

## FCC RULES THAT VERIZON RETENTION MARKETING PROGRAM VIOLATES SECTION 222(b) OF THE COMMUNICATIONS ACT

*On June 23, 2008, the Federal Communications Commission (“FCC” or “Commission”) released a Memorandum Opinion and Order<sup>1</sup> (“MO&O”) in a Section 208 complaint matter initiated by Bright House Networks, Comcast Corporation, and Time Warner Cable Inc., (“Complainants”) ordering numerous Verizon incumbent local exchange carriers (“LECs”) to cease and desist from engaging in customer retention marketing activities that used unique disconnection information from carrier-initiated port requests (“Local Service Requests” or “LSRs”).*

In so doing, the Commission rejected an April 2008 *Recommended Decision* of the Enforcement Bureau’s, which recommended that the Commission deny the Complainants’ claims against Verizon under Sections 222(a) and (b) of the Communications Act.<sup>2</sup> Notably, FCC Chairman Kevin Martin was the lone dissenter.

The MO&O sheds light on retention marketing campaigns that use carrier to carrier information required to implement local number portability requests. It also illuminates factors that may be considered in any examination of other marketing campaigns. The Commission noted that it has taken under advisement

whether to initiate a generic proceeding examining retention marketing practices. The MO&O also provides some guidance, although limited to the facts of the case and Section 222(b) of the Communications Act under review, on factors that determine whether an entity that provides telecommunications solely to an affiliate is a “telecommunications carrier.”

Verizon sought a stay of the MO&O from the Commission on June 24, 2008.

### VERIZON’S RETENTION MARKETING PROGRAM

The Communications Act requires telecommunications carriers to permit customers to retain their telephone numbers if they switch their voice service to a competing carrier.<sup>3</sup> When a customer decides to switch its carrier, the new carrier issues an LSR to the existing carrier. This type of LSR acts as a cancellation request for the existing carrier and as a request to port the customer’s telephone number to a new facilities-based carrier. The LSRs under scrutiny in the MO&O included, among other information, the new carrier’s name and the exact date and time that the customer’s telephone number was to be moved to the new carrier.

Verizon’s retention marketing campaign used the information on such port-request LSRs to compile a sub-list of all LSRs it received to target customers who were switching to a competing facilities-based carrier. Verizon approached this sub-group of customers offering discounts and reward cards sent by express mail, email

<sup>1</sup> *In the Matter of Bright House Networks, LLC v. Verizon California, Inc.*, FCC Docket 08-159 (rel. June 23, 2008) (MO&O).

<sup>2</sup> *Bright House Networks, LLC v. Verizon California, Inc.*, File No. EB-08-MD-0002, 2008 WL 17220033 (Enf. Bur., rel Apr. 11, 2008).

<sup>3</sup> 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30).

and/or automated telephone messages hoping to entice them not to switch. If its marketing was successful, then Verizon would not disconnect the customer and would issue a conflict notice to prevent the number port from transferring to the new carrier. The Complainants, Voice over Internet Protocol (“VoIP”) retail service providers competing with Verizon’s voice services, challenged the marketing program by filing a Section 208 Complaint with the FCC. Two of the Complainants (Bright House and Comcast) were, and are, using the wholesale telecommunications services of affiliated carriers, while the third (Time Warner Cable), uses the wholesale offerings of a third-party carrier (Sprint).

### **THE COMMISSION APPLIED A FOUR PART TEST TO FIND THAT VERIZON’S PROGRAM VIOLATED SECTION 222(B)**

Section 222(b) prohibits marketing based on proprietary information received from another carrier. The Commission evaluated Verizon’s program under the following test: Did Verizon (a) receive or obtain proprietary information (b) from another carrier (c) for purposes of providing a telecommunications service, and did Verizon (d) fail to use the proprietary information only for such purposes or use the information for its own marketing efforts. The Commission found that each prong of the test was satisfied, and ordered Verizon to cease and desist from the unlawful marketing activities in question. The MO&O sheds light on determinations that the FCC may make in other challenges against carrier marketing activities under Section 222(b).

