**PROJECT NO. 28324**

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| **PUC RULEMAKING PROCEEDING TO AMEND PUC SUBSTANTIVE RULES §26.32 AND §26.130** | **§ § §** | **PUBLIC UTILITY COMMISSION OF TEXAS** |

**ORDER REPEALING §26.32 AND ADOPTING NEW §26.32 AS APPROVED AT THE AUGUST 19, 2004 OPEN MEETING**

The Public Utility Commission of Texas (commission) repeals §26.32, relating to Protection Against Unauthorized Billing Charges ("Cramming"), and adopts new §26.32, relating to Protection Against Unauthorized Billing Charges ("Cramming"), with changes to the proposed text as published in the February 27, 2004 *Texas Register* (29 Tex Reg 1791). The rule is intended to ensure that all customers in this state are protected from unauthorized charges on their telecommunications utility bills. The adopted §26.32, compared to the repealed §26.32, establishes and clarifies the requirements necessary to obtain (1) customer consent for charges for any product or service, and (2) verification of that consent. Project Number 28324 is assigned to this proceeding. Amendments to §26.130 (relating to Selection of Telecommunications Utilities) are also assigned to this project, but those changes were approved by the commission for publication during a public hearing conducted on October 23, 2003, and adopted during a public hearing conducted on April 15, 2004, and, therefore, precede the changes to §26.32.

The commission received comments on the proposed amendments from AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc. (collectively, AT&T), MCImetro Access Transmission Services LLC (MCI), the Office of the Attorney General of the State of Texas (OAG), Southwestern Bell Telephone, L.P. d/b/a SBC Texas, (SBC), Sprint Corporation (Sprint), Texas Statewide Telephone Cooperative, Inc. (TSTCI), Office of Public

Utility Council (OPUC), Texas Telephone Association (TTA), VoiceStream GSM I Operating Company, LLC d/b/a/ T-Mobile; VoiceStream Houston, Inc., d/b/a/ T-Mobile; VoiceStream PCS II Corporation d/b/a T-Mobile; AT&T Wireless Services, Inc.; southwestern Bell Wireless, LLC d/b/a Cingular Wireless; and Nextel of Texas, Inc. (collectively, CMRS Group), and Verizon Southwest (Verizon). The commission also received reply comments from AT&T, MCI, OAG, OPUC, Verizon, SBC, and TSTCI.

A public hearing on the proposed amendments was held at the commission's offices on April 6, 2004, at 1:30 p.m. Representatives from AT&T, MCI, OAG, OPUC, SBC, TSTCI, and Verizon participated in the hearing in person and by telephone.

*General comments*

TSTCI stated in its initial comments that it did not find any changes that might be of concern to its member companies.

MCI asserted that, because the Federal Communications Commission (FCC) does not have any rules related to cramming, that any rule adopted by the commission exceeds its authority to promulgate rules pursuant to PURA §17.158 and §64.158.

**The commission disagrees with MCI's assertion that the FCC's failure to adopt rules related to cramming prohibits the commission from adopting such rules. The Texas Legislature addressed cramming and adopted specific prohibitions in PURA, Chapters 17 and 64, intended to protect Texas customers from fraudulent, unfair, misleading, deceptive,**

**or anticompetitive cramming practices. PURA §17.158 and §64.158 only prohibit the commission from adopting rules more burdensome than any *existing* FCC rules. The FCC has not adopted cramming rules. Rather, the FCC has adopted principles and guidelines related to cramming. However, the FCC's principles and guidelines do not rise to the level of a formal rulemaking with accompanying consequences for noncompliance. Therefore, there are no existing FCC rules with which the proposed rules would conflict or against which the proposed rules would be more burdensome. Therefore, the commission's adoption of cramming rules is consistent with the Legislature's prohibition in §17.158 and §64.158 and implements the consumer protection provisions therein.**

SBC applauded the commission's efforts to curb the problem of cramming, but asserted that the number of cramming violations has decreased over the past several years and would, therefore, not appear to justify the proposed rule, which appears, to SBC, to be more burdensome than the commission's existing rule. SBC stated that its experience has been that customers resist a lengthy and redundant verification process, and that the proposed rule will increase customer frustration and make it more difficult for customers to change services.

**The commission's responses to SBC's general comments are embedded within the commission's responses elsewhere in this preamble.**

The OAG supported adoption of subsections (a), (b), and (c) as proposed and noted that these provisions should assist the commission in its enforcement efforts. The OAG also supported

subsections (i), (j), and (k) as proposed. The OAG noted its support, specifically, for allowing the failure of a provider to provide proof and verification of authorization to establish a violation.

OPUC commented that the authorization and verification requirements of the proposed rule should help to ensure that customers are only charged for products or services for which they have agreed to be billed.

**As a general matter, the commission notes that as a result of agreeing with certain commenters, rule references in the adopted rule may not match commenter references to the proposed rule as published. This mismatch is the result of the deletion of proposed subsection (f) and the corresponding renumbering of the remaining subsections. Where appropriate, the commission has cross-referenced the affected sections.**

**The commission also notes that by deleting proposed subsection (f), the commission deleted all references to "authorization" and instead believes that the term "consent" better clarifies the intent of this rule. Thus, while commenters' comments refer to authorization, the commission's responses to those comments and the provisions of the rule refer to "customer consent" or "verification of customer consent."**

*Proposed Subsection (a), Purpose*

MCI stated that the proposed language in the first sentence for this subsection is clear and sufficient. MCI also stated, however, that it opposes the second sentence in this section because, in MCI's view, it blurs the distinction between §26.130 and §26.32.

The OAG supported the proposed subsection.

**The commission disagrees with MCI and notes that §26.130 of this title relates to Selection of Telecommunications Utilities, while §26.32 of this title relates to Protection Against Unauthorized Billing Charges. Thus, while the two sections may have similarities, the commission finds they are clearly distinguishable one from the other.**

**The commission notes that subsection (a) has been amended in response to comments related to proposed subsections (f) and (g) regarding whether PURA requires that consent and verification be obtained in separate processes. Subsection (a) has been amended to reflect the commission's determination that service providers are required to obtain customer consent and to verify that consent pursuant to the verification requirements of the adopted subsection (f) of this section.**

*Proposed Subsection (b), Application*

The OAG and MCI stated their support of the proposed subsection.

Verizon recommended exempting "business customers," including governmental units at all levels and corporate entities who have a contract for the services appearing on their bill, from the applicability of this rule. Verizon described business customers as sophisticated customers that often purchase their telecommunications services through negotiated contracts with standard

terms that may include multiple states. Thus, Verizon concluded, Texas-specific cramming rules are unnecessary and unduly burdensome.

**The commission declines to modify the rule to exempt "business customers" as recommended by Verizon. The statutory protections in PURA apply equally to all types of customers, without exception.**

The CMRS Group provided extensive comment to demonstrate that the proposed cramming rule should not apply to Commercial Mobile Radio Service (CMRS) providers. Sprint stated that although it does not appear that the proposed rules were intended to include CMRS providers, subsection (b) could be interpreted to apply to them. The CMRS Group and Sprint suggested adding clarifying language to subsection (b) relating to this concern.

**The commission agrees with the commenters and has modified the proposed rule to clarify that it does not apply to CMRS providers.**

*Proposed Subsection (c), Definition*

AT&T, SBC, and MCI urge the commission to adopt a definition of "customer" that matches the definition of "subscriber" as used by the FCC in 47 C.F.R. §64.1100(h). They argue that the FCC's definition of subscriber is broader than the definition of customer used in the proposed rule.

AT&T asks for insertion of the phrase "or individual" after the phrase "any other entity" to clarify that other individuals may have legal capacity to authorize that charges be placed on a customer's telephone bill.

