

ORAL ARGUMENT NOT YET SCHEDULED

No. 08-1234

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

VERIZON CALIFORNIA INC., *ET AL.*,

Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,**

Respondents.

**BRIEF OF AMICUS CURIAE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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September 25, 2008

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. The National Cable & Telecommunications Association (“NCTA”) and Consumers Union are participating in this case as *amici* in support of Respondents. All other parties, intervenors, and *amici* appearing in the Court are listed in the Brief for Petitioners.

(B) Rulings Under Review. References to the ruling at issue appear in the Brief for Petitioners.

(C) Related Cases. This case has not been on review previously before this Court or any other court. Amicus is aware of no related cases.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRAP RULE 26.1

NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 90 percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1.

CERTIFICATE REGARDING SEPARATE AMICUS BRIEFS

Pursuant to Local Rule 29(d)(4), NCTA certifies that a separate *amicus* brief is necessary in this case. NCTA (in addition to Consumers Union) sought leave to participate in this proceeding as *amicus curiae* supporting the Federal Communications Commission (“FCC” or Commission”). NCTA expects that Consumers Union, an advocate for consumer rights, will address in its brief the consumer impact of the FCC’s enforcement decision and of the reversal sought by Verizon. While NCTA can provide some insight on that issue, its role as the principal trade association for the cable industry is to represent the interests of cable operators in this matter, and that necessarily is its focus in this brief. Given these divergent purposes, NCTA certifies that filing a joint *amicus* brief with Consumers Union would not be practicable and that NCTA thus must submit a separate brief.

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INTEREST OF AMICUS CURIAE

Amicus curiae the National Cable and Telecommunications Association (“NCTA”) is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90 percent of the nation’s cable television households. The cable industry is the nation’s largest broadband provider of high-speed Internet access and cable companies also provide voice service to millions of American homes and are rapidly making these services available nationwide. Resolution of the issues raised by Verizon in this appeal will affect all cable operators that compete with Verizon in the marketplace for voice services. Moreover, to the extent the Court reverses the FCC’s order in this case, other incumbent local exchange carriers (“ILECs”) in addition to Verizon can be expected to begin similar marketing retention campaigns, which would also adversely affect cable operators providing voice service as well as their customers. Accordingly, NCTA has a strong interest in this proceeding.

Source of Authority to File

On September 18, 2008, the Court granted NCTA’s Motion for Leave to Participate as Amicus Curiae in this case, filed pursuant to Fed. R. App. P. 29(a) and D.C. Cir. Rule 29(b).

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioners.

SUMMARY OF ARGUMENT

To facilitate the transfer of telephone numbers between the old and new voice carriers when a customer switches providers, Congress and the Commission established a regime in which the new provider must request that the old provider “port” the phone number to it. The Commission recognized that the old provider has an incentive to interfere with or otherwise delay the port and that it could exploit the advance notice of a carrier change that its competitor is forced to provide. Accordingly, the Commission established a mandatory porting interval and, pursuant to 47 U.S.C. § 222(b), prohibited the old provider from engaging in retention marketing efforts based on proprietary carrier information contained in the port request during the limited period of time while the port is pending.

Three NCTA member companies discovered that Verizon was violating the prohibition on retention marketing (*i.e.*, during the period in which Verizon processed a port request, and prompted by the proprietary carrier information contained therein, Verizon would offer the customer gift cards and other inducements not to switch to the new provider) and filed a complaint with the FCC. The Commission properly confirmed that carriers cannot unfairly use their access to a competitor’s highly sensitive business information to defeat competition.

Verizon’s argument that Section 222(b) does not apply in this case and that cable operators and other facilities-based voice providers are not entitled to that provision’s protections is without merit. In particular, Verizon’s claim that the FCC’s order results in disparate regulation of Verizon vis-à-vis its cable company competitors is a classic case of mixing apples and oranges. First, the three “triple play” services (voice, broadband Internet access, and video) offered by cable operators in competition with Verizon are each subject to different regulatory regimes. Only voice services are subject to Section 222(b), contained in Title II of the Communications Act; video services, in contrast, are regulated under Title VI. Second, the

provisions at issue in this case apply to all voice providers equally. Thus, all of the parties in this case are subject to exactly the same regulatory regime for each of the three triple play services. Third, as a practical matter, switching video providers raises none of the competitive issues associated with switching voice providers.

