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**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 services¹ 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 services². 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 consumers³ 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 consumers⁴ 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.

¹ What are sold in this way are almost always services, rather than goods.

² 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.

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

⁴ 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.⁵

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.

⁵ 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 2010.⁶

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.

⁶ An example of these settlements accompanies this testimony as Attachment I.

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,⁷ 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.

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