

A New Way to Compromise: An Analysis of the FCC, CTIA, and Consumers Union Bill Shock Compromise and its Application to Cramming

Matthew Friedman *

TABLE OF CONTENTS

I. INTRODUCTION.....	205
II. HISTORY OF COMMISSION PROTECTION OF WIRELESS CONSUMERS	206
<i>A. Pre-Genachowski Commission Regulatory Approaches.....</i>	<i>206</i>
1. Chairman Kennard	206
2. Chairman Powell.....	209
3. Chairman Martin.....	210
<i>B. Regulatory Actions and Philosophy of the Genachowski Commission</i>	<i>211</i>
1. Bill Shock.....	212
2. Cramming	216
3. Improving Consumer Education and Access to Information	219

* Attorney, Technology Law Group. J.D., George Washington University Law School, May 2012; B.S. in Physics and Political Science, Muhlenberg College, 2007. The author would like to thank Natalie Roisman for her guidance in connection with this article and the staff of the Federal Communications Law Journal for their work in helping prepare it for publication. He also thanks his mom and dad for their endless encouragement and support.

III. ANALYSIS OF THE BILL SHOCK COMPROMISE	220
A. <i>The Commission’s Authority to Impose the Rules Proposed in the Bill Shock NPRM is Questionable at Best</i>	221
B. <i>The Bill Shock Compromise is Too Regulatory in Nature and Does Not Adequately Resolve the Consumer Harms that Exist</i>	222
1. The Wireless Industry Agreed to the Bill Shock Compromise Because It Was More Costly to Not Reach a Compromise and Not Because the Compromise Was Good Policy.....	222
2. The Compromise is Unnecessarily Paternalistic, Inadequately Allocates the Costs of Compliance, and Will Ultimately Lead to Increased Costs for Wireless Consumers.....	223
3. The Compromise is an Example of Regulating for Regulation’s Sake that Does Not Adequately Address the Harms to Some Wireless Consumers.....	225
C. <i>Commission Action in Response to Bill Shock Should Have Focused on Deregulatory Solutions that Are More Narrowly Tailored to the Harms Found</i>	227
1. The Commission Should Have Taken Enforcement Action Against Unjust and Unreasonable Carrier Behavior Through the Rules and Mechanisms Already in Place	227
2. The Commission Should Have Focused More on Adopting Policies Aimed at Working with Industry to Take Advantage of Usage Tracking Tools Already in Place and Increasing Consumer Access to Information.....	228
IV. APPLICATION OF THE BILL SHOCK COMPROMISE TO CRAMMING..	229
V. CONCLUSION	232

I. INTRODUCTION

This article will address the question of what amount of regulation is appropriate to protect consumers of commercial mobile radio services (“CMRS” or “wireless”). Specifically, it focuses on the recent compromise between the wireless industry, Consumers Union, and the Federal Communications Commission (“Commission” or “FCC”), which stemmed from the Commission’s “bill shock” proceeding, and the viability of Commission-industry compromises as a future regulatory tool for protecting wireless consumers. Ultimately, the article concludes that the bill shock compromise is bad policy because it places substantial burdens on the wireless industry and fails to properly allocate the costs of compliance, which will lead to unnecessary costs for consumers. Instead, the Commission should have focused on enforcement against unjust and unreasonable carrier behavior for which the Commission already has authority. The Commission should have adopted policies that are aimed at working with industry to increase consumer choice and access to information, and narrowly tailored its solutions to concrete harms. While this paper concludes that in the case of bill shock, the compromise was bad policy, it nevertheless makes the argument that this style of Commission-industry compromise could be a useful regulatory mechanism for protecting consumers on issues such as cramming—as long as the outlined industry commitments are narrowly focused on the issue of informing and educating consumers.

In order to get a sense of past Commission actions, Part II of this paper first discusses the regulatory approaches and strategies relied on by prior Commissions to protect wireless telecommunications consumers. Second, it examines the regulatory philosophy of the Commission under Chairman Genachowski with regard to consumer protection. This discussion focuses primarily on the series of Commission actions regarding the issues of bill shock and cramming that culminated in a compromise where the wireless industry agreed to provide free and automatic alerts to consumers when their data, text and minute usage approaches and reaches capped levels. In Part III, the article analyzes whether the bill shock compromise is a wise policy mechanism for protecting wireless consumers from the harms of bill shock by examining whether these perceived consumer harms are actual harms, whether the costs of compliance were distributed efficiently, and whether the compromise will effectively remedy the consumer harms that do exist. It concludes that the costs of the compromise outweigh the benefits and therefore it is not a good policy. Finally, Part IV considers the merits of applying a similar Commission-industry compromise solution to the Commission’s pending bill cramming proceeding and finds that such an approach is advisable to the extent that any actions required by industry are narrowly focused on informing and educating consumers.

II. HISTORY OF COMMISSION PROTECTION OF WIRELESS CONSUMERS

The Communications Act of 1934 (“the Act”), as amended, created the Commission and authorized it, under Title II, to regulate common carriers and ensure that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable”¹ Throughout its history, the Commission has relied upon Title II and other authority to take measures to protect consumers, although its philosophy regarding the proper amount and breadth of the regulations has varied over time. An examination of previous consumer protection policies and regulations utilized by the Commission is helpful in determining the merits of the Commission’s bill shock compromise under Chairman Julius Genachowski. This examination will provide meaningful information regarding the state of the wireless regulatory environment when the compromise was reached, as well as highlight the successes and failures of past approaches from which lessons can be learned.

A. *Pre-Genachowski Commission Regulatory Approaches*

Since the passage of the Telecommunications Act of 1996 (“the 1996 Act”) and the rollout in 1998 of the “bucket of minutes” concept that dominates the post-paid wireless marketplace today, four individuals—two Democrats and two Republicans—have been nominated by the President, confirmed by the Senate, and served as Chairman of the Commission.² The structure and extent of the policies and regulations implemented by the Commission have been intricately linked to the regulatory philosophy and political affiliation of the Chairman who adopted them. Accordingly, past consumer protection actions are best examined in light of the Chairman implementing them.

1. Chairman Kennard

William Kennard, a Democrat appointed by President Clinton, served as Commission Chairman from November 1997 to January 2001, during

1. Communications Act of 1934, ch. 652, § 201(b), 48 Stat. 1064, 1070 (codified as amended at scattered sections 47 U.S.C.).

2. See *Commissioners from 1934 to Present*, FCC, <http://transition.fcc.gov/commissioners/commish-list.html> (last updated Jan. 3, 2012) [hereinafter *FCC Commissioners*]. This excludes Acting Chairman Copps, who served on an interim basis between Chairman Martin and Chairman Genachowski. See also *History of Wireless Communications, Wireless Timeline 1977-1999*, CTIA, http://www.ctia.org/media/industry_info/index.cfm/AID/10388 (last updated Jan. 2013).

the implementation of the 1996 Act.³ Although he is a Democrat, and might have been expected to have a more regulation-oriented philosophy, Chairman Kennard stressed that “[a] business solution to a business problem is always better than a regulatory solution to a business problem,”⁴ and according to the Commission itself, he “shaped policies that created an explosion of new wireless phones.”⁵ However, Chairman Kennard’s deregulatory philosophy was not unbridled. He considered protecting consumers to be one of six key responsibilities of the Commission in the post-1996 Act regulatory environment,⁶ and acknowledged that “not all competitors are scrupulous, and not all means of garnering competitive advantages are fair to consumers, especially those consumers who are used to obtaining telecommunications services from regulated monopolists.”⁷ In implementing policies to protect telecommunications consumers, Chairman Kennard focused primarily on the issues of cramming—which involves unauthorized, misleading, or deceptive charges on a consumer’s telephone bill—and truth-in-billing. The Chairman’s efforts established the regulatory base that eventually led to the bill shock compromise.⁸

During a meeting convened by Chairman Kennard in May 1998, local exchange carriers (“LECs”) and providers of billing and collection services worked with the Commission to address the problem of cramming.⁹ Following the meeting, the Commission promulgated a voluntary code of “best practices” designed to prevent the type of charges associated with cramming.¹⁰ The code was not legally enforceable on the consenting parties and only applied to charges by third parties to wireline LECs (not mobile providers) for inclusion on consumers’ local telephone bills. These best practices focused primarily on (1) ensuring that bills were complete and comprehensible; (2) ensuring that consumers had the information necessary to discuss or dispute charges; (3) providing consumers control over whether or not a third party’s products and services are charged on their telephone bills; and (4) establishing procedures for screening products, services, and service providers prior to approval for inclusion on a bill.¹¹ Further, the Commission educated consumers about the importance of reviewing their telephone bills and provided assistance

3. See *Biography of William Kennard*, FCC, <http://transition.fcc.gov/commissioners/previous/kennard/biography.html> (last updated Mar. 18, 2005) [hereinafter *Kennard Biography*].

