

February 10, 2009

MEMORANDUM TO CLIENTS

Re: **DC Circuit Upholds FCC Order Prohibiting Verizon's Use of Local Service Requests ("LSR") Information to Win Back Local Telephone Customers.**

The United States Court of Appeals for the DC Circuit has ruled¹ that incumbent providers of telecommunications services, such as Verizon, may not use information obtained directly from their competitors through the local service request ("LSR")² or similar processes, to engage in "win-back" customer retention marketing campaigns.

On February 11, 2008, three cable companies – Bright House Networks, LLC, Comcast Corp., and Time Warner Cable, Inc. ("Cable Companies") filed a joint complaint at the FCC arguing that certain customer retention practices used by Verizon violated Section 222(b) of the Communications Act.³ Specifically, Verizon had been using information provided by the Cable Companies, as required by the LSR process, to identify Verizon customers that had agreed to switch to the Cable Companies for the provision of local telephone service. Verizon then used this information to engage in "win-back" marketing campaigns targeting those customers before the switch was completed. On June, 23, 2008, the FCC issued an Order in which it ruled in favor of the Cable Companies and ordered Verizon to cease and desist using information gleaned from the Cable Company LSRs for its "win-back" marketing programs ("*Retention Marketing Order*"). Verizon and other incumbent local exchange carriers appealed the *Retention Marketing Order* to the D.C. Circuit Court of Appeals, arguing that the FCC had misconstrued Section 222(b) and that the *Retention Marketing Order* violated Verizon's First Amendment rights.

In upholding the FCC's *Retention Marketing Order*, the DC Circuit validated the FCC's interpretation and authority to act under Section 222(b) of the Communications Act, and found that any curtailment of Verizon's First Amendment rights was a permissible restriction on

¹ *Verizon California, Inc. v. FCC*, No. 08-1234, slip opinion, -- F.3d -- (DC Cir. Feb. 10, 2008).

² A local service request ("LSR") is a form used by competitive telecommunications companies to order local service from incumbents. It is also used, among other things, to inform the incumbent to change the local service provider of one of its customers to a competitive provider.

³ Section 222(d) of the Communications Act, 47 U.S.C. § 222(d), 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.

commercial speech. In upholding the FCC's interpretation of Section 222(b), the Court rejected various textual arguments advanced by Verizon, including its argument that Section 222(b) does not apply where the carrier that receives the LSR is not the carrier that will be providing the service to the end user. The Court ruled that the FCC was reasonable in finding that Section 222(b) applies where the information is provided to the incumbent telephone company *for the competitor's provision of telecommunications services*, rather than for the incumbent to provide services. The Court similarly rejected Verizon's argument that where the entities submitting the LSRs are affiliates of the Cable Companies, they were not "telecommunications *carriers*" for purposes of Section 222(b). The Court found that the entities in question had met the prima facie case for being carriers because they: 1) self certified that they do and would continue to operate as common carriers, serving all similarly situated customers similarly, 2) had entered into publicly available interconnection agreements with the incumbents, and 3) each had obtained a state certificate of public convenience and necessity, thereby giving notice of intent to act as a common carrier.

With regard to Verizon's First Amendment argument, the Court determined that the FCC's *Retention Marketing Order* need only satisfy "intermediate" judicial scrutiny because only commercial speech was implicated. The Court found that the *Retention Marketing Order* was "designed carefully" to achieve its stated goal, namely of promoting competition by preventing Verizon from "using an opportunity fortuitously placed in its hands by a technological necessity – the fact that its technical cooperation is essential to implementation of the submitting carrier's competitive victory."

If you would like more information regarding this matter, please let us know.

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