REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FILED[2]
APR 2 3 2008
Missouri Public Service Commission

In the Matter of Bright House Networks, LLC, Comcast Corporation, and Time Warner Cable Inc., Complainants, v. Verizon California Inc., Verizon Delaware LLC, Verizon Florida, LLC, Contel of the South, Inc., Verizon South Inc., Verizon New England Inc., Verizon Maryland Inc., Verizon New Jersey Inc., Verizon New York Inc., Verizon Northwest Inc., Verizon North Inc., Verizon Pennsylvania Inc., GTE Southwest Incorporated d/b/a Verizon Southwest, Verizon Virginia Inc., Verizon Washington, D.C. Inc., Defendants.	File No. EB-08-MD-002

ANSWER OF VERIZON

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

February 21, 2008

AARON M. PANNER
EVAN T. LEO
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for Verizon

Exhibit No. 12
Case No(s). LC-2008-0049
Date 4/2/08 Rptr LW

REDACTED FOR PUBLIC INSPECTION

TABLE OF CONTENTS

Page

ANSWER OF VERIZON

Defendants ("Verizon"), pursuant to the Commission's letter of January 7, 2008, and 47 C.F.R. §§ 1.724 and 1.730, hereby answer the formal Complaint of Bright House Networks, LLC ("BHN"), Comcast Corporation ("Comcast"), and Time Warner Cable Inc. ("TWC"), filed on February 11, 2008.

INTRODUCTION AND SUMMARY

Communications markets have been transformed by the advent of vigorous facilities-based competition. Incumbent cable companies – which need not depend on incumbent telephone companies for facilities or services – are "competing in the telephony market."[1] Telephone companies like Verizon are investing billions of dollars to offer customers a meaningful – indeed, superior – video service alternative. Service providers using rival technologies are offering customers triple-play bundles of voice, broadband, and video services, at attractive discounts.

In this competitive environment, cable companies like complainants are undertaking aggressive efforts to retain their customers in the face of Verizon's deployment of state-of-the-art fiber optic facilities. Verizon, too, has introduced programs designed to retain customers by providing superior service packages and pricing incentives. The Verizon retention marketing program at issue here provides consumers accurate information about the voice, broadband, and video services and attractive pricing plans that Verizon offers. The program provides that information at a meaningful time – after the customers have cancelled their Verizon voice service but before they have left Verizon's network. Consumers benefit from better information

[1] Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, 5103, ¶ 2 (2007).

and superior value; those who choose to remain with Verizon, rather than switching service to a rival, do so because Verizon offers a better deal. Nothing prevents cable companies from seeking to persuade customers to switch after all, perhaps by sweetening the offer to the consumer. This intense competition for subscribers represents the ideal of facilities-based competition that Congress and the Commission have been seeking to encourage for more than a decade. In their complaint, the cable companies seek to squelch this competition, pleading instead for "protection[]." Compl. ¶ 42. They ask for regulatory intervention even though they do not and cannot claim that such marketing threatens any harm to competition that could offset the concrete benefits to consumers. That plea is anathema to the Commission's pro-consumer mission.

Just as Verizon's retention marketing program serves the pro-competition spirit of the Communications Act and the Commission's rules, so too does the program comply with the letter of the law. Verizon's retention marketing depends on information that Verizon possesses by virtue of its role as a provider of retail services, not by virtue of its provision of wholesale services or network facilities to another carrier. Section 222(b) of the Act thus does not apply in this situation for two independent reasons. First, the information that complainants provide to Verizon in the course of the Local Number Portability ("LNP") process is not "for purposes of providing any telecommunications service," because Verizon does not provide any telecommunications service in connection with the porting of a telephone number to a rival provider. 47 U.S.C. § 222(b). Second, and in any event, Verizon does not use any other carrier's proprietary information in its retention marketing.

