

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF THE
FEDERAL TRADE COMMISSION**

Introduction

The Federal Trade Commission (FTC) appreciates this opportunity to respond to the Federal Communications Commission’s (FCC) Notice of Inquiry on how consumer-friendly information policies can protect and empower consumers as they purchase and use communications services.¹

As explained in further detail below, the FTC maintains a database of consumer complaints, including complaints about communications services. Analysis of recent complaints shows that consumers are often confused about their purchases of communications services and may not be getting the services they thought they had purchased. Complaint data also indicate that consumers may fall prey to cramming of unauthorized charges onto their telephone bills. Based on these data, as well as our significant consumer protection and competition expertise, the FTC offers several recommendations to provide consumers with accurate, meaningful, and timely information about the communications services they purchase and use.

Section I of this comment recommends that price advertisements for communications services reflect the price the consumer actually pays – including all taxes, fees, and associated charges, which can increase the total price by over 20 percent. This policy would facilitate competition by allowing consumers to compare directly the prices of competing communications services (*e.g.*, mobile versus wireline broadband) that are subject to different levels of taxes, fees, and charges. Section I also recommends that the FCC seriously consider whether standardized information disclosures would facilitate consumer understanding of competing communications services offers. Section II of the comment describes the FTC’s aggressive law enforcement actions to combat

¹ This comment refers to “communications services” broadly to mean fixed and mobile service, including voice, data, cable, satellite programming, and broadband service. Some of these services are classified as common carrier services over which the FTC does not have jurisdiction. 15 U.S.C. § 45(a)(2).

cramming. Section III recommends several policy changes that would empower and protect consumers against cramming.

The FTC is an independent administrative agency charged with promoting consumer protection, competition, and the efficient functioning of the marketplace. The keystone of the FTC's law enforcement mission is Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.”² The scope of Section 5 encompasses a wide range of business practices, including advertising, marketing, billing, and collection. Section 5 also authorizes the FTC to challenge “unfair methods of competition” as well as violations of other antitrust laws.

The recommendations in this comment are based, in part, on the substantial number of complaints the FTC has amassed through its consumer complaint system, Consumer Sentinel Network.³ During the twelve months ending in August 2009, the FTC’s Consumer Sentinel received more than 37,000 complaints about communications services in general. Approximately 28,000 of these complaints were about cable and satellite services (including bundled services) and more than 9,000 complaints were related to telephone services. By addressing the issues and recommendations identified in this comment, the FCC can help promote a robust communications marketplace that benefits consumers.

I. Advertising That Empowers Consumers to Comparison Shop Facilitates a Robust and Competitive Marketplace.

Advertising serves the important function of informing the consumer about “who is producing and selling what product, for what reason, and at what price.”⁴ By apprising consumers of the “availability, nature, and prices of products and services,” advertising “performs an indispensable role in the allocation of resources in a free enterprise system.”⁵ Advertising can foster and sustain competition, facilitate consumers’ efforts to identify the product or service provider of their choice, and lower entry barriers for new

² 15 U.S.C. § 45(a).

³ The FTC receives complaints directly from consumers; it collects those complaints in a database that also houses complaints from other law enforcement agencies. This database, the Consumer Sentinel Network (“Consumer Sentinel”), contains consumer complaint data from law enforcement agencies including the U.S. Postal Inspection Service, as well as the Internet Crime Complaint Center, the National Fraud Information Center, and most branches of the Better Business Bureau (<http://www.ftc.gov/sentinel/>). The FCC does not contribute complaints to this database at this time, nor do state public utility commissions.

⁴ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). See generally *American Medical Association*, 94 F.T.C. 701, 1005 (1979), *aff’d as modified*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided Court*, 455 U.S. 676 (1982).

⁵ *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

competitors.⁶ Studies have demonstrated that price advertising tends to enhance competition and lower prices.⁷

Before a consumer signs up for a particular communications service or plan, advertising is an important source of information that guides the consumer's purchase decision. Numerous service providers promote their communications services through national and regional television and radio advertising, as well as through print, online, telemarketing, and direct mail advertising campaigns. Advertising of material terms allows consumers to compare similar services offered by one or more providers, and also to weigh the relative importance of different terms.⁸ Depending on the context and usage, certain terms may be material, including, for example, contract duration, use limitations, and geographic restrictions.

Because customers have different preferences and needs, advertising plays a critical role in informing consumers about the variety of choices and plans. If consumers lack the information they need to make informed decisions, their purchase decisions will be distorted and competition on the merits will be harmed.