#### **1. The LSRs Contained Carrier Proprietary Information and Were Received from Other Carriers.**

The MO&O clarifies that the information on a carrier-initiated LSR that exceeds what Verizon requires to disconnect its customer and facilitates the customer switching to a new carrier is “proprietary information” of the new carrier. Aware that the Commission had previously found that advance notice of a carrier change that one carrier is required to submit to another carrier is “proprietary information” under Section 222(b), *Verizon argued first that the information on the*

*LSRs was Verizon’s own information* because it required the LSRs to terminate service to its current customer. *The Commission rejected this argument because the LSRs contained more than disconnect-related information; namely, 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.”*

*The Commission also rejected Verizon’s arguments that the information on the LSRs is the customer’s information and the new carrier submitted the LSR as an agent of the customer.* According to Verizon, the LSRs were not proprietary information as contemplated by Section 222(b) because the customer authorized the information’s release. Verizon attempted to rely upon earlier Commission pronouncements that information on a *customer-submitted* LSR is not proprietary information received “from another carrier.” The Commission rejected Verizon’s argument, finding that the competing carrier submitted the information, *not as an agent of the customer*, but on its own behalf: the competing carrier was “acting to promote its own commercial interests, which requires conveying its own proprietary information.” *Thus the Commission concluded that new carrier-submitted LSR information needed for the port constituted the proprietary information of the new carrier.*

Lastly, in an attempt to have the information fall outside of the scope of Section 222(b), *Verizon argued that the entities submitting their LSRs (at least the Bright House and Comcast affiliates) were not “telecommunication carriers.”* The Commission rejected Verizon’s argument, finding that the telecommunication-provider affiliates were “telecommunications carriers” under Section 222(b). The Commission noted that, although the Bright House and Comcast affiliates provided telecommunications only to their respective VoIP service provider affiliates and do not have filed tariffs or posted websites for their services, Verizon failed to demonstrate that the telecommunications providers were not “telecommunications carriers” for purposes of Section 222(b). The Commission found that Verizon failed to provide evidence that the telecommunications carriers were unwilling to provide telecommunications services to unaffiliated entities on a non-discriminatory

basis. Moreover, neither federal nor state tariffs were required for the services at issue. To the contrary, the FCC found that the Bright House and Comcast telecommunications affiliates:

- have taken public steps to serve the public as common carriers by obtaining state-commission authorizations as local exchange carriers; and
- had previously been treated by Verizon as telecommunications carriers, as demonstrated by the fact that Verizon had entered into state-approved interconnection agreements with each.

The Commission took pains to state that the finding that the Bright House and Comcast carrier affiliates were “telecommunications carriers” was not a finding that they were carriers for all purposes. Rather, the Commission concluded that they were carriers solely for the purposes of Section 222(b) and limited to the particular facts in the case. In dissent, Commissioner Martin sharply criticized the majority’s efforts to limit the scope of this interpretation in order to reach a desired outcome, and cautioned that what he viewed as an inconsistent and arbitrary approach in interpreting the term “telecommunications carriers” will likely result in undesirable consequences. Following Chairman Martin’s lead, this aspect of the *MO&O* may turn out to be as, or more important than, the specific retention marketing issue in the long run, as it may be used to undercut attempts by incumbent LECs to pigeonhole what entities qualify as “telecommunications carriers” for interconnection, access to unbundled network elements, and other purposes. On the other hand, it may subject entities to broader liabilities and obligations, should they seek to be a telecommunications carrier for limited purposes. Verizon is likely to appeal the *MO&O* on this point, among others.

## **2. Section 222(b) Encompasses LSRs Submitted for the Purpose of Providing Telecommunications Services by the Submitting Carrier.**

The plain language of Section 222(b) is ambiguous. It prohibits the use of carrier-provided proprietary information for the purposes of providing telecommunications services without clarifying whether

the services of the submitting carrier or the receiving carrier are at issue. The parties in the Complaint did not dispute that Section 222(b) applies when the *receiving carrier* provides the telecommunications service. *The MO&O interprets the statute to apply also when the proprietary information is provided for the purposes of the submitting carrier providing the telecommunications service, specifically the carriers submitting the LSRs and port requests to Verizon.*

The Commission’s rationale is based in part on 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.” Consequently, the Commission concluded that Verizon must remain neutral until the carrier change is completed, not acting as a competitor until the new carrier begins providing service to the switching customer.

