BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC and its affiliate, Bright House Networks, LLC	)	Docket No. 070691-TP
In re: Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone	)	Docket No. 080036-TP

REBUTTAL TESTIMONY OF MICHELLE A. ROBINSON
ON BEHALF OF VERIZON FLORIDA LLC

JULY 25, 2008

DOCUMENT NUMBER-DATE
06473 JUL 25 8
FPSC-COMMISSION CLERK

1 Q. **PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. My name is Michelle A. Robinson. My business address is 201 N.

3 Franklin Street, Tampa, Florida.

4

5 Q. **WHAT IS YOUR PROFESSIONAL EXPERIENCE AND**

6 **EDUCATIONAL BACKGROUND?**

7 A. I recently became the president of Verizon's southeast region, which

8 includes Florida. Before assuming my current role, I was senior vice

9 president for Verizon's southern region in Atlanta and managed all

10 public policy and public affairs for six states. I have worked for Verizon

11 (and its predecessor, GTE) for ten years and have held a variety of

12 management positions in public policy and government relations,

13 including vice president of regulatory affairs in Florida. Before starting

14 with GTE, I held a number of positions involving diversity management

15 and compliance, including community liaison on behalf of U.S.

16 Congressman Bob Filner (D–San Diego, CA). I hold a Bachelor of Arts

17 in political science from the University of California at Los Angeles and a

18 master's degree in public policy analysis from the University of Southern

19 California School of Public Administration.

20

21 Q. **ARE YOU ADOPTING THE DIRECT TESTIMONY OF ALAN**

22 **CIAMPORCERO THAT WAS PREVISOUSLY FILED IN THIS CASE?**

23 A. Yes.

24

25 Q. **WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

DOCUMENT NUMBER-DATE
06473 JUL 25 8
FPSC-COMMISSION CLERK

1 A. The purpose of my Rebuttal Testimony is to describe recent
2 developments in the federal retention marketing case and to respond to
3 the Direct Testimony of Timothy M. Frendberg filed on behalf of Bright
4 House Networks, LLC and Bright House Networks Information Services
5 (Florida), LLC (collectively, "Bright House") and the Direct Testimony of
6 Beth Choroser filed on behalf of Comcast Phone of Florida, LLC d/b/a
7 Comcast Digital Phone ("Comcast").
8
9 **Q. THE DIRECT TESTIMONY YOU ARE ADOPTING REFERRED TO**
10 **THE RECOMMENDED DECISION ISSUED BY THE FCC'S**
11 **ENFORCEMENT BUREAU IN THE FEDERAL RETENTION**
12 **MARKETING CASE. HOW DID THE FCC RULE ON THE**
13 **RECOMMENDED DECISION?**
14 A. The FCC rejected the Recommended Decision and ordered Verizon to
15 cease and desist from engaging in the retention marketing activities in
16 question. Memorandum Opinion and Order, *Bright House Networks,*
17 *LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel.
18 June 23, 2008)("FCC Order").
19
20 **Q. HAS VERIZON COMPLIED WITH THE FCC ORDER?**
21 A. Yes.
22
23 **Q. HAS VERIZON TAKEN LEGAL ACTION IN RESPONSE TO THE FCC**
24 **ORDER?**
25 A. Yes. On June 23, 2008, the same day the FCC Order was issued,

1 Verizon asked the FCC for a stay of the order, requesting a ruling by
2 June 26. When the FCC failed to act on Verizon's request by that date,
3 Verizon filed a Petition for Review and a Motion for Stay Pending
4 Judicial Review and for Expedited Treatment ("Motion for Stay") at the
5 United States Court of Appeals for the District of Columbia Circuit on
6 June 27. A copy of the Petition for Review is attached as Exhibit MAR-9
7 and a copy of the Motion for Stay is attached as Exhibit MAR-10.
8
9 **Q. HOW DID THE D.C. CIRCUIT RULE ON THE MOTION FOR STAY?**
10 A. By a 2-1 vote, the court denied Verizon's Motion for Stay, stating that
11 "Petitioners have not satisfied the stringent standards required for a stay
12 pending court review." On its own motion, however, the court ordered
13 expedited consideration of Verizon's Petition for Review, with briefing to
14 be completed by September 22, 2008.
15
16 **ISSUE 1: IS VERIZON OBTAINING AN UNDUE OR UNREASONABLE**
17 **ADVANTAGE BY MARKETING A CUSTOMER WHEN**
18 **RECEIVING A LOCAL SERVICE REQUEST TO PORT A**
19 **SUBSCRIBER'S TELEPHONE NUMBER FOR BRIGHT HOUSE**
20 **OR COMCAST, IN VIOLATION OF SECTION 364.10(1)? IF**
21 **SO, HOW IS VERZON DOING SO?**
22 **Q. MS. CHOROSER STATES AT PAGE 23 OF HER DIRECT THAT**
23 **VERIZON IS PROVIDING ITSELF AN UNDUE ADVANTAGE BY**
24 **USING CONFIDENTIAL INFORMATION OBTAINED DURING THE**
25 **LNP PROCESS THAT ITS COMPETITORS DO NOT HAVE. PLEASE**

1 **RESPOND.**

2 A. Verizon is not using another carrier's confidential information, but rather
3 is acting on its customer's direction to cancel her retail service and port
4 her number. There is nothing unreasonable or undue about Verizon
5 communicating with its own customers based on disconnect information
6 they have provided to Verizon.

7

8 **Q. MS. CHOROSER STATES AT PAGE 24 OF HER DIRECT THAT SHE**
9 **IS CONCERNED THAT VERIZON'S RETENTION OFFERS ARE NOT**
10 **AVAILABLE TO ALL CUSTOMERS. IS HER CONCERN VALID?**

11 A. No. As stated in the Direct Testimony of Bette Smith at page 4,
12 Verizon's retention offers were available to any customer that called
13 Verizon about disconnecting service.

14

15 **<u>ISSUE 2</u>: DOES VERIZON TIMELY COMPLETE PORTING OF A**
16 **SUBSCRIBER'S TELEPHONE NUMBER UPON REQUEST OF**
17 **BRIGHT HOUSE OR COMCAST, PURSUANT TO RULE 25-**
18 **4.082, F.A.C.?**

19 **Q. MS. CHOROSER ASSERTS AT PAGE 11 OF HER DIRECT**
20 **TESTIMONY THAT VERIZON'S RETENTION MARKETING**
21 **PROGRAM "CREATES AN INHERENT CONFLICT OF INTEREST**
22 **THAT UNDERMINES THE PORTING PROCESS." DO YOU AGREE?**

23 A. No. Ms. Choroser provides no empirical evidence to support her claim
24 that the porting process has been undermined. If it were, aggrieved
25 parties could file complaints at the FCC to enforce the LNP

1 requirements. In fact, as described in the Direct Testimony of Patrick
2 Stevens, Verizon has established a strong track record of completing
3 the steps required for its role in the number porting process within the
4 required time. By contrast, Verizon has recently sent cease-and-desist
5 letters to Comcast and Bright House based on their failure to perform
6 their porting-out obligations on time.
7
8 **Q. AT PAGE 25, MS. CHOROSER SUGGESTS THAT VERIZON'S
9 RETENTION MARKETING PROGRAM RESULTED IN DELAYS IN
10 THE PORTING PROCESS AND WAS OTHERWISE INCONSISTENT
11 WITH VERIZON'S DUTY TO FACILITATE NUMBER PORTING. IS
12 HER SUGGESTION CORRECT?**
13 A. No. As I noted in response to the previous question, Verizon's program
14 does not delay number porting. Further, there is no inconsistency
15 between Verizon's program and its duty to facilitate number porting
16 because once a customer changes his or her mind and decides to keep
17 Verizon's service, Bright House or Comcast are no longer the "acquiring
18 company." At that point, Verizon should, in compliance with the
19 customer's request and Rule 25-4.082, stop the number port if there is
20 time to do so.
21
22 **ISSUE 3: IS VERIZON'S RETENTION MARKETING PROGRAM FOR
23 VOICE CUSTOMERS ANTICOMPETITIVE, IN VIOLATION OF
24 SECTION 364.01(4)(g)? WHY OR WHY NOT?**
25

1 **Q. MR. FRENDBERG CLAIMS AT PAGE 3 OF HIS DIRECT THAT**
2 **VERIZON IS EXPLOITING BRIGHT HOUSE'S CONFIDENTIAL**
3 **BUSINESS INFORMATION. MS. CHOROSER MAKES SIMILAR**
4 **CLAIMS AT PAGES 11 AND 12 OF HER DIRECT. HOW DO YOU**
5 **RESPOND?**
6 A. These assertions are invalid. As I stated previously, Verizon is not using
7 another carrier's confidential information, but rather is acting on its
8 customer's direction to cancel her retail service and port her number.
9
10 **Q. MR. FRENDBERG CLAIMS AT PAGES 5, 7 AND 8 OF HIS DIRECT**
11 **THAT BRIGHT HOUSE DOES NOT ENGAGE IN SIMILAR**
12 **RETENTION MARKETING EFFORTS. IS HIS STATEMENT**
13 **ACCURATE?**
14 A. No. As explained in the Direct Testimony that I am adopting at page 15,
15 Bright House and other cable companies acknowledged in the FCC
16 retention marketing case that they typically require customers to deal
17 with them directly when canceling their video or broadband Internet
18 service, and that they use those customer calls as retention marketing
19 opportunities. Indeed, Mr. Frendberg acknowledges that Bright House
20 "engage[s] in efforts to retain a customer with a pending port-out . . .
21 when the customer, on his or her own, calls BHN [the Bright House
22 cable company] to cancel their BHN service." (Frendberg Direct, p. 7.)
23 Thus, when a Bright House customer with a bundle that includes video
24 and voice service leaves, and then calls Bright House to cancel the
25 video service, Bright House will engage in retention efforts for bundles

1 that include voice service. Mr. Frendberg claims that Bright House's
2 retention marketing program is not "similar" to Verizon's program, but in
3 fact Bright House's retention marketing program is more aggressive
4 than Verizon's. As explained in the Direct Testimony of Bette Smith at
5 page 3, Verizon typically reached out to customers using direct mail that
6 urged them to contact Verizon, thus giving them the *option* to hear
7 Verizon's retention offers. Bright House, on the other hand, gives
8 customers no choice, but instead makes its retention marketing pitch
9 during the required call customers *must* make to cancel their service.
10
11 **Q. MR. FRENDBERG COMPLAINS AT PAGES 6 AND 7 OF HIS DIRECT**
12 **THAT VERIZON'S RETENTION MARKETING PROGRAM ADDS**
13 **"COST AND CONFUSION" ON BRIGHT HOUSE. DOES HE RAISE A**
14 **VALID CONCERN?**
15 A. No. Mr. Frendberg acknowledges that when a customer accepts a
16 Verizon retention offer, Bright House continues to compete for the
17 customer. As providers compete, customers win – by receiving more
18 information about available services and the lowest available prices.
19 Although those marketing efforts may involve additional cost and
20 challenges to competitors, consumers benefit from the intense
21 competition for their business.
22
23 **Q. MR. FRENDBERG SUGGESTS AT PAGE 8 OF HIS DIRECT THAT IF**
24 **VERIZON'S RETENTION MARKETING PROGRAM IS ALLOWED TO**
25 **CONTINUE, BRIGHT HOUSE MIGHT TRY TO PERSUADE**

1 **CUSTOMERS TO TAKE A NEW TELEPHONE NUMBER WHEN THEY**
2 **SWITCH TO BRIGHT HOUSE. IS BRIGHT HOUSE LIKELY TO USE**
3 **THAT TACTIC?**

4 A. No. As Mr. Frendberg admits, "[m]ost customers prefer to keep their
5 telephone number when they switch providers." (Frendberg Direct, p.
6 8.) This issue is addressed in more detail in the Rebuttal Testimony of
7 Jeffrey Eisenach.
8

9 **Q. AT PAGES 5 AND 6 OF HER DIRECT, MS. CHOROSER POINTS TO**
10 **FCC DATA AS SUPPORT FOR HER CLAIM THAT THERE**
11 **"REMAINS LARGELY A MONOPOLY MARKET FOR VOICE**
12 **SERVICES IN FLORIDA," THAT THE DATA "PAINT A PICTURE OF**
13 **A MARKET THAT IS STILL DOMINATED BY THE ILECS" AND THAT**
14 **THEY REFLECT "AN EXTREME DEARTH OF TRUE FACILITIES-**
15 **BASED COMPETITION." SHE MAKES SIMILAR STATEMENTS AT**
16 **PAGE 21 OF HER DIRECT. HOW DO YOU RESPOND?**

17 A. Ms. Choroser draws the wrong conclusion about the Florida market
18 because the data she relies upon only includes ILEC and CLEC lines
19 and excludes voice service provided by intermodal providers such as
20 cable companies, wireless carriers and VoIP providers. The NERA
21 Report that is attached to the Direct Testimony I am adopting as Exhibit
22 AFC-1 describes in detail the intermodal competition that is taking place
23 throughout Florida and particularly in Verizon's service territory.
24 Moreover, the draft Status of Competition Report that has been
25 distributed by Staff acknowledges the rapid growth of intermodal

1 competition and its impact on local carriers like Verizon. For example,
2 the draft estimates that as of December 2007 there were 1 million VoIP
3 subscribers in Florida, an increase of almost 340,000 VoIP lines in about
4 a year and a half. Staff reports that the five largest FCTA (cable)
5 companies were providing 748,143 of the Florida VoIP lines, information
6 Ms. Choroser presumably knew but chose to exclude from her
7 testimony. She also declined to mention that Comcast is now the fourth
8 largest telephone service provider in the United States.
9
10 **Q. HAS INTERMODAL COMPETITION HAD A SIGNIFICANT IMPACT IN**
11 **VERIZON'S SERVICE TERRITORY?**
12 A. Yes. At page 13 of the Direct Testimony I am adopting, the substantial
13 line losses Verizon has experienced in recent years were described.
14 Staff makes the same point in its draft Local Competition Report when it
15 notes that from June 2006 to December 2007, Verizon's residential
16 access lines decreased by 19%. In other words, in a one-and-a-half-
17 year period, Verizon lost nearly one in five of its residential customer
18 lines to intermodal competition. This fact alone belies Ms. Choroser's
19 rather shrill claims about Verizon's supposed market power and the
20 "extreme dearth of true facilities-based competition."
21
22 **<u>ISSUE 4</u>: WHAT ACTION, IF ANY, SHOULD THE COMMISSION TAKE**
23 **WITH RESPECT TO VERIZON'S RETENTION MARKETING**
24 **PROGRAM?**
25

1 **Q. WHAT ACTION SHOULD THE COMMISSION TAKE CONCERNING**
2 **VERIZON'S RETENTION MARKETING PROGRAM?**
3 A. For the reasons I have described in my Rebuttal Testimony and the
4 Direct Testimony I am adopting, the Commission should take no action
5 concerning the program.
6
7 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**
8 A. Yes.
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

VERIZON CALIFORNIA INC., *et al.*,

Petitioners,

v.

No. ________

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

MOTION OF VERIZON FOR STAY PENDING JUDICIAL REVIEW AND FOR EXPEDITED TREATMENT

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
(202) 719-7049 (facsimile)

Counsel for Verizon

June 27, 2008

CERTIFICATE OF PARTIES

1. Parties Before the Court:

Petitioners in this case are:

Verizon California Inc.
Verizon Delaware LLC
Verizon Florida, LLC
Contel of the South, Inc.
Verizon South Inc.
Verizon New England Inc.
Verizon Maryland Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon Northwest Inc.
Verizon North Inc.
Verizon Pennsylvania Inc.
GTE Southwest Incorporated
 d/b/a Verizon Southwest
Verizon Virginia Inc.
Verizon Washington, D.C. Inc.

Respondents in this case are the Federal Communications Commission and United States of America.

2. Parties to the Proceeding Below

The parties that participated in the agency proceeding below are Bright House Networks, LLC, Comcast Corporation, Time Warner Cable Inc., and the petitioners listed above.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Verizon submits the following corporate disclosure statement:

The Verizon telephone companies participating in this filing are regulated, wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon Communications Inc.'s general nature and purpose is to provide communications services, including voice, data, and video services.

Verizon respectfully requests a stay, pending judicial review, of the FCC's *Order*[1] requiring Verizon to cease and desist from targeted retention marketing. Verizon further requests expedited consideration of this motion.

When a Verizon voice customer decides to switch service to a new voice service provider, the new provider may, as the customer's agent, contact Verizon to relay the customer's direction to cancel service and, if the customer chooses, to allow her or his number to be transferred ("ported") to the new service provider. After Verizon receives the customer's request, without delaying the pending cancellation process, Verizon contacts the customer, typically by overnight letter, to encourage the customer to call Verizon. If the customer chooses to call, Verizon provides information about service packages – including voice, video, and Internet services – competitive prices, and incentives (such as gift cards) that Verizon offers. If the customer prefers Verizon's offer, the customer can remain with Verizon; in that case, nothing prevents Verizon's competitor from improving its offer and persuading the customer to switch after all.

Complainants – incumbent cable providers – claimed that Verizon's marketing violates section 222(b) of the Communications Act ("Act"). That provision was added in 1996, when Congress imposed new obligations on local

---

[1] Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008) ("*Order*") (Exh. 1).

exchange carriers to act as wholesale providers to their competitors. To ensure that carriers would not use to their own advantage another carrier's proprietary information that they obtained in order to provide wholesale services to that carrier, Congress also added section 222(b). That section provides that a telecommunications carrier that receives "proprietary information from another carrier for purposes of providing any telecommunications service . . . shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b). In the *Order*, the FCC, by a 4-1 vote over Chairman Martin's dissent, granted the complaint, holding that the statute applies, even though the information at issue is not any other carrier's proprietary information but is instead the *customer's* direction to Verizon as the customer's current retail provider, and even where, as here, Verizon is providing no wholesale telecommunications service to another carrier. The resulting cease-and-desist order, which bars Verizon from engaging in – and customers from receiving – truthful speech, is contrary to the statute and violates the First Amendment.

The *Order* inflicts irreparable harm – on Verizon and the public – by suppressing constitutionally protected and beneficial speech. Moreover, while the *Order* is in effect, Verizon will lose customers and goodwill; that harm is accentuated because the cable incumbents – selling the same bundle of services in direct competition with Verizon – are *permitted* to engage in equivalent retention

marketing when one of their video service customers cancels service. And the *Order* disserves the public interest by squelching competition, taking money from consumers and putting it into the pockets of the cable incumbents. Accordingly, the Court should grant the requested relief.

STATEMENT OF THE CASE

A. 1. In the past several years, the communications marketplace has been transformed by the advent of direct competition between facilities-based rivals, including cable providers and local telephone companies, selling bundles of voice, Internet, and video services. Cable operators have completed their "triple play" by adding Voice-over-Internet-Protocol ("VoIP") service to their cable modem and traditionally dominant video services. For its part, Verizon is investing approximately $23 billion to deploy a fiber-to-the-premises network – "FiOS" – capable of delivering industry-leading voice, video, and Internet services to thousands of communities and millions of homes and businesses in 16 states.

As a result of this competition, Verizon has been losing voice customers at a significant rate. These competitive losses not only cost Verizon a voice service customer, but they also make it more difficult for Verizon to win and retain subscribers to other services that Verizon offers – such as high-speed Internet and video. Moreover, despite the success of FiOS, many of Verizon's voice customers remain unaware that Verizon is able to offer not just voice and data services, but

video services as well. Consumers who switch their voice service to competing cable providers – to take advantage of the convenience of one-stop shopping – may not know that they could obtain directly competitive services from Verizon.

2. The retention marketing program at issue was designed to provide timely, accurate information about Verizon's services to customers who decide to cancel their Verizon voice service, with no delay in the transfer of service if the customer still decides to leave. When Verizon learns that a customer is leaving, Verizon contacts the customer, typically by overnight letter, urging the customer to call Verizon. If the customer decides to call, then Verizon can inform the customer about potentially attractive services, prices, discounts, and incentives.

The retention marketing program is expensive, but it is necessary as a result of a regulatory disparity, one that dramatically favors the cable incumbents. When one of cable's video customers decides to switch to a new service provider (Verizon, for example), the cable incumbents refuse to accept cancellation requests from the new provider, forcing cancelling customers to call the cable provider directly. Before cancelling the customer's service, however, the video providers engage in marketing in an attempt to retain the video service customer and to "up-sell" additional services like voice and Internet service. By contrast, when Verizon's voice service customer chooses to switch to a new provider (cable incumbents, for example), the new provider may submit a cancellation request on

the customer's behalf. Verizon usually has no chance to speak with a customer before he or she cancels voice service to switch to another provider. The program at issue is Verizon's effort to inform departing customers of potentially attractive offers – an opportunity that the cable incumbents have as a matter of course.

3. When a new provider obtains a customer's authorization to do so, it submits a "local service request" to Verizon that conveys the customer's direction to cancel her or his retail service and to allow the customer's number to be transferred.[2] This triggers an internal retail service cancellation request, which ensures that the customer's service is properly terminated and a final bill is sent.

The new provider (not Verizon) is principally responsible for ensuring that the customer's number is transferred, a process known as "local number portability," or "LNP." Verizon's role is to send confirmatory messages to the neutral LNP administrator and to ensure that the customer's calls are properly routed during the brief period between the initiation of the new provider's service and the cancellation of Verizon's service. Verizon does not charge for any of this. Verizon's LNP performance is nearly perfect; more than 99 percent of ports are on time. The retention marketing program does not affect that performance. Verizon does not delay porting numbers while it is trying to retain customers.

[2] Cable providers typically submit the requests through affiliated or unaffiliated "carrier partners."

4. Verizon assembles a list of customers who have cancelled their retail service and uses it to generate a "lead list" of candidates for retention marketing. Verizon eliminates from the cancellation list customers who are remaining on Verizon's network – as customers of one of Verizon's wholesale service customers, for example – and customers who have called Verizon directly to cancel service (since it already had a chance to retain those customers). Verizon's marketing also is designed to target exclusively customers who still want to purchase voice service at the same telephone number, which avoids marketing to customers who are moving to a different area, or who are cancelling voice service entirely. The two facts that Verizon uses to do so are (1) the fact that a customer has cancelled Verizon service and (2) the fact that the customer is porting out his or her telephone number.

Verizon then typically sends overnight letters to each of the customers on the narrowed lead list and invites them to call Verizon. Many of those customers do not call, and their cancellation order is unaffected. If the customer does call, Verizon does not refer to the identity of the new service provider, but lets the customer know that Verizon wants to keep her or his business. If the customer rejects the offer, again, nothing happens and the cancellation proceeds as scheduled. If the customer accepts Verizon's offer, Verizon can stop the cancellation request. In those cases, customers avoid the inconvenience of

switching service (which often entails a time-consuming installation) and end up with the services they want at the price they prefer. Cable providers can and do keep trying to win the customers with more attractive offers.

B. Three incumbent cable providers – Comcast, Time Warner, and Bright House – filed a complaint, claiming that Verizon's retention marketing program violated 47 U.S.C. § 222(b). The cable providers conceded that they do not purchase any wholesale telecommunications services from Verizon. Nevertheless, they argued that the statute applied because Verizon uses the fact that a customer is porting out his or her number to narrow its lead list.

The FCC adjudicated the complaint on an expedited basis; the FCC's Enforcement Bureau issued a Recommended Decision[3] on April 11, 2008, rejecting the claim under section 222(b). The Bureau held that the statute applies by its terms only when a carrier receives another carrier's information so that the carrier *receiving* the information can provide a telecommunications service to the other carrier. *See* RD ¶ 11. And it further held that Verizon's role in the LNP process is not a "telecommunications service" – a defined statutory term – because it does not involve the transmission of a customer's information and is not provided for a fee. *See id.* ¶ 13. "In other words, although number portability

[3] Recommended Decision, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, DA 08-860 (Enf. Bur. rel. Apr. 11, 2008) ("RD") (Exh. 2).

requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier 'telecommunications service.'" *Id.*

In a decision released June 23, a majority of the FCC – over the Chairman's dissent – rejected the Recommended Decision and granted the complaint. The FCC rejected the argument that section 222(b) was limited to a carrier's receipt of information in its capacity as a wholesale telecommunications carrier, and instead held that it applied as long as *some* carrier is providing *some* telecommunications service. *See Order* ¶ 20. The FCC further held that, in any event, Verizon's LNP-process role constitutes a telecommunications service. *See id.* ¶ 31. The FCC did not claim that the fact that a customer has decided to cancel Verizon service is proprietary, nor the fact that the customer has decided to keep her number. Instead, the FCC held that the fact that Verizon's customer has selected a particular service provider and that the new provider will begin service on a particular date are proprietary information of the new provider. *Id.* ¶ 15 (that "a competing carrier has convinced a particular Verizon customer to switch to the competing carrier's voice service on a particular date"). The FCC also rejected Verizon's argument that a ban on its retention marketing would violate the First Amendment.

Verizon immediately sought a stay, asking that the FCC rule by June 26; the FCC has yet to act. This petition for review and motion for stay followed.

ARGUMENT

I. THE ORDER IS CONTRARY TO THE LANGUAGE AND PURPOSE OF SECTION 222(b) AND VIOLATES THE FIRST AMENDMENT

In the Telecommunications Act of 1996 ("1996 Act"), Congress sought to open all communications markets to competition, with the ultimate objective of promoting full facilities-based competition. But Congress also recognized that, as new providers entered the local market, they would likely need, at least initially, to use incumbents' network to provide competing retail services. *See* 47 U.S.C. § 251(c). Congress did not want incumbent providers to be able to use to their own advantage any proprietary information they obtained from competing providers solely by virtue of the incumbents' new wholesale role.

To this end, Congress simultaneously added section 222(b) to protect such information. That provision, governing "Confidentiality of Carrier Information," states that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." *Id.* § 222(b). The express terms of section 222(b) thus apply only when (1) a carrier, acting in a wholesale capacity, provides telecommunications services to another carrier and (2) by virtue of that role receives proprietary information of another carrier that it uses in its marketing. Neither circumstance is present here. The FCC's contrary

conclusions are arbitrary and inconsistent with the record; furthermore, the Court does not "accord the Commission deference when its regulations create serious constitutional difficulties." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003); *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988).

A. Verizon does not use another carrier's proprietary information, and section 222(b) does not apply for that reason alone. The *Order* acknowledges that section 222(b) applies only if Verizon uses another carrier's proprietary information for its own marketing. *See Order* ¶¶ 13, 17, 34, 35: Section 222(b) (governing "Confidentiality of Carrier Information"). Here, the only information that Verizon uses in its retention marketing is the fact that the customer has cancelled service and requested that her or his telephone number be ported. That is not "proprietary information" of "another carrier"; on the contrary, those are directions Verizon receives from its retail customers, and that fact does not change regardless of whether customers communicate the information directly or authorize a third party to do so as their agent.

The *Order* does not claim that the fact that the customer is cancelling Verizon's retail service and keeping her or his existing number is another carrier's proprietary information. Nor could it, because the FCC allows a carrier to use that information if it learns it directly from the customer. Instead, the *Order* holds that

the information that is proprietary to the submitting carrier is that it has "convinced a particular Verizon customer *to switch to the competing carrier's voice service on a particular date.*" *Id.* ¶ 15 (emphasis added). But Verizon does not use the *identity* of the new carrier (or the date it will initiate service, for that matter) either to narrow its lead list or in its marketing pitch.[4] The information it does use is limited to the customer's directions to Verizon as that customer's existing *retail* provider – information that Verizon would need in its retail capacity irrespective of the identity or intentions of the new service provider.

The *Order*'s conclusion that section 222(b) nevertheless applies constitutes an abrupt and unexplained departure from prior FCC decisions, which hold that section 222(b) does *not* apply when a carrier obtains information in its retail capacity. *See, e.g.*, *2002 CPNI Order*, 17 FCC Rcd 14860, 14917, ¶ 131 (2002) (holding that retention marketing is permitted when "a carrier's retail operations . . . legitimately obtain notice that a customer plans to switch to another carrier"). "[D]eeming any winback or retention effort[s], including those based on information learned through the carrier's retail operations, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits." *Id.* at 14918, ¶ 133 (second alteration and ellipses in original; internal quotation marks omitted). That determination *should have* controlled this case: Verizon's

[4] Joint Statement ¶ 38 (filed Feb. 29, 2008); *see also* Joint Declaration of Chris Creager, Bette Smith, Patrick Stevens, and Gary Sacra ¶ 50 (Feb. 21, 2008).

role in cancelling a *retail* customer's service and transferring his or her telephone number is – quite evidently – part of its "retail operations."

