Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Bright House Networks, LLC, *et al.*,	)	
	)	
Complainants,	)	**File No. EB-08-MD-002**
	)	
v.	)	
	)	
Verizon California, Inc., *et al.*,	)	
	)	
Defendants.	)	

RECOMMENDED DECISION

Adopted: April 11, 2008 **Released: April 11, 2008**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Recommended Decision, we recommend that the Commission deny in part a formal complaint[1] filed against Defendants (collectively, "Verizon") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] For the reasons explained below, we recommend that the Commission deny Complainants' claims that Verizon is violating section 222(b) of the Act (Count I) and section 222(a) of the Act (Count II) by allegedly using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process. Because it is unclear whether this conduct violates section 201(b), and for other reasons described below, we do not reach a conclusion on Complainants' claim that this same conduct constitutes a violation of section 201(b). We further recommend that the Commission promptly issue a Notice of Proposed Rulemaking ("NPRM") regarding consumer and competitive benefits of customer retention marketing practices. Given the prevalence of intermodal and bundled service competition, we recommend that such an NPRM conclude that customer retention marketing practices be made consistent across all platforms.

[1] Formal Complaint, File No. EB-08-MD-002 (filed Feb. 11, 2008) ("Complaint").

[2] 47 U.S.C. § 208. Before the Complaint was filed, the Enforcement Bureau issued a letter order, pursuant to section 1.730 of the Commission's rules, 47 C.F.R. § 1.730, granting Complainants' request to file a Complaint against Verizon alleging violations of section 222 of the Act on the Commission's Accelerated Docket. *See* Complaint at Ex. T.

II. BACKGROUND

A. The Parties

2. Defendants are telecommunications carriers that operate as incumbent local exchange carriers (incumbent "LECs") in a number of states.[3] Complainants Bright House Networks, LLC ("Bright House"), Comcast Corporation ("Comcast"), and Time Warner Cable Inc. ("Time Warner") (collectively, "Complainants") provide facilities-based voice services to retail customers using Voice over Internet Protocol ("VoIP") in competition with Verizon's local voice services.[4] Complainants provide those services by relying on wholesale carriers ("Competitive Carriers") to interconnect with incumbent LECs and to provide transmission services, local number portability ("LNP") functions, and other functionalities.[5] Bright House and Comcast rely on Competitive Carriers that are affiliated with them,[6] while Time Warner relies on Sprint Communications Company L.P. ("Sprint").[7]

B. Local Number Portability and Verizon's Retention Marketing Program

3. The Communications Act requires local exchange carriers to provide number portability, *i.e.*, the ability to retain one's phone number when switching from one telecommunications carrier to another.[8] Thus, when customers decide to switch voice service from Verizon to one of the Complainants, they may choose to retain their telephone numbers. Such a choice triggers an inter-carrier process -- developed mainly by the industry -- by which the customer's telephone number is "ported" from Verizon to the Complainant's Competitive Carrier.[9]

4. The number porting process begins with a Competitive Carrier, at the direction of a Complainant, submitting a "Local Service Request" ("LSR") to Verizon.[10] The LSR serves as both a request to cancel the customer's Verizon service and a request to port the customer's telephone number to the Competitive Carrier.[11] Under current industry practices, the LSR includes at least the following information: the identity of the submitting carrier; the date and time for the disconnection of Verizon's

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[3] *See, e.g.*, Joint Statement, File No. EB-08-MD-002 (filed Feb. 29, 2009) ("Joint Statement") at 3-4, ¶ 4. The Defendants 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.; and Verizon Washington, D.C. Inc. *See, e.g.*, *id.* at 3-5, ¶¶ 4-5.

[4] *See, e.g.*, Joint Statement at 2-3, ¶¶ 1-3; Complaint at 3-4, ¶¶ 2-3. Complainants provide their retail VoIP service through affiliated entities. *See, e.g.*, Joint Statement at 1-3, ¶¶ 1-3. For convenience, we include those affiliates when we refer to "Complainants" herein.

[5] *See, e.g.*, Joint Statement at 5, ¶ 6.

[6] *See, e.g.*, Joint Statement at 6, ¶¶ 8-9.

[7] *See, e.g.*, Joint Statement at 6, ¶ 7.

[8] *See, e.g.*, 47 U.S.C. § 251(b)(2); 47 U.S.C. § 153(30) (providing that "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another). *See also* 47 C.F.R. §§ 52.11, 52.21-26.

[9] *See, e.g.*, Complaint at 8, ¶ 10, and at Ex. E; Answer of Verizon, File No. EB-08-MD-002 (filed Feb. 21, 2008) ("Answer") at Exs. 22-27; *In the Matter of Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281, 12315-16 at ¶¶ 55-56 (1997).