**The commission declines to adopt the definition of "customer" as requested by AT&T and other commenters. PURA §55.303 requires carriers to obtain authorization from the "customer." The term "customer" is defined in PURA §17.002 as "any person in whose name telephone … service is billed, including individuals, governmental units at all levels of government, corporate entities, and any other entity with legal capacity to be billed for telephone … service." The commission has consistently interpreted these provisions to require carriers to obtain authorization for a change in service provider, whether from the individual in whose name service is billed or from an individual or entity with legal capacity to act on behalf of that customer. Therefore, while tracking the language in PURA, the commission's rules and current practice provide carriers and customers the flexibility to obtain authorization from the spouse of the account holder and other persons with a legal relationship to the account holder in a manner similar to the FCC's definition of "subscriber." Accordingly, the commission declines to change the proposed rule as requested by some of the commenters.**

*Proposed Subsection (d), Requirements for billing authorized charges*

AT&T opposed proposed subsections (d), (f), and (g), because, in AT&T's opinion, they create a two-tiered verification process by creating an artificial distinction between "customer authorization" and "verification of authorization." AT&T argued that PURA §17.151(b) and

§64.151(b) only require a record of customer consent, as defined by §17.151(a)(2) and §64.151(a)(2). AT&T argued that PURA does not require any of the proposed rule's four methods for the consent/authorization portion for obtaining customer consent. In its reply comments, AT&T stressed its statutory interpretation and asserted that the commission seems to be pursuing an unnecessary and arbitrary distinction between "consent" and "verification" by unreasonably assigning more significance to the word "and" in PURA §17.151(b) and §64.151(b) than is warranted or suggested by any other part of Chapters 17 and 64. In its reply comments, MCI argued that PURA §17.151(a) and §64.151(a) cannot be read to require that customer consent must be obtained as provided by §17.151(b) or §64.151(b). MCI also asserted that the history of existing §26.32 supports MCI's interpretation, and cited to AT&T's estimated $20 million cost of compliance if the "rule is revised as proposed." AT&T concluded that a plain reading of the statute is that a customer's consent must be verified for consent to occur, and that the statute prescribed at least four methods to obtain that verified consent.

OPUC agreed with the proposed interpretation of PURA §17.151 and §64.151 and concluded that those sections grant the commission sufficient authority to adopt the changes in proposed subsections (d), (f), and (g). OPUC argued that a reasonable interpretation of §17.151 and §64.151 is that consent and verification are two distinct steps necessary to obtain a customer's valid authorization for a charge to appear on their bill.

**The commission agrees with the commenters' arguments and concludes that PURA allows and commission policy supports a one-step process for verification of customer consent by service providers. In response to these comments, the rule has been changed to delete the**

**proposed subsections (d)(3), (d)(4), and (f). The rule has been renumbered to reflect these changes.**

SBC stated that proposed subsection (d)(2) requires the service provider to maintain the record of authorization for at least 24 months immediately after the authorization is obtained, but that it is not clear whether the intent of the proposed rule also includes a requirement to maintain the record of verification.

**The commission agrees with SBC and notes that subsection (d)(2) has been modified to require service providers to maintain records of customer "verified consent" for at least 24 months immediately after obtaining that verified consent.**

SBC stated that it is unclear how customer authorization and verification of authorization may be obtained in one transaction as provided for by subsection (d)(4).

**Since proposed subsection (d)(4) has been deleted and authorization and verification combined into a single-step process, the commission need not address this comment.**

AT&T, Sprint, SBC, and, in its reply comments, MCI, recommended eliminating the requirement in subsection (d)(5) for the service provider to provide, during the sales transaction, the customer with both a toll-free telephone number and an address to which a customer may write. These commenters stated that carriers should not be compelled to provide an address

unless the customer requests it. Sprint asserted that, due to space limitations on its bills, it estimates that compliance with this rule would cost between $267,000 and $356,000.

**The commission declines to modify the rule as recommended by Sprint and other commenters because, pursuant to PURA §17.151(a)(3)(A), the service provider must provide customers with both a toll-free telephone number and an address. Thus, the statute requires service providers to make the contact information available to customers. Moreover, §64.151(a)(3)(A) of PURA likewise requires that this be provided to customers. Therefore, the costs of compliance stated by Sprint should have already been incurred and expensed. Accordingly, the commission declines to modify proposed subsection (d)(5) (now subsection (d)(3)) of the rule.**

SBC suggested modifying proposed subsections (d)(6) and (7) to require that either the service provider or its billing agent provide the business information referred to in (d)(6) and obtain authorization from the billing telecommunication utility referred to in (d)(7). SBC stated that the billing telecommunications utility may contract with either the service provider or the billing agent and, in that regard, is only able to exert influence on the entity with which it has contracted. Similarly, Sprint described arrangements between the billing clearinghouse, Billing and Collection (B&C) client, service provider, billing agent and billing utility and explained that some entities whose charges appear on the Sprint ILEC invoice are not a Sprint B&C client. According to Sprint, it maintains appropriate records in paper files, but not in systems that are accessible by customer-service representatives. Without quantification, Sprint asserts that the

proposed rule would require it to implement a systematic conversion of the data that would require significant investment.

**PURA §17.151(a)(3) and §64.151(a)(3) clearly state that the service provider *and* the billing agent for the service provider must contract with the billing utility, and §17.151(c) and §64.151(c) require that such contract include the service provider's name, address and business telephone number. Accordingly, the commission declines to modify proposed subsections (d)(6) and (7) (now subsections (d)(4) and (5)) of the rule.**

**Because Sprint failed to quantify its claims regarding economic impact, the commission declines to make the changes proposed by Sprint because the commission cannot assess the merits of Sprint's claims. Moreover, the commission notes that the obligations contained in the adopted subsections (d)(4) and (5) predate this rule and therefore any financial impact should have already been absorbed by Sprint.**

Sprint stated that proposed subsection (d)(7) imposes operational difficulties and infringes on the proprietary nature of Sprint's B&C clients. According to Sprint, this subsection requires the service provider and its billing agent to execute written agreements with the billing telecommunications utility that must be maintained by all entities engaged in the B&C service. Sprint explained that it does not have a direct B&C agreement with every entity that places charges on its invoice, and asserted that all B&C agreements and any correspondence between Sprint and its B&C clients are considered proprietary and are not provided to the third-party entities.

**The commission adopts subsection (d)(5) (published as subsection (d)(7)) without modification. PURA §17.151(a)(3)(B) requires the service provider and any billing agent for the service provider to contract with the billing utility to bill for products and services on the billing utility's bill. That contract must include certain contact information of the service provider and must be maintained by the billing utility for as long as the billing for the products or services continues and for 24 months immediately following permanent discontinuation of the billing. *See* PURA §§17.151(a)(3)(B), 17.151(c), 64.151(a)(3)(B), and 64.151(c). The commission notes that the requirements contained in subsection (d)(5), as adopted, are identical to the requirements found in repealed §26.32(d)(5).**

*Proposed Subsection (e), Post-termination billing*

MCI, AT&T, SBC, and the OAG recommended modifying the proposed rule to clarify that a provider may bill customers for validly provided unpaid and/or outstanding balances.

**The commission agrees with these comments and makes appropriate clarifying changes to proposed subsection (e).**

*Proposed Subsection (f), Authorization requirements*

Arguing that the commission lacks the requisite statutory authority to adopt the proposed changes to this subsection, MCI, AT&T, and SBC stated that PURA does not require any of the proposed rule's four methods for the consent/authorization portion of obtaining customer

consent; the four methods outlined in PURA §17.151(b) and §64.151(b), the commenters continued, apply solely to the verification of the customer consent/authorization.

