Dulaney L. O'Roark III
Vice President & General Counsel, Southeast Region
Legal Department

5055 North Point Parkway
Alpharetta, Georgia 30022

Phone 678-259-1449
Fax 678-259-1589
de.oroark@verizon.com

August 7, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 070691-TP
Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC and its affiliate, Bright House Networks, LLC

Docket No. 080036-TP
Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone

Dear Ms. Cole:

Enclosed for filing in the above-referenced matters is Verizon Florida LLC's Motion for Continuance. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1449.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

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Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Bright House Networks Information Services (Florida), LLC and its affiliate, Bright House Networks, LLC	Docket No. 070691-TP Filed: August 7, 2008
In re: Complaint and request for emergency relief against Verizon Florida LLC for anticompetitive behavior in violation of Sections 364.01(4), 364.3381, and 364.10, F.S., and for failure to facilitate transfer of customers' numbers to Comcast Phone of Florida, LLC d/b/a Comcast Digital Phone	Docket No. 080036-TP

VERIZON FLORIDA LLC'S MOTION FOR CONTINUANCE

Verizon Florida LLC ("Verizon"), pursuant to Rule 28-106.210, Florida Administrative Code, moves for a continuance of the hearing in this case currently scheduled to begin on August 28, 2008. Verizon respectfully submits that good cause exists to continue the hearing to November 2008 or as soon thereafter as possible, for the reasons explained below.

1. In these dockets and in federal proceedings, the complainants[1] and their affiliates have stopped Verizon's retention marketing program both nationally and in Florida. Complainants obtained that relief from the FCC when, by order released on June 23, 2008, the FCC directed Verizon to cease its retention marketing program.[2] *Verizon has complied with the FCC's order in all respects.* Unless the FCC Order is

[1] The complainants are Bright House Networks Information Services (Florida) LLC and Bright House Networks, LLC (collectively, "Bright House") and Comcast Phone of Florida LLC ("Comcast").
[2] Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008)("FCC Order")

overturned on appeal, the complaints in this case will be moot and, if a hearing has been held, it will have been a waste of time.

2. Verizon contested the FCC Order by filing a Petition for Review at the United States Court of Appeals for the District of Columbia Circuit on June 27, 2008.[3] The D.C. Circuit has ordered expedited consideration of Verizon's petition, with briefing to be completed by September 22.[4] Verizon filed its initial brief on August 1, arguing among other things, that it does not use other carriers' proprietary information in its retention marketing program.[5] That point is important in this case because Bright House and Comcast assert here that Verizon has violated Florida law by using their confidential information. Because the court has ordered expedited briefing, it is reasonable to expect that the court will issue its ruling on an expedited basis. In the meantime, Verizon's program will not be in effect.

3. The only other state regulatory cases concerning Verizon's retention marketing program are in New York and Pennsylvania. In New York, Verizon requested a stay in January 2008, the cable company (Cablevision) supported Verizon's request, and the commission has not taken further action in the case. In Pennsylvania, Comcast has agreed to postpone the prehearing conference until a to-be-determined date in November 2008 and the administrative law judge has approved the postponement. Florida is the only state that is moving forward with a hearing on Verizon's retention marketing program while the D.C. Circuit's decision is pending.

4. Circumstances have changed substantially since the Commission denied Verizon's earlier requests for a stay. Staff recommended against Verizon's stay

[3] A copy of the Petition for Review is attached as Exhibit MAR-10 to the Rebuttal Testimony of Michelle Robinson filed in this case.
[4] *Verizon California, Inc. v. Federal Communications Comm'n*, No. 08-1234, slip op. (D.C. Cir. July 16, 2008).
[5] See Brief for Petitioners, pp. 22-25, attached as Exhibit A.

requests because of concerns that the FCC proceeding might be protracted, that the FCC's decision might not resolve the Florida dispute or provide useful guidance, and that the complainants and their customers might be prejudiced in the interim.[6] Accordingly, the Commission denied Verizon's requests.[7] Verizon sought reconsideration, noting that the FCC's Enforcement Bureau had issued a Recommended Decision in Verizon's favor and that the FCC was scheduled to rule on the recommendation by June 23. Staff recommended against reconsideration, in significant part because the FCC had not yet made its decision,[8] and the Commission denied Verizon's motion.[9] Since Verizon filed its motions for stay and for reconsideration, the FCC Order has required Verizon to cease its retention marketing program. The concerns underlying the denial of Verizon's motions – potential delay by the FCC, uncertainty as to whether the FCC's decision would bear on the Florida case and potential prejudice to the complainants and their customers in the interim – have all been resolved.

5. Granting a continuance would serve the interests of administrative economy and conservation of resources. If the D.C. Circuit does not reverse the FCC's decision, the state case will be moot and the hearing can be canceled. If the D.C. Circuit overturns the FCC Order, it will have determined that the FCC erred in finding that Verizon's program does not comply with federal law and probably will have provided useful guidance concerning whether the information used in Verizon's retention marketing program is carrier proprietary information, an important issue in this

[6] Staff Recommendation in Docket No. 070691, pp. 11-12 (Feb. 21, 2008); Staff Recommendation in Docket No. 080036, p. 9 (March 6, 2008).
[7] Order No. PSC-08-0180-FOF-TP (March 24, 2008); Order No. PSC-08-0213-FOF-TP (April 2, 2008).
[8] Staff Recommendation in Docket Nos. 070691-TP and 080036-TP, p. 12 (June 5, 2008).
[9] Order No. PSC-08-0450-FOF-TP (July 16, 2008)

case. Moreover, if Verizon prevails at the D.C. Circuit and this case moves forward, the Commission will be poised to hear the case within a short time.

6. In accordance with Rule 28-106.204(3), counsel for Verizon has conferred with opposing counsel and has been informed that Bright House and Comcast oppose Verizon's motion.

For the foregoing reasons, Verizon respectfully requests that the hearing in this case be continued to November 2008 or as soon thereafter as possible.

Respectfully submitted on August 7, 2008.

By: s/ Dulaney L. O'Roark III
Dulaney L. O'Roark III
5055 North Point Parkway
Alpharetta, Georgia 30022
Phone: (678) 259-1449
Fax: (678) 259-1589
Email: de.oroark@verizon.com

Attorney for Verizon Florida LLC

EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 08-1234

VERIZON CALIFORNIA INC., *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR PETITIONERS

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Verizon

August 1, 2008

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), petitioner Verizon certifies as follows:

A. PARTIES AND AMICI

1. Parties Before the Court

Petitioners in this case 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.
Verizon Washington, D.C. Inc.

Respondents in this case are the Federal Communications Commission ("FCC") and the United States of America.

Intervenors for petitioners are the United States Telecom Association, Qwest Communications International Inc., and the Independent Telephone & Telecommunications Alliance. Intervenors for respondents are Comcast Corporation ("Comcast"), Bright House Networks, LLC ("Bright House"), Time Warner Cable Inc. ("Time Warner"), and the National Association of State Utility Consumer Advocates.

2. Parties to the Proceeding Below

Comcast, Bright House, and Time Warner were complainants in the agency proceeding below; petitioners were defendants.

B. RULINGS UNDER REVIEW

The ruling under review is the FCC's Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008) (JA1-26).

C. RELATED CASES

The order under review has not previously been the subject of a petition for review by this Court or any other court. Petitioners are unaware of any related cases pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Verizon submits the following corporate disclosure statement:

The Verizon telephone companies participating in this filing are regulated, wholly owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. has no parent company. No publicly held company owns 10 percent or more of Verizon Communications Inc.'s stock. Insofar as relevant to this litigation, Verizon Communications Inc.'s general nature and purpose is to provide communications services, including voice, data, and video services.

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TABLE OF AUTHORITIES

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CASES

Authorities principally relied upon are marked with an asterisk (*).

STATUTES AND REGULATIONS

ADMINISTRATIVE DECISIONS

OTHER MATERIALS

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
6/3/08 Ex Parte	Ex Parte Letter from Aaron M. Panner, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, File No. EB-08-MD-002 (June 3, 2008)
Bureau	Enforcement Bureau of the Federal Communications Commission
CALEA	Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994)
Communications Act or Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
Compl.	Complaint, File No. EB-08-MD-002 (filed Feb. 11, 2008)
Complainants' Comments	Comments Challenging Recommended Decision, File No. EB-08-MD-002 (filed Apr. 28, 2008)
CPNI	Customer Proprietary Network Information
Creager Decl.	Declaration of Chris Creager in Support of Verizon's Motion To Stay, File No. EB-08-MD-002 (filed June 23, 2008) (Exh. 2 to Verizon's Petition for Stay)
Eisenach Decl.	Declaration of Jeffrey A. Eisenach, File No. EB-08-MD-002 (filed Feb. 29, 2008)
FCC or Commission	Federal Communications Commission
Further Suppl. Joint Statement	Further Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 10, 2008)
JA	Joint Appendix
Joint Decl.	Joint Declaration of Chris Creager, Bette Smith, Patrick Stevens, and Gary Sacra, File No. EB-08-MD-002 (filed Feb. 21, 2008) (Exh. A to Verizon's Answer)
Joint Statement	Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-08-MD-002 (filed Feb. 29, 2008)

LNP	Local Number Portability
LSR	Local Service Request
Order	Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008)
Recommended Decision	Recommended Decision, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, DA 08-860 (Enf. Bur. rel. Apr. 11, 2008)
Suppl. Joint Statement	Supplemental Joint Statement, File No. EB-08-MD-002 (filed Mar. 5, 2008)
VoIP	Voice over Internet Protocol

JURISDICTION

The Federal Communications Commission ("FCC" or "Commission") issued the *Order*[1] on June 23, 2008. Verizon filed a petition for review on June 27, 2008. The Court has jurisdiction under 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344.

ISSUES PRESENTED

When a cable incumbent's video customer wishes to switch service to a new provider, the cable company refuses to accept a cancellation request from the new service provider, requiring the customer to call the cable incumbent directly. When the customer calls, the cable provider, before cancelling service, will attempt to retain the customer and to sell additional services, including voice and data services. By contrast, when one of Verizon's voice service customers signs up with a new voice service provider, the new service provider may contact Verizon to relay the customer's direction to cancel service and, if the customer chooses, to allow her or his number to be transferred ("ported") to the new service provider. In an effort to communicate with these departing customers – an opportunity the cable incumbents have as a matter of course – Verizon began to contact them, typically by overnight letter, to encourage them to call Verizon. If a customer chooses to call in response to that contact, Verizon provides information about service packages – including voice, video, and data – competitive prices, and incentives (such as gift cards) that Verizon offers.