The Commission's rules and orders confirm this interpretation of the statute, both limiting any restrictions on retention marketing to circumstances where the carrier is providing wholesale facilities or services, and approving the use in retention marketing of information that a carrier obtains in connection with its retail operations. Nor is this a situation where an "executing carrier" is using "information gained from a carrier change request" for marketing purposes. *1998 Slamming Order*,[2] 14 FCC Rcd at 1572, ¶ 106. The information that prompts Verizon's marketing efforts is the retail-service disconnect order, which is information that Verizon's retail operations obtain for the purpose of carrying out retail service functions that are independent of Verizon's role in the LNP process. Furthermore, Verizon is not an "executing carrier" as defined in the Commission's rules because Verizon does not "effect[] a request that a subscriber's telecommunications carrier be changed." 47 C.F.R. § 64.1100(b).

The Commission should deny the complaint.

[2] Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 1508 (1998) ("*1998 Slamming Order*").

COUNTER-STATEMENT OF FACTS

I. Mass-Market Competition

1. In the past several years, the communications marketplace has undergone fundamental transformations. Mass-market consumers now can choose from a wide variety of technologies and providers for voice services, including cable, wireless, over-the-top Voice-over-Internet-Protocol ("VoIP"), and traditional wireline competitors, as well as other alternatives to traditional voice services. Cable operators have emerged as the strongest competitors for voice services and also are the leading providers of high-speed Internet access services to mass-market customers. Cable also remains the dominant provider of video services. *See* Joint Declaration of Chris Creager, Bette Smith, Patrick Stevens, and Gary Sacra ¶ 10 ("Joint Decl.") (Exh. A).

2. In response to this rising competition, Verizon has been investing heavily to provide consumers with the full range of services they demand. Verizon is investing approximately $23 billion to deploy a fiber-to-the-premises network – known as "FiOS" – in thousands of communities in 17 states around the country, reaching 18 million customers' premises by the end of 2010. As of year-end 2007, FiOS Internet was deployed to more than 9.3 million homes and businesses in more than 2,000 communities across parts of 17 states, and was being actively marketed to 7.5 million of those premises. As of January 2008, more than 1 million customers were buying FiOS TV from Verizon. *See id.* ¶ 11.

3. Verizon's FiOS services have earned the highest ratings and consumer satisfaction of any in the country. In its February 2008 issue, *Consumer Reports* rated Verizon FiOS video, high-speed Internet, and long-distance telephone service the top service available in the country. Both FiOS video and Internet gained the top possible ranking in each of four

categories – value, reliability, performance, and customer support. These were the first-ever "perfect" scores for a video or broadband provider. In its March 2008 issue, *Consumer Reports* rated Verizon FiOS number one in the country for high definition TV service. *See id.* ¶ 12.

4. The ability to offer consumers multiple services has become important in the marketplace, because consumers increasingly insist on consolidating and reducing the number of their vendors. In addition, "bundling" involves significant efficiencies that allow multiple services to be provided at a lower overall cost than the provision of services on a stand-alone basis. Thus, providers that are able to offer multiple services can do so as lower-priced bundles that consumers value highly. The proportion of customers who receive voice, data, and video services from a single provider has tripled in the past two years. A study conducted for Verizon found that, of the consumers who have switched from Verizon to another provider, **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** did so in order to obtain a bundle of three services. *See id.* ¶ 13.

5. Cable operators are Verizon's most significant competitors in the mass market today. Virtually all mass-market consumers – both nationally and in Verizon's local telephone service areas – now are able to purchase voice services from an incumbent cable operator. Complainants have touted their success in increasing the number of voice customers they serve. For example, TWC recently announced that it had succeeded in adding 22,000 voice subscribers each week in the fourth quarter of 2007. Comcast announced that it added approximately 40,000 voice subscribers each week in the third quarter of 2007. Cable operators also are the largest providers of high-speed Internet access services. And cable operators are the dominant providers of video services by a wide margin. *See id.* ¶¶ 14-17.