The OAG supported the more specific requirements for authorization and verification and stated that it believes those requirements are consistent with the commission's specific authority under PURA §17.151(b) and §64.151(b). As summarized above, in its reply comments, OPUC disagreed with MCI and AT&T and concluded that the commission not only had authority to adopt the "two-tiered" approach, but that it was a reasonable interpretation of PURA to do so as proposed in new subsections (d), (f), and (g).

**The commission agrees with the commenters' arguments and concludes that PURA allows and commission policy supports a one-step process for verification of customer consent by service providers. In response to these comments, the commission deletes proposed subsection (f) and renumbers the rule to reflect this change. The commission notes that as a result of deleting proposed subsection (f), the new subsection (f) (formerly subsection (g)) has been modified to clarify that the verification of customer consent must not contain discussion related to obtaining customer consent.**

SBC states that subsection (g)(3) is redundant because it "requires that the customer once again verify that he or she has authorized the product or service." SBC also commented that it is not clear whether the reference in proposed subsection (f)(2) to "explicit customer acknowledgment" is a reference to third-party verification. In addition, SBC stated that it was not clear about what would constitute "explicit customer acknowledgment."

**The commission clarifies that the term "explicit customer acknowledgment" is practically identical to the statutory language related to customer authorization, *i.e.* "clearly and explicitly consented," found in PURA §17.151(a)(2) and §64.151(a)(2). Because subsection (f) has been deleted and subsection (g) renumbered, the potential for conflict has been eliminated and, therefore, the commission need not address the balance of these comments.**

AT&T asserted that under *existing* subsection (e)(2) (proposed (f)(3)), a service provider has the option of using Third Party Verification (TPV) as a "verification" method but that the proposed amendment to subsection (f)(3) (relating to authorization requirements) eliminates that option. AT&T stated that the use of TPV is generally less expensive than audio recording, and the TPV is a relatively efficient process that the industry has used for years to verify changes to customer services. AT&T requested explicitly listing TPV as an available verification method. In their reply comments, Verizon and TTA made statements similar to those of AT&T relating to TPV.

**Since proposed subsection (f) has been deleted and the verification of consent provision contained in the renumbered subsection (g) authorizes TPV, the commission need not address this comment.**

SBC commented that proposed subsection (f)(3)(A)(ii) conflicts with the definition of "customer" in subsection (c). SBC reasoned that proposed subsection (f) permits an employee or agent to authorize a change in service, but that, in SBC's opinion, the definition of "customer" is more limited and does not extend beyond an individual customer or their spouse.

**Since proposed subsection (f) has been deleted, the commission need not address this comment; however, to the extent the definition of "customer" appears in other sections of the rule, the commission declines to change the definition of "customer" as requested by some of the commenters. As discussed previously in response to comments on subsection (c), the commission declines to change the definition of "customer" to match the FCC's definition of "subscriber" as requested by some of the commenters. PURA §17.151 requires carriers to obtain consent from the "customer." The term "customer" is defined in PURA §17.002 as "any person in whose name telephone … service is billed, including individuals, governmental units at all levels of government, corporate entities, and any other entity with legal capacity to be billed for telephone … service." The commission has consistently interpreted these provisions to require carriers to obtain consent to a charge for a product or service, whether from the individual in whose name service is billed or from an individual or entity with legal capacity to act on behalf of that customer. Therefore, the commission's rules and current practice already provide the flexibility provided by the FCC's definition of "subscriber."**

MCI, Sprint, AT&T, and in their reply comments, Verizon, SBC, and TTA, stated that compliance with proposed subsection (f) would be burdensome because obtaining evidence of customer authorization by any of the four methods would impose significant costs on providers but would provide no additional customer protection. Sprint asserted that the proposed rule would require Sprint to audio-record its sales transactions, at a one-time implementation cost of $14.4 million. Sprint asserted that the existing rule provides customers substantial protection

against cramming and noted that it had received only 23 cramming complaints since January 2002. According to MCI, evidence of verification is sufficient to establish customer intent. Verizon and MCI argued that the commission has not shown that there is a cramming problem in Texas that would justify the costs of the proposed rule amendments or the need for them. Several commenters suggested the proposed rule would contribute to customer frustration.

**Since proposed subsection (f), which contained the requirement to record customer consent, has been deleted in response to the comments and the renumbered subsection (g) only requires recording of verification of consent, the commission need not address this comment.**

MCI, AT&T, SBC, TTA, and Verizon argued that the proposed rule exceeds the commission's statutory authority by requiring authorization of *customer-initiated* requests for a product or service by one of the four methods. PURA, some commenters continued, exempts customer-initiated transactions from "verification" unless verification is required by federal law or rules implementing federal law. Verizon expressed concern that the proposed rule goes well beyond the finding of the FCC regarding the root cause of cramming complaints, *i.e.*, third party miscellaneous service providers and would place onerous requirements on the service providers, even when the order for services results from traditional customer-initiated transactions for basic local exchange and adjunct services. In its reply comments, TSTCI noted that its member companies are not large enough to maintain systems for voice recording, utilizing an independent third party verification company or toll-free electronic authorization for every customer request

for new services. Several commenters asserted that implementation costs related to the elimination of the customer-initiated exception could be several million dollars.

**The commission agrees with the commenters and has modified the renumbered subsection (f)(4) of the adopted rule to preserve the customer-initiated exception.**

AT&T urged amending proposed subsection (f)(3)(A)(i), and, if the commission retains the proposed distinction between "authorization" and "verification of authorization," in proposed subsection (g)(4)(A)(i), to explicitly permit the use of a single document for obtaining written or electronically signed "authorization" and "verification of authorization" for charges to be placed on a bill and for changes in service.

**Since proposed subsection (f) has been deleted in response to the comments and subsection (g) has been renumbered, the commission need not address this comment because new subsection (f) explicitly contemplates a single-step process for verification of customer consent.**

OPUC recommended adding two provisions to proposed subsection (f)(1). First, OPUC suggested adding a provision that would require a customer to be informed of the effective date of the product or service to which they are agreeing. OPUC stated that it may not always be the case that products or services would begin immediately and, therefore, the customer should be informed of when charges will begin to accrue. Second, OPUC suggested adding a provision to require the customer to be given an explanation of how a product or service can be cancelled,

including any charges associated with such cancellation. OPUC stated that this information should be part of the authorization process, not the verification process, because some customers may decline a product or service in which they initially had an interest if the conditions for termination were unacceptable to them. MCI opposed, as unnecessary and inconsistent with the FCC's requirements, the amendments proposed by OPUC.

**Since proposed subsection (f) has been deleted in response to comments and the new subsection (f) (formerly subsection (g)) prohibits elements of the sales call from the verification of consent procedure, the commission need not address this comment.**

*Proposed Subsection (g), Verification requirements*

SBC asserted that subsections (f)(2) and (g)(3) are redundant.

**Since proposed subsection (f) has been deleted in response to the comments and subsection (g) has been renumbered, two subsections are not redundant and the commission need not further address this comment.**

**The commission further notes that as a result of deleting proposed subsection (f), the commission has modified adopted subsection (f) (formerly subsection (g)) to clarify that the verification of customer consent procedure must not contain discussion related to obtaining customer consent.**

SBC stated also that it is not clear whether two separate explicit customer acknowledgments that charges will be assessed on their bill must be obtained by the requirements in subsection (f) and those in subsection (g)(2).

**Since proposed subsection (f) has been deleted in response to the comments and the renumbered subsection (g) contains a single acknowledgement, the commission need not address this comment.**

The OAG and OPUC stated they did not see a compelling reason to provide an exception permitting, under certain circumstances, a sales representative to remain on the call during the third-party verification process, particularly if the exception is granted based only on a written statement. In the OAG's opinion, such a requirement would be difficult to enforce. In any event, OAG and OPUC asserted such an exception should not last two years.