In the *Order*, the FCC ruled that this retention marketing program constituted an unlawful use of another carrier's proprietary information for marketing purposes in violation of 47 U.S.C. § 222(b). In so doing, the FCC "allow[ed] complainants – players providing a bundle of services over one platform (cable . . .) – to gain an advantage over their competitors – players providing

[1] Memorandum Opinion and Order, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, FCC 08-159 (rel. June 23, 2008) ("*Order*") (JA1-26).

those same bundled services over a different platform (traditional telephone service)." Dissenting Statement of Chairman Kevin J. Martin at 1 ("Martin Statement") (JA20). The issues presented are:

(1) Whether the FCC's interpretation of section 222(b) to prohibit Verizon's retention marketing program is contrary to the statute and otherwise arbitrary and capricious.

(2) Whether the FCC's interpretation of section 222(b) to prohibit Verizon's retention marketing program constitutes an unconstitutional restriction on protected speech.

STATUTES AND REGULATIONS

Relevant statutes and regulations have been reproduced in the Addendum to this brief.

PRELIMINARY STATEMENT

In the *Order*, the FCC, heeding the cable incumbents' plea for "protection[]," Compl. ¶ 42 (JA51), and ignoring the unquestioned benefits to consumers, ordered a stop to Verizon's retention marketing efforts and the intense competition it has fostered, holding that Verizon's program violates section 222(b) of the Communications Act. The FCC concedes that there is nothing wrong with retention marketing. Indeed, the *Order* makes clear that Verizon's retention marketing program would be permissible so long as it targeted *all* customers who are disconnecting their services. *See Order* ¶ 15 (JA7). The foul, according to the FCC, is not marketing to disconnecting customers, but instead using the fact that a disconnecting customer has chosen to keep his or her telephone number to limit the number of customers who receive the marketing material, thereby reducing expenses and avoiding annoying customers who are no longer in the market. *See id.* ¶ 34 & n.78 (JA13).

The FCC is wrong. The sole fact that Verizon uses to reduce the universe of disconnecting customers to whom it sends marketing materials – that a customer is keeping his or her number and has directed Verizon to take steps to allow the transfer of the number associated with her or his existing retail service – is not another carrier's proprietary information but rather is *its own customer's direction* to Verizon. Moreover, section 222(b) applies only when a carrier receives information for purposes of providing wholesale *telecommunications service to another carrier* – as the FCC has previously held – not to information that a carrier receives in its retail capacity, and Verizon *provides no telecommunications service* to another carrier in this circumstance. And because Verizon's retention marketing benefits consumers and promotes competition – as the evidence before the FCC proved – the FCC's decision to ban that truthful speech based on unsubstantiated speculative claims that it is "anticompetitive" violates the First Amendment.

The *Order* prohibits practices that "promote competition and benefit consumers" and does so in a way that provides "a competitive advantage to one type of service provider platform over other platforms." Martin Statement at 2, 3 (JA21, 22). The Court should grant the petition for review and vacate the *Order*.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Carrier Proprietary Information

In the Telecommunications Act of 1996 ("1996 Act"), Congress sought to open all communications markets to competition. The ultimate objective, of course, is head-to-head competition between competing providers and competing technologies, resulting in lower prices and better products and services for consumers. But Congress also recognized that, as new providers entered the local telephone market, they would likely need, at least initially, to use incumbents' networks on a wholesale basis to provide competing retail telecommunications services. *See* 47 U.S.C. § 251(c). At the same time, Congress did not want incumbent local telephone companies to be able to use to their own advantage any proprietary information incumbent providers obtained from competing providers solely by virtue of the incumbents' new wholesale role.

To that end, Congress added section 222(b) to the Communications Act to protect against the misuse of carrier proprietary information. That provision, which governs the "[c]onfidentiality of carrier information," 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." *Id.* § 222(b). At the same time, Congress adopted other statutory provisions that protect retail customers' proprietary information. *See id.* § 222(a), (c).

2. *Local Number Portability*

When a retail voice customer decides to switch voice service from one provider to another, the customer's voice service with the old provider must be cancelled. The customer may also choose at that time to have his or her telephone number ported to a new provider. Under current industry-process flows, a customer will typically instruct a new provider to make the cancellation and port request on the customer's behalf. *See* Joint Statement ¶ 18 (JA225-26). When a new provider obtains a customer's authorization to do so, it (or its affiliate) submits a "local service request," or "LSR," to Verizon that conveys the customer's direction to cancel her or his retail service and to allow the customer's number to be ported.[2] "The LSR contains a field

[2] Cable providers typically submit the requests through affiliated or unaffiliated "carrier partners." Here, the "Competitive Carriers" for Comcast and Bright House are affiliates of

for Agency Authorization Status, which must contain a 'Y' to indicate that the new provider has authorization to act on the customer's behalf. That authorization allows the new provider to inform the customer's current provider (*i.e.*, Verizon) of the intended number port and retail service cancellation." Joint Statement ¶ 21 (JA226-27).

Verizon's role in the LNP process reflects its obligation to its retail customer to ensure that his or her number is ported smoothly and that the customer's calls are properly routed during the brief period between the initiation of the new provider's service and the cancellation of Verizon's service. *See id.* ¶¶ 30-32 (JA229-31). Verizon does not charge for this. And Verizon's performance in the LNP process is exemplary; more than 99 percent of ports are on time. The retention marketing program does not affect that performance: Verizon does not delay the porting of numbers while it attempts to retain customers by providing them with information about Verizon's prices and services. *See* Suppl. Joint Statement ¶ 2 (JA272).

B. Transformation of the Communications Marketplace

In the last several years, there has been rapid growth in facilities-based competition. Indeed, incumbent cable operators are leading competitors in the mass market for retail voice services today. *See* Creager Decl. ¶ 4 (JA524). Time Warner, for example, announced that it had succeeded in adding 22,000 voice subscribers each week in the fourth quarter of 2007. Comcast announced that it added approximately 40,000 voice subscribers each week in the third quarter of 2007. *See* Joint Statement ¶ 13 (JA224). Cable operators also are the largest providers of high-speed Internet access services in the nation. And cable operators are the largest provider of video services, with a de facto monopoly in many parts of the country. *See id.* According to the most recent data reported by the FCC, the number of access lines served by

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Comcast and Bright House; the Competitive Carrier for Time Warner is Sprint Communications Company L.P. *See Order* ¶ 3 (JA2).

cable companies grew by more than 50 percent, from 5.1 million lines at of the end of 2005, to 7.7 million lines as of the end of June 2007.[3] Industry reports show continuing dramatic increases since, estimating the number of residential voice subscribers served by cable companies at more than 15 million at the end of the first quarter of 2008 – three times the figure at the end of 2005.[4] In addition to competition from cable companies, Verizon is now competing with other wireline carriers, wireless carriers, and Voice-over-Internet-Protocol ("VoIP") providers. *See* Joint Statement ¶ 10 (JA224).

The ability to compete in the new communications marketplace increasingly depends on the ability to offer "bundles" of voice, high-speed Internet, and video services. *See* Creager Decl. ¶ 5 (JA525). To that end, Verizon is investing billions of dollars to deploy a fiber-to-the-premises network – known as "FiOS" – in thousands of communities in 16 states around the country, reaching 18 million customers' premises by the end of 2010. *See* Verizon Motion for Stay at 3, No. 08-1234 (filed June 27, 2008); *id.* Exh. 3, ¶ 5. As of year-end 2007, FiOS Internet was deployed to more than 9.3 million homes and businesses in more than 2,000 communities across parts of 16 states, and was being actively marketed to 7.5 million of those premises. As of January 2008, more than 1 million customers were buying FiOS video service from Verizon. *See* Joint Statement ¶ 11 (JA224). In markets where Verizon has not yet built out its FiOS network, Verizon competes by offering its customers bundles consisting of voice, satellite television, and Internet broadband access.

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[3] Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2007*, Table 5 (Mar. 2008) ("*FCC Local Competition Report*").

[4] *See* Craig Moffett et al., Bernstein Research, *U.S. Telecom, Cable & Satellite: A Subscriber Scorecard . . . Who's Winning the Wars?* at 15, Exh. 23 (May 27, 2008).

In this new competitive marketplace, all providers – Verizon and its cable competitors included – have intensified their marketing efforts in general and their retention marketing efforts in particular. Bundle-against-bundle competition means that when Verizon loses a voice customer, it is also more difficult to win and retain subscribers to other services that Verizon offers – such as high-speed Internet access and video services. (The same point holds true for cable providers losing a video customer.) Moreover, because FiOS is relatively new and still being deployed, many customers remain unaware that Verizon is able to offer not just voice and data services, but video services as well. Consumers who switch their voice service to competing cable providers – to take advantage of the convenience of one-stop shopping – may not know that they could obtain directly competitive services from Verizon. *See* Creager Decl. ¶ 12 (JA527).

C. Retention Marketing

As a result of the advent of robust facilities-based competition in the communications marketplace, all providers have been compelled to increase their marketing efforts in order to win new customers and to retain the customers they have. All competitors, including cable incumbents, have intensified their retention marketing efforts in response to competitive pressures. *See* 6/3/08 Ex Parte (JA493-95) (describing Comcast's "win-at-any-cost" retention marketing).

Cable incumbents have benefitted from a stark regulatory disparity with respect to retention marketing. When one of cable's video customers decides to switch to a new service provider (Verizon, for example), the cable incumbents refuse to accept cancellation requests from the new provider, forcing cancelling customers to call the cable provider directly. *See* Creager Decl. ¶ 22 (JA530). Before cancelling the customer's service, however, the video providers engage in marketing in an attempt to retain the video customer and to "up-sell" additional services like voice and Internet service. *See* 6/3/08 Ex Parte (JA493-95). By contrast, when Verizon's voice customer chooses to switch to a new provider (cable incumbents, for example), the new provider may submit a cancellation request on the customer's behalf. Verizon usually has no chance to speak with a customer before he or she cancels voice service to switch to another provider.