B. Verizon also does not "receive" information in any wholesale capacity "for purposes of providing any telecommunications service" to "another carrier." Section 222(b) includes an affirmative requirement as well as a prohibition: the carrier receiving information "*shall use* such information only *for such purpose*" – that is, "providing any telecommunications service" to the carrier submitting the information. 47 U.S.C. § 222(b) (emphases added). If the receiving carrier does not "receive[] or obtain[]" information to provide "any telecommunications service" in its wholesale capacity, then section 222(b)'s affirmative injunction – that the information be used only for that purpose – cannot apply.

The Enforcement Bureau correctly concluded that this was the unambiguous meaning of the provision, *see* RD ¶¶ 10, 11, and – until the *Order* – was the construction that the FCC had consistently given to the provision. *See CPNI Reconsideration Order*, 14 FCC Rcd 14409, 14449-50, ¶¶ 77, 78 (1999) (section 222(b) is limited to situations where "the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service"); *see also 1998 Slamming Order*, 14 FCC Rcd 1508, 1574-75, ¶ 109 (1998) (noting concern that "monopoly service provider" may learn "that the submitting carrier needs service provisioning for a new subscriber").

That condition is not satisfied. Verizon's role in the LNP process is *not* a "telecommunications service" under the Act's definition at all – it does not involve any transmission of information of the user's choosing (as required by the definition of "telecommunications," *see* 47 U.S.C. § 153(43)), and Verizon does not receive any fee for its role (as the FCC apparently concedes). *See* RD ¶ 13; *see also* Further Suppl. Joint Statement ¶ 3 (filed Mar. 10, 2008) (Verizon does not "impose any charge" for LNP process). Nor is Verizon providing *any* service to the other carrier – to the contrary, FCC regulations make clear that number portability is a service provided *to customers*, not other carriers. *See* 47 C.F.R. § 52.21(*l*) (defining "number portability" as "the ability of *users* . . . to retain . . . existing telecommunications numbers . . . when switching from one telecommunications carrier to another") (emphasis added); *Time Warner Order*, 22 FCC Rcd 3513, 3522, ¶ 16 (Wireline Comp. Bur. 2007) ("where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer *at the customer's request*") (emphasis added).

The FCC argues that LNP should nevertheless be treated like a telecommunications service because it is "incidental or adjunct to" a telecommunications service. *Order* ¶ 31 (internal quotation marks omitted); *see id.* ¶ 32. But Verizon provides no telecommunications (or other) service *to the submitting carrier* to which LNP could be "incidental or adjunct." Rather, porting

a number is, if anything, "adjunct" or incidental to Verizon's *retail* service (as complainants effectively conceded below). *See* Comments Challenging Recommended Decision at 23 (filed Apr. 28, 2008) ("LNP is incidental to the telecommunications service that Verizon provides to its own retail customer.").

The conclusion that the statute applies when some carrier *other than* the receiving carrier intends to provide a telecommunications service, *see Order* ¶ 21, is contrary to the unambiguous terms of the statute, as the Bureau correctly concluded, *see* RD ¶¶ 10, 11. The statute applies only if information is *received* for purposes of providing a telecommunications service to another carrier, and Congress went out of its way to specify that the carrier *receiving* the information must use it for that purpose. The FCC's expansion of the limitation squelches competition in a circumstance not contemplated by Congress or any prior FCC order. *See id.* ¶ 11 (there is "not . . . a single Commission order that has construed section 222(b) to mean that the submitting carrier is the one who is 'providing any telecommunications service'"). Moreover, the decision ignores the fundamental purpose of section 222(b), which is to ensure that carriers do not take advantage of their wholesale role to market to wholesale customers' customers.

C. Under the *Order*, once Verizon has learned from the customer's agent that the customer is cancelling service and porting his or her telephone number, Verizon is prohibited from directing targeted speech to that customer. The *Order*

impinges upon: (i) Verizon's right to select its audience; (ii) Verizon's right to tailor the content of its speech to that audience; and (iii) the rights of willing listeners to receive and act upon truthful marketing speech. Such a restriction on targeted speech is a prior restraint that implicates the First Amendment. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) ("The First Amendment . . . protects commercial speech from unwarranted governmental regulation" because such "expression . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("targeted speech constitute[s] commercial speech," and a restricting it "implicate[s] the First Amendment").

The First Amendment bars restrictions on truthful commercial speech unless they can be justified under a three-part test: the regulation must be supported by a substantial governmental interest, it must directly advance that interest, and it must be narrowly tailored not to restrict more speech than necessary to accomplish its objectives. *See Central Hudson*, 447 U.S. at 564.

The *Order* does not withstand scrutiny. The governmental interest underlying section 222(b) is to ensure that incumbent carriers do not use to their own advantage proprietary information of another carrier that they obtain by virtue of their role as a wholesale provider. That interest has no bearing when the

information at issue is not proprietary information of another carrier and is not obtained by virtue of Verizon's wholesale role. As a result, the governmental interest underlying the statutory provision does not apply, and the sweeping new interpretation adopted by the majority does not pass the *Central Hudson* test.

Indeed, the FCC has conceded that there is *no* governmental interest served by prohibiting a carrier from using a retail customer's direction to terminate service as a basis to engage in retention marketing. To the contrary, the FCC squarely ruled that such retention marketing is permitted. *See 2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131; *CPNI Reconsideration Order*, 14 FCC Rcd at 14445, ¶ 67. This demonstrates that there is no legitimate interest underlying the *Order*'s restriction on retention marketing based on the direction provided by a customer's agent to terminate service: when the government distinguishes between speech on the basis of a distinction that "bears no relationship *whatsoever* to the particular interests that [the government] has asserted," it violates the First Amendment. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *see also Pearson v. Shalala*, 164 F.3d 650, 657 (D.C. Cir. 1999).

Furthermore, the *Order* creates a sharp disparity between regulatory treatment of Verizon's retention marketing and the comparable efforts of the cable providers. Cable providers take the position that they are not required to accept video service cancellations submitted on a customer's behalf by competing service

providers. As a result, customers must call directly before cable providers will cancel service. When customers call, cable providers engage in targeted marketing to sell not just video, but data and voice service as well – the same services that Verizon seeks to sell through its own retention marketing. The *Order* thus has the effect of authorizing speech by one group of speakers while banning it for another. This is impermissible: "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 659 (1994); *Action for Children's Television v. FCC*, 58 F.3d 654, 668 (D.C. Cir. 1995). For the same reason, the *Order* is not narrowly tailored within the meaning of *Central Hudson*.

II. A STAY WILL AVERT IRREPARABLE HARM TO VERIZON AND SERVE THE PUBLIC INTEREST

A. The *Order* will prohibit Verizon from engaging in truthful speech to consumers and, correspondingly, will prevent consumers from receiving truthful speech that may benefit them. This silencing of constitutionally protected speech, without more, constitutes irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998).

Likewise, avoiding the unconstitutional suppression of free speech is always in the public interest. *See Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir.

2007); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005). That conclusion is especially true because of the *public's* First Amendment interest in hearing Verizon's speech. "[A] particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (internal quotation marks and ellipsis omitted).

B. By barring Verizon from providing departing customers truthful information about Verizon's competitive offers, the *Order* ensures that many of those customers will be lost even though, if fully informed, many of those customers would have remained with Verizon. *See* Declaration of Chris Creager in Support of Verizon's Motion for Stay ¶¶ 11, 15-17 ("Creager Decl.") (Exh. 3).

In today's hyper-competitive communications marketplace, a loss of customers and accompanying goodwill constitutes irreparable injury. *See, e.g.*, *Gateway Eastern Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir. 1994); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). "[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor . . . , the irreparable injury prong is satisfied." *Multi-Channel TV Cable*, 22 F.3d at 552.

Moreover, Verizon cannot remedy the loss of customers by engaging in winback marketing after the customer has switched. In that situation, the customer

will have already undergone the expense and inconvenience of the cable industry's voice-service installation process. *See* Creager Decl. ¶ 19. And customers may be irritated by Verizon's failure to inform them of available offers *before* terminating service leading to disaffection and loss of goodwill. *See id.* ¶ 18.

Verizon suffers another form of irreparable harm because the *Order* grants the cable incumbents a regulatory advantage in the direct competition between Verizon and the cable incumbents for bundled service customers, with cable incumbents permitted to engage in retention marketing directed at their video customers and Verizon barred from engaging in comparable efforts directed at departing voice customers. *See supra* pp. 16-17. Comcast has touted both the aggressiveness of its retention marketing and the advantage it gains as a result of more favorable regulatory treatment. *See* Ex Parte Letter from Aaron M. Panner, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC (June 3, 2008). Because Verizon faces losses resulting from the "acute competitive disadvantage" that the *Order* creates, those losses constitute irreparable harm. *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929-30, 951-52 (D.C. Cir. 1976).

C. The *Order* disserves the public interest. It deprives consumers of the substantial benefits of competing offers—benefits the FCC itself has recognized in the past. By barring consumers from receiving information about Verizon's offers, the *Order* means that individuals will pay more for service than they otherwise

would. Economic analysis showed lost welfare benefits from the *Order* of $75 million over five years. *See* Declaration of Jeffrey Eisenach ¶ 28 (filed Feb. 29, 2008). Ironically, the *Order* would deny consumers the benefit of full-fledged facilities-based competition that Congress, in the 1996 Act, sought to deliver.

D. The balance of equities overwhelmingly favors a stay because cable incumbents will suffer no cognizable irreparable harm. They will simply have to compete for customers subject to the same rules as Verizon. In fact, so long as the cable incumbents refuse to accept video disconnect orders from Verizon, it is cable incumbents that will retain a competitive advantage, even if a stay is granted.

Respectfully submitted,

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
(202) 719-7049 (facsimile)

June 27, 2008

Counsel for Verizon

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of June 2008, I caused copies of the foregoing Motion of Verizon for Stay Pending Judicial Review and for Expedited Treatment to be served upon each of the following on the attached service list by hand delivery.

Darrin Leverette

SERVICE LIST

FEDERAL COMMUNICATIONS COMMISSION

Matthew Berry
Joel Marcus
Federal Communications Commission
445 12th Street, S.W., Room 8-A741
Washington, D.C. 20554

UNITED STATES OF AMERICA

Michael B. Mukasey
Attorney General
U.S. Department of Justice
Antitrust Division – Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Catherine G. O'Sullivan
Nancy C. Garrison
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

BRIGHT HOUSE NETWORKS, LLC

Christopher Savage
Davis Wright Tremaine LLP
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

TIME WARNER CABLE INC.

Matthew A. Brill
Brian W. Murray
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004

COMCAST CORPORATION

Mark D. Schneider
Jenner & Block LLP
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005

EXHIBIT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Bright House Networks, LLC, *et al.*,	)	
	)	
Complainants,	)	File No. EB-08-MD-002
	)	
v.	)	
	)	
Verizon California, Inc., *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2008 **Released: June 23, 2008**

By the Commission: Commissioner McDowell issuing a statement; Chairman Martin dissenting and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we reject the Enforcement Bureau's April 11, 2008, *Recommended Decision*[1] in this Accelerated Docket proceeding, and grant in part a formal complaint[2] filed against Defendants (collectively, "Verizon") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[3] For the reasons explained below, we conclude that Verizon is violating section 222(b) of the Act[4] by using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process, and we order Verizon immediately to cease and desist from such unlawful conduct.

2. The *Recommended Decision* recommended that we (i) deny the Complaint's claims under sections 222(b) and 222(a) of the Act (Counts I and II, respectively); (ii) rule on the Complaint's claim under section 201(b) of the Act[5] in a separate, subsequent order; and (iii) initiate a rulemaking regarding customer retention marketing practices. Complainants filed comments challenging the *Recommended*

---

[1] *Bright House Networks, LLC v. Verizon California, Inc.*, Recommended Decision, File No. EB-08-MD-002, 2008 WL 1722033 (Enf. Bur., rel. Apr. 11, 2008) ("*Recommended Decision*"). *See* 47 C.F.R. § 1.730(i) ("If parties to the proceeding file comments to the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.")

[2] Formal Complaint, File No. EB-08-MD-002 (filed Feb. 11, 2008) ("Complaint").

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. § 222(b).

[5] 47 U.S.C. § 201(b). *See* Count III of the Complaint.

Decision, and Verizon filed comments supporting it.[6] We have carefully reviewed the *Recommended Decision* and are not persuaded by its reasoning. Consequently, we reject its recommendations to deny Counts I and II of the Complaint, and to defer decision on Count III. Instead, we grant Count I, and dismiss Counts II and III without prejudice because it is unnecessary to reach those two Counts. We will take under further advisement the recommendation to initiate a rulemaking.

II. BACKGROUND

A. The Parties

3. Defendants are telecommunications carriers that operate as incumbent local exchange carriers (incumbent "LECs") in a number of states.[7] Complainants Bright House Networks, LLC ("Bright House"), Comcast Corporation ("Comcast"), and Time Warner Cable Inc. ("Time Warner") (collectively, "Complainants") provide facilities-based voice services to retail customers using Voice over Internet Protocol ("VoIP") in competition with Verizon's local voice services.[8] Complainants provide those services by relying on wholesale competitive local exchange carriers ("Competitive Carriers") to interconnect with incumbent LECs and to provide transmission services, local number portability ("LNP") functions, and other functionalities.[9] Bright House and Comcast rely on Competitive Carriers that are affiliated with them,[10] while Time Warner relies on Sprint Communications Company L.P. ("Sprint").[11]

B. Local Number Portability and Verizon's Retention Marketing Program

4. The Communications Act requires local exchange carriers to provide number portability, *i.e.*, the ability to retain one's phone number when switching from one telecommunications carrier to another.[12] Thus, when customers decide to switch voice service from Verizon to one of the Complainants,

---

[6] Comments Challenging Recommended Decision, File No. EB-08-MD-002 (filed Apr. 28, 2008); Comments of Verizon in Support of Recommended Decision, File No. EB-08-MD-002 (filed May 13, 2008); Complainants' Reply Comments Challenging the Recommended Decision ("Reply Comments"), File No. EB-08-MD-008 (filed May 23, 2008).

[7] *See, e.g.*, Joint Statement, File No. EB-08-MD-002 (filed Feb. 29, 2009) ("Joint Statement") at 3-4, ¶ 4. The Defendants are: Verizon California Inc.; Verizon Delaware LLC; Verizon Florida LLC; Contel of the South, Inc.; Verizon South Inc.; Verizon New England Inc.; Verizon Maryland Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon Northwest Inc.; Verizon North Inc.; Verizon Pennsylvania Inc.; GTE Southwest Incorporated d/b/a Verizon Southwest; Verizon Virginia Inc.; and Verizon Washington, D.C. Inc. *See, e.g.*, *id.* at 3-5, ¶¶ 4-5.

[8] *See, e.g.*, Joint Statement at 2-3, ¶¶ 1-3; Complaint at 3-4, ¶¶ 2-3. Complainants provide their retail VoIP service through affiliated entities. *See, e.g.*, Joint Statement at 1-3, ¶¶ 1-3. For convenience, we include those affiliates when we refer to "Complainants" herein.

[9] *See, e.g.*, Joint Statement at 5, ¶ 6. The services provided by the Competitive Carriers to Complainants are similar, if not identical, to the wholesale services discussed in *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (Wireline Comp. Bur. 2007) (*"Time Warner Wholesale Services Order"*).

[10] *See, e.g.*, Joint Statement at 6, ¶¶ 8-9. As described below, each of the Comcast and Bright House Competitive Carriers has a state certificate and an interconnection agreement with Verizon. *See* Section III.D, *infra*.

[11] *See, e.g.*, Joint Statement at 6, ¶¶ 7-9.

[12] *See, e.g.*, 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30) (providing that "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another). *See also* 47 C.F.R. §§ 52.11, 52.21-26.

they may choose to retain their telephone numbers. Such a choice triggers an inter-carrier process -- developed mainly by the industry -- by which the customer's telephone number is "ported" from Verizon to the Complainant's Competitive Carrier.[13]

5. The number porting process begins with the Competitive Carrier, at the direction of a Complainant, submitting a "Local Service Request" ("LSR") to Verizon.[14] The LSR serves as both a request to cancel the customer's Verizon service and a request to port the customer's telephone number to the Competitive Carrier.[15] Under current industry practices, the LSR includes at least the following information: the identity of the submitting carrier; the date and time for the disconnection of Verizon's retail service (and, by implication, the date and time for the initiation of Complainant's service);[16] the name and location of the retail customer whose service is being switched; the Verizon retail account number; and whether the port involves one or more numbers.[17] Thus, the LSR informs Verizon that, at a particular date and time, the customer's telephone number is to be ported to the Competitive Carrier, and the customer's existing Verizon voice service is to be disconnected, so that the Complainant served by the Competitive Carrier may initiate retail service using the customer's existing telephone number. After submitting the LSR to Verizon, the Complainant or Competitive Carrier sends the Number Portability Administration Center ("NPAC")[18] a "create message" that is used to enter a pending subscription record with the necessary routing data for the number to be ported.[19]

6. Upon receiving the LSR, Verizon confirms that it contains sufficient information to accomplish the port, and then creates an internal service order, which it transmits to the appropriate downstream Operations Support Systems.[20] The transmittal of the internal service order initiates several work steps for Verizon. First, Verizon's automated systems send the Complainant or Competitive Carrier a Local Service Request Confirmation (also known as a Firm Order Confirmation, or "FOC") that contains information specific to the individual request.[21] In addition, Verizon creates a disconnect order scheduling a retail service disconnect on the requested due date.[22] Moreover, Verizon establishes a "10-

---

[13] *See, e.g.*, Complaint at 8, ¶ 10, and at Ex. E; Answer of Verizon, File No. EB-08-MD-002 (filed Feb. 21, 2008) ("Answer") at Exs. 22-27; *In the Matter of Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12315-16 at ¶¶ 55-56 (1997).

[14] *See, e.g.*, Joint Statement at 9, ¶ 20. The Competitive Carrier may submit the LSR directly to Verizon, or through a contractor. *Id.*

[15] *See, e.g.*, Joint Statement at 9, ¶ 18.

[16] *See, e.g.*, Joint Statement at 11, ¶ 25. As the parties aptly indicate, "[w]hen a customer migrates from one provider to another, it is important that the retail service being provided by the old service provider be terminated contemporaneously with the establishment of new service. This ensures that the customer is not left without service for any significant period of time and does not wind up being required to pay two providers for duplicative service." *Id.*

[17] *See, e.g.*, Joint Statement at 9, ¶ 20.

[18] The Number Portability Administration Center, or NPAC, was created to support the implementation of local number portability by operating regional number portability databases. *See generally* www.npac.com.

[19] *See, e.g.*, Joint Statement at 11, ¶ 28.

[20] *See, e.g.*, Joint Statement at 10, ¶ 23.

[21] *See, e.g.*, Joint Statement at 10, ¶ 24.

[22] *See, e.g.*, Joint Statement at 12, ¶ 29. The submission of an LSR by the Competitive Carrier notifying Verizon of the porting of a Verizon customer's number is the only submission that is required (and, typically, the only communication that is received) to generate a disconnect order within Verizon's internal systems. Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 5, 2008) ("Supp. Joint Statement") at 2, ¶ 1.

digit trigger" in the switch serving the retail customer to prevent the misrouting of certain calls in the short interval after the number has been ported but before disconnection of the customer's Verizon retail service has been completed.[23] Finally, Verizon confirms the pending subscription record that the new provider previously created in the NPAC database.[24] Meanwhile, the Complainant and/or Competitive Carrier perform any necessary work on their own networks to turn up the customer's service.[25]

7. Beginning around the summer of 2007, Verizon started a program of retention marketing directed specifically at retail customers who are in the midst of the carrier-changing/number-porting process just described.[26] The program's first step is generating -- on a frequent, if not daily, basis -- a marketing "lead list" of Verizon customers to be contacted by Verizon that is based on the LSRs explained above.[27] To generate the lead list, Verizon begins with the universe of customers for whom there are retail-service disconnect orders pending, including disconnect orders that were prompted by the submission of an LSR.[28] Verizon then *eliminates* from the lead list *all* those customers who are *not* switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as Complainants. Put differently, Verizon *keeps on* the lead list *only* those customers who *are* switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as Complainants.[29] Verizon is able to carry out this sifting because, *inter alia*, the disconnect orders stemming from the Competitive Carriers' LSRs differ from all other disconnect orders. Specifically, disconnect orders stemming from the Competitive Carriers' LSRs contain "additional entries that are required to facilitate the actual porting of the telephone number to the new provider."[30]

8. Upon completion of the lead list, Verizon immediately -- sometimes within 24 hours of receiving the LSR -- contacts customers on the lead list, by express mail, e-mail, and/or automated

---

[23] *See, e.g.*, Joint Statement at 12-13, ¶¶ 30-31. Use of 10-digit triggers is routine in the industry, but it is not required by industry process flows, which permit coordinated migration as an alternative. *Id.* at 13, ¶ 31.

[24] *See, e.g.*, Joint Statement at 13, ¶ 32. This "confirmation" step is permitted, but not required, by industry process flows. *Id.* Additional work steps that Verizon undertakes include: physically disconnecting the wire serving the customer from the frame in the central office; using a service order to deliver information to the E911 database to unlock the customer's record so that it can be modified by the new carrier; implementing any requested changes to the retail customer's directory listing; and, after service is disconnected, informing the billing systems to cease billing for service. *Id.* at 12, ¶ 29.

[25] *See, e.g.*, Joint Statement at 11-12, ¶ 28.

[26] *See, e.g.*, Joint Statement at 14-17, ¶¶ 35-45.

[27] *See, e.g.*, Joint Statement at 15, ¶¶ 37-38. The record contains no specific reference to how frequently the lead list is developed. Given the nature of the retention marketing program, however, it is reasonable to infer that the lead list is generated on approximately a daily basis.

[28] *See, e.g.*, Joint Statement at 15, ¶ 37; Supp. Joint Statement at 2, ¶ 1 (stating that Verizon's retention marketing lead list is generated from disconnect orders, including disconnect orders that are generated as a result of receiving LSRs). Of course, disconnect orders may stem from circumstances other than an LSR, such as a customer move out of the local service area. *See, e.g.*, Reply Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 14, 2008) at 1.

[29] *See, e.g.*, Joint Statement at 15, ¶ 37. Toward that end, Verizon eliminates from the lead list customers who (i) are switching to a service provider that is either a Verizon wholesale customer (such as a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product) or a Verizon affiliate (*e.g.*, Verizon Wireless), or (ii) contacted Verizon directly to terminate service. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists. *Id.*

[30] Answer at 10, ¶ 20. The record reveals no other means by which Verizon could identify and eliminate customers who are not switching their phone service to a facilities-based competitor.

telephone message. Those contacts encourage customers to remain with Verizon, offering price incentives such as discounts and American Express reward cards.[31] Verizon conducts this marketing while the number-porting request is still pending, *i.e.*, before the new provider (such as Complainants) has established service to the customer.[32]

9. If Verizon is successful in persuading a customer to cancel his or her order with the new service provider, Verizon cancels the internal service order relating to the port request, and Verizon's systems issue a "jeopardy notice" to the provider that submitted the port request.[33] Verizon also puts the new provider's port request "into conflict" by sending a conflict code to NPAC. That conflict code cannot be overridden by the new provider. If the new service provider persuades the customer to switch after all, it can either seek resolution of the conflict code or, what is much more common, submit a new LSR.[34]

C. The Complaint

10. On February 11, 2008, Complainants filed the Complaint alleging, *inter alia*, that the Verizon customer retention marketing practices described above violate section 222(b) of the Act.[35] Complainants seek an order enjoining Verizon from continuing such customer retention marketing.[36] Complainants also seek an award of damages, but defer that determination to a separate, subsequent proceeding pursuant to section 1.722(d) of the Commission's rules.[37] Thus, this Order addresses only the question of Verizon's alleged liability.[38]

III. LEGAL ANALYSIS

11. Section 222(b) provides that "[a] telecommunications carrier that receives or obtains

---

[31] *See, e.g.*, Joint Statement at 15-16, ¶¶ 39-40.

[32] *See, e.g.*, Joint Statement at 16, ¶ 41. Any marketing that Verizon conducts after the number port and disconnect of Verizon service have occurred is not at issue here. *See, e.g.*, Complaint at 13-14; Answer at 1.

[33] Joint Statement at 17, ¶ 44.

[34] Joint Statement at 17, ¶ 45.

[35] 47 U.S.C. § 222(b). The Complaint also alleges that Verizon's customer retention marketing practices violate sections 222(a) and 201(b) of the Act. *See, e.g.*, Complaint at 28-31 (citing 47 U.S.C. §§ 222(a), 201(b)). Because Complainants prevail on their claim under section 222(b), and that victory will afford Complainants all the relief to which they would be entitled under sections 222(a) and 201(b), we need not and do not reach their claims under sections 222(a) and 201(b). Accordingly, we dismiss those claims (*i.e.*, Counts II and III) without prejudice.

[36] Complaint at 31, ¶ 59 (asking the Commission to "enjoin Verizon from continuing its retention marketing based on carrier change information"). In the context of section 222(b) of the Act, the Commission generally labels as "retention marketing" any marketing to a customer by the customer's existing provider that occurs while the carrier-change/number-porting request applicable to that customer is pending; the Commission generally labels as "winback marketing" any marketing to a customer by the customer's former provider that occurs after the carrier-change/number-porting request applicable to that customer has been effectuated. *See, e.g.*, *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14443-4, ¶ 65 (1999) ("*CPNI Reconsideration Order*"). The Complaint challenges only Verizon's retention marketing, and only Verizon's retention marketing that stems, directly or indirectly, from the submission of an LSR. *See, e.g.*, Complaint at 14. Thus, this Order applies only to such retention marketing, and not to any winback marketing.

[37] Complaint at 31, ¶ 59 (citing 47 C.F.R. § 1.722(d)).

[38] Pursuant to section 1.730 of the Commission's rules, at the Complainants' request, the Enforcement Bureau accepted the Complaint on the Commission's Accelerated Docket. 47 C.F.R. § 1.730. *See* Complaint at Ex. T.

proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[39] Thus, a telecommunications carrier violates section 222(b) when it (a) receives or obtains proprietary information; (b) from another carrier; (c) for purposes of providing any telecommunications service; and (d) fails to use such information "only" for such purpose, or uses the information "for its own marketing efforts."[40] For the reasons discussed below, we find that Verizon's retention marketing program violates section 222(b) of the Act. Specifically, we find that Verizon, a telecommunications carrier, receives proprietary information from the Competitive Carriers; that this information is contained in number porting requests that were submitted for the purpose of the Competitive Carriers providing telecommunications service to the Complainants, and for the purpose of Verizon providing telecommunications service to the Competitive Carriers; and that Verizon uses the proprietary information for its own marketing efforts.

A. The LSRs Submitted by the Competitive Carriers to Verizon Contain "Proprietary Information from Another Carrier" Within the Meaning of Section 222(b).

12. As described above, when a Competitive Carrier, working in conjunction with one of the Complainants, submits an LSR to Verizon, Verizon receives advance notice that the Complainant (again, working in conjunction with the Competitive Carrier) will supplant Verizon as the voice service provider to a particular customer on a particular date. Complainants provide this highly sensitive information to their competitor, Verizon, only because they must do so in order to serve their newly-won customer properly.[41] Specifically, Complainants have no choice but to provide this information (via a Competitive Carrier) to Verizon in order to effectuate a number port in accordance with industry processes.

13. The Commission has already found that advance notice of a carrier change that one carrier is required to submit to another is carrier "proprietary information" under section 222(b).[42] These rulings stem from the inherently sensitive nature of the information itself and from a concern that carriers not unfairly exploit such information received in advance through necessary carrier-to-carrier interactions. As the Commission has observed, "competition is harmed if any carrier uses carrier-to-carrier information . . . to trigger retention marketing campaigns, and [we] consequently prohibit such actions accordingly."[43] Therefore, under Commission precedent, the carrier change information that the Competitive Carriers must submit to Verizon in the LSRs is plainly "proprietary" within the meaning of section 222(b).[44]

14. Verizon proffers several arguments for concluding that the foregoing Commission

---

[39] 47 U.S.C. § 222(b).