6. In addition to cable, Verizon faces competition from a variety of other sources, all of which increases the pressure to retain customers. For example, Verizon's wireline business competes extensively with wireless providers. Today, there are substantially more wireless subscribers (230 million) than wireline access lines (168 million), and more than 80 percent of the U.S. population has at least one wireless phone. A large and growing fraction of consumers are giving up their wireline phones entirely – roughly 14 percent today, rising to nearly 17 percent in two years, and 20-33 percent by the end of 2010. *See id.* ¶ 18.

7. Many customers also use their broadband connections to access competitive over-the-top VoIP services. Today, broadband connections are available to more than 95 percent of U.S. households from a provider other than the incumbent local exchange carrier ("LEC"), and approximately 54 percent of all households subscribe to broadband. Moreover, a number of broadband alternatives such as WiFi, WiMAX, and Broadband over Power Lines are emerging that will make it even easier for consumers to obtain broadband and over-the-top VoIP services in the future. Traditional competitive LECs ("CLECs") still serve millions of mass-market customers, either by reselling an incumbent's local service from end-to-end or by combining portions of an incumbent's network with their own facilities. *See id.* ¶ 19.

8. As a result of the rapidly rising competition described above, Verizon has been losing a significant number of wireline access lines. Between December 1999 and December 2006, Verizon's retail access lines declined by approximately 37 percent. Over the past three years, 2005-2007, Verizon has been losing an average of 7 percent of its access lines per year, mostly to competitive alternatives. These declines contrast with an average historical growth rate in access lines of at least 3.5 percent. As a result, Verizon's actual share of total voice lines is even smaller than the percentage decline in access lines suggests, and **[BEGIN**

PROPRIETARY] **[END PROPRIETARY]** in some places. These competitive losses not only cost Verizon a voice customer, but also make it more difficult to win and retain subscribers to other services that Verizon seeks to offer, such as high-speed Internet and video. *See id.* ¶ 20.

II. The LNP Process

9. LNP is defined as the ability of end users to retain their telephone numbers when they switch service providers. *See* 47 C.F.R. § 52.21(*l*). Section 251(b)(2) of the Communications Act directs each local exchange carrier "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The Commission has delegated certain authority over number portability issues to the North American Numbering Council ("NANC"). *See* 47 C.F.R. §§ 52.11, 52.21-52.26.

10. When a customer decides to switch voice service from one facilities-based provider to another, two things happen that involve the old provider. The customer's voice service with the old provider must be cancelled. And – if the customer so chooses – the customer's telephone number must be ported to the new service provider. When local number portability was developed and implemented, customers could have been required to contact the old service provider directly to cancel service and to request that his or her telephone number be ported to a new carrier. Instead, under process flows developed by the industry, the new service provider submits a single request on behalf of the customer that serves as both the customer's retail service cancellation request and the request to port the customer's telephone number. *See* Joint Decl. ¶ 22.

11. Verizon has developed an internal process that enables the porting out of numbers in a timely manner when a Verizon customer chooses to switch to another provider's network and retain his or her number. This process conforms to the industry-standard process and flows that were designed by NANC. *See id.* ¶ 23.

12. Verizon's involvement in the LNP process begins when the provider to which the customer intends to switch service (the "new provider") submits a Local Service Request ("LSR") to Verizon Partner Solutions that communicates the customer's desire to port his or her telephone number to the new provider. The LSR requires the service provider that is submitting the request to identify itself, to give its order a unique Purchase Order Number, to designate the type of transaction desired, and to indicate the date and time for the termination of Verizon's retail service. The LSR also includes information about the retail customer, including the customer's name, location, Verizon retail account number, and desired treatment of telephone number listing. And the LSR also describes the nature of the desired number port – that is, whether it includes one or more numbers. *See id.* ¶¶ 24, 25.