Verizon developed the retention marketing program at issue here as one part of its efforts to compete against rival providers of voice and Internet access services, particularly cable companies, and to help offset the regulatory disparity favoring cable companies. *See* Creager Decl. ¶ 7 (JA525). Verizon designed its retention marketing program to provide timely, accurate information about Verizon's services to customers who decide to cancel their Verizon voice service but to port their telephone number to a competing provider.

Verizon assembles a list of customers who have cancelled their retail service and uses it to generate a "lead list" of candidates. Verizon eliminates from the list customers who are remaining on Verizon's network – as customers of one of Verizon's wholesale service customers, for example – and customers who have called Verizon directly to cancel service (because it already had a chance to retain those customers). *See* Joint Statement ¶ 37 (JA232). Verizon's marketing is designed to target exclusively customers who still want to purchase voice service at the same telephone number, which avoids marketing to customers who are moving to a different area, or who are cancelling voice service entirely. The two facts conveyed by the LSR that Verizon uses for retention marketing are (1) that a customer has directed Verizon to cancel his or her Verizon voice service and (2) that the customer has directed Verizon to take steps to port out the telephone number associated with that retail service. Verizon uses that information to reduce the universe of customers to whom it sends marketing materials and does not use any other information provided with the LSR to direct its marketing efforts.

Verizon then typically sends overnight letters to each of the customers on the narrowed lead list and invites them to call Verizon. Many of those customers do not call, and their cancellation request is unaffected. If the customer does call, Verizon lets the customer know that Verizon wants to keep her or his business. If the customer rejects the offer, again, nothing happens and the cancellation proceeds as scheduled. If the customer accepts Verizon's offer, then Verizon can stop the cancellation request. In those cases, customers avoid the inconvenience of switching service (which often entails a time-consuming installation) and end up with the services they want at the price they prefer. Cable providers can and do keep trying to win the customers with more attractive offers. *See* Creager Decl. ¶ 14 (JA528).

Verizon's retention marketing program has been successful because it benefits consumers. *See* Eisenach Decl. ¶ 18 (JA256). First, Verizon provides consumers with valuable and timely information about Verizon's services – in particular, that Verizon offers a bundle of voice, Internet, and video services just like cable companies – that some consumers may not be aware of because of the recent nature of Verizon's FiOS roll-out. *See* Creager Decl. ¶ 12 (JA527). Second, Verizon's retention marketing provides consumers substantial benefits in the form of monetary incentives to remain with Verizon, which translates directly into consumer welfare gains. *See id.* ¶ 13 (JA527-28). Expert testimony below establishes that Verizon's retention marketing programming could produce consumer welfare gains of up to $75 to $79 million over a five-year period. *See* Eisenach Decl. ¶ 2 (JA249).

D. Proceedings Before the FCC

1. On February 11, 2008, three incumbent cable providers – Comcast, Time Warner, and Bright House – filed a complaint with the FCC pursuant to 47 U.S.C. § 208, claiming that Verizon's retention marketing program violates, as relevant here, 47 U.S.C. § 222(b). *See* JA27-63. The complainant cable incumbents are facilities-based providers that offer voice service, cable modem Internet access service, and video service in direct competition with Verizon. *See* Joint Statement ¶¶ 1-3 (JA219-20); Compl. ¶¶ 1-3 (JA31-33). The cable operators conceded that they do not purchase any wholesale telecommunications services from Verizon. Nevertheless, they argued that section 222(b) applies to Verizon's retention marketing program because Verizon uses the fact that a customer is porting out his or her number in that effort. *See* Compl. at ii (JA28).

The FCC adjudicated the complaint on an expedited basis. Verizon answered the complaint on February 21, 2008, *see* JA64-125, and the FCC's Enforcement Bureau issued a Recommended Decision[5] on April 11, 2008, rejecting the cable companies' claim under section 222(b). Section 222(b) provides that a telecommunications carrier may not use for its own marketing purposes "proprietary information [that it receives] from another carrier *for purposes of providing any telecommunications service*." 47 U.S.C. § 222(b) (emphasis added). The Bureau held that this provision applies by its terms only when the information provided is to be used by the *receiving* carrier to provide a telecommunications service to the submitting carrier. *See* Recommended Decision ¶ 11 (JA359-60). That interpretation, the Bureau found, "provides the most natural, grammatically consistent reading of the statute." *Id.* ¶ 10 (JA359). In support

[5] Recommended Decision, *Bright House Networks, LLC v. Verizon California Inc.*, File No. EB-08-MD-002, DA 08-860 (Enf. Bur. rel. Apr. 11, 2008) ("Recommended Decision") (JA355-67).

of that reading, moreover, the Bureau found that the cable companies did not "cite[] 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.'" *Id.* ¶ 11 (JA360).

The Bureau further held that section 222(b) does not apply in any event because Verizon's role in the LNP process is not a "telecommunications service" – a defined statutory term, *see* 47 U.S.C. § 153(46) – because it does not involve the transmission of a customer's information and is not provided for a fee. *See* Recommended Decision ¶ 13 (JA360). "In other words, although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier 'telecommunications service.'" *Id.*

Finally, the Bureau held that, because Bright House and Comcast had failed to prove that their affiliates are common carriers subject to regulation under Title II, any information they provide to Verizon is not information "from another carrier" within the meaning of section 222(b). *See id.* ¶¶ 15-20 (JA361-62).

The cable companies filed comments challenging the Recommended Decision. Verizon filed comments in support of the Recommended Decision. *See* JA368-492.

2. In a decision released on June 23, 2008, a majority of the FCC – over the Chairman's dissent – rejected the Bureau's Recommended Decision and ordered Verizon to cease and desist its retention marketing. The FCC concluded that LSRs contain proprietary information from another carrier because they provide "advance notice" to Verizon of a transfer of a particular customer to another carrier on a particular date. *See Order* ¶ 12 (JA6). The FCC rejected Verizon's argument that the information at issue is simply the customer's direction to Verizon to cancel service and port a number rather than the submitting carrier's proprietary information. The FCC acknowledged "that a Verizon retail customer has every right to contact

Verizon directly to state that she intends to switch to a Complainant's voice service" and that, if the customer does so, "the carrier-change information conveyed by the customer to Verizon is not 'proprietary'" and "may be used to engage in retention marketing." *Id.* ¶ 16 (JA7). Nevertheless, the FCC held that, "[i]n the absence of such a direct customer contact," the identical information is the carrier's proprietary information. *Id.*

The FCC also held that section 222(b) applies to Verizon's retention marketing even if Verizon does not receive carrier information to provide any wholesale telecommunications service to the cable companies or to their affiliates. The FCC rejected the view that section 222(b) is limited to a carrier's receipt of information in its capacity as a wholesale telecommunications service provider, holding instead that section 222(b) applies as long as *some* carrier is providing *some* telecommunications service. *See id.* ¶ 20 (JA9). The FCC concluded – though it cited no record evidence and failed to address contrary record evidence – that Verizon's "limiting construction" of section 222(b) would undermine the purpose of the 1996 Act to promote "facilities-based local competition." *Id.* ¶ 27 (JA11).

Finally, the FCC rejected Verizon's arguments that a ban on Verizon's retention marketing would violate the First Amendment, reasoning that the FCC "previously found that [the First Amendment was not infringed] when it interpreted section 222(b) as prohibiting retention marketing based on the use of carrier change information." *Id.* ¶ 44 (JA18).

4. Chairman Martin dissented. He criticized the FCC majority for "allow[ing] complainants – players providing a bundle of services over one platform . . . – to gain an advantage over their competitors – players providing those same bundled services over a different platform." Martin Statement at 1 (JA20). The effect of the *Order* is to "prohibit some companies from marketing to retain their customers, even though the marketing practices prohibited today are similar to the aggressive marketing techniques engaged in by the complainants themselves." *Id.* Noting that "[c]ustomer retention marketing is a form of aggressive competition that has the potential to benefit consumers through lower prices and expanded service offerings," Chairman Martin noted that he was "disappointed that the Commission would prohibit these practices, which promote competition and benefit consumers and particularly disappointed that they would . . . prohibit practices from only one class of companies." *Id.* at 1-2 (JA20-21).

5. Verizon sought a stay of the *Order* from the FCC on the day of its release, *see* JA496-521, asking that the FCC rule by June 26, 2008; the FCC has yet to act on that request. Verizon filed a petition for review and motion for stay on June 27 with this Court. A divided motions panel of the Court denied Verizon's motion for a stay on July 16 but *sua sponte* ordered an expedited briefing schedule.[6]

SUMMARY OF ARGUMENT

I. The text of the statute, its context, and its purposes make clear that section 222(b) applies only where a carrier receives another carrier's proprietary information for the purpose of providing a wholesale telecommunications service to that carrier. In holding that section 222(b) applies to Verizon's retention marketing, the FCC misconstrued and misapplied the statute and ignored the evidence before it.

A. Verizon does not use another carrier's proprietary information in its marketing, and for that reason alone section 222(b) does not apply. The *Order* acknowledges that section 222(b) applies only if Verizon uses another carrier's proprietary information for its own marketing. *See Order* ¶¶ 13, 17, 34, 35 (JA6, 8, 13). Here, the only information that Verizon

[6] *See* Order, No. 08-1234 (July 16, 2008). Judge Ginsburg would have granted Verizon's motion for stay.

uses in its retention marketing is the fact that the customer has directed Verizon to cancel its retail service and directed Verizon to take steps to port out her or his telephone number associated with that retail service. That is not "proprietary information" of "another carrier"; on the contrary, it is direction that Verizon receives from its retail customer, and that fact does not change regardless of whether the customer communicates the information directly or authorizes a third party to relay the request as the customer's agent.

The *Order* does not provide any valid justification for its contrary conclusion. The FCC does not claim that the fact that the customer is cancelling Verizon's retail service and keeping her or his existing number is itself another carrier's proprietary information. Nor could it, because the FCC allows a carrier to use that information in its marketing if it acquires the information directly from the customer. Instead, the *Order* holds that what is proprietary to the submitting carrier is that it has "convinced a particular Verizon customer *to switch to the competing carrier's voice service on a particular date*." *Id.* ¶ 15 (JA7) (emphasis added). But Verizon does not use the *identity* of the new carrier (or the date it will initiate service, for that matter) either to narrow its lead list or to develop its marketing pitch. *See* Joint Statement ¶ 38 (JA232); *see also* Joint Decl. ¶ 50 (JA147). The information it does use is limited to the customer's directions to Verizon as that customer's existing *retail* provider – information that Verizon needs to perform in its capacity as a retail provider. That a customer has chosen to convey his or her cancellation and port request to Verizon through an agent rather than calling Verizon directly does not alter the nature of the information itself.