4. Erwin G. Krasnow & M. Wayne Milstead, *FCC Regulation and Other Oxymorons Revisited*, 7 MEDIA L. & POL’Y 7, 11 (1999).

5. *Kennard Biography*, *supra* note 3.

6. Victor Rivero, *Giving the Telecom*, GOV’T TECH. (Dec. 31, 2008) <http://www.govtech.com/magazines/gt/Giving-the-Telecom.html>.

7. *Id.*

8. See *Anti-Cramming Best Practices Guidelines*, FCC, http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.html.

9. See *id.*

10. See *id.*

11. See *id.*

with understanding these bills.¹² Through this action, the Commission, which had processed on average more than 300 complaints each month from consumers claiming to have been crammed,¹³ took affirmative, but narrowly tailored, steps. The Commission anticipated that these new efforts would limit unfair or deceptive marketing and billing practices, as well as assist consumers with recognizing improper charges before any payment is made, but would not unnecessarily burden the nascent mobile industry.¹⁴

Less than a year later, in April 1999, the Commission took further action to protect consumers in its “truth-in-billing” proceeding. Relying on its authority under section 201(b) of the Act,¹⁵ as well as section 258,¹⁶ which prohibits “slamming” (changing a subscriber’s selection of a provider of wireline telephone service without that subscriber’s knowledge or permission), the FCC adopted broad and flexible, but binding, principles to promote truth-in-billing.¹⁷ The *First Truth-in-Billing Report and Order* required that “(1) the name of the service provider associated with each charge must be clearly identified; (2) charges must be separated by service provider; and (3) clear and conspicuous notification of any change in service provider must be made manifest.”¹⁸ The Commission claimed that the guidelines enhanced the ability of consumers to review individual charges and facilitated the detection of unauthorized charges and changes.¹⁹ In essence, the Commission focused on empowering consumers by ensuring that they had access to non-misleading information in a clear and well-organized manner so that they could ensure that all charges were legitimate. However, the Commission explicitly rejected adopting these rules in the mobile environment, finding that the record did not indicate a failure in providing wireless consumers with the clear and non-misleading information required to make informed choices.²⁰

Despite the fact that these two consumer protection mechanisms exempted wireless providers, they were the building blocks for additional regulations and proposed rules such as the bill shock compromise and the Genachowski Commission’s *Cramming NPRM*, which have major ramifications for wireless providers. Further, these mechanisms play a

12. See Press Release, Statement of William Kennard, Chairman, FCC, on the Release of Local Exchange Company Best Practices to Combat “Cramming,” FCC (Jul. 22, 1998), available at http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8050.html.

13. See *id.*

14. See *id.*

15. 47 U.S.C. § 201(b) (2006).

16. *Id.* § 258.

17. See Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-72, para. 17 (1999) [hereinafter *First Truth-in-Billing Report and Order*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-99-72A1.pdf.

18. *Id.* at para. 28.

19. See *id.* at para. 29.

20. See *id.* at para. 16.

critical role in analyzing the viability of Commission-industry compromises as a regulatory tool by giving an example of how successful alternative, less burdensome approaches have been.

2. Chairman Powell

With the election of George W. Bush as President in 2001, Michael Powell was chosen to replace Chairman Kennard. Powell, a Republican, had served as a FCC Commissioner since 1997, and served as Chairman from January 2001 through March 2005.²¹ Like Chairman Kennard, and as is generally expected from Republicans, Chairman Powell also employed a deregulatory philosophy that focused on market-driven solutions.²² In his first public appearance as Chairman, Powell labeled prolonged uncertainty to be the greatest enemy of regulation and cautioned that three of five unelected and unaccountable officials on the Commission should not be making judgments about where a citizen's thoughts, energies, and family time should be directed.²³

Fundamentally, Chairman Powell believed that regulation limits consumer choice,²⁴ and that the efficient use of market mechanisms would lead to maximized consumer welfare.²⁵ However, he did recognize that sometimes regulation is necessary to protect consumers. For example, under Chairman Powell, the Commission established the "Do Not Call" registry, which made it easier and more efficient for consumers to stop telemarketing calls,²⁶ and the Commission implemented number portability regulations requiring wireless carriers to allow consumers to maintain their phone numbers even when switching carriers.²⁷

Additionally, Chairman Powell made policy with regards to "truth-in-billing," by extending the broad, binding rules applied to wireline providers during the Kennard Commission to mobile providers.²⁸ In the

21. *FCC Commissioners*, *supra* note 2.

22. *See Biography of Michael K. Powell*, FCC, <http://transition.fcc.gov/commissioners/previous/powell/biography.html> (last updated Mar. 18, 2005).

23. *See* Raymond L. Fischer, *What Lies Ahead for the Federal Communications Commission?*, USA TODAY (SOC'Y FOR ADVANCEMENT EDUC.), Jan. 2002.

24. *See Michael Powell Biography*, THE HISTORY-MAKERS, <http://www.thehistorymakers.com/biography/michael-powell-41> (last accessed Oct. 3, 2012).

25. *See NewsHour with Jim Lehrer: Interview with FCC Chairman Powell* (PBS television broadcast Aug. 9, 2001) available at http://www.pbs.org/newshour/bb/media/july-dec01/powell_8-9.html.

26. *See* Press Release, Fed. Trade Comm'n, National Do Not Call Registry Opens (June 27, 2003), available at <http://www.ftc.gov/opa/2003/06/donotcall.shtm>.

27. *See generally* Tel. No. Portability, *Memorandum Opinion and Order*, FCC 03-237 (2003), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-03-237A1.pdf.

28. *See Truth-in-Billing and Billing Format, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking*, FCC 05-55, para. 16 (2005) [hereinafter *Second Truth-in-Billing Report and Order*], available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-55A1.pdf.

Second Truth-in-Billing Report and Order, the Commission noted a significant increase in complaints regarding wireless “billing & rates” and “marketing & advertising,” and found that exempting mobile providers from the requirements that billing descriptions be “brief, clear, non-misleading and in plain language” no longer met the statutory criteria for forbearance required by section 10.²⁹ In making this finding, the Commission emphasized its belief that this requirement would not constitute a substantial new regulatory burden on wireless providers.³⁰ Further, the Commission rejected the contention that CMRS providers should be exempted solely because they operate in a competitive marketplace and emphasized the critical nature of accurate billing information in allowing consumers to receive the full benefits of a competitive marketplace.³¹ Similar to the “Do Not Call” registry and the number portability rules, these regulations were restrictive in that they placed limits on industry’s unfettered discretion to act as they pleased, regardless of the fairness or reasonableness of their actions. However, these regulations were adopted and implemented in a way that promoted consumer choice and empowerment, rather than mandating specific, affirmative actions to be taken by the wireless industry. This is a fundamental difference from the paternalistic approach the Genachowski Commission would adopt in the bill shock compromise with industry that requires overly burdensome actions on the part of wireless providers regardless of whether consumers believe it is in their best interest to receive these alerts. Part III of this paper will focus on this difference.

3. Chairman Martin

In early 2005, Chairman Powell resigned and President George W. Bush appointed Kevin Martin, who had been serving as a Commissioner since 2001, to replace him.³² Martin, a Republican, served as FCC Chairman from 2005 until 2009.³³ Upon his resignation, Martin said his goal at the Commission “had been to ‘pursue deregulation while paying close attention to its impact on consumers and the particulars of a given market, to balance deregulation with consumer protection.’”³⁴ His deregulatory approach was especially perceptible with regard to truth-in-billing and cramming, as he took no actions to further either set of rules.³⁵

29. *See id.* at paras. 16, 18.

30. *See id.* at para. 19.

31. *See id.* at paras. 16, 18.

32. *See FCC Commissioners, supra* note 2.

33. *Id.*

34. Sam Gustin, *Can You Hear Me Now? FCC Launches Shot Across Big Telecom’s Bow*, Daily Finance (Aug. 27, 2009, 6:00 PM), <http://www.dailyfinance.com/2009/08/27/can-you-hear-me-now-fcc-launches-shot-across-big-telecoms-bow>.

35. *See Truth-In-Billing Policy: Major Truth-In-Billing Orders and Notices*, FCC, <http://transition.fcc.gov/cgb/policy/truthinbill.html> (last updated Dec. 20, 2010).