[10] *See, e.g.*, Joint Statement at 9, ¶ 20. The Competitive Carrier may submit the LSR directly to Verizon, or through a contractor. *Id.*

[11] *See, e.g.*, Joint Statement at 9, ¶ 18.

retail service (and, by implication, the date and time for the initiation of Complainant's service);[12] the name and location of the retail customer whose service is being switched; the Verizon retail account number; and whether the port involves one or more numbers.[13] Thus, the LSR informs Verizon that, at a particular date and time, the customer's telephone number is to be ported to the Competitive Carrier, and the customer's existing Verizon voice service is to be disconnected, so that the Complainant served by the Competitive Carrier may initiate retail service using the customer's existing telephone number. After submitting the LSR to Verizon, the Complainant or Competitive Carrier sends the Number Portability Administration Center ("NPAC")[14] a "create message" that is used to enter a pending subscription record with the necessary routing data for the number to be ported.[15]

5. Upon receiving the LSR, Verizon confirms that it contains sufficient information to accomplish the port, and then creates an internal service order, which it transmits to the appropriate downstream Operations Support Systems.[16] The transmittal of the internal service order initiates several work steps for Verizon. First, Verizon's automated systems send the Complainant or Competitive Carrier a Local Service Request Confirmation (also known as a Firm Order Confirmation) that contains information specific to the individual request.[17] In addition, Verizon creates a disconnect order scheduling a retail service disconnect on the requested due date.[18] Moreover, Verizon establishes a "10-digit trigger" in the switch serving the retail customer to prevent the misrouting of certain calls in the short interval after the number has been ported but before disconnection of the customer's Verizon retail service has been completed.[19] Finally, Verizon confirms the pending subscription record that the new provider previously created in the NPAC database.[20] Meanwhile, the Complainant and/or Competitive Carrier perform any necessary work on their own networks to turn up the customer's service.[21]

6. Beginning around the summer of 2007, Verizon started a program of retention marketing.[22] The program's first step is generating a marketing "lead list" of Verizon customers.[23] To generate the lead list, Verizon begins with the universe of customers for whom there are retail-service disconnect orders pending, including disconnect orders that were prompted by the submission of an LSR.[24] Verizon then eliminates from the lead list all those customers who are not switching their phone service and porting their telephone numbers from Verizon to a facilities-based service provider, such as

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[12] *See, e.g.*, Joint Statement at 11, ¶ 25.

[13] *See, e.g.*, Joint Statement at 9, ¶ 20.

[14] The Number Portability Administration Center, or NPAC, was created to support the implementation of local number portability by operating regional number portability databases. *See generally* www.npac.com.

[15] *See, e.g.*, Joint Statement at 11, ¶ 28.

[16] *See, e.g.*, Joint Statement at 10, ¶ 23.

[17] *See, e.g.*, Joint Statement at 10, ¶ 24.

[18] *See, e.g.*, Joint Statement at 12, ¶ 29.

[19] *See, e.g.*, Joint Statement at 12-13, ¶¶ 30-31.

[20] *See, e.g.*, Joint Statement at 13, ¶ 32.

[21] *See, e.g.*, Joint Statement at 11-12, ¶ 28.

[22] *See, e.g.*, Joint Statement at 14-17, ¶¶ 35-45.

[23] *See, e.g.*, Joint Statement at 15, ¶¶ 37-38. .

[24] *See, e.g.*, Joint Statement at 15, ¶ 37; Supp. Joint Statement at 2, ¶ 1 (stating that Verizon's retention marketing lead list is generated from disconnect orders, including disconnect orders that are generated as a result of receiving LSRs). Of course, disconnect orders may stem from circumstances other than an LSR, such as a customer move out of the local service area. *See, e.g.*, Reply Brief of Verizon, File No. EB-08-MD-002 (filed Mar. 14, 2008) at 1.

Complainants.[25] Verizon then contacts customers on the lead list and encourages them to remain with Verizon, offering price incentives such as discounts and American Express reward cards.[26] Verizon conducts this marketing while the number-porting request is still pending, *i.e.*, before the new provider (such as Complainants) has established service to the customer.[27]

7. If Verizon is successful in persuading a customer to cancel his or her order with the new service provider, Verizon cancels the internal service order relating to the port request, and Verizon's systems issue a "jeopardy notice" to the provider that submitted the port request.[28] Verizon also puts the new provider's port request "into conflict" by sending a conflict code to NPAC. If the new service provider persuades the customer to switch after all, it can either seek resolution of the conflict code or, what is much more common, submit a new LSR.[29]

C. The Complaint

8. On February 11, 2008, Complainants filed the Complaint, alleging that the Verizon customer retention marketing practices described above violate sections 222(b), 222(a), and 201(b) of the Act.[30] Complainants seek an order enjoining Verizon from continuing such customer retention marketing.[31] Complainants also seek an award of damages, but deferred that determination to a separate, subsequent proceeding pursuant to section 1.722(d) of the Commission's rules.[32]

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[25] *See, e.g.*, Joint Statement at 15, ¶ 37. Toward that end, Verizon eliminates from the lead list customers who (i) are switching to a service provider that is either a Verizon wholesale customer (such as a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product) or a Verizon affiliate (*e.g.*, Verizon Wireless), or (ii) contacted Verizon directly to terminate service. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists. *Id.*

[26] *See, e.g.*, Joint Statement at 15-16, ¶¶ 39-40.