[40] 47 U.S.C. § 222(b).

[41] *See, e.g.*, Complaint at Ex. A, ¶ 7, Ex. E ¶ 6.

[42] *See, e.g.*, *CPNI Reconsideration Order*, 14 FCC Rcd at 14449, ¶ 78 (1999) ("[C]arrier change information is carrier proprietary information under section 222(b)."); *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*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1572, ¶ 106 (1998) ("*1998 Slamming Order*") ("[C]arrier change information is carrier proprietary information and, therefore, pursuant to section 222(b), the executing carrier is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.").

[43] *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77.

[44] Verizon contends that a different process not involving the transmission of carrier-change information to Verizon *could* have been established, *see, e.g.*, Answer at 7, but the existence of that hypothetical alternative has no bearing on the legal requirements applicable to the processes currently in place.

precedent does not apply to the information at issue here. As explained below, all of those arguments lack merit.

15. First, in Verizon's view, the information that the Competitive Carriers submit to Verizon in an LSR is actually Verizon's information, not another carrier's. Specifically, according to Verizon, the fact that its own customer has cancelled his or her retail Verizon voice service on a certain date is information that Verizon, as the current retail carrier, requires to carry out the last portion of its retail service -- timely disconnection.[45] This argument distorts the nature of the information contained in the LSRs. Although the LSR does contain information that Verizon needs to disconnect a customer, it also contains additional, highly sensitive competitive information that is independent of the mechanics of disconnection. Specifically, the LSR discloses in advance that a competing carrier has convinced a particular Verizon customer to switch to the competing carrier's voice service on a particular date. This is the information that is proprietary. Significantly, even Verizon does not dispute that information on the LSR revealing the identity of the new carrier is proprietary information.[46] And, as explained in more detail later, it is precisely that information – *i.e.*, the fact that a retail customer has chosen not only to disconnect Verizon service but also to switch to a competitor on a particular date – that Verizon employs in its retention marketing program.[47]

16. Verizon also argues that the carrier-change information in the LSR is the customer's information, and the Competitive Carrier is merely conveying that information as the customer's agent.[48] We disagree. It is true that a Verizon retail customer has every right to contact Verizon directly to state that she intends to switch to a Complainant's voice service. Indeed, the Commission has already recognized that truth and held that, if a customer makes such a contact, the carrier-change information conveyed by the customer to Verizon is not "proprietary" within the meaning of section 222(b) and may be used to engage in retention marketing.[49] In the absence of such a direct customer contact, however, the carrier-change information conveyed in carrier-to-carrier communications remains proprietary.[50]

[45] *See, e.g.*, Answer at 37-38, 43-44, 48-50; Comments of Verizon in Support of Recommended Decision at 19-20.

[46] *See, e.g.*, Answer at 16 (explaining that Verizon instructs its customer retention marketing representatives to refrain from looking at the name of the new carrier or mentioning the name of the new carrier to the target customer); 43 ("assuming for the sake of argument that the *identity* of the winning carrier is proprietary information").

[47] *See* Section III.C, *infra.*

[48] *See, e.g.*, Answer at 45, 49-50; Comments of Verizon in Support of Recommended Decision at 20.

[49] *See, e.g.*, *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 79 (holding that "section 222(b) is not violated if the carrier has independently learned from its retail operation that a customer is switching to another carrier"); *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14917, ¶ 131 and n.302 (2002) ("*CPNI 3rd Report & Order*") (recognizing that "a carrier's retail operations may, without using information obtained in violation of section 222(b), legitimately obtain notice that a customer plans to switch to another carrier," but noting that "such instances are the exception, not the rule").

[50] In this vein, Verizon states: "Complainants are left to argue that, if a consumer calls to cancel service, retention marketing is permitted and beneficial, but that, if the customer authorizes a service provider to cancel on his or her behalf, retention marketing is prohibited and harmful. That nonsensical distinction finds no support in the Act or the Commission's rules and is so irrational as to render the restriction ... an unconstitutional restriction on Verizon's speech." Opening Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 12, 2008) at 1. Yet the Commission plainly made that distinction in prior orders, and neither Verizon nor anyone else challenged it as "nonsensical" or "irrational." Indeed, we are not aware of any carrier, including Verizon prior to the summer of 2007, acting contrary to that distinction.

Moreover, labeling the Complainant (or Competitive Carrier) as merely the "agent" of the customer is misleading. By transmitting the information in the LSR, the Competitive Carrier is certainly acting to help effectuate the customer's choice of carrier, but it is also acting to promote its own commercial interests, which requires conveying its own proprietary information. Verizon's agency theory also conflicts with the approach the Commission has taken in applying section 222(b) in the slamming context. Just as in the context of a number porting request, a customer can effect a change of carrier by authorizing the new carrier to make the change request on the customer's behalf.[51] Nevertheless, the Commission banned the use of carrier change requests for marketing purposes as inconsistent with section 222(b).[52] By Verizon's reasoning, a carrier submitting a carrier change request on behalf of a customer would seemingly be acting only as the customer's agent, and the marketing ban would not apply. That was clearly not the approach taken by the Commission.

17. Verizon further contends that the LSRs do not convey proprietary information "from another carrier" within the meaning of section 222(b), because Complainants are not "telecommunications carriers."[53] Verizon's contention lacks merit, even assuming, *arguendo*, that (i) the statute's reference to "carrier" means "telecommunications carrier"; (ii) Complainants are not "telecommunications carriers;"[54] and (iii) the "proprietary information" must concern the carrier who conveys it.[55] Due to the closeness of the operational partnership between Complainants and their respective Competitive Carriers,[56] we hold that information regarding a Verizon customer's decision to switch from Verizon to a Complainant is as proprietary to the Competitive Carrier as it is to the Complainant. Moreover, as explained below, the Competitive Carriers are "telecommunications carriers" under section 222(b).[57] Thus, when a Competitive Carrier conveys carrier-change information in an LSR to Verizon, Verizon is receiving such information "from a carrier" under section 222(b).[58]

18. In sum, for all of the foregoing reasons, the LSRs submitted by the Competitive Carriers to Verizon contain "proprietary information from another carrier" within the meaning of section 222(b).

---

[51] *See, e.g., 1998 Slamming Order*, 14 FCC Rcd at 1510, ¶ 1.

[52] *Id.* at 1572-73, ¶ 106.

[53] *See, e.g.*, Opening Brief of Verizon at 5; Answer at 42.

[54] We note that none of the Complainants claims to be a "telecommunications carrier" within the meaning of section 222(b).

[55] We emphasize that these are assumptions, not conclusions.

[56] *See, e.g.*, Joint Statement at 5-6; Complaint at 7-9. *See also In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) ("VoIP LNP Order and Declaratory Ruling") (observing in a closely analogous context that interconnected VoIP providers and wholesale interconnection providers work in partnership to provide competitive voice services to end-users); *Time Warner Wholesale Services Order, supra* (same point as *VoIP LNP Order and Declaratory Ruling*).

[57] *See* Section III.D, *infra*.

[58] Verizon cursorily asserts that, if the LSR's carrier-change information is deemed to be proprietary to the Competitive Carriers, then the Complainants lack standing to prosecute this Complaint. Opening Brief of Verizon at 5-6. Verizon's assertion overlooks the last sentence of section 208, which provides that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant." 47 U.S.C. § 208. At a minimum, Complainants have clearly experienced indirect damage from Verizon's customer retention marketing program, even if each Complainant is not a "carrier" whose proprietary information is protected by section 222(b). Thus, Complainants have standing under section 208 to obtain a ruling regarding the lawfulness of Verizon's conduct. Whether Complainants also have standing to obtain a ruling awarding monetary damages to them is a question we need not reach unless and until they file a supplemental complaint for damages pursuant to 47 C.F.R. § 1.722.

B. When a Competitive Carrier Submits an LSR to Verizon, Verizon Receives It "For Purposes of [the Competitive Carrier] Providing Telecommunications Service" to a Complainant Within the Meaning of Section 222(b).

19. Section 222(b) prohibits a telecommunications carrier from using for its own marketing efforts any proprietary information that it receives from another carrier "for purposes of providing any telecommunications service...."[59] Section 222(b) does not expressly state *whose* provision of telecommunications services is covered. Specifically, section 222(b) does not expressly state whether its marketing ban applies when the receipt of proprietary information is for purposes of (i) the *submitting* carrier (here, a Competitive Carrier) "providing any telecommunications service," or (ii) the *receiving* carrier (here, Verizon) "providing any telecommunications service," or (iii) either the submitting carrier or the receiving carrier "providing any telecommunications service."

20. The parties do not dispute that section 222(b) applies when the *receiving* carrier provides telecommunications service. The issue here is whether section 222(b) also applies when a telecommunications carrier's receipt of proprietary information from another carrier is for purposes of the *submitting* carrier providing telecommunications services.[60] For the following reasons, and consistent with Commission precedent in a similar context, we conclude that section 222(b)'s marketing ban applies in the latter situation as well.

21. Our conclusion rests on a reasonable construction of the statutory language. Indeed, in addressing the meaning of section 222(b), the Commission has already held that "information contained in a carrier change request is by its very nature proprietary [and] ... may only be used by the executing carrier to effectuate the provision of service *by the submitting carrier to its customer.*"[61] Applied in the context of this case, it is reasonable to read section 222(b) as stating that, when Verizon "receives or obtains proprietary information from a [Competitive Carrier] for purposes of [the Competitive Carrier] providing any telecommunications service ... [, Verizon] shall use such information only for such purpose [*i.e.*, the Competitive Carrier providing a telecommunications service], and shall not use such information for its own marketing efforts."

22. Our conclusion is also compelled by the Commission's prior assessment of the fundamental objective of section 222(b): to protect from anti-competitive conduct carriers who, in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor.[62] To achieve that objective, the Commission has repeatedly construed

[59] 47 U.S.C. § 222(b).

[60] *See, e.g.*, Joint Statement at 23, ¶ 68 ("Complainants assert that one legal issue is whether provision of 'telecommunication service' by the Competitive Carriers, but not by Verizon, constitutes 'providing any telecommunications service' within the meaning of section 222(b). Defendants assert that one legal issue is whether provision of 'telecommunications service' by a carrier that submits information . . . implicates section 222(b)"); Comments of Verizon in Support of Recommended Decision at 11-14.

[61] *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*, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, 5109-10, ¶ 25 (2003) ("*Third Slamming Reconsideration Order*") (emphasis added).

[62] *1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109 (stating that section 222(b) "promotes competition and protects consumer choices by prohibiting executing carriers from using information gained solely from the carrier change transaction to thwart competition by using the carrier proprietary information of the submitting carrier to market the submitting carrier's subscribers"); *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77 (stating that "competition is harmed if any carrier uses carrier-to-carrier information . . . to trigger retention marketing campaigns"); ¶ 78 (stating that "where a carrier exploits advance notice of a customer change by

(continued ...)

section 222(b) to mean that, when a customer's current carrier obtains carrier-change information from a competing carrier solely because of the current carrier's existing relationship with the customer, the current carrier may not use that information to attempt to disrupt the carrier change.[63] The existing carrier must remain "neutral," and not act as a competitor, until the carrier change is completed and the new carrier has begun providing telecommunications service. At bottom, the Commission has focused on preventing the receiving carrier from hindering the submitting carrier's ability to initiate its provision of telecommunications service to its customers.

23. In accordance with our view of section 222(b)'s overriding goal, as just described, we conclude that section 222(b)'s marketing ban applies when a telecommunications carrier's receipt of proprietary information from another carrier is for purposes of the *submitting* carrier providing telecommunications service, and is not limited to situations where the information is received for purposes of the *receiving* carrier providing service. Otherwise, section 222(b)'s protection could have irrational gaps, such as situations where the receiving carrier provides no "telecommunications service" to the submitting carrier.

24. Applying that construction of section 222(b) here, section 222(b)'s requirements squarely encompass Verizon's retention marketing. In order to initiate its provision of telecommunications service to a Complainant to serve a particular new customer, the Competitive Carrier has no choice but to notify Verizon of the customer's decision to switch service from Verizon to the Complainant. Thus, as the receiving carrier under section 222(b), Verizon may use that carrier-change information only for purposes of helping effectuate the initiation of the Competitive Carrier's (*i.e.*, the submitting carrier's) telecommunications service.

25. Verizon contends that, as a grammatical matter, the "purpose" referenced twice in section 222(b) must concern only the *receiving* carrier – and not the *submitting* carrier – providing telecommunications service.[64] Put differently, Verizon contends that section 222(b) must be read to apply *only* when the receipt of proprietary information is for purposes of the *receiving* carrier providing telecommunications service.[65] We disagree. As described above, we find, consistent with the Commission's statements in the slamming context, that the language of section 222(b) does not require such a reading. The statutory language is reasonably susceptible of meaning that the "purpose" includes the submitting carrier providing telecommunications service. And that interpretation more

---

(Continued from previous page)
virtue of its status as the underlying network-facilities or service provider to market to that provider, it does so in violation of section 222(b)"); *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶¶ 131, 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 26 (accepting the view that "Congress intended by the express terms of section 222(b) to prevent carriers from using information obtained from another to be used for the carrier's own marketing efforts against the submitting carrier"); ¶ 28 (stating that "carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier").

[63] *1998 Slamming Order*, 14 FCC Rcd at 1575, ¶ 106 (stating that "when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to that consumer"); *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶¶ 77-79 (stating that a carrier that exploits advance notice of a customer change violates section 222(b)); *CPNI 3rd Report & Order*, 17 FCC Rcd at 14917, ¶ 131 (stating that a carrier that receives carrier change information in its role as executing carrier is prohibited from using that information to attempt to change the subscriber's decision); *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 28 (stating that carrier change information provided in order to execute carrier change cannot be used for any other purpose).

[64] *See, e.g.*, Answer at 39; Comments of Verizon in Support of Recommended Decision at 12-13.

[65] Comments of Verizon in Support of Recommended Decision at 11-14.

comprehensively achieves section 222(b)'s objectives, as previously explained.

26. Verizon also asserts that the Commission has already construed section 222(b)'s marketing ban to apply only where, unlike here, the receiving carrier is providing a wholesale telecommunications service to the submitting carrier, such as resale or access.[66] We see no such limiting construction in any Commission order. When the Commission has referred to the receiving carrier's "wholesale operations" or "wholesale service" or "carrier-to-carrier service" and the like, it has done so merely to identify the source of the carrier-change information as something other than the receiving carrier's direct communications with its retail customer; it has *not* done so to limit section 222(b)'s scope to situations where the receiving carrier is providing a wholesale "telecommunications service" to the submitting carrier.[67]

27. Moreover, such a limiting construction would contravene what the Commission has repeatedly described as a fundamental policy of the Act – to promote facilities-based local competition.[68] Specifically, if Verizon's interpretation of the Commission's retention marketing orders were correct, those orders would have prevented receiving carriers from retention marketing against resellers and UNE competitors, but allowed receiving carriers to retention market against facilities-based competitors. Verizon has not proffered any sensible basis for the Commission to have made such a distinction, and we can discern none. Quite the contrary. While their number-port requests are pending with a receiving carrier, facilities-based carriers are just as vulnerable as resellers to any anti-competitive conduct by the receiving carrier.

28. Finally, in Verizon's view, even assuming, *arguendo*, that section 222(b) generally applies when the submitting carrier is the one "providing telecommunications service," section 222(b) does not apply here, because the information contained in the LSRs does not relate to the specific telecommunications services provided by the Competitive Carriers to Complainants.[69] We disagree. Verizon focuses only on the services provided by the submitting carrier, but the language of section 222(b) is not so limited, requiring only that the proprietary information be submitted for the purpose of providing *any* telecommunications service. That purpose is certainly satisfied here. A Competitive Carrier submits the LSR to Verizon so that, upon completion of the number port and service

[66] *See, e.g.*, Answer at 2-3, 37, 40, 51; Opening Brief of Verizon at 4.

[67] *1998 Slamming Order*, 14 FCC Rcd at 1572-73, ¶106; *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶¶ 78-79.

[68] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008) at ¶ 2 (noting that 1996 Telecommunications Act was designed to eliminate barriers to facilities-based competition); *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2535, ¶ 3 (2005) (subsequent history omitted) (adopting rules intended to "spread the benefits of facilities-based competition to all consumers"); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) (noting that facilities-based competition serves the Act's overall goals) (subsequent history omitted); *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20644-45, ¶ 5 (2001) (subsequent history omitted) (stating that "facilities-based competition, of the three methods of entry mandated by the Act, is most likely to bring consumers the benefits of competition in the long run"); *Time Warner Wholesale Services Order*, 22 FCC Rcd at 3519, ¶ 13 (referring to Commission's goal of promoting facilities-based competition).

[69] *See, e.g.*, Answer at 42, Opening Brief of Verizon at 5-6.

disconnection, the Competitive Carrier can provide telecommunications service to a Complainant.[70]

29. In sum, when a Competitive Carrier submits an LSR to Verizon, Verizon receives that LSR "for purposes of providing any telecommunications service" within the meaning of section 222(b). That conclusion, combined with the conclusion reached above about the LSR's proprietary nature, means that section 222(b) forbids Verizon from using the information in the LSR for its own marketing efforts.

30. Moreover, even if Verizon were correct that section 222(b) applies only when the carrier that receives proprietary information uses it for the purpose of providing telecommunications service, we would find that Verizon's retention marketing practices violate the statute because Verizon's provision of LNP constitutes a telecommunications service.

31. Verizon argues that LNP is not a telecommunications service because it does not constitute transmission, and because it is not offered for a fee.[71] Number portability, however, is a wholesale input that is a necessary component of a retail telecommunications service. We have previously found that services or functions that are "incidental or adjunct to common carrier transmission service" – i.e., they are "an integral part of, or inseparable from, transmission of communications" – should be classified as telecommunications services.[72] For instance, the Commission has found that central office space for collocation,[73] certain billing and collection services,[74] and validation and screening services[75] should be treated for regulatory purposes in the same manner as the transmission services underlying them, notwithstanding that none of these services actually entails transmission.

32. LNP similarly constitutes such an "adjunct to basic" service. Verizon's provision of LNP is a vital part of the telecommunications services that it provides to the Competitive Carriers.[76] Without the number port, Verizon could not route traffic to its former customer, as required under its interconnection agreements with the Competitive Carriers. Moreover, implementing LNP requires Verizon to be involved in properly switching and transmitting calls to the new carrier – these are unquestionably "telecommunications" functions. For instance, the parties have stipulated that for LNP to work, Verizon must provide the transmission necessary to route calls in its role as the "N-1" carrier (the

[70] In any event, contrary to Verizon's suggestion, the LSR's information *is* related to the Competitive Carriers' transmission services: the information is critical to Complainants' acquisition of a new customer, which, in turn, drives Complainants' purchase of the Competitive Carriers' telecommunications service.

[71] Answer at 38-39.

[72] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958 ¶ 107 (1996); *see also, e.g., Beehive Telephone v. The Bell Operating Companies,* Memorandum Opinion and Order, 10 FCC Rcd 10562, 10566 ¶ 21 (1995); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services,* Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831 ¶ 16 & n. 28 (2005); *Federal-State Joint Board on Universal Service, Appeal of Administrator's Decision, Radiant Telecom, Inc.,* Order, 22 FCC Rcd 11811, 11813-14 ¶ 9 (WCB 2007).

[73] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport,* Second Report and Order, 12 FCC Rcd 18730, 18744 ¶ 20.

[74] *Detariffing Billing and Collection Services,* Report and Order, 102 FCC2d 1150, 1167-69 ¶ 31 (1986).

[75] *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards,* Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531 ¶ 19 (1992).

[76] Complainants' Supplemental Reply Brief at 2; Complainants' Reply at 36-38; Complaint at ¶¶ 40-41.

next-to-last carrier in the call sequence).[77]

33. For all of the above reasons, we find that Verizon's provision of LNP constitutes a telecommunications service for purposes of section 222(b).

C. Verizon's Retention Marketing Program Makes Use of Other Carriers' Proprietary Information.

34. An examination of the way Verizon handles the proprietary information it receives from the Competitive Carriers via LSRs confirms that Verizon uses this information "for its own marketing efforts," in violation of section 222(b). As stated above, the proprietary information at issue is the fact that, at a particular date and time in the near future, a Complainant will, in conjunction with a Competitive Carrier, begin to provide facilities-based, voice service to a specific customer who presently is being served by Verizon. Verizon uses that very information to swiftly identify exactly to whom it will engage in retention marketing. In particular, Verizon uses that information to help winnow from the universe of its daily disconnect orders all customers who are disconnecting service for *any* reason *other* than that they are switching service to a facilities-based, competing service provider like Complainants. This "threshing of the wheat from the chaff" leaves Verizon with a lead list consisting *only* of those customers who *are* switching their service to a facilities-based, competing provider like Complainants. Thus, the proprietary information contained in LSRs is a key organizing tool used by Verizon to determine which customers will receive retention marketing.[78]

35. Verizon asserts that its retention marketing depends only on the non-proprietary fact that Verizon's own retail customer has cancelled voice service and seeks disconnection – information that Verizon says it obtains legitimately, and of necessity, as part of its retail voice operations.[79] Verizon's own description of how it targets customers for retention marketing belies that assertion. Verizon acknowledges that, in order to identify its retention marketing audience, Verizon relies specifically on two facts – both the fact that the disconnect request stems from a switch in carriers rather than some other reason (such as moving or otherwise exiting the market), and the fact that the new carrier is a facilities-based provider.[80] Verizon has identified no source for either of those facts other than the proprietary information contained in the LSRs submitted to Verizon by the Competitive Carriers. That such information finds its way into a "retail" disconnect order does not mean that Verizon refrains from using it to target customers for retention marketing.

36. Verizon also contends that, because it does not mention any Complainant's name in any of its oral or written retention marketing, Verizon does not "use" proprietary information.[81] Verizon's contention misses the point. The Complainants' names, standing alone, are not the information at issue. What is at issue is the carrier change information, which, as discussed above, lies at the heart of Verizon's retention marketing program.

---

[77] Further Supplemental Joint Statement, File No. EB-0-MD-002 (filed Mar. 10, 2008) at ¶ 2.a.

[78] Verizon argues: "That Verizon includes in its lead list disconnecting customers who are porting their numbers to another service provider does not mean that Verizon is using another carrier's proprietary information. Verizon seeks to reach out to customers who have not spoken with a Verizon representative – and who are leaving Verizon's network – to ensure that they are informed about Verizon's competitive pricing and retention offers; Verizon assembles its lead list with that goal." Answer at 44. The point is that Verizon would not know which customers to reach with its retention marketing but for its use of the LSRs' proprietary information.

[79] *See, e.g.*, Answer at 37-38, 43-44, 48-50; Comments of Verizon in Support of Recommended Decision at 21-24.

[80] *See, e.g.*, Answer at 14; Joint Statement at 15, ¶ 37.

[81] *See, e.g.*, Answer at 16, 45-46.

D. The Bright House and Comcast-affiliated Competitive Carriers are "Telecommunications Carriers" Offering "Telecommunications Service."

37. Verizon argues that, even if section 222(b) refers to the submitting carriers' provision of "telecommunications service," section 222(b)'s marketing ban does not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers. That is because, according to Verizon, the record lacks evidence that those Competitive Carriers provide "telecommunications services" to Comcast and Bright House.[82] This argument hinges on the statutory definitions of "telecommunications,"[83] telecommunications carrier,"[84] and "telecommunications service,"[85] as well as on the Commission's determination that the common law concept of "common carrier" sheds significant light on the meaning of those statutory definitions.[86]

38. Verizon's argument boils down to an assertion that, with respect to the telecommunications provided to Comcast and Bright House, the record lacks evidence that the Comcast and Bright House Competitive Carriers engage in "offering" those telecommunications "directly to the public, or to such classes of users at to be effectively available directly to the public...."[87] Put in common law terms, Verizon asserts that the Comcast and Bright House Competitive Carriers do not "hold themselves out" to the public regarding the telecommunications they provide to their Complainant affiliates. Neither the Communications Act nor the case law describes exactly what is required to "offer" telecommunications "directly to the public, or to such classes of users at to be effectively available directly to the public." Therefore, whether a provider has made such an offering must be determined on a case-by-case basis.[88]

39. Based on the specific record in this specific case, we find that the Bright House and Comcast-affiliated Competitive Carriers are common carriers for purposes of section 222(b). As an initial matter, the Comcast and Bright House Competitive Carriers "self-certify" that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.[89] We give

---

[82] Answer at 22-24, 42-43; Verizon Response to Supplemental Statements of Comcast and BHN, File No. EB-08-MD-002 (filed Mar. 12, 2008) ("Verizon's 3/12 Response"); Comments of Verizon in Support of Recommended Decision at 35-39. Verizon does not dispute that Sprint provides "telecommunications service" to Time Warner. *Id.*

[83] The Act provides that "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[84] The Act provides, in pertinent part, that "[t]he term 'telecommunications carrier' means any provider of telecommunications services." 47 U.S.C. § 153(44).

[85] The Act provides that "[t]he term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[86] *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming the Commission's use of the "common carrier" test in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (*"NARUC I"*) to help ascertain the meaning of the term "telecommunications service" in 47 U.S.C. § 153(46)).

[87] 47 U.S.C. § 153(46).

[88] *See, e.g., United States Telecom Ass'n. v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*"NARUC II"*); *NARUC I, supra.*

[89] *See, e.g.*, Supplemental Affidavit of Susan Jin Davis, File No. EB-08-MD-002 (filed Mar. 10, 2008) ("Supp. Davis Aff.") at ¶¶ 5, 7; Second Affidavit of Marva B. Johnson, File No. EB-08-MD-002 (filed Mar. 10, 2008) ("Supp. Johnson Aff.") at ¶¶ 8-9.

significant weight to these attestations because being deemed a "common carrier" (*i.e.*, being deemed to be providing "telecommunications services") confers substantial responsibilities as well as privileges, and we do not believe these entities would make such statements lightly.[90] Further supporting our conclusion are the public steps the Comcast and Bright House Competitive Carriers have taken, consistent with their undertaking to serve the public indifferently. Specifically, each of the Comcast and Bright House Competitive Carriers has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates.[91] Moreover, each of the Comcast and Bright House Competitive Carriers has entered into a publicly-available interconnection agreement with Verizon, filed with and approved by the relevant state commission pursuant to sections 251 and 252 of the Act.[92] These facts, in combination, establish a prima facie case that the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b).

40. To try to rebut Complainants' prima facie case, Verizon points out that the Comcast and Bright House Competitive Carriers (i) serve only their affiliates, and (ii) lack a tariff or website posting or any other advertisement regarding the telecommunications at issue.[93] We find these facts in isolation insufficient to overcome Complainants' showing for purposes of section 222(b). First, it is well-established that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population."[94] Verizon has submitted no credible evidence that the Competitive Carriers are unwilling to provide telecommunications services to unaffiliated entities on a nondiscriminatory basis.[95] Second, the telecommunications services at issue here need not be federally tariffed,[96] and Verizon has not argued that state tariffs are required.[97] Furthermore,

---

[90] *See, e.g.*, 47 U.S.C. §§ 201, 202, 208, 254. Perhaps that is why we know of no case in which a provider has chosen to act as a common carrier and yet ultimately has been found not to meet the test.

[91] *See, e.g.*, Complaint at Ex. B, ¶¶ 8-27; Ex. E at ¶ 2. *See also VoIP LNP Order and Declaratory Ruling*, 22 FCC Rcd at 19542, ¶ 20 n.62 (stating that, although the Commission has not determined whether interconnected VoIP service should be classified as a telecommunications service, and although only telecommunications carriers are entitled to obtain direct access to numbering resources, "[t]o the extent that an interconnected VoIP provider is licensed or certificated as a carrier, that carrier is eligible to obtain numbering resources directly from NANPA, subject to all relevant rules and procedures applicable to carriers").

[92] *See, e.g.*, Complaint at Ex. B, ¶¶ 45-61; Ex. E at ¶ 3.

