June 25, 2012

Marlene H. Dorch
Secretary
Federal Communications Commission
445 12th St., SW., Room TW-A325,
Washington, DC 20554

Re: Proposed Anti-Cramming Opt-in Regulation

Dear Secretary Dorch:

The Federal Communications Commission ("FCC") has proposed to adopt an affirmative opt-in as an additional safeguard measure to prevent phone bill cramming. I welcome the opt-in measure as an extremely necessary, and a long overdue, solution to the widely spread problem of the cramming fraud. Here is why.

A Brief History of Local Exchange Carrier Billing

Telephone third-party fraud is, unfortunately, quite common. Wikipedia.com lists eight known types third-party telephone fraud. Cramming refers to placing unauthorized third-party charges on a customer's landline telephone bill without his or her knowledge or consent. Cramming became possible after the deregulatory break-up of AT&T. When AT&T was a monopoly telephone carrier, it pioneered a system of adding charges for communication services to customer telephone bills. After the break-up of AT&T, local exchange carriers ("LEC") – former AT&T units – became responsible for billing for their own services and collecting charges from third-party vendors and long-distance carriers. Over time, an increasing variety of third-party vendors, who sold non-communication services, began charging for their services through telephone bills.

In an ideal world, a phone line owner would call a third-party vendor to request a service: voice mail, data services, some form of entertainment, a psychic reading, etc. The third-party vendor would submit the bill to a billing aggregator, who in turn bills the local exchange carrier. The customer's phone call serves as proof of consent to receive the service and a corresponding charge. In real world, however, LEC billing is notoriously vulnerable to fraud.

Attractiveness of LEC Billing and Proneness to Abuse

LEC billing requires no credit card, no bank account number, and no personal identification from the caller. Consequently, there is no security. To sell a service, a third-party vendor needs to show only that the customer called the vendor from the customer's telephone number. The vendor's possession of the customer's phone number serves as proof of customer's consent. Some third-party vendors use Automatic Number Identification (ANI). The system works like a "caller ID." It captures the caller's number.

If a crammer induces people to call, the caller's phone number will be identified by crammer's ANI. Common ways of tricking people into calling crammers are call-back numbers left on people's voicemails. Returning a phone call to an unrecognized number left in a voice mail may result in captured phone number. This is all the consent needed to start sending bills to a LEC for this number. Unfortunately, crammers can obtain customers' telephone numbers by very low-tech means as well. They can look in telephone directories. They can use an imposter who poses as a representative of a phone company conducting a satisfaction survey. A customer's answer of "yes" to any question can be recorded and then used as proof of consent to buy some service. Incidentally, opinion poll calls are exempt from the Do Not Call Registry if they are non-commercial. Also, e-mails may contain a negative option, meaning that a service will be sold unless the customer stops it. Phony sweepstakes that require a phone number to enter have also been a source of customer's phone numbers.[1]

The variety of means that allow fraudsters to target phone line owner's bills is staggering. Unfortunately, phone line owners have absolutely no federally guaranteed means of protecting their telephone accounts from cramming. They can't block ANIs from capturing their number. They can't stop crammers' access to phone directories. They can't even prevent unauthorized use of their own phone by someone else. Unlike other payment methods e.g., credit cards, bank cards, PayPal, etc., LEC billing provides no protection from phony charges. LECs would accept any charge and post it to the phone line owner's account. A billing practice that started as a convenient method of collecting third-party communication charges after the deregulation of the phone industry quickly evolved into a gateway for abuse.

Some Statistics

It is not surprising that the unregulated LEC billing has become a fraudster's paradise. Many third-party vendors are illegitimate. These businesses have been created only to exploit third-party LEC billing. Many of these vendors operate out of apartments, non-existent offices, or post-office boxes. According to the Senate Committee on Commerce, Science, and Transportation report, US consumers pay almost $2 billion in unauthorized charges annually. Telephone companies place nearly 300 million third-party charges on their customers' bills every year. Telephone companies benefit from third-party LEC billing; it brings them roughly over $100 million in annual profits. For example, Verizon charges a flat fee between $1 and $2 per charge.[2]

The amount of customer complaints about cramming is impressive. AT&T, Qwest, and Verizon receive over 100,000 complaints a year. Yet, previous attempts to adopt anti-cramming measures have failed because telephone companies provided inaccurate statistics that showed that cramming was not a problem, and that customers enjoyed the convenience of third-party billing. For example, AT&T justified the practice of

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[1] See generally: Prepared Statement of the Federal Trade Commission on "Cramming" Before the Subcommittee on Investigations of the Governmental Affairs Committee United States Senate Washington, D.C. July 23, 1998. http://www.ftc.gov/os/1998/07/cramming.htm#N_19_

[2] See generally: http://www.consumeraffairs.com/news04/2011/07/cramming-costing-consumers-2-billion-a-year-study-finds.html

cramming by stating "we currently receive cramming complaints for only about one out of every thousand bills that contain third-party charges."[3] In reality, however, customers often report that telephone companies provided little to no assistance with complaints about cramming.