13. The LSR contains a field for Agency Authorization Status, which must contain a "Y" to indicate that the new provider has authorization to act on the customer's behalf. That authorization allows the new provider to inform the customer's current provider (*i.e.*, Verizon), on the customer's behalf, of the intended number port and retail service cancellation. *See id.* ¶ 26.

14. Ordinarily, when a carrier submits an LSR for purposes of ordering a service or facility from Verizon, there is a charge associated with processing the LSR (in addition to whatever charges are imposed for the service). In the case of LNP-only LSRs, however, Verizon

does not impose any charge either for its role in the LNP process or for processing the LSR. *See id.* ¶ 27.

15. Each LNP transaction must be processed in accordance with Verizon's business rules. Those rules are fully compliant with the process flows and requirements for specific field entries recommended by NANC in 1997 and adopted by the Commission in the *Second Number Portability Order*,[3] and with the updated recommendations adopted in 2003 (on which the Commission has never acted) and the current recommendation of the LNPA Working Group (which NANC has not yet approved). Verizon's business rules also are compliant with the ATIS Local Service Migration Guidelines, issued April 2, 2007. *See* Joint Decl. ¶ 28.

16. After receiving an LNP-only LSR, Verizon confirms that the field entries on the LSR provide valid information sufficient to accomplish the port. After that is accomplished, an internal order is created in Verizon's Service Order Processor ("SOP") system to fulfill the request. The SOP system both coordinates communication with the requesting service provider and ensures that the proper orders are issued to accomplish the work processes needed to accomplish the request. *See id.* ¶ 29.

17. Once the internal service order is issued, Verizon's automated systems send the new provider a Local Service Request Confirmation (also known as a Firm Order Confirmation, or "FOC") that contains information specific to the individual request. Verizon confirms more than 90 percent of LNP-only LSRs in an automated "flow-through" fashion, with no human intervention, typically within minutes. *See id.* ¶¶ 30, 31.

18. When a customer migrates from one provider to another, it is important that the retail service being provided by the old service provider be terminated contemporaneously with

[3] Second Report and Order, *Telephone Number Portability*, 12 FCC Rcd 12281 (1997) ("*Second Number Portability Order*").

the establishment of new service. This ensures that the customer is not left without service for any significant period of time and does not wind up being required to pay two providers for duplicative service. *See id.* ¶ 32.

19. The NANC process flows make clear that, when a new service provider submits an LNP request, the old service provider (here, Verizon) must treat that request as a request for disconnection of the customer's retail service. Thus, when a Verizon customer wishes to switch his or her voice service (and number) to a cable incumbent, it is almost always the new service provider, acting on the customer's behalf, that transmits, on the customer's behalf, the request to disconnect the customer's retail service on a specified date. *See id.* ¶ 33.

20. As explained above, when Verizon receives an LNP-only LSR, an internal SOP retail service order is generated that is then transmitted to the appropriate downstream Operations Support Systems ("OSS"). The specific service order that is generated in such cases requires a "disconnect" of Verizon's existing retail line and end user account. It is identical to the order that would be issued had the end user called to terminate his or her service, except for the additional entries that are required to facilitate the actual porting of the telephone number to the new provider. The disconnect order is automatically populated from information contained in Verizon's systems as well as additional information provided by the new provider on the LSR. This information includes the date the port will take place. *See id.* ¶ 34.

21. According to the NANC process flows, after submitting the LSR to Verizon, the new provider uses its Service Order Administration ("SOA") interface to Number Portability Administration Center ("NPAC") to send a "create message" that is used to enter a pending subscription record with the necessary routing data for the number to be ported. The new

provider also performs any necessary work on its own network to turn up the customer's service. *See id.* ¶ 35.

