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05609-1001

## TESTIMONY OF ELLIOT BURG BEFORE THE U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION (JULY 13, 2011)

My name is Elliot Burg. I am a Senior Assistant Attorney General in the Vermont Attorney General's Office, where I have worked on issues of consumer protection since 1987. I very much appreciate the opportunity to testify today on the subject of cramming, on behalf of Vermont Attorney General William H. Sorrell.

Since the spring of 2010, I have overseen a multi-pronged investigation into "cramming" in Vermont—that is, the practice of charging consumers and businesses on their local telephone bills for third-party services<sup>1</sup> without their authorization or knowledge. Based on the results of that investigation, which is still ongoing, some important observations can be made about the *nature and scope* of the problem of cramming. In addition, out of the investigation has come a state legislative proposal, enacted into law earlier this year, which represents a potential *solution* to the problem.

### *The investigation*

In the spring of 2010, the Vermont Attorney General's Office sent a Civil Investigative Subpoena under the state's Consumer Fraud Act, 9 V.S.A. § 2460, to the first of what would ultimately be four billing aggregators—the companies that arrange for the placement of charges on local telephone bills to pay for third-party services<sup>2</sup>. Based on complaints filed by consumers with the state, there was reason to believe that the sellers of those services (called "merchants" here) had violated the Act by charging consumers<sup>3</sup> without their authorization. There was also reason to believe that neither the vendors nor the aggregators were complying with a Vermont statute enacted in the year 2000 that sought to address the problem of cramming by requiring notice to consumers<sup>4</sup> of billing in the form of a letter containing specified information about the charges, any right to cancel, and contact information for the Attorney General's Office.

<sup>1</sup> What are sold in this way are almost always services, rather than goods.

<sup>2</sup> Information and documents produced in response to such a subpoena are deemed confidential under 9 V.S.A. § 2460. As a result, this testimony details only facts obtained from other sources or otherwise made public, such as through formal settlements.

<sup>3</sup> Under the Vermont Consumer Fraud Act, the term "consumer" in most situations includes businesses.

<sup>4</sup> The notice requirement, enacted in the year 2000 and now substantially amended (as discussed below), was set out in 9 V.S.A. § 2466. That section required merchants to send the notice, but held both merchants and aggregators liable if that did not occur.

The aggregators were asked by subpoena to identify merchants for whom they had arranged for charges to appear on local telephone bills in Vermont. The Attorney General's Office then subpoenaed the merchants with the highest total of dollars billed, for detailed information on their Vermont "customers," their methods of doing business, and their marketing materials, including web pages and telephonic scripts. Surveys were mailed to a number of the customers, asking, among other things, whether they were aware that they had been charged for the particular service, whether they had received notice of the charges other than on their local telephone bill, and whether they had consented to the charges.

The merchants consisted mostly of companies we had never heard of—such as More Local Reach, MyiProducts, YPD—that offered email, third-party voice mail, computer technical support, online directory listings, website hosting, and other services.

### ***Conclusions drawn about the nature and scope of cramming***

Three main conclusions were arrived at as a result of our investigation:

**1. *The level of consumer awareness about third-party charges on local telephone bills is very low.*** Of the 562 responses to 1700 surveys mailed in connection with the first of the aggregators to be investigated, only 8 (1.4%) recalled having received any separate written notice of their charges (although the merchants claimed to have provided notice, either online or through the mail), and only an estimated 27.4% noticed the charge within the first three months of its appearance on their telephone bill.<sup>5</sup>

**2. *The incidence of cramming is very high.*** Of the 562 respondents, fully 503 (89.5%) stated that they had not agreed to be charged for the third-party services that appeared on their telephone bill. Indeed, a number of these consumers indicated that they had no reason to order the services for which they were charged; the respondents gave such explanations as, "[I] have an answering machine [and so] would never use this service," "I had voicemail from the phone company [and] did not need [another service]," and "[I] can't imagine agreeing to voicemail since we have always had a personal voice recorder."

**3. *Deceptive telemarketing scripts have been used.*** Of the merchants who telemarketed their potential customers—usually businesses—a number used scripts that misstated the purpose of the call. Typical of those scripts was one employed by eBridge, Inc., which offered an online directory to local businesses using a script that began, "The reason I'm calling today is to make sure your information is listed correctly." In fact, the reason for the call was to sign up the business for a \$49.95-per month service.

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<sup>5</sup> A total of 234 (41.6%) responding consumers indicated on the survey that they noticed a third-party charge on their local telephone bill. It was then possible to identify the billing records of 205 of these consumers; and of that number, 135 (65.9%) were charged for fewer than four months. The resulting percentage of consumers who noticed the charge, but only within the first three months, was 41.6% x 65.9%, or 27.4%.

### ***Merchant settlements***

The investigation also led to a series of settlements, all in the form of Assurances of Discontinuance, with eight merchants. It is anticipated that there will be another 20 or more such settlements before the initiative is over. In all, the eight companies charged more than 7,000 consumers and 1,300 businesses in Vermont a total of over \$639,000.