Cramming is Hard to Detect

Nearly 20 million phone customers fall victim to cramming annually. Only 5% of them are aware of the fraudulent charges.[4] The small amount of detected charges points to the real problem of cramming: a surreptitious nature of the fraud. Unauthorized third-party charges are difficult to recognize on a phone bill. Phone bills are generally hard to read. They may contain pages of itemized phone calls, and a dozen of federal, state, local taxes, charges, surcharges and fees. A common-sense advice to customers is to check the phone bill every month and call the phone company immediately upon noticing a phony charge. But the complexity of phone bills and the greed-fuelled ingenuity of crammers put all phone users in a vulnerable position. In one scam, a mob family netted over $100 million in profits in the course of four years of running a cramming scam.[5] The scammers charged their victims up to $40 a month for fictitious services described on the bill as "voice mail" and other common looking terms. Most customers never noticed the charges! It is even harder to overlook a small $1.99 or $2.99 charge on a bill.

Billing Services Group ("BSG"), a billing aggregator, has a sample phone bill on its website.[6] The sample shows two third-party charges titled "Enhanced Services" and "OAN Services, Inc." Both titles have toll free numbers. The phone line owner, however, has to pay attention to detail to realize that theses are third-party charges. The charges are placed under one heading "Billing Summary" together with communication related charges. It is very easy to mistake these charges for other communications-related charges.

The website's Consumer Protection FAQs link states that BSG uses a rigorous internal monitoring program to protect customers from unauthorized third-party charges by authenticating every purchase, reviewing service providers, and an ongoing monitoring of service providers. Sounds reassuring, but it is not! According to the FCC, BSG placed some $70 million in unauthorized charged to unsuspecting phone customers' accounts. The FCC filing states that BSG billed customers through local phone companies for "three voice-mail services, one streaming video service, two identity theft protection services, two directory assistance services, and one job skills training service." One of BSG's prolific billers is a crammer who has a history of cramming with several

[3] http://www.channelpartnersonline.com/news/2012/03/verizon-at-t-set-to-stop-hitting-customers-with-t.aspx

[4] See generally http://www.consumeraffairs.com/news04/2011/07/cramming-costing-consumers-2-billion-a-year-study-finds.html

[5] Mobsters Charged in Cramming Scam 02/12/2004 http://www.consumeraffairs.com/news04/mob_cram.html

[6] http://www.bsgclearing.com/question_about_your_bill/sample_bill/

companies and is under an FBI investigation.[7]

This example shows that third-party billing through LECs is not amenable to self-policing. The scheme involves several parties: a third party vendor, a billing aggregator, a LEC. There are too many players and no oversight. The loose scheme allows room for unbridled fraud. Unfortunately, each party profits from the sheer volume or transactions. Expecting effective self-policing in this arrangement is as reasonable as trusting that a fox will be an honest guard of chickens.

States' Reaction

In the absence of a national solution, states started to take measures to protect their consumers. In 2009, Connecticut's Attorney General made AT&T agree to stop putting unauthorized third-party charges on customers' bills. In 2011, Vermont passed a statewide ban on most third-party charges on consumers' telephone bills. Alaska and Illinois have proposed similar legislation. Other states are also considering legislation to limit unauthorized third-party billing. Even phone companies have begun to self-regulate the practice of third-party billing. Verizon and Century Link are considering policies to stop charges not related to communication.

The main challenge of such legislation is to distinguish between legitimate third-party charges and fraudulent ones. The deregulated phone system relies on numerous vendors: local carriers, interstate carriers, voicemail and data services, as well as vendors of non-communication services. Vermont, for example, allows third-party charges only for 1) goods or services that are marketed by a company that is under the jurisdiction of the Vermont Public Service Board (which regulates telecommunications services); 2) customer initiated direct dial or dial-around services; and 3) certain calling services from inmates at correctional centers.[8] Verizon continues to charge for communication and information services that occur on its network, while having notified third-party vendors that it would stop billing its customers for "miscellaneous and enhanced" third-party charges. [9]

The Proposed Opt-In

The FCC's proposed opt-in approach would help minimize phone bill cramming by putting a consensual block between LEC billers and crammers. The Vermont model may serve as a good starting point for the future FCC regulation. LECs should be able to continue billing for legitimate services from other common carriers, such as long-distance service providers, as well as legitimate communication services providers, such as providers of data services, voice mail. All other third-party vendors should receive a notification that LECs would no longer accept billing from them unless the customers opt-in to receive such billing.