[93] Answer at 22-24, 42-43;Verizon's 3/12 Response at 3-6. Verizon also contends that we should disregard any factual evidence on this subject not filed with the Complaint. Verizon's 3/12 Response at 1-2. Verizon's contention lacks merit, because the only "new" facts on which we rely here – the nature of the potential customer base, and the "self-certification" as common carriers – were suggested by the Complaint itself, and are not complex. Thus, Verizon has had an adequate opportunity to respond. Accordingly, to the extent that our rules require those facts to be alleged more clearly in the Complaint, we waive those rules for good cause shown. *See* 47 C.F.R. §§ 1.3, 1.721, 1.726.

[94] *See NARUC I*, 525 F.2d at 608.

[95] As mentioned previously, "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." *NARUC I*, 525 F.2d at 608. This undermines the probative value of the fact that the Comcast and Bright House Competitive Carriers presently serve only their affiliates. Given the nature of their services, it could well be that there are only a few potential customers other than their affiliates.

[96] *See generally Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (subsequent history omitted); *Time Warner Wholesale Services Order, supra.*

[97] *See generally Consolidated Communications of Fort Bend Co. v. Public Utility Commission of Texas*, 497 F.Supp.2d 836 (W.D. Tex. 2007) (holding that Sprint's provision of service similar, if not identical, to the service at issue here was "telecommunications service," despite the absence of a state tariff).

by obtaining publicly available state certificates and interconnection agreements, the Comcast and Bright House Competitive Carriers have given notice that telecommunications services are available to the particular class of potential customers that might be interested in the services at issue here.[98] If a voice services provider similarly situated to Comcast and Bright House were looking for a provider of these services, the Comcast and Bright House Competitive Carriers would be obvious choices. Finally, prior to the dispute at issue here, Verizon itself appears to have treated these entities as telecommunications carriers.[99]

41. In sum, based on the particular facts in this record regarding the telecommunications provided to Comcast and Bright House by their affiliated Competitive Carriers, we conclude that Comcast and Bright House have shown, by a preponderance of the evidence, that the Competitive Carriers are telecommunications carriers for purposes of section 222(b) of the Act and provide "telecommunications services" to Comcast and Bright House within the meaning of section 222(b) of the Act. We stress, however, that our holding is limited to the particular facts and the particular statutory provision at issue in this case. The U.S. Court of Appeals for the D.C. Circuit has made clear that an agency may interpret an ambiguous term "differently in two separate sections of a statute which have different purposes."[100] Here, section 222(b) has a different purpose – privacy protection – than many other provisions of the Communications Act, and we believe that this purpose argues for a broad reading of the provision. As a result, our decision holding the Competitive Carriers to be "telecommunications carriers" for purposes of section 222(b) does not mean that they are necessarily "telecommunications carriers" for purposes of all other provisions of the Act. We leave those determinations for another day. While the Act does provide a definition of the term "telecommunications carrier," "the presence of a definition does not necessarily make the meaning clear. A definition only pushes the problem back to the meaning of the defining terms."[101] Therefore, we believe that it may be permissible to interpret an ambiguous but defined term differently in different statutory provisions that serve distinct purposes.

---

[98] The segment of the "public" to which the Comcast and Bright House Competitive Carriers seek to provide telecommunications consists of sophisticated entities – other carriers – knowledgeable about state regulatory processes and the ramifications of state certificates and interconnection agreements. *See, e.g.*,Supp. Davis Aff. at ¶ 5; Supp. Johnson Aff. at ¶ 9. We note that, had the Comcast and Bright House Competitive Carriers simply posted on their websites some indication of the general availability of the telecommunications they provide to their affiliates, Verizon might not have challenged their status as "telecommunications carriers." *See generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, ¶ 90 (2005) (subsequent history omitted) (holding that wireline broadband providers that choose to offer the transmission component of a wireline broadband Internet access service as a telecommunications service may do so without filing tariffs setting forth the rates, terms, and conditions under which they will provide that transmission, but only if the providers "include those rates, terms, and conditions in generally available offerings posted on their websites").

[99] Verizon entered into interconnection agreements with the Comcast and Bright House Competitive Carriers, which Verizon is statutorily obligated to do only with "telecommunications carriers," and these agreements were approved by the state commissions, and made public, pursuant to section 252 of the Act. *See, e.g.*, 47 U.S.C §§ 251(a)(1), 251(c)(2), 252(a); Complaint at Ex. B, ¶¶ 45-61; Ex. E at ¶ 3. We also note that Verizon did not draw any distinctions between the services provided to Time Warner by Sprint – which Verizon admits is a telecommunications carrier – and those provided to Comcast and Bright House by the Comcast and Bright House Competitive Carriers. *See, e.g.*, Complaint at Ex. B, ¶ 7, Ex. E at 1-2; Bright House Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 3, Ex. 1 at 2-4.

[100] *Abbott Laboratories v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990); *see Common Cause v. Federal Election Commission*, 842 F.2d 436, 441 (D.C. Cir. 1988) (upholding agency decision to interpret the same term – "name" – differently in two Federal Election Campaign Act provisions).

[101] *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873, 878 (D.C. Cir. 2006).

E. Verizon's Policy and Constitutional Arguments Do Not Justify its Proposed Reading of Section 222(b).

42. Verizon argues that interpreting section 222(b) so as to allow its retention marketing program would promote competition and benefit consumers, and has submitted the declaration of an economist to support this assertion.[102] Verizon also suggests that we should construe section 222(b) to permit the challenged customer retention marketing practices because doing so would help level the playing field on which voice providers compete for video and Internet customers, and video and Internet providers compete for voice customers.[103]

43. Verizon's policy arguments might be appropriately raised anew in some other context, such as a request to forbear from application of section 222(b) or a notice of proposed rulemaking under section 201(b) of the Act, but do not persuade us to adopt Verizon's interpretation of section 222(b) in this adjudication. The Commission has already evaluated the policy concerns underlying section 222(b) and adopted a construction that balances the concerns of protecting proprietary information and promoting competition.[104] Our decision here is fully in accord with those prior decisions. Verizon's policy arguments, and its economist's declaration, simply fail to consider the importance the Commission has placed on protecting proprietary information that voice carriers are required to share with their competitors. Moreover, Verizon's "level playing field" argument ignores the fact that the statute itself treats different services differently – on its face, section 222 applies to telecommunications services, but not to video or other services.[105] That different statutory treatment reflects the fact that only a competing voice service provider must communicate and coordinate with a customer's existing voice service provider in order to initiate service to that new customer. Where, as here, a provider has no choice but to communicate competitively sensitive information to its rival, the rival cannot use that information for marketing.

44. Verizon also asserts that the interpretation of section 222(b) advanced by Complainants "would severely restrict lawful, non-misleading speech and accordingly would raise significant First Amendment concerns."[106] More specifically, Verizon argues that no legitimate government interest could be served by restricting marketing "for the sole reason that it is based on information submitted by a

---

[102] Declaration of Jeffrey Eisenach, File No. EB-08-MD-002 (filed Feb. 29, 2008).

[103] *See, e.g.*, Answer at 56-58; Opening Brief of Verizon at 7-9; Comments of Verizon in Support of Recommended Decision at 24-29. Verizon points out, and Complainants acknowledge, that Complainants typically require customers to contact them directly to cancel video or broadband Internet access service; and when customers do so, Complainants offer incentives to remain customers in some instances. Letter from Matthew A. Brill to Marlene Dortch, Secretary, Federal Communications Commission, File No. EB-08-MD-002 (filed Mar. 6, 2008). In Verizon's view, because Complainants are allowed to engage in such retention marketing of their video and Internet services, Verizon should be allowed to engage in retention marketing of its voice service.

[104] *See 1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109; *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77; *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶ 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 28. For just one example, the Commission has already acknowledged what Verizon's economist principally asserts – that in the short term retention marketing may benefit some consumers. *CPNI Reconsideration Order*, 14 FCC Rcd at 14452-53, ¶¶ 84-85. The Commission went on to hold, nevertheless, that retention marketing's long-term harm to competition in the market as a whole outweighs any short-term benefits to individuals. *Id.* Moreover, Verizon's economist simply assumes, with no support, that material competition in the residential voice market would continue to exist despite the barriers to competition that retention marketing would entail.

[105] Verizon has not identified any analogue to section 222 in Title I or Title VI or any other part of the Act.

[106] Opening Brief of Verizon at 9. *See, e.g.*, Comments of Verizon in Support of Recommended Decision at 30-31.

service provider on behalf of the customer rather than by the customer him or herself."[107] As even Verizon notes, however, the government may restrict truthful communications if such restriction is narrowly tailored to serve a substantial government interest.[108] The Commission previously found that this test was met when it interpreted section 222(b) as prohibiting retention marketing based on the use of carrier change information.[109] The same analysis applies here concerning retention marketing based on the use of carrier change information embedded in number porting requests.

IV. CONCLUSION AND RELIEF AWARDED

45. In sum, we find that, under section 222(b) of the Act, the number-porting/carrier-change information obtained by Verizon from the Competitive Carriers is "proprietary" to the Competitive Carriers; Verizon obtains the proprietary information "for purposes of [the Competitive Carriers] providing ... telecommunications service" to Complainants, and for purposes of Verizon providing a telecommunications service to the Competitive Carriers; each of the Competitive Carriers is providing "telecommunications service" to a Complainant; and Verizon uses that proprietary information for a purpose other than the Competitive Carriers providing telecommunications service to Complainants, namely, "its own marketing efforts." Consequently, we hold that Verizon's customer retention marketing activities, as described above, violate section 222(b) of the Act. In turn, we grant Complainants' claim under section 222(b) of the Act (*i.e.*, Count I), and award the requested injunctive relief. Specifically, we hereby order Verizon to immediately cease and desist from engaging in the customer retention marketing activities described above.

V. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[110] and sections 1.720-1.736 of the Commission's rules,[111] that the Enforcement Bureau's April 11, 2008, *Recommended Decision* in File No. EB-08-MD-002 IS REJECTED.

47. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[112] and sections 1.720-1.736 of the Commission's rules,[113] that Count I of the Complaint is GRANTED, and that Counts II and III are DISMISSED without prejudice.

---

[107] Opening Brief of Verizon at 10.

[108] Opening Brief of Verizon at 9 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).

[109] *1998 Slamming Order*, 14 FCC Rcd at 1573-75, ¶¶ 107-111.

[110] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[111] 47 C.F.R. §§ 1.720-1.736.

[112] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[113] 47 C.F.R. §§ 1.720-1.736.

48. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, 222, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 222, and 303(r), and sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736 that Verizon SHALL IMMEDIATELY CEASE AND DESIST from engaging in the customer retention marketing activities described in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN, DISSENTING

Re: Bright House Networks, LLC et al., Complainant, v. Verizon California Inc., et al., Defendants.

I have consistently maintained that it is important to create a regulatory environment that promotes competition and investment, setting rules of the road so that all players can compete on a level playing field. Today, a majority of the Commission voted to allow complainants--players providing a bundle of services over one platform (cable VoIP)—to gain an advantage over their competitors—players providing those same bundled services over a different platform (traditional telephone service). Specifically, the majority decided to prohibit some companies from marketing to retain their customers, even though the marketing practices prohibited today are similar to the aggressive marketing techniques engaged in by the complainants themselves (when they provide cable video service). To reach this result, the majority has created new law, holding that these complainants are "telecommunications carriers" for purposes of obtaining this competitive advantage, but that they are not "telecommunications carriers" for other purposes, such as complying with the obligations of "telecommunications carriers."

I am concerned that today's decision promotes regulatory arbitrage and is outcome driven; it could thwart competition, harm rural America, and frustrate regulatory parity. Therefore, I must dissent from today's decision.

In its *Recommended Decision*, the Enforcement Bureau (Bureau) recommended that the Commission, among other things, deny the cable Complainants' claims that Verizon's practices violate section 222(b) of the Act.[1] The Bureau interpreted section 222(b) to apply only where a telecommunications carrier receives another carrier's proprietary information so that the *receiving carrier* can provide a telecommunications service. The Bureau concluded that Verizon's actions, as the receiving carrier, did not violate section 222(b) because Verizon's role in the number porting process does not involve the provision of a "telecommunications service." Although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier "telecommunications service."

The Bureau further concluded that even assuming *arguendo* that section 222(b) could be construed to refer to the *submitting carrier's* provision of "telecommunications service," section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliates because the record lacked evidence that those affiliates are, in fact, "telecommunications carriers." Comcast and Bright House pointed to their affiliates' state certificates and interconnection agreements, and to self-certifications during the proceeding that the affiliates are common carriers. However, the Bureau found that Complainants failed to show that the affiliates publicly hold themselves out as offering telecommunications indiscriminately to any and all potential customers.

As I have said before, all consumers should enjoy the benefits of competition. Competition is the best protector of the consumer's interest and the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Customer retention marketing is a form of aggressive competition that has the potential to benefit consumers through lower prices and expanded service offerings. Moreover, the cable companies engage in such practices to keep their video customers from switching to other providers. I am therefore disappointed that the Commission would prohibit these

[1] *In the Matter of Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, File No. EB-08-MD-002, Recommended Decision, DA 08-860 (EB rel. Apr. 11, 2008) (*Recommended Decision*).

practices, which promote competition and benefit consumers and particularly disappointed that they would do so and prohibit practices from only one class of companies.

I also fear that today's decision will have a negative impact on rural carriers and customers in rural America. Today's action rests in part on a questionable conclusion that Comcast's and Bright House's affiliates are "telecommunications carriers." This finding affords the affiliates the privileges of a "telecommunications carrier," including the right to interconnection, even though there is scant evidence that the affiliates have ever offered telecommunications to the public and no evidence that they have provided telecommunications to any entity other than Bright House and Comcast. This will bind our hands and have far-reaching consequences, particularly for small rural local exchange carriers around the country, such as Vermont Telephone Company, who may be forced to interconnect with similar entities that have no intention of providing telecommunications to the public or assuming the obligations of a "telecommunications carrier." For example, will such entities assume the obligations of "telecommunications carriers," such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements?

Part of the job of being a Commissioner is that you are required to make hard or difficult decisions and those decisions have implications for the entire industry. For example, what constitutes a "telecommunications carrier"?

Here the majority wants to grant the Complaint but not really answer that question. They have avoided making a difficult decision by embracing the novel idea that a company can be classified as a carrier for a provision or even a subprovision of a statute but not another provision or subprovision of the very same statute. Naturally, they do so without citing any statutory basis or authority for such an inherently arbitrary approach. Yet they had no choice but to create such an argument if they were to find in favor of Comcast and Bright House.

The majority's attempt to dodge the issue and deny the consequences of today's action by holding that we are determining that the Competitive Carriers are carriers for purposes of 222(b) based on the specific record and specific facts of this case but not for other purposes makes no sense and is not legally sustainable. A provider either is or is not a "telecommunications carrier." This "pick and choose, rule by rule" approach is the very height of arbitrary and capricious conduct by the Commission, and is a thinly veiled attempt by the majority to reach a desired result without accepting responsibility for the legal consequences of their action.

Indeed if such an approach were possible it would allow industry players and the Commission to circumvent the entire statutory scheme applied by picking and choosing which provisions and subprovisions of the statute applied by classifying and declassifying carriers without any factual or statutory distinction or basis.

Almost by definition this approach is arbitrary and capricious as it acknowledges that it does not want to be bound by the logic and legal rationale of the decision for any other purpose and preserves the flexibility to not apply the same statutory definition to any other aspect of the statute.

It is indefensible to say that these entities are telecommunications carriers under one part of the Act and not others; the Act makes no such distinction. The majority attempts to find precedent to support its approach. However, that precedent should not apply because "telecommunications carrier" is a specific statutory definition. The majority's refusal to say that these entities are "telecommunications carriers" for all purposes shows that, clearly, their holding is outcome driven, advances regulatory arbitrage, and reflects a cavalier refusal to live with the legal consequences of their decision.

In addition, this approach will bind our hands going forward, with broad implications for other rural carriers and consumers around the country, and will raise a host of questions. If these entities are "telecommunications carriers," as the majority holds today, I presume they are subject to the obligations of a "telecommunications carrier", such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements.

Here, however, the majority is not providing regulatory consistency, nor are they providing certainty, except for the certainty of providing a competitive advantage to one type of service provider platform over other platforms. Thus, consumers will be treated differently based on the platform over which they receive service.

In the past, some Commissioners have warned the Commission of the dangers of "inconsistent and arbitrary application" of the Commission's rules. Specifically, in concurring in the Commission's decision to uphold a Media Bureau denial of a set-top box waiver request, they stated that "[t]he result of these inconsistent decisions is that consumers will be treated differently, based on where they live and which MVPD they choose."[2] I agree that "[a]ll market players deserve the certainty and regulatory even-handedness necessary to spark investment, speed competition, empower consumers, and make America a stronger player in the global economy."[3] It is unfortunate that the majority did not follow that advice here.

Indeed, the majority does not respond to Verizon's claims.

> Section 222(b) protects proprietary information of telecommunications carriers. But the supposedly proprietary information at issue here, if it did belong to the service provider, would belong to the complainants (cable VoIP providers), not the CLEC submitting the information to Verizon – indeed, the CLECs are not even complainants. And complainants here do not claim to be telecommunications carriers under the Act. The Commission cannot designate a cable VoIP provider a telecommunications carrier for purposes of extending privileges granted under section 222(b) without subjecting those carriers to the *obligations* set forth in Title II. There is a single definition of "telecommunications carrier" in the Act. The Commission never has and could not classify the same service as a "telecommunications service" – and thus the entity that provides the service as a "telecommunications carrier" – for the purposes of one provision but not another *within the same statute. See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (meaning of words in a statute cannot change with statute's application); *cf. American Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (noting that CALEA's text is "more inclusive" than definition of "telecommunications carrier" in the Act).[4]

---

[2] Joint Statement of Commissioners Robert M. McDowell and Jonathan S. Adelstein Concurring, *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-7012-Z, Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Application for Review*, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 17113 (2007).

[3] Statement of Commissioner Robert M. McDowell, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

[4] Letter from Aaron M. Panner, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, File No. EB-08-MD-002, at 1 (filed June 20, 2008).

I am also troubled about the impact of today's decision on our ability to promote regulatory parity. Last month, I proposed to my fellow Commissioners a Notice of Proposed Rulemaking (NPRM) that would initiate an inquiry into customer retention marketing practices, including how to ensure that such practices are treated consistently across all platforms used to provide voice, video, and broadband Internet service.

I am concerned, however, that today's decision will preclude our ability to apply a consistent regulatory framework across platforms. Indeed, I anticipate that when the time comes, some of the same members of the majority will preserve today's competitive advantage for one industry over another by claiming that we lack statutory authority to establish such a consistent approach or regulatory level playing field. Despite the fact that the inconsistencies are a result of a novel interpretation of what can constitute a telecommunications carrier that they themselves established.

Indeed, the action we take today to afford the affiliates the full benefits of a telecommunications carrier without the corresponding obligations, coupled with a potential lack of statutory authority to later impose those obligations, is in direct conflict with any stated intent to provide regulatory parity through the NPRM.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Bright House Networks, LLC, et al., Complainants v. Verizon California, Inc., et al., Defendants.*

American consumers deserve the benefits that come from robust competition, especially in the telecommunications marketplace. It is the FCC's mission to promote such consumer-friendly competition. Additionally, Congress has required that we protect consumer privacy. Section 222 of the Communications Act clearly prohibits carriers from using confidential customer information for marketing efforts. Consistent with Congress's intent and Commission precedent in the long-distance context, today we carry out Congress's unambiguous mandate to protect consumer privacy in local markets as well.

Carriers are free to initiate customer retention marketing campaigns before a consumer gives the order to switch from his or her current phone service provider to a new provider. Under the law, carriers are also permitted to launch "win-back" campaigns after consumers have switched. Today's action underscores long-held Commission policy that using proprietary customer information for marketing efforts cannot take place during the window of time when a customer's phone number is being switched to a new provider.

Our March, 2007, action granting the Time-Warner petition for declaratory ruling on interconnection with incumbent LECs held that cable and other VoIP providers must be able to use local phone numbers and be allowed to put calls through to other phone networks. Our action then was premised on the belief that we were working to increase meaningful competition in local telephone service. Similarly, today's action ensures that consumers in all areas of the country reap the benefits of competition in the form of lower prices, innovative services and more choice.

EXHIBIT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Bright House Networks, LLC, *et al.*,	)	
	)	
Complainants,	)	**File No. EB-08-MD-002**
	)	
v.	)	
	)	
Verizon California, Inc., *et al.*,	)	
	)	
Defendants.	)	

RECOMMENDED DECISION

Adopted: April 11, 2008 **Released: April 11, 2008**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Recommended Decision, we recommend that the Commission deny in part a formal complaint[1] filed against Defendants (collectively, "Verizon") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] For the reasons explained below, we recommend that the Commission deny Complainants' claims that Verizon is violating section 222(b) of the Act (Count I) and section 222(a) of the Act (Count II) by allegedly using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process. Because it is unclear whether this conduct violates section 201(b), and for other reasons described below, we do not reach a conclusion on Complainants' claim that this same conduct constitutes a violation of section 201(b). We further recommend that the Commission promptly issue a Notice of Proposed Rulemaking ("NPRM") regarding consumer and competitive benefits of customer retention marketing practices. Given the prevalence of intermodal and bundled service competition, we recommend that such an NPRM conclude that customer retention marketing practices be made consistent across all platforms.

---

[1] Formal Complaint, File No. EB-08-MD-002 (filed Feb. 11, 2008) ("Complaint").

[2] 47 U.S.C. § 208. Before the Complaint was filed, the Enforcement Bureau issued a letter order, pursuant to section 1.730 of the Commission's rules, 47 C.F.R. § 1.730, granting Complainants' request to file a Complaint against Verizon alleging violations of section 222 of the Act on the Commission's Accelerated Docket. *See* Complaint at Ex. T.

II. BACKGROUND

A. The Parties

2. Defendants are telecommunications carriers that operate as incumbent local exchange carriers (incumbent "LECs") in a number of states.[3] Complainants Bright House Networks, LLC ("Bright House"), Comcast Corporation ("Comcast"), and Time Warner Cable Inc. ("Time Warner") (collectively, "Complainants") provide facilities-based voice services to retail customers using Voice over Internet Protocol ("VoIP") in competition with Verizon's local voice services.[4] Complainants provide those services by relying on wholesale carriers ("Competitive Carriers") to interconnect with incumbent LECs and to provide transmission services, local number portability ("LNP") functions, and other functionalities.[5] Bright House and Comcast rely on Competitive Carriers that are affiliated with them,[6] while Time Warner relies on Sprint Communications Company L.P. ("Sprint").[7]

B. Local Number Portability and Verizon's Retention Marketing Program

3. The Communications Act requires local exchange carriers to provide number portability, *i.e.*, the ability to retain one's phone number when switching from one telecommunications carrier to another.[8] Thus, when customers decide to switch voice service from Verizon to one of the Complainants, they may choose to retain their telephone numbers. Such a choice triggers an inter-carrier process -- developed mainly by the industry -- by which the customer's telephone number is "ported" from Verizon to the Complainant's Competitive Carrier.[9]

4. The number porting process begins with a Competitive Carrier, at the direction of a Complainant, submitting a "Local Service Request" ("LSR") to Verizon.[10] The LSR serves as both a request to cancel the customer's Verizon service and a request to port the customer's telephone number to the Competitive Carrier.[11] Under current industry practices, the LSR includes at least the following information: the identity of the submitting carrier; the date and time for the disconnection of Verizon's

---

[3] *See, e.g.*, Joint Statement, File No. EB-08-MD-002 (filed Feb. 29, 2009) ("Joint Statement") at 3-4, ¶ 4. The Defendants are: Verizon California Inc.; Verizon Delaware LLC; Verizon Florida LLC; Contel of the South, Inc.; Verizon South Inc.; Verizon New England Inc.; Verizon Maryland Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon Northwest Inc.; Verizon North Inc.; Verizon Pennsylvania Inc.; GTE Southwest Incorporated d/b/a Verizon Southwest; Verizon Virginia Inc.; and Verizon Washington, D.C. Inc. *See, e.g.*, *id.* at 3-5, ¶¶ 4-5.

[4] *See, e.g.*, Joint Statement at 2-3, ¶¶ 1-3; Complaint at 3-4, ¶¶ 2-3. Complainants provide their retail VoIP service through affiliated entities. *See, e.g.*, Joint Statement at 1-3, ¶¶ 1-3. For convenience, we include those affiliates when we refer to "Complainants" herein.

[5] *See, e.g.*, Joint Statement at 5, ¶ 6.

[6] *See, e.g.*, Joint Statement at 6, ¶¶ 8-9.

[7] *See, e.g.*, Joint Statement at 6, ¶ 7.

[8] *See, e.g.*, 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30) (providing that "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another). *See also* 47 C.F.R. §§ 52.11, 52.21-26.

[9] *See, e.g.*, Complaint at 8, ¶ 10, and at Ex. E; Answer of Verizon, File No. EB-08-MD-002 (filed Feb. 21, 2008) ("Answer") at Exs. 22-27; *In the Matter of Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12315-16 at ¶¶ 55-56 (1997).

[10] *See, e.g.*, Joint Statement at 9, ¶ 20. The Competitive Carrier may submit the LSR directly to Verizon, or through a contractor. *Id.*

[11] *See, e.g.*, Joint Statement at 9, ¶ 18.

retail service (and, by implication, the date and time for the initiation of Complainant's service);[12] the name and location of the retail customer whose service is being switched; the Verizon retail account number; and whether the port involves one or more numbers.[13] Thus, the LSR informs Verizon that, at a particular date and time, the customer's telephone number is to be ported to the Competitive Carrier, and the customer's existing Verizon voice service is to be disconnected, so that the Complainant served by the Competitive Carrier may initiate retail service using the customer's existing telephone number. After submitting the LSR to Verizon, the Complainant or Competitive Carrier sends the Number Portability Administration Center ("NPAC")[14] a "create message" that is used to enter a pending subscription record with the necessary routing data for the number to be ported.[15]

5. Upon receiving the LSR, Verizon confirms that it contains sufficient information to accomplish the port, and then creates an internal service order, which it transmits to the appropriate downstream Operations Support Systems.[16] The transmittal of the internal service order initiates several work steps for Verizon. First, Verizon's automated systems send the Complainant or Competitive Carrier a Local Service Request Confirmation (also known as a Firm Order Confirmation) that contains information specific to the individual request.[17] In addition, Verizon creates a disconnect order scheduling a retail service disconnect on the requested due date.[18] Moreover, Verizon establishes a "10-digit trigger" in the switch serving the retail customer to prevent the misrouting of certain calls in the short interval after the number has been ported but before disconnection of the customer's Verizon retail service has been completed.[19] Finally, Verizon confirms the pending subscription record that the new provider previously created in the NPAC database.[20] Meanwhile, the Complainant and/or Competitive Carrier perform any necessary work on their own networks to turn up the customer's service.[21]

6. Beginning around the summer of 2007, Verizon started a program of retention marketing.[22] The program's first step is generating a marketing "lead list" of Verizon customers.[23] To generate the lead list, Verizon begins with the universe of customers for whom there are retail-service disconnect orders pending, including disconnect orders that were prompted by the submission of an LSR.[24] Verizon then eliminates from the lead list all those customers who are not switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as

[12] *See, e.g.*, Joint Statement at 11, ¶ 25.

[13] *See, e.g.*, Joint Statement at 9, ¶ 20.

[14] The Number Portability Administration Center, or NPAC, was created to support the implementation of local number portability by operating regional number portability databases. *See generally* www.npac.com.

[15] *See, e.g.*, Joint Statement at 11, ¶ 28.

[16] *See, e.g.*, Joint Statement at 10, ¶ 23.

[17] *See, e.g.*, Joint Statement at 10, ¶ 24.

[18] *See, e.g.*, Joint Statement at 12, ¶ 29.

[19] *See, e.g.*, Joint Statement at 12-13, ¶¶ 30-31.

[20] *See, e.g.*, Joint Statement at 13, ¶ 32.

[21] *See, e.g.*, Joint Statement at 11-12, ¶ 28.

[22] *See, e.g.*, Joint Statement at 14-17, ¶¶ 35-45.

[23] *See, e.g.*, Joint Statement at 15, ¶¶ 37-38. .

