ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties appearing before the Federal Communications Commission and in this Court are listed in the Brief for Petitioners.

(B) Ruling Under Review

Bright House Networks, LLC v. Verizon California, Inc., 23 FCC Rcd 10704 (2008) (JA1).

(C) Related Cases

The order on review has not been before this Court or any other court. Counsel are not aware of any related cases pending before this Court or any other court.

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GLOSSARY

Competitive Carriers	the wholesale telecommunications carriers used by the Complainants to provide local telephone service
Complainants	Bright House Networks, Comcast, and Time Warner Cable
LSR	Local Service Request

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

A consumer who decides to switch his telephone service typically chooses to keep the same telephone number. For that reason, the process of shifting a customer's service from one phone company to another involves a level of advance cooperation between competitors that is not required for such customer switches in any other market, including the markets for video and Internet services. To enable the transfer of a customer's phone number from his existing carrier to a competitor (a process known in the industry as "number porting"), the competing carrier must reveal to the customer's current carrier some competitively sensitive information – specifically, the fact that (and the date on which) the customer will be switching to the competing carrier. Section 222(b) of the Communications Act prohibits the incumbent from using that proprietary information "for its own marketing purposes." 47 U.S.C. § 222(b).

For more than a decade after section 222(b) became law in 1996, every local phone company in the nation – including Verizon – complied with this statutory ban. Then, in 2007, Verizon began using proprietary information from its competitors' number porting requests to conduct a "retention marketing" campaign: a last-ditch marketing pitch aimed at customers who had decided to leave Verizon for a competing facilities-based carrier. Rather than using its competitors' number porting requests just for their intended purpose – to complete the ministerial act of transferring a number – it instead used them to create a list of customers whom it hoped to retain and whose number porting requests it hoped to nullify. After some of Verizon's competitors filed a formal complaint, the Federal Communications Commission determined that Verizon was violating section 222(b) by using the proprietary information contained in other carriers' number porting requests to aid its own retention marketing efforts. *Bright House Networks, LLC v. Verizon California, Inc.*, 23 FCC Rcd 10704 (2008) (JA1) ("*Order*"). Accordingly, the FCC ordered Verizon "immediately to cease and desist from such unlawful conduct." *Order* ¶ 1 (JA1).

Verizon's petition for review of the *Order* presents two issues:

(1) whether the FCC reasonably construed section 222(b) to bar Verizon from using proprietary information from its competitors' number porting requests to identify the target audience for its retention marketing campaign; and

(2) whether the *Order* violates the First Amendment.

JURISDICTION

The FCC issued the *Order* on June 23, 2008. The petition for review was filed within the time period prescribed by 28 U.S.C. § 2344. The Court has jurisdiction to review the *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the brief for petitioners.

COUNTERSTATEMENT

A. Local Competition And Number Portability

Congress substantially rewrote the Communications Act when it passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act "fundamentally restructure[d] local telephone markets" by ending "the longstanding regime of state-sanctioned monopolies" that had shielded incumbent local phone companies like Verizon from competition. *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 371 (1999). One of the statute's principal purposes "is to stimulate competition" in local telephone markets – "preferably genuine, facilities-based competition." *United States Telecom Association v. FCC,* 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*").

To foster the development of local competition, the 1996 Act imposes on local carriers various "requirements" that Congress deemed "necessary for opening the local exchange market to competition." S. Rep. No. 104-23, at 19 (1995). Among other things, local carriers must provide "number portability." 47 U.S.C. § 251(b)(2). The statute defines "number portability" as "the ability of users of telecommunications services to retain … existing [telephone] numbers … when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). Congress considered number portability essential to promoting local competition: "The ability to change service providers is only meaningful if a customer can retain his or her local telephone number" because many customers would be unwilling to make a move if it meant changing phone numbers. H.R. Rep. No. 104-204, at 72 (1995); *see also Cellular Telecommunications & Internet Association v. FCC,* 330 F.3d 502, 513 (D.C. Cir. 2003) ("*CTIA*") (lack of number portability presents a barrier to switching carriers).

Due to the need to port phone numbers, competition in the local exchange market is fundamentally different from competition in other markets, including those for video and Internet services. In normal markets, a customer may switch service providers by canceling his current service and immediately commencing service with a new provider. There is no requirement that the new provider give the incumbent advance notice that it has taken one of the incumbent's customers, and no rational competitor would do so. Moreover, once such a switch occurs, the former provider does not necessarily know why the customer canceled service, whether the customer has switched to another provider, who that provider is, or when any new service might begin.

In the local exchange market, by contrast, a new carrier cannot provide service to a customer who wants to retain his phone number until the number has been ported to the new carrier. Before that can happen, the new carrier must ask the existing carrier to transfer the number.

A customer may not directly request a number port. Instead, number porting is strictly a carrier-to-carrier process. *See* Joint Statement ¶ 18 (JA 225-26). After a customer contacts a competitor to initiate phone service, the new carrier initiates the number porting process by submitting a "Local Service Request" ("LSR") to the incumbent carrier. The LSR serves as a request both to port the customer's phone number and to cancel the customer's current service. *Order* ¶ 5 (JA3).

A competing carrier's LSR includes information necessary to "facilitate the … porting of the telephone number to the new provider." Answer at 10 (JA76). This is information, however, that a competitor would ordinarily never disclose to the company from which it is about to take a customer. Not only does the LSR inform the current carrier that it is about to lose a customer to a competitor; it also identifies the customer and the new carrier, and specifies the date on which the new service will begin. *Order* ¶ 5 (JA3). The customer's current carrier would not have access to any of this competitively sensitive information but for its role in porting the customer's number.

B. Section 222(b)

Congress recognized that the process of opening the local exchange market to competition would require cooperation and coordination among competing carriers to complete such integral tasks as interconnection, number portability, resale, and providing unbundled access to network elements. *See generally* 47 U.S.C. § 251. Congress also knew that these tasks could not be completed unless carriers shared certain proprietary information with their competitors, and that access to such information created a clear conflict of interest between companies' ministerial obligation to discharge their new statutory duties and their natural incentive to use competitors' sensitive information to advance their own business interests. To protect this proprietary information from competitive abuse, Congress therefore added section 222(b) to the Communications Act. Section 222(b) provides: "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).

The FCC consistently has construed section 222(b) to forbid the use for marketing purposes of any information that one carrier receives from another in the course of transferring a customer. In 1998, the Commission ruled that a carrier of long-distance telephone service "may not use information gained from [another carrier's] carrier change request for any marketing purposes, including any attempts to change a subscriber's decision to switch to another carrier." *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 1508, 1572 (¶ 106) (1998) ("*1998 Slamming Order*"). The Commission found that a "submitting carrier's change request is proprietary information" subject to section 222(b) because the carrier requesting the change "must submit that information to the [customer's current] carrier in order to obtain provisioning of service for a new subscriber." *Ibid.* Were it not for the current carrier's role in executing the carrier change, that carrier "would have no knowledge at that time of a consumer's decision to change carriers." *Ibid.* "Therefore," the Commission concluded, "when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to [the] consumer" who wants to change carriers. *Ibid.* No carrier sought review of those determinations.

One year later, the Commission reiterated its understanding that "carrier change information is carrier proprietary information under section 222(b)." *Implementation of the Telecommunications Act of 1996,* 14 FCC Rcd 14409, 14450 (¶ 78) (1999) ("*CPNI Reconsideration Order*"). Citing the statute's "outright prohibition against the use of" other carriers' proprietary information "for a carrier's own marketing efforts," the Commission reasoned that "competition is harmed if *any* carrier uses carrier-to-carrier information … to trigger retention marketing campaigns" – *i.e.,* efforts to retain customers who are about to switch to competing carriers. *Id.* ¶ 77. The Commission "consequently prohibit[ed] such actions." *Ibid.* Once again, no carrier sought review of the agency's reading of section 222(b).

Under the Commission's longstanding interpretation of section 222(b), "information contained in a carrier change request … may only be used by the executing carrier to effectuate the provision of service by the submitting carrier to its customer." *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996,* 18 FCC Rcd 5099, 5109 (¶ 25) (2003) ("*Third Slamming Reconsideration Order*"). The Commission based its construction of the statute on the premise that a carrier that executes carrier change requests "should be a neutral party without any interest in the choice of carriers made by a subscriber." *1998 Slamming Order* ¶ 109. When a carrier change is requested, "section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information." *Id.* ¶ 106.

In 1999, the Commission denied several petitions for forbearance from section 222(b). *CPNI Reconsideration Order* ¶¶ 80-85. A number of petitioners – including Bell Atlantic and GTE, which later merged to form Verizon – had asked the agency to forbear from enforcing the restrictions imposed on retention marketing by section 222(b) on the ground that permitting such marketing would "place consumers in the attractive position of having two competitors simultaneously vying for the consumers' business." *Id.* ¶ 85. But the Commission was "not persuaded" that the public interest would be served by "permitting carriers to unfairly use information that they obtain" from carrier change requests in an effort to retain customers who had decided to change carriers. *Ibid.* Although the Commission acknowledged that "in the short-run allowing carriers to use carrier proprietary information to trigger retention campaigns may result in lower rates for some individual customers," it found that "protecting competitively-sensitive information" would best "promot[e] competition" "over the long-term." *Id.* ¶¶ 77, 85. No party challenged the Commission's decision not to forbear.

