

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

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VERIZON CALIFORNIA INC., *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents.

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No. \_\_\_\_\_

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

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June 27, 2008

## **CERTIFICATE OF PARTIES**

### **1. Parties Before the Court:**

Petitioners in this case are:

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

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

### **2. Parties to the Proceeding Below**

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

## **CORPORATE DISCLOSURE STATEMENT**

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

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

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

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

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

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

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

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

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

### **STATEMENT OF THE CASE**

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

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

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

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

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

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

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

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

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<sup>2</sup> Cable providers typically submit the requests through affiliated or unaffiliated "carrier partners."

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

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

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

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

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

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<sup>3</sup> Recommended Decision, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, DA 08-860 (Enf. Bur. rel. Apr. 11, 2008) (“RD”) (Exh. 2).

requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier ‘telecommunications service.’” *Id.*

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

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

## ARGUMENT

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

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

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

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

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

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