Chairmen Kennard, Powell, and Martin each believed that a deregulatory philosophy with regards to wireless was best. The consumer protection policies and mechanisms established under these Chairmen were narrowly tailored to specific industry practices they believed were unjust and unreasonable, and the policies focused on empowering consumers to make choices, which allowed the wireless industry to thrive.³⁶ However, with the appointment of a new chairman, Julius Genachowski, by President Barack Obama, the Commission's deregulatory approach toward protecting wireless consumers, which had previously endured across Chairmen of both political parties since the passing of the 1996 Act, has drastically changed.

B. Regulatory Actions and Philosophy of the Genachowski Commission

In August 2009, less than two months after Genachowski became Chairman, the Commission released a Notice of Inquiry ("NOI") to "examine whether there are opportunities to protect and empower consumers by ensuring sufficient access to relevant information about communications services."³⁷ The Commission noted that protecting and empowering consumers is one of its core responsibilities, that it had been four years since the record on consumer information issues had last been refreshed, and that technological advances in those years had benefited consumers in many ways, but also may have generated new sources of information for consumers to digest that create uncertainty and confusion.³⁸ Further, the Commission requested comment on "how to provide consumers with better access to clear, easily understandable information they need to choose a provider, to choose a service plan, manage use of the service plan, and decide whether and when to switch an existing provider or plan."³⁹

Comments submitted in response to the *Consumer Information and Disclosure NOI* were mixed. CTIA, the wireless industry's advocacy association, as well as wireless carriers such as Verizon Wireless, AT&T, and Sprint, contended that the competitive nature of the wireless industry ensured that carrier billing practices were responsive to consumer needs.⁴⁰

36. See CTIA—THE WIRELESS ASS'N, CONSUMER PROTECTION STANDARDS, available at http://files.ctia.org/pdf/121010_Consumer_Protection_Standards.pdf ("In the absence of harmful prescriptive regulation, wireless customer satisfaction continues to climb.").

37. Consumer Information and Disclosure, *Notice of Inquiry*, FCC 09-68, para. 17 (2009) [hereinafter *Consumer Information and Disclosure NOI*], available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-09-68A1_Rcd.pdf.

38. *Id.* at paras. 2-3.

39. *Id.* at para. 16.

40. See Comments of CTIA—The Wireless Ass'n at 2, Truth-in-Billing and Billing Format, FCC CC Docket No. 98-170 (rel. Oct. 14, 2009) (citing *Scores by Industry, Wireless Telephone Service*, THE AMERICAN CUSTOMER SATISFACTION INDEX,

Therefore, they argued, further regulation is unnecessary and would “disrupt the equilibrium . . . that has led to record high customer satisfaction levels.”⁴¹ On the other hand, Consumers Union, a public interest group, argued that substantial changes to the Commission’s rules were necessary to remedy consumer confusion and frustration when choosing a service provider and plan, using a carrier’s services, and receiving bills that were higher than expected.⁴²

1. Bill Shock

Ultimately, the Commission decided to inquire further into measures designed to assist US wireless consumers in avoiding “bill shock,” the “sudden and unexpected increase in [a mobile wireless user’s] monthly bill that is not caused by a change in service plans.”⁴³ In May 2010, the Commission released a Public Notice that sought to gather information “on the feasibility of instituting usage alerts and cut-off mechanisms similar to those required under the [European Union] regulations that would provide wireless voice, text, and data consumers in the United States a way to monitor, on a real-time basis, their usage of a wireless communications service, as well as the various charges they may incur in connection with such usage (e.g., roaming services, voice service “minute plans,” text message plans).”⁴⁴

After comments and reply comments on the Public Notice had been received, the Commission again took action with regard to bill shock. In

http://www.theacsi.org/index.php?option=com_content&view=article&id=147&catid=14&Itemid=212&i=Wireless+Telephone+Service&sort=Y2009&order=ASC (last visited Oct. 4, 2012)). See generally Comments of Verizon & Verizon Wireless, Truth-in-Billing and Billing Format, FCC CC Docket No. 98-170 (rel. Oct. 14, 2009); Reply Comments of AT&T, Inc., Truth-in-Billing and Billing Format, FCC CC Docket No. 98-170 (rel. Oct. 29, 2009); Comments of Sprint Nextel Corp., Truth-in-Billing and Billing Format, FCC CC Docket No. 98-170 (rel. Oct. 14, 2009).

41. Comments of CTIA, *supra* note 40, at 2.

42. See Comments of Consumer Fed’n of Am., Consumers Union, Free Press, Media Access Project, New Am. Found. & Public Knowledge at 2, Truth-in-Billing and Billing Format, FCC CC Docket No. 98-170 (rel. Oct. 14, 2009).

43. *Bill Shock*, FCC (Feb. 10, 2011), <http://www.fcc.gov/topic/bill-shock>.

44. Comment Sought on Measures Designed to Assist U.S. Wireless Consumers to Avoid “Bill Shock,” *Public Notice*, DA 10-803, at 2 (CGB 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-803A1.pdf. The EU regulations require that, when a wireless consumer places a voice call or text message in an EU market other than the consumer’s home market, the consumer’s home market provider must send to the consumer, free of charge, a text message detailing roaming prices for sending and receiving voice calls and text messages. Further, the EU regulations require that wireless providers notify a consumer using a data roaming service when the consumer has reached 80 percent of an agreed upon limit, and, when a consumer exceeds the established monetary or volume roaming limit, the provider must send another notification explaining the applicable costs and procedures if the consumer wishes to continue using the roaming data service. At that point, pending further instruction from the consumer, the provider must cease providing the service.

mid-October 2010, the Commission's Consumer and Governmental Affairs Bureau ("CGB") released a white paper, which discussed two national surveys that found bill shock to be common.⁴⁵ The first study conducted by the Government Accountability Office ("GAO"), reported that "34 percent of wireless phone users responsible for paying for their services received unexpected charges on their bills in 2008 and early 2009."⁴⁶ The second study, conducted by the FCC, "found that 17 percent of all Americans with cell phones . . . had experienced a sudden increase in their bill that occurred even when they had not changed their calling or texting plan."⁴⁷ CGB also listed what it believed to be the most prevalent circumstances causing wireless consumers to suffer from bill shock. The following items were identified: (1) international roaming charges that consumers can run up without realizing it, and that can add up to thousands of dollars; (2) charges that accrue when consumers exceed the limits on their voice, text, or data plans, and begin accumulating high charges at a per-minute rate; (3) unexpected charges when a phone is used with Wi-Fi in airplane mode; (4) charges for mandatory data plans that are included with new phones and plans without consumers being aware; (5) taxes and other fees of which a consumer was not aware; and (6) confusion about promotional rates, plans, and billing – including unclear or inconsistent guidance from salespeople and customer service representatives.⁴⁸

Shortly after releasing the white paper, the Commission issued a notice of proposed rulemaking ("NPRM") that found that mobile carriers were failing to provide complete information to consumers on the cost and usage management tools available to them and that the usage alerts being provided were inconsistently applied across carriers and service plans.⁴⁹ To remedy this, the *Bill Shock NPRM* proposed that mobile service providers be required to provide usage alerts.⁵⁰ Specifically, it proposed that mobile service providers "provide notification when a subscriber is approaching their plan's allotted limit for voice, text, or data usage,"⁵¹ "supply a notification message to consumers once they reach their monthly allotment limit and begin incurring overage charges,"⁵² and "supply a notification message to consumers when they are about to incur international or other roaming charges in excess of their normal rates."⁵³

45. See FCC, CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU WHITE PAPER ON BILL SHOCK 3 (Oct. 13, 2010) [hereinafter BILL SHOCK WHITE PAPER], available at <http://transition.fcc.gov/stage/Bill-Shock-White-Paper.pdf>.

46. *Id.*

47. *Id.*

48. See *id.* at 2-3.

49. See Empowering Consumers to Avoid Bill Shock, *Notice of Proposed Rulemaking*, FCC 10-180, paras. 16-17 (2010) [hereinafter *Bill Shock NPRM*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-180A1_Rcd.pdf.

50. See *id.* at para. 1.

51. *Id.* at para. 20.

52. *Id.* at para. 21.

53. *Id.* at para. 22.