ARGUMENT

In this proceeding, Verizon seeks review of an FCC ruling, *Bright House Networks LLC, et al. v. Verizon California, et al.*, FCC 08-159, File No. EB-08-MD-002 (rel. June 23, 2008) (“*Order*”). In the *Order*, the FCC granted a complaint filed by three NCTA member companies alleging that Verizon had violated Section 222(b) of the Communications Act, 47 U.S.C. § 222(b), by unlawfully using proprietary information of other carriers that it receives in the local number porting process to engage in retention marketing to the detriment of the complainant cable companies and consumers. The Commission ordered Verizon to immediately cease and desist from such unlawful conduct. Verizon sought a stay from this Court which was denied on July 16, 2008.¹

NCTA is filing this brief to address one issue highlighted by Verizon and its supporting intervenors. These parties argue that this Court should reverse the *Order* and strike down the rules governing retention marketing for voice providers because there are no similar rules governing customer switches between video providers.² As shown below, Congress chose – for good reason – to treat voice and video services differently. Different retention marketing rules are appropriate to govern the different circumstances under which customers switch their voice and video services.

¹ See *Order*, Case No. 08-1234 (D.C. Cir. July 16, 2008).

² See, e.g., Petitioners’ Brief 19, 42-45; Intervenors US Telecom *et al.* Brief 4, 10-15.

This does not mean, however, that Verizon and its cable competitors are subject to disparate regulatory regimes. When a customer changes his or her *phone* service provider, the old provider is subject to the restrictions of Section 222(b) – whether it is Verizon or one of its cable competitors. Similarly, when a customer changes his or her *video* service provider, Section 222(b) is inapplicable – regardless of whether the provider is Verizon or one of its cable competitors. All providers are subject to the same regulatory provisions, and like services are treated alike.

I. SECTION 222(b) RECOGNIZES THE UNIQUE CIRCUMSTANCES ASSOCIATED WITH SWITCHING PROVIDERS OF TELEPHONE SERVICE.

In adopting the Telecommunications Act of 1996 (“1996 Act”), Congress amended the Communications Act of 1934 (“Act”) to facilitate competition in the marketplace for local exchange services. Congress required incumbent local exchange carriers (“ILECs”) to interconnect and exchange traffic with facilities-based competitors, 47 U.S.C. §§ 251(b)(5), 251(c)(2), and it required all local exchange carriers to provide local number portability, which allows customers to continue using their existing telephone numbers when switching from one provider to another. *Id.* § 251(b)(2).

As Congress understood when it adopted the number portability requirement, competition in the voice market is simply not possible unless consumers can quickly and easily take their telephone numbers to a new provider. *Telephone Number Portability*, Second Report and Order, 12 FCC Rcd 12281 ¶ 4 (1997) (“In practical terms, the benefits of competition will not be realized if new facilities-based entrants are unable to win customers from incumbent providers as a result of economic or operational barriers.”). Recognizing that the old provider has no incentive whatsoever to process the porting request quickly and accurately, the Commission established a regime in which the old provider must process the port within a mandatory porting

interval. *Id.* at 12313; 47 C.F.R. § 52.26. Even with these requirements, however, the number porting process places a new voice provider in an extremely vulnerable situation because it cannot begin providing service without the cooperation of the old provider. *See generally* FCC Brief 3-8. In contrast, when Verizon wins a new *video* or *broadband* customer, it is not at all dependent on such cooperation from the existing provider.

Not only is a new voice provider dependent on the old provider to transfer the customer's telephone number, it is made even more vulnerable by the significant advance notice that it must give the old provider (at least four business days) when a customer desires to keep his or her telephone number. Providing competitors with this type of advance notice is not the norm in any other marketplace, and the Commission understood that ILECs would have an incentive to deter customers from switching providers by using this advance notice for marketing purposes.