C. Verizon's Retention Marketing Program

In light of the Commission's longstanding interpretation of section 222(b) and its rejection of the request from Verizon's predecessors that it forbear from enforcing the statute, the settled practice in the industry until 2007 was that carriers did not exploit carrier change information for marketing purposes. In particular, in the eleven years after enactment of section 222(b), none of the nation's local phone companies appears to have used other carriers' number porting requests to engage in retention marketing. In the summer of 2007, however, Verizon began to use the proprietary information disclosed in its competitors' LSRs for its own retention marketing purposes. *Order* ¶ 7 (JA4).

To coordinate its retention marketing efforts, Verizon generated a daily "lead list" of all customers with pending service disconnection requests (including LSRs, which requested both number porting and disconnection). It then used information gleaned from LSRs to retain on the list only those customers who are porting their telephone numbers and have decided to switch from Verizon to a facilities-based competitor. *Order* ¶ 7 (JA4). Verizon immediately contacted the remaining customers on the list via "express mail, e-mail, and/or automated telephone message," offering them various inducements to stay with Verizon, "such as discounts and American Express reward cards." *Order* ¶ 8 (JA4-5). At the time Verizon reached out to those customers, their number porting requests were still pending, so they had not yet completed the switch to a competing carrier. *Ibid.* (JA5).[1] If Verizon persuaded the customer to stay, it would cancel the order for a number port and issue a "jeopardy notice" to the carrier that requested the port. *Order* ¶ 9 (JA5).

Verizon would have been unable to target its retention marketing campaign in this way without two pieces of proprietary information it gleaned from other carriers' LSRs: (1) the fact that a particular "disconnect request stems from a switch in carriers"; and (2) "the fact that the new carrier is a facilities-based provider." *Order* ¶ 35 (JA13). Verizon would not have known "which customers to reach with its retention marketing but for its use of [this] proprietary information." *Order* at n.78 (JA13). It possessed no other means of distinguishing between the intended targets of its retention marketing program – subscribers on the brink of switching to a facilities-based competitor – and customers who requested disconnection of their Verizon service for other reasons (*e.g.,* because they were moving outside Verizon's service area or because they planned to purchase phone service from a Verizon affiliate or a Verizon wholesale customer, *i.e.,* a non-facilities-based provider). *See Order* ¶¶ 7, 35 & nn.28-30 (JA4, 13).

Verizon's retention marketing program was unique in the industry. The Commission is not aware of any other carrier that has used its competitors' number porting requests for retention marketing purposes.

D. The Complaint Against Verizon

This case concerns a complaint filed in February 2008 pursuant to 47 U.S.C. § 208 by Bright House Networks, Comcast Corporation, and Time Warner Cable (collectively, the "Complainants"). Although they are best known as providers of cable television service, these

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[1] Typically, the number porting process takes several business days. *See* Joint Statement ¶ 34 (JA231).

companies also offer local phone service and Internet access in competition with Verizon and other carriers. In order to do so, they employ the services of wholesale competitive local carriers (the "Competitive Carriers") to interconnect with incumbent local carriers and to provide transmission, number portability functions, and other functionalities. *Order* ¶ 3 (JA2). Bright House and Comcast use Competitive Carriers that are affiliated with them, while Time Warner uses Sprint Communications Company. *Ibid.*

If a Verizon subscriber decides to switch to the phone service offered by one of the Complainants, and if the subscriber asks to keep the same telephone number, the Complainant directs its Competitive Carrier to submit an LSR to Verizon requesting transfer of the customer's phone number to the Competitive Carrier and termination of the customer's existing service. *Order* ¶ 5 (JA3).

"Beginning in or around June 2007, the Competitive Carriers observed that Verizon suddenly was cancelling an unusually high number of [number porting] requests during the interval while such ports remained pending." Complaint ¶ 14 (JA38). Upon further investigation, they discovered that Verizon was using information conveyed by the Competitive Carriers' LSRs to mount an aggressive retention marketing campaign. Complaint ¶¶ 15-18 (JA39-41).

The Complainants alleged, *inter alia,* that Verizon's use of the Competitive Carriers' LSRs for retention marketing purposes violated section 222(b). Complaint ¶¶ 27-48 (JA44-56). In its answer to the complaint, Verizon acknowledged that it had developed a retention marketing program; but it contended that the program did not violate section 222(b). Answer at 13-19, 37-47 (JA79-85, 103-13).

In April 2008, the FCC's Enforcement Bureau issued a recommended decision regarding the complaint. *Bright House Networks, LLC v. Verizon California, Inc.,* 23 FCC Rcd 5857 (2008) (JA355) ("*Recommended Decision*"). Among other things, the Bureau recommended that the Commission deny the Complainants' claim of a section 222(b) violation. *Recommended Decision* ¶¶ 9-20 (JA359-62).

E. The Order On Review

Under the Commission's Accelerated Docket complaint rules, *see* 47 C.F.R. § 1.730, the parties filed comments on the staff's *Recommended Decision.* After reviewing those comments, the Commission rejected the Bureau's recommendation by a 4-to-1 vote. In an order issued on June 23, 2008, the Commission ruled that Verizon was violating section 222(b) "by using, for customer retention marketing purposes, proprietary information of other carriers that it receives in the local number porting process." *Order* ¶ 1 (JA1). Accordingly, the Commission granted the complaint insofar as it alleged a violation of section 222(b).

Applying the statute to the facts of this case, the Commission determined that the Competitive Carriers' LSRs contained "proprietary information from another carrier" within the meaning of section 222(b). *Order* ¶¶ 12-18 (JA6-8). In the Commission's judgment, this conclusion flowed logically from the FCC's earlier rulings that "advance notice of a carrier change that one carrier is required to submit to another is carrier 'proprietary information' under section 222(b)." *Order* ¶ 13 (JA6) (citing the *CPNI Reconsideration Order* and the *1998 Slamming Order*). Given "the inherently sensitive nature of the information" conveyed in carrier change requests and the valid "concern that carriers not unfairly exploit such information received in advance through necessary carrier-to-carrier interactions," the FCC had previously construed section 222(b) to ban the use of such information "'to trigger retention marketing campaigns.'" *Ibid.* (quoting *CPNI Reconsideration Order* ¶ 77). Consistent with that precedent, the Commission concluded that "the carrier change information that the Competitive Carriers must submit to Verizon in the LSRs is plainly 'proprietary' within the meaning of section 222(b)." *Ibid.*

The Commission also found that Verizon receives LSRs from the Competitive Carriers "for purposes of providing telecommunications service" within the meaning of section 222(b). *Order* ¶¶ 19-33 (JA9-13). By its terms, section 222(b) applies to proprietary information that one carrier receives from another "for purposes of providing any telecommunications service." 47 U.S.C. § 222(b). As the Commission noted, however, the statute does not specify who is "providing" the service that necessitates the disclosure of proprietary information. *Order* ¶ 19 (JA9). The Commission construed the marketing ban to apply to any carrier-to-carrier transmission of proprietary information that is required to enable the provision of telecommunications service by *either* the carrier receiving the information *or* the one submitting it. *Order* ¶¶ 20-27 (JA9-11).

Verizon maintained that "section 222(b) must be read to apply *only*" when proprietary information is submitted "for purposes of the *receiving* carrier providing telecommunications service." *Order* ¶ 25 (JA10). The Commission decided that Verizon's reading of the ambiguous statute was unduly narrow. In the agency's assessment, the statutory construction favored by Verizon would leave "irrational gaps" in the "protection" that section 222(b) was designed to provide to competing carriers. *Order* ¶ 23 (JA10). Under Verizon's interpretation, the statute would prohibit "receiving carriers from retention marketing against resellers" and competitors that lease unbundled network elements, but would permit "receiving carriers to retention market against facilities-based competitors." *Order* ¶ 27 (JA11). The Commission found that "such a limiting construction" of section 222(b) "would contravene ... a fundamental policy of the [1996] Act – to promote facilities-based competition." *Ibid.*

With that policy in mind, the Commission decided that the statute's ban on the use of carrier proprietary information for marketing purposes applied not just when proprietary information "is received for purposes of the *receiving* carrier providing service," *Order* ¶ 23 (JA10), but also when proprietary information is disclosed "for purposes of the *submitting* carrier providing telecommunications services." *Order* ¶ 20 (JA9). The agency found that the statutory language was "reasonably susceptible" to this reading, and that this interpretation "more comprehensively achieves section 222(b)'s objectives" than Verizon's narrow alternative. *Order* ¶ 25 (JA10-11).

On the basis of this interpretation, the Commission determined that section 222(b)'s marketing ban covers the carrier-change information that a Competitive Carrier must disclose so that it can provide "telecommunications service to a Complainant to serve a particular new customer." *Order* ¶ 24 (JA10).

