

**Before The  
Federal Trade Commission  
Washington, D.C. 20580**

Pay-Per-Call Rule	)	
16 C.F.R. Part 308	)	FTC File No. R611016
and Request for Comment	)	

**COMMENTS OF THE  
COALITION TO ENSURE RESPONSIBLE BILLING**

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## SUMMARY

The Coalition to Ensure Responsible Billing (“CERB”) is composed of seven billing clearinghouses that are working to ensure the integrity, and increase the clarity, of the local telephone bill. The members of CERB have established billing and collection contracts with most local exchange carriers (“LECs”) by which the billing clearinghouses submit charges from telecommunications vendors for inclusion on consumers’ local telephone bills. CERB has worked diligently to reduce the incidence of cramming, and has created billing clearinghouse standards of practice to guide clearinghouses and vendors toward more consumer-friendly billing practices.

Competitive Issues: While it is critical to protect consumers from unlawful billing practices, the Commission also has a role in protecting competition. LECs have both the opportunity and the incentive to use anti-cramming initiatives to disadvantage competitive products and services (such as voice mail or caller ID, for example), while failing to apply the same initiatives to their own similar services. To prevent any damage to competition, the Commission should ensure that any anti-cramming rules apply to LEC-provided services to the same extent as they apply to competitive services.

Suggested Modifications to the Commission’s Proposals: CERB commends the Commission for its efforts to end cramming, but suggests modifications to the Commission’s proposed 900-number rules. Initially, certain definitions should be modified to recognize the roles played by each entity in the billing chain, and to help define liability more clearly. First, the Commission should amend its definition of “telephone-billed purchase” by adopting the Federal Communications Commission’s definitions of those services. While the Commission has attempted to exclude basic local and interexchange services, as well as services that are “closely related” to each, the Commission’s current formulation does not make clear that certain basic services will indeed be excluded. Furthermore, the Commission should exempt from the PIN requirement

certain services that cannot feasibly integrate the use of a PIN, as long as those services are provided pursuant to a written agreement. Second, the Commission should amend its definition of “pay-per-call” service to allow meaningful exemptions for basic and adjunct-to-basic local and interexchange services. Third, the Commission’s proposed definition of “billing entity” should be adopted because it correctly assumes that all industry participants are links in the chain of billing for telecommunications services. Fourth, the Commission should amend its definition of “service bureau” to recognize that billing aggregators perform a fundamentally different service than traditional service bureaus. Billing aggregators maintain no control over the functions or content of the services for which they provide billing and thus should not be held to the same liability standard as traditional service bureaus, whose businesses are intertwined with those of their vendors. The Commission should further provide a more detailed explanation of the services that qualify an entity as a service bureau. Fifth, the Commission should modify its definition of “vendor” to make clear that where, for example, an interexchange carrier provides 800 service, it does not become a “vendor” for purposes of the rule.

In addition to modifying certain definitions, the Commission should also modify certain substantive obligations. First, the Commission should modify the “express authorization required” provision to make clear what criteria it will consider when determining when a billing entity “should have known” of a violation. While billing entities exercise some control over the practices of their vendors through pre-screening and monitoring, they cannot supervise the billing of each individual charge because they are removed from the daily practices of vendors. Recognizing this truth, the Commission should clarify the criteria it will use in assessing whether a billing entity “should have known” of a violation. To that end, the Commission should create a rebuttable presumption that where a billing entity takes certain affirmative, preventative actions to protect consumers, that billing entity will not be subject to “should have known” liability. Such actions

should include pre-screening and monitoring vendors. Failure to more narrowly define what constitutes “should have known” liability will result in competitive implications, such as an increase in the cost of providing billing services to small vendors, or the denial of billing services to new, untested market entrants. Even if billing entities apply every method at their disposal to police and monitor vendors, it is impossible to reach a zero complaint level, and any liability standard should recognize this fact. Second, billing aggregators should not be subject to the same broad liability standard as traditional service bureaus. Billing aggregators are not intertwined with the business practices of their vendors, and thus do not possess the requisite level of awareness of those activities to be held liable to the same degree as traditional service bureaus. Third, the Commission should modify the “multiple billing entities” section to provide that where one billing entity is designated to provide disclosures, that designation does not preclude another billing entity from being designated to receive and respond to billing error notices. Billing aggregators properly perform that function and should be allowed to continue in that role. Fourth, the Commission should modify the dispute resolution procedures to clarify that those procedures are triggered only in the event of an actual dispute, and need not be invoked upon a mere consumer inquiry. Requiring dispute resolution procedures for every inquiry would be extremely costly and is not necessary to provide consumer satisfaction. In addition, it would provide an incentive for LECs to give automatic credits, to the detriment of billing aggregators. Finally, the provision prohibiting deceptive statements to billing entities by vendors, service bureaus, and providing carriers should be expanded to apply to deceptive statements made during the pre-screening process under CERB’s Standards of Practice.

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**COMMENTS OF THE  
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**I.     INTRODUCTION**

The Coalition to Ensure Responsible Billing (“CERB”) is composed of seven billing clearinghouses (also called billing aggregators) that are working to ensure the integrity, and increase the clarity, of the local telephone bill.<sup>1</sup> The members of CERB have established billing and collection contracts with all of the Bell Operating Companies (“BOCs”), GTE, and most independent incumbent local exchange carriers (“LECs”). CERB members primarily assist smaller competitive telecommunications companies that offer interexchange services, voice mail, paging, and other services by aggregating these companies’ charges under a single contract with each LEC. These billing arrangements are essential to the development of an efficient and competitive telecommunications marketplace, as consumers benefit from the simplicity and accounting

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<sup>1</sup> The members of the CERB are Billing Concepts, OAN Services, Federal TransTel, HBS Billing Services, ILD Teleservices, Integretel, and USP&C.

convenience of a single bill, and as startup competitive companies are able to reach their customers through the local telephone bill on better terms and at a lower cost.

While consumers have enjoyed the benefits of receiving all of their authorized telecommunications-related charges on a single bill, many consumers have also been harmed by the addition of unauthorized charges to their bills. This phenomenon, known as “cramming,” is a significant consumer protection issue. CERB commends the Commission for taking a pro-active role in the public policy debate surrounding this issue and working to protect consumers from cramming.

In particular, CERB commends the Commission for recognizing that all entities that form links in the billing chain for telecommunications products and services -- including vendors, service bureaus, billing aggregators and LECs -- bear responsibility to protect consumers from cramming. Billing clearinghouses recognize the role they can and must play to combat cramming. To that end, several clearinghouses formed CERB in July of 1998. CERB now includes billing clearinghouses that process over 90 percent of all billing submitted to LECs by clearinghouses. Once formed, CERB’s first act was to draft rigorous pro-consumer “Standards of Practice” to guide billing clearinghouses toward more consumer-oriented processes (see attached). CERB members individually have implemented these tough anti-cramming measures which will go a long way toward protecting consumers from charges by careless or unscrupulous service providers.

In addition to playing an important consumer protection role, billing clearinghouses also play a unique and critical role in promoting competition in the market for telecommunications products and services. Billing aggregation services provide the economies of scale and access to the local telephone bill that many smaller service providers and new entrants need to survive and

compete in the marketplace. Most startup telecommunications providers cannot afford the cost of entering into direct contracts with the LECs (approximately one million dollars in up-front costs just to enter the required contracts). It is also cost-prohibitive for providers who bill small charges (for example, many charges for dial-around long distance calls total less than a dollar), to generate and send a bill themselves. In many cases, the cost of producing a bill would exceed the price of the service being billed. Without access to the telephone bill and the economy of scale provided by the billing clearinghouses, competitors that managed to survive in the market would have to increase dramatically the price of their products and services to consumers, or even risk going out of business.