**The commission adopts subsection (f)(4)(D)(vii) (proposed subsection (g)(4)(D)(vii)) without changes. The commission disagrees with the OAG's opposition to adopted subsection (f)(4)(D)(vii). The exemption given to a service provider or its sales representative that does not possess the current technology to drop off or hand off the sales call to the TPV is consistent with the commission's reliance in the slamming portion of this project on the FCC's *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* CC Docket No. 94-129, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Record 5099**

**(rel. March 17, 2003) (Third Order on Reconsideration). The FCC, at paragraph 35 of that Order, while not eliminating the drop-off requirement by a sales agent once the sales call is transferred to a TPV, determined that in certain specific situations, it may be infeasible for the submitting telecommunications utility to "drop-off" the line without losing the prospective customer. Thus, the FCC adopted an exemption to the slamming provision's general "drop-off" requirement under 47 C.F.R. §64.1120(c)(3)(ii). The commission believes it is reasonable to extend the same exemption to cramming situations. The commission believes that it is recognizing diversity in technology and is not imposing technological uniformity that some service providers may not be able to afford or that is inconsistent with the service provider's current sales network and procedures. Notwithstanding the limited drop-off exemption, the commission notes that this rule still requires carriers electing to use TPV to recognize that the TPV portion of the customer call is beyond the influence of the sales representative and that no interference from the sales representative with the verification of authorization process is permitted. The commission observes that the voice recordings will demonstrate to enforcement staff whether or not the sales representative conduct violated this subsection.**

*Proposed Subsection (h), Expiration of Authorization and Verification of Authorization*

The OAG supported the rule as proposed and stated that allowing authorizations to expire should assist in reducing allegations of cramming by customers who simply do not remember providing their authorizations at some point in the past.

AT&T, SBC, Verizon, and, in its reply comments, MCI suggested modifying the proposed rule to reflect that the customer's authorization is valid under the terms of that customer's authorization; *i.e.,* if the customer authorizes service to be provided in 90 days, then the authorization should be valid for at least that long.

**The rule states that the product or service must be implemented within 60 calendar days from the date of authorization. The rule is necessary to protect a customer from being charged for a product or service ordered that was never provided. If the provider contracts with a business customer to provide multi-line or multi-location service on a date certain, then it is acceptable to the commission that the provider provisions such service within the contractual date. If, however, there is no existing and valid contractual obligation for a date certain, then the provider must implement the product or service as provided by this subsection. The commission notes that this information should be provided to the commission upon request in the event, for example, that the commission is investigating alleged cramming violations. The commission adopts subsection (g) (formerly subsection (h)) with change to provide an exception for business customers with multi-line or multi-location service.**

*Proposed Subsection (i), Unauthorized charged*

Asserting that 45 calendar days is incongruous with the clause "shall promptly," OPUC recommended changing the time for meeting the requirements of proposed subsection (i)(1) from 45, to 15, calendar days. SBC and MCI opposed OPUC's proposal and noted that the 45-day time period is provided for by PURA §17.152(a) and §64.152(a).

**The commission agrees with SBC and MCI and adopts subsection (h) (formerly subsection (i)) without the changes suggested by OPUC.**

Without identifying a specific provision of proposed subsection (i), Sprint opposed several aspects of this subsection asserting that the requirements would impose improper obligations on the billing utility to "police the sales and verification processes of its billing and collection clients." Specifically, Sprint argues that under the rule as proposed it would not have: (1) knowledge that a customer's bill was charged improperly, (2) the capability to adjudicate cramming complaints; (3) the operational or technical capability to comply; or (4) the contractual flexibility to comply with the rule.

Sprint also comments that proposed subsection (i) unfairly requires "service providers to discontinue billing for a product or service after the termination or cancellation date." Sprint believes that this requirement is inconsistent with the commission's carrier notification rule.

**Proposed subsection (i) is identical to repealed subsection (f) and PURA §17.152. As such, Sprint is currently required to comply with these requirements. The commission is confused and concerned about Sprint's apparent admission that it does not have the operational or technical capability to comply with the existing statute and rule. That issue aside, the commission adopts subsection (h) and declines to modify proposed subsection (i) as proposed by Sprint because the requirements in proposed subsection (i) are identical to current subsection (f) and PURA §§17.151(f), 17.152, 17.153, 64.151(f), and 64.153.**

OPUC also recommended adding a provision under §26.32(i)(1)(A)(vi) to require that a record kept by the billing telecommunications utility on the unauthorized charge include an identification of what service or product was unauthorized. OPUC suggested that this information may help establish a pattern or practice by the service provider, and could help alert the commission that certain products or services have been targeted for improper inclusion on bills.

SBC and MCI opposed OPUC's proposal and noted that PURA §17.152(b) and §64.152(b) specifically outline what the record should contain.

**The commission agrees with SBC and MCI and, in addition, finds that it is not necessary to amend the rule as proposed by OPUC because the commission does not scan its records for that information on a regular basis and, more importantly, the customers who complain typically tell CPD the nature of the disputed charge and CPD, therefore, is aware of the types of trends OPUC references in its comment.**

*Proposed Subsection (j), Notice of customer rights*

SBC suggested revising the notice requirements in proposed subsection (j)(4) to eliminate the requirement to include the commission's contact information on each bill and, instead, to only require such information be provided to the customer twice each year.

**The commission declines to modify adopted subsection (i)(4) (formerly subsection (j)(4)) as proposed by SBC because a customer cannot control when an unauthorized charge is going to appear on their bill. Therefore, the information required by adopted subsection (i)(4) must be available on every bill upon which it is possible to incur unauthorized charges.**

*Proposed Subsection (k), Complaints to the commission*

To maintain consistency in the rule, SBC and OPUC suggested that the term "telecommunications utility," as used in proposed subsection (k), should be changed to refer to both service providers and billing utilities. In its reply comments, MCI agreed with SBC and OPUC.

**The commission agrees with SBC, MCI, and OPUC and, in accord with PURA §§17.156(a), 17.156(b), 64.156(a), and 64.156(b), modifies the proposed rule to refer to service providers, billing utilities, and billing agents.**

Verizon and SBC recommended amending proposed subsection (k) to require the commission's Customer Protection Division (CPD) to forward the complaint filed by the customer to the service provider alleged to have crammed the customer because it is unduly burdensome and costly for the billing telecommunications utility to play "middle-man" by coordinating the actual service provider's response to CPD. Moreover, Verizon continued, the billing telecommunications utility does not have the documentation required by proposed subsections (f) and (g).

**The commission has modified and adopted subsection (j)(2) (formerly subsection (k)(2)) to clarify that the entity to which CPD forwards the complaint must provide a response that includes, to the extent it is within its custody or control, all information required by adopted subsection (j)(2).**

**The commission, however, does not agree to amend the rule as suggested by Verizon and SBC. PURA Chapters 17 and 64, require service providers, billing agents, and billing utilities to maintain and provide to the commission, upon request, certain records relating to charges placed on a customer's telephone bill. These chapters also specify the responsibilities of billing utilities and service providers in the event a customer's telephone bill is charged without proper authorization and verification of authorization. For example, a billing utility is specifically required by §17.152(a)(1) and (4), and §64.152(a)(1) and (4), upon its knowledge or notification, to notify the service provider to cease charging the customer for an unauthorized product or service and provide the customer with all billing records under its control. The commission believes the rule is consistent with PURA Chapters 17 and 64. Moreover, the commission is not inclined to assume the costs, or to risk potential accusations, as the "middle-man" since the commission may have ultimate responsibility to seek remedies against a service provider, billing agent or billing telecommunications utility against whom the complaint was lodged.**

SBC suggested modifying the reference in proposed subsection (k)(2)(B) from "switch in service" to avoid confusion between this rule and the slamming rules.