A. Price Advertising Should Empower Consumers to Make Fully Informed Purchase Decisions.

In 2000, the FCC and FTC issued a Joint Policy Statement regarding Advertising of Dial-Around and Other Long-Distance Services that is particularly relevant to price advertising of communications services in general.⁹ The FCC-FTC Joint Policy

⁶ See generally Robert E. McAuliffe, *ADVERTISING, COMPETITION, AND PUBLIC POLICY* (1987); Philip K. Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); James A. Langenfeld & John Morris, *Analyzing Agreements among Competitors*, 1991 ANTITRUST BULL. 651, 667 & n.21; Carolyn Cox & Susan Foster, *The Costs and Benefits of Occupational Regulation* 29-36 (Bureau of Economics: Federal Trade Commission 1990).

⁷ See, e.g., Cleveland Regional Office and the Bureau of Economics of the Federal Trade Commission, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising*, *Federal Trade Commission Staff Report* (1984); Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. L. & ECON. 337 (1972); John F. Cady, *An Estimate of the Price Effects of Restrictions on Drug Price Advertising*, 14 ECON. INQUIRY 493 (1976); John Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211 (1984); John R. Schroeter, *Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49 (1987).

⁸ Under the FTC Act, advertisements must be truthful and not mislead consumers in ways that affect consumers' behavior or decisions about the product or service. An advertisement claim can be misleading if it contains a misrepresentation, or omission, that is likely to mislead consumers acting reasonably under the circumstances to their detriment. In addition, advertising claims must be substantiated, especially when they concern performance attributes of the product or service. *Cliffdale Assocs.*, 103 F.T.C. 110, 175 (1984) (appending FTC Policy Statement on Deception).

⁹ Federal Communications Commission & Federal Trade Commission, *In the Matter of Joint FCC/FTC Policy Statement For the Advertising of Dial-Around and Other Long-Distance Services to Consumers* (2000) ("FCC-FTC Joint Policy Statement"), available at <http://www.ftc.gov/os/2000/03/jpsada.pdf>.

Statement explained that in the context of dial-around long-distance calls, consumers care not just about the per-minute or per-month rate, but rather how that rate, along with all other additional fees and charges, will ultimately be reflected in the charges they see on their monthly bills. Moreover, advertising is often the only source of information available to consumers before incurring these charges. The FCC and FTC, therefore, advised advertisers to exercise the greatest care in ensuring the accuracy of their claims related to price, including the clear and conspicuous disclosure of information that significantly affects the total price of a communications plan or service.

The volume of complaints identified by Consumer Sentinel about all communications services suggests that consumers care about the total price they see on their monthly bills. In the 28,000 complaints about cable and satellite service, approximately 30 percent of the consumers complained that the total bill they were required to pay was not as advertised or marketed. Similarly, a random sample of more than 7,300 telephone-related complaints over the past 12 months indicated that approximately 27 percent related to charges for rates and fees that were not what consumers had understood or agreed to purchase.¹⁰

For example, consumers complained that providers had advertised an introductory or teaser price but did not indicate the price the consumer would pay once the introductory period ended. An introductory rate may expire after a three- or six-month period, leading to substantially increased charges, without a consumer being aware of the extent of the impending price increase at the time of purchase. In other instances, associated charges or preconditions to obtain an advertised price were not specified. For example, an advertisement for a video service may not indicate that a consumer must have basic telephone service with that provider before obtaining the video services at the advertised price. These types of complaints suggest that consumers believe that the advertised monthly price is the actual price they will pay when the bill arrives.¹¹

Given these complaints, the FTC recommends a consumer- and competition-friendly consumer information policy: communications service price advertisements should disclose the amount that the consumer actually will pay. For example, a wireless provider in the District of Columbia currently advertises a monthly price of \$39.99 for a fixed number of wireless minutes. The advertised price does not state, and it would be difficult for a consumer to determine, that an additional \$7.55 (in surcharges, taxes, and

¹⁰ The pool of 7,300 complaints for the random sample does not include more than 2,000 complaints involving the unauthorized switching of carriers, Voice over Internet Protocol-related complaints, and the marketing of prepaid phone cards. Altogether there were over 9,000 telephone-related complaints as mentioned in the Introduction. More than 50 percent of the random sample related to unauthorized billing. These complaints are discussed below in Section II. Finally, the complaints discussed in this comment do not include separate complaints about potential violations of telemarketing restrictions related to the National Do Not Call Registry.