[27] *See, e.g.*, Joint Statement at 16, ¶ 41. Any marketing that Verizon conducts after the number port and disconnect of Verizon service have occurred is not at issue here. *See*, *e.g*., Complaint at 13-14; Answer at 1.

[28] *See, e.g.*, Joint Statement at 17, ¶ 44.

[29] *See, e.g.*, Joint Statement at 17, ¶ 45.

[30] 47 U.S.C. §§ 222(b), 222(a), 201(b).

[31] Complaint at 31, ¶ 59 (asking the Commission to "enjoin Verizon from continuing its retention marketing based on carrier change information"). The Commission generally labels as "retention marketing" any marketing to a customer by the customer's existing provider that occurs while the carrier-change/number-porting request applicable to that customer is pending; the Commission generally labels as "winback marketing" any marketing to a customer by the customer's former provider that occurs after the carrier-change/number-porting request applicable to that customer has been effectuated. *See, e.g.*, *In the Matter of Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14443-4, ¶ 65 (1999) ("*CPNI Reconsideration Order*"). The Complaint challenges only Verizon's retention marketing, and only Verizon's retention marketing that stems, directly or indirectly, from the submission of an LSR. *See, e.g.*, Complaint at 14. Thus, this Recommended Decision applies only to such retention marketing, and not to any winback marketing.

[32] Complaint at 31, ¶ 59 (citing 47 C.F.R. § 1.722(d)).

III. LEGAL ANALYSIS

A. Complainants Have Not Established a Violation of Section 222(b).

1. Verizon Does Not Receive the Proprietary Information for "Purposes of Providing Any Telecommunications Service" Within the Meaning of Section 222(b).

9. 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."[33] 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…."[34] Section 222(b) does not expressly state *whose* provision of telecommunications services is covered. Specifically, section 222(b) does not expressly state whether its marketing ban applies when the receipt of proprietary information is for purposes of (i) the *receiving* carrier (here, Verizon) "providing any telecommunications service," or (ii) the *submitting* carrier (here, a Competitive Carrier) "providing any telecommunications service," or (iii) either the submitting carrier or the receiving carrier "providing any telecommunications service." Verizon contends that the first construction is the correct one, arguing that section 222(b) applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service.[35] Complainants advocate the third construction, asserting that "section 222(b) encompasses *any* carrier-to-carrier service regardless of which carrier is providing it or to whom."[36]

10. We recommend that the Commission adopt the construction advocated by Verizon, because that construction provides the most natural, grammatically consistent reading of the statute. Under section 222(b), a carrier that receives proprietary information "for the purposes of providing any telecommunications service . . . shall use such information only for such purpose." Section 222(b) thus includes both an affirmative requirement and a prohibition. The requirement is that the carrier that receives information "*shall use* such information only *for such purpose*" – that is, "for purposes of providing any telecommunications service."[37] If the receiving carrier is not using the information that it "receives" to provide "any telecommunications service," then section 222(b)'s affirmative requirement – that the information be used only for that purpose – cannot apply. The prohibition in the last clause of section 222(b) – which provides that a receiving carrier "shall not use *such information* for its own marketing efforts,"[38] – applies only in the same circumstance in which the affirmative requirement applies – to the receiving carrier's provision of telecommunications service. Section 222(b)'s marketing ban thus applies *only* when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service.

11. In turn, we also recommend that the Commission reject Complainants' alternative interpretation of section 222(b), which makes the marketing ban applicable even where the *submitting* carrier is the one providing the telecommunications service. Complainants would have us read section

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[33] 47 U.S.C. § 222(b).

[34] 47 U.S.C. § 222(b).

[35] Answer at 39.

[36] Complainants' Reply to Defendants' Answer and Separate Statement, File No. EB-08-MD-001 (filed Feb. 29, 2008) ("Reply") at 32. *See, e.g.*, Complaint at 19-20; Reply at 33; Complainants' Supplemental Reply Brief, File No. EB-08-MD-001 (filed Mar. 14, 2008) at 2.

[37] 47 U.S.C. § 222(b) (emphases added).

[38] 47 U.S.C. § 222(b) (emphasis added).