Alternatively, the Commission found that even if Verizon's narrow construction of section 222(b) were correct, the statute bars "Verizon's retention marketing practices" because the Competitive Carriers convey carrier-change information to enable Verizon to provide a telecommunications service: number porting. *Order* ¶ 30 (JA12). The Commission reasoned that although number portability does not entail an offering of transmission for a fee, it nonetheless qualifies as a "telecommunications service" under the Act because it "is a vital part of the telecommunications services that [Verizon] provides to the Competitive Carriers." *Order* ¶ 32 (JA12). The agency explained that unless Verizon executed the number port requested by a Competitive Carrier, it could not perform the basic telecommunications functions of "properly switching and transmitting calls to the new carrier" serving Verizon's "former customer." *Ibid.* Accordingly, under established precedent, the Commission found that number portability is an "adjunct to basic" service that should be classified as a telecommunications service. *Order* ¶¶ 31-32 (JA12).

Finally, the Commission determined that the Competitive Carriers affiliated with Bright House and Comcast are "telecommunications carriers" whose proprietary information is protected by section 222(b). *Order* ¶¶ 37-41 (JA14-16). The record showed that: (1) "the Comcast and Bright House Competitive Carriers 'self-certify' that they do and will operate as common carriers"; (2) each of them "has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates"; and (3) both carriers have entered into state-approved interconnection agreements with Verizon. *Order* ¶ 39 (JA14-15). On the basis of this evidence, the Commission concluded that for purposes of section 222(b), those Competitive Carriers are "telecommunications carriers." *Order* ¶ 41 (JA16).

The Commission found no basis for Verizon's claim that a ban on Verizon's retention marketing program "would raise significant First Amendment concerns." *Order* ¶ 44 (JA17) (internal quotations omitted). It pointed out that the First Amendment allows the government to restrict truthful commercial speech "if [the] restriction is narrowly tailored to serve a substantial government interest." *Ibid.* (JA18) (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980)). "The Commission previously found that this test was met" in the *1998 Slamming Order* "when it interpreted section 222(b)" to prohibit "retention marketing based on the use of carrier change information." *Ibid.* (citing *1998 Slamming Order* ¶¶ 107-111). Applying the "same analysis" here, the Commission concluded that the First

Amendment permitted it to construe section 222(b) to bar "retention marketing based on the use of carrier change information embedded in number porting requests." *Ibid.*

Having determined that Verizon's retention marketing practices violated section 222(b), the Commission ordered Verizon "immediately" to "cease and desist from" using number porting requests to identify the targets of its retention marketing campaign. *Order* ¶ 45 (JA18). Verizon remains free to market its services to its customers at any time and in any way it chooses, so long as its marketing does not rely on the use of a competitor's proprietary information.

Verizon petitioned for review of the *Order*. It also moved for a stay pending review. The Court denied Verizon's stay motion on July 16, 2008.

SUMMARY OF ARGUMENT

The telecommunications industry has long understood that section 222(b) bars carriers from using their competitors' number porting requests to engage in retention marketing. When a competing carrier requests a number port to serve a new customer, it must give the customer's current carrier "advance notice" that the customer is switching to another carrier "on a particular date." *Order* ¶ 12 (JA6). This is the sort of competitively sensitive proprietary information that a company ordinarily would never divulge to a competitor. For more than a decade after section 222(b) became law, not a single carrier used this proprietary information for its own marketing purposes.

Suddenly and without warning, Verizon broke from this industry consensus in 2007. It began using its competitors' number porting requests to identify the target audience for an aggressive retention marketing campaign. To the best of the Commission's knowledge, Verizon was – and still is – the only carrier that has ever used other carriers' number porting requests for its own marketing purposes.

In response to a complaint from some of Verizon's competitors, the FCC reasonably concluded that Verizon had violated section 222(b) by using its competitors' number porting requests to coordinate its retention marketing program. In the Commission's view, Verizon is permitted to use its competitors' information only for the purpose for which it is received: to complete the ministerial act of porting a phone number to a competitor. Verizon may not use the information "for its own marketing efforts." The Commission's decision rested on a reasonable interpretation of the statute's ambiguous terms – an interpretation that was consistent with the statutory text, the agency's own precedents, the industry's general practice, and the statute's basic purpose.

Verizon contends that the Commission's reading of section 222(b) is both unreasonable and unconstitutional. Neither claim has merit.

I. The Commission reasonably determined that Verizon used other carriers' proprietary information for marketing purposes in violation of section 222(b). When a competing carrier requests a number port from Verizon, it has "no choice but to provide" Verizon with "advance notice" that a facilities-based competitor "will supplant Verizon as the voice service provider to a particular customer on a particular date." *Order* ¶ 12 (JA6). Verizon used this proprietary information – which the competitor was compelled to provide to port a phone number – to identify the target audience for its retention marketing program: customers who are about to leave Verizon for another facilities-based carrier. Section 222(b) requires Verizon to remain neutral when implementing a number port to enable a customer to switch carriers. Instead, Verizon improperly used proprietary information to negate the port and abort the switch.

The information that Verizon used for retention marketing purposes was not merely a direction from a customer, as Verizon mistakenly claims. Number porting is exclusively a carrier-to-carrier transaction; the customer has no direct involvement in the process. Moreover, contrary to Verizon's assertion, the competing carrier is not merely acting as the customer's "agent." That carrier has its own commercial interest in requesting a number port; it cannot start serving a new customer until the customer's number is ported. That is why a competitor is willing to reveal to Verizon that a certain Verizon customer will soon be switching carriers. This is the kind of proprietary information that competitors usually keep confidential.

The Commission reasonably found that competitors provided Verizon with this proprietary information "for purposes of providing … telecommunications service" within the meaning of section 222(b). Competing carriers submitted the information so that they could provide telecommunications service to new customers they won from Verizon. They also submitted the information to enable Verizon to provide a telecommunications service: number porting. There is no basis for Verizon's claim that section 222(b) applies only when the recipient of proprietary information uses it to provide wholesale telecommunications service. The statute contains no such limitation. Indeed, the word "wholesale" appears nowhere in the statute. The Commission reasonably concluded that the statute's reference to "*any* telecommunications service" could fairly be read to encompass service provided by *either* the carrier receiving proprietary information *or* the one submitting it. This reading of the statute, unlike Verizon's more cramped construction, properly protects the proprietary information of facilities-based competitors – the carriers that Congress expected to play the leading role in opening the local exchange market to competition.

Even assuming that section 222(b) applies only when the receiving carrier uses proprietary information to provide telecommunications service, it would apply here because Verizon received proprietary information for purposes of providing number porting. That service is a vital component of the basic telecommunications services that Verizon provides to the Competitive Carriers. Number porting is also an integral part of the retail service that Verizon provides to its own customers.

Finally, the Commission reasonably concluded that the Competitive Carriers affiliated with Bright House and Comcast are "telecommunications carriers" whose proprietary information is protected by section 222(b). Those carriers self-certified that they operate as common carriers. They also obtained state certificates of public convenience and entered into interconnection agreements with Verizon. They thereby established their status as telecommunications carriers for purposes of section 222(b).

II. The *Order*'s limitation on Verizon's use of its competitors' proprietary information does not raise any significant First Amendment concerns. If it did, the First Amendment would forbid protective orders – which permit parties to use information for only limited purposes – and rules against misappropriation of another's intellectual property or trade secrets by one who receives them for only a limited use.

Assuming that a limitation on Verizon's use of other carriers' proprietary information constitutes a restriction on speech, the only speech implicated here is purely commercial speech. The First Amendment permits regulation of commercial speech as long as the restriction directly advances a substantial government interest and is narrowly tailored to serve that interest. The *Order* passes that test.

Congress adopted section 222(b) to advance a substantial government interest: preventing telecommunications carriers from misusing their competitors' proprietary carrier-change information for their own marketing purposes. The government has a substantial interest in preventing such anti-competitive conduct and safeguarding the integrity of the carrier change process in light of the receiving carriers' obvious conflict of interest. By requiring Verizon to "remain 'neutral,' and not act as a competitor," during the brief period between the submission of a number porting request and the completion of the port, the *Order* directly advances the government's interest. *Order* ¶ 22 (JA10). The *Order* is also narrowly tailored to achieve the statutory objective. Under the terms of the *Order*, the only thing Verizon may not do is use carrier-change information for marketing purposes during the few days while a number porting request is pending. Otherwise, Verizon remains free to communicate any marketing message it chooses to any customer at any time by any means.

Verizon complains that the *Order*'s restrictions on the speech of Verizon and other telephone companies do not apply to the speech of cable companies. But the restriction applies equally to all telecommunications carriers, whether they are incumbents, like Verizon, or relatively new competitors, like Complainants. Complainants in their capacity as telephone companies face precisely the same rules as Verizon: They may not use porting requests from Verizon (or any other carrier) to engage in marketing. This rule does not apply to the markets for video or Internet access services because they do not share the unique characteristics of the telephone service market. Only in that market must a competing service provider "communicate and coordinate with a customer's existing ... service provider in order to initiate service to that new customer." *Order* ¶ 43 (JA17). This distinctive feature of the carrier change process in general – and number porting in particular – justified a different regulatory approach toward telephone companies. In this context, therefore, any regulatory distinction between telephone companies and cable companies does not offend the First Amendment.

STANDARD OF REVIEW

Review of the FCC's interpretation of section 222(b) is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005) ("*Brand X*").