¹¹ These complaints also suggest that, to the extent consumers sign service contracts (for example, when they purchase a new mobile telephone along with a service plan), these contracts may not be written in plain language that consumers can understand.

other fees) will be added to the monthly bill, leading to total monthly charges that are more than eighteen percent higher than the advertised price.¹²

When price advertising fails to reveal what the consumer will actually pay, the likely effect is not only consumer confusion, but also a distortion of competition. This is especially true in situations where consumers are attempting to compare similar functional services based on different technologies, such as landline versus wireless or cable versus telephony.¹³ Different communications services are subject to varying levels of fees, taxes, and other associated charges; unlike state sales taxes, these fees and taxes are not uniform across types of providers and services. Consumers typically are not well-versed in the different tax and fee regulations that apply to competing types of services and providers. These disparities may make it difficult for consumers to compare their out-of-pocket costs. For example, a landline provider may offer stand-alone high-speed internet services for \$40.95 per month, and a competing mobile broadband provider may offer similar services for \$40.00 per month. When the landline customer receives a bill, charges include a \$3.00 modem fee and \$4.10 for fees and taxes, for a total of \$48.05. In contrast, the mobile customer's bill includes \$.57 in fees and taxes, for a total of \$40.57. Thus, what looked like a \$.95 price differential is actually a difference of \$7.48 per month. As a result, competition on the merits may be distorted.

Consumer confusion relating to inadequate price and fee information is likely to arise more frequently as consumers increasingly shop among competing broadband providers of substitutable services, including telephone service as well as satellite and cable television programming. Consumers are no longer confined to obtaining voice telephone service from one provider and cable television programming from another. Advances in technology have broken down barriers and enabled some consumers to mix and match these services to assemble their own communications bundles, which makes it even more important that the various taxes and fees be adequately disclosed. In addition, other consumers now choose to purchase a bundled set of services from a single provider (such as a "triple play" of phone, internet, and television). Advertising of prices that do not match what consumers are likely to pay may make it still more difficult for consumers to compare their options to determine whether the bundled or non-bundled

¹² The FTC has challenged price claims that involve misrepresentations of the true price to the consumers or hidden charges that were not disclosed to consumers until after purchase. *See, e.g., General Rent-A-Car, Inc.*, 54 Fed. Reg. 30,106 (July 18, 1989) (consent order); *Alamo Rent-A-Car, Inc.*, 54 Fed. Reg. 25,106 (June 13, 1989) (consent order). The complaints in both *General Rent-A-Car* and *Alamo Rent-A-Car* alleged that the companies failed to disclose to consumers the existence and amount of airport surcharges and mandatory fuel charges when consumers inquired about renting vehicles. *See also FTC v. World Travel Vacation Brokers, Inc.*, No. 87 C 8449 (N.D. Ill. Sept. 28, 1987) (temporary restraining order) (complaint alleged that the company represented that the costs of its travel certificates would entitle consumers to a round-trip airfare to Hawaii, when, in fact, the cost of the airfare was added to the actual rates for accommodations); *FTC v. Amy Travel Services, Inc.*, No. 87 C 6776 (N.D. Ill. Aug. 3, 1987) (temporary restraining order) (complaint alleged that company engaged in unfair and deceptive acts or practices by misrepresenting and deceptively failing to disclose the true costs of the vacations they sold).

¹³ This example is based on current communications providers' offerings in the District of Columbia.

services meets their needs, especially if the impact of taxes, fees, and other charges as they relate to the bundled and non-bundled services are not readily apparent.

Ideally, the advertised price should be equal to the amount the consumer pays, and consumers should be able to understand in advance the price they ultimately will pay. It would be easier for consumers to compare prices between and among providers and services if advertised prices included all regulatory fees, taxes, and associated charges that are known ahead of time by the provider or apportioned by the provider.¹⁴ If the taxes, fees, and charges are not included in the advertised price, the advertisement should provide for consumers easily to obtain this information.¹⁵ Implementation of this recommendation not only will facilitate vigorous competition, but also is likely to reduce consumer confusion surrounding line-item charges on monthly bills because consumers are concerned mostly about the monthly amount they will pay. A point-of-sale disclosure (*e.g.*, at the time the consumer accepts the contract) is inadequate because it comes too late in the shopping process to allow meaningful price comparisons and thereby facilitate robust competition.

We believe that this recommendation can be tailored to accommodate different forms of advertising when, for example, taxes vary by state or local jurisdiction and the provider has no discretion over the level or amount of the tax. For example, current technology allows providers to quote online consumers the exact price they will pay; when a consumer uses the internet to research or purchase communications services, the provider typically asks the consumers to enter his or her zip code prior to listing available services and associated prices. Based on location information, the provider knows the specific taxes and surcharges imposed by state and local jurisdictions and therefore should be able to provide consumers with the price they will actually pay, which will aid in comparison shopping. The same level of detail regarding actual prices could be provided in bill inserts that advertise new services and prices to existing customers, because the provider already knows the consumer's address and billing jurisdiction. At every opportunity, providers should strive to provide consumers with the price they will actually pay, utilizing current as well as innovative means.

B. Standardized Information Disclosures of the Terms of Communications Services Offers Reduce Search Costs and Facilitate Competition.

