and Governmental Affairs Bureau released a Public Notice seeking to refresh the record on cramming.<sup>144</sup> The request to refresh the record on cramming was due to new developments and additional evidence related to cramming for both wireline and wireless consumers.<sup>145</sup> Specifically, the Public Notice discusses Verizon's and AT&T decision to cease billing for many third-party charges on telephone bills, the NAAG letter, workshops held at the FCC and FTC on the extent of the cramming problem, and other new information.<sup>146</sup> For example, the Public Notice cites to "recently published state studies [which] indicate that half of all CMRS bills contain unauthorized charges and contend that the number of consumer complaints may substantially understate the magnitude of the CMRS cramming problem." The Public Notice also requested information to refresh the record on all of the other issues raised in the *Further Notice*, including "the need for an opt-in requirement and the mechanics of an opt-in process for wireline and/or CMRS services."<sup>147</sup> The CPUC filed comments on the Public Notice recommending that the FCC adopt a default blocking opt-in requirement.<sup>148</sup>

## **B. Federal Class Action & the FTC's Complaint Against Wise Media**

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,

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<sup>143</sup> *Id.*, at 11-12.

<sup>144</sup> CG Docket No. 11-116 and 09-158; CC Docket No. 98-170

<sup>145</sup> Public Notice, *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record Regarding "Cramming"*, CG Docket No. 11-116 and 09-158; CC Docket No. 98-170, at 1.

<sup>146</sup> *Id.* at 2.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Supplemental Comments of the California Public Utilities Commission and the People of the State of California*, 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, CG Docket No. 11-116 and 09-158; CC Docket No. 98-170, filed November 18, 2013.

and Mobile Messenger Americas, Inc. (“Mobile Messenger”), a billing aggregator, *Fields v. Wise Media*.<sup>149</sup> 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”).<sup>150</sup> The Amended Complaint alleges that Wise Media, Mobile Messenger, mBlox and Motricity “enroll consumers—without their knowledge or consent—in short message service (“SMS”) text subscription plans with monthly membership fees of \$9.99.”<sup>151</sup> As a result of new information found during discovery, Plaintiffs filed a Second Amended Complaint on August 5, 2013. The Second Amended Complaint states that Plaintiffs have now discovered that “Wise Media worked in a joint venture with Mobile Messenger and proposed new defendants The Winley Group, LLC (“The Winley Group”), Mobile Messenger Australia Pty Limited (“Mobile Messenger Australia”), and M-Qube (collectively with Wise Media, the “Merchant Defendants”) to operate the [cramming] scam.”<sup>152</sup> Consequently, Plaintiffs added new allegations and claims against the Merchant Defendants. On June 21, 2013, Judge William Alsup denied, on almost all grounds, Mobile Messenger’s motion to dismiss the claims against Wise Media and the Aggregator Defendants in *Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss* (“Order”).<sup>153</sup> The significance of Judge Alsup’s June 21, 2013 Order should not be overlooked. The Order cites to the *FTC. v. Inc21* case<sup>154</sup> and the FTC report titled *FTC Calls Wireless Phone Bill Cramming a Significant Consumer Problem* (July 23, 2012).<sup>155</sup> The Court also allowed claims against three billing aggregators to move forward.

On November 18, 2013, Judge Alsup issued an order denying plaintiffs’ motion for class certification and appointment of class counsel.<sup>156</sup> This order was only against the billing aggregators as the court stayed the action against Wise Media, due to the FTC’s case, as

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<sup>149</sup> Mobile Messenger, mBlox 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 mBlox 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. N.D. Cal., First Amended Complaint at 8, ¶¶ 48-51.)

<sup>150</sup> *Wise Media v. Fields*, Case No. 3:12-cv-05160-WHA, U.S. Dist. Ct. N.D. Cal., First Amended Complaint (“Complaint”) at 1, ¶ 1.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Fields v. Wise Media*, Case No. 3:12-cv-05160-WHA, U.S. Dist. Ct. N.D. Cal., Second Amended Complaint at 1.

<sup>153</sup> *Fields v. Wise Media*, Case No. C 12-05160 WHA, U.S. Dist. Ct. N.D. Cal., Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss (“Order”), June 21, 2013.

<sup>154</sup> *Id.* at 2.

<sup>155</sup> *Ibid.*; see also <http://www.ftc.gov/opa/2012/07/cramming.shtm>

<sup>156</sup> *Fields v. Wise Media*, Case No. C 12-05160 WHA, U.S. Dist. Ct. N.D. Cal., Order Denying Plaintiff’s Motion for Class Certification and Appointment of Class Counsel, November 18, 2013.

discussed below.<sup>157</sup> On December 18, 2013, Judge Alsup approved a stipulation dismissing the billing aggregators Mobile Messenger, Motricity, m-Qube from the case, with prejudice.<sup>158</sup> On December 23, 2013, the judge granted in part and denied in part the motion to dismiss by the remaining billing aggregator, mBlox.<sup>159</sup>

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 that Wise Media took in millions of dollars by placing charges on consumers' mobile phone bills, many of which were unauthorized charges.<sup>160</sup> 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.<sup>161</sup> 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 ongoing basis.<sup>162</sup>

The FTC's press release on this case discussed how Wise Media was able to make unauthorized charges on customers' bills:

Wise Media and its operators have taken advantage of the fact that consumers may not expect their mobile phone bills to contain charges from third parties and that Wise Media's charges appear on bills in an abbreviated manner that does not always clearly designate the company as the source of the charge. As a result, many consumers didn't notice or understand the charges and paid the bills. To the extent that consumers did notice the charges, the process of obtaining refunds was difficult and often unsuccessful according to the complaint.<sup>163</sup>

Staff will continue to closely follow the Wise Media cases to learn about new developments in mobile cramming particularly with regard to premium SMS. Staff wishes to learn more about how Wise Media and billing aggregators were able to cram so many consumers so that it may protect California consumers from becoming victims of similar types of cramming schemes.

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<sup>157</sup> *Ibid.*

<sup>158</sup> *Fields v. Wise Media*, Case No. C 12-05160 WHA, U.S. Dist. Ct. N.D. Cal., Order Approving a Stipulation Dismissing Billing Aggregators Mobile Messenger, Motricity, m-Qube, December 18, 2013.