Although it is true that the Court "will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties," the Court will "not abandon *Chevron* deference at the mere mention of a possible constitutional problem." *National Mining Association v. Kempthorne,* 512 F.3d 702, 711 (D.C. Cir. 2008) (internal quotations omitted). A party cannot "trump *Chevron*" by invoking "the canon of constitutional avoidance" unless it demonstrates that an agency's reading of a statute creates "a comparatively high likelihood of unconstitutionality, or at least [implicates] some exceptional intricacy of constitutional doctrine." *Whitaker v. Thompson,* 353 F.3d 947, 952 (D.C. Cir. 2004). Even if the constitutional arguments against an agency's statutory construction have "some force," the agency's reading is entitled to deference so long as it does not raise "grave and doubtful constitutional questions." *Rust v. Sullivan,* 500 U.S. 173, 191 (1991).

Verizon's claim that the *Order* violates the First Amendment is reviewed *de novo. United States v. Popa,* 187 F.3d 672, 674 (D.C. Cir. 1999).

ARGUMENT

I. THE COMMISSION REASONABLY CONSTRUED SECTION 222(b) TO BAR VERIZON'S RETENTION MARKETING PRACTICES

When a telecommunications carrier "receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service," section 222(b) prohibits the recipient from using this proprietary information "for its own marketing efforts." 47 U.S.C. § 222(b). After carefully applying the terms of the statute to the facts of this case, the FCC concluded that "Verizon's retention marketing program violates section 222(b)." *Order* ¶ 11 (JA6). The Commission's contextual interpretation of section 222(b), based on the statute's language as well as its purpose, is reasonable and entitled to the Court's deference. *Chevron,* 467 U.S. at 843.

Verizon contends that the *Order* misconstrues and misapplies the statute. It claims that section 222(b) does not apply to its retention marketing program for three reasons: (1) the information that Verizon used for retention marketing purposes was not proprietary; (2) Verizon did not receive the information for purposes of providing any "wholesale" telecommunications service; and (3) the information submitted by two of the Competitive Carriers is not governed by section 222(b) because those carriers are not "telecommunications carriers." None of Verizon's claims has merit.

A. The Commission Reasonably Found That Verizon Used Other Carriers' Proprietary Information For Its Own Marketing Purposes

The FCC has repeatedly found that "advance notice of a carrier change that one carrier is required to submit to another is carrier 'proprietary information' under section 222(b)." *Order* ¶ 13 (JA6) (citing the *CPNI Reconsideration Order* and the *1998 Slamming Order*). The Competitive Carriers provided such information to Verizon when they submitted number porting requests. That proprietary information served as "a key organizing tool" in Verizon's retention marketing efforts. *Order* ¶ 34 (JA13). The record showed that Verizon used the information to sift through its daily disconnect orders and to "swiftly identify" the target audience for its retention marketing campaign – *i.e.,* customers who are "switching their service to a facilities-based, competing provider like Complainants." *Ibid.* Accordingly, the Commission reasonably concluded that Verizon was violating section 222(b) by using other carriers' proprietary information for its own marketing purposes.

Verizon contends that the only information it used in its retention marketing was its own "retail customer's direction to cancel service and to port a telephone number." Br. 22. In Verizon's view, a carrier submitting an LSR is "merely conveying that information as the customer's agent." *Order* ¶ 16 (JA7). Therefore, according to Verizon, the information is not governed by section 222(b) because it is not another carrier's proprietary information. Br. 22-26.

This argument rests on the false premise that when a carrier submits an LSR to Verizon, "the *customer* has directed Verizon to take steps to port out her or his telephone number." Br. 26. When it comes to number porting, the customer does not direct *Verizon* to do anything. Rather, he simply informs his prospective new carrier that he wishes to keep the same telephone number. The competing carrier then requests a number port from Verizon so that the competing carrier can begin providing local phone service to the customer. The number porting process is strictly a carrier-to-carrier transaction. During that process, the customer does not even contact Verizon, let alone direct the company to take any action.[2]

As the Commission explained in the *Order*, a Competitive Carrier that requests a number port for a customer is "acting to promote its own commercial interests," and it cannot advance those interests without "conveying its own proprietary information." *Order* ¶ 16 (JA8). Before a Competitive Carrier can begin providing service to a Complainant serving a new customer, it must disclose "highly sensitive competitive information" to Verizon in an LSR, providing advance notice "that a competing carrier has convinced a particular Verizon customer to switch to the competing carrier's voice service on a particular date." *Order* ¶ 15 (JA7). Such information is plainly "proprietary," which in this context means "private." *See* American Heritage Dictionary 674 (4th ed. 2001). Any information held by a competing carrier that would enable the customer's current carrier to try to undo the switch and retain the customer is obviously private. No rational competitor would voluntarily reveal such information to the customer's current carrier.

Verizon claims that the only information it uses for retention marketing purposes is "the fact that the customer has directed [Verizon] to take steps to allow the customer to keep his or her number." Br. 23. That is incorrect. In the proceeding below, Verizon acknowledged that it "relies specifically on two facts" to identify its retention marketing audience – "the fact" that a

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[2] Verizon claims that the FCC, in opposing Verizon's unsuccessful stay motion, agreed with Verizon that "[t]he submitting carrier that transmits the [number porting] request is … simply acting 'as a conduit for a customer's direction.'" Br. 22 (quoting FCC Stay Opposition at 9). That is a remarkable mischaracterization of the Commission's pleading, which said just the opposite: "[T]he competing carrier is **not** acting solely as a conduit for a customer's direction. The Commission found that although the competing carrier is 'effectuat[ing] the customer's choice of carrier,' it is 'also acting to promote its own commercial interests, which requires conveying its own proprietary information.'" FCC Stay Opposition at 9 (emphasis added) (quoting *Order* ¶ 16 (JA8)).

particular disconnect request "stems from a switch in carriers," and "the fact that the new carrier is a facilities-based provider." *Order* ¶ 35 (JA13) (citing Answer at 14 (JA80) and Joint Statement ¶ 37 (JA232)). Verizon uses these facts to distinguish between customers who are leaving Verizon for a facilities-based competitor and customers who are requesting disconnection for other reasons (*e.g.,* because they are moving out of Verizon's service area or taking service from a Verizon affiliate or a Verizon wholesale customer). "Verizon has identified no source for either of these facts other than" the LSRs that it receives from competing carriers. *Ibid.*

Verizon argues that the information disclosed in LSRs cannot be proprietary because the statute's marketing ban would not apply if the customer himself revealed the same information to Verizon. Br. 24. This argument ignores the critical difference between customers and competitors. A customer, unlike a competing carrier, is not required to reveal any proprietary information to the customer's current carrier in order to switch to a new service provider. Even if a customer contacted Verizon directly to request termination of his service, he would be under no obligation to inform Verizon that he planned to switch to another carrier. Thus, the anti-competitive conduct that the statute seeks to prevent is not implicated when a customer himself *voluntarily* initiates contact. Congress recognized as much when it limited the marketing ban in section 222(b) to information received "from another carrier."

Furthermore, the fact that a customer *could* reveal information to his current carrier does not make that information any less proprietary to the competing carrier when the customer has *not* done so. Businesses do not share their customer lists with competitors, but treat such information as extremely sensitive, even though the customers themselves are free to tell competitors of the relationship.[3] Therefore, as a general rule, a former employee "has a duty not to disclose" his former employer's confidential customer list, regardless of whether this information might be "available on the open market." *Jeter v. Associated Rack Corp.,* 607 S.W.2d 272, 276 (Tex. Civ. App. 1980) (citing Restatement (Second) of Agency § 396(b) (1958)). A company's customer list "arguably is not 'secret'" because individual customers could always reveal their relationship with the company; but the list "still provides the one who possesses it with a competitive advantage." *Triple Tee Golf, Inc. v. Nike, Inc.,* 485 F.3d 253, 267 (5th Cir. 2007).

Given the competitively sensitive nature of information concerning particular customers, the Commission reasonably concluded that unless a customer directly informs his current carrier of his plans to change carriers, "the carrier-change information conveyed in carrier-to-carrier communications remains proprietary." *Order* ¶ 16 (JA7). Consistent with this reasonable premise, the Commission ruled ten years ago that section 222(b) applies to carrier change requests that carriers submit on behalf of customers. *Order* ¶ 16 (JA8) (citing the *1998 Slamming Order*). In light of that precedent, Verizon has no basis for claiming that a carrier that requests a number port for a customer does not disclose proprietary information because it is merely acting as the customer's "agent."

Verizon makes much of the fact that the earlier FCC orders construing section 222(b) to cover carrier-change information all involved requests for wholesale service. Br. 24-25 & n.8. It maintains that this case is different because the Competitive Carriers did not order any wholesale

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[3] *See, e.g.,* Restatement (Third) of Unfair Competition § 42, cmt. f (1995) ("Customer identities and related customer information can be a company's most valuable asset and may represent a considerable investment of resources."); *Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.,* 247 F.3d 79, 107 (3d Cir. 2001) ("[C]ustomer lists and customer information … [are] highly confidential and constitute[] a valuable asset.") (internal quotations omitted).

service from Verizon. As we explain in the next section, however, those carriers *did* request wholesale service from Verizon; and even if they did not, the Commission reasonably interpreted section 222(b) to cover *all* carrier change requests, not just wholesale service orders.