In competitive markets, consumers compare products and services among providers and weigh the different terms being offered when making decisions about what to purchase. Where search and other transaction costs (both in terms of time and money) are relatively low, consumers are more likely to rely on these market processes to satisfy

¹⁴ To the extent that regulatory fees vary monthly or quarterly, it may be desirable to develop mechanisms to stabilize these fees for longer time periods, which will further enhance transparency in determining typical monthly charges.

¹⁵ See *FCC-FTC Joint Policy Statement*, *supra* note 9, at 9-16.

their preferences. By contrast, where search and other transaction costs are relatively high, the optimal functioning of the marketplace may be inhibited, making consumers less likely to rely on it.¹⁶ Research suggests that when consumers find it less difficult to obtain information, or perceive it to be less costly to gather data, they participate in the market more, and the demand for products and services increases compared to when time and money-related transaction costs are high.¹⁷

Recent FTC complaint evidence shows that consumers increasingly have found it hard to understand key features and prices of communications services options. As noted above, during the past 12 months the FTC received more than 37,000 complaints about communications services and of these 28,000 related to cable and satellite services. Approximately half of these complaints about cable and satellite services (including bundled services) involved consumers complaining about not receiving what they thought they had ordered (or that they were charged for services they had not ordered) or about the existence and amount of termination fees.¹⁸

This evidence of consumer confusion suggests that the FCC should seriously consider the possibility of requiring a standardized disclosure of key terms and features of communications services. Any analysis of the benefits of standardized disclosures should, of course, include consideration of whether these benefits would outweigh the costs.

In other contexts, FTC and independent research has demonstrated that well-designed standardized disclosures – ones that address the elements that matter most to consumers – can improve consumer understanding and facilitate greater competition on the merits. For example, standardized disclosures for mortgage products, student loans, health insurance policies, and school choice have been shown to facilitate consumer choice and permit consumers to select products and services that meet their preferences.¹⁹

¹⁶ See generally Dennis W. Carlton & Jeffrey M. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 471-96 (4th ed. 2005).

¹⁷ Susan Marquis, *Consumer Decision Making in the Individual Health Insurance Market*, HEALTH AFF. (May 2006), available at <http://content.healthaffairs.org/cgi/content/full/hlthaff.25.w226v1/DC1>.

¹⁸ This analysis of the cable and satellite services complaints is based on a random sampling of the complaints. The 50 percent figure noted in the text includes the 30 percent of complaints mentioned above regarding advertising and marketing. The remaining 50 percent of cable and satellite complaints dealt with issues such as debt collection, technical problems, and the failure to rebate the consumer's money.

¹⁹ James M. Lacko & Janis K. Pappalardo, Federal Trade Commission, Bureau of Economics Staff Report, *IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS* (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf> (“Improving Mortgage Disclosures”); Consumers Union, *HELPING FAMILIES FINANCE COLLEGE: IMPROVED STUDENT LOAN DISCLOSURES AND COUNSELING* (July 2007), available at <http://www.consumersunion.org/pdf/CU-College.pdf>; Michael Wroblewski, *Uniform Health Insurance Information Can Help Consumers Make Informed Purchase Decisions*, 26 J. INS. 21 (2007) (private health insurance); Justine Hastings et al., Nat'l Bureau of Economic Research, *Preferences, Information, and Parental Choice Behavior in Public School Choice* (2007) (NBER Working Paper 12995).

By contrast, when consumers do not understand the costs and terms of their mortgages, “they may pay more for their mortgage than necessary, obtain inappropriate loan terms, fall prey to deceptive lending practices, and experience unpleasant surprises and financial difficulties during the course of their loans.”²⁰ Needless to say, similar harms can occur with respect to complex and multi-dimensional products or services found in the communications sector.²¹

At the same time, the research also demonstrates that disclosures must be developed carefully, because even well-intentioned disclosures can actually harm consumers by creating a misleading or erroneous impression. To be most effective, uniform disclosures should be developed (and updated) based on controlled, quantitative, objective tests of consumer understanding.²²

The timing of a disclosure, in addition to its terms, is critical for the disclosure to have a pro-competitive and pro-consumer impact. For example, in the context of private student loans, Congress recently required lenders to provide borrowers with a uniform disclosure once they were approved for the loan and to keep the offer open for 30 days.²³ Previously, the borrower did not receive the necessary disclosure until he or she consummated the loan. By that time, it was too late for the consumer to comparison-shop, so the disclosure did little to facilitate consumer choice and foster market competition.

Similarly, if uniform disclosures are considered in the communications services context, it may make sense to require them at the time an offer for services is made. It is too late in the shopping process to provide meaningful disclosure only at the point of sale, by which point consumers can no longer be expected to comparison shop; these late disclosures would do nothing to facilitate robust market competition.

²⁰ Improving Mortgage Disclosures, *supra* note 19, at ES-12.