<sup>159</sup> *Fields v. Wise Media*, Case No. C 12-05160 WHA, U.S. Dist. Ct. N.D. Cal., Order Re: mBlox's Motion for Summary Judgment, December 23, 2013.

<sup>160</sup> *FTC v. Wise Media, LLC*, Case No. 13-CV-1234, U.S. Dist. Ct., N.D. Ga., Complaint at ¶ 11.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> <http://ftc.gov/opa/2013/04/wisemedia.shtm>

### C. January 31, 2013 Letter from the CPUC to the FCC

On January 31, 2013, CAB and 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 received by the Commission. As adopted in D.10-10-034, the Commission does not receive data on the number of cramming complaints from wireless carriers as it does from wireline carriers. Rather, the Commission 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 supports what the FTC stated in its report on cramming – that very few consumers complain to regulatory agencies about mobile cramming.<sup>164</sup>

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<sup>164</sup> 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, lines 17-25, p. 7 lines 1-10.

**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 |   |
| <b>2011</b> | 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   |
| <b>2012</b> | 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   |

**D FTC Staff Report on Mobile Payments and FTC’s Mobile Cramming Roundtable**

In March 2013, the FTC issued a staff report titled, “Paper, Plastic . . . or Mobile” on mobile payments (“FTC Mobile Payments Report”). 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.”<sup>165</sup> 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.<sup>166</sup>

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.”<sup>167</sup> 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.”<sup>168</sup> In its 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.

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 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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<sup>165</sup> FTC Mobile Payment Report, p. 4.

<sup>166</sup> *Ibid.*

<sup>167</sup> *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/2012/07/12>

0723crammingcomment.pdf).

<sup>168</sup> *Ibid.*

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.<sup>169</sup>

The Commission already adopted rules in D.10-10-034 that are consistent with the FTC's recommendations regarding bill blocking, customer disclosures, dispute resolution and refund policies. The FTC set forth some other suggested ways to protect consumers from receiving crammed charges on their mobile phone bill in its Mobile Payment Report. The Commission may wish to consider whether any of the FTC's other suggestions would be appropriate and are necessary in order to protect California consumers from mobile cramming.

The FTC also held a Mobile Cramming Roundtable on May 8, 2013. The Mobile Cramming Roundtable had three panel discussions: (1) "Understanding Third-Party Mobile Billing and Cramming"; (2) "Current Strategies to Reduce Mobile Cramming"; and "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.<sup>170</sup> The FTC will issue a report on the roundtable which will hopefully provide Commission staff with further guidance on how to best protect consumers from the growing problem of mobile cramming.

#### **E. FTC's Complaint Against and Proposed Settlement with Jesta Digital, LLC**

On August 20, 2013, the FTC filed a complaint against a mobile third-party content provider, Jesta Digital, LLC (Jesta)<sup>171</sup>, 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.<sup>172</sup> The advertisements falsely claimed that a virus was detected on the consumer's mobile device and they incorporated an image of a robot designed to look similar to the Android operating system's robot logo.<sup>173</sup> When consumers clicked on the advertisements, Jesta presented them with a series of screens or landing pages that included prominent language and visuals about protecting

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<sup>169</sup> *Id.*, at 8-10 (citations omitted).

<sup>170</sup> Transcript of FTC Mobile Cramming Roundtable, 5/8/13, available at <http://www.ftc.gov/bcp/workshops/mobilecramming/30508mob.pdf>.

<sup>171</sup> Jesta also does business as Jamster.

<sup>172</sup> *FTC v. Jesta*, Complaint for Permanent Injunction and Equitable Relief, U.S. Dist. Ct. D.D.C., at 2-3.

<sup>173</sup> *Id.* at 3.

Android mobile devices from viruses.<sup>174</sup> While a screen contained a subscriber button, the FTC alleged that if consumers clicked anywhere on the screens or landing pages, According to the FTC’s complaint, Jesta charged consumers \$9.99 per month directly on their mobile bill for ringtones and other mobile content.<sup>175</sup> If consumers actually attempted to subscribe and download Jesta’s “anti-virus software” to their mobile devices, the download often failed. Jesta charged unsuspecting consumers by misusing a new billing method known as Wireless Access Protocol (WAP) billing.<sup>176</sup> 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.<sup>177</sup>

Under the terms of the settlement with the FTC, Jesta is required to automatically provide full refunds to consumers who were billed between Dec. 8, 2011, and the date of entry of the order for any good or service that involved the company claiming the consumer’s device was infected with malware or that Jesta would provide purchasers with software to protect their mobile device from malware.<sup>178</sup> In addition to providing timely refunds directly to consumers, Jesta will pay \$1.2 million directly to the FTC.<sup>179</sup>

#### **F. FTC’s Complaint Against Tatto, Inc., *et alia***

On December 4, 2013, the FTC filed a mobile cramming complaint (Complaint) against Tatto, Inc. (also doing business as WinBigBidLow and Tatto Media); Bullroarer, Inc. (also doing business as Bullroarer Corporation Pty. Ltd.); Shaboom Media, LLC (also doing business as Tatto Media); Bune, LLC; Mobile Media Products, LLC; Chairman Ventures, LLC; Galactic Media, LLC; Virtus Media, LLC; Lin Miao and Andrew Bachman in the Central District Court of California.<sup>180</sup>

According to the Complaint, Lin Miao and Andrew Bachman, through a number of companies they owned and controlled sent text messages to consumers with random facts such as celebrity-related text messages, “fun facts”, and horoscope readings that consumers dismissed as spam without realizing they had received them through a paid subscription service they did not knowingly buy.<sup>181</sup> The defendants also allegedly used misleading website offers to obtain valid consumer phone numbers that they used to sign up consumers for their services without their

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<sup>174</sup> *Id.* at 3-4.

<sup>175</sup> *Id.* at 5-6.

<sup>176</sup> *Id.* at 6.

<sup>177</sup> *Id.* at 8.

<sup>178</sup> Proposed Order at 10-13.

<sup>179</sup> Proposed Order at 13.

<sup>180</sup> *FTC v. Tatto, Inc., Complaint for Injunctive and Other Equitable Relief*, Case No. CV 13-8912, U.S. Dist. Ct., C.D. Cal., filed December 5, 2013.