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[7] See generally http://www.channelpartnersonline.com/news/2012/05/ftc-billing-services-group-in-cahoots-with-cramme.aspx

[8] http://tkctelecomlaw.wordpress.com/category/fcc-regulations/

[9] http://redtape.msnbc.msn.com/_news/2012/03/28/10908841-after-investigation-att-verizon-agree-to-stop-cramming-phone-bills?lite

The Authority of the FCC to Promulgate the Opt-in Regulation

The FCC derives its express statutory authority from the Federal Communications Act of 1934 ("FCA").[10] The Act created the FCC to "regulate interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United Sates rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[11] The FCA further provides that the Commission "shall execute and enforce the provisions of the Act and that the Act's provisions shall apply to all interstate and foreign communications by wire. . . ." [12] §201 of the FCA establishes the FCC's authority only over common carriers. Under the FCA, "'common carriers' are entities that must provide [transmission] services to the public without discrimination and are heavily regulated by the FCC."[13] Under this interpretation of "common carriers", LECs are common carriers, because they provide both the transmission services to the public and prepare the monthly bill. §201 (b) gives the FCC the authority to regulate "all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable."[14] Also, *Brand X*, defines common carriers as providers of "ordinary language messages to another point with no computer processing or storage of information.[15] LECs provide the transmission of ordinary language messages. LECs fit the definition of common carrier and thus are under the jurisdiction of the FCC.

47 U.S.C.S §154 (i) gives FCC ancillary authority "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary to in the execution of its functions."[16] The Supreme Court held that the FCC's ancillary power did not allow to impose common-carrier obligations on cable operators who were not common carriers.[17] Because LECs are common carriers, the ancillary powers of §154 (i) should apply to them.

Definitely, crammers are not communication service providers and are outside the jurisdiction of the FCC. Similarly, billing aggregators do not provide communication services under §151of the FCA. The FCC may regulate LECs' billing practices under its ancillary powers by requiring LECs to screen third-party bills and allow only those bills that have been approved by customers.

As I mentioned earlier, some telephone companies have started to institute such policies voluntarily. However, consumers will enjoy a more substantial protection against cramming by a federal regulation than from voluntary self-policing efforts of phone carriers, who constantly look to maximize their profits.

How the Opt-In Should Work with Existing Customers

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[10] Federal Communications Act of 1934, 47 U.S.C. § 151 et seq.
[11] *Id*. at §151
[12] *Id*. at §152 (a)
[13] *Pinney v. Nokia, Inc.*, 402 F.3d 430, 450 (4th Cir. Md. 2005), *cert. denied*.
[14] 47 U.S.C. § 201
[15] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).
[16] 47 U.S.C. §154 (i).
[17] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (U.S. 1979).

The proposed opt-in will only work if it requires customers to approve every third-party vendor with a CLE. New customers should be notified about the opt-in when they create their account. Implementing the opt-in to existing accounts will be slightly more involved. Third-party vendors of existing customers should be able to inform their existing customers that they need to opt-in with their CLEs to continue to receive the vendor's services. Third party vendors can make automated phone calls to the customers. These phone calls from legitimate vendors will not violate the Do Not Call Registry because of the vendors' existing business relationship with these customers. The reason for requiring an individual opt-in for each vendor is to stop the current practice of fraudulent methods of obtaining phone numbers to cram. Only the calls placed from the customer's phone directly to the LEC should have the legitimacy of consent to opt-in.

Burden of the Implementation of the Opt-In on CLAs

The cost of the impact of the opt-in regulation will likely be very moderate. Telephone companies have a system of call verification in place; they use it when customers change long-distance carriers. AT&T, Verizon, and some other phone carriers have already agreed to implement their own third-party vendor screening processes. Now that the problem of cramming has received nationwide attention, self-policing may become an industry-wide trend. The FCC should help shape a uniform national policy to stem cramming. The statistics that show high numbers of users of CLE billing likely include a high percentage of unsuspecting victims of cramming. Once the opt-in system is in place, only the customers who actually chose to opt in will continue to use the service. The reduction of the number of CLE billing customer to only those who consent to the opt-in will reduce the burden of CLE screening efforts. Another potential for a projected lowering burden on CLEs may come from an overall decline of the use of wired phones because of the advances in wireless communications.

Conclusion

I hope that the FCC will adopt the opt-in measure, because the decline in landline phone use will likely make remaining phone customers very attractive targets of ever-active crammers.

Sincerely,
Igor Osatuke