B. The Commission Reasonably Determined That Verizon Received Proprietary Information From The Competitive Carriers For Purposes Of Providing Telecommunications Service

Section 222(b) applies to proprietary information that one carrier receives from another "for purposes of providing any telecommunications service." 47 U.S.C. § 222(b). But the statute does not specify who is "providing" the service that compels the disclosure of proprietary information. Nor does the statute identify the recipient of the service. Addressing this ambiguity, the Commission reasonably construed the statute's reference to "*any* telecommunications service" to mean either wholesale or retail service provided by *either* the carrier receiving the information *or* the one submitting it. *Order* ¶¶ 19-23 (JA9-10). Not only does the FCC's interpretation fit within the statute's broad language; it also furthers the fundamental purpose of the 1996 Act – promoting the development of facilities-based competition. *See Order* ¶ 27 (JA11); *USTA II,* 359 F.3d at 576.

On the basis of this reasonable statutory construction, the FCC found that section 222(b) applies to Verizon's retention marketing because Verizon received LSRs from the Competitive Carriers to enable the provision of two telecommunications services: a Competitive Carrier's "provision of telecommunications service to a Complainant to serve a particular new customer," *Order* ¶ 24 (JA10), and Verizon's provision of number portability, *Order* ¶¶ 30-33 (JA12-13).

(1) Section 222(b) is not limited to "wholesale" services provided by the receiving carrier

Without citing any authority, Verizon repeatedly argues that section 222(b) applies only when a carrier "receives proprietary information in the course of providing a wholesale telecommunications service to the carrier submitting that information." Br. 26. This wholly unsupported argument permeates Verizon's brief. *See, e.g.,* Br. 3, 13, 14-15, 17-18, 21, 26-29, 37. "The short answer" to this argument "is that Congress did not write the statute that way." *See United States v. Naftalin,* 441 U.S. 768, 773 (1979).

Verizon asserts that the "text and structure of section 222(b) confirm" that the statute applies only to wholesale service requests. Br. 26. Verizon's claim to textual support for its position is especially weak; the word "wholesale" does not appear anywhere in the statutory text. Nor does the statute make any distinction whatsoever between information received for purposes of providing telecommunications service *to another carrier* and information received for purposes of providing telecommunications service *to a retail customer*. To the contrary, the statute by its own terms applies to proprietary information received "for purposes of providing *any* telecommunications service" – not just wholesale service. 47 U.S.C. § 222(b) (emphasis added). Thus, when Verizon insists that section 222(b) governs only wholesale service requests, it "reads into the statute a drastic limitation that nowhere appears in the words Congress chose" – a restriction "that, in fact, directly contradicts the unrestricted character of those words." *See Hercules Inc. v. EPA,* 938 F.2d 276, 280 (D.C. Cir. 1991).

Likewise, there is no merit to Verizon's assertion that section 222(b) applies only when "service" is provided by the carrier *receiving* proprietary information. The statute "does not expressly state *whose* provision of telecommunications services is covered." *Order* ¶ 19 (JA 9). Verizon nonetheless contends that its restrictive reading of section 222(b) "is mandated" by the statute's "grammatical structure." Br. 26 (internal quotations omitted). The Commission rightly rejected that argument. It concluded that the statute's ambiguous language was "reasonably susceptible" to an interpretation that covered the use of proprietary information submitted for purposes of "the submitting carrier providing telecommunications service." *Order* ¶ 25 (JA10). Applying the statute to the facts of this case, the Commission found that section 222(b) could reasonably be read to mean that "when Verizon 'receives or obtains proprietary information from a [Competitive Carrier] for purposes of [the Competitive Carrier] providing any telecommunications service,'" Verizon "'shall use such information only for such purpose [*i.e.*, the Competitive Carrier providing a telecommunications service], and shall not use such information for its own marketing efforts.'" *Order* ¶ 21 (JA9). Whether or not this interpretation is "the most readily apparent" reading of the statute, it is clearly not precluded by the statute's language or structure and therefore must be affirmed.[4] The statute is ambiguous, and the Commission construed it reasonably.

In addition, the Commission's statutory construction "more comprehensively achieves section 222(b)'s objectives" than Verizon's reading does. *Order* ¶ 25 (JA10-11). The "fundamental objective of section 222(b)" is "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 statute was enacted to

[4] *Cf. New Edge Network, Inc. v. FCC,* 461 F.3d 1105, 1108-09, 1112 (9th Cir. 2006) (although the Supreme Court had upheld the FCC's original interpretation of section 252(i) as "the most readily apparent," the Ninth Circuit ruled that the Commission could reasonably change its interpretation in light of its experience in implementing the statute) (quoting *AT&T,* 525 U.S. at 396). *See also Brand X,* 545 U.S. at 980 (a reviewing court must defer to an implementing agency's reasonable interpretation of an ambiguous statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation"); *Troy Corp. v. Browner,* 120 F.3d 277, 291 (D.C. Cir. 1997) (this Court "will not reverse an agency's interpretation of a statute merely because it is not the most obvious one").

prevent carriers that receive such competitively sensitive information from unfairly exploiting it for their own marketing purposes. The potential for such misconduct exists whenever carriers submit carrier change requests, whether or not the submitting carrier requests a wholesale telecommunications service other than number porting from the receiving carrier. Facilities-based carriers that submit carrier-change information "are just as vulnerable as resellers to … anti-competitive conduct by the receiving carrier." *Order* ¶ 27 (JA11). Thus, contrary to Verizon's contention (Br. 27-29), the Commission had good reason for construing section 222(b) to cover more than just wholesale service requests.

The alternative advocated by Verizon – reading section 222(b) to apply only where the receiving carrier is providing a wholesale telecommunications service other than number porting to the submitting carrier – would produce "irrational gaps" in the statute's coverage. *Order* ¶ 23 (JA10). That reading would protect resellers and users of unbundled network elements – but *not* facilities-based competitors – from the anti-competitive use of their proprietary information by other carriers. *Order* ¶ 27 (JA11). Such an approach, which completely ignores the statute's underlying context, would "lead to an absurd result." *See CTIA,* 330 F.3d at 511. Verizon and other incumbent local carriers have long complained about the "synthetic" competition they face from carriers that lease incumbents' network facilities instead of building their own. *See United States Telecom Association v. FCC,* 290 F.3d 415, 424 (D.C. Cir. 2002) ("*USTA I*"). This Court has emphasized that the ultimate aim of the 1996 Act is to promote "genuine, facilities-based competition" by carriers that construct their own networks. *USTA II,* 359 F.3d at 576. Yet under Verizon's cramped construction of the statute, section 222(b) would protect the proprietary information of competitors that provide service exclusively over equipment they lease from incumbents (or competitors that resell the incumbent's services), but would deny protection to the "genuine, facilities-based" competitors that Congress expected to play the leading role in opening local exchange markets to competition. The Commission sensibly concluded that "such a limiting construction" of section 222(b) would conflict with the basic purpose of the 1996 Act: "to promote facilities-based local competition." *Order* ¶ 27 (JA11).

Verizon also asserts that the Commission made "an arbitrary and capricious departure" from its previous orders when it decided here that section 222(b) applies outside the wholesale service context. Br. 30. That claim is baseless. To be sure, in its earlier orders, the Commission used the terms "wholesale" and "retail" in applying the statute; but it did so "merely to identify the source of the carrier-change information." *Order* ¶ 26 (JA11). In those orders, "wholesale" referred to carrier-to-carrier communications, use of which the statute restricts; "retail" referred to customer-to-carrier communications, use of which the statute does not limit.[5]

In the *CPNI Reconsideration Order,* for example, the Commission ruled that section 222(b) prohibits receiving carriers from using *any* "carrier-to-carrier information ... to trigger retention marketing campaigns" (¶ 77); but it also determined that a carrier is free to make marketing use of information that it "has independently learned from its retail operations" (¶ 79) – *i.e.,* information that a customer reveals directly. *Accord Third Slamming Reconsideration Order* ¶¶ 27-28. The Commission properly rejected the notion that this distinction between carrier and customer contacts amounted to a "limiting construction" restricting the scope of the statute to wholesale services. *Order* ¶ 26 (JA11). Indeed, in a 2003 order addressing the meaning of section 222(b), the agency expressly held that information submitted to implement a long-distance carrier change "may only be used by the executing carrier to effectuate the

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[5] Verizon's own practices reflect the same distinction. A competing carrier that requests a number port submits the LSR to Verizon Partner Solutions, Verizon's wholesale operating entity. Joint Statement ¶ 20 (JA226).

provision of service *by the submitting carrier to its customer*" – in other words, the submitting carrier's *retail* service. *Order* ¶ 21 (JA9) (quoting *Third Slamming Reconsideration Order* ¶ 25).

The Commission's "interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *MCI Worldcom Network Services, Inc. v. FCC,* 274 F.3d 542, 547 (D.C. Cir. 2001) (internal quotations omitted). In this case, there has been no departure at all from earlier orders, let alone an unexplained one.

(2) Section 222(b) would apply even if it were limited to services provided by the receiving carrier

Even if Verizon were correct that section 222(b) applies only when the recipient of proprietary information uses it to provide telecommunications service, the statute would still apply here because Verizon uses the information in LSRs to provide the Competitive Carriers with number porting. *Order* ¶ 31 (JA12). Verizon contends that number porting falls outside the Act's definition of "telecommunications service" because it does not entail the offering of transmission for a fee. Br. 29-30 (citing 47 U.S.C. §§ 153(43), (46)). The Commission, however, has previously classified as "telecommunications services" functions or services that are "adjunct to" or "inseparable from" common carrier transmission service – *e.g.,* "central office space for collocation, certain billing and collection services, and validation and screening services" – even though "none of these services actually entails transmission." *Order* ¶ 31 (JA12) (internal quotations omitted). The agency reasonably concluded that number porting, like these other services, is an "adjunct to basic" telecommunications service. *Order* ¶ 32 (JA12).