222(b) to mean here that Verizon shall use the proprietary information it receives only "for purposes of" the Competitive Carriers' provision of service. This reading is grammatically awkward, as it suggests that Verizon would be using the information it receives "for purposes" of another carrier's service. The only textual support Complainants offer for this reading of section 222(b) is the use of the word "any" in the phrase "any telecommunications service."[39] The word, "any," however, addresses what is provided, not who provides it. Moreover, Complainants have not cited a single Commission order that has construed section 222(b) to mean that the submitting carrier is the one who is "providing any telecommunications service…." Indeed, although several prior orders apply section 222(b) to customer retention practices, none of them focuses on the specific question of statutory interpretation that concerns us here, *i.e.*, which carrier is the one "providing any telecommunications service" under section 222(b).[40] The absence of any authority with a contrary construction of section 222(b) bolsters our recommended conclusion that Complainants can establish a violation of section 222(b) only if they can show that Verizon received proprietary information for the purpose of *Verizon* providing a telecommunications service.

12. Complainants have failed to make such a showing here, because Verizon's role in the number porting process does not constitute the provision of a "telecommunications service" within the meaning of the Act. Under section 153(46) of the Act, the term "telecommunications service" means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[41] The term "telecommunications" is defined in section 153(43) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[42]

13. Applying those statutory definitions here, we recommend concluding that Verizon's role in the numbering porting process does not involve the provision of a "telecommunications service," for two distinct reasons. First, number porting does not involve *transmission* of a customer's information; rather, it entails carrier-to-carrier arrangements, coordinated with the NPAC, to ensure that future calls are properly routed to the customer's chosen carrier. In other words, although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier "telecommunications service." By contrast, Verizon plainly provides telecommunications service to another carrier when, for example, it provides another carrier with unbundled network elements (UNEs), switched access service, or resale service. Second, Verizon does not charge a fee for its role in porting numbers.[43]

14. Because Complainants cannot show that Verizon provides any "telecommunications service" when it handles their Competitive Carriers' number porting requests, they cannot show that

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[39] Complaint at 19-20; Reply at 32, 33: Complainants' Supplemental Reply Brief at 2.

[40] *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, 1572, 1575-76, ¶¶ 106-111 (1998) ("*1998 Slamming Order*"); CPNI Reconsideration Order, 14 FCC Rcd at 14449-50, ¶ 77-79; *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14918-19, ¶¶ 131-134 (2002) ("*CPNI 3rd Report & Order*"); 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, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 5099, 5109-10, ¶¶ 25-28 (2003) ("*Third Slamming Reconsideration Order*").

[41] 47 U.S.C. § 153(46).

[42] 47 U.S.C. § 153(43).

[43] Further Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 4, ¶ 3.

section 222(b) applies, or was violated here. Accordingly, we recommend that the Commission deny Complainants' claim (*i.e.*, Count I) alleging a violation of section 222(b).

2. Bright House and Comcast Cannot Prove a Violation of Section 222(b) Even Under Their Own Construction of the Statute Because They Have Not Shown That Their Affiliated Competitive Carriers are "Telecommunications Carriers" Offering "Telecommunications Service."

15. Even assuming, *arguendo*, that section 222(b) refers to the submitting carrier's provision of "telecommunications service," section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers. That is because, as explained below, we recommend that the Commission conclude that the record lacks evidence that those Competitive Carriers provide "telecommunications service" to Comcast and Bright House.

16. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[44] This definition largely, if not entirely, incorporates the common law rule that, to be a common carrier, an entity must publicly "hold itself out" as offering telecommunications indiscriminately to whatever similarly situated customers might have use for such telecommunications.[45]

17. Here, Bright House and Comcast have failed to show by a preponderance of the evidence that, with respect to the telecommunications provided to Bright House and Comcast, their affiliated Competitive Carriers publicly hold themselves out as offering those telecommunications indiscriminately to any and all potential customers. The record contains no evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever provided the telecommunications at issue to any entity other than Bright House and Comcast, respectively.[46] The record also lacks any evidence that the Competitive Carriers affiliated with Bright House and Comcast have ever offered the telecommunications at issue in any public written or oral communication, such as a tariff,[47] an advertisement, a brochure, a

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[44] 47 U.S.C. § 153(46). *See* 47 U.S.C. § 153(43) (providing that "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"); 47 U.S.C. § 153(44) (providing that "[t]he term 'telecommunications carrier' means any provider of telecommunications services").

[45] *See, e.g.*, *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (affirming the Commission's use of the "common carrier" test in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") to help ascertain the meaning of the term "telecommunications service" in 47 U.S.C. § 153(46)). *See also*, *United States Telecom Ass'n. v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002); *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

[46] We recognize that "[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." *NARUC I*, 525 F.2d at 608. Nevertheless, the fact that the Competitive Carriers have, to date, provided telecommunications only to their own affiliates has significant probative value concerning whether the Competitive Carriers have held themselves out publicly to all potential customers.

