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: Commissioners Copps and McDowell issuing separate statements; 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*

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[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,

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[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-

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[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

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[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

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[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

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[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]

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[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).

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[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

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[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

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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

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[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.

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[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

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[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,

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[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.

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[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

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[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.

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[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]

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[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 MICHAEL J. COPPS

Re: *Bright House Networks, LLC, et al., Complainants, v. Verizon California. Inc., et al., Defendants*; Memorandum Opinion and Order (June 23, 2008)

Today's decision is good news for consumers and competition.

First, there is nothing pro-consumer about allowing Verizon to wait until a customer decides to terminate service before making the company's best and final offer. After today's ruling, Verizon will have additional incentive to focus on making sure that ***all*** its customers are happy with their service, rather than reserving the red carpet treatment for those who have already decided to leave but whose transfer has not yet been technically implemented.

Second, it is essential to understand that this entire situation arises only because incumbents control the technical process—which still takes inexplicably up to four days, in distinct contrast to the switch between wireless carriers, which takes as little as four hours—that allows a customer to retain his or her phone number while switching to a competitive carrier. The FCC plainly needs to ensure that incumbents do not tamper with this process in order to discourage customers from switching, especially by using proprietary information that competitive carriers must share in order to initiate the process. Competitive telephone service will never take hold if incumbents are permitted to manipulate the system to interfere with customers seeking better terms and conditions with another carrier.

Third, I am surprised and disappointed with the argument that the majority should not have taken efforts to limit the scope of the statutory interpretation in today's item to the facts of this case. The critical point to remember here is that today's decision is reached in the context of a proceeding that is "restricted" under the Commission's rules—meaning that the record reflects only the comments of direct parties to the case.
A "restricted" proceeding is most assuredly not the right venue for interpreting a statutory term in a way that carries broader implications for the public and other stakeholders not represented in this proceeding. Yet, in order to decide the case before us, we must resolve this term as it applies to a particular section of the Communications Act—and I recognize that this decision may indeed bear on how we resolve it in future contexts.

But make no mistake, the real villain here is ***not*** the decision we reach today. It is the fact that this basic statutory question has not yet been decided, even ***years*** after it first became clear that the Commission needed to do so in order to dispel the unwelcome uncertainty that presently infects this set of issues. This is most decidedly ***not*** a situation of my choosing. Indeed, as I have stated on countless occasions over the past few years, we should have dispelled this regulatory fog years ago—when broadband and VoIP were still emerging technologies and not the mainstream offerings they are today—through an open, general proceeding that solicits comment from the public as well as all affected industries and stakeholders.

Nevertheless, despite my strenuous and frequent objections, important statutory questions remain unanswered. So how can the Commission make the best of this sad state of affairs? One argument that has been made is that the Commission should reach a result that would allow us to avoid the question. But this would propel putting-the-cart-before-the-horse to new and unheard of levels. It would in fact require reaching an ***anti-consumer, anti-competitive*** result in the case before us—just because the Commission has been derelict in its duty (for several years now) to resolve the statutory question in a broader, more open proceeding. The American public plainly deserves better. Another path would be to decide the question for all time and in all contexts, without giving the public or other interested parties an opportunity to comment on this important issue. Though some might describe that as decisively resolving

a hard case, I see it as moving forward blindly and irresponsibly – not the way for a regulatory agency to conduct the people's business. The essence of reasoned agency decision-making is that it be based on a full record, and with wide input from the public and all affected stakeholders. I see no virtue to departing from those principles in this case.

The only responsible decision that I can see in this context is a third path—the one we take today. That is to decide the statutory question before us in this case in a way that will benefit consumers and competition—but to make our decision as narrow as possible pending a further, non-"restricted" consideration of the issues. Today's decision accomplishes this much.

Our work in this area must not end with today's decision. The next logical step is to (at long last) create clear statutory and regulatory rules of the road for VoIP and broadband technologies. And—of critical importance—we must reach this decision on the basis of broad comment from the public and all affected stakeholders and industries. I have advocated this step for years now and it gives me no pleasure to say that today's difficult situation simply underscores the cost of the Commission's unwillingness to heed this call.

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.