In its brief, Verizon does not contest the validity of the Commission's longstanding classification of "adjunct to basic" services. Instead, it simply asserts that number porting is not "adjunct" to any telecommunications service that Verizon provides to the Competitive Carriers.

Br. 30. To the contrary, the Commission found that number porting "is a vital part of the telecommunications services that [Verizon] provides to the Competitive Carriers." *Order* ¶ 32 (JA12). Under its interconnection agreements with the Competitive Carriers, Verizon is obligated to "route traffic" to its former customers – something it could not do without the number port. *Ibid.* Indeed, implementing the number port "requires Verizon to be involved in" providing the basic telecommunications service of "properly switching and transmitting calls to the new carrier" serving a former Verizon customer. *Ibid.*

Number porting is also an aspect of the telecommunications service that Verizon provides *to its own customers*. *See Order* ¶ 31 (JA 12) ("Number portability … is a necessary component of a retail telecommunications service."). Verizon acknowledges that porting a customer's number is one of Verizon's "obligations as the customer's current *retail* voice service provider." Br. 25. It contends, however, that such service is not covered by section 222(b) because it is not "wholesale." As we explained in Section I.B.1 above, this argument reads a limitation into the statute that does not exist. The text of section 222(b) nowhere distinguishes between a telecommunications service provided to a carrier and one provided to a retail customer. Thus, even if section 222(b) could be read to apply only when the receiving carrier is providing a telecommunications service, Verizon is providing such a service when it provides number porting.

C. The Commission Reasonably Concluded That The Competitive Carriers Affiliated With Bright House And Comcast Are Telecommunications Carriers

Section 222(b) restricts the use of proprietary information that a telecommunications carrier receives "from another carrier." 47 U.S.C. § 222(b). The statute thus applies only if the party submitting proprietary information is a "telecommunications carrier." *See* 47 U.S.C. §

153(44). The FCC has construed the statutory term "telecommunications carrier" to mean a common carrier, and this Court has upheld that construction as reasonable. *See Virgin Islands Telephone Corp. v. FCC,* 198 F.3d 921, 922, 925-26 (D.C. Cir. 1999).

Verizon does not dispute that Sprint – the Competitive Carrier used by Time Warner – is a common carrier. It contends, however, that the other two Competitive Carriers – those affiliated with Bright House and Comcast – are not covered by section 222(b) because they are not common carriers. Br. 32-34. The Commission reasonably found otherwise.

To be a common carrier, "one must hold oneself out indiscriminately to the clientele one is suited to serve." *National Association of Regulatory Utility Commissioners v. FCC,* 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*"). A carrier may be a common carrier even if it is under no legal obligation to serve all potential users indifferently; "it is the practice of such indifferent service that confers common carrier status." *National Association of Regulatory Utility Commissioners v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*").

In assessing whether Comcast's and Bright House's Competitive Carriers are common carriers, the Commission found substantial evidence that they hold themselves out to serve the public indiscriminately. Those carriers self-certified "that they do and will operate as common carriers and … will serve all similarly situated customers equally." *Order* ¶ 39 (JA14). Furthermore, each of them "has obtained a certificate of public convenience and necessity (or a comparable approval) from the state in which it operates." *Ibid.* (JA15). Finally, both carriers have entered into state-approved interconnection agreements with Verizon. *Ibid.* "These facts, in combination," established "a prima facie case that the Comcast and Bright House Competitive Carriers are indeed telecommunications carriers for purposes of section 222(b)." *Ibid.*

Verizon produced no evidence to rebut the prima facie case that these carriers are common carriers. *Order* ¶ 40 (JA15-16). Indeed, prior to this proceeding, "Verizon itself appears to have treated these entities as telecommunications carriers." *Ibid.* (JA16).[6]

Verizon faults the Commission for relying on the carriers' self-certifications that they operate as common carriers. Br. 32-33. But Verizon "submitted no credible evidence" that these carriers "are unwilling to provide telecommunications services to unaffiliated entities on a nondiscriminatory basis." *Order* ¶ 40 (JA15). Finding nothing in the record to discredit the self-certifications, the agency properly gave those statements "significant weight." *Order* ¶ 39 (JA15). A carrier would not "make such statements lightly"; common carrier status can entail "substantial responsibilities." *Ibid.*

In any event, the Commission did not rely solely on the self-certifications in determining that Comcast's and Bright House's Competitive Carriers are common carriers. Each of those carriers has also obtained a state certificate of public convenience and entered into a publicly available, state-approved interconnection agreement with Verizon. *Order* ¶ 39 (JA15). Those facts, in tandem with the self-certifications, convinced the Commission that those carriers "are telecommunications carriers ... and provide 'telecommunications services' to Comcast and Bright House within the meaning of section 222(b)." *Order* ¶ 41 (JA16).

Verizon contends that the record contains no evidence that the Competitive Carriers' state certificates and interconnection agreements "constitute a public offering of the particular telecommunications provided by the Competitive Carriers to Bright House and Comcast." Br.

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[6] For example, Verizon entered into interconnection agreements with these carriers – something it is statutorily obligated to do only with "telecommunications carriers." *Order* at n.99 (JA16) (citing 47 U.S.C. § 251(a)(1)). In addition, "Verizon did not draw any distinctions between the services provided to Time Warner by Sprint – which Verizon admits is a telecommunications carrier – and those provided to Comcast and Bright House by [their affiliated] Competitive Carriers." *Ibid.*

33 (quoting *Recommended Decision* ¶ 18 (JA362)). As the Commission explained, however, when the Competitive Carriers obtained "publicly available state certificates and interconnection agreements," they held themselves out as common carriers, putting the public on "notice that telecommunications services are available to the particular class of potential customers that might be interested in the services at issue here." *Order* ¶ 40 (JA16).[7]

Finally, Verizon argues that the FCC improperly determined that the Comcast and Bright House Competitive Carriers are common carriers for purposes of section 222(b), "but not for *any* other Title II purpose." Br. 33; *see also* USTA Br. 23-34. The Commission made no such determination. It simply observed that its decision that certain carriers are "telecommunications carriers" for purposes of section 222(b) "does not mean that they are *necessarily* 'telecommunications carriers' for all other provisions of the Act." *Order* ¶ 41 (JA16) (emphasis added). The agency's decision here was "limited to … the particular statutory provision at issue" – section 222(b). *Ibid.* The Commission reached no firm conclusions as to whether any of the Act's other provisions regarding "telecommunications carriers" would or would not apply to Comcast's and Bright House's Competitive Carriers. *Ibid.*

Verizon speculates that the FCC might not "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 [those carriers] to all Title II common-carrier regulation." Br. 34; *see also* USTA Br. 29 n.7. There is no basis for such speculation. The Commission clearly recognized that if it classified the Competitive Carriers as "telecommunications carriers"

[7] The fact that the Comcast and Bright House Competitive Carriers "presently serve only their affiliates" does not disqualify them for common carrier status. *Order* at n.95 (JA15). "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." *NARUC I,* 525 F.2d at 641. The specialized services provided by the Comcast and Bright House Competitive Carriers may be of use to "only a few potential customers other than their affiliates." *Order* at n.95 (JA15).

for purposes of section 222(b), those carriers might also be subject to the Act's other provisions governing "telecommunications carriers." *Order* ¶ 41 (JA16) (stating only that "we believe that it *may* be permissible to interpret an ambiguous but defined term differently in different statutory provisions that serve distinct purposes") (emphasis added). It simply left that "determination[] for another day." *Ibid.* Undaunted by the possible implications of its holding for future decisions, the Commission unequivocally concluded that the Bright House and Comcast Competitive Carriers are "telecommunications carriers" covered by section 222(b). *Order* ¶ 41 (JA16).

To the extent Verizon seeks to challenge any suggestion by the Commission that the other provisions of Title II might not apply to the Comcast and Bright House Competitive Carriers, any such challenge is plainly not ripe. Given the limited scope of this proceeding, the Commission had no need to – and did not – decide whether any statutory provision other than section 222(b) applied to those carriers. Its holding here was "limited to the particular facts and the particular statutory provision at issue in this case." *Order* ¶ 41 (JA 16). The agency's general observations about the Act's other provisions were dicta; they were "not in any way a part of the basis" for the FCC's conclusion that section 222(b) applies to the Comcast and Bright House Competitive Carriers. *See US West, Inc. v. FCC,* 778 F.2d 23, 28 (D.C. Cir. 1985) (dismissing as unripe a challenge to dicta in a Commission order). Should the FCC interpret the statutory phrase "telecommunications carrier" in some future order construing a different statutory provision, any carrier aggrieved by that order can bring a challenge then. Any such challenge at this point is not ripe for adjudication because "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300 (1998) (internal quotations omitted).[8]

II. THE *ORDER* DOES NOT VIOLATE THE FIRST AMENDMENT

Verizon claims that the Commission's interpretation of section 222(b) violates the First Amendment because it "impinges upon" Verizon's right "to select its audience" and "to tailor the content of its speech to that audience," as well as "the rights of willing listeners to receive ... truthful speech." Br. 35. Even assuming that limiting the use of another carrier's proprietary information constitutes a restriction on speech, doing so is lawful, as the Commission determined when GTE (one of Verizon's predecessors) raised the same argument ten years ago. *1998 Slamming Order* ¶¶ 107-111; *see also Order* ¶ 44 (JA18) (endorsing the analysis in the *1998 Slamming Order*).