[47] There apparently is one exception: Comcast's Competitive Carrier in Pennsylvania did file a tariff regarding the telecommunications at issue here. Comcast's Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 5, 12 n.41 (and attachments referenced therein). That tariff has yet to be approved by the Pennsylvania Public Service Commission, however, and Comcast's 16 other Competitive Carriers lack such tariffs. *See, e.g.*, Comcast's Supplemental Statement at 4-5, 12 n.41, 14-15 (and attachments referenced therein). Moreover, Comcast did not submit this evidence with the Complaint or the Reply, as it should have. *See* 47 C.F.R. §§ 1.721(a)(5), 1.726(e); Complainants' Reply to Defendant's Answer and Separate Statement, File No. EB-08-MD-002 (filed Feb. 29, 2008) ("Reply"). Therefore, we accord little significance to this evidence.

hand-out, a press release, an industry trade-show presentation, or a website posting.[48] This absence of any public written or oral offering, coupled with the absence of any non-affiliated customers, is dispositive.

18. Bright House and Comcast rely heavily on the facts that their affiliated Competitive Carriers have obtained state certificates and interconnection agreements, arguing that those documents constitute public declarations of their willingness to provide telecommunications indiscriminately to all potential customers.[49] Their arguments overlook the black-letter proposition that an entity may be a common carrier (*i.e.*, an entity that provides "telecommunications service") with respect to some forms of telecommunications and not others.[50] The Competitive Carriers' state certificates and interconnection agreements may suggest that the Competitive Carriers publicly offer some forms of telecommunications, but there is no evidence in the record that those documents constitute a public offering of the particular telecommunications provided by the Competitive Carriers to Bright House and Comcast.[51]

19. Bright House and Comcast also rely heavily on declarations filed in this proceeding of corporate officers asserting that their Competitive Carriers will serve all similarly situated customers indiscriminately.[52] This *post-hoc* attempt to "self-certify" their common carrier status, though not inconsequential, falls short. Objective evidence regarding the substance of the Competitive Carrier's conduct trumps these belated characterizations of the Competitive Carriers' alleged subjective intent.[53]

20. Thus, in sum, we recommend that the Commission conclude that the record fails to demonstrate that, with respect to the telecommunications provided to Bright House and Comcast, the Competitive Carriers affiliated with Bright House and Comcast provide "telecommunications service" under the Act. Accordingly, even if section 222(b) referred to the submitting carrier's provision of telecommunications service, section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliated Competitive Carriers.

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[48] *See generally Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901, ¶ 90 (2005) (subsequent history omitted) (holding that wireline broadband providers that choose to offer the transmission component of a wireline broadband Internet access service as a telecommunications service may do so without filing tariffs setting forth the rates, terms, and conditions under which they will provide that transmission, but only if the providers "include those rates, terms, and conditions in generally available offerings posted on their websites"); *Consolidated Communications of Fort Bend Co. v. Public Utility Commission of Texas*, 497 F.Supp.2d 836, 845-46 (W.D. Tex. 2007) (holding that Sprint provided "telecommunications services," based, in part, on the fact that Sprint advertised its wholesale interconnection service "over the Internet, through product brochures, and at relevant industry trade shows").

[49] *See, e.g.*, Complaint at 2-4; Complaint at Ex. B, ¶¶ 8-27, 45-61; Complaint at Ex. E, ¶¶ 2-3; Comcast's Supplemental Statement at 2-15 (and attachments referenced therein); Bright House Network's Supplemental Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008) at 6-10 (and attachments referenced therein).

[50] *See, e.g.*, 47 U.S.C. §153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services…."); *Southwestern Bell v. FCC*, 19 F.3d at 1481.

[51] The Comcast Competitive Carriers have tariffs, but those tariffs do not pertain to the telecommunications at issue here, so they lack probative value for the same reasons applicable to the state certificates and interconnection agreements. *See, e.g.*, Comcast's Supplemental Statement at 14-15.

[52] Comcast's Supplemental Statement at 2-15 (and attachments referenced therein); Bright House Network's Supplemental Statement at 6-10 (and attachments referenced therein).

[53] *See generally Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742, 750 (5th Cir. 2003) (noting that the test for common-carrier status "is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it") (internal quotation marks omitted).