Although there are a relatively small number of problematic service providers that have significant cramming complaints, the vast majority of companies submitting charges for inclusion on the LEC bill are responsible and conscientious service providers. These legitimate providers depend on fair access to the LEC bill through billing clearinghouses in order to enter the market and to compete effectively. Thus, even as it considers how best to protect consumers, the Commission should ensure that its anti-cramming measures are carefully crafted to address specific harms. Measures that are too broad may have a chilling effect on either the LECs' or the billing aggregators' willingness to bill for new entrants or smaller telecommunications service providers. In fact, comments filed in the Federal Communications Commission's ("FCC") recent "Truth-in-Billing" proceeding demonstrate that increasing regulatory burdens on LEC billing and collection practices also increases the incentive for LECs to discriminate in their provision of billing and

collection services or to cease billing for third parties altogether,<sup>2</sup> while continuing to bill for their own competing ancillary services. This result would harm competition and ultimately would result in fewer choices and higher prices for consumers.

As the Commission implements strong measures to protect consumers against cramming, it should also recognize the need to preserve the competitive balance in the telecommunications industry and the possibility that overly restrictive or costly anti-cramming protections could upset that balance. Given its dual authority over enhancing consumer protection and promoting competition, the Commission is well suited to strike the right balance.

**A. The FTC Should Prohibit LECs from Discriminating Against Unaffiliated Billing Entities in the Provision of Billing and Collections**

LECs that market their own ancillary services, such as voice mail, paging, caller ID and others, have both the opportunity and the incentive to discriminate against similar competitive services. The Commission should thus prohibit LECs from imposing draconian anti-cramming measures on their competitors as a pretense for securing their own business advantage, while failing to apply the same measures to their own ancillary services. Allowing such behavior would

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<sup>2</sup> See Comments filed in Matter of Truth-in-Billing and Billing Format, on Notice of Proposed Rulemaking, CC Docket No. 98-170, FCC 98-232 (rel. Sept. 17, 1998). The Comments of Project Mutual Telephone Cooperative Association (“PMT”) demonstrate that LECs stand ready to discontinue billing for third parties if the FCC imposes excessive burdens on their billing and collection practices. PMT argues that regulation “is likely to result in carriers such as PMT discontinuing billing services for other entities.” Comments of Project Mutual Telephone Cooperative Association (“PMT”) at 2 (Dec. 16, 1998). Similarly, GVNW Inc./Management, on behalf of independent telephone companies, argues that the prospect of increased burdens associated with billing and collections may cause them to “terminate some or all B&C for third parties.” GNVW thus requested guidance from the FCC on whether it is permitted to do so. Comments of GVNW Inc./Management at 2 (Dec. 16, 1998).

ultimately deny consumers the lower prices and greater choices inherent to a robustly competitive market.

LECs have already imposed onerous, one-sided terms on billing aggregators, claiming that such actions are necessary to combat cramming. For example, some LECs have imposed so-called zero tolerance policies (where a statistically minuscule number of consumer inquiries or complaints is grounds for terminating a billing contract) on competitive providers. Further, in an effort to force unilateral modifications to cramming-related provisions in existing agreements with billing aggregators, some LECs have threatened to refuse to renew these contracts altogether. These policies are both anti-competitive and unnecessary. They are anti-competitive where they are not applied to LEC-provided services in the same manner as they are applied to services provided by unaffiliated billing entities. They are made unnecessary by the instant rulemaking, which will create a comprehensive framework for combating cramming throughout the industry.

In the context of this rulemaking, the Commission should establish a non-discrimination principle that prohibits LECs from applying standards and penalties to billing entities who receive cramming complaints, without applying the same standards and penalties to their own provision of ancillary services. This rule would prevent cramming disputes from being used selectively as a weapon to eliminate competition. At the same time, the rule would in no way weaken sanctions against cramming. LECs could apply whatever penalties they chose in response to cramming problems, but would simply have to apply the same standards to their own ancillary services. The new policy would also advance consumer protection, as it would ensure that consumers enjoy a consistent level of protection regardless of whether they purchase a product or service from a LEC or from an unaffiliated provider.

Thus, CERB strongly urges the Commission to prohibit LECs from discriminating between their own affiliated services and third-party billed services when imposing consumer-protection terms and standards.

**II. OVERVIEW OF ARGUMENT: RESPONSIBILITY BASED ON ROLE OF ENTITY IN MARKETPLACE**

CERB supports an approach to solving the cramming problem that assigns to entities in the billing chain – vendors, service bureaus, billing aggregators and LECs – the responsibility, and thus the incentive, to protect consumers against cramming. The Commission takes such an approach. The appropriate role to be played by each entity in combating cramming, however, depends upon the role that each plays in the marketplace. It is neither efficient nor effective for every participant in the billing process to repeat the same consumer protections and verifications for every consumer purchase of a product or service that appears on a consumer's telephone bill.

LECs and billing aggregators alike play roles as facilitators; they help vendors (also called service providers) to reach consumers through the local telephone bill. Because billing aggregators typically perform the critical function of receiving and responding to billing errors, complaints and inquiries from consumers, CERB recognizes that its members are likely to qualify under the definition of “billing entities” under the proposed rule. As “billing entities,” CERB members accept responsibility for their direct communications with consumers regarding inquiries and disputed charges. Similarly, to the extent LECs receive and respond to consumer inquiries, LECs bear responsibility for their communications with consumers with respect to inquiries and disputed charges. CERB members also play a critical role by (1) pre-screening and monitoring their vendors’ products, services, and marketing and sales practices; (2) identifying bad practices; and

(3) disciplining vendors. LECs also play a similar role with respect to vendors.<sup>3</sup> The role played by billing aggregators and LECs is important, but is necessarily limited by the fact that neither LECs nor billing aggregators are a party to the sale of the product or service to a consumer.

Vendors are in the best position to protect consumers against cramming because they have the first and the most direct contact with the consumer when the purchase is made or the presubscription agreement is entered. Accordingly, the Commission should assign the greatest responsibility (and thus create the greatest incentive) for vendors to ensure that charges are expressly authorized by consumers before appearing on the bill.

### **III. DEFINITIONS**

#### **A. The Commission Should Amend Its Definition of Telephone-Billed Purchase [308.2(q)]**

The Commission should clarify the definition of “telephone-billed purchase” by adopting the definitions of telecommunications services already applied by the FCC, thus excluding those services the FCC defines as “basic” and “adjunct-to-basic.” In doing so, the Commission would provide clear guidance as to which services and charges are encompassed by the rules.

The Commission plainly attempted to exclude basic local and interexchange telephone services, as well as services that are “closely related” to each from its definition of “telephone-billed purchase.”<sup>4</sup> Such services properly should be excluded. Given that local exchange and

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<sup>3</sup> Although much focus is on the relationship between billing aggregators and vendors, LECs very commonly contract directly with vendors. In fact, for many LECs, direct vendor contracts outnumber their contracts with billing aggregators.