²¹ Standardized privacy disclosures also have been found to assist consumer understanding of a company’s privacy policy. See FINANCIAL PRIVACY RULE: INTERAGENCY NOTICE RESEARCH PROJECT, reports and data, available at http://www.ftc.gov/privacy/privacyinitiatives/financial_rule_inrp.html.

²² See James M. Lacko & Janis K. Pappalardo, Federal Trade Commission, Bureau of Economics Staff Report, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (Feb. 2004), available at <http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf>; LACKO & PAPPALARDO, IMPROVING MORTGAGE DISCLOSURES, *supra* note 19, at ES-13.

²³ S. REP. NO. 110-327, at 2 (2008) (Private Student Loan Transparency and Improvement Act of 2008).

II. The Federal Trade Commission Has Substantial Law Enforcement Experience in Stopping Unauthorized Billing.

The FCC has asked specifically if there are lessons to be learned from consumer protection efforts of other government agencies combating the placement of unauthorized charges on telephone bills, a practice known as cramming. The FTC has much experience, both in policy work and law enforcement action, tackling the practice of placing unauthorized charges on telephone bills. For many years, FTC has investigated suspect charges and taken law enforcement actions in courts across the nation to shut down fraudulent businesses and to return money to defrauded consumers

Cramming is a significant area of increasing consumer complaint. More than 3,000 complaints received by Consumer Sentinel during the past 12 months relate to what consumers describe as unauthorized charges on telephone bills (including landline, mobile wireless, and Voice over Internet protocol (VoIP) services).²⁴

The FTC treats cramming as both “deceptive” and “unfair” conduct, under the FTC Act.²⁵ Practices characterized as “deceptive” under the FTC Act involve a representation, whether it is a misrepresentation or an omission; a representation is likely to mislead consumers acting reasonably under the circumstances; and a representation that is likely to affect a consumer's choice of or conduct regarding a product or service and thus be material.²⁶ When a company places a charge on a consumer’s telephone bill, it represents to that consumer that the charge is valid and that the consumer is obligated to pay for that item. Where the charge has been “crammed” onto a consumer’s bill, those representations are not just likely to be misleading; they are false. Under such circumstances, the FTC has taken enforcement action against unauthorized billing as a deceptive practice under the FTC Act.²⁷

Cramming also has been challenged as “unfair.” The FTC considers practices “unfair” if they result, or are likely to result, in substantial injury to consumers; cause injury that consumers cannot reasonably avoid; and the injury is not outweighed by countervailing benefits to consumers or to competition.²⁸ Placing fraudulent charges on

²⁴ This number does not include complaints received during that period alleging unauthorized switching of service providers.

²⁵ 15 U.S.C. § 45(a).

²⁶ For a detailed explanation of the FTC’s “deception” standard, see FTC Policy Statement on Deception (Oct. 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

²⁷ See, e.g., *FTC v. Nationwide Connections*, Civil Action, No. 06-80180 (S.D. Fla. filed 2006); see also *FTC v. Cyberspace.com*, 2003-1 Trade Cas. (CCH) ¶73,960, *aff'd* 453 F.3d 1196 (9th Cir. 2006) (consumers signed check which defendants argued unsuccessfully was agreement to be charged on their telephone bill).

²⁸ For a detailed analysis of the FTC’s “unfairness” standard, consult the FTC Policy Statement on Unfairness (Dec. 1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

telephone bills is likely to injure consumers because they are likely to pay the charges, simply because they appear on their telephone bill. Even if each consumer loses only a small dollar amount, the total injury to consumers across the country from cramming can still be substantial. Consumers cannot reasonably avoid having fake items placed on their telephone bills. The cramming of unauthorized charges onto consumers' telephone bills provides *no* benefit to consumers or competition.²⁹ Courts repeatedly have held such unauthorized billing to be an unfair act or practice.³⁰

The FTC has focused on two types of companies that place charges on consumers' telephone bills. First are the "vendors" that originate some of the line item charges that consumers may find on their bills for products or services. Second are "billing aggregators" that interface between the vendor and a telephone company. Although some vendors submit charges directly to telephone companies for placement on their subscribers' telephone bills, most vendors contract with one of several large billing aggregators. The billing aggregators supply information to the telephone companies about the vendors' businesses, submit the charges to the telephone companies on behalf of the vendors, and often field complaints and inquiries from consumers. The charges may appear on a billing aggregator's separate section of a bill, or as a line item billed by the billing aggregator on behalf of the vendor. The FTC, which has limited jurisdiction over common carriers, has primarily targeted such vendors and billing aggregators, as well as individuals associated with those companies, in law enforcement actions to stop cramming.³¹

III. Several Policy Adjustments Can Help Eliminate Cramming.

As discussed above, effective and meaningful disclosures can help consumers understand their communications bills. This information can create an environment in

²⁹ See *In re: Orkin Exterminating Co., Inc.*, 849 F.2d at 1354, 1365 (11th Cir. 1988), *aff'd sub. nom.*, *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (noting that increase in fees without corresponding increase in services results in no consumer benefit, and efficient operation of the marketplace presumes informed consumer choices).