The settlements were with the following companies:

- Douglas-Lambert Laboratories LLC, doing business as Orbit Telecom, of Henderson, Nevada, which charged more than 1,200 Vermonters over \$119,000 for a voicemail service between 2004 and 2006.
- Durham Technology, LLC, d/b/a MyiProducts IMail, of Indianapolis, Indiana, which charged more than 1,300 Vermonters over \$78,000 for a voicemail service between 2005 and 2010.
- eBridge, Inc., also known as Lawstar, Inc., doing business as B2B-ISP, eLink-ISP, InMySip, MSMB-ISP, and Zip Wide Web, Inc., also known as ZWW-ISP, based in Encino, California, which charged 485 Vermont businesses over \$93,000 for an online business directory service between 2004 and 2010.
- Liveonthenet.com, based in Huntsville, Alabama, which charged 852 Vermonters over \$56,000 for personal computer technical support between 2005 and 2008.
- More Local Reach, Inc., of Boca Raton, Florida, which charged 214 Vermont businesses over \$58,000 for online directory services between 2007 and 2010.
- Residential Email LLC, based in Henderson, Nevada, which charged more than 1,170 Vermonters over \$65,000 for an email service between 2005 and 2006.
- The Internet Business Association, Inc., based in Carson City, Nevada, which charged 435 businesses over \$86,000 for an internet and website address service between 2007 and 2010.
- YPD Corporation of Smyrna, Georgia, which charged 201 Vermont businesses over \$84,000 for online directory services between 2007 and 2010.<sup>6</sup>

Given that there are many more such companies, consumer losses in Vermont over the past six years have likely totaled in the millions of dollars—a significant issue for a state with a population of only 620,000, and an indicator that the problem nationwide is very substantial.

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<sup>6</sup> An example of these settlements accompanies this testimony as Attachment 1.

***The solution: prohibition, not disclosure***

Vermont's through-the-mail notice requirement enacted in 2000 to address the problem of cramming has not worked. For a decade, consumers have not received, seen or understood notifications that merchants claim to have provided; most of them have not readily noticed the merchants' charges on their telephone bills; and very few of them recall ever having agreed to be billed. In short, despite the notice requirement, consumers have continued to be crammed, a fact that is not surprising in light of the low level of public awareness that non-telephone charges can appear on one's telephone bill (any more than that third-party charges can be passed through to a person's electric bill, fuel bill, or monthly mortgage account statement).

In January 2011, the Attorney General's Office presented legislation *prohibiting* most third-party charges on local telephone bills for introduction in the Vermont Legislature. With the support of the local telephone companies, this anti-cramming measure passed both the Vermont House and Senate by voice vote, and on May 27, 2011, it was signed into law by Governor Peter Shumlin and became effective immediately.

The new law,<sup>7</sup> which amends the earlier notice requirement, 9 V.S.A. § 2466, contains a general prohibition on third-party charges to local telephone bills, with the following limited exceptions:

- Billing for goods or services marketed or sold by a company subject to the jurisdiction of the Vermont Public Service Board;
- Billing for direct dial or dial-around services initiated from the consumer's telephone; and
- Operator-assisted telephone calls, collect calls, and telephone services that facilitate communication to or from correctional center inmates.

Vermont's statutory approach takes account of actual consumer expectations—*i.e.*, that consumers do *not* anticipate that they will be charged on their local telephone bills for third-party services. It is straightforward to enforce. It does not interfere with other methods of receiving payment for services provided, such as credit cards, debit cards, personal checks, and electronic funds transfers. And it is viewed as a solution to the problem of cramming in our state—one that other jurisdictions may wish to adopt in the future.

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<sup>7</sup> The text of the law is set out in Attachment 2 to this testimony.

Attachment 1

STATE OF VERMONT  
SUPERIOR COURT  
WASHINGTON UNIT

2011-01-11

In Re eBridge, Inc., a/k/a Lawstar, Inc., ) Civil Division  
d/b/a B2B-ISP, eLink-ISP, InMyZip, ) Docket No. 276-5-11wnw  
MSMB2B-ISP, and Zip Wide Web, Inc., )  
a/k/a ZWW-ISP )

ASSURANCE OF DISCONTINUANCE

WHEREAS eBridge, Inc., a/k/a Lawstar, Inc., d/b/a B2B-ISP, eLink-ISP, InMyZip, MSMB2B-ISP, and Zip Wide Web, Inc., a/k/a ZWW-ISP, (hereinafter referred to as "eBridge"), is a California corporation with offices 16133 Ventura Blvd., Suite 855, Encino, CA 91436;

WHEREAS eBridge is a third-party provider of an online business directory to businesses, the charges for which were placed on local telephone bills with the assistance of a San Antonio-based company called Enhanced Services Billing, Inc. (ESBI);

WHEREAS eBridge solicited Vermont businesses over the telephone to purchase its service;

WHEREAS eBridge's charges to businesses averaged \$49.95 per month;

WHEREAS during the period 2004 to 2010, eBridge charged a total of \$93,007 to 485 businesses for its services that appeared on local telephone bills in Vermont's area code 802, with \$16,983 refunded;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specified in the statute, including the consumer assistance address and telephone number specified by the Attorney General, which