<sup>4</sup> *Notice of Proposed Rulemaking to Amend the Commission’s Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992*, 63 Fed. Reg. 58524, 58541 (issued October 30, 1998) (“Notice”).

interexchange services are already defined and regulated by the FCC, excluding them from the definition of “telephone-billed purchase” and thus from the scope of the proposed rule avoids unnecessary overlap without sacrificing customer protection. Basic telecommunications services are already subject to substantial FCC regulation and are not typically the subject of cramming complaints.<sup>5</sup>

The proposed definition, however, is too ambiguous to ensure a uniform understanding and application of the rule. For example, the definition specifically excludes “all local exchange or interexchange telephone services, as well as other services excluded by FCC regulation.”<sup>6</sup> The Commission does not, however, define *in telecommunications terms* the local exchange telephone services or interexchange telephone services excluded from the rule. Indeed, the examples the Commission provides in the Notice suggest that some FCC-defined interexchange and local exchange services would be considered “telephone-billed purchases,” pursuant to the Commission’s interpretation.

For example, the Commission suggests that “telephone-billed purchases” would include charges for personal 800 numbers, paging and calling cards.<sup>7</sup> These services, however, are basic interexchange telephone services subject to FCC regulation and thus should be outside the scope of the definition.<sup>8</sup> By contrast, the Commission proposes to include several services that clearly

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<sup>5</sup> *See id.*

<sup>6</sup> Notice at 58541.

<sup>7</sup> *Id.*

<sup>8</sup> *See discussion, infra.*

are not interexchange or local exchange telephone services. These services include club memberships, subscriptions for psychic, personal, travel, or 900-number services, and voice mail.<sup>9</sup>

The Commission's proposed definitions of basic local and interexchange services and those services that are "closely related" are not sufficiently clear for billing aggregators to determine which services are included and which services are exempted. These categories thus need further refinement to clarify the scope of the rule.

1. The Commission Should Adopt the FCC's Categories of Basic, Enhanced and Adjunct-to-Basic Telecommunications Services

To resolve this problematic aspect of the "telephone-billed purchase" definition, which is critical to the application of the Commission's rules, the Commission should amend the definition by adopting the FCC's three categories of telephone services: basic, adjunct-to-basic and enhanced. The Commission should exclude FCC-defined "basic" and "adjunct-to-basic" services from the scope of its rules.

The FCC first established a distinction between "basic services" and "enhanced services" in its 1985 decision in *Computer II*.<sup>10</sup> In *Computer II*, the FCC defined basic services as "the common carrier offering of transmission capacity for the movement of information."<sup>11</sup> In general, a basic service transmits information generated by a customer from one point to another, without changing the content of the transmission. Thus, the "basic" service category is intended to define the transparent transmission capacity that makes up conventional communications service.

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<sup>9</sup> Notice at 58541.

<sup>10</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) ("*Computer II*").

<sup>11</sup> *Id.* at 419.

Because the FCC considers “basic” services to be “wholly traditional common carrier activities,” such services are regulated under Title II of the Communications Act of 1934.<sup>12</sup> Among other provisions, Title II requires that basic interstate and international services be offered pursuant to tariffs at fully disclosed rates. Under FCC rules, therefore, basic services include local calls, 1+ calls, 0+ calls, dial-around calls, calling card calls, paging services, 800 calls and any other services that consist simply of the direct transmission of information.<sup>13</sup>

The FCC defined “adjunct-to-basic” services through its determination that a variety of Centrex services<sup>14</sup> would be regulated as common carrier services, despite a certain level of customer interaction with the switch (or computer) to route or forward voice calls.<sup>15</sup> Such services, the Commission determined, were “adjunct” to basic service and should be regulated as basic service, although they could not be classified as “pure” transmission service.<sup>16</sup> Under the FCC’s decision, a service will be considered an adjunct-to-basic service, and be subject to regulation if the service is: (1) intended to facilitate use of traditional telephone service, and (2) does not alter the fundamental character of telephone service, despite other characteristics that

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<sup>12</sup> *Id.* at 435. *See also* 47 U.S.C. §§ 201 et.seq.

<sup>13</sup> *See Computer II* at 420. In addition, basic services would include monthly fees that are charged for the provision of basic services, because such fees are regulated under Title II of the Communications Act of 1934. However, if the monthly fees were for Internet access or other enhanced services, those fees would be considered enhanced services.

<sup>14</sup> Centrex is a single line telephone service used by businesses, in which service is delivered to individual desks, with added features. These features include intercom, call forwarding, call transfer, toll restrict, and call hold.

<sup>15</sup> *North American Telecommunications Association*, 101 FCC 2d 349, 359-61 (1985) (“*Centrex Order*”).

<sup>16</sup> *Centrex Order* at 360.

might classify the service as enhanced.<sup>17</sup> This category includes services such as call forwarding, call waiting, directory assistance, caller ID, call blocking, call return, repeat dialing, and call tracking.<sup>18</sup>

The FCC defined “enhanced services” as services that are offered over common carrier transmission facilities used in interstate communications, which “(1) employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; (2) provide the subscriber additional, different or restructured information; or (3) involve subscriber interaction with stored information.”<sup>19</sup> The FCC concluded that regulation of enhanced services is unwarranted because the market for those services is competitive and consumers benefit from that competition.<sup>20</sup> Since the passage of the 1996 Telecommunications Act (“Act”), the Commission clarified that information services, as defined in the Act, would constitute “enhanced services” as defined by the FCC.<sup>21</sup> Accordingly, among others, enhanced services include voice mail, interactive voice response, facsimile store and forward, alarm monitoring service and Internet services.<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *See Centrex Order* at 359-60, 366-67

<sup>19</sup> 47 C.F.R. 64.702(a).

<sup>20</sup> *Computer II* at 433.

<sup>21</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501, 11520 (1998) (“*Report to Congress*”).

<sup>22</sup> *See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion and Order, 84 FCC 2d 50, 54-5 (1980); *Report to Congress*, at 115636-40.

The Commission should exempt from the definition of “telephone-billed purchase” all basic and adjunct-to-basic services, so that “telephone-billed purchase” would include only products and services that the FCC defines as enhanced. This exemption would accomplish several important purposes. First, categorization of services would provide industry members and consumers clear direction as to the charges, products and services included by the definition. Second, categorization would ensure consistency between the regulations established by the FCC and the Commission. Finally, adopting the FCC’s categorization of telecommunications services would cast the appropriate net around the products targeted for regulation.

As the Commission recognized in its Notice, cramming issues have tended to arise with “product” type services, including club memberships, or subscriptions for psychic, personal travel or 900-number services.<sup>23</sup> CERB’s proposed amendment to the definition would ensure that all such products and “enhanced services” are included in the definition and thus, subject to the Commission’s regulation. However, the categorization will ensure that basic local and interexchange services are excluded from the definition as intended by the Commission’s proposed rules. This amended definition will further the public interest by more accurately targeting the products and services that have caused consumers cramming problems.

Moreover, this amended definition will avoid the potential overlap in regulation that could result from the Commission’s current definition. Because basic and adjunct-to-basic services are currently subject to Title II regulation by the FCC, further regulation from the Commission is unnecessary and could result in confusing and inconsistent requirements.

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<sup>23</sup> Notice at 58541.

If the Commission declines to adopt the FCC’s categories of service, it must define “local exchange service” and “interexchange service” to clarify what charges and services such terms include. The Commission also would have to further define the phrase “closely related to the provision of local exchange services or interexchange services.” As explained above, the current explanations of the exempted services are not sufficient to provide clarity as to the charges and services included in the definition.

