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Client Alert

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# D.C. Circuit Upholds FCC Ruling Enforcing Retention Marketing Restrictions

"Barring further action on rehearing or by the U.S. Supreme Court, the D.C. Circuit's decision should make such retention marketing a dead letter."

On February 10, 2009, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously denied a challenge to a Federal Communications Commission (FCC) order enforcing a prohibition on a telecommunications carrier's use of proprietary carrier information to conduct "retention marketing"—that is, marketing directed at customers who are about to leave for another voice service provider.[1] The decision confirms that telecommunications carriers may not misuse, for marketing purposes, competitively sensitive information that their competitors are forced to provide before commencing service to new customers.

## Background

Customers who switch from one voice provider to another often wish to keep their telephone numbers. Accordingly, the Communications Act of 1934, as amended (the Act), requires local exchange carriers to "port" the customer's telephone number to the new provider.[2] There is no mechanism in place by which a retail customer can request a number port directly. Rather, the new provider must submit a service request for "local number portability" or "LNP" to the wholesale arm of the soon-to-be-former provider (often an incumbent carrier). The carrier that receives the request must then take several actions to ensure that the telephone number is transferred to the new provider and that calls are correctly transmitted to the customer after the port has occurred.

Competitive providers, such as facilities-based cable operators offering voice over Internet Protocol (VoIP) services, rely on this LNP process to acquire customers. Cable VoIP providers often do so by contracting with a competitive telecommunications carrier, with which they may or may not be affiliated, to submit LNP requests on their behalf and provide various other wholesale inputs necessary to allow VoIP customers to make calls to and receive calls from the public switched telephone network.

The FCC has long recognized that this forced cooperation between competitors—which is unique to the local telephone business—is potentially problematic. As the agency has explained, the existing provider in this scenario has both the incentive and the ability to delay or deny carrier changes.[3] To mitigate that harm and preserve the ability of competitors to enter the market, the FCC has consistently prohibited carriers from using information gained from a competitor's carrier change request for marketing purposes.[4] (In contrast, the FCC has permitted carriers to market

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to customers who notify them directly of their intention to depart for another provider.)

## FCC Complaint Proceeding

In the summer of 2007, three cable operators—Bright House Networks, LLC (Bright House), Comcast Corporation (Comcast) and Time Warner Cable Inc. (TWC)—discovered that Verizon was cancelling unusually high numbers of LNP requests submitted to it by the cable operators' carrier partners. Verizon eventually admitted that, after learning through the submission of an LNP request that one of its customers had ordered voice service from one of the cable operators, Verizon would contact the customer while the port request was pending and offer incentives (such as gift cards and price incentives) to persuade him or her to cancel the order and remain with Verizon.

In February 2008, Bright House, Comcast and TWC filed a consolidated complaint with the FCC's Enforcement Bureau (Bureau) alleging that Verizon's retention marketing practices violated Section 222(b) of the Act. Section 222(b) provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[5] The Bureau accepted the complaint onto its Accelerated Docket. After briefing and discovery, the Bureau issued a recommendation to deny the complaint, but the full Commission conducted an independent inquiry and ultimately sided with the complainants.

The Commission found that Verizon had used proprietary carrier information contained in LNP requests to trigger retention marketing efforts in violation of Section 222(b).[6] In particular, the FCC found that the advance notice of carrier changes contained in those requests was proprietary information that had been submitted for the purpose of providing a telecommunications service. The FCC explained that its decision was "compelled by [its] prior assessment of the fundamental objective of section 222(b): to protect from anti-competitive conduct carriers [that], in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor."[7] In addition, the FCC found (reiterating findings it had made in the past) that retention marketing triggered by such information caused long-term harm to competition by undermining the competitive process, notwithstanding any short-term benefits that customers may obtain through retention offers.[8] Accordingly, the FCC granted the complaint and directed Verizon to cease and desist its retention marketing practices.

## D.C. Circuit Review

Verizon petitioned the D.C. Circuit for review, and, after rejecting Verizon's request for a stay, the court upheld the FCC's decision. The court agreed with the FCC that advance notice of a carrier change that one carrier is required to submit to another constitutes carrier proprietary information under Section 222(b). It then turned to the core dispute of how broadly the phrase "for purposes of providing any telecommunications service" in Section 222(b) should be construed. Verizon had argued that this language encompassed only information received for purposes of the *receiving* carrier's (*e.g.*, Verizon's) provision of a telecommunications service—which Verizon claimed it did not do when it received LNP requests in these circumstances. The FCC, however, maintained that the language could also be read to cover information received for purposes of *submitting* carriers' (*e.g.*, the cable operators' carrier partners) provision of a telecommunications service—as they did when they provided interconnection and other services to the cable operators.