<sup>181</sup> *Id.* at 6, 8-9.

knowledge.<sup>182</sup> For example, a website told visitors they had won free Justin Bieber tickets, which they could claim by filling out an online quiz.<sup>183</sup> Part of the process required consumers to enter their phone number, and while consumers didn't receive the Justin Bieber tickets, the complaint alleges that their phone numbers were likely signed up for one of the defendants' paid services.<sup>184</sup>

The Complaint contends that the charges often appeared on consumers' bills with abbreviated and informative descriptions and in many instances; consumers did not notice the variations in the amount of their bills from month to month.<sup>185</sup> The charges continued to appear on consumers' bills until the consumers noticed them and took action to unsubscribe.<sup>186</sup> When consumers did notice the charges, the process of getting a refund was often extremely difficult.<sup>187</sup> The Complaint alleges that the number of consumers seeking refunds from their phone companies was as high as 40 percent in some months, and some carriers suspended the defendants from placing charges on consumers' bills.<sup>188</sup> According to the Complaint, "[d]efendants have made millions from the unauthorized charges . . ."<sup>189</sup>

## **VI. FINDINGS AND NEXT STEPS**

Ordering Paragraph 2 of D.10-10-034 provides that "[t]he report must include findings on whether the cramming rules adopted by this decision sufficiently protect customers from unauthorized charges." At this point, staff is able to make the finding that the cramming reporting rules adopted in D.10-10-034 for wireline carriers, when viewed with wireline BTCs' changes in business practices and the climate created by the federal regulatory efforts and class action settlements, sufficiently protect consumers from unauthorized charges. The current available data is insufficient to tell whether the cramming reporting rules alone sufficiently protect customers of wireless carriers. It is clear, however, that cramming is still occurring in both the wireline and wireless contexts.

### **A. BTCs' Compliance with D.10-10-034 Cramming Rules**

Based on the information BTCs provided to Commission staff, BTCs have worked towards complying with the cramming rules the Commission adopted in D.10-10-034. Although BTCs appear to be following many of the requirements in the cramming rules, there is room for improvement in their overall implementation.

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<sup>182</sup> *Id.* at 9.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Id.* at 9-10.

<sup>188</sup> *Id.* at 10.

<sup>189</sup> *Ibid.*

### **1. Third-Party Charges Blocking Option**

G.O. 168 Part 4 Rule 5 requires that BTCs provide subscribers with the option to block third-party Service Provider charges. Based on test call inquiries to BTC customer service representative and review of BTC data responses, it appears consumers are not receiving adequate disclosure, online or from customer service representatives of their option to have third-party bill blocking implemented at no charge. Staff discussed these findings with each BTC and offered recommendations specific to them. Where deficiencies exist, SED will work with the BTCs to ensure that the third-party bill blocking rules are implemented per the directives of G.O. 168. Also, as discussed below in Section VI(C), Next Steps, staff recommends that the Commission revisit adopting an opt-in requirement.

### **2. Establishing Protocols for Monitoring Billing to Determine Need for Terminations and Suspensions**

G.O. 168 Part 4 Rule 6 requires BTCs to have in place and comply with a protocol for identifying unauthorized charges and suspending or terminating billing services to any billing agent or service provider that has submitted unauthorized charges. The BTCs report that they have established these protocols. In some cases, the BTCs report that they may terminate a Service Provider on a first offense, and some may have a graduated process where fines are imposed first, but repeat offenses usually result in termination. In either case, BTCs report that they are actively suspending or terminating Service Providers in compliance with G.O. 168 Part 4. Staff will continue to monitor the terminations and suspensions of service providers to see whether these protocols, as administered by the BTCs, are effective, and whether BTCs continue to comply with these protocols.

### **3. Reporting Requirements**

G.O. 168 Part 4 Rule 11.1 requires wireless BTCs to create a calendar month summary report every quarter listing refunds made to subscribers with California area codes for charges originated by Service Providers or Billing Agents. In addition, G.O. 168 Part 4 Rule 11.2 requires wireless BTCs to create a calendar month summary report every quarter listing all third-party services that have been suspended or terminated. For wireline BTCs, G.O. 168 Part 4 Rule 11.3 requires that they create a calendar month summary report every quarter providing data on cramming complaints. These reports are required to be submitted to the Director of SED. With the exception of a few minor delays, BTCs have complied with these reporting requirements.

### **B. Effectiveness of Cramming Rules in Protecting Consumers**

It is difficult to precisely quantify the effects of the cramming rules in protecting consumers because of other possible influences on cramming behavior. Advances in technology, BTCs' changes in business practices, federal regulatory efforts, the Rockefeller Report, and nationwide *Moore* and *Nwabueze* settlements reported above, all have possible impacts on post-decision cramming behavior that are difficult to precisely measure.

Although there are some positive developments to report in the fight against cramming, it is not yet clear to what specific extent the cramming rules, or any of these developments, have been effective in protecting consumers. Staff analyzed the available data and major activities that resulted from the decision, as reported by the BTCs, and found positive trends and results in many areas. Results included:

- Wireline cramming complaints reported by the BTCs declined by more than 50% from Q1 2011 to Q2 2012.
- Wireless refunds (which are issued for multiple reasons in addition to cramming complaints) showed a downward trend.
- According to the information BTCs provided, BTCs suspended or terminated Service Providers with questionable activities.
- Collaboration with staff has helped the BTCs understand and implement the cramming rules, and resulted in consumer education materials that have been published on the Commission's website and distributed to California consumers.

### **C. Next Steps**

The fact that the two largest wireline BTCs in the State, AT&T and Verizon, no longer bill for third-party charges (with some limitations) has provided customers of wireline BTCs significant protections from unauthorized charges. Staff will continue to monitor the levels of cramming for wireline BTCs because staff is aware that AT&T's and Verizon's new policies on third-party cramming are limited. Both carriers have stopped third-party billing only for recurring charges, not "message telephone services" such as directory lookup, other operator services, and, based on staff's understanding, all one-off charges. Also, other wireline BTCs continue to bill for third-party charges, including for recurring charges. Despite the Commission's Cramming Rules, changes in the federal regulatory landscape, and the class action settlements, cramming is still occurring on the telephone bills of customers of wireline BTCs.

SED staff will continue to monitor wireless BTCs' compliance with D.10-10-034. SED staff will also follow up on several areas identified in this report. For example, SED staff will make certain that wireless BTCs are providing adequate disclosures of customers' option to have third-party bill blocking implemented at no charge. SED staff will also continue to monitor the FTC's efforts to stop mobile cramming and will review FTC and other industry reports and request implementation of such recommendations as are appropriate to protect California consumers from cramming.