Adopting the FCC’s categories of services would provide a simple solution that the industry and consumers could easily understand and follow. If the Commission declines to adopt the FCC categories, at the very least, the Commission must provide clearer terms to its definition of “telephone-billed purchase.”

2. Presubscription Agreements Should Not Necessarily Require PINs

In addition to exempting local exchange and interexchange telecommunications services from the definition of “telephone-billed service,” the Commission also exempts purchases and charges pursuant to presubscription agreements.<sup>24</sup> CERB agrees that charges incurred pursuant to presubscription agreements should be excluded from the definition. Furthermore, CERB urges the Commission to modify the definition of a presubscription agreement so that a personal identification number (“PIN”) is not required where a service or product (1) cannot feasibly integrate the use of a PIN and (2) is provided pursuant to a written agreement.

As the definition is currently drafted, a presubscription agreement requires the use of a valid PIN, which is a unique number or code provided exclusively to the customer.<sup>25</sup> Use of a PIN

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<sup>24</sup> Notice at 58542.

<sup>25</sup> Notice at 58537-38.

number for certain services, however, is simply not feasible. For example, some paging and wireless telephone services (to the extent the Commission were to define them as telephone-billed purchases) are structured so that the consumer is billed for each incoming page or call. Each person who pages or calls the consumer thus causes a charge to appear on the consumer's bill. The PIN number, however, would likely not be known or available to those desiring to send a page or call a person on a wireless telephone. Thus, the PIN requirement unnecessarily limits the types of services that could be exempted from the definition of "telephone-billed purchase" through the use of a presubscription agreement.

Furthermore, requiring a PIN number where a written agreement already exists is not always necessary to promote the Commission's purposes. When the Commission provided an exemption for presubscription agreements, it wisely determined that if a customer has contractually agreed to be charged for a service, such a service does not require the same level of protection as a "telephone-billed purchase." Given that most paging and wireless telephone customers have signed contracts with providers that would otherwise constitute "presubscription agreements," paging and wireless telephone services and other services that present barriers to the use of a PIN should not be subject to a PIN requirement.

**B. The Commission Should Amend Its Definition of Pay-Per-Call Service  
[308.2(g)]**

The Commission's definition of "pay-per-call services," like its definition of "telephone-billed purchase," should be clarified to allow meaningful exemptions for basic and adjunct-to-basic local and interexchange service. It is apparent from the Notice that the definition is intended to target audio information or audio entertainment services, which are often the recipient of consumer

complaints.<sup>26</sup> CERB agrees with the Commission that, where consumers pay to receive audio information and audio entertainment services, those services should be subject to the regulations. However, as with the definition of “telephone-billed purchase,” the definition of “pay-per-call services” is so broad and confusing that it threatens to encompass services that are basic interexchange or local services, already regulated by the FCC, and plainly, should be beyond the scope of these regulations.<sup>27</sup>

Accordingly, the Commission should adopt the FCC categories of telephone services and should specifically exempt basic and adjunct-to-basic services from the scope of the “pay-per-call services” definition. Such exemptions would ensure clarity and understanding of the regulations and would target the regulations to the appropriate services.

**C. CERB Supports the Commission’s Proposed Definition of Billing Entity  
[308.2(a)]**

CERB endorses the Commission’s proposed broad definition of the term “billing entity.” The definition correctly assumes that all industry participants, including LECs, billing aggregators,

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<sup>26</sup> See Notice at 58533-35.

<sup>27</sup> In addition, CERB notes that it may not be wise at this time to define an exemption in terms of whether a service is tariffed. In its definition of “pay-per-call services,” the exemptions include “tariffed directory services.” Although CERB understands the Commission’s intention, the FCC intends to detariff services provided by nondominant carriers in the near future. See *in the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61, 12 FCC Rcd 15014 (1997). Therefore, the Commission should exempt directory services from the definition of pay-per-call services and remove the word “tariffed.” CERB notes that this problem would also be resolved by its suggestion to adopt the FCC’s categorization of telecommunications services. Because directory services are adjunct-to-basic telecommunications services, such services would be exempt from the definition of “pay-per-call services” pursuant to CERB’s suggestion.

service bureaus and vendors, are links in the chain of billing for telecommunications products and services and thus each should bear responsibility commensurate with its function in the industry.

As the Commission has recognized, billing aggregators should be responsible for their consumer inquiry service or for statements of debt that their customer service representatives make to consumers.<sup>28</sup> Accordingly, CERB supports the proposed definition of billing entity, which makes clear that billing aggregators take on a special responsibility to ensure consumer protection and to help resolve consumer disputes upon being contacted by a consumer. This result is consistent with the goal of the proposed rule, which is to prevent a consumer from being passed from one company to another with each denying responsibility. Furthermore, as pointed out in Section D, below, billing aggregators are most properly defined as “billing entities” rather than “service bureaus” because they typically are not involved with the vendors’ products and services, but simply act as conduits that electronically transmit charges from the vendor to the LEC.

Billing aggregators and LECs each have recognized their obligations to monitor the quality of marketing materials and the sales practices of vendors to the full extent of their ability. Both LECs and billing aggregators have industry standards that promote: (1) pre-screening of vendors, products, and services; (2) continuing review of vendors’ practices; (3) use of specific methods to ensure consumer authorization for billing; (4) consumer satisfaction; and (5) termination of contracts with troublesome vendors.<sup>29</sup> These types of activities reflect the extent to which LECs and billing aggregators can exercise some control over vendors’ practices, products, and services

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<sup>28</sup> See Notice at 58530.

<sup>29</sup> See CERB Standards of Practice (attached); LEC Best Practices Guidelines (July 22, 1998).

at the front end -- and later when problems become evident -- but cannot exercise control over the day-to-day activities of the vendors for whom they bill. If a vendor has successfully passed through all the screening and monitoring exercises, it is difficult for billing aggregators and LECs to anticipate that a problem may arise.

**D. The Commission Should Amend Its Definition of Service Bureau [308.2(n)]**

As explained in the Notice, the Commission modified its definition of “service bureau” to include billing aggregators.<sup>30</sup> The Commission has recognized that billing aggregators are different from the “traditional service bureaus,” that have played an essential role in the growth of audiotext, but nonetheless included billing aggregators specifically in the definition of service bureau.<sup>31</sup> CERB urges the Commission to reconsider this determination.

Billing aggregators perform a fundamentally different service from traditional service bureaus. Billing aggregators maintain no control over the functions or content of audiotext or telephone services for which they provide billing. Accordingly, billing aggregators should not be held to the same vicarious liability standard, discussed below at IV.B., as traditional service bureaus. In the Notice, the Commission lists the following services to define “service bureaus:” voice storage, voice processing, call processing, billing aggregation, call statistics, and call revenue arrangements or prepackaged pay-per-call investment opportunities.<sup>32</sup> Of these functions, voice storage, voice processing, call processing and call statistics are truly functions essential to creating a pay-per-call service. In performing these services, traditional service providers become

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<sup>30</sup> Notice at 58540.

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

intertwined with vendors and the services they provide. Billing aggregators perform a fundamentally different function. They exercise no control over the facilities through which the vendor creates or provides the service to the customer. In fact, by the time the billing aggregator receives the calling records, the service already has been provided.