22. The disconnect order described in paragraph 20 above triggers three key work steps for Verizon. The first step involves a number of different activities described in this paragraph. One is the scheduling of a retail disconnect on the requested due date. This instruction is transmitted to the Verizon switch serving the customer (referred to in the LNP context as the "donor" switch) through the appropriate OSS. Based on that instruction, Verizon would remove the translation from the switch as it applies to the telephone number and then remove the number from the switch entirely. Verizon also would physically disconnect the wire serving the customer from the frame in the central office; the loop would then be placed into inventory so it could be used if necessary to serve another customer. A service order is used to deliver information to the E911 database to unlock the customer's record so that it can be modified by the new carrier. If the LSR communicated any change to the customer's directory listing, that change would be implemented. And, after service is disconnected, the billing systems are informed to cease billing for service and to generate a final bill for the customer. *See id.* ¶ 36.

23. The second step is the establishment of what is known as a "10-digit trigger" in the donor switch. The purpose of the trigger is to prevent misrouting of certain calls made to the customer in the short interval after the number has been ported but before the disconnection of the customer's old retail service has been completed. During that interval, the software "translations" in the donor switch will still reflect the assignment of the customer's number to that switch. Most calls made to the customer after the port takes place will generate a "query" to the appropriate LNP routing database; in those cases, the response to the query will ensure that

the call is correctly routed to the new service provider's network. However, calls to the customer that originate in the donor switch itself are not queried; instead, the donor switch would route the call, pursuant to the translations still resident in that switch, to the customer's "old" line. In order to avoid misrouting in such cases, the 10-digit trigger is established in the switch. The trigger is a software instruction that directs the switch to initiate a routing database query in response to calls to the customer. Once the disconnect is completed and the translations for the customer's old service are removed from the donor switch, this query will be initiated without the need for a special trigger, and the trigger can be removed. *See id.* ¶ 37.

24. The 10-digit trigger is essentially a simple, convenient, and reliable way of closing the very narrow call-routing "loophole" described above. As an alternative to the use of a 10-digit trigger, the providers can arrange closely to coordinate the disconnection of the old retail service, the establishment of the new retail service, and the number port. For this reason, although the use of 10-digit triggers is routine in the industry, it is not required by the NANC process flows, which permit coordinated migration as an alternative. *See id.* ¶ 38.

25. The third step taken by Verizon in number ports is the confirmation of the pending subscription record previously created by the new provider in the NPAC database. Like the establishment of a trigger, this step is not required for the number to port successfully and is not required by the NANC process flows. It is essentially a precautionary measure to ensure that numbers do not port out incorrectly as a result of an error by the new service provider. Verizon sends an "Old Provider Create Message," which simply serves as confirmation for the Create Message submitted by the new service provider. If no such message is submitted, the new service provider can nevertheless cause the number to port. *See id.* ¶ 39.

26. On the due date, the new provider *activates* the port that it previously *established* in the NPAC database (by transmitting an appropriate instruction through its SOA interface with NPAC), and NPAC broadcasts the new routing instructions for the ported number to all subtending providers. Although the two extra steps described above – the establishment of a 10-digit trigger and the confirmation of the pending subscription record – are appropriate and important steps that serve the interests of end users in seamless and accurate number porting, they are not physically necessary for the completion of the port. The port will occur as long as the port activation and the broadcast of the new routing instructions take place on the due date. *See id.* ¶ 40.

27. Verizon processes LNP requests within the industry-standard interval of three business days from the issuance of the confirmation (absent a contrary request from the new service provider). However, in Verizon's experience, only a small minority of LNP orders have a requested interval of three business days. For example, in 2007, only **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** of the LNP orders submitted by Comcast, **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** of the LNP orders submitted by Time Warner, and **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** of orders submitted by BHN had a requested interval of three business days or less. Cable companies often ask for extended periods to allow them to complete the necessary physical work at the customer's premises. *See id.* ¶ 42.