Although it acknowledged that some individual consumers might benefit from such retention marketing efforts in the short-term, it concluded that, in the long-term, “competition is harmed if *any* carrier uses carrier-to-carrier information . . . to trigger retention marketing campaigns, and [we] consequently prohibit such activities accordingly.” *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 ¶ 77 (1999) (“*CPNI Reconsideration Order*”) (emphasis in original).

In reliance on the market-opening provisions of the 1996 Act, and the Commission's rules implementing those provisions, cable operators have emerged as the primary competitors to ILECs in the marketplace for residential voice services, as Congress contemplated might occur.³

³ The legislative history of the Act shows that Congress specifically contemplated that cable operators would provide such competition. As long ago as 1996, Congress observed that “meaningful facilities-based competition is possible, given that cable services are available to

At the same time, Verizon and other ILECs recently have started to compete with cable operators and Direct Broadcast Satellite providers in the already competitive market for distribution of multichannel video programming services. Both cable operators and ILECs often offer a bundled “triple play” package of voice, video, and broadband Internet access, but they also offer these services on a standalone basis.

II. VERIZON’S “DISPARATE TREATMENT” ARGUMENT CANNOT WITHSTAND SCRUTINY.

Verizon argues that the *Order* results in a regulatory disparity between itself and cable operators with which it competes. In the context of its First Amendment claim, it argues that the FCC’s decision “creates a sharp disparity between the treatment of Verizon’s speech and equivalent speech by cable providers in an equivalent context, even though both types of providers are competing to sell the same bundles of services.” Petitioners’ Brief 19. This argument is a makeweight.

First, as a legal matter, the “parity” argument is nonsensical because the three “triple play” services offered by cable operators in competition with Verizon (voice, broadband Internet access, and video) are subject to different regulatory regimes. Only voice services are subject to Section 222(b), which is contained in Title II of the Act; video services, in contrast, are regulated under Title VI. There is no comparable provision in Title VI or elsewhere that applies to video or broadband Internet access.⁴ Given this statutory scheme, it is neither surprising nor significant

more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated.” H. Rep. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 148 (1996).

⁴ We note that, in situations where a departing voice customer also switches its broadband service, Verizon may have a retention marketing opportunity notwithstanding the prohibition in Section 222(b). If the customer calls Verizon to cancel broadband service before the phone service has been terminated, Verizon will become aware of the customer’s intentions

that the Commission reached a result that treats voice services differently than video services in the context of this complaint. *Order* ¶ 43 (JA17) (“Verizon’s ‘level playing field’ argument ignores the fact that the statute itself treats different services differently – on its face, section 222 applies to telecommunications services but not to video or other services.”).

Second, while some provisions of Title II apply only to ILECs like Verizon, the provisions at issue in this case apply to all voice providers equally. Thus, all the parties in this case are subject to exactly the same regulatory regime for each of the three triple play services. To the extent these rules have a disparate effect on Verizon relative to its cable competitors, Verizon is free to ask the Commission to make prospective changes, as Verizon in fact did during the pendency of this proceeding at the Commission.⁵ But it cannot expect the Commission to turn a blind eye to conduct that plainly violates existing rules.

Third, as a practical matter, switching video providers raises none of the competitive concerns associated with switching voice providers that the FCC sought to address in its ruling. Verizon argues that “[i]ncumbent cable providers’ video customers are required to call directly to cancel service; when they do, cable providers engage in marketing, not only of video service but of voice and data services as well. The *Order* unreasonably deprives Verizon of the opportunity to engage in marketing of the same services in directly analogous circumstances.” Petitioners’ Brief 19. But there is nothing “unreasonable” about the differences between the processes by which customers switch video providers on the one hand and voice providers on the

independent of whether the cable operator submits a port request that serves to cancel the voice service.