**The commission agrees with SBC and accordingly modifies and adopts subsection (j)(2)(B) (formerly subsection (k)(2)(B)).**

MCI, AT&T, and SBC suggested, consistent with their comments in the slamming portion of this rulemaking, revising the 21-day requirement in subsections (k)(2) and (3), and (l)(1) and (2), to 30 days, and expressly providing for a good-cause extension as permitted by §26.3 of this title. MCI, AT&T, and SBC urged also, that a provider's failure to comply timely with commission requests for record production should not presumed to be a cram. These commenters asserted that this portion of the rule would result in a denial of due process. The commenters asserted that failure to produce records should only be considered a failure to timely produce records and should not be considered as a cramming violation.

**The commission declines to change the deadline within which billing utilities, service providers, and billing agents must respond to the commission. Pursuant to the commission's existing rules, P.U.C. PROC. R. 22.242(d), commission staff is required to attempt to resolve all complaints within 35 days of the date of receipt of the complaint. Unless parties provide the required information sufficiently in advance of the 30th day after the request, commission staff would not have sufficient time to resolve all complaints within the 35-day goal established by commission rule. Accordingly, the commission declines to modify the existing rule as proposed by some of the commenters.**

**The commission declines to create an exception to the proposed rule as suggested by some commenters. P.U.C. SUBST. R. 26.30(b) of the commission's rules currently requires**

**companies to investigate a complaint forwarded to it by the commission and to advise the commission in writing of the results of its investigation within 21 days.**

**In addition, the commission believes that the deletion of proposed subsection (f) and the creation of a single-step process for verification of consent substantially reduce the evidence necessary for a service provider to produce to demonstrate compliance with this rule. Therefore, the failure of a service provider to provide the commission with this single item of evidence during the investigation of complaints is a cramming violation that does not result in a denial of due process.**

**Finally, the commission notes that most commission-regulated companies are required to be familiar with the commission's "21-day" rules and generally do respond in a timely manner to complaints forwarded to them by the commission. The requirements in adopted subsection (j) serve to better define the appropriate and expected scope of a company's response when information is requested by the commission. Accordingly, the commission declines to modify proposed subsection (k), adopted in subsection (j), as suggested by these commenters.**

**Based upon the comments to, and discussion about, proposed subsection (k) adopted as subsection (j), the commission moves proposed subsection (k)(3) to adopted subsection (k) as new subsection (k)(3). The commission also modifies the text of that subsection to refer to the appropriate subsections of this rule necessitated by that move.**

*Proposed Subsection (l), Compliance and enforcement*

TTA stated that proposed subsections (l)(1) and (2) subject a billing telecommunications utility or service provider to the burden of providing proof of documentation and records to the commission. TTA argued that the rule should not be broad enough to allow enforcement actions against a billing agent that simply makes billing changes per the service provider's request.

**The commission makes no changes to proposed subsections (l)(1) and (2) based upon the suggestion of TTA. PURA §17.155 and §64.155 require billing utilities and service providers to provide certain records to the commission upon request. PURA §17.156 and §64.156 subject billing utilities, service providers, and billing agents to enforcement for violations of cramming prohibitions. Subsections (l)(1) and (2) adopted in subsections (k)(1) and (2) are consistent with PURA.**

OPUC recommended amending proposed subsections (l)(1) and (l)(2) to require that records produced under these subsections be provided to OPUC in addition to commission staff. OPUC asserted that such an amendment was necessary in its statutory role as the representative of residential and small commercial customers, including its ability to evaluate the need for petitioning the commission to initiate an enforcement action.

MCI opposed OPUC's recommendation to amend proposed subsections (l)(1) and (2) so that OPUC gains access to the records maintained by the commission. MCI argued that PURA §§17.155, 17.156, 64.155, and 64.156 grant solely to the commission the record request and enforcement authority related to cramming issues. Moreover, MCI continued, OPUC's

jurisdiction is set forth at PURA §13.003 and is limited to the same access as a party, other than commission staff, to records gathered by the commission under §14.204. Accordingly, MCI explained that OPUC's request is not authorized by statute.

**The commission generally agrees with MCI's analysis and declines, therefore, to amend proposed subsections (l)(1) and (2) as recommended by OPUC. This provision is intended to ensure that the commission and commission staff have adequate ability to obtain the information necessary to monitor compliance with commission rules and effectively conduct enforcement activities when necessary pursuant to authority given to the commission by PURA. The commission notes that OPUC, in the exercise of its "statutory role as the representative of residential and small commercial customers," on a case by case basis, is entitled to request the information required by proposed subsection (l)(1) and (l)(2), adopted in subsections (k)(1) and (2).**

MCI, Sprint, Verizon, AT&T, and SBC, in its reply comments, opposed, for similar reasons to those they propounded in the slamming portion of this rule project, the language in subsection (l)(5) that permits customer affidavits that challenge a charge as evidence of a cramming violation.

The OAG supported proposed subsection (l)(5) and stated that probably the most important and effective single change proposed by these rules is the allowance of customer affidavits as evidence of cramming violations. Because the Administrative Procedure Act (APA), specifically, Texas Government Code §2001.081, allows for a more expansive approach to

evidentiary issues, the OAG noted that it should not always be necessary to require a customer's presence at hearing to prove a cramming violation. Indeed, the OAG stated, such requirement would be counter-productive because most customers would not take on the time or burden required for such a proceeding, particularly when the financial burden to them could easily outweigh the benefit. Moreover, the OAG observed, the standard in the proposed rule is to only admit an affidavit that meets the requirements of APA §2001.081. Accordingly, the OAG concluded, the proposed rule should be adopted to promote effective enforcement efforts.

**The commission disagrees that proposed subsection (l)(5) predetermines the admissibility of a customer affidavit in a proceeding to enforce the commission's cramming rules. Because a customer affidavit is not presumptively admitted into evidence against a company accused of cramming, the proposed rule does not infringe upon such a company's due process rights.**

**Customer affidavits are not presumptively admitted into evidence against a company in a proceeding to enforce the commission's cramming rules. As noted by the OAG, proposed subsection (l)(5), adopted in subsection (k)(5), specifically identifies customer affidavits as information the commission believes *may* be admissible pursuant to the more expansive approach to evidentiary issues allowed by APA §2001.081. Pursuant to this proposed rule, a customer affidavit, to be admitted into evidence in the absence at hearing of the customer who made the affidavit, must meet the requirements set out in APA §2001.081. Accordingly, the proponent seeking to admit the customer affidavit must demonstrate that it is: (1) necessary to ascertain facts not reasonably susceptible to proof under the rules of**

**evidence as applied in a nonjury civil case in a district court of Texas; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. Any party opposing admission of the customer affidavit may argue that one or more of these elements have not been satisfied by the proponent and, if successful, prevent admission of the affidavit.**

**However, as explained below in more detail, the commission finds that a customer affidavit is the type of evidence that is appropriate for admission pursuant to APA §2001.081 in a proceeding to enforce the commission's slamming rules.**

**First, the evidence described by proposed subsection (l)(5), adopted in subsection (k)(5), is necessary to ascertain facts that are not likely reasonably susceptible to proof because it is generally too costly for customers and the commission to require attendance by the customer at an enforcement proceeding related to slamming. The commission interprets the phrase "not reasonably susceptible to proof" as a reference to the ease with which the facts may be proved under the rules of evidence. How long it would take and how much it would cost to prove an issue are, therefore, relevant factors in determining whether some fact at issue is "reasonably susceptible of proof." In most cramming cases, the economic harm to the customer caused by the cram will be far outweighed by the cost of attending a hearing in Austin, Texas. Attendance at a hearing in Austin would, in most instances, require the customer to incur un-reimbursed expenses, including, but not necessarily limited to, lodging, meals, and travel. In addition, attending a hearing in Austin would require customers with daytime jobs to take time off from work. The commission does not**