Similar to the comments in response to the *Consumer Information and Disclosure NOI*, responses to the *Bill Shock NPRM* were mixed. CTIA and the wireless providers stressed that instead of imposing carrier mandates, the Commission should work with the carriers to make consumers better aware of the myriad of tools available to manage their accounts.⁵⁴ CTIA noted that its carriers, which provide wireless services to 93 percent of US wireless consumers,⁵⁵ currently offer tools to consumers such as shortcuts and websites, alerts and cut-off mechanisms, parental controls, account management and usage monitoring applications, and international voice and data usage monitoring tools that enable consumers to monitor their account activities directly on both the device and the web.⁵⁶ Further, CTIA stressed that the proposed rules would create substantial implementation challenges for carriers, to the detriment of consumers and the public interest, because the costs of implementing any alert system would inevitably be passed on to consumers and because the consistent transmission of “real-time” alerts for voice, text and data services is technologically infeasible.⁵⁷ CTIA also argued that the proposed regulations would harm competition, significantly curtail provider flexibility, and should therefore be avoided.⁵⁸

Meanwhile, the consumer advocates contended that unexpectedly high charges affect millions of consumers and that additional protection mechanisms were needed to minimize further harm to consumers.⁵⁹ They agreed with the Commission that “notifications should be provided in ‘real-time,’ at 80 and 100 percent usage thresholds of an allotted service (voice, text, or data) to all lines associated with an account”⁶⁰ and argued that these notifications would go a long way in remedying the problem of bill shock.⁶¹ However, the consumer advocates believed the Commission’s proposal did not go far enough to protect consumers fully. They urged the Commission to require that subscribers affirmatively ‘opt-in’ to any

54. Comments of CTIA—The Wireless Ass’n at 5, Empowering Consumers to Avoid Bill Shock, FCC CG Docket No. 10-207 (rel. Jan. 10, 2011) [hereinafter CTIA Bill Shock NPRM Comments].

55. *Id.* at 8. This figure is now 97 percent. See Press Release, CTIA, FCC and Consumers Union Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges (Oct. 17, 2011) [hereinafter CTIA Bill Shock Compromise News Release], available at <http://www.ctia.org/media/press/body.cfm/prid/2137>.

56. See CTIA Bill Shock NPRM Comments, *supra* note 54, at 9-14.

57. See *id.* at 31-32.

58. See *id.* at 34.

59. See Comments of Ctr. for Media Justice, Consumer Action, Consumer Fed’n of Am., Consumers Union, Free Press, Media Access Project, Nat’l Consumers League, Nat’l Hispanic Media Coal. & New Am. Found. Open Tech. Initiative in Response to NPRM at 1, Empowering Consumers to Avoid Bill Shock, FCC CG Docket No. 10-207 (rel. Jan. 10, 2011) [hereinafter Public Interest Group Bill Shock NPRM Comments].

60. *Id.* at 3.

61. See *id.* at 7.

additional fees from exceeding their plans or roaming internationally, before they can be charged.⁶²

Ultimately though, rather than the Commission adopting an order implementing the rules proposed in the NPRM, the issue of bill shock was resolved, at least for the time being, through a compromise between the FCC, CTIA, and Consumers Union.⁶³ The compromise became section eleven of CTIA's "Consumer Code for Wireless Service," and providers serving more than 97 percent of wireless consumers in the U.S. agreed to abide by it.⁶⁴ The agreement specifically provides that

Each wireless provider will provide, at no charge: (a) a notification to consumers of currently-offered and future domestic wireless plans that include limited data allowances when consumers approach and exceed their allowance for data usage and will incur overage charges; (b) a notification to consumers of currently-offered and future domestic voice and messaging plans that include limited voice and messaging allowances when consumers approach and exceed their allowance for those services and will incur overage charges; and (c) a notification to consumers without an international roaming plan/package whose devices have registered abroad and who may incur charges for international usage. Wireless providers will generate the notifications described above to postpaid consumers based on information available at the time the notification is sent.⁶⁵

Further, participating carriers agreed to provide two of the four notifications for data, voice, text, and international roaming to all subscribers by October 17, 2012, and all of the alerts by April 17, 2013, unless a subscriber affirmatively opts out of the plan,⁶⁶ as well as to "clearly and conspicuously disclose tools or services that enable consumers to track, monitor and/or set limits on voice, messaging and data usage."⁶⁷

The FCC intends to take a "trust, but verify" approach moving forward, in which it will put its rulemaking on hold while ensuring that the

62. *See id.* at 2.

63. *See* Julius Genachowski, Chairman, FCC, Announcement at the Bill Shock Event at the Brookings Institution 2 (Oct. 17, 2011) [hereinafter Genachowski Bill Shock Announcement] (transcript on file with the FED. COMM. L. J.).

64. *See* CTIA Bill Shock Compromise News Release, *supra* note 55, at 1.

65. CTIA, CONSUMER CODE FOR WIRELESS SERVICE § 11 (2011) [hereinafter CTIA WIRELESS CODE], available at http://files.ctia.org/pdf/The_Code.pdf.

66. Press Release, CTIA—The Wireless Ass'n, Federal Communications Commission and Consumers Union Announce Free Alerts to Help Consumers Avoid Unexpected Overage Charges, CTIA (Oct. 17, 2011), available at <http://www.ctia.org/media/press/body.cfm/prid/2137>.

67. CTIA WIRELESS CODE, *supra* note 65, § 11.

carriers provide the promised alerts.⁶⁸ The Commission, with the assistance of Consumers Union, can detect noncompliance through a web portal hosted on the FCC's website that will track whether carriers have complied with their obligations. If a carrier has not complied, the Commission will take further action.⁶⁹ Thus, this compromise by the wireless industry, in essence, concedes to the Commission nearly all the rules the agency contemplated imposing through the Administrative Procedures Act-mandated rulemaking process, absent extremely detailed specifics such as alerts being sent at 80 percent and 100 percent of the data, text and minute limits. Accordingly, as Part III of this paper explains, this compromise really serves as a binding regulation that improperly distributes the costs of complying with the rules. Therefore, as CTIA highlighted in its *Bill Shock NPRM* comments,⁷⁰ it is an unwise policy that restricts industry flexibility, ignores the myriad of tools for tracking consumer usage that are already available, and unnecessarily causes wireless providers to assume extra costs that will ultimately be passed along to consumers in the form of increased prices.

2. Cramming

In addition to addressing bill shock, the Genachowski Commission has shown an intention to protect wireless consumers by regulating cramming, as well as taking action against other billing practices it deems unfair and unreasonable. In its *Consumer Information and Disclosure NOI*, the Commission specifically addressed the issue of cramming, requesting comment on the "extent to which cramming remains a problem for consumers," despite the anti-cramming best practices guidelines that were already adopted by the Kennard Commission.⁷¹ Further, the Commission sought information on the billing practices of CMRS carriers, including whether and how they include charges for services rendered by third parties.⁷² In response, several regulatory and law enforcement entities, as well as consumer organizations, stated that unauthorized charges continue to be a substantial problem for consumers, who often have difficulty detecting unauthorized charges on their bills, especially when the dollar amounts of the charges are low.⁷³ Industry representatives contended that they have safeguards in place, such as "taking corrective measures against

68. Genachowski Bill Shock Announcement, *supra* note 63, at 2.

69. *Id.*

70. *See generally* CTIA Bill Shock NPRM Comments, *supra* note 54.

71. Consumer Info. & Disclosure, *Notice of Inquiry*, FCC 09-68, para. 41 (2009), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-09-68A1_Rcd.pdf.

72. *Id.*

73. Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), *Notice of Proposed Rulemaking*, FCC 11-106, para. 15 (2011) [hereinafter *Cramming NPRM*], http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-106A1_Rcd.pdf.

third-party billers that exceed specified complaint levels, . . . offering blocking options, and expeditiously resolving complaints relating to disputed charges,” and that all carriers have incentives to protect subscribers from unauthorized charges that make regulatory mandates unnecessary.⁷⁴

In October 2010, the Commission’s Enforcement Bureau entered into a consent decree with Verizon Wireless—which has the same force and effect as a Commission order—over data usage charges that the Bureau contended violated section 201(b) of the Act and the Commission’s truth-in-billing rules.⁷⁵ The Enforcement Bureau’s investigation, which was conducted in response to consumer complaints and press reports that some Verizon Wireless customers had observed unexpected data charges on their bills, focused on the incorrect billing that stemmed from Verizon Wireless’s \$1.99 per megabyte data usage charge for certain pay-as-you-go customers (“Paygo Customers”).⁷⁶

Ultimately, the Consent Decree requires that, in consideration for the Commission agreeing to terminate its investigation, Verizon Wireless must: 1) make a good faith effort to refund incorrect \$1.99 per megabyte charges to affected customers, totaling approximately \$52.8 million; 2) implement specific mechanisms and provide certain materials to inform customers about the credit/refund plan; 3) develop for all customer service employees additional training materials relating to data charges for Paygo customers; 4) train all customer service employees on the range of data usage options, including data blocks, and on resolving Paygo customer complaints related to data usage; 5) establish a Data Charge Task Force (“Task Force”) and specify a Task Force leader who will review customer appeals of refund denials, address issues regarding complaints from Paygo customers brought to their attention, and ensure that customer service employees are notified of any widespread or systemic billing errors relating to per MB data usage charges; 6) provide a plain-language description of: (i) the circumstances under which a Paygo customer may incur a \$1.99 per MB charge for data usage; (ii) whether the charge is imposed for application downloads; (iii) whether the charge is imposed for browsing or other data usage; (iv) how customers may get additional information about the basis for data usage charges (e.g., by phone or online); (v) the free tools that are available both online and on the wireless device for tracking data usage (e.g., the MyVerizon usage meter that provides the amount of data usage incurred during a bill cycle, and the #DATA feature that provides data usage information to customers directly on their devices); and (vi) the availability and location of an online bill tutorial; and 7) include in an easily-

74. *Id.* at para. 17.