[24] *See, e.g.*, Joint Statement at 15, ¶ 37; Supp. Joint Statement at 2, ¶ 1 (stating that Verizon's retention marketing lead list is generated from disconnect orders, including disconnect orders that are generated as a result of receiving LSRs). Of course, disconnect orders may stem from circumstances other than an LSR, such as a customer move out of the local service area. *See, e.g.*, Reply Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 14, 2008) at 1.

Complainants.[25] Verizon then contacts customers on the lead list and encourages them to remain with Verizon, offering price incentives such as discounts and American Express reward cards.[26] Verizon conducts this marketing while the number-porting request is still pending, *i.e.*, before the new provider (such as Complainants) has established service to the customer.[27]

7. If Verizon is successful in persuading a customer to cancel his or her order with the new service provider, Verizon cancels the internal service order relating to the port request, and Verizon's systems issue a "jeopardy notice" to the provider that submitted the port request.[28] Verizon also puts the new provider's port request "into conflict" by sending a conflict code to NPAC. If the new service provider persuades the customer to switch after all, it can either seek resolution of the conflict code or, what is much more common, submit a new LSR.[29]

C. The Complaint

8. On February 11, 2008, Complainants filed the Complaint, alleging that the Verizon customer retention marketing practices described above violate sections 222(b), 222(a), and 201(b) of the Act.[30] Complainants seek an order enjoining Verizon from continuing such customer retention marketing.[31] Complainants also seek an award of damages, but deferred that determination to a separate, subsequent proceeding pursuant to section 1.722(d) of the Commission's rules.[32]

---

[25] *See, e.g.*, Joint Statement at 15, ¶ 37. Toward that end, Verizon eliminates from the lead list customers who (i) are switching to a service provider that is either a Verizon wholesale customer (such as a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product) or a Verizon affiliate (*e.g.*, Verizon Wireless), or (ii) contacted Verizon directly to terminate service. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists. *Id.*

[26] *See, e.g.*, Joint Statement at 15-16, ¶¶ 39-40.

[27] *See, e.g.*, Joint Statement at 16, ¶ 41. Any marketing that Verizon conducts after the number port and disconnect of Verizon service have occurred is not at issue here. *See, e.g.*, Complaint at 13-14; Answer at 1.

[28] *See, e.g.*, Joint Statement at 17, ¶ 44.

[29] *See, e.g.*, Joint Statement at 17, ¶ 45.

[30] 47 U.S.C. §§ 222(b), 222(a), 201(b).

[31] Complaint at 31, ¶ 59 (asking the Commission to "enjoin Verizon from continuing its retention marketing based on carrier change information"). The Commission generally labels as "retention marketing" any marketing to a customer by the customer's existing provider that occurs while the carrier-change/number-porting request applicable to that customer is pending; the Commission generally labels as "winback marketing" any marketing to a customer by the customer's former provider that occurs after the carrier-change/number-porting request applicable to that customer has been effectuated. *See, e.g.*, *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14443-4, ¶ 65 (1999) ("*CPNI Reconsideration Order*"). The Complaint challenges only Verizon's retention marketing, and only Verizon's retention marketing that stems, directly or indirectly, from the submission of an LSR. *See, e.g.*, Complaint at 14. Thus, this Recommended Decision applies only to such retention marketing, and not to any winback marketing.

[32] Complaint at 31, ¶ 59 (citing 47 C.F.R. § 1.722(d)).

III. LEGAL ANALYSIS

A. Complainants Have Not Established a Violation of Section 222(b).

1. Verizon Does Not Receive the Proprietary Information for "Purposes of Providing Any Telecommunications Service" Within the Meaning of Section 222(b).

9. Section 222(b) provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[33] Section 222(b) thus prohibits a telecommunications carrier from using for its own marketing efforts any proprietary information that it receives from another carrier "for purposes of providing any telecommunications service...."[34] Section 222(b) does not expressly state *whose* provision of telecommunications services is covered. Specifically, section 222(b) does not expressly state whether its marketing ban applies when the receipt of proprietary information is for purposes of (i) the *receiving* carrier (here, Verizon) "providing any telecommunications service," or (ii) the *submitting* carrier (here, a Competitive Carrier) "providing any telecommunications service," or (iii) either the submitting carrier or the receiving carrier "providing any telecommunications service." Verizon contends that the first construction is the correct one, arguing that section 222(b) applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service.[35] Complainants advocate the third construction, asserting that "section 222(b) encompasses *any* carrier-to-carrier service regardless of which carrier is providing it or to whom."[36]

10. We recommend that the Commission adopt the construction advocated by Verizon, because that construction provides the most natural, grammatically consistent reading of the statute. Under section 222(b), a carrier that receives proprietary information "for the purposes of providing any telecommunications service . . . shall use such information only for such purpose." Section 222(b) thus includes both an affirmative requirement and a prohibition. The requirement is that the carrier that receives information "*shall use* such information only *for such purpose*" – that is, "for purposes of providing any telecommunications service."[37] If the receiving carrier is not using the information that it "receives" to provide "any telecommunications service," then section 222(b)'s affirmative requirement – that the information be used only for that purpose – cannot apply. The prohibition in the last clause of section 222(b) – which provides that a receiving carrier "shall not use *such information* for its own marketing efforts,"[38] – applies only in the same circumstance in which the affirmative requirement applies – to the receiving carrier's provision of telecommunications service. Section 222(b)'s marketing ban thus applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service.

11. In turn, we also recommend that the Commission reject Complainants' alternative interpretation of section 222(b), which makes the marketing ban applicable even where the *submitting* carrier is the one providing the telecommunications service. Complainants would have us read section

[33] 47 U.S.C. § 222(b).

[34] 47 U.S.C. § 222(b).

[35] Answer at 39.

[36] Complainants' Reply to Defendants' Answer and Separate Statement, File No. EB-08-MD-001 (filed Feb. 29, 2008) ("Reply") at 32. *See, e.g.*, Complaint at 19-20; Reply at 33; Complainants' Supplemental Reply Brief, File No. EB-08-MD-001 (filed Mar. 14, 2008) at 2.

[37] 47 U.S.C. § 222(b) (emphases added).

[38] 47 U.S.C. § 222(b) (emphasis added).

222(b) to mean here that Verizon shall use the proprietary information it receives only "for purposes of" the Competitive Carriers' provision of service. This reading is grammatically awkward, as it suggests that Verizon would be using the information it receives "for purposes" of another carrier's service. The only textual support Complainants offer for this reading of section 222(b) is the use of the word "any" in the phrase "any telecommunications service."[39] The word, "any," however, addresses what is provided, not who provides it. Moreover, Complainants have not cited a single Commission order that has construed section 222(b) to mean that the submitting carrier is the one who is "providing any telecommunications service...." Indeed, although several prior orders apply section 222(b) to customer retention practices, none of them focuses on the specific question of statutory interpretation that concerns us here, *i.e.*, which carrier is the one "providing any telecommunications service" under section 222(b).[40] The absence of any authority with a contrary construction of section 222(b) bolsters our recommended conclusion that Complainants can establish a violation of section 222(b) only if they can show that Verizon received proprietary information for the purpose of *Verizon* providing a telecommunications service.

12. Complainants have failed to make such a showing here, because Verizon's role in the number porting process does not constitute the provision of a "telecommunications service" within the meaning of the Act. Under section 153(46) of the Act, the term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[41] The term "telecommunications" is defined in section 153(43) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[42]

13. Applying those statutory definitions here, we recommend concluding that Verizon's role in the numbering porting process does not involve the provision of a "telecommunications service," for two distinct reasons. First, number porting does not involve *transmission* of a customer's information; rather, it entails carrier-to-carrier arrangements, coordinated with the NPAC, to ensure that future calls are properly routed to the customer's chosen carrier. In other words, although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier "telecommunications service." By contrast, Verizon plainly provides telecommunications service to another carrier when, for example, it provides another carrier with unbundled network elements (UNEs), switched access service, or resale service. Second, Verizon does not charge a fee for its role in porting numbers.[43]

14. Because Complainants cannot show that Verizon provides any "telecommunications service" when it handles their Competitive Carriers' number porting requests, they cannot show that

[39] Complaint at 19-20; Reply at 32, 33: Complainants' Supplemental Reply Brief at 2.

[40] *Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1572, 1575-76, ¶¶ 106-111 (1998) ("*1998 Slamming Order*"); CPNI Reconsideration Order, 14 FCC Rcd at 14449-50, ¶ 77-79; *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14918-19, ¶¶ 131-134 (2002) ("*CPNI 3rd Report & Order*"); 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, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, 5109-10, ¶¶ 25-28 (2003) ("*Third Slamming Reconsideration Order*").

[41] 47 U.S.C. § 153(46).

[42] 47 U.S.C. § 153(43).

[43] Further Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 4, ¶ 3.

section 222(b) applies, or was violated here. Accordingly, we recommend that the Commission deny Complainants' claim (*i.e.*, Count I) alleging a violation of section 222(b).

2. Bright House and Comcast Cannot Prove a Violation of Section 222(b) Even Under Their Own Construction of the Statute Because They Have Not Shown That Their Affiliated Competitive Carriers are "Telecommunications Carriers" Offering "Telecommunications Service."

15. Even assuming, *arguendo*, that section 222(b) refers to the submitting carrier's provision of "telecommunications service," section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers. That is because, as explained below, we recommend that the Commission conclude that the record lacks evidence that those Competitive Carriers provide "telecommunications service" to Comcast and Bright House.

16. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[44] This definition largely, if not entirely, incorporates the common law rule that, to be a common carrier, an entity must publicly "hold itself out" as offering telecommunications indiscriminately to whatever similarly situated customers might have use for such telecommunications.[45]

17. Here, Bright House and Comcast have failed to show by a preponderance of the evidence that, with respect to the telecommunications provided to Bright House and Comcast, their affiliated Competitive Carriers publicly hold themselves out as offering those telecommunications indiscriminately to any and all potential customers. The record contains no evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever provided the telecommunications at issue to any entity other than Bright House and Comcast, respectively.[46] The record also lacks any evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever offered the telecommunications at issue in any public written or oral communication, such as a tariff,[47] an advertisement, a brochure, a

[44] 47 U.S.C. § 153(46). *See* 47 U.S.C. § 153(43) (providing that "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"); 47 U.S.C. § 153(44) (providing that "[t]he term 'telecommunications carrier' means any provider of telecommunications services").

[45] *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming the Commission's use of the "common carrier" test in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") to help ascertain the meaning of the term "telecommunications service" in 47 U.S.C. § 153(46)). *See also, United States Telecom Ass'n. v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

[46] We recognize that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." *NARUC I*, 525 F.2d at 608. Nevertheless, the fact that the Competitive Carriers have, to date, provided telecommunications only to their own affiliates has significant probative value concerning whether the Competitive Carriers have held themselves out publicly to all potential customers.

[47] There apparently is one exception: Comcast's Competitive Carrier in Pennsylvania did file a tariff regarding the telecommunications at issue here. Comcast's Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 5, 12 n.41 (and attachments referenced therein). That tariff has yet to be approved by the Pennsylvania Public Service Commission, however, and Comcast's 16 other Competitive Carriers lack such tariffs. *See, e.g.*, Comcast's Supplemental Statement at 4-5, 12 n.41, 14-15 (and attachments referenced therein). Moreover, Comcast did not submit this evidence with the Complaint or the Reply, as it should have. *See* 47 C.F.R. §§ 1.721(a)(5), 1.726(e); Complainants' Reply to Defendant's Answer and Separate Statement, File No. EB-08-MD-002 (filed Feb. 29, 2008) ("Reply"). Therefore, we accord little significance to this evidence.

hand-out, a press release, an industry trade-show presentation, or a website posting.[48] This absence of any public written or oral offering, coupled with the absence of any non-affiliated customers, is dispositive.

18. Bright House and Comcast rely heavily on the facts that their affiliated Competitive Carriers have obtained state certificates and interconnection agreements, arguing that those documents constitute public declarations of their willingness to provide telecommunications indiscriminately to all potential customers.[49] Their arguments overlook the black-letter proposition that an entity may be a common carrier (*i.e.*, an entity that provides "telecommunications service") with respect to some forms of telecommunications and not others.[50] The Competitive Carriers' state certificates and interconnection agreements may suggest that the Competitive Carriers publicly offer some forms of telecommunications, but there is no evidence in the record that those documents constitute a public offering of the particular telecommunications provided by the Competitive Carriers to Bright House and Comcast.[51]

19. Bright House and Comcast also rely heavily on declarations filed in this proceeding of corporate officers asserting that their Competitive Carriers will serve all similarly situated customers indiscriminately.[52] This *post-hoc* attempt to "self-certify" their common carrier status, though not inconsequential, falls short. Objective evidence regarding the substance of the Competitive Carrier's conduct trumps these belated characterizations of the Competitive Carriers' alleged subjective intent.[53]

20. Thus, in sum, we recommend that the Commission conclude that the record fails to demonstrate that, with respect to the telecommunications provided to Bright House and Comcast, the Competitive Carriers affiliated with Bright House and Comcast provide "telecommunications service" under the Act. Accordingly, even if section 222(b) referred to the submitting carrier's provision of telecommunications service, section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers.

---

[48] *See generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, ¶ 90 (2005) (subsequent history omitted) (holding that wireline broadband providers that choose to offer the transmission component of a wireline broadband Internet access service as a telecommunications service may do so without filing tariffs setting forth the rates, terms, and conditions under which they will provide that transmission, but only if the providers "include those rates, terms, and conditions in generally available offerings posted on their websites"); *Consolidated Communications of Fort Bend Co. v. Public Utility Commission of Texas*, 497 F.Supp.2d 836, 845-46 (W.D. Tex. 2007) (holding that Sprint provided "telecommunications services," based, in part, on the fact that Sprint advertised its wholesale interconnection service "over the Internet, through product brochures, and at relevant industry trade shows").

[49] *See, e.g.*, Complaint at 2-4; Complaint at Ex. B, ¶¶ 8-27, 45-61; Complaint at Ex. E, ¶¶ 2-3; Comcast's Supplemental Statement at 2-15 (and attachments referenced therein); Bright House Network's Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 6-10 (and attachments referenced therein).

[50] *See, e.g.*, 47 U.S.C. §153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services...."); *Southwestern Bell v. FCC*, 19 F.3d at 1481.

[51] The Comcast Competitive Carriers have tariffs, but those tariffs do not pertain to the telecommunications at issue here, so they lack probative value for the same reasons applicable to the state certificates and interconnection agreements. *See, e.g.*, Comcast's Supplemental Statement at 14-15.

[52] Comcast's Supplemental Statement at 2-15 (and attachments referenced therein); Bright House Network's Supplemental Statement at 6-10 (and attachments referenced therein).

[53] *See generally Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742, 750 (5th Cir. 2003) (noting that the test for common-carrier status "is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it") (internal quotation marks omitted).

B. Verizon's Customer Retention Marketing Practices Do Not Violate Section 222(a).

21. Section 222(a) of the Act provides, in pertinent part, that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers…."[54] Complainants assert that, inherent in the "duty to protect" the confidentiality of proprietary information of other telecommunications carriers is the duty not to use the proprietary information for any purpose other than the purpose for which the proprietary information was provided. Applying that interpretation of section 222(a) to the facts here, Complainants contend that Verizon can use the information contained in the LSRs only to port the customer's number and terminate the customer's existing Verizon service, and may not use the information to market the customer. Complainants argue, therefore, that Verizon's customer retention marketing practices violate section 222(a).[55]

22. We recommend that the Commission reject Complainants' construction of section 222(a). In our view, the more natural reading of section 222(a) is that the "duty to protect" the confidentiality of proprietary information creates only a duty not to disclose the information to any third party. Section 222(a) simply does not address how a carrier may "use" such information internally. Instead, the usage issue is expressly addressed by section 222(b). Here, Complainants do not contend that Verizon discloses the information contained in the LSRs to any third party.[56] Therefore, Complainants have not shown that Verizon's customer retention marketing practices violate section 222(a). Accordingly, we recommend denial of Complainants' claim (*i.e.*, Count II) under section 222(a).

C. Complainants' Claim that Verizon's Customer Retention Marketing Practices Violate Section 201(b) of the Act, and Other Retention Marketing Issues, Should be Addressed in a Subsequent Order and NPRM.

23. Complainants also assert, in cursory fashion, that Verizon is violating section 201(b) of the Act because Verizon's customer retention marketing activities are "unjust and unreasonable."[57] The staff order accepting this case onto the Accelerated Docket, however, referred only to claims under section 222, not 201(b).[58] Thus, the section 201(b) claim was not accepted onto the Accelerated Docket, and is not subject to the 60-day deadline for staff rulings or recommendations in Accelerated Docket cases.[59] That claim will be addressed in the ordinary course in a subsequent order.

24. Although we defer addressing the claims that Verizon violated section 201(b), the Bureau recommends that the Commission examine the claims therein further, and more broadly.

25. The Commission does not yet have a consistent policy with regard to retention marketing. The Commission has, in the past, found certain retention marketing practices – but not others – to violate section 222(b). Specifically, the Commission has found that a telecommunications carrier violates section 222(b) when it "exploits advance notice of a customer change by virtue of its status as the underlying

---

[54] 47 U.S.C. § 222(a).

[55] *See, e.g.*, Complaint at 28-30; Reply at 42-43.

[56] We need not and do not reach whether the LSRs contain "proprietary information" within the meaning of section 222(a).

[57] Complaint at 30-31; Reply at 44-45. *See* 47 U.S.C. § 201(b) (providing that "any charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful").

[58] Complaint Ex. T; *see* Answer at 56.

[59] *See In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018 (1998).

network-facilities or service provider to market to that customer."[60] By contrast, the Commission has also found that "section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier."[61] Thus, section 222, standing alone, may create an environment where retention marketing to customers of non-facilities-based competitive LECs is unlawful, while retention marketing to customers of facilities-based providers is permitted. While this distinction may have been of less import several years ago, the Bureau suggests that the Commission consider whether it fairly promotes facilities-based competition of the sort the Commission has repeatedly said is likely to result in the greatest consumer benefits.[62]

26. Indeed, the market for all types of communications services differs significantly from what we saw only a few years ago. Customers have more choices among competing facilities-based providers of several different types of services, and, more and more, competitors are offering bundles of services, such as voice, video, and data, and are competing for customers across different delivery platforms. And today, the rules defining fair competition are not equivalent among those services.[63]

27. For example, in the video context, customers now have opportunities to switch to new, facilities-based providers of video services, such as legacy telephone companies that are deploying fiber to the home. One such provider, Verizon, has filed a petition for declaratory ruling regarding certain cable operators' retention marketing activities.[64] In its petition, Verizon alleges that it has encountered a problem when it acquires new customers for its video service. Specifically, Verizon states that when it acquires a new video customer, it may obtain authorization from its new customer to do two things: (1) submit a cancellation request on behalf of its new customer to the customer's old video provider, and (2) return any of its customer's equipment belonging to the old video provider back to that provider.[65] Verizon alleges, however, that when it acts upon this authorization and submits a cancellation request to its customer's old provider, some old providers refuse to accept the cancellation order.[66] As a result, the customer must contact the old provider personally to cancel service. If the customer does not do this promptly or does not understand its obligation to do so, the customer may be double-billed during the period when the new service is operational yet the old service has not been canceled. Verizon asks the

[60] *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 78.

[61] *Id.* at 14450, ¶ 79

[62] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 2008 WL 762860 (Mar. 21, 2008) at ¶ 2 (noting that 1996 Telecommunications Act was designed to eliminate barriers to facilities-based competition); *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2535, ¶ 3 (2005) (subsequent history omitted) (adopting rules intended to "spread the benefits of facilities-based competition to all consumers"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) (noting that facilities-based competition serves the Act's overall goals) (subsequent history omitted); *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20644-45, ¶ 5 (2001) (subsequent history omitted) (stating that "facilities-based competition, of the three methods of entry mandated by the Act, is most likely to bring consumers the benefits of competition in the long run"); *Time Warner Wholesale Services Order*, 22 FCC Rcd at 3519, ¶ 13 (referring to Commission's goal of promoting facilities-based competition).

[63] Indeed, the rules we have relied on in the transition from a monopoly environment to a competitive environment may not apply, or even make sense, in a vigorously competitive environment where the former monopoly may even find itself dealing with potential "bottlenecks" caused by incumbent providers of other services in the bundled offering.

[64] *See* Petition of Verizon for Declaratory Ruling Confirming That Incumbent Cable Companies Must Accept Subscriber Cancellation Orders When Delivered by Competitive Multichannel Video Programming Distributors as Lawful Agents (filed Mar. 26, 2008) ("Verizon Petition").

[65] *See* Verizon Petition at 5.

[66] *See id.*

Commission to declare that "it constitutes an unfair method of competition or an unfair practice for an incumbent cable operator to refuse to accept its subscriber's order to cancel video service when such a cancellation request is communicated by a competing video provider as the subscriber's lawful agent."[67] Verizon argues that the conduct it describes violates section 628(b) of the Act, which says that it is "unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing [certain] programming to subscribers or consumers."[68] Verizon further argues that this conduct thwarts the purposes of the Act as expressed in section 706's mandate to promote the deployment of advanced telecommunications capability to all Americans,[69] section 601's instruction to "promote competition in cable communications,"[70] and the overall purpose of the Act expressed in section 1.[71]

28. In the situation Verizon describes – where two facilities-based providers are competing for the same customer – it is not at all clear to the Bureau whether retention marketing should be allowed, or even encouraged as a form of vigorous competition, or whether it is a form of anticompetitive conduct. In fact, one could argue that, when the customer's existing provider offers to lower prices or expand services to prevent the customer from switching providers, the customer benefits. This type of aggressive competition to win and to keep customers can result in lower prices for consumers, the introduction of new services and technologies, and improved quality of service as carriers compete in the open marketplace.

29. Many providers – such as "legacy" telephone companies, cable operators, and new entrants – compete not on the basis of individual services, but for bundles of services, including voice, video, and broadband.[72] In fact, today's competitive marketplace for bundled services, and intermodal competition of providers of services within the bundle, may reduce the need for regulation. It is reasonable even to ask whether further deregulation would allow for even more vigorous competition for customers and bring with it the associated benefits of such competition. On the other hand, the application of our current rules, which may serve to restrict the activities of some competitors but not others, may provide an unfair advantage to the historically less regulated entity. For example, in the Verizon Petition, Verizon argues that certain cable providers refuse to respect Verizon's status and authority as the customer's agent to request disconnection of the customer's service. In contrast, the Complainants in the instant case do not dispute that Verizon, as it is required by our rules, respects the status of their affiliated competitive carriers to act as an agent for the customer in ordering the switch and associated disconnection of service. The Bureau strongly urges the Commission, in reviewing the actions at issue in the instant case, to consider whether such conduct is desirable by any provider of service; the same rules of conduct should apply in every retention marketing situation.

30. Regulatory parity, whether by increased regulation or deregulation, is important to ensure a level playing field, despite possible historic differences in regulation of the various services in the bundle. When an old provider interferes with a customer's choice to switch to a new provider of bundled services, its interference with regard to any one service affects the new provider's ability and likelihood of providing all the services in the bundle. For example, in the voice context, the Commission has noted

---

[67] Verizon Petition at 11.

[68] 47 U.S.C. § 548(b).

[69] 47 U.S.C. § 157 nt.

[70] 47 U.S.C. § 521(6).

[71] 47 U.S.C. § 151.

[72] *See, e.g.*, *MDU Video Nonexclusivity Order* at ¶ 19; *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 08-87, Report and Order, ¶¶ 5, 9 (rel. Mar. 21, 2008) ("*MTE Nonexclusivity Order*").

that where a service provider has no choice but to share proprietary information with a competitor, the receiving carrier gets the chance to use that proprietary information for its own marketing purposes and possibly persuade the customer not to switch providers.[73] A cable operator has a similar opportunity to retain its customer if it requires the customer to call personally to cancel service, to stay home to wait for a technician to arrive to disconnect service, or if it requires that the customer personally return equipment to the cable provider's offices. Yet these practices affect not just the customer's choice of provider for a single service. In a market of bundles they affect the customer's choice of provider for *all* services. Indeed, as most of these bundles include broadband services, practices that affect competition for any one of the included services necessarily affect competition for broadband services – an issue of special interest for the Commission.

31. It is not clear at all whether the conduct complained of in this case – or in the Verizon Petition, for that matter – warrants increased oversight and regulation. In fact, the Bureau suggests that, given the benefits of competition, the Commission should consider whether this conduct should be restricted at all. One thing, however, is very clear: this type of aggressive retention marketing behavior, whether engaged in by the incumbent telephony provider or by the cable provider, should be treated consistently.

32. The Bureau therefore recommends that the Commission adopt a Notice of Proposed Rulemaking to seek comment on whether the Commission should adopt specific rules addressing certain practices, and, if so, what form those rules should take. Whatever form they take, the Bureau recommends that they be consistent across various service platforms. The Commission has acted in several areas to create parity across different platforms,[74] and the Bureau suggests that the current market for bundled, facilities-based service requires consistency.

33. As the Commission has stated on numerous occasions, the Act provides ample authority to impose rules on providers of all types of services under the Commission's jurisdiction. The Commission has authority under section 201(b) and other sections in Title II of the Act to prohibit unjust or unreasonable practices by common carriers. The Commission also has authority under section 628(b) to prohibit certain unfair methods of competition by cable operators.[75] In addition, the Supreme Court has affirmed the Commission's authority to impose regulations on providers of information services, such as broadband Internet access services.[76] The Bureau recommends that the Commission seek comment on the strongest source of authority to use to promulgate any rules in this area.

34. The Bureau also recommends that the Commission seek comment on what services and service providers should be addressed. For example, should the Commission fashion rules for voice

[73] *1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109; *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77-8; *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶¶ 131, 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶¶ 26, 28.

[74] *Compare Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 44 (2007) (*"MDU Video Nonexclusivity Order"*), *appeal pending sub nom. National Cable & Telecommunications Ass'n v. FCC*, No. 08-1016 (D.C. Cir.) *with MTE Nonexclusivity Order*; *see also* note 78, *infra* (citing four orders establishing similar regulatory frameworks for broadband provided over four different platforms).

[75] 47 U.S.C. § 548(b).

[76] *See* 47 U.S.C. § 151; *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) (*"Brand X"*) ("Information service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications . . . .").

services,[77] broadband Internet access services,[78] any video services not addressed in section 628, or any other services subject to the Commission's jurisdiction? Finally, the Bureau recommends that the Commission seek comment on whether it should require (as it already does in the voice context) that any service provider accept a cancellation request from a customer's authorized agent.[79]

IV. CONCLUSION AND RECOMMENDATIONS

35. In sum, for all of the foregoing reasons, and pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[80] and sections 1.720-1.736 of the Commission's rules,[81] we recommend that the Commission (i) DENY Complainants' claim (*i.e.*, Count I) that Verizon's customer retention marketing practices violate section 222(b) of the Act; and (ii) DENY Complainants' claim (*i.e.*, Count II) that Verizon's customer retention marketing practices violate section 222(a) of the Act. Complainants' claim (*i.e.*, Count III) that Verizon's customer retention marketing practices violate section 201(b) of the Act will be addressed in due course in a subsequent order. We also recommend that the Commission promptly issue a Notice of Proposed Rulemaking regarding customer retention marketing practices.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

---

[77] As to one particular type of voice service, the Commission has not determined whether interconnected VoIP is a telecommunications service or an information service, but has found in either event that it is subject to the Commission's jurisdiction under Title I or also Title II. *See, e.g.*, *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 54 (2007), *pet. for review pending sub nom. National Cable & Telecommunications Ass'n v. FCC*, No. 07-1312 (D.C. Cir.).

[78] The Commission has held that several different types of broadband Internet access services are information services, including wireline, cable modem, powerline, and wireless-based services. *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*), *aff'd*, *Time Warner Telecomms. Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Brand X*, 545 U.S. at 967; *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006). These services are subject to Commission jurisdiction. *See supra* note 76.

[79] *Cf.* 47 C.F.R. § 64.1120(a)(1) ("No submitting carrier shall submit a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining . . . [a]uthorization from the subscriber; and . . . [v]erification of that authorization . . . ."); *id.* § 64.1130(a) ("A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization . . . ."); *see also* Verizon Petition.