**have budgeted funds to pay witnesses' expenses. Under these circumstances, the commission believes a customer will rarely choose to come to Austin to testify in a cramming case.**

**Next, the commission is not aware of any statute that specifically precludes admitting customer affidavits in slamming cases.**

**Finally, the customer affidavits contemplated in the proposed rule are the type on which staff experts who testify about slamming complaints at this commission rely. Staff experts commonly rely on a variety of information to determine whether a cram occurred, including the customer's complaint, whether affirmed or not, and the carrier's response to that complaint. Therefore, the commission finds that a customer affidavit is the type of evidence that should be admissible as contemplated by APA §2001.081.**

**Some commenters also suggested that customer affidavits were not admissible pursuant to APA §2001.081 because the affiant could easily be deposed by the commission or ordered to appear at the hearing by telephone. The commission disagrees. Cramming enforcement proceedings share many characteristics of mass litigation (the complainant usually suffers only minor monetary losses and temporary service interruptions, but the complainant may be one of hundreds or thousands of similarly situated customers). The commission does not have the budget or manpower necessary to attend and conduct depositions of so many complainants, many of whom may live great distances from Austin. Also, telephonic participation may be reasonable for one or two witnesses, but because cramming**

**proceedings can involve hundreds of customers, telephonic participation potentially presents substantial and unreasonable logistical difficulties, for the customers, the commission, the carrier and the ALJ, relating to scheduling an order of presentation for each customer, their appropriate contact telephone number and the specific time each customer will appear. Therefore, the costs to the customer and to the commission of pursuing such alternatives to attendance at a cramming enforcement proceeding will generally far outweigh any benefit they may provide. Accordingly, the commission disagrees that either of these methods of customer attendance will be reasonable in all enforcement proceedings related to cramming.**

**Moreover, carriers' due process concerns are not infringed by proposed subsection (l)(5), adopted in subsection (k)(5) of the rule. First, carriers may object and assert that one or more of the elements of APA §2001.081 have not been demonstrated by commission staff. Second, nothing in the proposed rule eliminates a carrier's ability to depose a customer who has submitted an affidavit or to seek compulsory attendance at the proceeding by that customer. Finally, a carrier may conduct discovery, depose, and cross-examine the commission's testifying expert about the basis for that expert's opinion, including the customer affidavits, if such were relied upon by the expert.**

**The commission also notes that the content of customer affidavits is admissible through the testimony of the commission's staff expert. Pursuant to Texas Rules of Evidence 703 and 705, the staff expert may rely on customer affidavits as the basis for his or her testimony and may disclose on direct, or must disclose on cross, the facts or data, including those**

**affidavits, that form the basis of the commission staff's opinion. Therefore, even if the customer affidavits are not admitted pursuant to APA §2001.081, those affidavits are properly the subject of the staff expert's testimony.**

Sprint recommended deleting proposed subsection (l)(6) because allowing the commission to suspend, restrict or revoke the registration or certificate of a billing telecommunications utility is exceptionally severe.

**The commission derives this authority, and the wording for the proposed rule, from PURA §17.156(d) and §64.156(d) (relating to Violations). Since the remedies are identical to those found in PURA, the commission declines to modify proposed subsection (l)(6) as adopted in subsection (k)(7) of the rule.**

This repeal and new section are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (PURA) which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including Chapter 17, Customer Protection, Subchapter D, Protection Against Unauthorized Charges, §§17.151, *et seq.*; Chapter 64, Customer Protection, Subchapter A, Customer Protection Policy, §64.001 which confers on the commission authority to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices, and Subchapter D, Protection Against Unauthorized Charges, §§64.151, *et seq.* Further, PURA §52.002, grants the commission

"exclusive original jurisdiction over the business and property of a telecommunications utility in this state subject to the limitations imposed by this title."

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.151-17.158, 52.001, 52.002, 64.001, and 64.151-64.158.

**§26.32. Protection Against Unauthorized Billing Charges ("Cramming"). (Repeal)**

**§26.32. Protection Against Unauthorized Billing Charges ("Cramming").**

(a) **Purpose.** The provisions of this section are intended to ensure that all customers in this state are protected from unauthorized charges on a customer's telecommunications utility bill. This section establishes the requirements necessary to obtain and verify customer consent for charges for any product or service before the associated charges appear on the customer's telephone bill.

(b) **Application.** This section applies to all "billing agents," "billing telecommunications utilities," and "service providers" as those terms are defined in §26.5 of this title (relating to Definitions) or the Public Utility Regulatory Act (PURA). This section does not apply to:

(1) an unauthorized change in a customer's local or long distance service provider, which is addressed in §26.130 of this title (relating to Selection of Telecommunications Utilities);

(2) message telecommunications charges that are initiated by dialing 1+, 0+, 0-, 1010XXX, or collect calls and charges for video services, if the service provider has the necessary call record detail to establish the billing for the call or service; and

(3) a provider of commercial mobile radio service as defined in PURA §51.003(5).

(c) **Definition.** The term "customer," when used in this section, shall mean the account holder, including the account holder's spouse, in whose name telephone service is billed, including individuals, governmental units at all levels of government, corporate entities, and any other entity or person with legal capacity to request to be billed for telephone service.

(d) **Requirements for billing authorized charges.** No service provider or billing agent shall submit charges for any product or service for billing on a customer's telephone bill before complying with all of the following requirements:

(1) **Inform the customer.** The service provider offering the product or service shall thoroughly inform the customer of the product or service being offered, including all associated charges for the product or service, and shall inform the customer that the associated charges for the product or service will appear on the customer's telephone bill.

(2) **Obtain customer consent.** The service provider shall obtain clear and explicit consent, verified pursuant to subsection (f) of this section, from the customer to obtain the product or service being offered and to have the associated charges appear on the customer's telephone bill. A record of the customer's verified consent shall be maintained by the service provider offering the product or service for at least 24 months immediately after the verified consent was obtained.

(3) **Provide contact information.** The service provider offering the product or service, and any billing agent for the service, shall provide the customer with a toll-free telephone number that the customer may call, and an address to which the customer may write, to resolve any billing dispute and to obtain answers to any questions.

(4) **Provide business information.** The service provider (other than the billing telecommunications utility) and its billing agent shall provide the billing telecommunications utility with its name, business address, and business telephone number.

(5) **Obtain billing telecommunications utility authorization.** The service provider and its billing agent shall execute a written agreement with the billing telecommunications utility to bill for products or services on the billing telecommunications utility's telephone bill. Record of this agreement shall be maintained by:

(A) the service provider;

(B) any billing agent for the service provider; and

(C) the billing telecommunications utility for as long as the billing for the product or service continues and for the 24 months immediately following the permanent discontinuation of the billing.

(e) **Post-termination billing.** A service provider shall not bill a customer for a product or service after the termination or cancellation date for that product or service unless the bill is for a product or service provided prior to the termination or cancellation date; or the service provider subsequently obtains customer consent and verification of that consent pursuant to this section.

(f) **Verification requirements.**

(1) Verification of a customer's consent for an order of a product or service must include:

(A) the date of customer consent;

(B) the date of customer verification of consent;

(C) the name and telephone number of the customer; and

(D) the exact name of the service provider as it will appear on the customer's bill.

(2) Verification of a customer's consent for an order of a product or service may not include discussion of any incentives that were or may have been offered by the service provider and shall be limited, without explanation, to the identification of:

(A) each offered product or service;

(B) applicable charges;

(C) how a product or service can be cancelled, including any charges associated with terminating the product or service; and

(D) how the charge will appear on the customer's telephone bill.