B. The language, structure, and purpose of section 222(b) make clear that it applies when a telecommunications carrier receives information in its wholesale capacity for purposes of providing a *telecommunications service to the submitting carrier*. The FCC's contrary conclusions are inconsistent with the statute and arbitrary and capricious.

Congress enacted section 222(b) to protect the "[c]onfidentiality of carrier information" out of a concern that incumbent local exchange carriers would use their status as wholesale providers – under wholesale obligations also created by the 1996 Act – to market to its wholesale customers' customers. That purpose is simply not implicated where (as here) a receiving carrier is not acting in a wholesale role, and instead uses information gained in a *retail* capacity to engage in *retail* marketing. The text and grammatical structure of section 222(b) likewise indicate that section 222(b) applies only when Verizon is providing wholesale telecommunications services to another carrier, as the Enforcement Bureau correctly concluded. Section 222(b) applies only when a carrier receives information for the purpose of "providing any telecommunications service" to the carrier submitting the information. 47 U.S.C. § 222(b). If the receiving carrier does not "receive[] or obtain[]" the information in order to provide a wholesale "telecommunications service" to the submitting carrier, then section 222(b) cannot apply. *Id.*

The FCC's alternative holding that Verizon's role in the LNP process constitutes the provision of a telecommunications service is both incorrect and insufficient to support its conclusion that section 222(b) applies. As the Enforcement Bureau held, Verizon's role in the LNP process is *not* a "telecommunications service" at all – it does not involve any transmission of information of the user's choosing (as required by the definition of "telecommunications," *see* 47 U.S.C. § 153(43)), and Verizon does not receive any fee for its role (as required by the definition of "telecommunications service," *see id.* § 153(46)). The FCC's holding that LNP is "incidental or adjunct to" a telecommunications service, *Order* ¶ 31 (JA12), is unavailing because Verizon provides no telecommunications (or other) service *to the submitting carrier* to which LNP could be "incidental or adjunct." Rather, porting a number is, if anything, "adjunct" or incidental to Verizon's *retail* service (as complainants effectively conceded below).

The FCC's contrary reading of section 222(b) is unlawful too because it represents an abrupt, unexplained, and unlawful departure from its prior orders. Prior to the *Order*, the FCC had held that section 222(b) applies to information that a carrier obtains "through the provision of carrier-to-carrier service" – that is, where the carrier relies on information that it possesses "by virtue of its status as the underlying network-facilities or service provider." *CPNI Reconsideration Order*, 14 FCC Rcd 14409, ¶¶ 77, 78 (1999). The FCC specifically held that it does not apply to information obtained by a "carrier's retail operations." *2002 CPNI Order*, 17 FCC Rcd 14860, ¶ 131 (2002). Furthermore, the FCC's claim that the policy underlying those prior decisions – the protection of nascent competition – supports the *Order* is contrary to the record. The FCC has acknowledged that retention marketing benefits consumers, but the *Order* speculates that allowing Verizon to engage in retention marketing would threaten competition in the "long term." *Order* ¶ 43 n.104 (JA17). But it had no support for that claim other than decade-old statements, addressing entirely different facts. Intermodal competition between facilities-based competitors was exactly what the 1996 Act was meant to promote. Now that it is emerging, the FCC is snuffing out the marketing speech that will give consumers full information about their choices in that competitive market. The undisputed evidence before the FCC in this proceeding established that Verizon's retention marketing is pro-competitive; the FCC unreasonably failed to address this evidence in adopting an unprecedented extension of section 222(b).

C. In the case of Comcast and Bright House, the FCC's decision is unlawful for the additional reason that complainants failed to prove that the entities submitting the information at issue are "telecommunications carriers." As this Court has held, "telecommunications service" includes only those services that are offered on a common-carrier basis. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). To satisfy the definition of "common carrier," the affiliates must " 'hold [themselves] out' " as offering service indiscriminately to the public. But the affiliated carriers have never provided the services at issue here to any customer other than their affiliates; indeed, the affiliates have never made a public offer to provide the services to anyone. And the FCC's decision that the affiliates are "carriers for purposes of 222(b) . . . but not for other purposes . . . is the very height of arbitrary and capricious conduct." Martin Statement at 2 (JA21).

II. The FCC's newfound interpretation of the statute also raises significant constitutional issues and would violate the First Amendment. The *Order* impinges upon critical First Amendment rights: (i) Verizon's right to select its audience; (ii) Verizon's right to tailor the content of its speech to that audience; and (iii) the rights of willing listeners to receive and act upon truthful speech. Before the government can restrict truthful commercial speech, it must demonstrate that the restriction would serve a "substantial interest," is "in proportion to that interest," and is "designed carefully to achieve" that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The *Order*'s newfound interpretation of section 222(b) cannot withstand scrutiny.

A. There is no governmental interest advanced by silencing Verizon's speech. Because the congressional purpose in enacting section 222(b) was to ensure that a carrier that obtains proprietary information of another carrier in its new role as a wholesale telecommunications provider does not use that information to its advantage, imposing a restraint on marketing in this circumstance, where Verizon uses no other carrier's proprietary information and is not providing any telecommunications service to the submitting carrier, does not advance the statute's underlying governmental interest. Moreover, the FCC's attempt to invent a different, more general governmental interest – promoting competition generally – is unavailing as well. There is no evidence to support the FCC's assertion that its reading of section 222(b) serves that asserted interest either. To the contrary, the only evidence before the FCC was that Verizon's retention marketing benefits consumers without any threat of long-term competitive harm, and the FCC has admitted that consumers do receive real benefits in the here and now. The FCC pointed to no evidence of any long-term threat to the competitive process from Verizon's retention marketing. In restricting Verizon's speech, the FCC could not properly ignore this evidence in favor of decade-old pronouncements made in a different competitive context.

B. The *Order* imposes irrational restrictions on Verizon's speech, rendering it unlawful. The *Order* restricts retention marketing based on information that a carrier receives from a customer indirectly but not when the same information is received directly. That distinction between permissible and impermissible speech has no relationship to the supposed interests served by the ban. In addition, the *Order* is clear that Verizon's retention marketing would be permissible if it targeted *all* customers who are disconnecting their service: the problem, according to the FCC, is that Verizon uses the fact that a disconnecting customer has chosen to keep his or her telephone number to limit the number of customers who receive marketing material, thereby reducing expenses and avoiding annoying customers who are no longer in the market. Those distinctions between permitted and prohibited speech are irrational, establishing that the *Order* is not narrowly tailored under *Central Hudson.*

C. The *Order* is also unlawful because it 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. Incumbent 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.

STANDING

The *Order* requires Verizon "immediately to cease and desist from" retention marketing. *Order* ¶ 1 (JA1). By shutting down Verizon's retention marketing program, the *Order* has directly caused Verizon substantial economic and First Amendment injuries, *see* Creager Decl. ¶¶ 15-19 (JA528-30), that would be redressed by granting Verizon's petition for review. Verizon therefore has standing to challenge the *Order*. *See Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007).

STANDARD OF REVIEW

The *Order* must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)-(B). Although this Court ordinarily reviews the FCC's interpretations of the Communications Act with deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court does not "accord [an agency] deference when its regulations create serious constitutional difficulties." *AFL-CIO v.*

FEC, 333 F.3d 168, 175 (D.C. Cir. 2003); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995); *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). Because the *Order* silences Verizon's truthful commercial speech, thereby implicating serious First Amendment concerns, the *Order* deserves no deference. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions.").

Even under *Chevron*, this Court "employ[s] the traditional tools of statutory construction, including examination of the statute's text, legislative history, and structure[,] as well as its purpose," to ascertain Congress's intent. *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (citation and internal quotation marks omitted). If "the intent of Congress is clear, that is the end of the matter," *Chevron*, 467 U.S. at 842-43; if Congress's intent is not clear, the question is whether the FCC's "answer is based on a permissible construction of the statute," *id.* at 843. The role of the Court at *Chevron*'s second step is "neither rote nor meaningless," *Natural Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000), and this Court should defer to the FCC's statutory interpretation only if it is "reasonable and consistent with the statutory scheme and legislative history," *City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995), and it does not "diverge[] from any realistic meaning of the statute," *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996).

ARGUMENT

I. SECTION 222(b) DOES NOT BAR VERIZON'S RETENTION MARKETING PROGRAM

The history, text, and structure of the statute establish that section 222(b) applies only where Verizon is providing a wholesale telecommunications service to another carrier and only where it receives another carrier's proprietary information by virtue of that wholesale role.[7] In enacting the 1996 Act, Congress created new statutory obligations for incumbent local exchange carriers to provide competing carriers with wholesale access to incumbents' telecommunications networks. *See* 47 U.S.C. § 251(c). Congress recognized, however, that incumbents might gain access to competing carriers' proprietary information through the provision of such wholesale service. *See, e.g.*, *CPNI Reconsideration Order* ¶ 78 ("[w]e concede that in the short term this prohibition" on the use of information gained "by virtue of [a carrier's] status as the underlying network-facilities or service provider" "falls squarely on the shoulders of the [Bell operating companies] and other [incumbents]"). Congress thus enacted section 222(b) to protect the "[c]onfidentiality of carrier information" in the context of that wholesale relationship. That provision is simply not implicated where (as here) (1) a carrier such as Verizon receives no other carrier's proprietary information and (2) is not providing a wholesale telecommunications service to the carrier that submits that information. Those conclusions are not only compelled by the express terms of the statute, but also by the principle that this Court "construe[s] [statutory provisions] to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress." *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995). It is for

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[7] Section 222(b) 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." 47 U.S.C. § 222(b).

that reason, as well, that the FCC's interpretation of the statute – which restricts Verizon's speech in violation of the First Amendment – "is not entitled to *Chevron* deference." *Id.*

The FCC's contrary statutory conclusions, as well as its ultimate holding that section 222(b) bars Verizon's retention marketing program, represent an unreasonable interpretation of the statute and are arbitrary and capricious.