Billing aggregators act as a mere conduit, electronically transmitting billing records from the vendor to the LEC. These billing records exist in a standard electronic format that provides no evidence as to their legitimacy. Billing aggregators view a package of data, much like a postal carrier views a package of goods as it is transferred from one entity to another. Like a postal carrier, a billing aggregator is not involved in the creation of the package, nor should it be expected to know its contents. Given that the billing aggregator merely transmits to the LEC information *given to it by the vendor*, it should not be considered a service bureau, nor held to the same standard of liability as an entity involved with or in control of the functions that are essential to providing services to consumers.

Further, the Commission should provide a more detailed explanation of the services that qualify an entity as a “service bureau.” The proposed list of services fails to define the nature of each service. Without further definition, the categories are so overbroad as to encompass services not contemplated by the Commission. For example, under the Commission’s standard, it is possible that traditional interexchange service providers would be considered service bureaus because they provide “call and minute counts,” which may be considered “call statistics.”

Finally, CERB supports the Commission’s modification of the definition of service bureau to include common carriers which act as service bureaus.<sup>33</sup> There is no public policy reason to

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<sup>33</sup> See Notice at 58540-41.

create a loophole for common carriers that would otherwise satisfy the definition of service bureau. CERB commends the Commission for imposing liability equally among common carriers and non-common carriers.

**E. The Commission Should Clarify Its Definition of Vendor [308.2(t)]**

Because the definition of telephone-billed purchase is unclear, the definition of vendor also becomes unclear. Although the proposed rule purports to exempt local and interexchange services from the definition of telephone-billed purchase, LECs and interexchange carriers (“IXCs”) would, in fact, be deemed vendors of certain interexchange and local services. For example, if “800” service is included in the definition of telephone-billed purchase, then IXCs become vendors for purposes of the rule. If the Commission determines, as CERB urges, that basic and adjunct-to-basic services are not within the scope of the rule, it would follow that providers of those services would not be vendors for purposes of the rule. Thus, the Commission should clarify the definition of “vendor” to exclude the basic and adjunct-to-basic services described above in Section A. This clarification is important to billing clearinghouses because they need to identify the entities that are “vendors” and thus assess the extent of their liability under the rule.

**IV. SUBSTANTIVE OBLIGATIONS PURSUANT TO THE REGULATIONS**

**A. The Commission Should Modify the Express Authorization Required Provision to Make Clear What Criteria It Will Consider When Determining Whether a Billing Entity “Should Have Known” that a Charge Was Unauthorized [308.17]**

This provision states that it is a deceptive act or practice and a violation of these rules for any vendor, service bureau, or billing entity to collect or attempt to collect, directly or indirectly, payment for a telephone-billed purchase where the vendor, service bureau or billing entity knew or

should have known that the charge was not expressly authorized by the person from whom payment is being sought.<sup>34</sup> The Commission should modify this provision to make clear what criteria it will consider when determining whether a billing entity “should have known” that a charge was not expressly authorized. Further, the Commission should establish a rebuttable presumption that where a billing entity adopts decisive, affirmative pre-screening and monitoring procedures, it is not subject to “should have known” liability. Clarification of the “should have known” standard is necessary to allow billing entities to assess the extent of their liability under the rule. In the face of an indeterminate standard, billing entities who wish to avoid liability may be forced to constrain their billing for startup telecommunications vendors to such a degree as to inhibit the growth of competition.

### **1. Ascertaining “Should Have Known” Liability**

While it is fair to hold billing entities responsible when they “know” billing without express authorization is occurring, it is not at all clear when a billing entity “should have known” that a consumer has been billed without express authorization. Although billing entities form a critical link between the vendor of services and the telephone bill through which consumers are charged for those services, billing entities are not a party to the transaction between vendors and consumers. As such, billing entities can play an important, but necessarily a limited role in protecting those consumers from unauthorized billing. Given this fact, the nature of the liability facing billing entities must be appropriate to the level of oversight billing entities can successfully assert.

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<sup>34</sup> See Notice at 58548-49.

Clearly, however, billing entities cannot turn a blind eye to the practices of their vendors. Billing entities can exercise some degree of control over their vendors and the products and services they provide, particularly at the inception of billing for a new provider, program or service. For example, billing entities can insist that their vendors' marketing materials, including advertisements and sales scripts, are not misleading. Billing entities also can demand that vendors submit only clear, honest product descriptions ("text phrases") for inclusion on LEC bills. Once a billing entity has screened and accepted a vendor, however, it becomes difficult for that billing entity to know with certainty whether the vendor is keeping up the high standards to which it agreed at the outset.

Billing entities employ a variety of quality control methods to ensure that vendors are maintaining approved marketing materials and are billing only authorized charges. For example, entities spot check vendors by "ordering" products or services incognito, then taking note of whether proper authorizations are made. When billing entities are made aware of complaints, they take corrective action with the vendor including, if necessary, terminating a billing contract. Despite these efforts, it is possible for even the most responsible and stringent billing entity to receive a relatively small number of inquiries or complaints from consumers. The existence of a few complaints for a vendor that bills literally millions of records should not constitute sufficient notice so that a billing entity "should have known" that those or other charges are unauthorized and thus trigger liability. On the other hand, providing service for historically disreputable vendors or permitting vendors to employ deceptive sales tactics or confusing service programs should result in liability where the billing entity could have and should have acted to protect consumers.

## 2. **The FTC Should Establish a Rebuttable Presumption of Responsible Behavior**

Where a billing entity makes a real effort to screen providers and programs and to monitor ongoing activities and, nonetheless, a bad actor successfully deceives both the billing entity and the consumer, it is not appropriate to hold the billing entity liable for the vendor's deceptive acts. The "should have known" provision, unfortunately, is necessarily subjective and open to interpretation. The Commission should make that standard less indeterminate by establishing a rebuttable presumption that where a billing entity takes decisive, affirmative steps to prevent the billing of unauthorized charges, the entity could not reasonably have known that a vendor billed a charge that was not expressly authorized by an individual consumer. In order to establish the presumption, billing entities would have to undertake two distinct and important activities with regard to each vendor and the services and products it provides: (a) pre-screening and (b) compliance monitoring. Outlined below is CERB's proposal of specific actions a billing entity must take to avail itself of the presumption that it could not reasonably have known that charges were billed without express authorization.

### a. **Pre-screening of Providers and Services**

Because billing entities simply cannot participate in or monitor each vendor's individual sales to millions of consumers, it is all the more critical for billing entities to scrutinize carefully and thoroughly their vendors and the products and services for which they bill *before* they sign contracts to begin billing. This rigorous pre-screening benefits consumers by preventing unscrupulous or careless vendors from attempting to bill charges that are not authorized in the first place.

Billing entities that want to take advantage of the presumption must, as a precondition for any business relationship, pre-screen all prospective vendors and the programs, products and services they offer. In order to establish the responsibility of the parties, billing entities must require the names of the vendor's officers and principals, and proof of corporate or partnership status. Further, to establish that vendors are operating in good standing, billing entities must require vendors to produce: copies of state and federal regulatory certifications as required; foreign corporation filings as required; and any information regarding whether the vendors and their affiliates (and/or their officers or principals) have been subject to prior conviction for fraud. Billing entities must require that vendors produce tariffs on request. Finally, in order to establish a record of which contractors the vendors themselves are using, billing entities that wish to avail themselves of the presumption must require vendors to provide the names of their telemarketing companies and third party verification companies.