[80] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[81] 47 C.F.R. §§ 1.720-1.736.

EXHIBIT 3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERIZON CALIFORNIA INC., *et al.* Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. __________

DECLARATION OF CHRIS CREAGER
IN SUPPORT OF VERIZON'S MOTION FOR STAY

I. Declarant

1. My name is Chris Creager. My business address is One East Pratt Street, Baltimore, Maryland. I have been employed by the Verizon companies and their predecessor companies since 1987. I am Senior Vice President and General Manager responsible for Verizon's retail telecom business in Verizon's Potomac region since 2006. I am responsible for overall P&L (profit and loss), sales, marketing, and operations for Maryland, Washington, D.C., Virginia, and West Virginia. Prior to that, I was Senior Vice President for Network Services for the Mid-Atlantic Region, which is New Jersey, Pennsylvania, Delaware, Maryland, Washington, D.C., Virginia, and West Virginia. I am knowledgeable about Verizon's retention marketing program generally, which has common features in all of the areas where it has been implemented.

II. Purpose of Declaration

2. In this declaration, I will discuss factual matters relevant to Verizon's motion for a stay pending this Court's review of the Federal Communication Commission's June 23, 2008 Order enjoining Verizon's retention marketing program. In particular, I will explain how the Commission's Order irreparably harms Verizon and its customers and how granting a stay will further the public interest.

III. Competition

3. As explained in more detail in the joint declaration submitted in the accelerated docket proceeding before the Commission, Verizon is subject to tremendous competition in the provision of both voice services and the bundle of voice, Internet access, and video services that customers are demanding.[1] As a result of this competition, Verizon has been losing a significant number of wireline access lines. Between December 1999 and December 2006, retail access lines declined by approximately 37 percent (from 40.5 million to 25.4 million).[2] Over the past three years, 2005-2007, Verizon has been losing an average of 7 percent of its access lines per year, mostly to competitive alternatives.[3] These declines contrast with an average historical growth rate in access lines of at least 3.5 percent.[4] As a result, Verizon's actual share of total voice lines is even smaller than the percentage decline in access lines suggests. These

---

[1] Joint Declaration of Chris Creager, Bette Smith, Patrick Stevens, and Gary Sacra ¶¶ 10-20 ("Joint Decl.").

[2] *Compare* FCC, *Selected RBOC Local Telephone Data: As of 12/31/06*, http://www.fcc.gov/Bureaus/ Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_Dec_2006.xls, *with* FCC, *Selected RBOC Local Telephone Data: As of 12/31/99*, http://www.fcc.gov/Bureaus/ Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_Dec_1999.xls.

[3] *See* M. Rollins & E. Schmitz, Citigroup Global Markets, *Verizon Communications Inc.* at 11, Fig. 5 (Jan. 28, 2008) (Attach. 18 to Joint Decl.).

[4] *See* Ind. Anal. & Tech. Div., Wireline Comp. Bur., FCC, *Trends in Telephone Service* at Table 7.1 (2005).

competitive losses not only cost Verizon a voice customer, but also make it more difficult to win and retain subscribers to other services that Verizon seeks to offer, such as high-speed Internet and video.

4. Cable operators, such as complainants, are Verizon's most significant competitors in the mass market today. Virtually all mass-market consumers – both nationally and in Verizon's local telephone service areas – are able to purchase voice services from an incumbent cable operator. In fact, Comcast is the fourth largest provider of voice services in the country, with 4.4 million customers.[5] Cable operators also are the largest providers of high-speed Internet access services, and due to their monopoly legacies, they continue to be the dominant providers of video services by a wide margin.

5. The ability to offer consumers multiple services has become important in the marketplace, because consumers increasingly insist on consolidating and reducing the number of their vendors. To respond to this demand, Verizon has been investing heavily to provide consumers with state-of-the-art Internet and video services, in addition to its traditional telephone services. Verizon is investing approximately $23 billion to deploy a fiber-to-the-premises network – known as "FiOS" – in thousands of communities in 17 states around the country, reaching 18 million customers' premises by the end of 2010. Verizon's increasing ability to provide these services has enabled it to begin competing head-to-head with cable incumbents to provide bundles of services.

6. In addition to competing with cable companies on the quality of its services, Verizon aggressively competes on price. Because "bundling" involves significant efficiencies

---

[5] *See* Bortz Media & Sports Group, Inc., *An Analysis of the Cable Industry's Impact on the U.S. Economy* at 24 (2008), *available at* http://www.ncta.com/PublicationType/ExpertStudy/Bortz-Report.aspx.

that allow multiple services to be provided at a lower overall cost than the provision of services on a stand-alone basis, providers that are able to offer multiple services can do so as lower-priced bundles.

IV. Verizon's Retention Marketing Program

7. Verizon developed the retention marketing program that is the subject of this proceeding as one aspect of its efforts to compete against rival providers of voice and other services, particularly cable operators. Verizon implemented its program in the summer of 2007. By that time, Verizon had become able to offer its video and Internet services to enough customers that the potential benefits of such a program would outweigh the substantial costs. Verizon has implemented its retention marketing program in all regions across its national footprint in which Verizon provides local voice service.

8. As more fully explained in the prior joint declaration, when a customer indicates his or her intention to cancel service from Verizon (through the new provider acting as the customer's agent), the internal order to disconnect a customer's retail service is frequently received by Verizon's retail operations several days in advance. Verizon attempts to reach out to those customers who have not already spoken with a Verizon retail representative by sending an overnight letter alerting customers to Verizon's competitive offers and asking them to call if they want to learn more.

9. When the customer calls Verizon in response to a retention campaign letter, the Verizon representative asks the customer why he or she is disconnecting service. The representative informs a customer who is migrating to another provider about the available service packages and promotional offers, in an attempt to persuade the customer to stay. If the

customer does decide to remain with Verizon, Verizon employs a third-party verification process to confirm the customer's choice.

10. In some cases, a customer may not rely on another carrier to submit a cancellation request but will instead call Verizon directly (or in addition). When that happens, Verizon uses the same retention pitch from the same retention representatives to attempt to retain those customers. In either case – when the customer calls directly, or when their new service providers submits the information on the customer's behalf – Verizon will attempt to communicate with the customer to ensure they are aware of the options available to them. When a customer calls directly, Verizon does so directly; when the new service provider submits a cancellation, Verizon will reach out to the customer through direct mail.

11. Verizon's retention marketing program has been successful. Not only has the response rate to our direct mail solicitation been extraordinary, but a significant number of those customers who call us have elected to keep their voice service with Verizon (and frequently to purchase additional services, including high-speed Internet and video services).

12. Verizon's retention marketing efforts have been successful for two basic reasons. First, Verizon provides consumers with information about Verizon's services that they may not have had at the time that they initially decided to switch providers. For example, because of Verizon's recent FiOS roll-out, some consumers who switch to a cable operator offering a bundle of voice, video, and high-speed Internet services are not aware that Verizon offers comparable bundles. Verizon's retention letters inform customers about this fact. This ensures that consumers have all the information they need to make the best decision. Moreover, Verizon provides consumers this information at the time they are likely to be most focused on their choice of provider, given their recent decision to switch, and often before they experience any

inconvenience associated with making a switch (such as taking time off from work to wait for a cable company service call).

13. Second, Verizon's retention marketing program provides consumers substantial benefits in the form of monetary incentives to remain with Verizon. Verizon's bundles are priced very competitively in comparison to cable providers' bundles. In addition, Verizon has offered customers a $10 monthly discount off a bundle of voice, video, and high-speed Internet services, and also has offered between $50 and $200 in American Express-branded reward cards. These are direct savings to consumers.

14. Verizon's retention marketing practices not only benefit consumers directly, but also promote competition that provides consumers with further benefits. In the event a customer is retained, a competitor receives notice from Verizon that the customer has decided to stay with Verizon. That competitor then has the same opportunity that Verizon had to try to convince the customer to change his or her mind. The competitive provider could "sweeten the pot" by offering greater discounts or other incentives that redound to the consumer's benefit.

V. Verizon and Its Customers Will Be Harmed Irreparably by the Commission's Order

15. By prohibiting Verizon from engaging in its retention marketing program, the Order deprives customers of information about Verizon services that is directly relevant to their decision whether or not to switch providers. Verizon's experience with its program confirms that many thousands of customers have been made unambiguously better off as a consequence of having learned about Verizon's services and electing not to switch to a different provider.

16. Verizon's most recent data, which reflects Verizon's continuing adjustments to the program, including the size of available discounts, indicate that Verizon retains over one thousand customers *per week*. Absent a stay of the Commission's Order pending this Court's

review, Verizon faces the loss of thousands of customers who would have remained with Verizon but for the fact that they were denied the opportunity to learn about Verizon's offers.

17. In addition to simply losing a number of voice customers, Verizon will lose the opportunity to sell its bundles that include video and Internet services to voice-only customers that initially decide to switch providers. As noted earlier, because competition to supply bundled services is so intense, a major goal of Verizon's retention marketing is to introduce Verizon's customers to its offerings that have just entered the marketplace.

18. Moreover, the Order prohibits Verizon from competing for customers at precisely the time they are most likely to be focused on their choice of provider. Verizon will not only lose customers that it would otherwise have been able to retain, but it will lose some of them simply because they did not know what services were actually available from Verizon and at what price. By prohibiting Verizon from providing its customers with this information when it would be most relevant to them, the Order imposes a harm that is more than the loss of the customers themselves; the customers who leave Verizon under these circumstances are more likely to be angry and frustrated – particularly if they subsequently learn that a better deal might have been available. As a consequence of the Order, Verizon will not only lose customers but it will lose their goodwill as well.

19. The ability to engage in winback marketing (i.e., marketing after the customer switches providers) does not remedy the burdens on Verizon imposed by the Order. Customer winbacks impose additional costs on Verizon and customers alike – costs that could have been avoided had the customer simply been aware of Verizon's services and prices. Winbacks entail high installation costs when a customer does more than just change voice service providers. For example, a customer who would have agreed to a retention offer from Verizon would have to

arrange his or her schedule to be at home for two service installations and undertake the burdensome effort to return the unwanted provider's equipment. Neither the customer's time waiting for two installations nor the service providers' time performing the installations can be adequately compensated should the Order be subsequently modified. Verizon's retention marketing program would have avoided these inefficient switching costs.

VI. Verizon's Competitive Position Will Be Harmed by the Unlevel Playing Field Being Further Tilted by the Order

20. Verizon's retention marketing program is of particular competitive importance because it helps level the playing field with cable incumbents in marketing the triple-play bundles that consumers demand. By prohibiting Verizon from carrying out its program, the Order will further distort the market for bundled services.

21. There currently exists an unlevel playing field with respect to the cancellation of services. As described in the prior joint declaration, from the customer's perspective, the process to switch telephone providers is simple. There are long-established procedures under which the new provider can submit a disconnect order as the authorized agent for the customer. Once a customer agrees to accept service from the new provider, the customer need not do anything more. These practices have proven to work well, enhancing customer convenience while facilitating the ability of competitive carriers to transfer customers between them. Verizon has attempted to retain its cancelling customers by sending information and asking interested customers to call to learn more.

22. The process to switch video providers is far more cumbersome for a consumer. Cable incumbents do not accept disconnect orders from the new provider; instead, they require the customer to contact them directly to cancel service after choosing a new video provider and

to return any equipment. This significantly complicates the process of switching video providers for the customer, thereby entrenching the cable incumbents' dominant market position.

23. Like Verizon, cable companies attempt to retain their cancelling customers. The existing cancellation procedures provide cable companies with a notable advantage because customers are forced to call and speak with a representative before his or her cable service is disconnected. Therefore, *100%* of disconnecting cable customers are subject to a live retention pitch from the incumbent cable provider. Moreover, cable operators typically require the customer to return the equipment to the location of the cable operator's choosing, which provides yet another opportunity for a retention discussion with the customer.

24. By contrast, Verizon's retention marketing efforts, which merely ask interested customers to call Verizon, only resulted in Verizon's speaking to a small percentage of its disconnecting customers. The Order will require Verizon to lower that percentage to *zero*.

25. Because the Order prohibits Verizon's retention marketing program, but has no effect on the ability of Verizon's chief competitors to continue their aggressive efforts to retain their disconnecting customers, Verizon's competitive position will suffer substantial harm, particularly when Verizon's FiOS is a relatively new entrant to the market. The Order's restriction on Verizon's ability to compete for its customers could delay or even prevent Verizon from achieving the market position that it otherwise would attain. It is foreseeable that the disparate treatment of direct competitors that results from the Order would dissuade other companies from entering the market and making similar investments in the future. Consumers will ultimately suffer from the lack of choices among competitors.

26. While retention marketing for all voice services would be prohibited by the Order, the Order's ban does not apply equally in practice. For many years, cable incumbents have

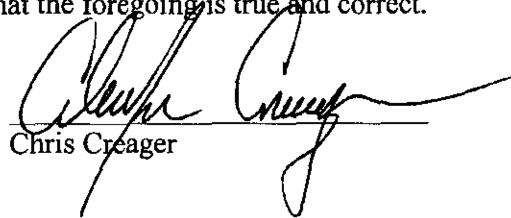
enjoyed little to no competition with respect to their video services. Because Verizon has only recently entered the video space, many of its voice customers already receive video services from cable providers. Should those customers indicate an interest in switching voice providers to their cable provider, the Order would prevent Verizon from attempting to retain them. If Verizon were successful in winning such a customer back and providing the customer with a bundle that included video services, the cable provider would require the customer to call it to cancel service. In that case, the customer would likely receive a retention marketing pitch not only for video, but also for bundles that include voice. In other words, Verizon would have no opportunity to retain the customer, while its competitor would.

27. In the opposite scenario – i.e., where a customer receives voice service, but not video or broadband service from a cable provider, the Order would prevent the cable provider from retention marketing. However, that situation rarely exists today when competition is based on discounted bundles of services and cable providers have a dominant share of the video space.

28. Moreover, as a practical matter, because Verizon has traditionally had a larger share of voice service customers – while cable providers have been dominant in video service – the unequal treatment of voice and video services systematically favors cable. Verizon's retention marketing efforts will most frequently be directed at departing *voice* customers (who may also purchase data service); cable's retention marketing efforts at departing *video* customers (who may also purchase data). As a result, the Order bars Verizon from engaging in retention marketing to cancelling customers even though Verizon would be attempting to sell the same bundle of services – voice, video, and data – that the cable incumbents are permitted to sell through pre-cancellation retention marketing.

29. Therefore, Verizon (as well as similarly situated traditional phone companies) will suffer considerable harm to its competitive position from the Order, while cable companies will continue to prosper *at the expense of customers.* This market distortion cannot be remedied should the Commission's Order be modified or overturned in subsequent proceedings.

I declare, under penalty of perjury, that the foregoing is true and correct.



Chris Creager

June 27, 2008

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

VERIZON CALIFORNIA INC.,
VERIZON DELAWARE LLC,
VERIZON FLORIDA, LLC,
CONTEL OF THE SOUTH, INC.,
VERIZON SOUTH INC.,
VERIZON NEW ENGLAND INC.,
VERIZON MARYLAND INC.,
VERIZON NEW JERSEY INC.,
VERIZON NEW YORK INC.,
VERIZON NORTHWEST INC.,
VERIZON NORTH INC.,
VERIZON PENNSYLVANIA INC.,
GTE SOUTHWEST INCORPORATED
d/b/a VERIZON SOUTHWEST,
VERIZON VIRGINIA INC.,
VERIZON WASHINGTON, D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. ___________

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, Verizon* hereby petitions this

---

* Petitioners in this case are Verizon California Inc., Verizon Delaware LLC, Verizon Florida, LLC, Contel of the South, Inc., Verizon South Inc., Verizon New

Court for review of an order of the Federal Communications Commission. *See* Memorandum Opinion and Order, *Bright House Networks, LLC, et al. v. Verizon California Inc., et al.*, File No. EB-08-MD-002, FCC 08-159 ("*Order*"). The *Order*, a copy of which is attached to this petition, was released on June 23, 2008. Venue is proper under 28 U.S.C. § 2343.

Verizon seeks review on the grounds that the *Order* is arbitrary and capricious, not supported by substantial evidence, in violation of the First Amendment, and otherwise contrary to law. *See* 5 U.S.C. § 706. Verizon asks this Court to hold the *Order* unlawful and to enter an order vacating, enjoining, and setting aside the *Order*.

England Inc., Verizon Maryland Inc., Verizon New Jersey Inc., Verizon New York Inc., Verizon Northwest Inc., Verizon North Inc., Verizon Pennsylvania Inc., GTE Southwest Incorporated d/b/a Verizon Southwest, Verizon Virginia Inc., and Verizon Washington, D.C. Inc. They are referred to here collectively as "Verizon."

Respectfully submitted,

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
(202) 719-7049 (facsimile)

Counsel for Verizon

June 27, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERIZON CALIFORNIA INC.,
VERIZON DELAWARE LLC,
VERIZON FLORIDA, LLC,
CONTEL OF THE SOUTH, INC.,
VERIZON SOUTH INC.,
VERIZON NEW ENGLAND INC.,
VERIZON MARYLAND INC.,
VERIZON NEW JERSEY INC.,
VERIZON NEW YORK INC.,
VERIZON NORTHWEST INC.,
VERIZON NORTH INC.,
VERIZON PENNSYLVANIA INC.,
GTE SOUTHWEST INCORPORATED
d/b/a VERIZON SOUTHWEST,
VERIZON VIRGINIA INC.,
VERIZON WASHINGTON, D.C. INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

No. ___________

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Verizon submits the following corporate disclosure statement:

The Verizon telephone companies participating in this filing are regulated, wholly owned subsidiaries of Verizon Communications Inc. Verizon

Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon Communications Inc.'s general nature and purpose is to provide communications services, including voice, data, and video services.

Respectfully submitted,

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
(202) 719-7049 (facsimile)

Counsel for Verizon

June 27, 2008

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Bright House Networks, LLC, *et al.*,	)	
	)	
Complainants,	)	File No. EB-08-MD-002
	)	
v.	)	
	)	
Verizon California, Inc., *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2008 **Released: June 23, 2008**

By the Commission: Commissioner McDowell issuing a statement; Chairman Martin dissenting and issuing a statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we reject the Enforcement Bureau's April 11, 2008, *Recommended Decision*[1] in this Accelerated Docket proceeding, and grant in part a formal complaint[2] filed against Defendants (collectively, "Verizon") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[3] For the reasons explained below, we conclude that Verizon is violating section 222(b) of the Act[4] by using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process, and we order Verizon immediately to cease and desist from such unlawful conduct.

2. The *Recommended Decision* recommended that we (i) deny the Complaint's claims under sections 222(b) and 222(a) of the Act (Counts I and II, respectively); (ii) rule on the Complaint's claim under section 201(b) of the Act[5] in a separate, subsequent order; and (iii) initiate a rulemaking regarding customer retention marketing practices. Complainants filed comments challenging the *Recommended*

---

[1] *Bright House Networks, LLC v. Verizon California, Inc.*, Recommended Decision, File No. EB-08-MD-002, 2008 WL 1722033 (Enf. Bur., rel. Apr. 11, 2008) ("*Recommended Decision*"). *See* 47 C.F.R. § 1.730(i) ("If parties to the proceeding file comments to the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.")

[2] Formal Complaint, File No. EB-08-MD-002 (filed Feb. 11, 2008) ("Complaint").

[3] 47 U.S.C. § 208.

[4] 47 U.S.C. § 222(b).

[5] 47 U.S.C. § 201(b). *See* Count III of the Complaint.

Decision, and Verizon filed comments supporting it.[6] We have carefully reviewed the *Recommended Decision* and are not persuaded by its reasoning. Consequently, we reject its recommendations to deny Counts I and II of the Complaint, and to defer decision on Count III. Instead, we grant Count I, and dismiss Counts II and III without prejudice because it is unnecessary to reach those two Counts. We will take under further advisement the recommendation to initiate a rulemaking.

II. BACKGROUND

A. The Parties

3. Defendants are telecommunications carriers that operate as incumbent local exchange carriers (incumbent "LECs") in a number of states.[7] Complainants Bright House Networks, LLC ("Bright House"), Comcast Corporation ("Comcast"), and Time Warner Cable Inc. ("Time Warner") (collectively, "Complainants") provide facilities-based voice services to retail customers using Voice over Internet Protocol ("VoIP") in competition with Verizon's local voice services.[8] Complainants provide those services by relying on wholesale competitive local exchange carriers ("Competitive Carriers") to interconnect with incumbent LECs and to provide transmission services, local number portability ("LNP") functions, and other functionalities.[9] Bright House and Comcast rely on Competitive Carriers that are affiliated with them,[10] while Time Warner relies on Sprint Communications Company L.P. ("Sprint").[11]

B. Local Number Portability and Verizon's Retention Marketing Program

4. The Communications Act requires local exchange carriers to provide number portability, *i.e.*, the ability to retain one's phone number when switching from one telecommunications carrier to another.[12] Thus, when customers decide to switch voice service from Verizon to one of the Complainants,

---

[6] Comments Challenging Recommended Decision, File No. EB-08-MD-002 (filed Apr. 28, 2008); Comments of Verizon in Support of Recommended Decision, File No. EB-08-MD-002 (filed May 13, 2008); Complainants' Reply Comments Challenging the Recommended Decision ("Reply Comments"), File No. EB-08-MD-008 (filed May 23, 2008).

[7] *See, e.g.*, Joint Statement, File No. EB-08-MD-002 (filed Feb. 29, 2009) ("Joint Statement") at 3-4, ¶ 4. The Defendants are: Verizon California Inc.; Verizon Delaware LLC; Verizon Florida LLC; Contel of the South, Inc.; Verizon South Inc.; Verizon New England Inc.; Verizon Maryland Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon Northwest Inc.; Verizon North Inc.; Verizon Pennsylvania Inc.; GTE Southwest Incorporated d/b/a Verizon Southwest; Verizon Virginia Inc.; and Verizon Washington, D.C. Inc. *See, e.g.*, *id.* at 3-5, ¶¶ 4-5.

[8] *See, e.g.*, Joint Statement at 2-3, ¶¶ 1-3; Complaint at 3-4, ¶¶ 2-3. Complainants provide their retail VoIP service through affiliated entities. *See, e.g.*, Joint Statement at 1-3, ¶¶ 1-3. For convenience, we include those affiliates when we refer to "Complainants" herein.

[9] *See, e.g.*, Joint Statement at 5, ¶ 6. The services provided by the Competitive Carriers to Complainants are similar, if not identical, to the wholesale services discussed in *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (Wireline Comp. Bur. 2007) ("*Time Warner Wholesale Services Order*").

[10] *See, e.g.*, Joint Statement at 6, ¶¶ 8-9. As described below, each of the Comcast and Bright House Competitive Carriers has a state certificate and an interconnection agreement with Verizon. *See* Section III.D, *infra*.

[11] *See, e.g.*, Joint Statement at 6, ¶¶ 7-9.

[12] *See, e.g.*, 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30) (providing that "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another). *See also* 47 C.F.R. §§ 52.11, 52.21-26.

they may choose to retain their telephone numbers. Such a choice triggers an inter-carrier process -- developed mainly by the industry -- by which the customer's telephone number is "ported" from Verizon to the Complainant's Competitive Carrier.[13]

5. The number porting process begins with the Competitive Carrier, at the direction of a Complainant, submitting a "Local Service Request" ("LSR") to Verizon.[14] The LSR serves as both a request to cancel the customer's Verizon service and a request to port the customer's telephone number to the Competitive Carrier.[15] Under current industry practices, the LSR includes at least the following information: the identity of the submitting carrier; the date and time for the disconnection of Verizon's retail service (and, by implication, the date and time for the initiation of Complainant's service);[16] the name and location of the retail customer whose service is being switched; the Verizon retail account number; and whether the port involves one or more numbers.[17] Thus, the LSR informs Verizon that, at a particular date and time, the customer's telephone number is to be ported to the Competitive Carrier, and the customer's existing Verizon voice service is to be disconnected, so that the Complainant served by the Competitive Carrier may initiate retail service using the customer's existing telephone number. After submitting the LSR to Verizon, the Complainant or Competitive Carrier sends the Number Portability Administration Center ("NPAC")[18] a "create message" that is used to enter a pending subscription record with the necessary routing data for the number to be ported.[19]

6. Upon receiving the LSR, Verizon confirms that it contains sufficient information to accomplish the port, and then creates an internal service order, which it transmits to the appropriate downstream Operations Support Systems.[20] The transmittal of the internal service order initiates several work steps for Verizon. First, Verizon's automated systems send the Complainant or Competitive Carrier a Local Service Request Confirmation (also known as a Firm Order Confirmation, or "FOC") that contains information specific to the individual request.[21] In addition, Verizon creates a disconnect order scheduling a retail service disconnect on the requested due date.[22] Moreover, Verizon establishes a "10-

---

[13] *See, e.g.*, Complaint at 8, ¶ 10, and at Ex. E; Answer of Verizon, File No. EB-08-MD-002 (filed Feb. 21, 2008) ("Answer") at Exs. 22-27; *In the Matter of Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12315-16 at ¶¶ 55-56 (1997).

[14] *See, e.g.*, Joint Statement at 9, ¶ 20. The Competitive Carrier may submit the LSR directly to Verizon, or through a contractor. *Id.*

[15] *See, e.g.*, Joint Statement at 9, ¶ 18.

[16] *See, e.g.*, Joint Statement at 11, ¶ 25. As the parties aptly indicate, "[w]hen a customer migrates from one provider to another, it is important that the retail service being provided by the old service provider be terminated contemporaneously with the establishment of new service. This ensures that the customer is not left without service for any significant period of time and does not wind up being required to pay two providers for duplicative service." *Id.*

[17] *See, e.g.*, Joint Statement at 9, ¶ 20.

[18] The Number Portability Administration Center, or NPAC, was created to support the implementation of local number portability by operating regional number portability databases. *See generally* www.npac.com.

[19] *See, e.g.*, Joint Statement at 11, ¶ 28.

[20] *See, e.g.*, Joint Statement at 10, ¶ 23.

[21] *See, e.g.*, Joint Statement at 10, ¶ 24.

[22] *See, e.g.*, Joint Statement at 12, ¶ 29. The submission of an LSR by the Competitive Carrier notifying Verizon of the porting of a Verizon customer's number is the only submission that is required (and, typically, the only communication that is received) to generate a disconnect order within Verizon's internal systems. Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 5, 2008) ("Supp. Joint Statement") at 2, ¶ 1.

digit trigger" in the switch serving the retail customer to prevent the misrouting of certain calls in the short interval after the number has been ported but before disconnection of the customer's Verizon retail service has been completed.[23] Finally, Verizon confirms the pending subscription record that the new provider previously created in the NPAC database.[24] Meanwhile, the Complainant and/or Competitive Carrier perform any necessary work on their own networks to turn up the customer's service.[25]

7. Beginning around the summer of 2007, Verizon started a program of retention marketing directed specifically at retail customers who are in the midst of the carrier-changing/number-porting process just described.[26] The program's first step is generating -- on a frequent, if not daily, basis -- a marketing "lead list" of Verizon customers to be contacted by Verizon that is based on the LSRs explained above.[27] To generate the lead list, Verizon begins with the universe of customers for whom there are retail-service disconnect orders pending, including disconnect orders that were prompted by the submission of an LSR.[28] Verizon then *eliminates* from the lead list *all* those customers who are *not* switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as Complainants. Put differently, Verizon *keeps on* the lead list *only* those customers who *are* switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as Complainants.[29] Verizon is able to carry out this sifting because, *inter alia*, the disconnect orders stemming from the Competitive Carriers' LSRs differ from all other disconnect orders. Specifically, disconnect orders stemming from the Competitive Carriers' LSRs contain "additional entries that are required to facilitate the actual porting of the telephone number to the new provider."[30]

8. Upon completion of the lead list, Verizon immediately -- sometimes within 24 hours of receiving the LSR -- contacts customers on the lead list, by express mail, e-mail, and/or automated

---

[23] *See, e.g.*, Joint Statement at 12-13, ¶¶ 30-31. Use of 10-digit triggers is routine in the industry, but it is not required by industry process flows, which permit coordinated migration as an alternative. *Id.* at 13, ¶ 31.