A. Verizon Does Not Use Other Carriers' Proprietary Information for Purposes of Retention Marketing

The *Order* acknowledges that section 222(b) unambiguously applies only to a telecommunications carrier's use of *another carrier's* "proprietary information," *see Order* ¶¶ 13, 17, 34, 35 (JA6, 8, 13), not to a carrier's use of its retail customer's direction to cancel service and to port a telephone number, matters governed (if at all) by section 222(c) and (d). The FCC did not contest that, if the information that Verizon uses is "the customer's information" that is conveyed by the "Competitive Carrier . . . as the customer's agent," section 222(b) does not apply. *Id.* ¶ 16 (JA7).

Accordingly, because the only information that Verizon uses in its retention marketing is the fact that a *customer* has directed Verizon to cancel her or his retail Verizon voice service and that the *customer* has directed Verizon to take steps to port out her or his telephone number associated with that retail service, Verizon's retention marketing is not covered, let alone prohibited, by section 222(b). The submitting carrier that transmits the LNP request is, in the FCC's words, simply acting "as a conduit for a customer's direction." FCC Opposition to Verizon Motion for Stay at 9, No. 08-1234 (filed July 8, 2008) ("FCC Stay Opp."). This is self-evidently the case with regard to the service-cancellation request, a point that the FCC does not contest. And it is likewise the case with respect to the customer's request to keep his or her telephone number. Local number portability is "the ability of *users* . . . to retain" their telephone numbers when switching carriers. 47 U.S.C. § 153(30) (emphasis added); 47 C.F.R. § 51.21(m). The decision to keep a number is the *customer's* decision: if a customer does not choose to retain his or her number for whatever reason, the new provider cannot request that it be ported to its switch – rather, Verizon would be permitted to reassign the telephone number to a new retail customer.

Thus, any "advance notice" that Verizon receives of its customer's intentions, *Order* ¶ 12 (JA6), does not reflect any other carrier's proprietary information, but instead Verizon's customer's directions to Verizon. Moreover, the specific information that the FCC pointed to as "sensitive" – the identity of the new provider and the date on which service will be cancelled – is not used to direct Verizon's retention marketing. In fact, Verizon does not use the identity of the new provider in its retention marketing at all – either to identify the targets of its marketing or in the marketing itself – as the FCC acknowledges in its *Order*. *See id.* ¶ 36 (JA13) (acknowledging that Verizon "does not mention any [new provider's] name in any of its oral or written retention marketing"). Verizon likewise does not use the *date* of cancellation to target its retention marketing. On the contrary, Verizon uses only the fact that the customer has directed it to take steps to allow the customer to keep her or his number, and uses that information merely to reduce the universe of customers to whom it sends marketing materials. Moreover, as the *Order* elsewhere acknowledges, the actual information that Verizon receives is "the date and time *for the disconnection of Verizon's retail service*," *id.* ¶ 5 (JA3) (emphasis added), further supporting the conclusion that this information is about the relationship between Verizon and its retail customer, it is not a carrier's proprietary information.

This conclusion is further reinforced by the undisputed record evidence. *First*, the LSR form "contains a field for Agency Authorization Status, which must contain a 'Y' to indicate that the new provider *has authorization to act on the customer's behalf*." Joint Statement ¶ 21 (JA226-27) (emphasis added).

Second, regulations and standard industry documents confirm that porting is something that is done at the customer's direction and that the customer's new provider is authorized to transmit the customer's direction on her or his behalf for the convenience of customers. *See* 47 C.F.R. § 64.1120; *First Telephone Number Portability Order*, 11 FCC Rcd 8352, ¶ 8 (1996) ("LECs are obligated under the statute *to provide number portability to customers*") (emphasis added); Inter-Service Provider LNP Operations Flows at 2 (July 9, 2003) (Joint Decl. Attach. 22) (JA158) (Flow Step 3: new service provider "obtains authority . . . from end-user to act as the official agent on behalf of the end-user"). Absent this regulatory structure and industry practice, customers would presumably call Verizon directly to cancel service and to request a number port. In that circumstance, no one could contend that the information is the new *carrier's* proprietary information. Indeed, the FCC has conceded that if the "competing carrier is . . . acting solely as a conduit for a customer's direction" that section 222(b) does not apply. FCC Stay Opp. at 9. There is no reason that result should be different where the customer has simply authorized the provider to act on his or her behalf: *who* relays the information does not transform the *nature* of the information itself.[8]

[8] The FCC claimed that its slamming precedent "banned the use of carrier change requests for marketing purposes" even though "a customer can effect a change of carrier by authorizing the new carrier to make the change request on the customer's behalf" or by doing so directly. *Order* ¶ 16 (JA8). But the restriction on marketing in the slamming context applies when "access to . . . information" arises from the "provision of wholesale service." *1998 Slamming Order*, 14 FCC Rcd 1508, ¶ 106 (1998); *see also id.* ¶ 109. Those orders thus do not support the FCC's finding here that the information at issue here – which is *not* conveyed for purposes of Verizon provisioning any wholesale telecommunications service – is another carrier's proprietary information.

Third, to cancel the customer's service and to fulfill its role in the LNP process, Verizon must know that its customer wishes to cancel her or his retail voice service and to retain her or his existing phone number associated with that retail service. The information Verizon uses in its retention marketing is thus received by Verizon to carry out its obligations as the customer's current *retail* voice service provider.

The FCC claims that it had previously held "notice of a carrier change" is "proprietary information." *Id.* ¶ 13 (JA6). But the FCC does not and cannot claim that its previous orders addressed customers' LNP requests, as the Enforcement Bureau implicitly recognized. Rather, those orders addressed a requesting carrier's order for wholesale service – exchange access service used as an input to retail long-distance service (in the case of long-distance carriers) or wholesale facilities and services for resale – that squarely implicated the receiving carrier's wholesale status, as the FCC has expressly noted. *See, e.g., CPNI Reconsideration Order* ¶ 78 (section 222(b) is implicated "where a carrier exploits advance notice of a customer change *by virtue of its status as the underlying network-facilities or service provider*") (emphasis added). Those orders simply did not address the question here: whether retail information provided on a customer's behalf by a submitting carrier is the submitting carrier's proprietary information under section 222(b).

In any event, even aside from the fact that the prior slamming orders do not apply, the FCC did not there explain *why* information relayed on behalf of a customer – where the carrier relaying the information is not ordering a telecommunications service for itself – is a *carrier's* "proprietary information" within the meaning of section 222(b). Nor does the FCC purport to do so in the *Order*. Even if the FCC had implicitly passed on that question in the slamming order, that does not relieve the FCC of its obligation to provide a reasoned explanation for that holding in the face of Verizon's substantive challenges here. *See Burlington Res. Oil & Gas Co. v. FERC*, 396 F.3d 405, 411 (D.C. Cir. 2005) ("[E]ven if [past agency] orders were on point, the [agency] would not be absolved of its obligation, in the face of [petitioner's] challenges, to justify the basis for the rule announced in those cases and applied in the orders under review.").

B. Verizon Does Not "Receive" Information for Purposes of Providing Any Wholesale "Telecommunications Service" to "Another Carrier"

Section 222(b) does not bar Verizon's retention marketing for a second and independent reason: the prohibition on use of proprietary information for marketing purposes applies only to information that a telecommunications carrier receives in a wholesale, not a retail, capacity for the purpose of providing wholesale telecommunications services to the submitting carrier. Because Verizon does not provide any telecommunications services to the submitting carrier, section 222(b) is inapplicable.

1. The text and structure of section 222(b) confirm that the statute applies when a carrier such as Verizon receives proprietary information in the course of providing a wholesale telecommunications service to the carrier submitting that information. Section 222(b) applies when a carrier receives information for the "purpose[ ]" of "providing any telecommunications service" to the carrier submitting the information. 47 U.S.C. § 222(b). If the carrier does not "receive[ ] or obtain[ ]" the information in order to provide "any telecommunications service" in its wholesale capacity to the submitting carrier, then section 222(b) does not apply. This reading – as the Enforcement Bureau recognized – is "mandated by [section 222(b)'s] grammatical structure." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *see Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 518-19 (D.C. Cir. 1997); Recommended Decision ¶ 10 (JA359) (adopting this reading as "the most natural, grammatically consistent reading of the statute").

Verizon's role in the process of porting its retail customers' numbers does not constitute the provisioning of any service to another carrier, neither a wholesale "telecommunications service" nor any other kind. On the contrary, in the LNP process, Verizon is merely implementing its retail customers' directions to terminate a retail service and to take steps to port out the customers' number associated with that retail service. *See, e.g.*, 47 C.F.R. § 52.21(m) (defining "number portability" as the "ability *of users* to retain . . . existing telecommunications numbers") (emphasis added); *First Telephone Number Portability Order* ¶ 8 ("LECs are obligated under the statute *to provide number portability to customers*") (emphasis added); *Time Warner Order*, 22 FCC Rcd 3513, ¶ 16 (Wireline Comp. Bur. 2007) ("where a [local exchange carrier] wins back a customer from a VoIP provider, the number should be ported to the [carrier] that wins the customer *at the customer's request*") (emphasis added); *see supra* pp. 22-23.

The FCC's contrary reading – to encompass situations where Verizon is not providing a wholesale telecommunications service but where a submitting carrier does intend to provide a telecommunications service – is, at best, "grammatically awkward": such an interpretation would "suggest[] that Verizon would be using the information it receives 'for purposes' of another carrier's service." Recommended Decision ¶ 11 (JA360). The conclusion that section 222(b) applies when some carrier other than the receiving carrier intends to provide a telecommunications service, *see Order* ¶ 21 (JA9), is thus contrary to the explicit terms and grammatical structure of the statute and fails at *Chevron*'s first step.