Once billing entities have found that vendors are operating in good standing, they must also examine the vendors' programs, products and services. To that end, billing entities must require their vendors to provide the marketing materials and advertisements (print or other media) that are used to attract consumers. Billing entities must require vendors to provide the scripts they plan to use for both sales and validation, and the text phrase they intend to use on consumer telephone bills. Billing entities must also require vendors to provide the package of information sent to a consumer once an order is made (the "fulfillment package"). Importantly, billing entities must require that this information include cancellation information if it is not included elsewhere and a toll-free customer service telephone number. The provision of this information will help ensure

that consumers can obtain complete information about a service and, if necessary, cancel it immediately.

Billing entities must also require their vendors to maintain records and information sufficient to allow third parties or regulatory entities to investigate and respond to consumer inquiries. Thus, vendors must be required to create and maintain for a period of not less than eighteen months records containing information sufficient to verify the sale, including written or recorded verification information, as applicable.

Finally, billing entities wishing to subject themselves to the presumption must require vendors to inform them of the type of consumer authorization they plan to use. The only acceptable methods are: independent third party verification; a signed authorization; or a voice recording of the telephone sales authorization. A valid authorization must include the date of the transaction; the name, address and telephone number of the consumer to be billed; a statement that the consumer is qualified to authorize billing; a description of the product or service; a description of the applicable charges; the vendor's refund policy, if any, or if none, the fact that refunds will not be granted; an explicit consumer acknowledgment that the charges for the product or service will appear on the telephone bill; and the acceptance by the consumer of the offer.

Pursuant to the presumption, billing entities must also refuse to provide billing for vendors employing practices that are likely to confuse or even mislead consumers. These practices include box, sweepstakes, or contest-type entry forms, negative option sales offers, 800 pay per call, and collect callback.

Billing entities must maintain an internal standards committee to review the information collected for both providers and programs and determine whether to accept a vendor or its

program, product or services. Members of the committee must not have a vested interest in the acceptance of a vendor, service, product or program.

It is important to note that billing aggregators are not the only billing entities who stand as a gatekeeper of the bill page. LECs also guard entry to the bill. With few exceptions, billing aggregators are not permitted to submit records for a vendor without approval from the LEC, based on the LEC's own investigation of the vendor and its product, service, and the intended text phrase. Where both the billing aggregator and the LEC have independently reached the conclusion after reasonable due diligence that the vendor and its marketing programs are reputable and competent, it is only fair that a presumption in favor of both billing entities be applied in connection with implementing the proposed cramming penalties.

Even in cases where a billing entity has properly implemented all of the pre-screening measures recommended by regulators and industry experts, it may nonetheless be defrauded by an unscrupulous vendor who has submitted false or recklessly inaccurate information during the pre-screening process or has substantially deviated from the material presented during pre-screening. At this point, the billing entity is also at financial risk due to the high volume of chargebacks and bad debt likely to occur on the account. In most instances, the vendor will either go out of business or switch to another means of billing, and thus avoid paying its negative balance with the billing entity. It is counterproductive and unreasonable to further penalize the billing entity by holding it liable for the actions of the rogue vendor when all precautions by the billing entity and the LECs failed to prevent deliberate vendor fraud.

**b. Compliance Monitoring**

Even though a billing entity implements all of the above practices, in order to be subject to the presumption of lawful behavior that entity must also show that it has appropriately and successfully performed its screening function. Ultimately, that test is not met if consumers continue to be victims of cramming. Thus, billing entities that wish to avail themselves of the presumption must engage in continual monitoring of vendors. Further, billing entities must share with each other and, upon request, with federal and state enforcement agencies, information learned while monitoring vendors and their practices, so that vendors cannot repeat errant practices undeterred. This information should include: (1) a description of practices relating to cramming that the billing entities have encountered; and (2) aggregate data with regard to complaints filed with federal and state government authorities received by each billing entity.

While it is impossible for a billing entity to control every sale made by a vendor, in theory where a billing entity receives a disproportionate number of consumer inquiries or complaints (either directly or through a regulatory body or another billing entity), the billing entity is then put on notice that the vendor may be engaging in unlawful activity. Successfully monitoring compliance is complicated, however, by the fact that there may be a substantial time lag between when a billing entity accepts what may prove to be an unauthorized charge from a vendor, the date such a charge appears on a consumer's statement, and the date on which the billing entity actually becomes aware of a problem through a communication from a consumer, a LEC, or a regulator. The Commission should take this time lag into account when assessing whether a billing entity "should have known" of unlawful activity.

The billing process begins when a consumer initiates a purchase with a vendor and the vendor then forwards the resulting charge to the billing entity and ultimately to the LEC. Once

received by the LEC, the record is then held in suspense for inclusion on the consumer's next billing statement. Once the bill is actually mailed, it is typically paid within thirty days, during which time most consumers who question a charge will do so. The entire process, however, can take sixty to ninety days. If the consumer contacts the LEC instead of the billing entity, and an adjustment is made, the billing entity may be notified even later (via regular electronic reports shipped back to the billing entity). Some LECs, however, do not itemize such credits, making it impossible for the billing entity to determine the source of the problem.

If the consumer calls the vendor directly and the vendor issues a credit, the billing entity will not receive notice that a credit is due until the next regular shipment from the vendor is received and processed. Thus, although vendor-issued credits provide an opportunity to monitor the conduct of the vendor, the time lag is again about sixty days. Even this does not address the worst offenders, since the first regulatory complaints by individual consumers typically are lodged when a consumer does not receive a satisfactory explanation or resolution of the charge from the vendor. Only where the consumer calls the billing entity directly to make an inquiry can the level of consumer complaints be monitored within the first sixty days of the billing cycle. Other than that, the billing entity has no way of knowing that the vendor is not handling its customer service or marketing responsibly until after complaints are processed and reported to the billing entity by LECs, consumers, the FCC or other federal or state agencies.

Notwithstanding the amount of time it takes to clear bills that have already been submitted, there may also be a lag time caused by the consumer's or regulatory agency's delay in reporting the complaint to the billing entity. Naturally, this lag time is unpredictable. Thus, by the time a high level of consumer complaints comes to the attention of the billing entity, the problem usually

has had at least ninety days to develop and become worse, with the unwitting billing entity accepting new records for billing from the offending vendor throughout. Billing entities are eager to make consumers whole and appropriately to discipline offending providers (including by terminating contracts, where appropriate), but regulators should be aware of the business realities inherent in the billing process and apply the “should have known” standard accordingly.

While compliance monitoring can result in the vendor being disciplined or terminated, such actions are not always warranted and should not necessarily preclude that vendor from participating in the market after correcting its practices. Further, the failure of a billing entity to terminate or refuse service to a vendor should not be viewed as a sign that the billing entity is endorsing errant behavior. Often a vendor, with guidance from an experienced billing entity, can modify its marketing plan to reduce consumer confusion and to enhance verification methods. Thus, the vendor may become a viable, lawful competitor in the marketplace. This is particularly the case with a startup vendor that enters the market with a business plan that proves unworkable and causes consumer inquiries or complaints. Once amended with the help of the billing entity, this business may become quite successful and consumer friendly. To essentially black list all vendors that run into trouble at some point in their history would stifle competition and innovation at the levels where it is most likely to occur -- the stratum of small startup companies.