75. *See* Verizon Wireless Data Usage Charges, *Consent Decree*, DA 10-2068 (EB 2010) [hereinafter *Verizon Wireless Consent Decree*], available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-2068A2_Rcd.pdf.

76. *Id.* at para. 2.

identifiable location on its website an online video tutorial explaining in detail the types of charges that may be reflected on customer bills and how customers can obtain additional information about such charges and their bills.⁷⁷

Accordingly, the Genachowski Commission has successfully relied on its enforcement authority to protect consumers of wireless services by obtaining key concessions and enforceable promises from wireless carriers that act unjustly and unreasonably.

In July 2011, the Commission further issued an NPRM where it “proposed rules designed to assist consumers in detecting and preventing the placement of unauthorized charges on their telephone bills,” i.e., cramming.⁷⁸ For mobile providers, the Commission proposed a requirement that “telephone bills and carriers’ websites include a clear and conspicuous statement indicating that consumer inquiries and complaints may be submitted to the Commission and provide the Commission’s contact information for the submission of complaints.”⁷⁹ Further, the Commission requested comment on whether any of the rules proposed for wireline carriers should also be applied to the CMRS carriers.⁸⁰

CTIA and the wireless industry responded that the Commission should refrain from imposing new wireless cramming mandates—and instead support voluntary industry efforts to prevent cramming—because the Commission lacks the authority to adopt the proposals included in the NPRM; there is no evidence that cramming is a widespread problem in the wireless industry; and the wireless industry competes vigorously on the basis of their customer service offerings and billing policies, which protects consumers.⁸¹ Others, such as the consumer advocacy organizations, stated that the Commission should require: that consumers opt-in to receive third-party charges regardless of the technology; that all providers must separate third-party charges on bills from the provider’s charges; that all providers include on their website and in their telephone bills a notice that consumers may file complaints with the Commission; that all carriers provide accurate contact information for third-party vendors on their telephone bills; and that all providers screen third parties for prior rule violations or other violations of law before agreeing to place their charges on telephone bills.⁸²

77. *See id.* at para. 8.

78. *Cramming NPRM, supra* note 73, at para. 1.

79. *Id.* at para. 52.

80. *See id.* at para. 53. The NPRM proposes that: 1) wireline carriers that offer subscribers the option to block third-party charges from their telephone bills must clearly and conspicuously notify subscribers of this option at the point of sale, on each bill, and on their websites and 2) charges from third-party vendors that are not carriers be placed in a section separate from charges assessed by carriers and their affiliates.

81. *See generally* Comments of CTIA—The Wireless Ass’n, Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”), CG Docket No. 11-116 (rel. Oct. 24, 2011) [hereinafter CTIA Cramming NPRM Comments].

82. *See* Comments of Consumers Union, Ctr. for Media Justice, Consumer Fed’n of Am., Nat’l Consumer Law Ctr & Public Knowledge at 2-5, Empowering Consumers to

In April 2012, the Commission adopted some of these proposed cramming rules for wireline carriers, but refrained from applying them to CMRS carriers.⁸³ However, as part of its order, the FCC issued a Further Notice of Proposed Rulemaking that noted increasing consumer concern over wireless cramming and sought comment on potential regulatory and non-regulatory measures, such as technological solutions, that could assist consumers in avoiding cramming.⁸⁴ The Commission has yet to adopt any binding regulations with regards to wireless cramming, but continues to express concern in this area, as well as a willingness to regulate.

3. Improving Consumer Education and Access to Information

Additionally, the Genachowski Commission has made substantial strides in protecting consumers by facilitating access to helpful information. First, in January 2010, the Commission launched a consumer task force that includes every Bureau Chief, the Chief of the Office of Engineering and Technology, the General Counsel, and the Managing Director, which focuses on protecting and empowering consumers as communications networks and technologies become increasingly complex yet essential to Americans' everyday lives.⁸⁵ Second, in July 2010, the Commission launched an online consumer help center, which offers "One-Stop Shopping" for consumers that allows them to learn about different issues in telecommunications, find out what's going on at the FCC, get tips for making the best choices in purchasing communications devices and services, have their voices heard by filing comments on issues that interest them, and file a complaint when there are problems.⁸⁶ Third, in February 2011, the Commission adopted an order reorganizing CGB to create a Web and Print Publishing Division that is responsible for providing consumers with significant information concerning telecommunications services and how those services are regulated, as well as the information consumers

Prevent and Detect Billing for Unauthorized Charges ("Cramming"), CG Docket No. 11-116 (rel. Oct. 24, 2011) [hereinafter Consumer Group Cramming NPRM Comments].

83. See Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), *Report and Order and Further Notice of Proposed Rulemaking*, FCC 12-42, para. 48, 80 (2012) [hereinafter *Cramming FNPRM*], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-42A1_Rcd.pdf. The rules "require wireline carriers that currently offer blocking of third-party charges to clearly and conspicuously notify consumers of this option on their bills, websites, and at the point of sale; to place non-carrier third-party charges in a distinct bill section separate from all carrier charges; and to provide separate totals for carrier and non-carrier charges."

84. See *id.* at para. 146.

85. See Press Release, FCC, FCC Chairman Julius Genachowski Announces Launch of Consumer Task Force (Jan. 20, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295816A1.pdf.

86. See Press Release, FCC, FCC Launches Consumer Help Center (Jul. 27, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-300333A1.pdf.

need to make choices in a competitive marketplace.⁸⁷ All three of these actions serve to empower consumers by granting them easy access to information they can use to protect themselves from harm, without imposing any unnecessary burdens on the wireless industry. Accordingly, and in contrast with the Kennard, Powell and Martin Commissions, the Genachowski Commission has been extremely active in using its power, through regulation and otherwise, in the name of protecting wireless consumers.

III. ANALYSIS OF THE BILL SHOCK COMPROMISE

First, it is conceded that the Commission, as the regulatory agency charged with “mak[ing] available, so far as possible, to all the people of the United States . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication services with adequate facilities at reasonable charges,”⁸⁸ has as a fundamental purpose the protection of consumers from unreasonable charges, and that sometimes regulatory intervention is necessary to ensure that this purpose is achieved. Second, there is evidence that a significant number of wireless consumers are receiving unexpected charges on their phone bills, and the Genachowski Commission’s focus on protecting these consumers is praiseworthy. Third, it is conceded that leaving industry some flexibility in implementing the bill shock compromise’s mandates and the fact that 97 percent of the wireless industry has agreed to abide by the compromise’s terms are generally positive attributes. However, the bill shock compromise, when examined as a whole, was not a wise policy mechanism for protecting wireless consumers from the perceived harms of bill shock and should not have been agreed upon.

First, the Commission’s authority to implement the bill shock rules absent industry agreement is questionable because the *Bill Shock NPRM* fails to point to any specific source of authority upon which it intends to rely. Instead, the Commission cites a variety of provisions in Title III of the Act that could potentially grant authority, but whether they cover services such as SMS and wireless broadband data services is unclear and contested.⁸⁹ Such action by the Commission without clear congressional authority taints the notion of compromise here because it suggests that the Commission was applying undue pressure in an area that Congress did not intend it to regulate. Second, although the bill shock compromise is a compromise in theory, in practice it is a really paternalistic and burdensome regulation that fails to properly allocate the costs of

87. See Reorganization of the Consumer and Governmental Affairs Bureau, *Order*, FCC 11-17, para. 1 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-17A1_Rcd.pdf.

88. 47 U.S.C. § 151 (2006).

89. See CTIA Bill Shock NPRM Comments, *supra* note 54, at 37-38.

compliance and which will lead to increased costs for consumers. Instead, the Commission should have focused on enforcing against unjust and unreasonable carrier behavior through the sufficient authority it already had, adopted policies aimed at working with industry to increase consumer choice and access to information, and tailored solutions only to concrete problems, not hypothetical problems or areas where the mere opportunity to empower consumers, no matter the cost, exists.