Staff also makes three specific recommendations:

**1. Reconsider D.11-01-009:**

*Staff recommends that the Commission re-examine D.11-01-009, Order Correcting Error In and Granting Extension of Time to Comply with Decision 10-10-034, which changed the definition of Billing Telephone Corporation, adopted by the Commission in D.10-10-034, to limit its applicability to only third-party providers. This change in the definition of BTC does not appear to be consistent with the Commission's intent in D.10-10-034. The issue of whether the definition of BTC applies only to third-party providers, or to third-party providers and the carriers themselves, was thoroughly vetted in the proceeding.<sup>190</sup> The plain language of D.10-10-034 states that the definition should apply to third-party providers and to the carriers themselves.<sup>191</sup>*

**2. Reporting Requirements for Wireline and Wireless BTCs.**

*Staff recommends that the Commission reconsider requiring wireless BTC's to also report cramming complaints. SED previously advocated for the same reporting requirements for wireless as wireline BTC's in Rulemaking 00-02-004. Instead, the Commission adopted refund reporting for wireless BTCs as a proxy for cramming complaints.*

G.O. 168 Part 4 Rule 11.1 requires wireless BTCs to create a calendar month summary report every quarter listing refunds for all services made to subscribers with California area codes for charges originated by Service Providers. Wireless BTCs do not report specific complaint data, which wireline BTCs do report. The Commission adopted the refund reporting protocol for wireless BTCs in D.10-10-034 to address concerns raised by the wireless BTCs that tallying subscriber complaints would be excessively burdensome.<sup>192</sup>

Under G.O. 168 Part 4 Rule 11.3, all wireline BTCs create a calendar month summary report every quarter listing complaints made by subscribers for unauthorized charges originated by Service Providers and Billing Agents. These reports include total number of consumer complaints by service provider/billing agent, total number of working

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<sup>190</sup> See, e.g., Assigned Commissioner's Ruling in R.00-02-004, 2/12/10. §§ 3.1.1, 3.2 at pp.2, 5-6, Appendix A, § 1.4 at ; Verizon Comments on 2/12/10 ACR at pp. 7-12; Cox Opening Comments on 2/12/10 ACR at pp. 3-5; DRA Reply Comments to ACR at pp. 18-21; Cox Comments on Proposed Decision, at 6; Verizon Reply Comments on Proposed Decision, at 6.

<sup>191</sup> D.10-10-034, Attachment A, p. 2, Rule 2.4.

<sup>192</sup> *Ibid.*

telephone numbers billed for each entity for which complaints were received, total number of subscribers billed, total billed amount, and updated contact information. Wireline BTCs do not report refund rates.

Staff has found that both the cramming complaint data and the refund rate are useful indicators of whether cramming is occurring. *Staff recommends that the Commission reconsider requiring wireless BTC's to also report cramming complaints so that we can properly monitor and measure trends in cramming for both wireline and wireless. The Commission should apply G.O. 168 Part 4 Rule 11.3, which requires reporting specific complaint data, to wireless carriers.*

### **3. Adopt a Default Blocking Opt-In Requirement.**

*Staff recommends that the Commission reconsider adopting a default blocking opt-in requirement.* The Commission elected to not adopt an opt-in requirement in D.06-03-013 and D.10-10-034. However, since the Commission adopted those decisions, several developments related to cramming have occurred. The charts and graphs in Section III of this report, the January 31, 2013 CAB/SED letter to the United States Senate Committee on Commerce, Science and Transportation, and the June 24, 2013, the National Association of Attorneys General (NAAG) comments all demonstrate that cramming is still a problem for customers of wireline and wireless BTCs. Staff believes that the best way for the Commission to protect California consumers from cramming is to adopt an opt-in requirement. First, the opt-in requirement would protect from cramming those who do not wish to purchase third-party services. Second, those who wish to access third-party services are empowered to access services via opt-in. Third, the opt-in requirement protects all California consumers because the opportunity for fraud and unauthorized charges is diminished when access to the number of consumer bills become limited.

## **APPENDIX 1**

### **Ordering Paragraphs 1 Through 3 from Decision 10-10-03 and Billing Rules Contained in Attachment A, Revised General Order 168, Part 4**

#### **O R D E R**

##### **IT IS ORDERED** that:

1. The California Telephone Corporation Billing Rules attached to this decision as Attachment A are adopted as Revised General Order 168, Part 4. All Billing Telephone Corporations, Billing Agents, and Service Providers must comply therewith at the earliest practicable date but in no event later than 90 days after the effective date of this order.

2. The Communications Division staff must prepare a report, in collaboration with the Consumer Protection and Safety Division, on developments in the wireless industry, including new types of offerings by third-party providers beyond Premium short messaging services. The report must include findings on whether the cramming rules adopted by this decision sufficiently protect customers from unauthorized charges. This report shall be prepared and served on parties to this proceeding by no later than January 1, 2013.

3. All Billing Telephone Corporations who offer third-party billing and collection services shall cooperate with the Telecommunications Division and the Consumer Protection and Safety Division and participate in meetings and workshops for the purpose of developing materials to educate consumers on how to avoid having unauthorized charges placed on bills. The workshops shall not only develop content for the CalPhoneInfo web site maintained by the Commission, but also shall discuss actions taken by the Billing Telephone Corporations to inform consumers of the ability to block third-party services and their related charges. Such workshops must occur no less than once each calendar quarter for the first year after the effective date of this decision and no less than annually thereafter. The consumer information must contain clear and concise descriptions of third-party billing, specific steps to dispute an unauthorized charge, a

summary of the responsibilities of a Billing Telephone Corporation, comprehensive information on means to block or limit such charges and such other information as the Commission may require to safeguard the rights of consumers. All carriers offering third-party billing services must participate in such workshops.

# ATTACHMENT A

## Revised General Order 168, Part 4

### California Telephone Corporation Billing Rules

#### 1. **Applicability:**

These rules apply to all Billing Telephone Corporations and Billing Aggregators and specify the responsibilities and procedures that must be followed to address and report cramming-related issues. Cramming occurs when an unauthorized charge is placed on a Subscriber's telephone bill.

