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Bureau Parses Section 222(b), Passes On Retention Marketing . . . For Now

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Recently, the FCC's Enforcement Bureau issued a "Recommended Decision" that the Commission deny in part a formal complaint filed by a number of cable operators against Verizon in regards to certain customer retention marketing practices Verizon has been using when it receives a notice to port a phone number to one of the cable operators.

It seems that the aggrieved cable operators provide VoIP services, in part, by relying on wholesale carriers to interconnect with incumbent LECs and provide transmission services, local number portability functions, and other functionalities. Around the summer of 2007, Verizon started a new program of so-called "retention marketing." Under this program, when Verizon is alerted that one of its customers wants to port its phone number to a competing cable company, it contacts these customers and encourages them to remain with Verizon, offering price incentives such as discounts and American Express reward cards. Verizon conducts this marketing while the number-porting request *is still pending, i.e.*, before the new provider has established service to the customer.

The understandably miffed cable operators filed a complaint, apparently claiming that Verizon's use of the porting request constituted a violation of Section 222(b) of the Communications Act, which 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." Section 222(b) thus prohibits a telecommunications carrier from using for its own marketing efforts any proprietary information that it receives from another carrier "for purposes of providing any telecommunications service...."

The problem here was that Section 222(b) does not expressly state *whose* provision of telecommunications services is protected by the marketing ban. The Bureau tentatively agreed with Verizon that Section 222(b)'s marketing ban applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service, as opposed to receiving the information for the

purposes of porting out a number, which the Bureau concludes is not itself a telecom service.

We are not overwhelmed with the primary Section 222 analysis. It seems to follow some of the words of the Act, but may well ignore the broader *purpose* of the statute. This “recommendation” also seems to conflict with other cases where the Commission has found that a telecommunications carrier violates Section 222(b) when it “exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer” (*i.e.*, when the ILEC finds out about the customer change due to the ILEC’s status as a provider of the UNE line or wholesale service that serves the end user). By contrast, the Commission has also found that “Section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier.” Rather than clearing up the operative rule, the Bureau’s decision muddles things more. Perhaps this is why they recommend that the Commission look at the whole thing in an NPRM.

As noted above, the legal status of retention marketing under Section 222 remains in limbo since the Bureau’s order here was only a “recommendation.” There will likely be an NPRM on this at some time in the future, but until this matter is definitively resolved, there may be legal risks for telecommunications carriers in doing retention marketing. Meanwhile, Verizon has filed its own “what’s good for the goose...” pleading, requesting that the Commission facilitate changes by *cable* customers from one provider to another. This has suddenly become a hot button as AT&T and Verizon begin rolling out video services competitive with cable. The Commission may wrap this issue into the NPRM.

In sum, this is a big mess that is getting bigger as the competition in “triple play” increases. We will let you know as the “clean up” proceeds.