B. Verizon's Customer Retention Marketing Practices Do Not Violate Section 222(a).

21. Section 222(a) of the Act provides, in pertinent part, that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers…."[54] Complainants assert that, inherent in the "duty to protect" the confidentiality of proprietary information of other telecommunications carriers is the duty not to use the proprietary information for any purpose other than the purpose for which the proprietary information was provided. Applying that interpretation of section 222(a) to the facts here, Complainants contend that Verizon can use the information contained in the LSRs only to port the customer's number and terminate the customer's existing Verizon service, and may not use the information to market the customer. Complainants argue, therefore, that Verizon's customer retention marketing practices violate section 222(a).[55]

22. We recommend that the Commission reject Complainants' construction of section 222(a). In our view, the more natural reading of section 222(a) is that the "duty to protect" the confidentiality of proprietary information creates only a duty not to disclose the information to any third party. Section 222(a) simply does not address how a carrier may "use" such information internally. Instead, the usage issue is expressly addressed by section 222(b). Here, Complainants do not contend that Verizon discloses the information contained in the LSRs to any third party.[56] Therefore, Complainants have not shown that Verizon's customer retention marketing practices violate section 222(a). Accordingly, we recommend denial of Complainants' claim (*i.e.*, Count II) under section 222(a).

C. Complainants' Claim that Verizon's Customer Retention Marketing Practices Violate Section 201(b) of the Act, and Other Retention Marketing Issues, Should be Addressed in a Subsequent Order and NPRM.

23. Complainants also assert, in cursory fashion, that Verizon is violating section 201(b) of the Act because Verizon's customer retention marketing activities are "unjust and unreasonable."[57] The staff order accepting this case onto the Accelerated Docket, however, referred only to claims under section 222, not 201(b).[58] Thus, the section 201(b) claim was not accepted onto the Accelerated Docket, and is not subject to the 60-day deadline for staff rulings or recommendations in Accelerated Docket cases.[59] That claim will be addressed in the ordinary course in a subsequent order.

24. Although we defer addressing the claims that Verizon violated section 201(b), the Bureau recommends that the Commission examine the claims therein further, and more broadly.

25. The Commission does not yet have a consistent policy with regard to retention marketing. The Commission has, in the past, found certain retention marketing practices – but not others – to violate section 222(b). Specifically, 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

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[54] 47 U.S.C. § 222(a).

[55] *See, e.g.*, Complaint at 28-30; Reply at 42-43.

[56] We need not and do not reach whether the LSRs contain "proprietary information" within the meaning of section 222(a).

[57] Complaint at 30-31; Reply at 44-45. *See* 47 U.S.C. § 201(b) (providing that "any charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful").

[58] Complaint Ex. T; *see* Answer at 56.

[59] *See In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018 (1998).

network-facilities or service provider to market to that customer."[60] 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."[61] Thus, section 222, standing alone, may create an environment where retention marketing to customers of non-facilities-based competitive LECs is unlawful, while retention marketing to customers of facilities-based providers is permitted. While this distinction may have been of less import several years ago, the Bureau suggests that the Commission consider whether it fairly promotes facilities-based competition of the sort the Commission has repeatedly said is likely to result in the greatest consumer benefits.[62]

26. Indeed, the market for all types of communications services differs significantly from what we saw only a few years ago. Customers have more choices among competing facilities-based providers of several different types of services, and, more and more, competitors are offering bundles of services, such as voice, video, and data, and are competing for customers across different delivery platforms. And today, the rules defining fair competition are not equivalent among those services.[63]

27. For example, in the video context, customers now have opportunities to switch to new, facilities-based providers of video services, such as legacy telephone companies that are deploying fiber to the home. One such provider, Verizon, has filed a petition for declaratory ruling regarding certain cable operators' retention marketing activities.[64] In its petition, Verizon alleges that it has encountered a problem when it acquires new customers for its video service. Specifically, Verizon states that when it acquires a new video customer, it may obtain authorization from its new customer to do two things: (1) submit a cancellation request on behalf of its new customer to the customer's old video provider, and (2) return any of its customer's equipment belonging to the old video provider back to that provider.[65] Verizon alleges, however, that when it acts upon this authorization and submits a cancellation request to its customer's old provider, some old providers refuse to accept the cancellation order.[66] As a result, the customer must contact the old provider personally to cancel service. If the customer does not do this promptly or does not understand its obligation to do so, the customer may be double-billed during the period when the new service is operational yet the old service has not been canceled. Verizon asks the

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[60] *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 78.

[61] *Id.* at 14450, ¶ 79

[62] *See*, *e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 2008 WL 762860 (Mar. 21, 2008) at ¶ 2 (noting that 1996 Telecommunications Act was designed to eliminate barriers to facilities-based competition); *In the Matter of Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2535, ¶ 3 (2005) (subsequent history omitted) (adopting rules intended to "spread the benefits of facilities-based competition to all consumers"); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) (noting that facilities-based competition serves the Act's overall goals) (subsequent history omitted); *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20644-45, ¶ 5 (2001) (subsequent history omitted) (stating that "facilities-based competition, of the three methods of entry mandated by the Act, is most likely to bring consumers the benefits of competition in the long run"); *Time Warner Wholesale Services Order*, 22 FCC Rcd at 3519, ¶ 13 (referring to Commission's goal of promoting facilities-based competition).