These rules supersede the rules adopted in Decision (D.) 00-03-020, as modified by D.00-11-015, and replace General Order 168, Part 4, adopted in D.06-03-013.

Compliance with these rules does not relieve Billing Telephone Corporations of other obligations they may have under their tariffs, other Commission General Orders and decisions, FCC orders, and state and federal statutes.

These rules shall not be interpreted to create any new private right of action, to abridge or alter a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing rules.

#### 2. **Definitions:**

**2.1. Billing Agents:** Any entity which provides billing services for Service Providers directly or indirectly through a Billing Telephone Corporation.

**2.2. Complaint:** Any written or oral communication from a Subscriber alleging that an unauthorized charge was included in the Billing Telephone Corporation's bill to the Subscriber.

**2.3. Service Provider:** A person or entity, other than a Billing Telephone Corporation, that originates the charge or charges that are billed to the Subscriber of the Billing Telephone Corporation.

**2.4. Billing Telephone Corporation:** A telephone corporation that bills a Subscriber for products and services.

**2.5. Telephone Corporation:** Any telephone corporation (as defined in Pub. Util. Code § 234) operating within California. This term includes resellers and wireless telephone service providers.

**2.6. Unauthorized Charge:** Any charge placed upon a Subscriber's telephone bill for a service or goods that the Subscriber did not agree to purchase, including any charges that resulted from false, misleading, or deceptive representations. Charges that relate to a change in a subscriber's selection of a provider of telecommunications service are excluded from these rules and are subject to Part 3 (Rules Governing Slamming Complaints) of this General Order.

**2.7. Subscriber:** Either one of the following:

- (1) The person or entity identified in the account records of a carrier as responsible for payment of the telephone bill;
- (2) Any person authorized by such party to charge services to the account;
- (3) Any person lawfully in possession of a wireless handset where the subscriber of record, after being fully informed of the optional nature of this feature and the associated responsibilities, has authorized the Billing Telephone Corporation to place third-party charges on the Subscriber's bill for the line serving the handset. This provision does not relieve the subscriber of any obligation to under their service agreement to promptly report a lost or stolen wireless handset to the Billing Telephone Corporation.

**2.8. Investigation:** An inquiry conducted by (i) the person or entity from which the disputed charge originated, (ii) a Billing Telephone Corporation, (iii) the Commission, or (iv) any other relevant government agency, such as the District Attorney's office in the Subscriber's county or the State Attorney General.

### **3. Authorization Required:**

Billing Telephone Corporations shall only place charges that have been authorized by the Subscriber on the Subscriber's telephone bill. All charges billed without Subscriber authorization are unlawful.

All disputed charges for which no verification of Subscriber authorization is available are subject to a rebuttable presumption that the charges are unauthorized. A Billing Telephone Corporation may establish that the Subscriber authorized the charge by (i) providing a record of affirmative authorization from the Service Provider, (ii) a demonstrated pattern of knowledgeable past use, or (iii) other persuasive evidence of authorization. With regard to direct dialed telephone services, evidence that a call was dialed is prima facie evidence of authorization. This presumption can be rebutted with evidence that the call was not authorized.

**4. Billing for Authorized Charges Only:**

Billing Telephone Corporations shall bill Subscribers only for authorized charges. Billing Telephone Corporations shall adopt protocols which prohibit Billing Agents and Service Providers from submitting, directly or indirectly, charges for billing through a Billing Telephone Company that the Subscriber has not authorized. Billing Telephone Corporations must monitor or cause to be monitored, either directly or through a Billing Agent, or other entity, each Service Provider's continuing compliance with this requirement. Such monitoring shall include review of the Service Provider's marketing materials, scripts, customer verification records, or other such information as may be necessary to demonstrate that the Service Provider is obtaining valid Subscriber authorizations.

**5. Responsibilities of Billing Telephone Corporations:**

The Billing Telephone Corporation bears ultimate responsibility for all items presented in a Subscriber's bill and must take the following measures to ensure that only authorized charges from lawful Billing Agents and Service Providers are included in the bill. Prior to approving a Service Provider or Billing Agent for the provision of billing services, the Billing Telephone Corporation shall directly or through another entity conduct a reasonable inquiry of the Service Provider's or Billing Agent's history of violations of state or federal law or rules relating to consumer protection and current ability to operate lawfully.

At service initiation, all Billing Telephone Corporations shall disclose to Subscribers that the Billing Telephone Corporation has opted to provide billing and collection services to Third Parties and that such charges may be placed on the Subscriber's bill, absent action by the Subscriber.

Wireless Billing Telephone Corporations shall explain at service initiation in clear and concise written terms that the Subscriber's line is open to charges from third-party Service Providers and that the Subscriber has the option to block these charges. The Billing Telephone Corporation shall not charge for blocking and must allow Subscribers to add or remove this feature quickly and easily. Billing Telephone Corporations must remind Subscribers in writing no less than once each calendar year that third-party charges may be placed on the bill and of the option to block such charges at any time and at no additional cost. The Billing Telephone Corporation shall explain the blocking option in neutral terms and shall not attempt to influence the Subscriber's decision.

For wireline Billing Telephone Corporations, this option to block third-party services shall not extend to any services they are required by law to provide, such as the option to purchase long distance services from a competitor, or services or products offered by their affiliates.

The Billing Telephone Corporation has an affirmative duty to investigate Subscriber allegations of unauthorized billings, and where there are reasonable grounds of concern that a pattern of unauthorized charges may have occurred, to take the initiative to determine whether other Subscribers may have been subjected to unauthorized charges. The Billing Telephone Corporation shall resolve all Subscriber complaints of unauthorized charges as required in Rule 8, Resolution. If a Subscriber contacts the Billing Telephone Corporation to dispute a billed item from a Service Provider, the Billing Telephone Corporation must promptly address and resolve the dispute without deflecting the Subscriber to the alleged Service Provider. Except as allowed under these rules, the Billing Telephone Corporation shall not state or imply the law or regulations require it to provide billing services to third parties.

**6. Monitoring of Subscriber Billings:**

Each Billing Telephone Corporation is responsible for monitoring the billings it controls for the purpose of preventing and detecting unauthorized charges, and for the prompt termination of billing services to Billing Agents and Service Providers that present unauthorized charges. Each Billing Telephone Corporation shall have in place and comply with a protocol for identifying unauthorized charges and suspending or terminating billing services to any Billing Agent or Service Provider that has submitted unauthorized charges.