A. The Commission's Authority to Impose the Rules Proposed in the Bill Shock NPRM is Questionable at Best

In its *Bill Shock NPRM*, the Commission did not *specifically* announce the statutory authority it intended to rely on in creating any bill shock rules. Instead, it listed a number of provisions from Title III of the Act from which authority could possibly be derived, while also seeking comment on other potential sources of authority.⁹⁰ In its comments, as noted above, CTIA stressed that SMS and wireless broadband data services are information services over which the Commission lacks authority to require information disclosures, and the consumer groups, who generally supported the Commission's bill shock proposal, were silent on the issue of authority.⁹¹ Accordingly, there is no clear authority upon which the Commission could have relied, which would have left any adopted rules open to attack on appeal. This, in turn, would have created excess costs to the wireless industry and taxpayers in the form of legal fees and regulatory uncertainty, and also suggests that the Commission may be unable to enforce its promise to reopen the bill shock proceeding, should it find that the wireless industry is not keeping up its end of the bargain.

Further, the constitutionality of any bill shock rules adopted through the rulemaking process is also unclear. In *Central Hudson*, the Supreme Court announced that a regulation of commercial speech will be found compatible with the First Amendment if: (1) the regulation relates to activity that is lawful and that is not misleading; (2) there is a substantial government interest; (3) "the regulation directly advances the governmental interest;" and (4) the proposed regulation "is not more extensive than is necessary to serve that interest."⁹² Here, the bill shock rules proposed in the NPRM would have controlled commercial speech because they would have forced wireless carriers to create an entirely new message made up of content established by the Commission and imposed the cost of distribution on the carriers. Additionally, even to the extent that the government has a

90. See *Bill Shock NPRM*, *supra* note 49, at para. 27.

91. CTIA Bill Shock NPRM Comments, *supra* note 54, at 34; see generally Public Interest Group Bill Shock NPRM Comments, *supra* note 59, at 1-3, 7 (supporting the Commission's proposal and urging it to establish additional rules).

92. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 566 (1980).

substantial interest in ensuring consumers have access to the contents of these alerts, any mandate that the information be sent directly to the device is more extensive than necessary to serve that interest because other, less burdensome methods of accessing this information from one's wireless device or the Internet already exist.⁹³ Accordingly, although the potential lack of authority does not taint the voluntary agreement by the wireless industry to provide alerts, it does suggest that Congress may not have intended to grant the Commission authority to regulate in this area, calls into question the Commission's ability to take further action should industry not send the alerts as promised, and generally weakens any contention that binding wireless carriers in this manner is good policy.

B. The Bill Shock Compromise is Too Regulatory in Nature and Does Not Adequately Resolve the Consumer Harms that Exist

As conceded above, there is significant evidence of harms to wireless consumers as a result of the billing practices of some wireless providers, which is exemplified in the report by the GAO that found that "34 percent of wireless phone users responsible for paying for their services received unexpected charges on their bills" and the FCC's finding that "17 percent of all Americans with cell phones . . . had experienced a sudden increase in their bill that occurred even when they had not changed their calling or texting plan."⁹⁴ However, the bill shock compromise is really just regulation in the form of a compromise, which was obtained through threatening the wireless industry with even more burdensome and less flexible regulation. Further, the compromise is unnecessarily paternalistic, which causes the costs of compliance to be misallocated and therefore, does not efficiently and adequately address the harms that some wireless consumers are experiencing. In essence, the compromise, which implements basically all the rules proposed in the NPRM, is a solution for solution's sake where the benefits of the solution do not outweigh the costs, rather than a mechanism narrowly calculated to maximize consumer protection in light of these costs. It was, therefore, bad policy for the Commission to agree to this compromise.

1. The Wireless Industry Agreed to the Bill Shock Compromise Because It Was More Costly to Not Reach a Compromise and Not Because the Compromise Was Good Policy

In the *Bill Shock NPRM*, the Commission not only proposed the usage alert requirements for post-paid subscribers that were agreed to in the

93. See CTIA Bill Shock NPRM Comments, *supra* note 54, at 9-14.

94. BILL SHOCK WHITE PAPER, *supra* note 45, at 3.

bill shock compromise, but also sought comment on less flexible and more burdensome regulations. These included adopting the European Union's requirement that alerts be sent out in "real-time" when both 80 percent and 100 percent usage levels are triggered, as well as extending the proposed rules to the prepaid context.⁹⁵ Further, in their *Bill Shock NPRM* comments, the public interest commenters stressed that the Commission's proposed rules did not go far enough and urged the Commission to require that subscribers affirmatively opt-in before overage fees could be charged.⁹⁶ Also, as noted above, there was uncertainty regarding the Commission's legal authority to implement bill shock rules, which could have potentially led to expensive litigation. Accordingly, these factors created an environment where the certainty of the compromise's requirements as well as the degree of flexibility regarding implementation that the compromise afforded made the compromise the lesser of two evils. However, the compromise is ultimately still an evil that should have been avoided.

2. The Compromise is Unnecessarily Paternalistic, Inadequately Allocates the Costs of Compliance, and Will Ultimately Lead to Increased Costs for Wireless Consumers

The bill shock compromise requires wireless carriers to "provide free alerts both before and after subscribers reach monthly limits on voice, data and text," as well as "inform consumers of international roaming charges when traveling abroad," unless they opt-out.⁹⁷ However, government studies show that only one-third of subscribers in charge of paying their phone bill are receiving unexpected charges.⁹⁸ Thus, this solution is over-inclusive in that alerts will be sent to subscribers who are already aware of their monthly usage, and were not at risk of suffering from bill shock.

This over-inclusion is not necessarily problematic; however, the costs imposed on the wireless industry substantially outweigh any convenience benefits to consumers gained by the over-inclusion. CTIA noted that "[s]ome carrier billing systems are not equipped to handle outbound usage alerts and would need to be overhauled or replaced entirely," and "many carriers would have to implement extensive network upgrades throughout their service area to address technical challenges to providing recurring usage alerts by SMS or voice" ⁹⁹ These upgrades are expensive but

95. See *Bill Shock NPRM*, *supra* note 49, at paras. 20, 25.

96. See Public Interest Group Bill Shock NPRM Comments, *supra* note 59, at 2.

97. CTIA Bill Shock Compromise News Release, *supra* note 55.

98. BILL SHOCK WHITE PAPER, *supra* note 45, at 3.

99. CTIA Bill Shock NPRM Comments, *supra* note 54, at 31-32.

necessary if carriers are to uphold their end of the bill shock compromise.¹⁰⁰

Furthermore, the Commission failed to demonstrate the benefits of these alerts to the majority of wireless consumers who do not suffer from bill shock. For example, consumers who never approach their usage limits or travel internationally will never trigger a usage alert. Thus, no benefits arise from creating the capability to send out usage alerts to them. Also, any usage alerts provide little benefit outside of mere convenience for consumers who currently monitor their usage through existing tools made available by their provider. Due to this, the inherent costs of complying with the bill shock compromise's conditions outweigh the benefits.

Additionally, the Commission's approach to the bill shock compromise is unnecessarily paternalistic because it is focused on the required delivery of usage information to consumers rather than ensuring that consumers understand how to protect themselves using the tools already available to them. This is precisely the type of behavior Chairman Powell was addressing when he cautioned against unelected, unaccountable Commissioners making judgments about where the thoughts, energies, and family time of consumers should be directed.¹⁰¹ Here, the Genachowski Commission, by pressuring industry into accepting the bill shock compromise, decided for the public that it is in their best interest to receive alerts when certain events are triggered. However, as noted above, the Commission does not make a compelling case of why the mandated delivery of this information, and the substantial costs associated with it, are necessary when increasing consumer access to information on how they can protect themselves from bill shock could be equally effective. This type of paternalistic regulation creates false consumer expectations that the role of government is to hold their hand, which encourages consumer laziness instead of accountability.

Ultimately, the cost of implementing usage and international roaming alert capabilities will be passed along to consumers, as CTIA explicitly noted in its comments on the *Bill Shock NPRM*.¹⁰² Thus, all wireless consumers, regardless of whether they reap the benefits of the alerts, will end up paying for costly network upgrades through increased fees. This cost distribution is unfair because it causes diligent consumers who are mindful of the charges they incur to subsidize the alert notifications sent to others, as well as inefficient because the total costs of implementation outweigh the benefits.

100. See Comments of T-Mobile USA at 16-17, Empowering Consumers to Avoid Bill Shock, CG Docket No. 10-207 (rel. Jan. 11, 2011).