[63] Indeed, the rules we have relied on in the transition from a monopoly environment to a competitive environment may not apply, or even make sense, in a vigorously competitive environment where the former monopoly may even find itself dealing with potential "bottlenecks" caused by incumbent providers of other services in the bundled offering.

[64] *See* Petition of Verizon for Declaratory Ruling Confirming That Incumbent Cable Companies Must Accept Subscriber Cancellation Orders When Delivered by Competitive Multichannel Video Programming Distributors as Lawful Agents (filed Mar. 26, 2008) ("Verizon Petition").

[65] *See* Verizon Petition at 5.

[66] *See id.*

Commission to declare that "it constitutes an unfair method of competition or an unfair practice for an incumbent cable operator to refuse to accept its subscriber's order to cancel video service when such a cancellation request is communicated by a competing video provider as the subscriber's lawful agent."[67] Verizon argues that the conduct it describes violates section 628(b) of the Act, which says that it is "unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing [certain] programming to subscribers or consumers."[68] Verizon further argues that this conduct thwarts the purposes of the Act as expressed in section 706's mandate to promote the deployment of advanced telecommunications capability to all Americans,[69] section 601's instruction to "promote competition in cable communications,"[70] and the overall purpose of the Act expressed in section 1.[71]

28. In the situation Verizon describes – where two facilities-based providers are competing for the same customer – it is not at all clear to the Bureau whether retention marketing should be allowed, or even encouraged as a form of vigorous competition, or whether it is a form of anticompetitive conduct. In fact, one could argue that, when the customer's existing provider offers to lower prices or expand services to prevent the customer from switching providers, the customer benefits. This type of aggressive competition to win and to keep customers can result in lower prices for consumers, the introduction of new services and technologies, and improved quality of service as carriers compete in the open marketplace.

29. Many providers – such as "legacy" telephone companies, cable operators, and new entrants – compete not on the basis of individual services, but for bundles of services, including voice, video, and broadband.[72] In fact, today's competitive marketplace for bundled services, and intermodal competition of providers of services within the bundle, may reduce the need for regulation. It is reasonable even to ask whether further deregulation would allow for even more vigorous competition for customers and bring with it the associated benefits of such competition. On the other hand, the application of our current rules, which may serve to restrict the activities of some competitors but not others, may provide an unfair advantage to the historically less regulated entity. For example, in the Verizon Petition, Verizon argues that certain cable providers refuse to respect Verizon's status and authority as the customer's agent to request disconnection of the customer's service. In contrast, the Complainants in the instant case do not dispute that Verizon, as it is required by our rules, respects the status of their affiliated competitive carriers to act as an agent for the customer in ordering the switch and associated disconnection of service. The Bureau strongly urges the Commission, in reviewing the actions at issue in the instant case, to consider whether such conduct is desirable by any provider of service; the same rules of conduct should apply in every retention marketing situation.

30. Regulatory parity, whether by increased regulation or deregulation, is important to ensure a level playing field, despite possible historic differences in regulation of the various services in the bundle. When an old provider interferes with a customer's choice to switch to a new provider of bundled services, its interference with regard to any one service affects the new provider's ability and likelihood of providing all the services in the bundle. For example, in the voice context, the Commission has noted

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[67] Verizon Petition at 11.

[68] 47 U.S.C. § 548(b).

[69] 47 U.S.C. § 157 nt.

[70] 47 U.S.C. § 521(6).

[71] 47 U.S.C. § 151.

[72] *See*, *e.g.*, *MDU Video Nonexclusivity Order* at ¶ 19; *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 08-87, Report and Order, ¶¶ 5, 9 (rel. Mar. 21, 2008) ("*MTE Nonexclusivity Order"*).

that where a service provider has no choice but to share proprietary information with a competitor, the receiving carrier gets the chance to use that proprietary information for its own marketing purposes and possibly persuade the customer not to switch providers.[73] A cable operator has a similar opportunity to retain its customer if it requires the customer to call personally to cancel service, to stay home to wait for a technician to arrive to disconnect service, or if it requires that the customer personally return equipment to the cable provider's offices. Yet these practices affect not just the customer's choice of provider for a single service. In a market of bundles they affect the customer's choice of provider for *all* services. Indeed, as most of these bundles include broadband services, practices that affect competition for any one of the included services necessarily affect competition for broadband services – an issue of special interest for the Commission.