Moreover, the FCC has no reasoned basis for its new interpretative expansion of the statutory terms to reach a circumstance where the receiving carrier is not providing a wholesale service. *See* Recommended Decision ¶ 11 (JA360) (there is "not . . . 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'"). The FCC claimed that an expansive reading of section 222(b) advances the "fundamental objective of section 222(b): to protect from anti-competitive conduct carriers who, in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor." *Order* ¶ 22 (JA9). The idea that restricting consumer access to information on competitive options promotes competition is nonsensical. *See* FCC Stay Opp. at 20 (acknowledging the "immediate benefits offered to individual customers"). Indeed, despite its reliance on this purported competition-policy justification, the FCC disregarded record evidence that Verizon's retention marketing furthered, not undermined, competition. Expert economic analysis established that Verizon's retention marketing program intensifies competition, bringing substantial economic benefits to consumers. Professor Jeffrey Eisenach concluded that Verizon's retention marketing program would deliver at least $75 million in consumer welfare benefit over five years. *See* Eisenach Decl. ¶¶ 21-23, 28 (JA256-57, 259). The FCC has recognized that consumers receive immediate benefits from Verizon's marketing in the here and now, FCC Stay Opp. at 20, and its speculative assertion that there is any offsetting harm in the long run, *see Order* ¶ 43 & n.104 (JA17), is both unsubstantiated and belied by the evidence. As Professor Eisenach explained, the competitive process benefits from Verizon's efforts: "[T]o forbid firms from informing customers of their best offers is to deprive them of the incentive to compete." Eisenach Decl. ¶ 25 (JA258). Furthermore, a ban on Verizon's retention marketing stands the purpose of competition on its head, by enabling cable companies "*to charge prices above the competitive price*, while still winning customers." *Id.* ¶ 26 (JA258).

In refusing to address this evidence, the FCC relied instead on statements in orders that addressed a different competitive context – one in which incumbent carriers had a "monopoly" on local facilities and in which competitors were forced to rely on those incumbents for the provision of wholesale telecommunications services. *1998 Slamming Order* ¶ 109; *see Order* ¶ 43 (JA17) (declining to consider policy arguments on the ground that "[t]he Commission has already evaluated the policy concerns underlying section 222(b)"). The FCC thus pointed to no evidence of harm to competition from Verizon's retention marketing in today's transformed competitive marketplace that would warrant its expansive reading of section 222(b), and the cable providers offered none. *See Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (agency acted arbitrarily in not adequately addressing "evidence" that "suggest[ed] changed circumstances regarding the reasonableness" of past decisions; "[u]nless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned").

2. The FCC ruled in the alternative that, even if Verizon's reading of the statute were correct, Verizon's role in the LNP process qualifies as a wholesale telecommunications service. But the functions that Verizon performs in that process do not qualify as a "telecommunications service" at all, as the Enforcement Bureau determined. *See* Recommended Decision ¶ 13 (JA360).

A "telecommunication service" is "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." 47 U.S.C. § 153(46). "Telecommunications," in turn, means to "transmi[t], between or among points specified by the user, . . . information of the user's choosing." *Id.* § 153(43). Verizon's participation in the LNP process does not include an offering of "telecommunications." Verizon's role is limited to three steps: scheduling a retail disconnect, establishing a 10-digit trigger to prevent the misrouting of calls in the interval after a number has been ported but before disconnection, and confirming a pending subscription record. *See* Joint Statement ¶¶ 29-32 (JA229-31). None of those steps involves "transmi[tting]" "information of the user's choosing" "between or among points specified by the user," as the Bureau correctly concluded. *See* Recommended Decision ¶ 13 (JA360). Beyond that, Verizon's performance of LNP is not an offering of telecommunications "for a fee." Verizon does not receive any "fee" for its role in the LNP process. *Id.*; *see* Further Suppl. Joint Statement ¶ 3 (JA280) (Verizon does not "impose any charge" for LNP process).

The FCC's contrary view is unavailing. The FCC did not hold that LNP is a "telecommunications service"; rather, it held that Verizon's LNP role should be treated like a telecommunications service because it is "incidental or adjunct to" "the telecommunications services *that it provides to the Competitive Carriers*." *Order* ¶¶ 31, 32 (JA12) (emphasis added). But Verizon provides no telecommunications (or other) services *to the submitting carrier* to which LNP could be "incidental or adjunct." The process of porting a number is, if anything, incidental or adjunct to Verizon's retail service to end users. The cable companies themselves made this point below: "LNP is incidental to the telecommunications service that *Verizon provides to its own end-user customers*." Complainants' Comments at 23 (JA398) (emphasis added). Thus, if Verizon's role in the LNP process can be considered a telecommunications service, it is adjunct to the retail service it provides to its own customer, and not to any wholesale service. This reinforces the conclusion that the information that Verizon receives is its own customer's direction, not the proprietary information of another carrier.

3. Although no FCC precedent addresses the LNP process in particular, the FCC's determination that section 222(b) applies even when the receiving carrier is not providing a wholesale telecommunications service is unlawful for the additional and independent reason that it constitutes an arbitrary and capricious departure from its own prior determinations that section 222(b) is restricted to carrier proprietary information that a carrier gains by virtue of its wholesale role and does not extend to information that a carrier obtains by virtue of its role as a retail service provider. Prior to the *Order*, the FCC had held that violations of section 222(b) occur when a "carrier gain[s] notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service" – that is, where the carrier relies on information that it possesses "by virtue of its status as the underlying network-facilities or service provider." *CPNI Reconsideration Order* ¶¶ 77, 78. The FCC explained that the purpose for restricting retention marketing was the concern that a "monopoly service provider" might unfairly use its wholesale role to learn "that the submitting carrier *needs service provisioning* for a new subscriber." *1998 Slamming Order* ¶ 109 (emphasis added); *see CPNI Reconsideration Order* ¶ 77 (section 222(b) is implicated when "network providers . . . *gain access to such information through their provision of wholesale services*") (emphasis added). The FCC, prior to the *Order*, thus had always "distinguish[ed] between the 'wholesale' and the 'retail' services of a carrier." *Id.* ¶ 79; *2002 CPNI Order* ¶ 131 (retention marketing is permitted when a "carrier's retail operations . . . legitimately obtain notice that a customer plans to switch to another carrier").

Rather than explain its departure from this precedent, the FCC stated that its earlier orders did not mean what they plainly said, claiming, for example, that their focus on wholesale, carrier-to-carrier relationships was for the purpose of "identify[ing] the source of the carrier-change information as something other than the receiving carrier's direct communications with its retail customer." *Order* ¶ 26 (JA11). But, while the FCC could have limited its prior orders to information "that a customer reveals directly," FCC Stay Opp. at 12, it was at pains not to do so, instead focusing – as the statute requires – on the function that the receiving carrier is performing. *See CPNI Reconsideration Order* ¶ 79 ("section 222(b) is not violated if the carrier has independently learned *from its retail operations* that a customer is switching to another carrier") (emphasis added); *2002 CPNI Order* ¶ 133 ("[D]eeming any winback or retention effort[s]," the FCC said, "including those based on information learned *through the carrier's* *retail operations*, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits.") (second alteration and ellipses in original; internal quotation marks omitted; emphasis added). The FCC's assertion that such precedent is consistent with the *Order* – which expands section 222(b) to regulate retail-against-retail competition – does not withstand scrutiny. The *Order* is thus unlawful. *See ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1996) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

C. Section 222(b) Does Not Apply Where Verizon Does Not Receive Any Information "from Another Carrier"

In the case of complainants Bright House and Comcast, section 222(b) does not prohibit Verizon's retention marketing program for a third reason: Verizon does not receive any information in the LNP process from another telecommunications carrier, as the statute requires. *See* 47 U.S.C. § 222(b). "[T]elecommunications service" includes only those services that are offered on a common-carrier basis. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999) ("the definition of 'telecommunications services' in the 1996 Act was intended to clarify that telecommunications services are common carrier services") (internal quotation marks omitted).

Complainants' affiliates do not qualify because they provide service only to their affiliates and concede that they have not provided – or even publicly offered to provide – the service to anyone else. For that reason, the Bureau correctly concluded that complainants failed to carry their burden of establishing that they are common carriers with respect to the services at issue. *See* Recommended Decision ¶ 17 (JA361-62). The FCC overruled the Bureau based on the fact that Comcast and Bright House Competitive Carriers "'self-certif[ied]' that they do and will operate as common carriers and attest that they will serve all similarly situated customers equally." *Order* ¶ 39 (JA14). There is no precedent that such a certification alone is sufficient, and crediting such a self-certification undermines the entire distinction between common carriage and private carriage. As the Enforcement Bureau properly determined, "[o]bjective evidence regarding the substance of the Competitive Carrier's conduct trumps these belated characterizations of the Competitive Carriers' alleged subjective intent." Recommended Decision ¶ 19 (JA362); *see also, e.g.*, *Thibodeaux v. Executive Jet Int'l, Inc.*, 328 F.3d 742, 750 (5th Cir. 2003) (test for common-carrier status is "objective").[9]

The FCC found it important that the Comcast and Bright House Competitive Carriers have "obtained a certificate of public convenience" and "entered into a publicly-available interconnection agreement." *Order* ¶ 39 (JA15). But such "arguments overlook the black-letter proposition that an entity may be a common carrier . . . with respect to some forms of telecommunications and not others." Recommended Decision ¶ 18 (JA362); *see Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). "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." Recommended Decision ¶ 18 (JA362) (emphasis added).

Furthermore, the FCC's determination that the carrier partners are common carriers "for purposes of section 222(b)," *Order* ¶ 41 (JA16), but not for *any* other Title II purpose is arbitrary

[9] The FCC credited the self-certification on the theory that entities would not "make such statements lightly" because "being deemed a 'common carrier' . . . confers substantial responsibilities." *Order* ¶ 39 (JA15). But the FCC went on to hold that the entities are not necessarily subject to *any* of the responsibilities applicable to common carriers under Title II. *See id.* ¶ 41 (JA16).

and capricious. The FCC cannot reasonably classify the same service as a "telecommunications service" – and thus the entity that provides the service as a "telecommunications carrier" (both of which are statutorily defined terms) – for the purposes of obtaining benefits under one provision but not for purposes of avoiding the burdens under another provision within the same title (Title II) of the same statute (the Communications Act). *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (meaning of words in a statute cannot change with statute's application); *cf. American Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (noting that CALEA's text is "more inclusive" than the definition of "telecommunications carrier" in the Communications Act).[10]

The FCC's unprecedented decision to do so here illustrates the "outcome driven" nature of a decision. *See* Martin Statement at 1 (JA20). As it applies to the complaints of Bright House and Comcast, the *Order* should be vacated and remanded on this basis alone, as it is not clear from the *Order* that the FCC would have concluded that the Bright House and Comcast Competitive Carriers are "carriers" within the meaning of section 222(b) if it understood that such a classification would subject the Competitive Carriers to all Title II common-carrier regulation.