(3) During any communication with a customer to verify that customer's consent for a product or service, the independent third-party verifier or the sales representative, shall, after sufficient inquiry to ensure that the customer is authorized to order the product or service, obtain the explicit customer acknowledgment that charges for the product or service ordered by the customer will be assessed on the customer's telephone bill.

(4) Except in customer-initiated transactions with a certificated telecommunications utility for which the service provider has the appropriate documentation obtained pursuant to section (d), verification of customer consent to an order for a product or service shall be verified by one or more of the following methods:

(A) Written or electronically signed documentation.

(i) Written or electronically signed verification of consent shall be a separate document containing only the information required by paragraphs (1) and (2) of this subsection for the sole purpose of verifying the consent for a product or service on the customer's telephone bill. A customer shall be provided the option of using another form of verification in lieu of an electronically signed verification.

(ii) The document shall be signed and dated by the customer. Any electronically signed verification shall include the customer disclosures required by the *Electronic Signatures in Global and National Commerce Act* §101(c).

(iii) The document shall not be combined with inducements of any kind on the same document, screen or webpage.

(iv) If any portion of the document, screen or webpage is translated into another language, then all portions of the document shall be translated into that language. Every document shall be translated into the same language as any promotional materials, oral descriptions, or instructions provided with the document, screen or webpage.

(B) Toll-free electronic verification placed from the telephone number that is the subject of the product or service, except in exchanges where automatic number identification (ANI) from the local switching system is not technically possible. The service provider must:

(i) ensure that the electronic verification confirms the information required by paragraphs (1) and (2) of this subsection for the sole purpose of

verifying the customer's consent for a product or service on the customer's telephone bill; and

(ii) establish one or more toll-free telephone numbers exclusively for the purpose of verifying the customer consent of charges for the product(s) or service(s) so that the customer calling the toll-free number(s) will reach a voice response unit or similar mechanism regarding the customer consent for the product(s) or service(s) and automatically records the ANI from the local switching system.

(iii) Automated systems shall provide customers the option of speaking with a live person at any time during the call.

(C) Voice recording by service provider.

(i) The recorded conversation with a customer shall be in a clear, easy-to-understand, slow, and deliberate manner and shall contain the information required by paragraphs (1) and (2) of this subsection.

(ii) The recording shall be clearly audible.

(iii) The recording shall include the entire and actual conversation with the customer on audio tape, a wave sound file, or other recording device that is compatible with the commission's equipment.

(iv) The recording shall be dated and include clear and conspicuous confirmation that the customer consented to recording the conversation and authorized the charges for a product or service on the customer's telephone bill.

(D) Independent Third Party Verification. Independent third party verification of consent shall meet the following requirements:

(i) Verification shall be given to an independent and appropriately qualified third party with no participation by a service provider, except as provided in clause (vii) of this subparagraph.

(ii) Verification shall be recorded.

(iii) The recorded conversation with a customer shall contain explicit customer consent to record the conversation, be in a clear, easy-to-understand, slow, and deliberate manner and shall comply with each of the requirements of paragraphs (1) and (2) of this subsection for the sole purpose of verifying the customer's consent of the charges for a product or service on the customer's telephone bill.

(iv) The recording shall be clearly audible.

(v) The independent third party verification shall be conducted in the same language used in the sales transaction.

(vi) Automated systems shall provide customers the option of speaking with a live person at any time during the call.

(vii) A service provider or its sales representative initiating a three-way call or a call through an automated verification system shall disconnect from the call once a three-way connection with the third party verifier has been established unless the service provider meets the following requirements:

(I) the service provider files sworn written certification with the commission that the sales representative is unable to disconnect

from the sales call after initiating third party verification. Such certification should provide sufficient information describing the reason(s) for the inability of the sales agent to disconnect from the line after the third party verification is initiated. The service provider shall be exempt from this requirement for a period of two years from the date the certification was filed with the commission;

(II) the service provider seeking to extend its exemption from this clause must, before the end of the two-year period, and every two years thereafter, recertify to the commission its continued inability to comply with this clause.

(III) The independent third party verification shall immediately terminate if the sales agent of an exempt service provider, pursuant to sub clause (I) of this clause, responds to a customer inquiry, speaks after third party verification has begun, or in any manner prompts one or more of the customer's responses.

(viii) The independent third party shall:

(I) not be owned, managed, directed or directly controlled by the service provider or the service provider's marketing agent;

(II) not have financial incentive to verify the consent to charges; and

(III) operate in a location physically separate from the service provider or the service provider's marketing agent.

(ix) The recording shall include the entire and actual conversation with the customer on audio tape, a wave sound file, or other recording device that is compatible with the commission's equipment.

(x) The recording shall be dated and include clear and conspicuous confirmation that the customer authorized the charges for a product or service on the customer's telephone bill.

(5) Any other verification method approved by the FCC.

(6) A record of the verification required by subsection (f) of this section shall be maintained by the service provider offering the product or service for at least 24 months immediately after the verification was obtained from the customer.

(g) **Expiration of consent and verification.**

(1) If a customer consents to obtain a product or service but that product or service is not provisioned within 60 calendar days from the date of customer consent:

(A) The customer's consent is null and void, and

(B) Before the charge may appear on the customer's bill, the service provider must obtain new consent and verification of that new consent in accordance with this section.

(2) Paragraphs (1)(A) and (B) of this subsection do not apply to verification of consent relating to multi-line and/or multi-location business customers that have entered into negotiated agreements with a service provider for a product or service provisioned under and during the term specified in the agreement. The verified consent shall be valid for the period specified in the agreement.

(h) **Unauthorized charges.**

(1) **Responsibilities of the billing telecommunications utility for unauthorized charges.** If a customer's telephone bill is charged for any product or service without proper customer verified consent in compliance with this section, the telecommunications utility that billed the customer, on its knowledge or notification of any unauthorized charge, shall promptly, but not later than 45 calendar days after the date of the knowledge or notification of an unauthorized charge meet the following requirements:

(A) A billing utility shall:

(i) notify the service provider to immediately cease charging the customer for the unauthorized product or service;

(ii) remove the unauthorized charge from the customer's bill;

(iii) refund or credit to the customer all money that has been paid by the customer for any unauthorized charge, and if any unauthorized charge that has been paid is not refunded or credited within three billing cycles, shall pay interest at an annual rate established by the commission pursuant to §26.27 of this title (relating to Bill Payment and Adjustments) on the amount of any unauthorized charge until it is refunded or credited;

(iv) on the customer's request, provide the customer with all billing records under its control related to any unauthorized charge within 15 business days after the date of the removal from the customer's telephone bill;

(v) provide the service provider with the date the customer requested that the unauthorized charge be removed from the customer's bill and the dates of the actions required by clauses (ii) and (iii) of this subparagraph, and

(vi) maintain for at least 24 months a record of every customer who has experienced any unauthorized charge for a product or service on the customer's telephone bill and has notified the billing telecommunications utility of the unauthorized charge. The record shall contain for each alleged unauthorized charge:

(I) the name of the service provider that offered the product or service;

(II) the affected telephone number(s) and addresses;

(III) the date each customer requested that the billing telecommunications utility remove the unauthorized charge from the customer's telephone bill;

(IV) the date the unauthorized charge was removed from the customer's telephone bill; and

(V) the date the customer was refunded or credited any money that the customer paid for the unauthorized charges.

(B) A billing telecommunications utility shall not:

(i) suspend or disconnect telecommunications service to any customer for nonpayment of an unauthorized charge; or

(ii) file an unfavorable credit report against a customer who has not paid charges that the customer has alleged were unauthorized unless the

dispute regarding the unauthorized charges is ultimately resolved against the customer. The customer shall remain obligated to pay any charges that are not in dispute, and this paragraph does not apply to those undisputed charges.