III. Verizon's Retention Marketing Program

28. The retention marketing program that is the subject of this complaint proceeding was developed as one aspect of Verizon's efforts to compete effectively against rival providers

of voice and other services, particularly cable operators. As described in detail above, *see supra* ¶ 27, the order to disconnect a customer's retail service is frequently received by Verizon's retail operations several days in advance. Verizon attempts to reach out to those customers who have not already spoken with a Verizon retail representative, sending an overnight letter alerting customers to Verizon's competitive offers and asking them to call if they want to learn more. *See* Joint Decl. ¶ 43.

29. To generate the "lead list" for its retention marketing program, Verizon's retail organization begins with the universe of disconnect orders. Verizon eliminates from that list customers who are purchasing service from a Verizon wholesale customer – for example, customers who are switching service to a reseller of Verizon service or a customer of Verizon's Wholesale Advantage product – or from a Verizon affiliate (*i.e.*, Verizon Wireless). Verizon also seeks to reach out to customers who have not already spoken with a Verizon retail representative, to ensure that all customers are informed about Verizon's competitive bundle pricing and retention offers. (This is because when a customer calls Verizon directly to disconnect service, the representative has an opportunity to try to retain the customer at that time.) To that end, Verizon eliminates from the lead list customers who are not porting their telephone numbers from Verizon to another service provider. Verizon also excludes those disconnecting customers who are on do-not-call, do-not-solicit, do-not-mail, or do-not-email lists. *See id.* ¶ 44.

30. Verizon uses an automated process that compiles five pieces of information about each customer on the lead list: the name, telephone number, disconnect order number, due date, and address of customers with pending disconnect orders. This information is compiled from the

retail service orders generated in the SOP, as described above, and not from the LSRs that Verizon receives from competing providers. *See id.* ¶ 45.

31. Verizon has tried different approaches to contacting its disconnecting customers, but the predominant approach has been the use of direct mail that urges the customer to contact Verizon. *See id.* ¶ 46.

32. The information from the lead list also is loaded onto a database and can be automatically retrieved by a retail representative when a customer calls Verizon's Retention Centers in response to the direct mail. The first screen a customer service representative sees indicates whether the disconnect date is at least two days away. If this is not the case, the customer service representative is instructed to inform the customer that it is too late to stop the switch. (Verizon still attempts to persuade the customer to switch back to Verizon after completing the switch to the rival.) The representative also can see the disconnect order number and the disconnect due date. *See id.* ¶ 47.

33. When the customer calls Verizon in response to a retention campaign letter, the retention representative asks the customer why he or she is disconnecting service. The representative informs a customer who is migrating to another provider about the available service packages and promotional offers, in an attempt to persuade the customer to stay. If the customer does decide to remain with Verizon, Verizon employs a third-party verification process to confirm the customer's choice. Verizon uses this same process – including the same retention pitch from the same retention representatives – for other customers seeking to disconnect their Verizon service and who did not receive a retention campaign letter. *See id.* ¶ 48.

34. In some instances, a customer may respond to a retention letter after the customer's service has been cancelled. If the customer decides to return to Verizon, after third-

party verification, Verizon will submit an order to port the customer's number back. *See id.* ¶ 49.

35. Verizon's retention representatives do not have access to or reason to access the new provider's identity from the LSR that the new provider submitted. In addition, the retention representatives are instructed not to view the name of the new provider on the disconnect order. In most cases, even when the customer is retained, the retail representative can reverse the service cancellation with a click of a button and has no reason to access the disconnect order. *See id.* ¶ 50.

36. After the verification process is complete, Verizon cancels the internal service order relating to the port request and Verizon's systems issue a "jeopardy notice" to the provider that submitted the port request. This notice informs the provider that it is no longer the customer's agent. Specifically, Jeopardy Code 1P is sent to the provider with a remark stating: "Cust[omer] requ[e]st to retain VZ s[er]v[i]c[e] verif[ie]d; Issue Sup 1 to c[a]nc[e]l LNP" or "LNP cancelled at request of End User." This remark informs the provider that it must submit a supplemental order to cancel the provider's previous port request. Such a cancellation is necessary to ensure that the customer is not ported to another provider against his or her wishes. *See id.* ¶ 51.