101. See Fischer, *supra* note 23, at 60.

102. See CTIA Bill Shock NPRM Comments, *supra* note 54, at 31-32.

3. The Compromise is an Example of Regulating for Regulation's Sake that Does Not Adequately Address the Harms to Some Wireless Consumers

In addition to being unfair and inefficient, the bill shock compromise does not adequately resolve the harms it is intended to address. In its white paper on bill shock, released one day before the *Bill Shock NPRM*, CGB compiled a list of reasons why consumers suffer from bill shock that included: (1) unexpected charges when a phone is used with Wi-Fi in “airplane mode,” (2) charges for mandatory data plans that are included with new phones and plans without consumers being aware, (3) taxes and other fees of which a consumer was not aware, and (4) confusion about promotional rates, plans, and billing.¹⁰³ However, the alerts and disclosure of tracking tools and services that the bill shock compromise calls for fail to get at the root of these problems;¹⁰⁴ they merely serve to notify the consumer that a certain triggering point has been reached without suggesting why it was reached. Thus, even if the consumer is aware that he is close to incurring additional fees, he is not empowered with information to resolve the problem. Accordingly, consumers may no longer be “shocked” at their bills, but the underlying problem that caused the shocking is likely to continue arising each month. This is specifically relevant with regard to data usage, which is much more difficult to conceptualize than number of minutes used or texts sent, or whether one is traveling internationally.

Additionally, in the *Bill Shock NPRM*, the Commission contended that any “[u]sage alerts that are currently provided vary substantially between service providers and are inconsistent in application among various types of mobile services and plans.”¹⁰⁵ Yet in agreeing to the bill shock compromise, carriers have only promised to provide, at no charge, “notifications” to consumers of currently offered and future domestic wireless plans that include limited voice, messaging, or data allowances.¹⁰⁶ Thus, the compromise does not require standardization across carriers regarding when the notification is sent out and what information it contains. When a consumer switches carriers, or potentially even when he switches devices or plans, the timing and form of the notification might change. Although allowing this flexibility is critical to ensuring that carriers can minimize the costs inherent in adjusting their networks to allow these notifications to be sent out, this flexibility greatly decreases the effectiveness of the alerts in creating an industry standard practice that consumers can rely upon. This serves to make the bill shock compromise a

103. See BILL SHOCK WHITE PAPER, *supra* note 45, at 2-3.

104. CTIA WIRELESS CODE, *supra* note 65, § 11.

105. *Bill Shock NPRM*, *supra* note 49, at para. 16.

106. See CTIA WIRELESS CODE, *supra* note 65, § 11.

“regulation for regulation’s sake,” i.e., a regulatory action for which Chairman Genachowski and the Commission can pat themselves on the back and use as an example of their dedication to protecting consumers,¹⁰⁷ but which in actuality does little to benefit consumers.

The bill shock compromise also fails to secure from the wireless industry a promise that the alerts will be in “real-time.” Real-time alerts would immediately inform consumers about additional fees associated with their presence in an international jurisdiction, or that they are approaching or have reached either a voice, text, or data usage limit, which would allow the consumer to discontinue the behavior before any excess fees are incurred. However, the bill shock compromise does not require real-time alerts. This allows the wireless industry some necessary buffer room regarding the timing of the alerts, “as data traffic usage is not processed and updated in real-time,”¹⁰⁸ but serves to diminish the benefits that the alerts provide. Moreover, in the context of international roaming, the expectation of an alert by a consumer that the bill shock compromise creates can be especially problematic because carriers have “no...advance warning with respect to a roaming customer who is about to download a large data file,” and alerts can be even more delayed than in the usage alert context because the roaming billing records are transmitted by the visiting carrier.¹⁰⁹ Therefore, the alerts could provide consumers with a false sense of security that they will be alerted with sufficient notice before incurring any additional fees, which may cause them to abandon any caution they would have had absent the compromise.

Further, although the bill shock compromise is applicable to wireless carriers that provide services for 97 percent of the population,¹¹⁰ 3 percent of the population will continue to operate under the un-regulated, pre-compromise billing regime. This 3 percent would not have been left out if the FCC issued binding rules, or pushed harder to get the carriers of the remaining 3 percent on board. The Commission’s willingness to compromise demonstrates its readiness to sacrifice protection of a portion of the population for a good headline, which could cause the abandoned 3 percent to lose confidence in the Commission. Accordingly, the bill shock compromise is unfair to consumers who do not benefit from the alerts, inefficiently allocates the costs of compliance, and fails to adequately resolve the existing harms to wireless consumers. Thus, it is a bad policy that never should have come into existence.

107. See Genachowski Bill Shock Announcement, *supra* note 63 (stating that “[t]oday’s announcement is a big win for consumers” and thanking the FCC staff, including those in the Chairman’s Office, for their hard work and “constant focus on doing the right thing for the American public”).

108. Comments of CTIA—The Wireless Ass’n at 33, Empowering Consumers to Avoid Bill Shock, CG Docket No. 10-207 (rel. Jan. 11, 2011).

109. *Id.*

110. See CTIA Bill Shock Compromise News Release, *supra* note 55.

C. Commission Action in Response to Bill Shock Should Have Focused on Deregulatory Solutions that Are More Narrowly Tailored to the Harms Found

Instead of entering into the bill shock compromise, causing the wireless industry to unnecessarily take on extra costs that are passed on to consumers, the Commission should have focused on protecting consumers from bill shock through the regulatory rules and mechanisms already in place and adopted policies aimed at working with industry to take advantage of existing usage tracking tools and increase consumer access to information, which more efficiently and effectively resolve the harms of bill shock.

1. The Commission Should Have Taken Enforcement Action Against Unjust and Unreasonable Carrier Behavior Through the Rules and Mechanisms Already in Place

Section 201(b) of the Act charges the Commission with ensuring that “[a]ll charges, practices, classifications, and regulations for and in connection with such [common carrier] service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is . . . unlawful.”¹¹¹ This provision remains a powerful tool for the Commission in protecting consumers. It, along with the truth-in-billing rules, was the basis for the Genachowski Commission’s investigation into Verizon Wireless’ billing practices that led to a Consent Decree where the Commission obtained binding promises by Verizon to stop behavior that harmed consumers.¹¹² Accordingly, although the Commission may not have the authority to impose the bill shock rules proposed in the *Bill Shock NPRM*, it does have the authority to enforce against billing practices that are unjust and unreasonable.¹¹³ Similar to the investigation into Verizon’s billing practices, the Commission could scrutinize any potentially unfair practices that are leading wireless consumers to be shocked by their bills, such as unfair disclosure of when data charges, or international roaming, apply. The Commission could then focus its effort on stopping these practices. This type of narrowly tailored enforcement action would demonstrate to the wireless industry that certain types of behavior will not be tolerated, while minimizing the regulatory burdens inherent in the bill shock compromise that lead to increased costs for consumers.

Furthermore, the Commission should utilize its authority derived from other portions of the Act, such as section 310(d), to ensure vigorous

111. 47 U.S.C § 201(b) (2006).

112. See *Verizon Wireless Consent Decree*, *supra* note 75, at paras. 7-8.

113. 47 U.S.C. § 201(b).

competition, specifically in the area of billing practices.¹¹⁴ Competition with regard to billing will incentivize pro-consumer practices such as fair and clear disclosure of billing policies and easy access to usage information. Should a carrier implement anti-consumer billing policies, then consumers will leave that carrier for another and, ultimately, the carrier with anti-consumer policies will be driven from the market. Accordingly, the Commission has substantial authority to enforce against unfair and deceptive practices, as well as ensure competition in the wireless market, which it can use to ensure consumers do not suffer from bill shock.