**7. Nonpayment of Charges During an Investigation:**

While a complaint investigation is pending, the Subscriber shall not be required to pay the disputed charge or any associated late charges or penalties; the charge may not be sent to collection; and no adverse credit report may be made based on non-payment of that charge. Pursuant to Pub. Util. Code § 2889.9(g), Billing Telephone Corporations, Billing Agents and Service Providers shall provide all requested information and shall cooperate fully with the Commission's staff in any investigation and prosecution.

**8. Resolution:**

If a Billing Telephone Corporation or Billing Agent receives a complaint that the Subscriber did not authorize the purchase of the product or service associated with a charge, the Billing Telephone Corporation or Billing Agent, whichever is the recipient of the complaint, not later than 30 days from the date on which the complaint is received, shall either (i) verify and advise the Subscriber of authorization of the disputed charge or (ii) credit the disputed charge and any associated late charges or penalties to the Subscriber's bill, and offer the option of blocking all future third party billings at no charge as set forth in Rule 5.

**9. Other Available Rights:**

Nothing herein shall prevent a Subscriber from exercising his or her other rights. The Billing Telephone Corporation shall also notify the Service Provider of any credits issued.

**10. Record Retention for Refunds:**

The Billing Telephone Corporation is ultimately responsible for refunding all unauthorized charges collected from its Subscribers, including those Subscribers who may have mistakenly paid the unauthorized charges and not requested a refund. Every Billing Telephone Corporation and Billing Agent shall maintain accurate and up-to-date records of all billings and Service Providers sufficient to demonstrate compliance with these rules and to facilitate customer refunds. Such records shall be retained for no less than twenty-four months.

In order to enable refunds to Subscribers, Billing Telephone Corporations and Billing Agents must retain records containing the following information:

- a. the Subscriber name;
- b. the Subscriber telephone number;
- c. the name of the Service Provider responsible for the charge complained about;
- d. the name of the Billing Agent(s), if any;

- e. the amount of the alleged unauthorized charge and the date the charge was incurred and billed;
- f. a description of the product or service billed;
- g. for Billing Agents, the total dollars billed and total amount refunded for each Service Provider; for Billing Telephone Corporations, the total dollars billed and total dollars refunded for each Service Provider for which the Billing Telephone Company directly bills and each Billing Agent; and
- h. for Billing Agents, the total number of working telephone numbers or purchases billed by each Service Provider; for Billing Telephone Corporations, the total number of working telephone numbers or purchases billed by each Service Provider for which the Billing Telephone Corporation directly bills and each Billing Agent.  
Flexible Compliance Option: Billing Telephone Corporations and Billing Agents may also elect to maintain records that meet the Commission's standard of sufficient information to enable refunds to customers but do not include each item listed above.

## **11. Reporting Requirements**

**11.1.** All wireless Billing Telephone Corporations shall create a calendar month summary report every quarter listing refunds made to Subscribers with California area codes for charges originated by Service Providers. The report of refunds shall be summarized by Service Provider and contain the following information:

- a. Name of Service Provider
- b. Name of Billing Agent (if any)
- c. Description of service provided
- d. Total number of purchases by Subscribers
- e. Total amount billed by the Billing Telephone Corporation on behalf of the Service Provider
- f. Total number refunds to Subscribers
- g. Total amount refunded by the Billing Telephone Corporation

The Report of Refunds shall be submitted to the Director of the Commission's Consumer Protection and Safety Division pursuant to the following schedule:

- Report for January, February, and March due no later than April 30th;
- Report for April, May and June due no later than July 31st;
- Report for July, August and September due no later than October 31st; and
- Report for October, November, and December due no later than January 31st of the following year.

**11.2.** All wireless Billing Telephone Corporations shall create a calendar month summary report every quarter listing all third party services that have been suspended or terminated. These services shall include, but are not limited to, Premium short messaging service (SMS) campaigns. The report of suspensions and terminations shall not include services that are complete or otherwise expired and may be based on national data. The report of suspensions and terminations shall be summarized by Service Provider and contain the following information:

- a. Name and contact information of Service Provider
- b. Description of service that was suspended or terminated
- c. Whether service was suspended or terminated
- d. Reason for suspension or termination. If the service is suspended, the date or conditions for reinstatement should be included.

The Report of Suspensions and Terminations shall be submitted to the Director of the Commission's Consumer Protection and Safety Division pursuant to the following schedule:

Report for January, February, and March due no later than April 30th;

Report for April, May and June due no later than July 31st;

Report for July, August and September due no later than October 31st; and

Report for October, November, and December due no later than January 31st of the following year.

**11.3.** All wireline Billing Telephone Corporations and their Billing Agents shall create a calendar month summary report which shall include the following information:

- a. the total number of consumer complaints received each month for each Service Provider and Billing Agent;
- b. Billing Telephone Corporations shall report the name, address, and telephone number of each entity receiving complaints, excluding Billing Agents;
- c. the total number of working telephone numbers billed for each entity for which complaints were received;
- d. for Billing Agents, the total number of subscribers billed by each Service Provider for which complaints were received; for Billing Telephone Corporations, the total number of Subscribers billed by each Service Provider for which the Billing Telephone Corporation directly bills and each billing agent;
- e. for Billing Agents, the total dollars billed by each Service Provider; for Billing Telephone Corporation, the total dollars billed by each Service Provider for which the Billing Telephone Corporation directly bills and each Billing Agent.

The Report of Consumer Complaints shall be submitted to the Director of the Commission's Consumer Protection and Safety Division pursuant to the following schedule:

- Report for January, February, and March due no later than April 30th;
- Report for April, May and June due no later than July 31st;
- Report for July, August and September due no later than October 31st; and
- Report for October, November, and December due no later than January 31st of the following year.

If no complaints exist, in lieu of this report, a letter shall be sent to the Director of the Consumer Protection and Safety Division affirmatively stating that no complaints exist for the quarter.

**11.4.** If a Billing Telephone Corporation terminates a Billing Agent or Service Provider for any reason, it shall notify the Director of the Commission's Consumer Protection and Safety Division within 10 business days of the termination date. The notification shall include the identity of the Service Provider or Billing Agent and any principals and the reason(s) for the termination.