31. It is not clear at all whether the conduct complained of in this case – or in the Verizon Petition, for that matter – warrants increased oversight and regulation. In fact, the Bureau suggests that, given the benefits of competition, the Commission should consider whether this conduct should be restricted at all. One thing, however, is very clear: this type of aggressive retention marketing behavior, whether engaged in by the incumbent telephony provider or by the cable provider, should be treated consistently.

32. The Bureau therefore recommends that the Commission adopt a Notice of Proposed Rulemaking to seek comment on whether the Commission should adopt specific rules addressing certain practices, and, if so, what form those rules should take. Whatever form they take, the Bureau recommends that they be consistent across various service platforms. The Commission has acted in several areas to create parity across different platforms,[74] and the Bureau suggests that the current market for bundled, facilities-based service requires consistency.

33. As the Commission has stated on numerous occasions, the Act provides ample authority to impose rules on providers of all types of services under the Commission's jurisdiction. The Commission has authority under section 201(b) and other sections in Title II of the Act to prohibit unjust or unreasonable practices by common carriers. The Commission also has authority under section 628(b) to prohibit certain unfair methods of competition by cable operators.[75] In addition, the Supreme Court has affirmed the Commission's authority to impose regulations on providers of information services, such as broadband Internet access services.[76] The Bureau recommends that the Commission seek comment on the strongest source of authority to use to promulgate any rules in this area.

34. The Bureau also recommends that the Commission seek comment on what services and service providers should be addressed. For example, should the Commission fashion rules for voice

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[73] *1998 Slamming Order*, 14 FCC Rcd at 1572, 1575-76, ¶¶ 106, 109; *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶ 77-8; *CPNI 3rd Report & Order*, 17 FCC Rcd at 14918-19, ¶¶ 131, 134; *Third Slamming Reconsideration Order*, 18 FCC Rcd at 5110, ¶¶ 26, 28.

[74] *Compare Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 44 (2007) ("*MDU Video Nonexclusivity Order*"), *appeal pending sub nom. National Cable & Telecommunications Ass'n v. FCC*, No. 08-1016 (D.C. Cir.) *with MTE Nonexclusivity Order*; *see also* note 78, *infra* (citing four orders establishing similar regulatory frameworks for broadband provided over four different platforms).

[75] 47 U.S.C. § 548(b).

[76] *See* 47 U.S.C. § 151; *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005) ("*Brand X*") ("Information service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications . . . .").

services,[77] broadband Internet access services,[78] any video services not addressed in section 628, or any other services subject to the Commission's jurisdiction? Finally, the Bureau recommends that the Commission seek comment on whether it should require (as it already does in the voice context) that any service provider accept a cancellation request from a customer's authorized agent.[79]

IV. CONCLUSION AND RECOMMENDATIONS

35. In sum, for all of the foregoing reasons, and pursuant to sections 4(i), 4(j), 201(b), 208, 222, and 303(r) of the Act,[80] and sections 1.720-1.736 of the Commission's rules,[81] we recommend that the Commission (i) DENY Complainants' claim (*i.e.*, Count I) that Verizon's customer retention marketing practices violate section 222(b) of the Act; and (ii) DENY Complainants' claim (*i.e.*, Count II) that Verizon's customer retention marketing practices violate section 222(a) of the Act. Complainants' claim (*i.e.*, Count III) that Verizon's customer retention marketing practices violate section 201(b) of the Act will be addressed in due course in a subsequent order. We also recommend that the Commission promptly issue a Notice of Proposed Rulemaking regarding customer retention marketing practices.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Enforcement Bureau

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[77] As to one particular type of voice service, the Commission has not determined whether interconnected VoIP is a telecommunications service or an information service, but has found in either event that it is subject to the Commission's jurisdiction under Title I or also Title II. *See, e.g.*, *Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer Proprietary Network Information and Other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 ¶ 54 (2007), *pet. for review pending sub nom. National Cable & Telecommunications Ass'n v. FCC*, No. 07-1312 (D.C. Cir.).

[78] The Commission has held that several different types of broadband Internet access services are information services, including wireline, cable modem, powerline, and wireless-based services. *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*), *aff'd*, *Time Warner Telecomms. Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Brand X*, 545 U.S. at 967; *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006). These services are subject to Commission jurisdiction. *See supra* note 76.

[79] *Cf.* 47 C.F.R. § 64.1120(a)(1) ("No submitting carrier shall submit a change on the behalf of a subscriber in the subscriber's selection of a provider of telecommunications service prior to obtaining . . . [a]uthorization from the subscriber; and . . . [v]erification of that authorization . . . ."); *id.* § 64.1130(a) ("A telecommunications carrier may use a written or electronically signed letter of agency to obtain authorization . . . ."); *see also* Verizon Petition.

[80] 47 U.S.C. §§ 154(i), 154(j), 201(b), 208, 222, and 303(r).

[81] 47 C.F.R. §§ 1.720-1.736.