Any speech implicated here is purely commercial speech, which occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 456 (1978). "[L]aws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial [government] interest in order to survive First Amendment scrutiny." *Edenfield v. Fane,* 507 U.S. 761, 767 (1993); *see also Central Hudson,* 447 U.S. at 563-66. Under this more lenient standard of scrutiny, numerous commercial communications "are regulated without offending the First Amendment," including "the exchange of information about securities, corporate proxy

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[8] Moreover, "administrative action must be 'final' in order to be reviewable"; and "[b]ecause the FCC has reserved judgment on whether" the other provisions of Title II apply to Comcast's and Bright House's Competitive Carriers, "there is no apparent final agency action on this matter." *See AT&T Corp. v. FCC,* 369 F.3d 554, 562-63 (D.C. Cir. 2004).

statements," and "the exchange of price and production information among competitors." *Ohralik,* 436 U.S. at 456 (citations omitted).

Like these other permissible forms of commercial speech regulation, the FCC's *Order*, which simply directs Verizon to use its competitors' information only for the limited purpose for which it was provided, does not offend the First Amendment.[9] The Commission's reading of section 222(b) in this case directly advances a substantial government interest: preventing carriers from taking unfair advantage of the proprietary information they receive whenever they are asked by a competing carrier to execute a carrier change. *Order* ¶ 22 (JA9-10). The *Order* is also narrowly tailored to achieve that objective. Under the Commission's construction, the statute bans retention marketing only if a carrier uses confidential information it receives *from another carrier* during the brief period while a number porting request is pending. Verizon and other carriers remain free to engage in retention marketing if they use carrier-change information that they receive directly from their customers. Such information is not covered by section 222(b) when a customer – not a carrier – has disclosed it. *Order* ¶ 16 (JA7).

In many respects, the use restriction at issue here resembles a protective order that a court issues to prevent the misuse of sensitive information disclosed during pretrial civil discovery. In civil discovery, as in the number porting process, parties obtain access to confidential information that they would never learn otherwise. The Supreme Court has held that a pretrial protective order "does not offend the First Amendment" if it "is entered on a showing of good cause …, is limited to the context of pretrial civil discovery, and does not restrict the

[9] This Court has suggested that a restriction on the use of compulsorily disclosed confidential information may be "constitutional if it has a rational basis" – the least demanding standard of First Amendment review. *FEC v. International Funding Institute, Inc.,* 969 F.2d 1110, 1116 (D.C. Cir. 1992) (en banc) ("*IFI*"). However, even if "rational basis" review is not applicable here, the *Order* passes muster under the "intermediate scrutiny" that courts typically apply to commercial speech regulation. *Ibid.*

dissemination of the information if gained from other sources." *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 37 (1984). Likewise, the use restriction here does not offend the First Amendment; there is good cause for the restriction (the need to prevent anti-competitive conduct), and the restriction is limited to the context that creates the potential for harm (carrier-to-carrier transmissions of proprietary information).

Under Verizon's view of the First Amendment, much intellectual property and trade secret law would also be unconstitutional. For example, it is black-letter trade secret law that "misappropriation" may result from the "use of a trade secret of another" when the secret is "acquired under circumstances giving rise to a duty to ... limit its use." Uniform Trade Secrets Act § 1(2)(ii) (1985). Verizon here had just such a duty; it received its competitors' proprietary information for a limited purpose (number porting), but claims that it has a First Amendment right to use the information for its own marketing. As the Supreme Court has made clear, however, there is no "First Amendment right" for a party "to 'appropriat[e] to itself the harvest of those who have sown.'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee,* 483 U.S. 522, 541 (1987) (quoting *International News Service v. Associated Press,* 248 U.S. 215, 239-40 (1918)).

Verizon mounts several attacks on the constitutionality of the *Order.* Br. 34-45; *see also* USTA Br. 8-22. All of these challenges are baseless.

A. The *Order* Directly Advances The Government's Substantial Interest In Preventing The Anti-Competitive Use Of Competitors' Proprietary Information

To withstand First Amendment scrutiny, a restriction on commercial speech "must directly advance" a "substantial" government interest. *Central Hudson,* 447 U.S. at 564. The *Order* in this case satisfies that requirement.

Congress adopted section 222(b) to advance a substantial government interest: "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). When a customer decides to switch from his current carrier to a competitor, the competing carrier typically must provide the customer's existing carrier with competitively sensitive carrier-change information so that the current carrier can implement the customer's change to a new carrier. Section 222(b) addresses the receiving carrier's natural conflict of interest by barring that carrier from unfairly exploiting this advance notice of a carrier change for its own marketing purposes. A carrier that has been asked by a competing carrier to execute a carrier change "must remain 'neutral,' and not act as a competitor, until the carrier change is completed and the new carrier has begun providing telecommunications service." *Order* ¶ 22 (JA10).

The *Order*'s ban on Verizon's retention marketing practices serves the statutory purpose exactly. The point of the statute is to prevent the anti-competitive harm that occurs when a carrier misuses for its own marketing purposes the proprietary information that it obtains from another carrier for a very different purpose – to execute a carrier change. In that limited circumstance, "the government cannot promote its interest … except by regulating speech because the speech itself … causes the very harm the government seeks to prevent." *Trans Union Corp. v. FTC,* 267 F.3d 1138, 1142 (D.C. Cir. 2001).

Verizon does not appear to dispute that the interest underlying section 222(b) is substantial. It acknowledges that the purpose of section 222(b) "is to ensure that incumbent carriers do not use to their own advantage" the proprietary information that they receive from other carriers. Br. 37. Verizon maintains, however, that this "governmental interest" comes into play only when carriers obtain proprietary information "by virtue of their role as" providers of "wholesale telecommunications service." Br. 37. To the contrary, as we explained in Section I.B.1 above, the statutory text says nothing about limiting the statute's scope to the wholesale context; nor is there any reason to believe that Congress intended to do so. The same concern that motivated Congress to adopt section 222(b) affects *all* carrier change requests, not just wholesale service requests. Even if they have no need to purchase wholesale service, facilities-based carriers that submit carrier change requests "are just as vulnerable as resellers to … anti-competitive conduct by the receiving carrier." *Order* ¶ 27 (JA11).

Verizon asserts that there is no evidence that section 222(b) furthers the goal of promoting "competition generally." Br. 37. But the FCC did not limit its discussion of section 222(b)'s goals to this "different and broader interest." *Ibid.* It is true, as Verizon points out, that the Commission alluded to the 1996 Act's general goal of promoting "facilities-based local competition." *See Order* ¶ 27 (JA11). It did so, however, merely to describe a serious deficiency in Verizon's proposed reading of section 222(b). The Commission noted that Verizon's interpretation, by confining the statute's reach to wholesale service requests, would protect resellers and users of unbundled network elements – but *not* facilities-based competitors – from the anti-competitive use of their proprietary information by other carriers. Given the "fundamental policy" of the 1996 Act "to promote facilities-based local competition," the Commission saw no good reason to deprive facilities-based carriers of the protection afforded by section 222(b). *Ibid.* In reaching this conclusion, the agency never lost sight of the more precise government interest underlying section 222(b): preventing "anti-competitive conduct" by carriers that receive their competitors' proprietary information in carrier change requests. *Ibid.*

More generally, Verizon argues that the Commission lacked evidence that Verizon's use of its competitors' proprietary information caused any real harm. Br. 37-39. This argument ignores the fact that rules safeguarding businesses' proprietary information – and preventing competitors from misappropriating it and using it to their own advantage – are fundamental to a market economy. *See, e.g., Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470, 481-82 (1974) ("The necessity of good faith and honest, fair dealing, is the very life and spirit of the commercial world.") (internal quotations omitted); *id.* at 482 (protections against misuse of proprietary information guard against "the competitor who by unfair means, or as the beneficiary of a broken faith, obtains the desired knowledge without himself paying the price in labor, money, or machines expended by" the party that possesses the information) (internal quotations omitted). New evidence of the importance of these rules need not be proffered every time they are applied to a new factual setting.

Moreover, this Court has found that restrictions on the use of compulsorily obtained information (such as the carrier-change information at issue here) "need not be supported by … empirical" proof. *IFI,* 969 F.2d at 1117 n.*. The *IFI* case concerned a federal law that requires political committees to make their contributor lists publicly available. That statute also bars anyone else from using those lists to solicit contributions or for commercial purposes. The Court rejected a First Amendment challenge to this use restriction. *Id.* at 1116-18. It recognized that because "a political committee's contributor lists are its most valuable assets," political committees "safeguard the confidentiality" of those lists "and disclose them to the public only under [legal] compulsion." *Id.* at 1116. The same kind of concern justifies the use restriction in this case. A competing carrier is compelled to share competitively sensitive information in order to port the telephone number of its new customer. The fact that the customer's current carrier obtains this information for the limited purpose of porting the number does not give that carrier a First Amendment right to exploit the information for any other purpose.