II. THE *ORDER* VIOLATES THE FIRST AMENDMENT

The FCC's newfound interpretation of the statute would present significant constitutional issues, and would violate the First Amendment. Under the *Order*, once Verizon has learned from a customer's agent that the customer is cancelling service and porting his or her number,

[10] The FCC cites two cases for the view that "an agency may interpret an ambiguous term differently in two separate sections of a statute which have different purposes." *Order* ¶ 41 (JA16) (internal quotation marks omitted). But the question of purpose does not even arise here: Congress adopted a single statutory definition of "telecommunications carrier," and that definition governs the interpretation of that term throughout the statute.

Verizon is prohibited from directing targeted speech to that customer. The *Order* impinges upon (i) Verizon's right to select its audience; (ii) Verizon's right to tailor the content of its speech to that audience; and (iii) the rights of willing listeners to receive and act upon truthful speech. Such a restriction on targeted speech plainly implicates the First Amendment. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("targeted speech constitute[s] commercial speech," and restricting it "implicate[s] the First Amendment"); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) ("The government's imposition of affirmative obligations on the residents' first amendment rights to receive speech is not permissible."). Moreover, Verizon's speech is silenced at a critical time – when customers are reconsidering their service options. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [the speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

Commercial speech serves paramount First Amendment interests. The First Amendment "protects commercial speech from unwarranted governmental regulation" because commercial "expression . . . assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). "[A] particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (internal quotation marks and ellipsis omitted); *see also Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish.").

In light of the constitutional value of commercial speech, the government has "circumscribed" authority to silence truthful commercial speech. *Central Hudson*, 447 U.S. at 564. In order for a restriction to survive First Amendment scrutiny, the government must demonstrate a "substantial interest" in restricting the speech; "the regulatory technique" used to impose the restriction "must be in proportion to that interest"; and "[t]he limitation on expression must be designed carefully to achieve the [government's] goal." *Id.* The government must show "that the challenged regulation advances the Government's interest 'in a direct and material way.'" *Rubin*, 514 U.S. at 487. The government thus carries a heavy "burden" of "establish[ing] a 'reasonable fit' between its legitimate interests . . . and its choice of a . . . prohibition . . . as the means chosen to serve those interests." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

As explained below, the FCC's newly minted interpretation of section 222(b) to bar Verizon's retention marketing fails those First Amendment standards in three ways, and in doing so violates the principle that the statute must be read where possible to avoid these constitutional infirmities. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) ("Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a 'cardinal principle': They 'will first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds.") (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)) (ellipsis in original); *DTV Must Carry Order*, 16 FCC Rcd 2598, ¶ 113 (2001) ("an administrative agency can consider potential constitutional infirmities in deciding between possible interpretations of a statute").

A. There Is No Evidence That the *Order* Directly Advances the Governmental Interest Underlying the Statute

The governmental interest underlying section 222(b) is to ensure that incumbent carriers do not use to their own advantage proprietary information of another carrier that they obtain by virtue of their role as a wholesale telecommunications service provider. *See 1998 Slamming Order* ¶ 109 (referring to "proprietary information" that an incumbent local provider receives "[b]ecause of its position as a monopoly service provider"). That interest has no bearing when the information at issue is not proprietary information of another carrier and is not obtained by virtue of Verizon's wholesale role. As a result, the governmental interest underlying the statutory provision does not apply at all. That should be the end of the matter. *See Discovery Network,* 507 U.S. at 416.

The FCC, however, attempts to invent a different and broader interest – promotion of competition generally – but that too is unavailing. *See, e.g.*, *Order* ¶ 27 (JA11) (citing as justification for restricting Verizon's speech the goal of "promot[ing] facilities-based local competition," but citing no evidence of competitive harm). Speculative or theoretical assertions of supposed harm, absent concrete evidence, cannot justify silencing speech: "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural[.]" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation and internal quotation marks omitted); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000) (the "Government must present more than anecdote and supposition" as a justification for suppressing speech); *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001). It is therefore "well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it" and that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real." *Edenfield*, 507 U.S. at 770-71 (internal quotation marks omitted).

The *Order*'s restriction on Verizon's truthful speech fails that standard. Cable providers are firmly entrenched in the marketplace, *see* Joint Statement ¶¶ 1-3, 13 (JA219-20, 224-25), and the cable incumbents did not submit any evidence below that Verizon's marketing program posed any threat to their ability or incentive to compete. Nor did the FCC cite to any evidence of anticompetitive harm in the *Order*, instead choosing to rely on decade-old orders that the FCC adopted in a markedly different competitive environment, *see supra* p. 28. Indeed, the FCC readily concedes that Verizon's retention marketing provides real and immediate competitive *benefits* to individual consumers. *See* FCC Stay Opp. at 20 (acknowledging the "immediate benefits offered to individual customers"). The FCC's failure to point to any evidence of competitive harm is especially striking in light of the overwhelming evidence of the pro-competitive and pro-consumer benefits of retention marketing in today's communications marketplace. *See* Eisenach Decl. ¶¶ 19-25 (JA256-58).

Under the First Amendment, the FCC was not free to disregard such a one-sided evidentiary record and to restrict Verizon's speech under the banner of speculative concerns about long-term competition without any reliable evidence of competitive harm. *See Turner*, 512 U.S. at 664; *Edenfield*, 507 U.S. at 770-71; *U.S. West*, 182 F.3d at 1237 (FCC's CPNI regulations failed *Central Hudson* because "[t]he government present[ed] no evidence showing the harm to either privacy or competition is real" and instead "relie[d] on speculation that harm to privacy and competition for new services will result if carriers use CPNI"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959 (8th Cir. 2003) (county needed to "come forward with empirical support for its belief" that video games harmed minors before imposing speech restrictions; "[w]here first amendment rights are at stake, the Government must present more than anecdote and supposition") (internal quotation marks omitted). Because the FCC's findings of harm in the *Order* do not rise above the "non-conjectural," the FCC's restriction on Verizon's speech violates the First Amendment. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1131-34 (D.C. Cir. 2001) (FCC "failed to identify a non-conjectural harm" sufficient to regulate speech).

B. The FCC Has Drawn Irrational and Impermissible Lines Between Permitted and Prohibited Speech

1. The *Order* also cannot withstand First Amendment scrutiny because it is not "carefully designed" to advance directly the FCC's purported interest in promoting competition; the lines the FCC has drawn between permissible and impermissible speech have no relationship to that purported interest. Laws that distinguish between speech on grounds that "bear[] no relationship *whatsoever* to the particular interests that the [government] has asserted" violate the First Amendment. *Discovery Network*, 507 U.S. at 424; *see Rubin*, 514 U.S. at 488-89 ("irrationality" of regulatory scheme on speech rendered it unlawful); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 (7th Cir. 1999) (*Discovery Network* prohibits "commercial speech regulations" where irrational distinctions in "the restriction [make] the fit between the regulation's goals and the restrictions not sufficiently close").

Those constitutional principles are dispositive here. Under the regulatory scheme adopted by the FCC, retention marketing based on information conveyed directly by the customer is allowed and is considered pro-competitive. *See 2002 CPNI Order* ¶ 131; *CPNI Reconsideration Order* ¶ 67. As the FCC put it in the *Order*, "a Verizon retail customer has every right to contact Verizon directly" and, in such cases, that information "may be used to engage in retention marketing." *Order* ¶ 16 (JA7).

Although the FCC allows – indeed, deems pro-competitive – retention marketing when it is based on information conveyed by the customer directly, *see CPNI Reconsideration Order* ¶ 69, the *Order* bans such speech when it based on information conveyed by another carrier on a customer's behalf. *See Order* ¶ 16 (JA7) (retention marketing is restricted in "the absence of . . . direct customer contact"). That line between permitted and prohibited speech bears no relationship to the competitive ends said to underlie the *Order*: retention marketing based on the direct conveyance of information and retention marketing based on a provider's request on a customer's behalf have precisely the same effects (whether positive or negative) on competitors and consumers, and it is wholly irrational to ban speech in one of those circumstances. *See Discovery Network*, 507 U.S. at 425-26 (city's "interest in esthetics" could not justify banning newsracks with commercial handbills but allowing newsracks with newspapers because "all newsracks, regardless of whether they contain" handbills or newspapers, "are equally at fault" in creating esthetic displeasure); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566-67 (2001) (restriction preventing advertising of tobacco products from being placed lower than 5 feet from the floor failed *Central Hudson* because the restriction was aimed at "limiting youth exposure to advertising" but "[n]ot all children are less than 5 feet tall," and thus the restriction was not "a reasonable fit with [the state's] goal").

The *Order*'s ban on Verizon's speech is irrational in another way. The *Order* is clear that Verizon's retention marketing program would be permissible so long as it targeted *all* customers who are disconnecting their service. *See Order* ¶ 15 (JA7). The problem, according to the FCC, is not marketing to disconnecting customers, but instead using the fact that a disconnecting customer has chosen to keep his or her telephone number to limit the customers to whom the retention marketing efforts are directed, thereby reducing expenses and avoiding sending materials to customers who have moved away or who do not intend to purchase voice service. *See id.* ¶ 34 & n.78 (JA13). That distinction as well illustrates the irrational nature of the regime adopted by the FCC. *See Rubin*, 514 U.S. at 488-89.