### **3. Implications of an Overbroad Liability Standard**

Failure to clarify the “should have known” standard in a way that allows billing entities to assess their potential liability, or to create a presumption of responsible behavior, could force billing entities to police the acts of their vendors to a degree that, in addition to yielding negligible benefits, would be neither economically feasible nor commercially practical. This policing would

increase the cost of billing and thus raise the existing barriers to entry for new market entrants. An increase in the cost of billing also would harm small existing vendors who compete with LEC-provided ancillary services for whom billing costs are de minimus because they have special access to the LEC bill. Consistent with the Commission's dual role as protector of consumers and promoter of competition, the Commission should guard against such a result.

**a. No Feasible Level of Policing Will Ensure Compliance with an Overbroad Liability Standard**

No amount of policing by billing entities can create absolute certainty that a consumer will never be billed without express authorization. While billing entities employ various methods of monitoring vendors and their products and services, several factors prevent monitoring from being foolproof. Billing entities often spot check vendors by calling and “ordering” products to identify problem vendors or sales programs. There are limits, however, to how frequently entities can check the actual sales practices of their vendors. Furthermore, an unscrupulous vendor may change a sales program during a time period where no spot check is made. Resource limitations also present a barrier to foolproof spot checking. One billing clearinghouse alone bills for over 400 vendors. It is simply impossible to cover all these vendors and all their telemarketers on a day-to-day basis.

Nor can billing entities ensure absolute compliance by tracking authorizations themselves. This would require billing entities to collect authorization records of the charges that are submitted by service providers in case they are called upon to prove a charge is authorized. Even if billing entities were able to collect these records, storing and accessing millions of authorization records would be logistically impossible; it would require huge volumes of tapes and authorization letters to be managed by billing entities who are not equipped to do so. Further, given that these records are already stored by service providers, requiring billing entities to generate them would be redundant.

Finally, while a spike in complaint levels fairly puts a billing entity on notice that charges that have not been authorized are nonetheless being billed, there is no reliable mathematical

formula for assessing when a problem exists; complaint levels, adjustment levels, or inquiry levels all are imprecise indicators. First, where a billing entity attempts to use complaint levels to gauge unlawful activity, it quickly becomes clear that even the definition of “complaint” is variable. Of course, a billing aggregator that receives a call directly from a consumer can categorize a report of unauthorized billing as a complaint. LECs and regulators, however, sometimes categorize any inquiry as a complaint. Second, the level of monetary credits or adjustments LECs apply to consumer bills is not a reliable indicator of the level of unauthorized charges because LECs routinely give automatic credits to consumers who make billing inquiries. Giving such credits costs little to the LECs because credits are debited from the billing aggregator’s account, and giving automatic credits creates good will for the LEC within its customer base. Finally, inquiry levels are not a reliable indicator because mere inquiries may be made for a variety of legitimate reasons. For instance, a consumer may make a 10-10-XXX call, then fail to recognize the charge upon receiving the bill, or may even call simply to inquire about how a service works. None of these methods of policing is so useful or so likely to succeed that imposing it would create a net public policy benefit.

**b. Competitive Effects of an Overbroad Liability Standard**

An overbroad liability standard would result in several undesirable competitive effects. For example, faced with an undefined liability risk, billing entities may refuse to bill charges for legitimate, but untested, market segments. Without access to affordable billing services, new market entrants would find it hard to gain a foothold. At least one billing aggregator has already made a policy decision not to bill for Internet access because that aggregator has no way of knowing how many complaints -- if any -- will be generated by those services. Internet access is a

legitimate competitive service and is even offered on the direct long distance bills of some IXC's. Further, LECs offer their own Internet access services on their own bills. But without billing aggregation, many small Internet access providers will have no feasible means to bill for their services and competition in that market segment will be thwarted. Even though Internet access is a robustly competitive market segment -- featuring 6,000 to 7,000 market participants -- many large Internet access providers, including LECs and IXC's, could quickly threaten to overshadow the small market players. The Commission should guard against this result by declining to impose a level of liability so severe that it chills competition by inhibiting access to billing and collection.

Finally, on a technical note, it is CERB's understanding that "Express Authorization Required" imposes only direct, and not vicarious, liability on the entities therein. Thus, a vendor would be exposed to liability only for the act of the vendor itself, a service bureau for its own act, and a billing entity for its own act. To clarify, a billing entity thus would not be liable, under this section, for a charge that a vendor knew or should have known was not expressly authorized. The Commission should make a technical modification to this provision to clarify that a billing entity is not liable where the vendor knew or should have known, but only where the billing entity itself knew or should have known that a charge was not authorized. This clarification could be made by changing the word "the" to "that." The provision would thus read, ". . . it is a deceptive act or practice and a violation of these rules, for any vendor, service bureau, or billing entity to collect or attempt to collect . . . payment for such a telephone billed purchase where *that* vendor, service bureau or billing entity knew or should have known that the charge was not expressly authorized . . ." This minor technical alteration would ensure that the Commission's intent is fulfilled.

**B. Billing Aggregators Should Not Be Subject to Service Bureau Liability [308.16]**

The proposed Section 308.16 imposes liability on service bureaus for violations of any part of the proposed rules by a pay-per-call vendor where the service bureau knew or should have known of the violation.<sup>35</sup> This is far broader liability than is created under Section 308.17 which, by contrast, imposes liability on billing entities who know or should have known that a charge is not expressly authorized. CERB urges the Commission to distinguish carefully the appropriate level of liability which should be applied in light of the relationship of the parties.

For many of the same reasons that billing aggregators should not be included in the definition of service bureau, they also should not be subject to the broad liability imposed by section 308.16. As noted in the above discussion of the service bureau definition, billing aggregators do not contribute their facilities to the marketing or content of a product or service and thus they lack the degree of involvement and control upon which the broad service bureau liability can be based. If the Commission chooses to adopt the proposed definition of service bureau, however, it should at least recognize that billing aggregators are not related to the businesses of their vendors, as traditional service providers are, and thus should not be subject to the same “should have known” liability standard.

Under the service bureau liability proposal, billing aggregators would be liable where they “should have known” of any vendor’s violation of the rules – ranging from the requirement that a pay-per-call disclosure must be read at a certain speed<sup>36</sup> to the requirement that a pay-per-call

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<sup>35</sup> Notice at 58548.

<sup>36</sup> See 308.3.

television advertisement must be aired during a time period when more than 50 percent of the audience is composed of persons over the age of 12.<sup>37</sup> While the Commission may intend to impose such liability on traditional service bureaus, who may have reason to know of violations because their businesses are intertwined with their vendors' provision of pay-per-call service, this liability standard should not apply to billing aggregators who provide mere billing aggregation and thus have less opportunity to become aware of violations by vendors.

For example, a traditional service bureau may be involved in the creation or dissemination of the preamble, or in setting up a pay-per-call preamble in such a way that the consumer is not billed until the content begins, and thus may bear some responsibility if that preamble is misleading or if the consumer is charged for listening to it. While billing aggregators take responsibility for pre-screening and monitoring vendors' scripts and marketing materials, they lack the proximity and control that mark a vendor's relationship with a traditional service bureau.

The dangers inherent in imposing "should have known" liability for unauthorized charges under Section 308.17 are intensified here. As discussed above, a vague or overly-broad liability standard makes it difficult for billing aggregators to assess the extent of their liability under the rule. In order to avoid liability, billing aggregators are likely to constrain their billing for startup telecommunications vendors and thus stunt the growth of competition. Furthermore, the costs of complying with an indeterminate standard are inordinately high, and would drive up the cost of billing services to small vendors and ultimately consumers. At bottom, it is unreasonable to apply the same level of liability to billing aggregators as is applied to service bureaus who exercise a greater degree of control over the provision of pay-per-call service.