³⁰ See, e.g., *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001) (unauthorized billing of credit and debit cards); *FTC v. J.K. Publ'ns*, 99 F. Supp. 2d 1176, 1202-3 (C.D. Cal. 2000) (unauthorized billing of credit and debit cards); *FTC v. Windward Mktg, Ltd.*, No. 1:96-CV-615F, 1997 WL 33642380 (N.D. Ga. 1997) (unauthorized bank drafts); *FTC v. Neovi, Inc.*, 06CV 1952-WQH-JMA (S.D. Cal. 2009) (fraudulent checks); Memorandum Opinion and Order, *FTC v. Kennedy*, No. 4:06-cv-01980, (S.D. Tex. 2008) (web-related charges on a telephone bill).

³¹ See, e.g., *FTC v. Lubell*, No. 3-96-CV-80200 (S.D. Iowa filed Oct. 17, 1996); *FTC v. Int'l Telemedia Assocs., Inc.*, No. 1-98-CV-1925 (N.D. Ga. filed 1998); *FTC v. Hold Billing Servs., Ltd.*, No. SA-98-CA-0629FB (W.D. Tex. filed July 19, 1998); *FTC v. American Telnet, Inc.*, No. 94-2551 CIV-Nesbitt (S.D. Fla. filed 1999); *FTC v. Shared Network Services, LLC*, No. CIV. S-99-1087 WBS JFM (E.D. Cal. filed 2000); *FTC v. Mercury Marketing of Delaware, Inc.*, No. 00-CV-3281 (E.D. Pa. filed 2000); *FTC v. Enhanced Services Billing, Inc.*, No. 1:01-CV-1660 (D.D.C. filed 2001); *FTC v. Access Resource Services, Inc.*, No. 02-CIV-60336-GOLD/SIMONTON (S.D. Fla. filed 2002); *FTC v. 800 Connect, Inc.*, No. 03-CIV-60150-MARRA (S.D. Fla. filed 2003); *FTC v. Webservice Media, LLC.*, No. H-06-1980 (S.D. Tex. filed 2006).

which consumers can more readily notice small fake charges on their telephone bills. These changes alone, however, are unlikely to remove opportunities for cramming. Discussed below are five policy changes that would transform the environment in which fraudulent entities have operated, and would empower consumers to protect themselves. They also would allow for improved enforcement actions by the FCC and FTC, and for the communications industry itself.

These recommendations apply not only to the traditional landline telephone billing platform, but also to new billing platforms as well. Advances in technology are moving consumers into a world where services such as Internet access and mobile phone calling can be billed via a variety of digital communication services platforms. For example, in many countries, mobile payment mechanisms already make mobile phones function like electronic wallets.³² Thus, the comments below should be read in the context not only of existing billing platforms, but new ones as well.

A. Prevent Fraudulent Companies from Obtaining Access to the Billing Platform.

First, the FCC should consider adopting more stringent measures to prevent fraudulent companies from obtaining access to the billing platform. In our experience, fly-by-night companies are able to submit charges and move on before the volume of consumer complaints rises to a level that gets a provider's attention. The individuals behind these companies change the organization's name, products, or services until they get caught. Many times, these companies had no legitimate claim to put any charges onto consumers' bills in the first place.

For example, in the case of *FTC v. Nationwide Connections, Inc.*, the FTC sued a company that was not a communications carrier of any type, but nonetheless was able to use billing aggregators to place more than \$30 million worth of fabricated collect-call charges on the phone bills of millions of consumers.³³ One of the principals of the scam conducted the business from a cell in the Palm Beach County Jail. The FTC also sued the billing aggregators that placed charges on telephone bills on behalf of that vendor.

As a consequence of the FTC's law enforcement action, the billing aggregators involved are now required to take specific steps to ensure that any new vendor billing for telecommunications services is a legitimate entity. For example, they must make diligent, good faith efforts to verify: the accuracy of new vendors' names and the names of the company principals; that the phone companies have not stopped that vendor or key individuals associated with it from billing; that the vendor is not subject to law

³² See, e.g., *Pay on the Go: Consumers & Contactless Payment*, FTC Town Hall (July 2008) (transcript and video archive available at <http://www.ftc.gov/bcp/workshops/payonthego/index.shtml>).

