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Verizon Retention Marketing Practices Prohibited

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In our last issue, we alerted you to the FCC's Enforcement Bureau's "Recommended Decision" concern Verizon's retention marketing practices. The Bureau recommended that the Commission deny in part a formal complaint filed by a number of cable operators against Verizon. According to the complaint, Verizon was acting improperly when it used for marketing retention purposes information obtained from notices to port a phone number to one of the cable operators. While the initial trade press seemed to characterize the Bureau's decision as a victory for Verizon, we were not so sure. After all, the reasoning in the Bureau's decision was very questionable, and the whole thing would eventually have to be considered by the Commission itself.

Predictably, in its recently released Order, the full Commission has overturned the Bureau: the Commission has prohibited Verizon's specific practices of using retention marketing to try to keep a customer after receiving a local service request (LSR) from a competitor to port that customer's number, but before service has been commenced by the competing carrier. Verizon has already sought a stay of the Order from the FCC, in anticipation of an appeal to a federal court to overturn the FCC's decision.

Unfortunately, the Commission's most recent Order does not create a clean or clear result. In our last issue, we noted that the legal status of retention marketing under Section 222 of the Communications Act is a mess, and that the Bureau's Recommended Decision was a mess on top of a mess. The most recent Order adds another level of mess on top of that, and there is a real chance that the Order could be reversed by an appellate court. Until that time, however, carriers would be wise not to engage in the retention marketing practices that Verizon performed.

The core issue in the case involves the question of whether, under Section 222, it is the carrier submitting customer change information, or the carrier receiving that information, that must perform a telecommunications service with the information. Contrary to the Bureau's conclusion, the full Commission has now decided that the Section 222 prohibition applies when proprietary information is given so that the *submitting* carrier

(here the affiliates of cable companies) can perform a telecom service. The Commission also observed that even if Section 222(b) applies only when the *receiving* carrier uses the information for the purpose of providing its own telecommunications service, then Verizon's retention marketing practices violate the statute because Verizon's provision of local number portability (LNP) constitutes a telecommunications service. While recognizing that LNP does not involve transmission and is not provided for a fee, the Commission makes an analogy to other findings that services "adjunct" to basic transmission services are themselves telecommunications services, such as collocation and billing and collection.

There were other contested issues in this case. Verizon suggested that the LSR did not contain proprietary information, but the Commission noted that it had already ruled in 1999 that carrier change information was proprietary under Section 222. The FCC also rejected Verizon's arguments that even if the information is proprietary, the information belongs to the customer and the competitor is merely acting as an agent when it conveys the information.

The Commission's logic, however, produces the following dilemma: if the customer had called Verizon directly to cancel service, Verizon *could* engage in retention marketing, but if the customer chose instead to use a competitor to relay that information, Verizon *could not* engage in retention marketing. The Commission addresses this dilemma by asserting that when the competitor sends an LSR, the competitor is not only relaying the customer's information, but also acting to promote its own commercial interests, which requires conveying its own proprietary information. That is, the customer's choice of new carrier is proprietary information owned by the competitor.

By the way, by rejecting Verizon's assertion that the competitor is merely the customer's agent, the FCC may be showing its hand as to how it may rule on another pending matter. Verizon has asked the Commission to rule that cable operators must recognize carriers as "agents" of customers when the carrier contacts the cable operator to deliver a request to cancel cable service. The Commission's treatment of the retention marketing question may signal how the Commission will ultimately resolve the related question which Verizon has posed.

One other interesting and potentially significant legal issue arises in this Order. Verizon argued that Section 222 is not triggered in this case since the complaining entities were affiliates of cable operators, and each provided (wholesale) service only to their single affiliates. Thus, according to Verizon, the complainants were not "telecommunications carriers" under Section 222 of the Act.

The issue of defining a “telecommunications carrier” or a “common carrier” has, of course, been litigated a number of times over the last 30 years in different contexts. While some decisions have found that “holding oneself out as offering service to the public” is one of the indicia of a common carrier, there have been exceptions to this. In response to Verizon’s argument, the Order observed that: the complainants have received certificates of public convenience and necessity from their respective PUCs; they have submitted certifications to the FCC that they operate as common carriers and would serve similarly situated customers; and while the complainants have no tariffs, none are needed for this service. Thus, the Commission held that the complainants *are* telecommunications carriers for the purposes of Section 222 of the Act; however, the Commission stated that it is *not* ruling on whether complainants are telecommunications carriers for any other provision of the Act. While this sort of distinction is not unheard of, it will be ripe for attack if Verizon chooses to appeal.

This Order was unusual in that the Chairman is the lone (and unusually strident) dissenter. This may raise a problem for the Commission if Verizon files an appeal: typically the Chairman controls legal strategy for the FCC in an appeal. That would be difficult here.

In sum, the Commission’s Order is less messy than the Bureau’s Decision, and unlike the Bureau’s Decision, the Order has a real legal effect. As noted above, Verizon appears to be in the process of appealing the Commission’s Order. It is hard to predict at this time what their likelihood of success will be. However, given some unclarity in the language of Section 222, a court may feel an obligation to defer to the Commission’s read of the statute. In the meantime, we will keep you up to date as this matter progresses.