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<sup>37</sup> See 308.5.

Accordingly, the Commission should either remove billing aggregators from the definition of service bureau or it should create a more limited liability standard for billing aggregators. That standard should recognize that liability should be imposed in proportion to the degree of control an entity may exercise over the provision of pay-per-call service.

**C. The Commission Should Modify the Multiple Billing Entity Section [308.20(n)]**

The Commission proposes that when there are multiple billing entities, only one need give the required disclosures and dispute resolution information and that the entities “shall agree” among themselves which billing entity will receive and respond to billing errors, inquiries and complaints.<sup>38</sup> This approach is problematic and should be modified. As an initial matter, this provision blurs the disclosure and dispute resolution elements with the consumer service functions of receiving and responding to billing error notices. These two sets of functions should be separate, and a different entity could be responsible for each. It is likely that LECs will be selected by the various entities to perform the required disclosures. This makes sense because LECs control the format and content of the local telephone bill and already include certain notifications in those bills. As to receiving and responding to billing errors, billing aggregators are better suited than LECs, in many cases, to perform this function. Billing aggregators already contract to answer customer inquiries and provide credits where necessary. Billing aggregators’ toll-free numbers are listed alongside the charges they bill on the consumer bill, and aggregators have the information necessary to answer consumer questions.

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<sup>38</sup> 308.20(n).

Billing aggregators should be allowed to continue to play this role, but the “multiple billing entity” section threatens their ability to do so. Although that section provides that entities will “agree among themselves” which entity should receive and respond to billing error notices, realities in the market place may result in LECs unilaterally seizing that function to their benefit. Due to their status as the single-source provider of the local telephone bill, LECs exercise a disproportionate amount of power over billing aggregators. Thus, if LECs view receiving and responding to consumer complaints as a valuable role, there is little chance that there will be true “agreement” as to who should play that role. If LECs indeed are given the power to play that role, they will be eager to give automatic credits, rather than investigate consumer claims of billing error. Giving credits inures to the benefit of the LEC because it creates good will with consumers, and is virtually costless to the LEC. On the other hand, the automatic credit hurts vendors who have legitimately placed a charge on the bill. Any credits that are given to consumers are charged back against billing aggregators and vendors. LEC policies then prohibit those charges from being rebilled on the LEC bill, even where later shown to be legitimate.

LECs also have competitive incentives to grant automatic credits: these credits will be charged against the accounts of providers who compete with LECs for voice mail, caller ID, Internet access, wireless and many other services. To the extent that LECs create costs for their competitors, they increase their own opportunities for success.

The Commission clearly intends that billing entities either give a credit or conduct an investigation upon receipt of a billing error notice;<sup>39</sup> this intent should not be thwarted. The Commission should thus modify the rule to prevent LECs from leveraging their size to become the

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<sup>39</sup> 308.20(c)

recipient of billing error notices and thus the arbiter of disputes. Instead, billing aggregators should be designated to receive and respond to billing error notices where they have contracted to perform customer inquiry service for a given vendor.

Thus, the rule should read:

(n) *Multiple billing entities.* (1) If a telephone-billed purchase involves more than one billing entity only one set of disclosures need be given, and the billing entities should agree among themselves which billing entity must provide such disclosures; (2) however, where a billing aggregator is designated by a vendor to provide customer inquiry service for that vendor, the billing aggregator shall be the billing entity designated to receive and respond to billing error notices related to charges by that vendor.

**D. Dispute Resolution Procedures Should Be Reserved for Disputes [308.20(c)]**

CERB shares the Commission's goal of ensuring that consumers have access to effective dispute resolution procedures so that they can readily gain information about unfamiliar or erroneous charges and can conveniently recover if a billing error has occurred.

Clearly, in the event of a dispute, a consumer must have the right to an investigation, an answer, and a remedy. It is critical to clarify, however, that the dispute resolution procedures are intended for use in the event of a dispute; they should not be triggered by every consumer inquiry, however informational in nature. While the rule apparently assumes a dispute, it fails to make this assumption explicit. Section 308.20(c), as proposed, guarantees dispute resolution protections to any consumer who has initiated a billing review by providing the billing entity with a notice of billing error. As the rule is proposed, however, a mere inquiry results in the billing entity's either having to grant the consumer a credit or suspend the charge and conduct an investigation. Once the investigation is completed, the billing entity will be required to provide a detailed, written explanation to the customer.

An investigation and written response are simply not necessary where a consumer has merely inquired about a charge and received a satisfactory answer as to why the charge is on the bill. Many consumer inquiries are resolved this way. A requirement that all inquiries, most of which can be resolved in a few minutes over the telephone, trigger the dispute resolution procedures would be unnecessary and also extremely costly for billing entities and vendors. Thus, the Commission should modify the dispute resolution procedures to make clear that those procedures apply only in the event of an actual dispute and do not apply to mere inquiries that are resolved by customer service staff.

A further pitfall of the proposed dispute resolution procedures is that they will encourage the LEC practice of indiscriminately crediting consumer accounts for third-party charges. As described above, LECs have the incentive to give automatic credits to the detriment of billing aggregators and service providers; credits are relatively costless to the LEC and generate good will within its consumer base. The dispute resolution provision legitimizes the automatic credit approach by forcing a choice between giving a credit and launching an investigation including suspending the charge.

Further, the Commission should clarify what telecommunications services trigger the dispute resolution procedures by modifying the definition of telephone-billed purchase. As argued above at III.A., services that should be deemed outside the scope of “telephone-billed purchase,” are local calls, 1+ calls, 0+ calls, dial-around, calling card calls, paging services, 800 calls, and any other services that involve only the direct transmission of information, including call forwarding, call waiting, directory assistance, caller ID, call blocking, call return, repeat dialing, and call tracking. At the very least, toll calls that are made possible only through the participation of

members of the household should be outside the scope of the rule. These types of calls include 1+, 0+, 10-10-XXX, and inbound collect.

Finally, the Commission should be commended for requiring the billing entity to provide the vendor or service bureau with customer and account information. It has been very difficult for CERB members to obtain sufficient information from LECs to ascertain which consumers received which amounts credited to their accounts. CERB supports this and any other provision which, to the extent feasible, would require LECs to identify the consumers, the amounts of the credits, and the reasons for those credits for all adjustments handled by the LECs.

**E. The Provision Prohibiting Deceptive Statements to Billing Entities by Vendors, Service Bureaus and Providing Carriers Should Be Expanded [308.20(p)]**

This proposed section provides that it is a deceptive act or practice and a violation of these rules for any vendor, service bureau or providing carrier to provide false or misleading information to a billing entity conducting an investigation of a telephone billed charge.

CERB commends the Commission for placing the important responsibility on vendors to provide correct information to billing entities. This provision should further be expanded to prohibit deceptive statements in other contexts, such as during the pre-screening of products and services conducted by CERB members under the Standards of Practice. If vendors provide billing entities with false or misleading information at any time relating to charges or records appearing on a bill, or products and services being marketed to consumers, they should be liable to the billing entities.

**V. CONCLUSION**

For the foregoing reasons, CERB respectfully requests the Commission to modify its recommended changes to the pay-per-call rule to reflect the proposals contained herein.

Respectfully submitted,

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