³³ *FTC v. Nationwide Connections, Inc.*, No. 06-80180.

enforcement action for unfair billing; and that the physical location of the company exists.³⁴

The FTC believes measures such as these can help reduce opportunities for cramming. Because of limitations on the FTC's authority, the FTC does not have the ability to put into place similar restrictions on certain communications service providers. Therefore, the FTC encourages the FCC to explore adopting additional controls to ensure that all communications service providers and the aggregators involved in their billing processes undertake due diligence of vendors before permitting a vendor to use the billing platform to place charges on consumers' bills.

B. Provide for Greater Coordination among and With Law Enforcement Entities.

Greater coordination among law enforcement entities can help combat cramming scams. There is much consumer confusion about which government agency to contact to complain about different types of cramming.³⁵ How can a consumer know to alert the FCC or a state utility commission when questioning some fees and rates, but to alert the FTC or state attorney general's office about completely fabricated long distance charges, or to complain to any of the above entities if the charge involves VoIP? One part of the solution is for government agencies to share those complaints with each other and have a process to handle them, rather than redirecting consumers to other agencies to complain yet again. As noted above, Consumer Sentinel provides a secure vehicle where complaints can be shared among law enforcement entities regardless of which agency received the consumer complaint in the first instance.

In addition, industry can play a larger role in alerting the government about frauds. For example, the FTC has invited the wireless industry -- through discussions with CTIA --The Wireless Association and the Mobile Marketing Association -- to refer information about scams, including unauthorized billing, to law enforcement. Internet and telephone service companies can voluntarily report complaints to the FTC with limited liability.³⁶ We are ready to work with the FCC and industry to quickly stamp out cramming when it emerges.

³⁴ Stipulated Final J. and Order for Permanent Inj. and Consumer Redress as to Def.'s Billing Concepts, Inc., ACI Billing Serv., Inc., d/b/a OAN, and BSG Clearing Solutions North America, LLC, *FTC v. Nationwide Connections, Inc.*, No. 06-80180 (Apr. 11, 2008) ("*Nationwide Aggregator Order*"); see also Press Release, Federal Trade Commission, Nation's Largest Telephone Bill Aggregators Will Pay \$1.9 Million and Stop 'Cramming' to Settle FTC Charges (May 18, 2008), available at www2.ftc.gov/os/caselist/0523141/0523141.shtm.

³⁵ *Id.* at 33 (discussing the finding and evaluating of complaints).

³⁶ 15 U.S.C. § 57b, as amended by U.S. SAFE WEB Act of 2006 (including clarification that the exemption from liability applies to Internet and telephone service providers normally subject to the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq.).

C. Provide Consumers with Information They Need to Detect Cramming.

Consumers should have easy-to-understand monthly bills as well as a reliable way to get more information about specific charges on their bills, so they can detect cramming more easily. In the FTC's law enforcement experience, a key problem in cramming is that consumers do not recognize the name of the product, service, or company listed next to a charge on their bill. Telephone bills that better describe the services and charges appearing on them would enable consumers to avoid falling prey to unscrupulous service providers which hide or mislabel unauthorized charges on consumers' telephone bills.

There are many ways to better identify the source of line items on bills. For example, concerns about unclear identification have been raised in the context of electronic debits. In response, the main industry association, NACHA -- The Electronic Payments Association -- has required companies to identify themselves by the name that is known and readily recognized by the consumer.³⁷ Also, consumer testing of sample billing descriptions and charges is likely to help ensure consumers understand the information on their bills. For example, if a purchase is made through a website, the name of website should be identified in the billing description if it is not otherwise clear in the item description.

The FCC has asked whether it should adopt requirements about which party is identified as the consumer contact for each charge on the bill. In our law enforcement experience, no particular party is better suited than another party to provide information about the nature of a charge. However, we believe that a consumer should not have to make multiple calls to learn more about a charge, or to dispute it.

Currently, consumer complaints about a charge often are directed to a number of parties -- the telephone company, the billing aggregator, and the vendor. In the FTC's law enforcement experience, consumers tend to complain to their own communications provider first even if the vendor or billing aggregator is listed on the bill next to the charge. If the consumer contacts the vendor identified on the bill and it is a fraudulent vendor, our experience is that those vendors often do not answer the phone or provide accurate information. Furthermore, if the contact information on the bill is for a billing aggregator, that aggregator often just redirects consumers to the vendor, rather than resolve the dispute itself. The FCC should consider adopting specific measures to require one or all of these parties, depending upon the context, to take responsibility for answering consumer inquiries and resolving disputes about charges in a timely manner.³⁸

³⁷ Press Release, NACHA -- The Electronic Payments Association (Feb. 11, 2008), available at www.nacha.org/News/news/pressreleases/2008/2008/Pr021108/Pr021108.htm.