[24] *See, e.g.*, Joint Statement at 13, ¶ 32. This "confirmation" step is permitted, but not required, by industry process flows. *Id.* Additional work steps that Verizon undertakes include: physically disconnecting the wire serving the customer from the frame in the central office; using a service order to deliver information to the E911 database to unlock the customer's record so that it can be modified by the new carrier; implementing any requested changes to the retail customer's directory listing; and, after service is disconnected, informing the billing systems to cease billing for service. *Id.* at 12, ¶ 29.

[25] *See, e.g.*, Joint Statement at 11-12, ¶ 28.

[26] *See, e.g.*, Joint Statement at 14-17, ¶¶ 35-45.

[27] *See, e.g.*, Joint Statement at 15, ¶¶ 37-38. The record contains no specific reference to how frequently the lead list is developed. Given the nature of the retention marketing program, however, it is reasonable to infer that the lead list is generated on approximately a daily basis.

[28] *See, e.g.*, Joint Statement at 15, ¶ 37; Supp. Joint Statement at 2, ¶ 1 (stating that Verizon's retention marketing lead list is generated from disconnect orders, including disconnect orders that are generated as a result of receiving LSRs). Of course, disconnect orders may stem from circumstances other than an LSR, such as a customer move out of the local service area. *See, e.g.*, Reply Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 14, 2008) at 1.

[29] *See, e.g.*, Joint Statement at 15, ¶ 37. Toward that end, Verizon eliminates from the lead list customers who (i) are switching to a service provider that is either a Verizon wholesale customer (such as a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product) or a Verizon affiliate (*e.g.*, Verizon Wireless), or (ii) contacted Verizon directly to terminate service. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists. *Id.*

[30] Answer at 10, ¶ 20. The record reveals no other means by which Verizon could identify and eliminate customers who are not switching their phone service to a facilities-based competitor.

telephone message. Those contacts encourage customers to remain with Verizon, offering price incentives such as discounts and American Express reward cards.[31] Verizon conducts this marketing while the number-porting request is still pending, *i.e.*, before the new provider (such as Complainants) has established service to the customer.[32]

9. If Verizon is successful in persuading a customer to cancel his or her order with the new service provider, Verizon cancels the internal service order relating to the port request, and Verizon's systems issue a "jeopardy notice" to the provider that submitted the port request.[33] Verizon also puts the new provider's port request "into conflict" by sending a conflict code to NPAC. That conflict code cannot be overridden by the new provider. If the new service provider persuades the customer to switch after all, it can either seek resolution of the conflict code or, what is much more common, submit a new LSR.[34]

C. The Complaint

10. On February 11, 2008, Complainants filed the Complaint alleging, *inter alia*, that the Verizon customer retention marketing practices described above violate section 222(b) of the Act.[35] Complainants seek an order enjoining Verizon from continuing such customer retention marketing.[36] Complainants also seek an award of damages, but defer that determination to a separate, subsequent proceeding pursuant to section 1.722(d) of the Commission's rules.[37] Thus, this Order addresses only the question of Verizon's alleged liability.[38]

III. LEGAL ANALYSIS

11. Section 222(b) provides that "[a] telecommunications carrier that receives or obtains

---

[31] *See, e.g.*, Joint Statement at 15-16, ¶¶ 39-40.

[32] *See, e.g.*, Joint Statement at 16, ¶ 41. Any marketing that Verizon conducts after the number port and disconnect of Verizon service have occurred is not at issue here. *See, e.g.*, Complaint at 13-14; Answer at 1.

[33] Joint Statement at 17, ¶ 44.

[34] Joint Statement at 17, ¶ 45.

[35] 47 U.S.C. § 222(b). The Complaint also alleges that Verizon's customer retention marketing practices violate sections 222(a) and 201(b) of the Act. *See, e.g.*, Complaint at 28-31 (citing 47 U.S.C. §§ 222(a), 201(b)). Because Complainants prevail on their claim under section 222(b), and that victory will afford Complainants all the relief to which they would be entitled under sections 222(a) and 201(b), we need not and do not reach their claims under sections 222(a) and 201(b). Accordingly, we dismiss those claims (*i.e.*, Counts II and III) without prejudice.

[36] Complaint at 31, ¶ 59 (asking the Commission to "enjoin Verizon from continuing its retention marketing based on carrier change information"). In the context of section 222(b) of the Act, the Commission generally labels as "retention marketing" any marketing to a customer by the customer's existing provider that occurs while the carrier-change/number-porting request applicable to that customer is pending; the Commission generally labels as "winback marketing" any marketing to a customer by the customer's former provider that occurs after the carrier-change/number-porting request applicable to that customer has been effectuated. *See, e.g.*, *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14443-4, ¶ 65 (1999) ("*CPNI Reconsideration Order*"). The Complaint challenges only Verizon's retention marketing, and only Verizon's retention marketing that stems, directly or indirectly, from the submission of an LSR. *See, e.g.*, Complaint at 14. Thus, this Order applies only to such retention marketing, and not to any winback marketing.

[37] Complaint at 31, ¶ 59 (citing 47 C.F.R. § 1.722(d)).

[38] Pursuant to section 1.730 of the Commission's rules, at the Complainants' request, the Enforcement Bureau accepted the Complaint on the Commission's Accelerated Docket. 47 C.F.R. § 1.730. *See* Complaint at Ex. T.

proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[39] Thus, a telecommunications carrier violates section 222(b) when it (a) receives or obtains proprietary information; (b) from another carrier; (c) for purposes of providing any telecommunications service; and (d) fails to use such information "only" for such purpose, or uses the information "for its own marketing efforts."[40] For the reasons discussed below, we find that Verizon's retention marketing program violates section 222(b) of the Act. Specifically, we find that Verizon, a telecommunications carrier, receives proprietary information from the Competitive Carriers; that this information is contained in number porting requests that were submitted for the purpose of the Competitive Carriers providing telecommunications service to the Complainants, and for the purpose of Verizon providing telecommunications service to the Competitive Carriers; and that Verizon uses the proprietary information for its own marketing efforts.

A. The LSRs Submitted by the Competitive Carriers to Verizon Contain "Proprietary Information from Another Carrier" Within the Meaning of Section 222(b).

12. As described above, when a Competitive Carrier, working in conjunction with one of the Complainants, submits an LSR to Verizon, Verizon receives advance notice that the Complainant (again, working in conjunction with the Competitive Carrier) will supplant Verizon as the voice service provider to a particular customer on a particular date. Complainants provide this highly sensitive information to their competitor, Verizon, only because they must do so in order to serve their newly-won customer properly.[41] Specifically, Complainants have no choice but to provide this information (via a Competitive Carrier) to Verizon in order to effectuate a number port in accordance with industry processes.

13. The Commission has already found that advance notice of a carrier change that one carrier is required to submit to another is carrier "proprietary information" under section 222(b).[42] These rulings stem from the inherently sensitive nature of the information itself and from a concern that carriers not unfairly exploit such information received in advance through necessary carrier-to-carrier interactions. As the Commission has observed, "competition is harmed if any carrier uses carrier-to-carrier information . . . to trigger retention marketing campaigns, and [we] consequently prohibit such actions accordingly."[43] Therefore, under Commission precedent, the carrier change information that the Competitive Carriers must submit to Verizon in the LSRs is plainly "proprietary" within the meaning of section 222(b).[44]

14. Verizon proffers several arguments for concluding that the foregoing Commission

---

[39] 47 U.S.C. § 222(b).

[40] 47 U.S.C. § 222(b).

[41] *See, e.g.*, Complaint at Ex. A, ¶ 7, Ex. E ¶ 6.

[42] *See, e.g.*, *CPNI Reconsideration Order*, 14 FCC Rcd at 14449, ¶ 78 (1999) ("[C]arrier change information is carrier proprietary information under section 222(b)."); *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*, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1572, ¶ 106 (1998) ("*1998 Slamming Order*") ("[C]arrier change information is carrier proprietary information and, therefore, pursuant to section 222(b), the executing carrier is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.").

[43] *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77.

[44] Verizon contends that a different process not involving the transmission of carrier-change information to Verizon *could* have been established, *see, e.g.*, Answer at 7, but the existence of that hypothetical alternative has no bearing on the legal requirements applicable to the processes currently in place.

precedent does not apply to the information at issue here. As explained below, all of those arguments lack merit.

15. First, in Verizon's view, the information that the Competitive Carriers submit to Verizon in an LSR is actually Verizon's information, not another carrier's. Specifically, according to Verizon, the fact that its own customer has cancelled his or her retail Verizon voice service on a certain date is information that Verizon, as the current retail carrier, requires to carry out the last portion of its retail service -- timely disconnection.[45] This argument distorts the nature of the information contained in the LSRs. Although the LSR does contain information that Verizon needs to disconnect a customer, it also contains additional, highly sensitive competitive information that is independent of the mechanics of disconnection. Specifically, the LSR discloses in advance that a competing carrier has convinced a particular Verizon customer to switch to the competing carrier's voice service on a particular date. This is the information that is proprietary. Significantly, even Verizon does not dispute that information on the LSR revealing the identity of the new carrier is proprietary information.[46] And, as explained in more detail later, it is precisely that information – *i.e.*, the fact that a retail customer has chosen not only to disconnect Verizon service but also to switch to a competitor on a particular date – that Verizon employs in its retention marketing program.[47]

16. Verizon also argues that the carrier-change information in the LSR is the customer's information, and the Competitive Carrier is merely conveying that information as the customer's agent.[48] We disagree. It is true that a Verizon retail customer has every right to contact Verizon directly to state that she intends to switch to a Complainant's voice service. Indeed, the Commission has already recognized that truth and held that, if a customer makes such a contact, the carrier-change information conveyed by the customer to Verizon is not "proprietary" within the meaning of section 222(b) and may be used to engage in retention marketing.[49] In the absence of such a direct customer contact, however, the carrier-change information conveyed in carrier-to-carrier communications remains proprietary.[50]

---

[45] *See, e.g.*, Answer at 37-38, 43-44, 48-50; Comments of Verizon in Support of Recommended Decision at 19-20.

[46] *See, e.g.*, Answer at 16 (explaining that Verizon instructs its customer retention marketing representatives to refrain from looking at the name of the new carrier or mentioning the name of the new carrier to the target customer); 43 ("assuming for the sake of argument that the *identity* of the winning carrier is proprietary information").

[47] *See* Section III.C, *infra*.

[48] *See, e.g.*, Answer at 45, 49-50; Comments of Verizon in Support of Recommended Decision at 20.

[49] *See, e.g.*, *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 79 (holding that "section 222(b) is not violated if the carrier has independently learned from its retail operation that a customer is switching to another carrier"); *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14917, ¶ 131 and n.302 (2002) ("*CPNI 3rd Report & Order*") (recognizing that "a carrier's retail operations may, without using information obtained in violation of section 222(b), legitimately obtain notice that a customer plans to switch to another carrier," but noting that "such instances are the exception, not the rule").

[50] In this vein, Verizon states: "Complainants are left to argue that, if a consumer calls to cancel service, retention marketing is permitted and beneficial, but that, if the customer authorizes a service provider to cancel on his or her behalf, retention marketing is prohibited and harmful. That nonsensical distinction finds no support in the Act or the Commission's rules and is so irrational as to render the restriction ... an unconstitutional restriction on Verizon's speech." Opening Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 12, 2008) at 1. Yet the Commission plainly made that distinction in prior orders, and neither Verizon nor anyone else challenged it as "nonsensical" or "irrational." Indeed, we are not aware of any carrier, including Verizon prior to the summer of 2007, acting contrary to that distinction.

Moreover, labeling the Complainant (or Competitive Carrier) as merely the "agent" of the customer is misleading. By transmitting the information in the LSR, the Competitive Carrier is certainly acting to help effectuate the customer's choice of carrier, but it is also acting to promote its own commercial interests, which requires conveying its own proprietary information. Verizon's agency theory also conflicts with the approach the Commission has taken in applying section 222(b) in the slamming context. Just as in the context of a number porting request, a customer can effect a change of carrier by authorizing the new carrier to make the change request on the customer's behalf.[51] Nevertheless, the Commission banned the use of carrier change requests for marketing purposes as inconsistent with section 222(b).[52] By Verizon's reasoning, a carrier submitting a carrier change request on behalf of a customer would seemingly be acting only as the customer's agent, and the marketing ban would not apply. That was clearly not the approach taken by the Commission.

17. Verizon further contends that the LSRs do not convey proprietary information "from another carrier" within the meaning of section 222(b), because Complainants are not "telecommunications carriers."[53] Verizon's contention lacks merit, even assuming, *arguendo*, that (i) the statute's reference to "carrier" means "telecommunications carrier"; (ii) Complainants are not "telecommunications carriers;"[54] and (iii) the "proprietary information" must concern the carrier who conveys it.[55] Due to the closeness of the operational partnership between Complainants and their respective Competitive Carriers,[56] we hold that information regarding a Verizon customer's decision to switch from Verizon to a Complainant is as proprietary to the Competitive Carrier as it is to the Complainant. Moreover, as explained below, the Competitive Carriers are "telecommunications carriers" under section 222(b).[57] Thus, when a Competitive Carrier conveys carrier-change information in an LSR to Verizon, Verizon is receiving such information "from a carrier" under section 222(b).[58]

18. In sum, for all of the foregoing reasons, the LSRs submitted by the Competitive Carriers to Verizon contain "proprietary information from another carrier" within the meaning of section 222(b).

---

[51] *See, e.g., 1998 Slamming Order*, 14 FCC Rcd at 1510, ¶ 1.

[52] *Id.* at 1572-73, ¶ 106.

[53] *See, e.g.*, Opening Brief of Verizon at 5; Answer at 42.

[54] We note that none of the Complainants claims to be a "telecommunications carrier" within the meaning of section 222(b).

[55] We emphasize that these are assumptions, not conclusions.

[56] *See, e.g.*, Joint Statement at 5-6; Complaint at 7-9. *See also In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007) ("VoIP LNP Order and Declaratory Ruling") (observing in a closely analogous context that interconnected VoIP providers and wholesale interconnection providers work in partnership to provide competitive voice services to end-users); *Time Warner Wholesale Services Order*, *supra* (same point as *VoIP LNP Order and Declaratory Ruling*).

[57] *See* Section III.D, *infra*.

[58] Verizon cursorily asserts that, if the LSR's carrier-change information is deemed to be proprietary to the Competitive Carriers, then the Complainants lack standing to prosecute this Complaint. Opening Brief of Verizon at 5-6. Verizon's assertion overlooks the last sentence of section 208, which provides that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant." 47 U.S.C. § 208. At a minimum, Complainants have clearly experienced indirect damage from Verizon's customer retention marketing program, even if each Complainant is not a "carrier" whose proprietary information is protected by section 222(b). Thus, Complainants have standing under section 208 to obtain a ruling regarding the lawfulness of Verizon's conduct. Whether Complainants also have standing to obtain a ruling awarding monetary damages to them is a question we need not reach unless and until they file a supplemental complaint for damages pursuant to 47 C.F.R. § 1.722.

B. When a Competitive Carrier Submits an LSR to Verizon, Verizon Receives It "For Purposes of [the Competitive Carrier] Providing Telecommunications Service" to a Complainant Within the Meaning of Section 222(b).

19. Section 222(b) prohibits a telecommunications carrier from using for its own marketing efforts any proprietary information that it receives from another carrier "for purposes of providing any telecommunications service...."[59] Section 222(b) does not expressly state *whose* provision of telecommunications services is covered. Specifically, section 222(b) does not expressly state whether its marketing ban applies when the receipt of proprietary information is for purposes of (i) the *submitting* carrier (here, a Competitive Carrier) "providing any telecommunications service," or (ii) the *receiving* carrier (here, Verizon) "providing any telecommunications service," or (iii) either the submitting carrier or the receiving carrier "providing any telecommunications service."

20. The parties do not dispute that section 222(b) applies when the *receiving* carrier provides telecommunications service. The issue here is whether section 222(b) also applies when a telecommunications carrier's receipt of proprietary information from another carrier is for purposes of the *submitting* carrier providing telecommunications services.[60] For the following reasons, and consistent with Commission precedent in a similar context, we conclude that section 222(b)'s marketing ban applies in the latter situation as well.

21. Our conclusion rests on a reasonable construction of the statutory language. Indeed, in addressing the meaning of section 222(b), the Commission has already held that "information contained in a carrier change request is by its very nature proprietary [and] ... may only be used by the executing carrier to effectuate the provision of service *by the submitting carrier to its customer*."[61] Applied in the context of this case, it is reasonable to read section 222(b) as stating that, when Verizon "receives or obtains proprietary information from a [Competitive Carrier] for purposes of [the Competitive Carrier] providing any telecommunications service ... [, Verizon] shall use such information only for such purpose [*i.e.*, the Competitive Carrier providing a telecommunications service], and shall not use such information for its own marketing efforts."

22. Our conclusion is also compelled by the Commission's prior assessment of the fundamental objective of section 222(b): to protect from anti-competitive conduct carriers who, in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor.[62] To achieve that objective, the Commission has repeatedly construed

---

[59] 47 U.S.C. § 222(b).

[60] *See, e.g.*, Joint Statement at 23, ¶ 68 ("Complainants assert that one legal issue is whether provision of 'telecommunication service' by the Competitive Carriers, but not by Verizon, constitutes 'providing any telecommunications service' within the meaning of section 222(b). Defendants assert that one legal issue is whether provision of 'telecommunications service' by a carrier that submits information . . . implicates section 222(b)"); Comments of Verizon in Support of Recommended Decision at 11-14.

[61] *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*, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, 5109-10, ¶ 25 (2003) ("*Third Slamming Reconsideration Order*") (emphasis added).

[62] *1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109 (stating that section 222(b) "promotes competition and protects consumer choices by prohibiting executing carriers from using information gained solely from the carrier change transaction to thwart competition by using the carrier proprietary information of the submitting carrier to market the submitting carrier's subscribers"); *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77 (stating that "competition is harmed if any carrier uses carrier-to-carrier information . . . to trigger retention marketing campaigns"); ¶ 78 (stating that "where a carrier exploits advance notice of a customer change by

(continued ...)

section 222(b) to mean that, when a customer's current carrier obtains carrier-change information from a competing carrier solely because of the current carrier's existing relationship with the customer, the current carrier may not use that information to attempt to disrupt the carrier change.[63] The existing carrier must remain "neutral," and not act as a competitor, until the carrier change is completed and the new carrier has begun providing telecommunications service. At bottom, the Commission has focused on preventing the receiving carrier from hindering the submitting carrier's ability to initiate its provision of telecommunications service to its customers.

23. In accordance with our view of section 222(b)'s overriding goal, as just described, we conclude that section 222(b)'s marketing ban applies when a telecommunications carrier's receipt of proprietary information from another carrier is for purposes of the *submitting* carrier providing telecommunications service, and is not limited to situations where the information is received for purposes of the *receiving* carrier providing service. Otherwise, section 222(b)'s protection could have irrational gaps, such as situations where the receiving carrier provides no "telecommunications service" to the submitting carrier.

24. Applying that construction of section 222(b) here, section 222(b)'s requirements squarely encompass Verizon's retention marketing. In order to initiate its provision of telecommunications service to a Complainant to serve a particular new customer, the Competitive Carrier has no choice but to notify Verizon of the customer's decision to switch service from Verizon to the Complainant. Thus, as the receiving carrier under section 222(b), Verizon may use that carrier-change information only for purposes of helping effectuate the initiation of the Competitive Carrier's (*i.e.*, the submitting carrier's) telecommunications service.

25. Verizon contends that, as a grammatical matter, the "purpose" referenced twice in section 222(b) must concern only the *receiving* carrier – and not the *submitting* carrier – providing telecommunications service.[64] Put differently, Verizon contends that section 222(b) must be read to apply *only* when the receipt of proprietary information is for purposes of the *receiving* carrier providing telecommunications service.[65] We disagree. As described above, we find, consistent with the Commission's statements in the slamming context, that the language of section 222(b) does not require such a reading. The statutory language is reasonably susceptible of meaning that the "purpose" includes the submitting carrier providing telecommunications service. And that interpretation more

---

(Continued from previous page)
virtue of its status as the underlying network-facilities or service provider to market to that provider, it does so in violation of section 222(b)"); *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶¶ 131, 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 26 (accepting the view that "Congress intended by the express terms of section 222(b) to prevent carriers from using information obtained from another to be used for the carrier's own marketing efforts against the submitting carrier"); ¶ 28 (stating that "carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier").

[63] *1998 Slamming Order*, 14 FCC Rcd at 1575, ¶ 106 (stating that "when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to that consumer"); *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶¶ 77-79 (stating that a carrier that exploits advance notice of a customer change violates section 222(b)); *CPNI 3rd Report & Order*, 17 FCC Rcd at 14917, ¶ 131 (stating that a carrier that receives carrier change information in its role as executing carrier is prohibited from using that information to attempt to change the subscriber's decision); *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 28 (stating that carrier change information provided in order to execute carrier change cannot be used for any other purpose).

[64] *See, e.g.*, Answer at 39; Comments of Verizon in Support of Recommended Decision at 12-13.

[65] Comments of Verizon in Support of Recommended Decision at 11-14.

comprehensively achieves section 222(b)'s objectives, as previously explained.

26. Verizon also asserts that the Commission has already construed section 222(b)'s marketing ban to apply only where, unlike here, the receiving carrier is providing a wholesale telecommunications service to the submitting carrier, such as resale or access.[66] We see no such limiting construction in any Commission order. When the Commission has referred to the receiving carrier's "wholesale operations" or "wholesale service" or "carrier-to-carrier service" and the like, it has done so merely to identify the source of the carrier-change information as something other than the receiving carrier's direct communications with its retail customer; it has *not* done so to limit section 222(b)'s scope to situations where the receiving carrier is providing a wholesale "telecommunications service" to the submitting carrier.[67]

27. Moreover, such a limiting construction would contravene what the Commission has repeatedly described as a fundamental policy of the Act – to promote facilities-based local competition.[68] Specifically, if Verizon's interpretation of the Commission's retention marketing orders were correct, those orders would have prevented receiving carriers from retention marketing against resellers and UNE competitors, but allowed receiving carriers to retention market against facilities-based competitors. Verizon has not proffered any sensible basis for the Commission to have made such a distinction, and we can discern none. Quite the contrary. While their number-port requests are pending with a receiving carrier, facilities-based carriers are just as vulnerable as resellers to any anti-competitive conduct by the receiving carrier.

28. Finally, in Verizon's view, even assuming, *arguendo*, that section 222(b) generally applies when the submitting carrier is the one "providing telecommunications service," section 222(b) does not apply here, because the information contained in the LSRs does not relate to the specific telecommunications services provided by the Competitive Carriers to Complainants.[69] We disagree. Verizon focuses only on the services provided by the submitting carrier, but the language of section 222(b) is not so limited, requiring only that the proprietary information be submitted for the purpose of providing *any* telecommunications service. That purpose is certainly satisfied here. A Competitive Carrier submits the LSR to Verizon so that, upon completion of the number port and service

---

[66] *See, e.g.*, Answer at 2-3, 37, 40, 51; Opening Brief of Verizon at 4.

[67] *1998 Slamming Order*, 14 FCC Rcd at 1572-73, ¶106; *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶¶ 78-79.

[68] *See, e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008) at ¶ 2 (noting that 1996 Telecommunications Act was designed to eliminate barriers to facilities-based competition); *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2535, ¶ 3 (2005) (subsequent history omitted) (adopting rules intended to "spread the benefits of facilities-based competition to all consumers"); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) (noting that facilities-based competition serves the Act's overall goals) (subsequent history omitted); *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20644-45, ¶ 5 (2001) (subsequent history omitted) (stating that "facilities-based competition, of the three methods of entry mandated by the Act, is most likely to bring consumers the benefits of competition in the long run"); *Time Warner Wholesale Services Order*, 22 FCC Rcd at 3519, ¶ 13 (referring to Commission's goal of promoting facilities-based competition).

[69] *See, e.g.*, Answer at 42, Opening Brief of Verizon at 5-6.

disconnection, the Competitive Carrier can provide telecommunications service to a Complainant.[70]

29. In sum, when a Competitive Carrier submits an LSR to Verizon, Verizon receives that LSR "for purposes of providing any telecommunications service" within the meaning of section 222(b). That conclusion, combined with the conclusion reached above about the LSR's proprietary nature, means that section 222(b) forbids Verizon from using the information in the LSR for its own marketing efforts.

30. Moreover, even if Verizon were correct that section 222(b) applies only when the carrier that receives proprietary information uses it for the purpose of providing telecommunications service, we would find that Verizon's retention marketing practices violate the statute because Verizon's provision of LNP constitutes a telecommunications service.

31. Verizon argues that LNP is not a telecommunications service because it does not constitute transmission, and because it is not offered for a fee.[71] Number portability, however, is a wholesale input that is a necessary component of a retail telecommunications service. We have previously found that services or functions that are "incidental or adjunct to common carrier transmission service" – i.e., they are "an integral part of, or inseparable from, transmission of communications" – should be classified as telecommunications services.[72] For instance, the Commission has found that central office space for collocation,[73] certain billing and collection services,[74] and validation and screening services[75] should be treated for regulatory purposes in the same manner as the transmission services underlying them, notwithstanding that none of these services actually entails transmission.

32. LNP similarly constitutes such an "adjunct to basic" service. Verizon's provision of LNP is a vital part of the telecommunications services that it provides to the Competitive Carriers.[76] Without the number port, Verizon could not route traffic to its former customer, as required under its interconnection agreements with the Competitive Carriers. Moreover, implementing LNP requires Verizon to be involved in properly switching and transmitting calls to the new carrier – these are unquestionably "telecommunications" functions. For instance, the parties have stipulated that for LNP to work, Verizon must provide the transmission necessary to route calls in its role as the "N-1" carrier (the

---

[70] In any event, contrary to Verizon's suggestion, the LSR's information *is* related to the Competitive Carriers' transmission services: the information is critical to Complainants' acquisition of a new customer, which, in turn, drives Complainants' purchase of the Competitive Carriers' telecommunications service.

[71] Answer at 38-39.

[72] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958 ¶ 107 (1996); *see also, e.g., Beehive Telephone v. The Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10566 ¶ 21 (1995); *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4831 ¶ 16 & n. 28 (2005); *Federal-State Joint Board on Universal Service, Appeal of Administrator's Decision, Radiant Telecom, Inc.*, Order, 22 FCC Rcd 11811, 11813-14 ¶ 9 (WCB 2007).

[73] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd 18730, 18744 ¶ 20.

[74] *Detariffing Billing and Collection Services*, Report and Order, 102 FCC2d 1150, 1167-69 ¶ 31 (1986).

[75] *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531 ¶ 19 (1992).

[76] Complainants' Supplemental Reply Brief at 2; Complainants' Reply at 36-38; Complaint at ¶¶ 40-41.

next-to-last carrier in the call sequence).[77]

33. For all of the above reasons, we find that Verizon's provision of LNP constitutes a telecommunications service for purposes of section 222(b).

C. Verizon's Retention Marketing Program Makes Use of Other Carriers' Proprietary Information.

34. An examination of the way Verizon handles the proprietary information it receives from the Competitive Carriers via LSRs confirms that Verizon uses this information "for its own marketing efforts," in violation of section 222(b). As stated above, the proprietary information at issue is the fact that, at a particular date and time in the near future, a Complainant will, in conjunction with a Competitive Carrier, begin to provide facilities-based, voice service to a specific customer who presently is being served by Verizon. Verizon uses that very information to swiftly identify exactly to whom it will engage in retention marketing. In particular, Verizon uses that information to help winnow from the universe of its daily disconnect orders all customers who are disconnecting service for *any* reason *other* than that they are switching service to a facilities-based, competing service provider like Complainants. This "threshing of the wheat from the chaff" leaves Verizon with a lead list consisting *only* of those customers who *are* switching their service to a facilities-based, competing provider like Complainants. Thus, the proprietary information contained in LSRs is a key organizing tool used by Verizon to determine which customers will receive retention marketing.[78]

35. Verizon asserts that its retention marketing depends only on the non-proprietary fact that Verizon's own retail customer has cancelled voice service and seeks disconnection – information that Verizon says it obtains legitimately, and of necessity, as part of its retail voice operations.[79] Verizon's own description of how it targets customers for retention marketing belies that assertion. Verizon acknowledges that, in order to identify its retention marketing audience, Verizon relies specifically on two facts – both the fact that the disconnect request stems from a switch in carriers rather than some other reason (such as moving or otherwise exiting the market), and the fact that the new carrier is a facilities-based provider.[80] Verizon has identified no source for either of those facts other than the proprietary information contained in the LSRs submitted to Verizon by the Competitive Carriers. That such information finds its way into a "retail" disconnect order does not mean that Verizon refrains from using it to target customers for retention marketing.