(2) **Responsibilities of the service provider for unauthorized charges**. The service provider responsible for placing any unauthorized charge on a customer's telephone bill shall:

(A) immediately cease billing upon notice from the customer or the billing telecommunications utility for a product or service that a charge for such product or service has not been authorized by the customer;

(B) for at least 24 months following the completion of all of the steps required by paragraph (1)(A) of this subsection, maintain a record for every disputed charge for a product or service on the customer's telephone bill. Each record shall contain:

(i) the affected telephone number(s) and addresses;

(ii) the date the customer requested that the billing telecommunications utility remove the unauthorized charge from the customer's telephone bill;

(iii) the date the unauthorized charge was removed from the customer's telephone bill; and

(iv) the date that action was taken to refund or credit to the customer any money that the customer paid for the unauthorized charges; and

(C) not resubmit any unauthorized charge to the billing telecommunications utility for any past or future period.

(i) **Notice of customer rights.**

(1) Each notice provided as set out in paragraph (2) of this subsection shall also contain the billing telecommunications utility's name, address, and a working, toll-free telephone number for customer contacts.

(2) Every billing telecommunications utility shall provide the following notice, verbatim, to each of the utility's customers:

**********

**Charges on Your Telephone Bill**

**Your Rights as a Customer**

Placing charges on your phone bill for products or services without your consent is known as "cramming" and is prohibited by law. Your telephone company may be providing billing services for other companies, so other companies' charges may appear on your telephone bill.

If you believe you were "crammed," you should contact the telephone company that bills you for your telephone service, (insert name of company), at (insert company's toll-free telephone number) and request that it take corrective action. The Public Utility Commission of Texas requires the billing telephone company to do the following within 45 calendar days of when it learns of the unauthorized charge:

- Notify the service provider to cease charging you for the unauthorized product or service;
- remove any unauthorized charge from your bill;

- refund or credit all money to you that you have paid for an unauthorized charge; and
- on your request, provide you with all billing records related to any unauthorized charge within 15 business days after the charge is removed from your telephone bill.

If the company fails to resolve your request, or if you would like to file a complaint, please write or call the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

Your phone service cannot be disconnected for disputing or refusing to pay unauthorized charges.

You may have additional rights under state and federal law. Please contact the Federal Communications Commission, the Attorney General of Texas, or the Public Utility Commission of Texas if you would like further information about possible additional rights.

**********

(3) **Distribution and timing of notice.**

(A) Each billing telecommunications utility shall mail the notice as set out in paragraph (2) of this subsection to each of its residential and business customers within 60 calendar days after the effective date of this section, or by inclusion in the next publication of the utility's telephone directory following

60 calendar days after the effective date of this section. In addition, each billing telecommunications utility shall send the notice to new customers at the time service is initiated and on any customer's request.

(B) Every telecommunications utility that prints its own telephone directories shall print the notice in the white pages of such directories, in nine point print or larger, beginning with the first publication of the directories after 60 calendar days following the effective date of this section; thereafter, the notice must appear in the white pages of each telephone directory published by or for the telecommunications utility.

(4) Any bill sent to a customer from a telecommunications utility must include a statement, prominently located in the bill, that if the customer believes the bill includes unauthorized charges, the customer may contact: Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

(5) Each billing telecommunications utility shall make available to its customers the notice as set out in paragraph (2) of this subsection in both English and Spanish as necessary to adequately inform the customer; however, the commission may exempt a billing telecommunications utility from the requirement that the information be provided in Spanish upon application and a showing that 10% or fewer of its customers are exclusively Spanish-speaking, and that the billing telecommunications utility will notify all customers through a statement in both English and Spanish, as an addendum to the notice, that the information is available

in Spanish from the telecommunications utility, both by mail and at the utility's offices.

(6) The customer notice requirements in paragraphs (1) and (2) of this subsection may be combined with the notice requirements of §26.130(g)(3) of this title if all of the information required by each is in the combined notice.

(7) The customer notice requirements in paragraph (4) of this subsection may be combined with the notice requirements of §26.130(i)(4) of this title if all of the information required by each is in the combined notice.

(j) **Complaints to the commission.** A customer may file a complaint with the commission's Customer Protection Division (CPD) against a service provider, billing agent or billing telecommunications utility for any reasons related to the provisions of this section.

(1) **Customer complaint information.** CPD may request, at a minimum, the following information:

(A) the customer's name, address, and telephone number;

(B) a brief description of the facts of the complaint;

(C) a copy of the customer's and spouse's legal signature; and

(D) a copy of the most recent phone bill and any prior phone bill that shows the alleged unauthorized product or service.

(2) **Service provider's, billing agent's or billing utility's response to complaint.** After review of a customer's complaint, CPD shall forward the complaint to the service provider, billing agent or billing telecommunications utility named in that complaint. The service provider, billing agent or telecommunications utility shall

respond to CPD within 21 calendar days after CPD forwards the complaint. The response shall include, to the extent it is within the custody or control of the service provider, billing agent or billing telecommunications utility, the following:

(A) all documentation related to verification of customer consent used to charge the customer for the product or service; and

(B) all corrective actions taken as required by subsection (h) of this section, if the customer's consent for the charge for the product or service was not verified in accordance with subsection (f) of this section.

(k) **Compliance and enforcement.**

(1) **Records of customer verifications.** A service provider, billing agent or billing telecommunications utility shall provide a copy of records maintained under the requirements of subsections (d) and (f) of this section to the commission staff within 21 calendar days of a request for such records.

(2) **Records of disputed charges.** A billing telecommunications utility or a service provider shall provide a copy of records maintained under the requirements of subsection (h) of this section to the commission staff within 21 calendar days of a request for such records.

(3) **Failure to provide thorough response.** The proof of verified consent as required pursuant to subsection (j)(2)(A) of this section must establish a valid authorized charge as defined by subsection (f) of this section. Failure to timely submit a response that addresses the complainant's assertions within the time specified in subsections (j)(2), (k)(1), and (k)(2) of this section establishes a violation of this section.

(4) **Administrative penalties.** If the commission finds that a billing telecommunications utility has violated any provision of this section, the commission shall order the utility to take corrective action, as necessary, and the utility may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15 and §22.246 of this title (relating to Administrative Penalties).

(5) **Evidence.** Evidence provided by the customer that meets the standards set out in Texas Government Code §2001.081, including, but not limited to, one or more affidavits from a customer challenging the charge, is admissible in a proceeding to enforce the provisions of this section.

(6) **Additional Corrective Action**. If the commission finds that any other service provider or billing agent subject to PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, has violated any provision of this section or has knowingly provided false information to the commission on matters subject to PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, the commission shall order the service provider or billing agent to take corrective action, as appropriate, and the commission may enforce the provisions of PURA, Chapter 15 and §22.246 of this title, against the service provider or billing agent as if the service provider or billing agent were regulated by the commission.

(7) **Certificate suspension, restriction or revocation.** If the commission finds that a billing telecommunications utility or a service provider has repeatedly violated this section, and if consistent with the public interest, the commission may suspend, restrict, or revoke the registration or certificate of the telecommunications service

provider, thereby denying the service provider the right to provide service in this state. The commission may not revoke a certificate of convenience and necessity of a telecommunications utility except as provided by PURA §54.008.

(8) **Termination of billing and collection services.** If the commission finds that a service provider or billing agent has repeatedly violated any provision of PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, the commission may order the billing utility to terminate billing and collection services for that service provider or billing agent.

(9) **Coordination with Office of Attorney General.** The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, unfair, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.32, relating to Protection Against Unauthorized Billing Charges ("Cramming"), is hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 26th DAY OF AUGUST 2004.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**JULIE PARSLEY, COMMISSIONER**

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**PAUL HUDSON, CHAIRMAN**

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**BARRY T. SMITHERMAN, COMMISSIONER**

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