2. The Commission Should Have Focused More on Adopting Policies Aimed at Working with Industry to Take Advantage of Usage Tracking Tools Already in Place and Increasing Consumer Access to Information

In addition, the Commission could have supplemented this authority by working with the wireless industry to truly empower consumers, much like the Commission did during the Chairmanships of Kennard and Powell. For example, in a similar nature to the best practices guidelines designed to prevent cramming charges that were adopted by the Kennard Commission, the Genachowski Commission should have worked with CTIA and the wireless industry to develop best practices that were truly voluntary, rather than unduly pressuring the industry to agree to send out alert notifications. As CTIA noted in its bill shock comments, the wireless industry offered to work with the Commission to promote the variety of innovative monitoring tools already available.¹¹⁵ This type of solution, a business solution, is, in the words of Chairman Kennard, “always better than a regulatory solution to a business problem,”¹¹⁶ as it would more efficiently take advantage of the myriad of usage tracking tools available, which avoids the unnecessary costs associated with implementing the mandatory alerts while also ensuring that consumers benefit from an enhanced ability to track their usage. Ultimately, although the compromise does call for clear and conspicuous disclosure of “tools and services that enable consumers to track, monitor and/or set limits on voice, messaging and data usage,” this disclosure takes a back seat to the alerts.¹¹⁷ The Commission should have

114. See, e.g., AT&T Inc. & Cellco P’ship d/b/a Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses & Authorizations & Modify a Spectrum Leasing Arrangement, *Memorandum Opinion and Order*, FCC 10-116, para. 22 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-116A1.pdf. Pursuant to section 310(d) of the Act, the Commission is charged with determining whether any proposed assignment and transfer of control of licenses and authorizations, which includes mergers and acquisitions, will serve the public interest, convenience, and necessity. See, e.g., *id.*

115. See CTIA Bill Shock NPRM Comments, *supra* note 56, at 5-6.

116. Krasnow & Milstead, *supra* note 4, at 7, 11.

117. CTIA WIRELESS CODE, *supra* note 65, § 11.

instead focused its efforts on working with industry to further develop and make use of the usage tracking tools already in place, encouraging industry to improve their accuracy, visibility and effectiveness, rather than merely requiring their existence be disclosed.

Further, the Commission should have focused more on educating consumers about the available usage tracking tools and informing them of the causes of bill shock, thus empowering them to avoid the harms of bill shock on their own. As Chairman Genachowski himself noted in the similar context of seizing the opportunities of broadband Internet, “[t]his is not about government regulation. It’s about responsibility. It’s about information and education. It’s about empowerment”¹¹⁸ Through creating a widespread education campaign about the causes of bill shock, which could involve increasing the dissemination of information at the point of sale of devices, on the Commission’s webpage, and on the website of every carrier, the Commission could have built off the momentum gathered from previously successful education initiatives such as the consumer task force, online consumer help center and creation of CGB’s Web and Print Publishing Division that were discussed in Part II. Armed with this information, consumers would then have an understanding of the tools available to them and could efficiently avoid suffering from bill shock by resolving the specific problem that had caused them to suffer from bill shock in the past. By focusing on taking advantage of and improving the myriad of tracking resources already available to consumers, as well as launching a widespread education campaign regarding the harms of bill shock and the reasons why it happens, the Commission would have more narrowly tailored its solution to bill shock’s harms, which eliminates unnecessary costs that are eventually passed along to consumers and therefore would have been a better policy than the bill shock compromise.

IV. APPLICATION OF THE BILL SHOCK COMPROMISE TO CRAMMING

The bill shock compromise, as implemented, was bad policy that should have been avoided. A similar compromise approach, however, might be advisable policy with regard to the Commission’s pending cramming proceeding, to the extent that any actions required by the wireless industry are narrowly focused on informing and educating consumers. First, like in the context of bill shock, the Commission’s authority to implement the rules proposed in the *Cramming NPRM* is unclear and disputed.¹¹⁹ Accordingly, any cramming rules imposed on the

118. Prepared Remarks of FCC Chairman Julius Genachowski at “Generation Mobile” Forum, at 3 (Dec. 14, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303609A1.pdf.

119. See CTIA Cramming NPRM Comments, *supra* note 54, at 18-19.

wireless industry are ripe for costly litigation and could potentially be thrown out on appeal, which would make them unenforceable. Therefore, a Commission-industry compromise could lead to a more amicable and longer lasting resolution to the issue of wireless cramming than binding regulation, making it a preferential vehicle for protecting consumers.

Additionally, the costs for the wireless industry in complying with the rules proposed in the *Cramming NPRM* would be substantially less than they are for complying with the Bill Shock rules. As proposed in the *Cramming NPRM*, the rules for wireless carriers are narrowly tailored to inform consumers of their right to complain to the Commission about unjust practices, provide them with the Commission's contact information, and potentially require that charges from third-party vendors be placed in a separate section than the charges accessed by the carrier.¹²⁰ Thus, the cramming rules would merely mandate that certain information that is narrowly tailored to empowering consumers to protect themselves against unauthorized charges be included on the face of the phone bill. This is not what the bill shock compromise entails. Rather, it sets up prescriptive rules about when alerts must be sent to consumers, which require substantial and costly upgrades to each carrier's network.¹²¹ Accordingly, the costs to the wireless industry in implementing the rules proposed in the *Cramming NPRM* are much less than in implementing the bill shock rules.

The proposed cramming rules are also similar to the Commission's truth-in-billing rules, which properly focus on curbing deceptive practices by carriers that mislead and confuse consumers. Currently, the truth-in-billing rules require that (1) the name of the service provider associated with each charge must be clearly and conspicuously identified;¹²² (2) where charges for two or more carriers appear on the same bill, the charges must be separated by service provider;¹²³ (3) charges for non-telecommunications services must be placed in a distinct section of the bill from all carrier charges;¹²⁴ and (4) clear and conspicuous notification of any change in service provider must be made manifest.¹²⁵ As noted above, the proposed cramming rules for wireless carriers are also narrowly tailored to limiting the ability of carriers to engage in deceptive billing practices and informing consumers of their right to complain to the Commission.¹²⁶ Both the proposed cramming rules and the existing truth-in-billing rule fundamentally focus on ensuring that information is presented to consumers in a simple and straightforward manner. Accordingly, like the

120. See *supra* text accompanying notes 20, 78-79.

121. See CTIA Bill Shock NPRM Comments, *supra* note 54, at 31.

122. 47 C.F.R. § 64.2401(a)(1) (2011).

123. *Id.* § 64.2401(a)(2).

124. Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), 77 Fed. Reg. 30919 (proposed May 24, 2012) (to be codified 47 C.F.R. § 64.2401(a)(3)).

125. 47 C.F.R. § 64.2401(a)(3) (2011).

126. See *supra* text accompanying notes 20, 78-79.

truth-in-billing rules, the proposed cramming rules empower consumers to protect themselves from cramming without requiring carriers to make costly alterations to their network infrastructure or abide by prescriptive rules. Therefore, it is a good policy.

Further, the proposed cramming rules are a proper response to “evidence that CMRS consumers . . . have been the target of cramming.”¹²⁷ In the *Cramming NPRM*, the Commission noted that “a recent survey by the GAO found that 34 percent of adult wireless users do not know where they can complain about issues with wireless service,” and as a result the GAO recommended that the Commission inform consumers that complaints about wireless phone service can be made to the Commission.¹²⁸ The proposed rule requiring wireless carriers to provide their customers with the Commission’s contact information merely serves to implement this recommendation—no more and no less.

The proposed rule could also be enhanced by adoption through an industry-government agreement rather than a rulemaking. Such a compromise would provide carriers with flexibility regarding where on the bill the notice is placed. A wide range of carrier billing practices exist because of the broad range of services and plans they offer as well as billing formats (electronic versus paper) that are offered. Thus, a compromise would allow carrier flexibility across technologies in how they implement the notice to consumers while equally ensuring that the consumers receive the benefit of the notice.

However, it is critical that any cramming rules are not overly burdensome. For example, if the Commission were to adopt the proposal proffered by the consumer groups, which would require all providers screen third parties for prior rule violations or other violations of law before agreeing to place their charges on telephone bills, the focus of the regulation would shift from informing and empowering consumers to protect themselves to instating overly paternalistic and burdensome mandates.¹²⁹ Under this type of governing regime, the wireless carriers would have to screen all third parties before allowing them to bill.¹³⁰ In today’s era of the third party app, a mandate like this would unnecessarily burden wireless carriers and, like in the context of bill shock, cause wireless consumers to bear the unnecessary costs that are eventually passed along to them.¹³¹ Thus, a Commission-industry compromise with regard to cramming might be advisable, but only to the extent that any actions required by the wireless industry are narrowly focused on informing and educating consumers.

127. *Id.*

128. *Id.*

129. *See* Consumer Group Cramming NPRM Comments, *supra* note 82, at 5.

130. *Id.* at 10.

131. *Id.*

V. CONCLUSION

Accordingly, the bill shock compromise was a bad policy that never should have been agreed upon because the Commission's authority to implement bill shock rules absent industry agreement is questionable. In addition, the compromise is a paternalistic and burdensome regulation that fails to properly allocate the costs of compliance and will therefore lead to unnecessary costs for consumers. Instead, the Commission should have focused on enforcing against unjust and unreasonable carrier behavior through the sufficient authority it already has, adopted policies aimed at working with industry to increase consumer choice and access to information, and narrowly tailored its solutions to concrete harms. Although this particular Commission-industry compromise was not advised, this style of compromise could be a useful regulatory mechanism for protecting wireless consumers with regard to issues such as cramming, so long as industry commitments are narrowly focused on informing and educating consumers.