The Commission also rejected Verizon’s attempt to limit Section 222(b) to apply only where the carrier receiving the information is providing a wholesale service to the submitting carrier. The Commission stated that such a limiting construction had no support in the language of the statute and would run counter to the Act’s goal of promoting local competition.

Finally, the Commission concluded that Verizon would still be subject to the marketing prohibition under Section 222(b) in the circumstances presented in the Complainant case, *even if the prohibition applied only with respect to information used by the receiving carrier to provide its own telecommunications services.* In particular, the Commission found the porting of local numbers should be treated as a telecommunications service. Although not provided for a fee and not constituting transmission, the Commission found that number portability is a necessary wholesale input to a telecommunications service. *As such, the FCC determined both that number porting is “incidental or adjunct” to Verizon’s transmission services, routing traffic to its former customer as required by its interconnection arrangements with the new carrier, and that number portability should itself be treated as a telecommunications service.*

### 3. Verizon Uses Proprietary Information in its Marketing Program.

Based on its review of Verizon's retention marketing program, the Commission concluded that Verizon used the LSR information that a customer had decided to switch carriers and the date that the switch was to take effect. Accordingly, the FCC found that Verizon improperly used the proprietary information for its own marketing purposes and that this use was not limited to the provision of the telecommunications services for which the information was provided – neither number portability nor the service provided by the new carrier to the switching customer. The Commission rejected Verizon's arguments that the marketing program only used the non-proprietary facts that its own customer had cancelled voice service and that Verizon did not use the Complainants' names in its marketing activities. The Commission noted that, to the contrary, Verizon's own description of the program relied on two pieces of information only ascertainable from the port-request LSR: 1) the fact that the disconnection is switching to a new carrier and 2) that the new carrier is facilities-based. Therefore, the Commission concluded that since Verizon could only get this information from the LSR and the information is proprietary, Verizon improperly used the proprietary information supplied by another carrier and violated Section 222(b).

The Commission ordered Verizon to cease and desist from the retention marketing efforts described in the MO&O. The Commission ruled that its decision on Section 222(b) renders moot the remaining questions of whether Verizon's marketing program violated other sections of the Act, such as Sections 222(a) and 201(b).

### 4. The Commission Rejected Verizon's Policy and Constitutional Arguments.

The Commission gave short shrift to Verizon's arguments that allowing its marketing program would promote competition and competitive parity, as well as benefit consumers.

The FCC allowed that Verizon's arguments could be raised anew in other contexts, such as a petition for forbearance or a rulemaking regarding retention marketing programs, but that in this complaint proceeding, the Commission was bound to interpret Section 222(b) and the policy concerns underlying its adoption by Congress.

Verizon also contended that prohibiting its retention program would violate the First Amendment by banning truthful commercial speech. The Commission found that its interpretation of Section 222(b) did not run afoul of the Constitution because it was narrowly tailored to promote a substantial government interest, promoting competition and protecting carriers' proprietary information.

### Verizon Immediately Petitions for a Stay

On June 24, 2008, Verizon petitioned the Commission for a stay of the MO&O pending judicial review. Verizon's petition argues that there is a likelihood of success on the merits of two arguments: first, the application of Section 222(b) is limited to where a carrier, in order to provide a wholesale service to another carrier, receives proprietary information of the other carrier from the other carrier, and that none of these preconditions were present; second, the petition contends that the MO&O infringes on its First Amendment right to "engage in truthful speech," resulting in harm to consumers and the consumer's chance to receive competitive pricing plans through Verizon offers on a parity basis with cable-based VoIP providers.

In addition, Verizon argues that it will suffer irreparable harm from enforcement of the MO&O because cable incumbents offering the same bundle of services as Verizon, including voice communications, are not prevented from engaging in marketing retention campaigns.

**Next Steps**

Verizon stated in its Petition for Stay that if the Commission does not act by June 26, 2008, it will seek a stay in federal court.

The Commission has indicated that it will take the Enforcement Bureau's recommended generic rulemaking regarding carrier retention marketing practices under advisement.

Verizon may file a petition for reconsideration within 30 days of the date of public notice of the *MO&O*, or by July 23, 2008. Verizon also has the option of seeking review of the *MO&O* in the U.S. Court of Appeals.

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