Verizon contends that its retention marketing program "benefits consumers." Br. 9 (citing Eisenach Decl. ¶ 18 (JA256)). But the Commission reasonably concluded that any short-term benefits to individual consumers were outweighed by the long-term harm to competition and the number porting process. Presumably, individual consumers would receive the same short-term benefits if Verizon hacked into Comcast's computer system, discovered which customers were leaving Verizon for Comcast, and used that information to engage in retention marketing. But allowing this kind of exploitation of a competitor's proprietary data will obviously harm competition in the long run.

B. The *Order*'s Restriction On Retention Marketing Is Narrowly Tailored To Achieve The Objective Of Section 222(b)

When regulating commercial speech, the government need not adopt "the least restrictive means" to achieve its purpose. *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 480 (1989). The First Amendment requires only that a restriction on commercial speech be "narrowly tailored to achieve the desired objective." *Ibid.* Under this standard, the "fit between the restriction and the government interest" must be "reasonable," but "not necessarily perfect." *United States v. Edge Broadcasting Co.,* 509 U.S. 418, 429 (1993). The *Order*'s restriction on Verizon's marketing practices easily passes that test.

Although Verizon suggests otherwise, the restriction at issue here is quite narrow. The *Order* does nothing to prevent Verizon from marketing its services at will to any customer at any time by mail, telephone, e-mail, or any other means. Nor does the *Order* place any restriction on the content of Verizon's marketing messages.[10] In addition, Verizon remains free to use carrier-change information for marketing purposes if it obtains the information voluntarily from the customer rather than involuntarily from the competing carrier. *Order* ¶ 16 (JA7).

There is only one thing Verizon may not do under the terms of the *Order*. During the limited time (typically, a few days) while a number porting request is pending, Verizon may not use for marketing purposes the proprietary information that the requesting carrier has been forced to reveal so that Verizon can port the number. Once Verizon receives an LSR, it "must remain 'neutral,' and not act as a competitor, until the carrier change is completed and the new carrier has begun providing telecommunications service." *Order* ¶ 22 (JA10). This carefully crafted restriction is narrowly tailored to guard against the anti-competitive use of competitors' proprietary information.

Verizon contends that the *Order* is not properly tailored because it makes an "irrational" distinction: permitting "retention marketing based on the direct conveyance of information" by customers, but prohibiting "retention marketing based on a provider's request on a customer's behalf." Br. 40. For the reasons discussed in Section I.A above, this distinction was entirely reasonable. A customer is not required to reveal any proprietary information to his current carrier in order to switch service providers, and many do not. By contrast, when a competing carrier must obtain a number port to begin serving a customer who plans to leave Verizon, that carrier must give Verizon "advance notice" that it "will supplant Verizon as the voice service provider to a particular customer on a particular date." *Order* ¶ 12 (JA6). Competing carriers "have no choice" but to provide "this highly sensitive information" to Verizon "in order to

[10] Insofar as Verizon is concerned that its customers might not be aware that the company offers video services (Br. 7), the *Order* does not preclude Verizon from generally informing customers of that fact. Verizon would seem to have a powerful incentive to do so whether or not a customer is contemplating a change in telephone service.

effectuate a number port in accordance with industry processes." *Ibid.* Recognizing the sensitivity of this information, the Commission reasonably concluded that "the carrier-change information conveyed in carrier-to-carrier communications remains proprietary" unless a customer directly and voluntarily discloses the information to Verizon. *Order* ¶ 16 (JA7).

This distinction between customer-to-carrier and carrier-to-carrier communications is nothing new. The Commission "plainly made that distinction in prior orders" interpreting section 222(b), "and neither Verizon nor anyone else challenged it as … 'irrational.'" *Order* at n.50 (JA7). Indeed, local phone companies generally have accepted that distinction as a constraint on their marketing efforts. No local carrier had ever used number porting requests to engage in retention marketing until Verizon began to do so in 2007. And Verizon remains the only carrier that has ever resorted to this tactic, notwithstanding the intensifying competition that all carriers face from cable companies offering phone service. The industry's general practice reflects an understanding that, for purposes of section 222(b), there is a difference between direct customer contacts and carrier-to-carrier communications. That industry-wide understanding belies Verizon's assertion that the distinction is "irrational."

Verizon also argues that the *Order* is "irrational" because, under the FCC's reading of section 222(b), "Verizon's retention marketing program would be permissible so long as it targeted *all* customers who are disconnecting their service." Br. 40 (citing *Order* ¶ 15 (JA7)). In Verizon's view, the *Order*'s ban on the company's more precisely targeted marketing makes no sense because it prevents Verizon from "reducing expenses and avoiding sending materials to customers" who are no longer in the market. Br. 41. Essentially, Verizon contends that it should be permitted to use number porting information "merely to reduce the universe of customers to whom it sends marketing materials." Br. 23.

The Commission properly found, however, that section 222(b) bars Verizon from using LSRs to identify the target audience for its retention marketing campaign. This targeting function is vital to the success of Verizon's marketing efforts. Verizon aims its retention marketing pitch at particular customers "at a critical time – when [those] customers are reconsidering their service options." Br. 35. It has no means of identifying those customers other than the LSRs submitted by competing carriers. *Order* ¶ 35 (JA13).

In essence, Verizon took information provided by its competitor to *facilitate* the port and the switch, and instead used that information to *negate* the port and *abort* the switch. This is precisely the type of behavior that Congress sought to prevent by enacting section 222(b). Thus, it is Verizon's reading of the statute – not the *Order* – that is irrational.

C. The *Order* Does Not Treat Similarly Situated Speakers Differently

Finally, Verizon asserts that the *Order* "creates a sharp disparity between the regulatory treatment of Verizon's retention marketing and the comparable efforts of cable providers." Br. 42. It points out that cable subscribers must contact their cable provider directly to cancel their cable service because cable companies will not accept cancellation requests submitted by competing service providers on a customer's behalf. Br. 43. As a result, cable companies, in their capacity as video providers, face none of the restrictions on retention marketing that the *Order* imposes on Verizon. According to Verizon, the *Order* "thus has the effect of authorizing speech by one group of speakers while banning the very same type of speech by another." Br. 43. This might raise a First Amendment issue if telephone companies and cable companies were similarly situated. They are not.

So long as regulatory distinctions among speakers "are not a subtle means of exercising a content preference," such distinctions "are not presumed invalid under the First Amendment."

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 645 (1994). Verizon does not – and cannot – claim that the disparate regulatory treatment in this case stems from a content-based preference for the speech of cable companies. Therefore, the "differential treatment" that Verizon challenges is permissible if it "is justified by some special characteristic of" the particular entities being regulated. *See id.* at 660-61; *BellSouth Corp. v. FCC,* 144 F.3d 58, 69 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC,* 93 F.3d 957, 978 (D.C. Cir. 1996). In the retention marketing context, telephone companies possess precisely the sort of "special characteristic" that justifies "differential treatment" under the First Amendment.

The telephone service market is fundamentally different from any other service market. Due to the unique nature of telephony, "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." *Order* ¶ 43 (JA17). Coordination between carriers is essential to the number porting process. Unless the customer's phone number is properly ported, his calls will be misrouted when he switches from his current carrier to a new provider. *See Order* ¶ 32 (JA12). Consequently, the competing carrier must give the customer's current carrier "advance notice" that "a particular customer" is changing carriers "on a particular date." *Order* ¶ 12 (JA6).

This distinctive feature of telephone service sets telephone companies apart from any other category of service providers. In every other service market (including the video market), a competing service provider may begin providing service to a new customer immediately, does not have to ask the existing provider to release the customer, and does not have to reveal to the existing provider the fact that (and the date on which) the customer is switching service providers. There is thus no reason to believe that providers of video or other services will gain access to – or have the opportunity to misuse – their competitors' proprietary information in the same way that telecommunications carriers do.

Of course, when they act as telecommunications carriers, cable companies, just like telephone companies, are subject to the statutory marketing ban. The restriction applies equally to all telecommunications carriers, whether they are incumbents (like Verizon) or relatively new competitors (like Complainants). Therefore, in their capacity as telephone companies, Complainants face exactly the same constraints as Verizon. For example, if a customer chooses to switch from Comcast's voice service to Verizon's, Comcast may not use a number porting request from Verizon to engage in retention marketing.

Congress had good reason to take special precautions to guard against anti-competitive conduct by telephone companies. The telephone service market is the only market where "a provider has no choice but to communicate competitively sensitive information to its rival" as a prerequisite to serving a new customer that it has just won from the rival. *Order* ¶ 43 (JA17). That is why section 222(b) applies only to telecommunications services, "not to video or other services." *Ibid.* This differential treatment is plainly justified by the unique characteristics of the telecommunications industry. Accordingly, it does not offend the First Amendment.

CONCLUSION

The Court should deny the petition for review.

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September 8, 2008

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

VERIZON CALIFORNIA, INC., et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 08-1234
	)	
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13960 words.

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September 8, 2008

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

Verizon California, Inc., Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing "Final Brief" was served this 8th day of September, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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