Because restrictions on speech imposed by the *Order* lack any relationship to the competitive interests asserted by the FCC in regulating Verizon's speech in the first place, the *Order*'s ban on Verizon's speech and the public's right to hear Verizon's speech fails First Amendment scrutiny. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 119-20 (1991) (distinction drawn by state law between income derived from a criminal's "expressive activity" and "any of the criminal's other assets" "has nothing to do" with purported interest in transferring the proceeds of crimes to victims); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (state's interest in protecting residential privacy could not sustain statute banning only non-labor picketing because "nothing" in the distinction between labor and non-labor picketing "has any bearing whatsoever on [residential] privacy"); *Pearson v. Shalala*, 164 F.3d 650, 657-58 (D.C. Cir. 1999) (FDA regulation did not satisfy reasonable "fit" requirement of *Central Hudson*).[11]

2. In the *Order*, the FCC offers no defense of the rationality of the distinctions drawn between permitted and restricted speech. Instead, the FCC states only that it "plainly

[11] The *Order* deprives many willing listeners of speech they want to receive. Most consumers want to make long-term purchasing decisions based on the most complete information. The FCC denies customers the right to engage in a dialogue with Verizon regarding price and service – violating their First Amendment rights as well as Verizon's. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) ("[i]f there is a right to advertise, there is a reciprocal right to receive the advertising"); *accord U.S. West*, 182 F.3d at 1232 ("Effective speech has two components: a speaker and an audience. A restriction on either of these components is a restriction on speech.").

made th[e] distinction [between direct conveyance and indirect conveyance] in prior orders, and neither Verizon nor anyone else challenged it as 'nonsensical' or 'irrational.'" *Order* ¶ 16 n.50 (JA7). But setting aside that the past orders referenced by the FCC addressed fundamentally different circumstances, as Verizon has fully explained, *see supra* p. 28, an assertion by the agency that it has silenced speech in the past on the basis of an irrational distinction provides no immunity from constitutional review here. *See Burlington Res.*, 396 F.3d at 411.

The FCC also claims that it analyzed the constitutionality of its interpretation of section 222(b) in the *1998 Slamming Order* and that, for the same reasons on which it relied in that order, its ban on Verizon's retention marketing is consistent with the First Amendment. *See Order* ¶ 44 (JA18). Not so. Nothing in the *1998 Slamming Order* remotely addresses the specific First Amendment challenges Verizon makes here: that the FCC lacked record support for concluding that banning Verizon's retention marketing would promote any governmental interest; that the distinction between direct and indirect conveyance of information is irrational; or that, in today's competitive market, a ban on Verizon's retention marketing creates a sharp disparity between First Amendment speakers. In addition, the FCC was clear in the *1998 Slamming Order* that incumbents' wholesale "position as . . . monopoly service provider[s]" justified the regulation, *1998 Slamming Order* ¶ 109 – a justification that is entirely absent here.

C. The *Order* Impermissibly Treats First Amendment Speakers Disparately

1. The *Order* offends the First Amendment for a third and final reason. The *Order* creates a sharp disparity between the regulatory treatment of Verizon's retention marketing and the comparable efforts of cable providers. *See* Martin Statement at 1 (JA20) (explaining that the *Order* allows cable companies "to gain an advantage over their competitors" and that the decision promotes "regulatory arbitrage," "frustrat[ing] regulatory parity"). As Verizon has explained, cable providers take the position that they are not required to accept video service cancellations submitted on a customer's behalf by competing service providers. *See* Creager Decl. ¶¶ 21-23 (JA530-31); *supra* pp. 7-8. As a result, customers must call directly before cable providers will cancel service. When 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.

The *Order* thus has the effect of authorizing speech by one group of speakers while banning the very same type of speech by another. This is impermissible: "government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "Regulations that discriminate . . . among different speakers within a single medium[] often present serious First Amendment concerns." *Turner*, 512 U.S. at 659; *see also Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582-83 (1983) (regulation that "single[s] out the press for special treatment" "cannot stand unless the burden" imposed by the regulation "is necessary to achieve an overriding governmental interest"). Because this "disparate treatment" of telephone companies and cable companies bears no "relationship" to the competitive concerns said to underlie section 222(b) and the *Order*, the FCC's ban on Verizon's retention marketing is not narrowly tailored and cannot withstand First Amendment scrutiny. *Action for Children's Television v. FCC*, 58 F.3d 654, 668-69 (D.C. Cir. 1995) (en banc); *Central Hudson*, 447 U.S. at 564 ("The limitation on [commercial] expression must be designed carefully to achieve the [government's] goal.").

2. The FCC's rationalizations for disparate regulation of the speech of telephone companies and cable companies are unconvincing.

The FCC argues, first, that "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." *Order* ¶ 43 (JA17). But that is no defense: because the statute does not compel the result that Verizon's retention marketing program is unlawful, the FCC was obliged to read the statute in a manner that would avoid a substantial regulatory disparity between First Amendment speakers. *See, e.g., Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997) ("The Commission has an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress."); *see supra* p. 36. Besides, if section 222(b) unambiguously required that First Amendment speakers be treated disparately, that disparate treatment (absent proper justification) is the *basis* for the statute's infirmity, not a *defense* to its constitutionality. *See Action for Children's Television*, 58 F.3d at 668-69.

Second, the FCC attempts to explain away the disparate treatment on the ground that "only a competing voice service provider must communicate and coordinate with a customer's existing voice service provider in order to initiate service to that new customer. Where, as here, a provider has no choice but to communicate competitively sensitive information to its rival, the rival cannot use that information for marketing." *Order* ¶ 43 (JA17). This misses the point. The FCC could have avoided singling out Verizon's speech for suppression had it read section 222(b) as inapplicable to Verizon's retention marketing, as it should have done consistent with the text, history, and purpose of the statute, as well as the principle of constitutional avoidance. *See supra* p. 36. Beyond that, the FCC has offered no justification for treating directly conveyed information differently from indirectly conveyed information for the purpose of regulating retention marketing, and it thus is no answer to point to the LNP process (which is simply a means for indirectly conveying information) as a basis for silencing Verizon's speech but not the same retention marketing of cable companies (which is based on the direct conveyance of information).

Finally, it no defense that cable incumbents are theoretically subject to the same restrictions on marketing to departing *voice* customers. That does not make the FCC's regulation of Verizon's speech evenhanded: both voice and video providers' retention marketing is directed at the *same* bundle of voice, video, and data services; at the same time, incumbent voice providers' retention efforts are, by definition, directed at departing voice customers while incumbent video providers' efforts are directed at their video customers. *See supra* pp. 6-8. The *Order* thus dramatically favors cable providers.

CONCLUSION

For the foregoing reasons, the Court should grant Verizon's petition for review and vacate the *Order*.

Respectfully submitted,

Aaron M. Panner /ked

AARON M. PANNER
KELLY P. DUNBAR
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

ANDREW G. MCBRIDE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

WILLIAM P. BARR
MICHAEL E. GLOVER
KAREN ZACHARIA
MARK J. MONTANO
VERIZON
1515 N. Courthouse Road, Suite 500
Arlington, VA 22201
(703) 351-3193

Counsel for Verizon

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 13,748 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2003) used to prepare this brief.

Aaron M. Panner

ADDENDUM

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5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 153

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires –

(30) Number portability

The term "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.

* * * * *

(43) Telecommunications

The 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.

* * * * *

(46) Telecommunications service

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.

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47 U.S.C. § 222

§ 222. Privacy of customer information

(a) In general

Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) Confidentiality of carrier information

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.

(c) Confidentiality of customer proprietary network information

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers

A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

(3) Aggregate customer information

A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.

(d) Exceptions

Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents –

(1) to initiate, render, bill, and collect for telecommunications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services;

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service; and

(4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title) or the user of an IP-enabled voice service (as such term is defined in section 615b of this title) –

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

* * * * *

47 U.S.C. § 251

§ 251. Interconnection

* * * * *

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

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47 C.F.R. § 52.21

§ 52.21. Definitions

As used in this subpart:

* * * * *

(m) The term *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.

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2008, I caused two copies of the foregoing Brief for Petitioners to be served on each of the parties listed below by first-class mail, postage prepaid.

Nadia McIlhany

Nadia McIlhany

FEDERAL COMMUNICATIONS COMMISSION

Matthew B. Berry
Joseph R. Palmore
Richard K. Welch
Joel Marcus
Federal Communications Commission
445 12th Street, S.W., Room 8-A741
Washington, D.C. 20554

UNITED STATES OF AMERICA

Catherine G. O'Sullivan
Nancy C. Garrison
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001

UNITED STATES TELECOM ASS'N

Bennett L. Ross
Joshua S. Turner
Thomas R. McCarthy
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

BRIGHT HOUSE NETWORKS, LLC

Christopher Savage
Davis Wright Tremaine LLP
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

TIME WARNER CABLE INC.

Matthew A. Brill
Brian W. Murray
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, D.C. 20004

COMCAST CORPORATION

Mark D. Schneider
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001

QWEST COMMUNICATIONS INT'L INC.

Robert B. McKenna
Qwest Communications Int'l Inc.
607 14th Street, N.W.
Suite 950
Washington, D.C. 20005

INDEPENDENT TELEPHONE & TELECOMMS. ALLIANCE

L. Charles Keller
L. Andrew Tollin
Craig E. Gilmore
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington, D.C. 20037

Curt Stamp
Joshua Seidemann
ITTA
975 F Street, N.W., Suite 550
Washington, D.C. 20004

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

David C. Bergmann
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on August 7, 2008 to:

Beth Salak
Rick Mann
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
bsalak@psc.state.fl.us
rmann@psc.state.fl.us

Samuel F. Cullari, Counsel
Comcast Cable
1500 Market Street
Philadelphia, PA 19102
samuel_cullari@comcast.com

Christopher McDonald
Comcast Digital Phone
Director of State Government Affairs
300 West Pensacola Street
Tallahassee, FL 32301
christopher_mcdonald@cable.comcast.com

Charlene Poblete, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
cpoblete@psc.state.fl.us

Christopher W. Savage
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
chrissavage@dwt.com

Beth Keating
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
beth.keating@akerman.com

Floyd R. Self
Messer Law Firm
2618 Centennial Place
Tallahassee, FL 32308
fself@lawfla.com

Marva Brown Johnson
Bright House Networks Information Services (Florida), LLC
12985 North Telecom Parkway
Temple Terrace, FL 33637-0907
Marva.johnson@bhnis.com

David A. Konuch
Florida Cable Telecommunications Association
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303
dkonuch@fcta.com

Howard E. Adams
Pennington Law Firm
P. O. Box 10095
Tallahassee, FL 32302-2095
gene@penningtonlaw.com

Carolyn Ridley
Time Warner Telecom
555 Church Street, Suite 2300
Nashville, TN 37219
carolyn.ridley@twtelecom.com

s/ Dulaney L. O'Roark III