**11.5.** All Billing Telephone Corporations shall submit a report to the Director of the Commission's Consumer Protection and Safety Division once a year that documents the means offered to Subscribers to restrict or otherwise block third-party billing. The report shall contain copies of consumer information and describe the Billing Telephone Corporation's actions to publicize the availability of third-party blocking.

**11.6. Exemptions from Reporting Requirement**

The following types of Billing Telephone Corporations may by letter request that the Director of the Consumer Protection and Safety Division suspend or modify their obligation to file the Report of Refunds and the Report of Suspensions and Terminations:

- a. Carriers offering wireless services through prepaid or pay in advance methods.
- b. Carriers that provide service only to business or wholesale customers.

The letter request must demonstrate that the specific Billing Telephone Corporation provides the types of services specified and is in compliance with these rules, and that the filing of the report(s) is not necessary to protect Subscribers. The letter should be signed and verified in accordance with

Rule 2.4 of the Commission's Rules of Practice and Procedure. Once an exemption is granted, a Billing Telephone Corporation shall file an annual certification or letter affirming that continued exemption is warranted. The annual certification or letter shall be signed and verified in accordance with Rule 2.4 of the Commission's Rules of Practice and Procedure.

The Director of the Consumer Protection and Safety Division may grant or deny, in whole or in part, or apply such conditions as may be necessary to protect Subscribers in response to the letter request. The Director of the Consumer Protection and Safety Division may also revoke the exemption for good cause.

**12. Ongoing Collaboration With Staff:**

Representatives from the Consumer Protection and Safety Division and the Telecommunications Division shall meet at least annually with all wireless Billing Telephone Corporations who offer third-party services to their customers to discuss recent developments in the wireless industry regarding cramming issues and any Commission concerns regarding cramming.

**13. Consumer Education:**

All Billing Telephone Corporations who offer third-party billing and collection services shall cooperate with the Telecommunications Division and the Consumer Protection and Safety Division and participate in meetings and workshops for the purpose of developing materials to educate consumers on how to avoid having unauthorized charges placed on bills. The workshop, shall not only develop content for the CalPhoneInfo web site maintained by the Commission, but also shall discuss actions taken by the Billing Telephone Corporations to inform consumers of the ability to block third-party services and their related charges.

**14. Effect of Failure to Supply Reports:**

Any Billing Telephone Corporation that fails to submit its reports in a complete and timely fashion is subject to citation by the Director of the Consumer Protection and Safety Division as follows:

Up to 30 days late, a citation requiring payment of \$500 to the General Fund,

30 to 60 days late, a citation requiring payment of \$5,000 to the General Fund, and

No less than 10 days before issuing a citation, the Director shall give the Billing Telephone Corporation or Billing Agent notice of the impending citation and an opportunity to submit the report.

In addition to the above-listed citations, any Billing Telephone Corporation failing to timely supply the required reports is subject to a Commission decision or resolution taking such further actions as may be necessary to protect the public interest.

**15. Actions Based on Reported Information:**

The Consumer Protection and Safety Division may request that a Billing Telephone Corporation or Billing Agent provide further information concerning a Service Provider. This requested information may include, but is not limited to, the Service Provider's contact information, Subscriber name and telephone number, and the amount of the alleged unauthorized charge. The Billing Telephone Corporation and Billing Agents shall provide all requested information within a reasonable period and shall cooperate fully with the Commission's staff in any investigation and prosecution.

The Consumer Protection and Safety Division, in consultation with the Communications Division, may convene such industry-wide or carrier-specific meetings or workshops as may be necessary to facilitate compliance with these rules and other law and regulations.

As provided in § 2889.9(b), the Commission's remedial statutory authority over public utilities, including the potential for fines up to \$20,000 per violation, extends

to all Service Providers and Billing Agents using the billing services of Billing Telephone Corporations. Billing Agents and Service Providers, like Billing Telephone Corporations, are subject to such remedial directives as the Commission finds necessary to protect the public interest.

## APPENDIX 2

### Third-Party Bill Blocking Test Plan Questions for Wireless BTCs

The test plan contained the following questions:

- 1. Website Review** – Search for and determine if a consumer can easily locate information on third-party bill blocking.
  - a) Is the information easily located?
  - b) Is the information presented in neutral terms?
  - c) Does the information describe what it is, who to contact to get it, and whether it states for “no charge”?
  
- 2. Terms of Service or Terms and Conditions review:** Identify and determine if a consumer can easily locate information on third-party bill blocking.
  - a) Are the terms and conditions of service available to non-subscribers?
  - b) Is the information easily located?
  - c) Is the information presented in neutral terms?
  - d) Does the information describe what it is, who to contact to get it, and whether it states for “no charge”?
  
- 3. Customer Guide Review:** Review the subscriber’s service manual or guide if available to determine if it includes third-party bill blocking disclosures.
  - a) Is there a customer guide or contract not related to terms and conditions? If so,
    - i. Is the information easily located?
    - ii. Is the information presented in neutral terms?
    - iii. Does the information describe what it is, who to contact to get it, and whether it states for “no charge”?
  
- 4. Customer’s Online Account Review:** Access customer’s online account to determine if blocking information is available and if you can add/remove third-party bill blocking.

Is the information easily located?

Is the information presented in neutral terms?

Does the information describe what it is, who to contact to get it, and whether it states for “no charge”?

Is there adequate and clear information to make the decision whether to block?

Were you able to add/remove blocking to your account easily?

**5. Online Chat with Customer Service:** Chat online with customer service about and request blocking. Ask the customer service representative the following questions:

- a) Do you offer blocking of third-party charges?
- b) Can I block third-party charges?
- c) What is the process for blocking unwanted third-party charges on my phone bill?

Did the online customer service representative provide an adequate and clear response in order to make the decision whether to block?

Were you able to request and have blocking added to your account easily?

Was the response presented in neutral terms? (Did customer service mention the pay option to block before the free option or try to up sell you to a block pay option?)

Did the response describe what it is, to whom to contact to get it, and whether it states for ‘no charge’?

**6. Retail Store Review:** Ask retail store representative the following:

- a) Do you offer blocking of third-party charges?
- b) Can I block third-party charges?
- c) What is the process entailed to block unwanted charges on my phone bill?
- d) Do you have any literature on it that I can take with me?
  - i. Did the customer service representative provide an adequate and clear response in order to make the decision whether to block?
  - ii. Were you able to request and have blocking added to your account easily?
  - iii. Was the response presented in neutral terms? (Did customer service mention the pay option to block before the free option and/or try to sell you a block pay option?)
  - iv. Did the response describe what it is, who to contact to get it, and whether it states for ‘no charge’?