⁵ See Petition of Verizon for Declaratory Ruling, attached to Letter from Mark J. Montano, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC (filed Mar. 26, 2008); see also Letter from Suzanne Guyer, Senior Vice President, Verizon, to Marlene H. Dortch, FCC, File EB-08-MD-002 (filed Apr. 29, 2008).

other.⁶ Ordering service from a new provider and separately cancelling service from the old provider, without regulatory oversight, is the norm for almost all consumer services – *e.g.*, newspapers, magazines, lawn service, alarm service, and video and Internet access services. Customers do so all the time. In many, if not most, instances, when a customer decides to switch video providers, he or she contacts the new provider *first*, arranges for the switch to be made and, only after that is accomplished, he or she notifies his or her old video provider.

Moreover, the voice and video contexts hardly involve “analogous circumstances.” In contrast to video services, there is a unique obstacle that inhibits consumers’ ability to switch providers: number porting. Because many consumers want to keep their existing phone number when changing voice providers, new voice providers must depend on existing providers to transfer or “port” that telephone number before commencing service. Congress and the Commission have long understood that competition in the voice market depends on efficient number porting and that incumbent providers have no incentive to process porting requests quickly and accurately. Congress mandated that all local exchange carriers provide number portability to their competitors, and the Commission implemented regulations, including a mandatory porting interval (currently four business days),⁷ specifically designed to prevent incumbents from delaying the porting process.

⁶ The intervenors supporting Verizon make this same erroneous argument by analogy. *See* US Telecom Brief 16 (“[I]t is arbitrary and capricious for the Commission to treat differently similarly situated competitors by permitting cable operators to retain their customers based on information that is analogous to the information that LECs are prohibited from using to retain their voice customers.”).

⁷ Recognizing the harm to consumers from long delays in switching providers, the Commission has tentatively concluded that the porting interval should be reduced to 48 hours. *Local Number Portability Porting Interval and Validation Requirements*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 ¶ 60 (2007).

To prevent the unfair advantage that a porting request gives a customer's existing carrier because of advance notification of a customer switch, Congress and the Commission prohibited carriers from engaging in retention marketing based on information contained in that request during the narrow window when it is being processed.⁸ Because the new carrier must contact the old carrier anyway to request the port, it can be more efficient for the new carrier to also arrange to let the old carrier know that the customer is terminating service, rather than requiring the customer to make a separate call to the carrier. Telephone companies can market immediately and without restriction, however, when a customer informs them directly of a decision to cancel service; the restriction on retention marketing is limited to the unique situation where an existing carrier has an opportunity to exploit its receipt of proprietary information that another carrier is required to provide in connection with a porting request.

Verizon's contrived reliance on "regulatory parity" in support of its appeal in this Court and its proposal for unnecessary regulation at the FCC glosses over these obvious differences between the provisioning of competitive voice and video services. Perhaps more importantly, Verizon also ignores the fact that, as noted above, regulatory parity already exists. All voice providers are subject to the same rules, and all video providers are subject to the same rules. Regulatory parity does not, and should not, mean that rules created for voice service should blindly be extended to video service, where in the latter case there is nothing to "port."

III. VERIZON'S CLAIM THAT THE LOCAL NUMBER PORTABILITY PROCESS GIVES CABLE A "COMPETITIVE ADVANTAGE" IS ABSURD.

Verizon has portrayed cable operators as the lucky beneficiaries of the Commission's LNP rules and argues that the cancellation procedures that apply to video services are unduly cumbersome. It claims that "customers must call directly before cable providers will cancel

⁸ See, e.g., *CPNI Reconsideration Order* ¶ 77.

service [and] [w]hen customers call, cable providers engage in targeted marketing to sell not just video, but data and voice services as well – the same services that Verizon seeks to sell through its own retention marketing.” Petitioners’ Brief 43. But Verizon has it backwards. On the voice side, it is indisputable that competition could not exist without rules to facilitate the porting of a customer’s existing phone number to the new provider, whereas on the video side, over 30 million customers have signed up for service from cable’s competitors without any rules governing cancellation procedures. This simple reality demonstrates that Verizon’s “parity” argument – that voice and video present equivalent situations in need of identical rules – is without merit.