36. Verizon also contends that, because it does not mention any Complainant's name in any of its oral or written retention marketing, Verizon does not "use" proprietary information.[81] Verizon's contention misses the point. The Complainants' names, standing alone, are not the information at issue. What is at issue is the carrier change information, which, as discussed above, lies at the heart of Verizon's retention marketing program.

---

[77] Further Supplemental Joint Statement, File No. EB-0-MD-002 (filed Mar. 10, 2008) at ¶ 2.a.

[78] Verizon argues: "That Verizon includes in its lead list disconnecting customers who are porting their numbers to another service provider does not mean that Verizon is using another carrier's proprietary information. Verizon seeks to reach out to customers who have not spoken with a Verizon representative – and who are leaving Verizon's network – to ensure that they are informed about Verizon's competitive pricing and retention offers; Verizon assembles its lead list with that goal." Answer at 44. The point is that Verizon would not know which customers to reach with its retention marketing but for its use of the LSRs' proprietary information.

[79] *See, e.g.*, Answer at 37-38, 43-44, 48-50; Comments of Verizon in Support of Recommended Decision at 21-24.

[80] *See, e.g.*, Answer at 14; Joint Statement at 15, ¶ 37.

[81] *See, e.g.*, Answer at 16, 45-46.

D. The Bright House and Comcast-affiliated Competitive Carriers are "Telecommunications Carriers" Offering "Telecommunications Service."

37. Verizon argues that, even if section 222(b) refers to the submitting carriers' provision of "telecommunications service," section 222(b)'s marketing ban does not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers. That is because, according to Verizon, the record lacks evidence that those Competitive Carriers provide "telecommunications services" to Comcast and Bright House.[82] This argument hinges on the statutory definitions of "telecommunications,"[83] telecommunications carrier,"[84] and "telecommunications service,"[85] as well as on the Commission's determination that the common law concept of "common carrier" sheds significant light on the meaning of those statutory definitions.[86]

38. Verizon's argument boils down to an assertion that, with respect to the telecommunications provided to Comcast and Bright House, the record lacks evidence that the Comcast and Bright House Competitive Carriers engage in "offering" those telecommunications "directly to the public, or to such classes of users at to be effectively available directly to the public...."[87] Put in common law terms, Verizon asserts that the Comcast and Bright House Competitive Carriers do not "hold themselves out" to the public regarding the telecommunications they provide to their Complainant affiliates. Neither the Communications Act nor the case law describes exactly what is required to "offer" telecommunications "directly to the public, or to such classes of users at to be effectively available directly to the public." Therefore, whether a provider has made such an offering must be determined on a case-by-case basis.[88]

39. Based on the specific record in this specific case, we find that the Bright House and Comcast-affiliated Competitive Carriers are common carriers for purposes of section 222(b). As an initial matter, the Comcast and Bright House Competitive Carriers "self-certify" that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally.[89] We give

[82] Answer at 22-24, 42-43; Verizon Response to Supplemental Statements of Comcast and BHN, File No. EB-08-MD-002 (filed Mar. 12, 2008) ("Verizon's 3/12 Response"); Comments of Verizon in Support of Recommended Decision at 35-39. Verizon does not dispute that Sprint provides "telecommunications service" to Time Warner. *Id.*

[83] The Act provides that "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[84] The Act provides, in pertinent part, that "[t]he term 'telecommunications carrier' means any provider of telecommunications services." 47 U.S.C. § 153(44).

[85] The Act provides that "[t]he term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[86] *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming the Commission's use of the "common carrier" test in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") to help ascertain the meaning of the term "telecommunications service" in 47 U.S.C. § 153(46)).

[87] 47 U.S.C. § 153(46).

[88] *See, e.g., United States Telecom Ass'n. v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*"); *NARUC I, supra.*

[89] *See, e.g.*, Supplemental Affidavit of Susan Jin Davis, File No. EB-08-MD-002 (filed Mar. 10, 2008) ("Supp. Davis Aff.") at ¶¶ 5, 7; Second Affidavit of Marva B. Johnson, File No. EB-08-MD-002 (filed Mar. 10, 2008) ("Supp. Johnson Aff.") at ¶¶ 8-9.

significant weight to these attestations because being deemed a "common carrier" (*i.e.*, being deemed to be providing "telecommunications services") confers substantial responsibilities as well as privileges, and we do not believe these entities would make such statements lightly.[90] Further supporting our conclusion are the public steps the Comcast and Bright House Competitive Carriers have taken, consistent with their undertaking to serve the public indifferently. Specifically, each of the Comcast and Bright House Competitive Carriers has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates.[91] Moreover, each of the Comcast and Bright House Competitive Carriers has entered into a publicly-available interconnection agreement with Verizon, filed with and approved by the relevant state commission pursuant to sections 251 and 252 of the Act.[92] These facts, in combination, establish a prima facie case that the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b).

40. To try to rebut Complainants' prima facie case, Verizon points out that the Comcast and Bright House Competitive Carriers (i) serve only their affiliates, and (ii) lack a tariff or website posting or any other advertisement regarding the telecommunications at issue.[93] We find these facts in isolation insufficient to overcome Complainants' showing for purposes of section 222(b). First, it is well-established that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population."[94] Verizon has submitted no credible evidence that the Competitive Carriers are unwilling to provide telecommunications services to unaffiliated entities on a nondiscriminatory basis.[95] Second, the telecommunications services at issue here need not be federally tariffed,[96] and Verizon has not argued that state tariffs are required.[97] Furthermore,

---

[90] *See, e.g.*, 47 U.S.C. §§ 201, 202, 208, 254. Perhaps that is why we know of no case in which a provider has chosen to act as a common carrier and yet ultimately has been found not to meet the test.

[91] *See, e.g.*, Complaint at Ex. B, ¶¶ 8-27; Ex. E at ¶ 2. *See also VoIP LNP Order and Declaratory Ruling*, 22 FCC Rcd at 19542, ¶ 20 n.62 (stating that, although the Commission has not determined whether interconnected VoIP service should be classified as a telecommunications service, and although only telecommunications carriers are entitled to obtain direct access to numbering resources, "[t]o the extent that an interconnected VoIP provider is licensed or certificated as a carrier, that carrier is eligible to obtain numbering resources directly from NANPA, subject to all relevant rules and procedures applicable to carriers").

[92] *See, e.g.*, Complaint at Ex. B, ¶¶ 45-61; Ex. E at ¶ 3.

[93] Answer at 22-24, 42-43;Verizon's 3/12 Response at 3-6. Verizon also contends that we should disregard any factual evidence on this subject not filed with the Complaint. Verizon's 3/12 Response at 1-2. Verizon's contention lacks merit, because the only "new" facts on which we rely here – the nature of the potential customer base, and the "self-certification" as common carriers – were suggested by the Complaint itself, and are not complex. Thus, Verizon has had an adequate opportunity to respond. Accordingly, to the extent that our rules require those facts to be alleged more clearly in the Complaint, we waive those rules for good cause shown. *See* 47 C.F.R. §§ 1.3, 1.721, 1.726.

[94] *See NARUC I*, 525 F.2d at 608.

[95] As mentioned previously, "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." *NARUC I*, 525 F.2d at 608. This undermines the probative value of the fact that the Comcast and Bright House Competitive Carriers presently serve only their affiliates. Given the nature of their services, it could well be that there are only a few potential customers other than their affiliates.

[96] *See generally Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (subsequent history omitted); *Time Warner Wholesale Services Order, supra.*

[97] *See generally Consolidated Communications of Fort Bend Co. v. Public Utility Commission of Texas*, 497 F.Supp.2d 836 (W.D. Tex. 2007) (holding that Sprint's provision of service similar, if not identical, to the service at issue here was "telecommunications service," despite the absence of a state tariff).

by obtaining publicly available state certificates and interconnection agreements, the Comcast and Bright House Competitive Carriers have given notice that telecommunications services are available to the particular class of potential customers that might be interested in the services at issue here.[98] If a voice services provider similarly situated to Comcast and Bright House were looking for a provider of these services, the Comcast and Bright House Competitive Carriers would be obvious choices. Finally, prior to the dispute at issue here, Verizon itself appears to have treated these entities as telecommunications carriers.[99]

41. In sum, based on the particular facts in this record regarding the telecommunications provided to Comcast and Bright House by their affiliated Competitive Carriers, we conclude that Comcast and Bright House have shown, by a preponderance of the evidence, that the Competitive Carriers are telecommunications carriers for purposes of section 222(b) of the Act and provide "telecommunications services" to Comcast and Bright House within the meaning of section 222(b) of the Act. We stress, however, that our holding is limited to the particular facts and the particular statutory provision at issue in this case. The U.S. Court of Appeals for the D.C. Circuit has made clear that an agency may interpret an ambiguous term "differently in two separate sections of a statute which have different purposes."[100] Here, section 222(b) has a different purpose – privacy protection – than many other provisions of the Communications Act, and we believe that this purpose argues for a broad reading of the provision. As a result, our decision holding the Competitive Carriers to be "telecommunications carriers" for purposes of section 222(b) does not mean that they are necessarily "telecommunications carriers" for purposes of all other provisions of the Act. We leave those determinations for another day. While the Act does provide a definition of the term "telecommunications carrier," "the presence of a definition does not necessarily make the meaning clear. A definition only pushes the problem back to the meaning of the defining terms."[101] Therefore, we believe that it may be permissible to interpret an ambiguous but defined term differently in different statutory provisions that serve distinct purposes.

[98] The segment of the "public" to which the Comcast and Bright House Competitive Carriers seek to provide telecommunications consists of sophisticated entities – other carriers – knowledgeable about state regulatory processes and the ramifications of state certificates and interconnection agreements. *See, e.g.*,Supp. Davis Aff. at ¶ 5; Supp. Johnson Aff. at ¶ 9. We note that, had the Comcast and Bright House Competitive Carriers simply posted on their websites some indication of the general availability of the telecommunications they provide to their affiliates, Verizon might not have challenged their status as "telecommunications carriers." *See generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, ¶ 90 (2005) (subsequent history omitted) (holding that wireline broadband providers that choose to offer the transmission component of a wireline broadband Internet access service as a telecommunications service may do so without filing tariffs setting forth the rates, terms, and conditions under which they will provide that transmission, but only if the providers "include those rates, terms, and conditions in generally available offerings posted on their websites").

[99] Verizon entered into interconnection agreements with the Comcast and Bright House Competitive Carriers, which Verizon is statutorily obligated to do only with "telecommunications carriers," and these agreements were approved by the state commissions, and made public, pursuant to section 252 of the Act. *See, e.g.*, 47 U.S.C §§ 251(a)(1), 251(c)(2), 252(a); Complaint at Ex. B, ¶¶ 45-61; Ex. E at ¶ 3. We also note that Verizon did not draw any distinctions between the services provided to Time Warner by Sprint – which Verizon admits is a telecommunications carrier – and those provided to Comcast and Bright House by the Comcast and Bright House Competitive Carriers. *See, e.g.*, Complaint at Ex. B, ¶ 7, Ex. E at 1-2; Bright House Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 3, Ex. 1 at 2-4.

[100] *Abbott Laboratories v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990); *see Common Cause v. Federal Election Commission*, 842 F.2d 436, 441 (D.C. Cir. 1988) (upholding agency decision to interpret the same term – "name" – differently in two Federal Election Campaign Act provisions).

[101] *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873, 878 (D.C. Cir. 2006).

E. Verizon's Policy and Constitutional Arguments Do Not Justify its Proposed Reading of Section 222(b).

42. Verizon argues that interpreting section 222(b) so as to allow its retention marketing program would promote competition and benefit consumers, and has submitted the declaration of an economist to support this assertion.[102] Verizon also suggests that we should construe section 222(b) to permit the challenged customer retention marketing practices because doing so would help level the playing field on which voice providers compete for video and Internet customers, and video and Internet providers compete for voice customers.[103]

43. Verizon's policy arguments might be appropriately raised anew in some other context, such as a request to forbear from application of section 222(b) or a notice of proposed rulemaking under section 201(b) of the Act, but do not persuade us to adopt Verizon's interpretation of section 222(b) in this adjudication. The Commission has already evaluated the policy concerns underlying section 222(b) and adopted a construction that balances the concerns of protecting proprietary information and promoting competition.[104] Our decision here is fully in accord with those prior decisions. Verizon's policy arguments, and its economist's declaration, simply fail to consider the importance the Commission has placed on protecting proprietary information that voice carriers are required to share with their competitors. Moreover, Verizon's "level playing field" argument ignores the fact that the statute itself treats different services differently – on its face, section 222 applies to telecommunications services, but not to video or other services.[105] That different statutory treatment reflects the fact that only a competing voice service provider must communicate and coordinate with a customer's existing voice service provider in order to initiate service to that new customer. Where, as here, a provider has no choice but to communicate competitively sensitive information to its rival, the rival cannot use that information for marketing.

44. Verizon also asserts that the interpretation of section 222(b) advanced by Complainants "would severely restrict lawful, non-misleading speech and accordingly would raise significant First Amendment concerns."[106] More specifically, Verizon argues that no legitimate government interest could be served by restricting marketing "for the sole reason that it is based on information submitted by a

[102] Declaration of Jeffrey Eisenach, File No. EB-08-MD-002 (filed Feb. 29, 2008).

[103] *See, e.g.*, Answer at 56-58; Opening Brief of Verizon at 7-9; Comments of Verizon in Support of Recommended Decision at 24-29. Verizon points out, and Complainants acknowledge, that Complainants typically require customers to contact them directly to cancel video or broadband Internet access service; and when customers do so, Complainants offer incentives to remain customers in some instances. Letter from Matthew A. Brill to Marlene Dortch, Secretary, Federal Communications Commission, File No. EB-08-MD-002 (filed Mar. 6, 2008). In Verizon's view, because Complainants are allowed to engage in such retention marketing of their video and Internet services, Verizon should be allowed to engage in retention marketing of its voice service.

[104] *See 1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109; *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77; *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶ 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶ 28. For just one example, the Commission has already acknowledged what Verizon's economist principally asserts – that in the short term retention marketing may benefit some consumers. *CPNI Reconsideration Order*, 14 FCC Rcd at 14452-53, ¶¶ 84-85. The Commission went on to hold, nevertheless, that retention marketing's long-term harm to competition in the market as a whole outweighs any short-term benefits to individuals. *Id.* Moreover, Verizon's economist simply assumes, with no support, that material competition in the residential voice market would continue to exist despite the barriers to competition that retention marketing would entail.

[105] Verizon has not identified any analogue to section 222 in Title I or Title VI or any other part of the Act.

[106] Opening Brief of Verizon at 9. *See, e.g.*, Comments of Verizon in Support of Recommended Decision at 30-31.

service provider on behalf of the customer rather than by the customer him or herself."[107] As even Verizon notes, however, the government may restrict truthful communications if such restriction is narrowly tailored to serve a substantial government interest.[108] The Commission previously found that this test was met when it interpreted section 222(b) as prohibiting retention marketing based on the use of carrier change information.[109] The same analysis applies here concerning retention marketing based on the use of carrier change information embedded in number porting requests.

IV. CONCLUSION AND RELIEF AWARDED

45. In sum, we find that, under section 222(b) of the Act, the number-porting/carrier-change information obtained by Verizon from the Competitive Carriers is "proprietary" to the Competitive Carriers; Verizon obtains the proprietary information "for purposes of [the Competitive Carriers] providing ... telecommunications service" to Complainants, and for purposes of Verizon providing a telecommunications service to the Competitive Carriers; each of the Competitive Carriers is providing "telecommunications service" to a Complainant; and Verizon uses that proprietary information for a purpose other than the Competitive Carriers providing telecommunications service to Complainants, namely, "its own marketing efforts." Consequently, we hold that Verizon's customer retention marketing activities, as described above, violate section 222(b) of the Act. In turn, we grant Complainants' claim under section 222(b) of the Act (*i.e.*, Count I), and award the requested injunctive relief. Specifically, we hereby order Verizon to immediately cease and desist from engaging in the customer retention marketing activities described above.

V. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[110] and sections 1.720-1.736 of the Commission's rules,[111] that the Enforcement Bureau's April 11, 2008, *Recommended Decision* in File No. EB-08-MD-002 IS REJECTED.

47. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[112] and sections 1.720-1.736 of the Commission's rules,[113] that Count I of the Complaint is GRANTED, and that Counts II and III are DISMISSED without prejudice.

---

[107] Opening Brief of Verizon at 10.

[108] Opening Brief of Verizon at 9 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).

[109] *1998 Slamming Order*, 14 FCC Rcd at 1573-75, ¶¶ 107-111.

[110] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[111] 47 C.F.R. §§ 1.720-1.736.

[112] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[113] 47 C.F.R. §§ 1.720-1.736.

48. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, 222, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, 222, and 303(r), and sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736 that Verizon SHALL IMMEDIATELY CEASE AND DESIST from engaging in the customer retention marketing activities described in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF CHAIRMAN KEVIN J. MARTIN, DISSENTING

Re: Bright House Networks, LLC et al., Complainant, v. Verizon California Inc., et al., Defendants.

I have consistently maintained that it is important to create a regulatory environment that promotes competition and investment, setting rules of the road so that all players can compete on a level playing field. Today, a majority of the Commission voted to allow complainants--players providing a bundle of services over one platform (cable VoIP)—to gain an advantage over their competitors—players providing those same bundled services over a different platform (traditional telephone service). Specifically, the majority decided to prohibit some companies from marketing to retain their customers, even though the marketing practices prohibited today are similar to the aggressive marketing techniques engaged in by the complainants themselves (when they provide cable video service). To reach this result, the majority has created new law, holding that these complainants are "telecommunications carriers" for purposes of obtaining this competitive advantage, but that they are not "telecommunications carriers" for other purposes, such as complying with the obligations of "telecommunications carriers."

I am concerned that today's decision promotes regulatory arbitrage and is outcome driven; it could thwart competition, harm rural America, and frustrate regulatory parity. Therefore, I must dissent from today's decision.

In its *Recommended Decision*, the Enforcement Bureau (Bureau) recommended that the Commission, among other things, deny the cable Complainants' claims that Verizon's practices violate section 222(b) of the Act.[1] The Bureau interpreted section 222(b) to apply only where a telecommunications carrier receives another carrier's proprietary information so that the *receiving carrier* can provide a telecommunications service. The Bureau concluded that Verizon's actions, as the receiving carrier, did not violate section 222(b) because Verizon's role in the number porting process does not involve the provision of a "telecommunications service." Although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier "telecommunications service."

The Bureau further concluded that even assuming *arguendo* that section 222(b) could be construed to refer to the *submitting carrier's* provision of "telecommunications service," section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliates because the record lacked evidence that those affiliates are, in fact, "telecommunications carriers." Comcast and Bright House pointed to their affiliates' state certificates and interconnection agreements, and to self-certifications during the proceeding that the affiliates are common carriers. However, the Bureau found that Complainants failed to show that the affiliates publicly hold themselves out as offering telecommunications indiscriminately to any and all potential customers.

As I have said before, all consumers should enjoy the benefits of competition. Competition is the best protector of the consumer's interest and the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Customer retention marketing is a form of aggressive competition that has the potential to benefit consumers through lower prices and expanded service offerings. Moreover, the cable companies engage in such practices to keep their video customers from switching to other providers. I am therefore disappointed that the Commission would prohibit these

[1] *In the Matter of Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, File No. EB-08-MD-002, Recommended Decision, DA 08-860 (EB rel. Apr. 11, 2008) (*Recommended Decision*).

practices, which promote competition and benefit consumers and particularly disappointed that they would do so and prohibit practices from only one class of companies.

I also fear that today's decision will have a negative impact on rural carriers and customers in rural America. Today's action rests in part on a questionable conclusion that Comcast's and Bright House's affiliates are "telecommunications carriers." This finding affords the affiliates the privileges of a "telecommunications carrier," including the right to interconnection, even though there is scant evidence that the affiliates have ever offered telecommunications to the public and no evidence that they have provided telecommunications to any entity other than Bright House and Comcast. This will bind our hands and have far-reaching consequences, particularly for small rural local exchange carriers around the country, such as Vermont Telephone Company, who may be forced to interconnect with similar entities that have no intention of providing telecommunications to the public or assuming the obligations of a "telecommunications carrier." For example, will such entities assume the obligations of "telecommunications carriers," such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements?

Part of the job of being a Commissioner is that you are required to make hard or difficult decisions and those decisions have implications for the entire industry. For example, what constitutes a "telecommunications carrier"?

Here the majority wants to grant the Complaint but not really answer that question. They have avoided making a difficult decision by embracing the novel idea that a company can be classified as a carrier for a provision or even a subprovision of a statute but not another provision or subprovision of the very same statute. Naturally, they do so without citing any statutory basis or authority for such an inherently arbitrary approach. Yet they had no choice but to create such an argument if they were to find in favor of Comcast and Bright House.

The majority's attempt to dodge the issue and deny the consequences of today's action by holding that we are determining that the Competitive Carriers are carriers for purposes of 222(b) based on the specific record and specific facts of this case but not for other purposes makes no sense and is not legally sustainable. A provider either is or is not a "telecommunications carrier." This "pick and choose, rule by rule" approach is the very height of arbitrary and capricious conduct by the Commission, and is a thinly veiled attempt by the majority to reach a desired result without accepting responsibility for the legal consequences of their action.

Indeed if such an approach were possible it would allow industry players and the Commission to circumvent the entire statutory scheme applied by picking and choosing which provisions and subprovisions of the statute applied by classifying and declassifying carriers without any factual or statutory distinction or basis.

Almost by definition this approach is arbitrary and capricious as it acknowledges that it does not want to be bound by the logic and legal rationale of the decision for any other purpose and preserves the flexibility to not apply the same statutory definition to any other aspect of the statute.

It is indefensible to say that these entities are telecommunications carriers under one part of the Act and not others; the Act makes no such distinction. The majority attempts to find precedent to support its approach. However, that precedent should not apply because "telecommunications carrier" is a specific statutory definition. The majority's refusal to say that these entities are "telecommunications carriers" for all purposes shows that, clearly, their holding is outcome driven, advances regulatory arbitrage, and reflects a cavalier refusal to live with the legal consequences of their decision.

In addition, this approach will bind our hands going forward, with broad implications for other rural carriers and consumers around the country, and will raise a host of questions. If these entities are "telecommunications carriers," as the majority holds today, I presume they are subject to the obligations of a "telecommunications carrier", such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements.

Here, however, the majority is not providing regulatory consistency, nor are they providing certainty, except for the certainty of providing a competitive advantage to one type of service provider platform over other platforms. Thus, consumers will be treated differently based on the platform over which they receive service.

In the past, some Commissioners have warned the Commission of the dangers of "inconsistent and arbitrary application" of the Commission's rules. Specifically, in concurring in the Commission's decision to uphold a Media Bureau denial of a set-top box waiver request, they stated that "[t]he result of these inconsistent decisions is that consumers will be treated differently, based on where they live and which MVPD they choose."[2] I agree that "[a]ll market players deserve the certainty and regulatory even-handedness necessary to spark investment, speed competition, empower consumers, and make America a stronger player in the global economy."[3] It is unfortunate that the majority did not follow that advice here.

Indeed, the majority does not respond to Verizon's claims.

> Section 222(b) protects proprietary information of telecommunications carriers. But the supposedly proprietary information at issue here, if it did belong to the service provider, would belong to the complainants (cable VoIP providers), not the CLEC submitting the information to Verizon – indeed, the CLECs are not even complainants. And complainants here do not claim to be telecommunications carriers under the Act. The Commission cannot designate a cable VoIP provider a telecommunications carrier for purposes of extending privileges granted under section 222(b) without subjecting those carriers to the *obligations* set forth in Title II. There is a single definition of "telecommunications carrier" in the Act. The Commission never has and could not classify the same service as a "telecommunications service" – and thus the entity that provides the service as a "telecommunications carrier" – for the purposes of one provision but not another *within the same statute. See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (meaning of words in a statute cannot change with statute's application); *cf. American Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (noting that CALEA's text is "more inclusive" than definition of "telecommunications carrier" in the Act).[4]

[2] Joint Statement of Commissioners Robert M. McDowell and Jonathan S. Adelstein Concurring, *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-7012-Z, Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Application for Review*, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 17113 (2007).

[3] Statement of Commissioner Robert M. McDowell, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

[4] Letter from Aaron M. Panner, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, File No. EB-08-MD-002, at 1 (filed June 20, 2008).

I am also troubled about the impact of today's decision on our ability to promote regulatory parity. Last month, I proposed to my fellow Commissioners a Notice of Proposed Rulemaking (NPRM) that would initiate an inquiry into customer retention marketing practices, including how to ensure that such practices are treated consistently across all platforms used to provide voice, video, and broadband Internet service.

I am concerned, however, that today's decision will preclude our ability to apply a consistent regulatory framework across platforms. Indeed, I anticipate that when the time comes, some of the same members of the majority will preserve today's competitive advantage for one industry over another by claiming that we lack statutory authority to establish such a consistent approach or regulatory level playing field. Despite the fact that the inconsistencies are a result of a novel interpretation of what can constitute a telecommunications carrier that they themselves established.

Indeed, the action we take today to afford the affiliates the full benefits of a telecommunications carrier without the corresponding obligations, coupled with a potential lack of statutory authority to later impose those obligations, is in direct conflict with any stated intent to provide regulatory parity through the NPRM.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: Bright House Networks, LLC, et al., Complainants v. Verizon California, Inc., et al., Defendants.

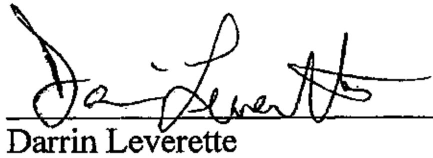
American consumers deserve the benefits that come from robust competition, especially in the telecommunications marketplace. It is the FCC's mission to promote such consumer-friendly competition. Additionally, Congress has required that we protect consumer privacy. Section 222 of the Communications Act clearly prohibits carriers from using confidential customer information for marketing efforts. Consistent with Congress's intent and Commission precedent in the long-distance context, today we carry out Congress's unambiguous mandate to protect consumer privacy in local markets as well.

Carriers are free to initiate customer retention marketing campaigns before a consumer gives the order to switch from his or her current phone service provider to a new provider. Under the law, carriers are also permitted to launch "win-back" campaigns after consumers have switched. Today's action underscores long-held Commission policy that using proprietary customer information for marketing efforts cannot take place during the window of time when a customer's phone number is being switched to a new provider.

Our March, 2007, action granting the Time-Warner petition for declaratory ruling on interconnection with incumbent LECs held that cable and other VoIP providers must be able to use local phone numbers and be allowed to put calls through to other phone networks. Our action then was premised on the belief that we were working to increase meaningful competition in local telephone service. Similarly, today's action ensures that consumers in all areas of the country reap the benefits of competition in the form of lower prices, innovative services and more choice.

CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of June 2008, I caused copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served upon each of the following on the attached service list by hand delivery.



Darrin Leverette

SERVICE LIST

FEDERAL COMMUNICATIONS COMMISSION

Matthew Berry
Joel Marcus
Federal Communications Commission
445 12th Street, S.W., Room 8-A741
Washington, D.C. 20554

UNITED STATES OF AMERICA

Michael B. Mukasey
Attorney General
U.S. Department of Justice
Antitrust Division – Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Catherine G. O'Sullivan
Nancy C. Garrison
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

BRIGHT HOUSE NETWORKS, LLC

Christopher Savage
Davis Wright Tremaine LLP
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

TIME WARNER CABLE INC.

Matthew A. Brill
Brian W. Murray
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004

COMCAST CORPORATION

Mark D. Schneider
Jenner & Block LLP
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, D.C. 20005