

## D.C. Circuit Upholds FCC Split Decision That Verizon Violated Communications Act in Its Handling of Cable TV Company "Porting" Requests

February 19, 2009

In our [July 16, 2008 Alert](#), we reported on an unusual decision by the Federal Communications Commission ("FCC") in which then-Chairman Kevin Martin dissented from his four fellow Commissioners. In a 4-1 decision, the FCC held that Verizon had violated the Communications Act by attempting to defeat cable TV companies' requests to transfer (or "port") subscribers' telephone service from Verizon to cable company affiliates. In particular, Verizon maintained a marketing practice aimed at retaining customers after the cable companies had submitted a request to Verizon that the customer's number be ported to the new provider. Verizon sought review of the decision by the U.S. Court of Appeals for the District of Columbia Circuit, but the court denied Verizon's petition in a decision handed down on February 10, 2009.

The decision is interesting on several counts, chief of which for aficionados of public utility law is likely to be the court's treatment of common carriage.

By way of background, Section 222(b) of the Communications Act 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.

Verizon argued that two of the three requesting companies, one an affiliate of Comcast and the other an affiliate of Bright House Networks, dealt only with their own cable TV affiliates. In essence, neither one was a "telecommunications carrier" because neither held itself out to serve all comers indifferently, which is the traditional test for common carriage. Chairman Martin made much of this in his dissent, contending that the majority twisted the definition of common carriage in order to find that the Comcast and Bright House affiliates were common carriers and, hence, entitled to porting rights under Section 222(b).

The court was not swayed by Verizon's argument. For the court, it was enough that the record showed the two affiliates had self-certified that they operated as common carriers; had secured interconnection agreements with Verizon (a type of agreement that Verizon was obligated to enter into only if the other party was a "telecommunications carrier"); and had obtained a state certificate of public convenience and necessity -- another mark of common carriage. The court dismissed the fact that neither had served an entity other than their respective cable TV affiliates: They were in a position to serve others and Verizon had failed to proffer any evidence suggesting that, if another entity came along needing the service provided by the affiliates, "the disputed affiliates would turn away such a customer."<sup>1</sup>

Beyond this issue, the court determined that the FCC's interpretation of Verizon's Section 222 obligations was not unreasonable. The FCC held that Section 222 was intended to protect proprietary information provided by a carrier seeking to provide telecommunications service (here the cable company affiliates) -- not just information received for purposes of the receiving carrier's provision of telecommunications service (Verizon). Among other things, the court observed that Verizon's contrary argument would produce an anomalous result inasmuch as the Act was intended to promote facilities-based competition, an objective that Verizon's argument would effectively undermine.

While the decision is interesting for its validation of facilities-based local competition, it has also introduced a new element of uncertainty in determining whether an entity is, or is not, a common carrier. What may not be surprising is language in another portion of the decision where the court confesses to finding "certain oddities in the Commission's justification of the rule."<sup>2</sup> In the end, the court endorsed the proposition that the paramount goal was to ensure "the losing carrier's neutral role in the execution process (here, execution of porting)."<sup>3</sup> On this basis, the FCC's decision was held to be neither contrary to the text of Section 222(b), nor arbitrary or capricious.

### For Further Information

If you have any questions regarding this Alert, please contact [William K. Keane](#), any of the other [members](#) of the [Telecommunications Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

### Footnotes

1. *Id.* at 10.
2. *Id.* at 7.
3. *Ibid.*