Verizon focuses on the supposed advantage a new voice provider enjoys because it often transmits a customer’s request to cancel service (while separately requesting LNP), whereas a new video provider typically has no such ability.⁹ This argument ignores the central, practical, and unavoidable feature of the LNP regime – that the new voice provider must give the old provider advance notice (currently four days) that the customer wants to change carriers, and that the old provider has the ability to interfere with or delay that change. There is no parallel notice provided in the video world because cancellation involves a single phone call from a customer, not a days-long process involving inter-carrier cooperation. And, there is no opportunity for the old provider to disrupt the change because consumers are free to start the new video service *before* they even cancel the old one, something that is not possible for voice services when a

⁹ As previously noted, this supposed competitive advantage, if it exists at all, is substantially diminished when a departing voice customer also switches its broadband service from Verizon’s high-speed Internet access service to cable modem service. Because broadband cancellation procedures are unregulated, a customer that drops Verizon’s voice and broadband services so that it can switch to voice and data services provided by a cable operator must still call Verizon and cancel broadband service even if the cable operator submits a port request that serves to cancel the voice service.

number is ported. And to the extent Verizon's complaint is that cable operators market to customers who call to cancel their service, that is no different than in the voice context, where Verizon is permitted to do likewise when customers directly contact it to cancel their service.

Verizon's suggestions that cable operators are obstructing the video switching process are also unsupported. *See* Petitioners' Brief 7-8. Verizon fails to provide a single example where it attempted to cancel video service on behalf of a customer and was refused. It fails to provide a single example where it attempted to return equipment on behalf of a customer and was refused. And it provides no evidence that it sought to negotiate arrangements with cable operators to process requests to cancel video service on behalf of a customer or that it even gave any cable operators notice that they should expect such requests.

Moreover, examples aside, it is hardly unreasonable for a video provider to question whether a telemarketer – whether from Verizon, a satellite company, or a cable provider – is accurately representing a customer's wishes. A key feature of the Commission's rules for switching voice providers is that procedures, including third-party verification, were established to ensure that the new provider was not misrepresenting the customer's wishes. Even with these procedures in place, however, mistakes happen.¹⁰ But in the absence of any standard procedures in the video context, it is unreasonable for Verizon to expect that a cable operator would process cancellation requests it receives from someone other than the customer and unreasonable to suggest some nefarious motive for the cable operator's desire to affirm the customer's actual choice.

Verizon has historically been a reluctant participant in LNP and has consistently opposed attempts to improve the process. While Verizon can process port requests in a matter of hours in

¹⁰ *Verizon; Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, Order, 23 FCC Rcd 6999 ¶ 4 (2008).

its wireless business, for wireline ports it objects to anything faster than four business days, despite the obvious consumer benefit of shorter intervals.¹¹ Verizon has been equally uncooperative in facilitating the process for requesting ports. One feature of the LNP process is that every carrier has its own form that must be used to request a port and its own standards for deciding whether the form is sufficiently accurate to process. Verizon and other ILECs opposed simplifying the request process by limiting the number of fields needed to validate port requests.¹² And when the Commission rejected these arguments and adopted simplified requirements, the ILECs asked the Commission to delay the new rules.¹³ Under these circumstances, Verizon can hardly claim that it is the victim of “regulatory disparity.”

¹¹ See, e.g., Verizon Comments, WC Docket No. 07-244, at 1 (filed Mar. 24, 2008), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869009.

¹² See Verizon’s Opposition to Petition for Declaratory Ruling on Number Portability, CC Docket No. 95-116, at 13 (filed Feb. 8, 2007) (“The Commission should not adopt any rules governing the forms used to process intermodal number portability requests.”), available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518725932.

¹³ *Local Number Portability Porting Interval and Validation Requirements*, Order, 23 FCC Rcd 2425 ¶¶ 3-4 (2008).

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Court deny the Petition for Review.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the applicable type-volume typeface and typestyle requirements of this Court. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32 (a)(7)(B) because this brief contains 3,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and D.C. Circuit Rule 32(a)(1), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 12-point Times New Roman font.

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September 25, 2008

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I hereby certify that true and correct copies of the foregoing Brief were served by hand-delivery this 25th day of September, 2008, to each of the following:

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