Applying the familiar two-step framework of *Chevron U.S.A., Inc. v. NRDC*,[9] the court concluded that the FCC's reading of the statute was reasonable. In addition to finding that this outcome was supported by FCC precedent prohibiting retention marketing based on carrier change requests, the court determined that Verizon's more narrow reading of the statute would contravene the Act's fundamental objective of promoting facilities-based competition. Specifically, the court noted that Verizon's interpretation risked depriving facilities-based competitors' information of protection (since Verizon claimed it did not provide them with any telecommunications service) while affording such protection to competitors that depended on Verizon's provision of wholesale services and network elements—contrary to what the Act was intended to achieve.[10]

Although Verizon argued that the FCC had unconstitutionally infringed on Verizon's marketing speech and thus was not entitled to full *Chevron* deference, the court disagreed. As the court explained, the FCC's restriction on retention marketing, while limiting commercial speech, was "designed carefully" to achieve the "substantial interest" of ensuring that Verizon completed its neutral role of executing number ports.[11]

The court proceeded to address one final issue, relating to the regulatory status of the carrier partners on which Bright House and Comcast rely—and with which they are affiliated—to obtain LNP, interconnection and other wholesale services. Verizon had argued that neither of these affiliates was a "common carrier" because they had not demonstrated that they provide carriage for anyone other than the cable operator, which if true would mean that their services are not "telecommunications services" covered even by the FCC's broader interpretation of Section 222(b). (This issue did not arise with respect to TWC, which relied on an unaffiliated company that Verizon conceded was a common carrier.) The court, however, determined that the FCC reasonably deemed both cable affiliates to be common carriers under a longstanding test that requires a common carrier to show only that it holds itself out as undertaking to serve all similarly situated entities indifferently.[12] Accordingly, the court denied Verizon's petition for review.

## Implications of the D.C. Circuit's Retention Marketing Decision

The D.C. Circuit's decision confirms that carriers required to complete LNP requests must do so in a neutral manner and may not use information obtained through the LNP process to trigger retention marketing. Although the industry had adhered to that rule for some time prior to Verizon's commencement of its now-enjoined practices, the FCC complaint and ensuing litigation attracted substantial interest from other incumbent providers that supported Verizon before the FCC and the D.C. Circuit and signaled their desire to engage in similar marketing practices. Barring further action on rehearing or by the U.S. Supreme Court, the D.C. Circuit's decision should make such retention marketing a dead letter.

Of further benefit to competitive voice providers, the D.C. Circuit's affirmation of the common carrier status of the Bright House and Comcast affiliates—and of the test by which that status is determined—should provide important guidance concerning the critical issue of preserving interconnection rights for VoIP providers. The FCC and a number of state public utility commissions have presided over disputes about whether entities that provide wholesale services to VoIP providers are common carriers entitled to the full suite of interconnection and other rights under the Act. The FCC's Wireline Competition

Bureau sought to resolve that basic question in 2007, ruling that wholesale carriers that provide telecommunications services to a VoIP provider (whether or not they are affiliated) are entitled to interconnection.[13] Nevertheless, some incumbent carriers have refused to interconnect with such entities—often questioning their eligibility as common carriers where they serve only a VoIP provider[14]—and thereby presented a significant barrier to entry for VoIP providers in those markets. The D.C. Circuit's ruling on this issue, like the FCC ruling it affirmed, should weaken the incumbents' arguments and eventually help diminish the incidence of such interconnection disputes.

Finally, one slight negative for competitive carriers is that the D.C. Circuit's decision could diminish pressure, at least in the immediate term, on the FCC to shorten the duration of the interval within which LNP requests must be completed. Many competitive providers have sought to reduce the existing four-day interval in the interest of promoting competition,[15] and consumer groups have pointed to concerns about opportunities for carriers to engage in retention marketing during the porting interval as a key rationale for reform. Competitors have raised a host of arguments for reform that have no relation to retention marketing, but the resolution of that issue may reduce the sense of urgency for FCC action.

**Endnotes**

1 *See Verizon California, Inc. v. FCC*, No. 08-1234 (D.C. Cir. Feb. 10, 2009).

2 *See* 47 U.S.C. § 251(b)(2); *id*. § 153(30) (defining "number portability").

3 *See, e.g., 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*, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 ¶ 15 (1997).

4 *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 ¶ 106 (1998).

5 47 U.S.C. § 222(b).

6 *Bright House Networks, LLC v. Verizon California, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 (2008).

7 *Id.* ¶ 22.

8 *Id.* ¶¶ 43-44 & n.104.

9 *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

10 *See, e.g., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 577 (D.C. Cir. 2004).

11 *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

12 *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

13 *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007).

14 *See, e.g., Pleading Cycle Established for Comments on Vermont Telephone Company's Petition for Declaratory Ruling Regarding Interconnection Rights*, Public Notice, WC Docket No. 08-56 (rel. Apr. 18, 2008).

15 *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 (2007).

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