**7. Call Center Customer Service Review:** Please call Customer Service to inquire about and request blocking. Please ask the following questions:

- a) Do you offer blocking of third-party charges?

- b) Can I block third-party charges?
- c) What is the process entailed to block unwanted charges on my phone bill?
  - i. Did the call center customer service representative provide an adequate and clear response in order to make the decision whether to block?
  - ii. Were you able to request and have blocking added to your account easily?
  - iii. Was the response presented in neutral terms? (Did customer service mention the pay option to block before the free option and/or try to sell you a block pay option?)
  - iv. Did the response describe what it is, who to contact to get it, and whether it states for 'no charge'?

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## APPENDIX 3

### Detailed Third Party Bill Blocking Test Findings for Wireless BTCs

#### Wireless Carrier Website, Terms and Conditions, Customer Guide Findings, and Customer's Online Account of Third Party Billing

| Wireless Carrier | Is the information easily located?         |                                      |                       |                         | Is the information presented in neutral terms? |                      |                       |                         |
|------------------|--|--------------------------------------|-----------------------|-------------------------|--|----------------------|-----------------------|-------------------------|
|                  | Website                                    | Terms and Conditions                 | Customer Guide Review | Customer online account | Website  | Terms and Conditions | Customer Guide Review | Customer online account |
| 1                | no   | no                                   | no                    | yes                     | no   | n/a                  | n/a                   | yes                     |
| 2                | No. "Block premium" is the best result.    | takes you to online customer account | yes                   | no                      | no   | none                 | yes                   | no                      |
| 3                | Yes  | yes                                  | none                  | yes                     | yes  | yes                  | n/a                   | yes                     |
| 4                | Yes, "block 3 <sup>rd</sup> party charges" | yes                                  | yes                   | yes                     | yes  | yes                  | yes                   | yes                     |
| 5                | no   | no                                   | none                  | n/a                     | yes  | yes                  | none                  | n/a                     |

| Wireless Carrier | Does the information describe what it is, to whom to contact to get it, & whether or not it states for “no charge”? |  |                       |                         | Were you able to add or remove blocking to your account easily? |
|------------------|---|--|-----------------------|-------------------------|---|
|                  | Website   | Terms and Conditions                   | Customer Guide Review | Customer online account | Customer Online Account   |
| 1                | yes   | no                                     | no                    | yes                     | Only by calling customer service.                               |
| 2                | no  | none                                   | yes                   | no                      | yes   |
| 3                | yes   | yes, but does not state “at no charge” | n/a                   | yes                     | yes   |
| 4                | yes   | yes                                    | yes                   | yes                     | yes   |
| 5                | no  | yes                                    | none                  | n/a                     | Only by calling customer service.                               |

**Wireless Customer Service Representative's (CSR's)  
Knowledge of Third Party Bill Blocking**

| Wireless Carrier | Customer Service Call Center  | Retail Store Visit   | On-line Chat at Website   | % of CSRs That Were Unable To Assist Customers About Bill Blocking | Presented In Neutral Terms?                             | Notes  |
|------------------|---|--|---|--|---|--|
| 1                | 4 out of 11 customer service reps were unable to assist customers about bill blocking | 1 out of 7 customer service reps were unable to assist customers about bill blocking | 2 out of 10 customer service reps were unable to assist customers about bill blocking | 25%  | 2 – No, one knowledgeable about blocking and one wasn't |  |
| 2                | 1 out of 13 customer service reps were unable to assist customers about bill blocking | 1 out of 2 customer service reps were unable to assist customers about bill blocking | 9 out of 13 customer service reps were unable to assist customers about bill blocking | 39%  | Yes   |  |
| 3                | 9 out of 20 customer service reps were unable to assist customers about bill blocking | 5 out of 5 customer service reps WERE able to assist customers about bill blocking   | 2 out of 13 customer service reps were unable to assist customers about bill blocking | 29%  | Yes   |  |
| 4                | 20 out of 20 customer service reps WERE able to assist customers about bill blocking  | 10 out of 10 customer service reps WERE able to assist customers about bill blocking | online chat option was unavailable  | 0%   | Yes   | Although all CSR's were able to assist about blocking, some had to inquire with another CSR or call the Call Center to find out. |
| 5                | 4 out of 15 customer service reps were unable to assist customers about bill blocking | No retail stores in our area to test   | no option for online chat   | 27%  | Yes   | Most CSR's had to be explained what 3 <sup>rd</sup> party bill blocking was before they were able to assist a customer           |

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## **APPENDIX 4**

### **Third-Party Bill Blocking Test Plan Questions for Wireline BTCs**

#### **Call Center Customer Service Review:**

Please call customer service to inquire about and request blocking. Please ask the following questions:

1. Do you offer blocking of third-party charges?
2. Can I block third-party charges?
3. What is the process entailed to block unwanted charges on my phone bill?
  - a) Did the call center customer service representative provide an adequate and clear response in order to make the decision whether to block?
  - b) Were you able to request and have blocking added to your account easily?
  - c) Was the response presented in neutral terms? (Did customer service mention the pay option to block before the free option and/or try to sell you a block pay option?)
  - d) Did the response describe what it is, who to contact to get it, and whether it states for 'no charge'?

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## APPENDIX 5

### Detailed Third-Party Bill Blocking Test Findings for Wireline BTCs

#### Customer Service Representative's (CSR's) Knowledge of Third-Party Bill Blocking

| Wireline Carrier | Customer Service/Call Center  | % Of CSRs That Were Unable To Assist Customers About Bill Blocking | Notes  |
|------------------|---|--|--|
| 1                | 5 out of 17 customer service reps were unable to assist customers about bill blocking       | 29%  |  |
| 2                | 10 out of 10 customer service reps <b>WERE able</b> to assist customers about bill blocking | 0%   |  |
| 3                | 12 out of 18 customer service reps were unable to assist customers about bill blocking      | 67%  | <i>Note: Many CSR's said that this carrier does not offer 3rd party billing.</i> |
| 4                | 9 out of 22 customer service reps were unable to assist customers about bill blocking       | 41%  |  |