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notice must be a separate document sent for the sole purpose of providing that information and may not contain any inducement to purchase goods or services;

WHEREAS eBridge mailed notices to Vermont businesses that were charged for its services on their local telephone bills;

WHEREAS the Attorney General alleges that eBridge violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, by not complying with that provision's notice requirements in that eBridge's notices (i) failed to include the consumer assistance address and telephone number specified by the Attorney General; and (ii) did not constitute separate documents sent for the sole purpose of providing the information required by the statute;

WHEREAS the script used by eBridge's telemarketers stated at the outset, "The reason I'm calling today is to make sure your information is listed correctly.";

WHEREAS the Attorney General alleges that the primary purpose of eBridge's calls was, instead, to solicit the purchase of its service, which was explained later in the company's telemarketing script;

WHEREAS the Attorney General therefore alleges that eBridge's script misrepresented the purpose of the company's sales calls, in violation of the Consumer Fraud Act prohibition on deceptive trade practices, 9 V.S.A. § 2453(a);

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* eBridge shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills and the prohibition on deceptive trade practices.

2. *Consumer relief.*

a. For each business from which eBridge has received money through a charge on a local telephone bill with a number in area code 802, eBridge shall, within ten (10) business days of signing this Assurance of Discontinuance, arrange for an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded. eBridge shall use due diligence to ensure that accurate credits are provided to each business to whom a credit is due.

b. If a credit record sent under the preceding paragraph is not accepted or is returned by the local telephone company, eBridge shall, within ten (10) days of learning of the non-acceptance or the return, send to the business, by first-class mail, postage prepaid, a check in the amount of the credit due to the business' last known address, accompanied by a letter in substantially the form attached as Exhibit 1.

c. No later than 60 (sixty) days after signing this Assurance of Discontinuance, eBridge shall provide to the Vermont Attorney General's Office the names and addresses of the businesses whose telephone numbers were credited, and to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

d. No later than ninety (90) days after signing this Assurance of Discontinuance, eBridge shall pay the total dollar amount of all checks returned as undeliverable to the Vermont Attorney General's Office to be treated as unclaimed funds, along with a list in Excel format of the businesses to whom the monies due were not paid and their last known addresses.

3. *Civil penalties, fees and costs.* Within twenty (20) days of signing this Assurance of Discontinuance, eBridge shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars (\$10,000.00) in civil penalties and costs.


4. *Binding effect.* This Assurance of Discontinuance shall be binding on eBridge, its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against eBridge or its affiliates based on conduct or activities arising under or in connection with the Vermont Consumer Fraud Act prior to the date of this Assurance of Discontinuance.

Date: 3/21/11

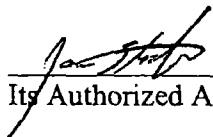
STATE OF VERMONT

WILLIAM H. SORRELL  
ATTORNEY GENERAL

by:   
Elliot Burg  
Assistant Attorney General

Date: 4/5/11

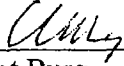
eBridge, Inc.

by:   
Its Authorized Agent

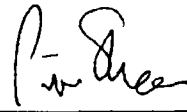
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APPROVED AS TO FORM:



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For eBridge, Inc.

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**Exhibit 1 (Letter to Businesses)**

Dear [Name of Business]:

eBridge, Inc. has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you of the fact that your business would be billed on your local telephone bill for our online business directory service, and that we used deceptive practices to interest you in buying our service.

As part of that settlement, we are enclosing a refund check for all of these charges. You have no obligation to do anything in response to this payment.

Sincerely,

eBridge, Inc.

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## Attachment 2

### Vermont “Anti-Cramming” Statute (2011)

9 V.S.A. § 2466 is amended to read:

#### § 2466. GOODS AND SERVICES APPEARING ON TELEPHONE BILL

- (a) Except as provided in subsection (f) of this section, a seller shall not bill a consumer for goods or services that will appear as a charge on the person’s bill for telephone service provided by any local exchange carrier.
- (b) No person shall arrange on behalf of a seller of goods or services, directly or through an intermediary, with a local exchange carrier, to bill a consumer for goods or services other than as permitted by this section. This prohibition applies, but is not limited, to persons who aggregate consumer billings for a seller and to persons who serve as a clearinghouse for aggregated billings.
- (c) Failure to comply with this section is an unfair and deceptive act and practice in commerce under this chapter.
- (d) The attorney general may make rules and regulations to carry out the purposes of this section.
- (e) Nothing in this section limits the liability of any person under existing statutory or common law.
- (f)(1) This section shall apply to billing aggregators described in 30 V.S.A. § 231a, but shall not apply to:
  - (A) billing for goods or services marketed or sold by persons subject to the jurisdiction of the Vermont public service board under 30 V.S.A. § 203;
  - (B) billing for direct dial or dial around services initiated from the consumer’s telephone;or
  - (C) operator-assisted telephone calls, collect calls, or telephone services provided to facilitate communication to or from correctional center inmates.
- (2) Nothing in this section affects any rule issued by the Vermont public service board.