³⁸ As part of a settlement with vendors and billing aggregators, the FTC has required entities subject to its jurisdiction to be more responsive to consumer inquiries about cramming. *See, e.g.*, Stipulated Final Judgment and Order for Permanent Injunction, *FTC v. Hold Billing Servs., Ltd.*, No. SA-98-CA-0629FB, (Oct. 1999) (prohibiting aggregator from failing: (1) to respond to consumer inquiries and complaints in a timely manner, (2) to investigate billing disputes, and (3) to require vendors that provide their own customer service to do the same).

D. Require Communications Providers and Billing Aggregators to Investigate and Detect Cramming.

The parties involved in the communications billing process should be required to investigate and detect cramming in response to consumer complaints and inquiries. Regardless of which entity – vendor, billing aggregator, or communications provider – receives the initial consumer complaint, it ought to have processes in place to investigate. The extent of any investigation should reflect the volume and nature of complaints.

In our law enforcement experience, we have seen too often that communications providers and billing aggregators fail to conduct a reasonable investigation after consumers' allegations should have raised suspicions. In *Nationwide Connections*, for example, consumers complained to their phone companies, the aggregators, and the vendor about charges for collect calls, even though their phone lines led to fax machines or computers and call logs showed that no calls were made.³⁹ The telephone service providers and billing aggregators continued to bill for such suspicious charges, without conducting an appropriate investigation. Accordingly, the FCC should consider requiring service providers, billing aggregators or vendors to take more steps to investigate the validity of challenged charges.

In addition to responding appropriately to individual complaints, industry should use aggregate complaint data to quickly detect fraudulent vendors. Complaint activity often can signal potential cramming problems. Vendors often pay other parties such as telephone service providers and billing aggregators to answer consumer calls. Through these calls, providers and aggregators become aware not only of the volume, but also the nature of complaints and inquiries. In addition, providers and billing aggregators should monitor the “chargebacks” they process in cases where a charge is removed after it has been billed.

Furthermore, vendors, billing aggregators, and communications providers should share information with each other about the number of consumer inquiries and complaints they each receive. This sharing of information would ensure industry rapidly receives information about the true extent of consumer complaints and inquiries in situations where consumer calls are divided among parties. The FCC should consider measures to ensure that communications providers are alerted by billing aggregators when there are a substantial number of complaints and inquiries about specific charges or vendors and that all entities investigate cramming using the information available to

³⁹ Even if a vendor produces voice recordings purporting to show that a consumer agreed to accept a charge, further investigation might also be appropriate. See, e.g., Memorandum Opinion and Order, *FTC v. Kennedy*, No. 4:06-cv-01980 (Mar. 17, 2008) (web-related charges on a telephone bills of hundreds of thousands of businesses and non-profits were unauthorized notwithstanding defendant's purported “verification recordings” that implied that a person agreed to be billed for an offer after a free trial, when the person had not); Final Judgment and Order for Permanent Injunction, *FTC v. City West Advantage, Inc.*, No. 2:08-CV-00609-BES-GWF (July 21, 2009) (D. Nev.) (voice recordings failed to accurately represent the actual conversation with consumers).

them. Industry as a whole should then make better use of this information by investigating patterns of problematic charges and vendors to help eliminate sources of fraudulent billing.⁴⁰

E. Increase Consumer Control over Billing through New Technologies.

Finally, the FTC encourages the development of, and spread of information about, technology that can give consumers more control of the charges that are placed on their communication bills. In 1998, the FTC asked the FCC to consider having providers include information on how consumers can block certain services in their monthly telephone bills as a way of possibly avoiding unauthorized charges. Some consumers may want to block long-distance or third-party calls, particularly if such options are available in a way that allows consumers some ability to tailor their options. Similarly, there appear to be some blocking options for wireless subscribers.⁴¹ When consumers are provided only with “all-or-nothing” choices, such as eliminating all text messaging or all third-party billing, however, it is unclear how many consumers benefit. We urge the FCC to explore how technology has changed and to determine if technology can help combat unauthorized billing.

IV. Conclusion

The FTC applauds the FCC’s effort to examine whether consumers have sufficient access to relevant information about the communications services they purchase and use. The FTC has identified several options to promote the provision of accurate, meaningful, and timely information to consumers regarding the communications services they purchase and use. It also has provided several policy suggestions for reducing unauthorized billing on communications service bills. By addressing significant consumer concerns, these recommendations can help promote a robust communications marketplace that benefits consumers.

⁴⁰ The FTC has addressed this issue in a recent law enforcement settlement, where a billing aggregator agreed to alert the service provider if complaints from consumers reach a certain level. *See Nationwide Aggregator Order, supra* note 34.

⁴¹ FTC Staff Report, *BEYOND VOICE: MAPPING THE MOBILE MARKETPLACE*, 24-27 (2009), available at <http://www.ftc.gov/reports/mobilemarketplace/mobilemktgfinal.pdf> (discussing controls for mobile devices).