37. Aside from issuing a jeopardy notice, Verizon puts the competing provider's port request "into conflict" by sending a conflict code to NPAC pending receipt of the LSR Sup 1 (port cancellation order) discussed above. This informs NPAC that Verizon is expecting the competing provider to comply with the customer's wishes to cancel the port and remain with Verizon, but that Verizon has not yet received a supplemental (*i.e.*, cancellation) LSR from the competing provider. That conflict code cannot be overridden by the competing provider. If the

new service provider persuades the customer to switch after all – for example, by improving its offer to the customer – it can either seek resolution of the conflict code or, what is much more common, submit a new LSR. *See id.* ¶ 52.

38. Verizon does not delay porting numbers in order to engage in the retention marketing program, as the metric performance described above makes clear. In 2006, Verizon completed 99.6 percent of more than 1.1 million stand-alone porting requests regardless of interval on the due date requested by the CLEC. Verizon's 2007 data indicate that that percentage has not materially changed. *See id.* ¶ 53.

39. Verizon's retention marketing program has been successful. Of approximately **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** customers who have received retention letters from Verizon, **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** have called Verizon's toll-free number. That response rate to a direct mail solicitation is considered extraordinary. Of the customers who call, nearly **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** have elected to keep their voice service with Verizon (and frequently to purchase additional services, including high-speed Internet and video services). In January 2008, of customers who have received retention letters from Verizon, **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** have called Verizon's toll-free number; of that number, fully **[BEGIN HIGHLY PROPRIETARY]** **[END HIGHLY PROPRIETARY]** have elected to keep their voice service with Verizon. *See id.* ¶ 55.

40. Verizon's retention marketing efforts have been successful for two basic reasons. First, Verizon provides consumers with information about Verizon's services that they may not

have had at the time that they initially decided to switch providers. For example, some consumers who switch to a cable operator offering a bundle of voice, video, and high-speed Internet services are not aware that Verizon offers comparable bundles. Verizon's retention letters inform customers about this fact. This ensures that consumers have all the information they need to make the best decision. Moreover, Verizon provides consumers information at the time they are likely to be most focused on their choice of provider, given their recent decision to switch, and often before they experience any inconvenience associated with making a switch (such as taking time off from work to wait for a service call). *See id.* ¶ 56.

41. Second, Verizon's retention marketing program provides consumers substantial benefits in the form of monetary incentives to remain with Verizon. Verizon's bundles are priced very competitively in comparison to cable providers' bundles. In addition, Verizon has offered customers a $10 monthly discount off a bundle of voice, video, and high-speed Internet services, and also has offered between $50 and $200 in American Express-branded reward cards. These are direct savings to consumers. *See id.* ¶ 57. The cable providers' own documents reflect the benefits that consumers have gained. *See* TWC0000185 (Exh. B) (commenting on Verizon offers); BHN 000701 (Exh. C) (commenting on Verizon offers).

42. Verizon's retention marketing practices not only benefit consumers directly, but also promote competition that provides consumers with further benefits. As noted above, in the event that a consumer decides to reverse its decision to switch providers and instead to remain with Verizon, Verizon will send a jeopardy notice. Once the competitor receives that notice, it has the same opportunity that Verizon had to try to convince the customer to change his or her mind. The competitive provider could "sweeten the pot" by offering greater discounts or other

incentives that redound to the consumer's benefit. *See* Joint Decl. ¶ 58; BHN 000701 (reflecting competitive response).

IV. Marketing Practices of Cable Incumbents

43. Verizon's retention marketing program is of particular competitive importance because it helps level the playing field with cable incumbents in marketing the triple-play bundles that consumers demand. *See* Joint Decl. ¶ 59.

44. When a customer chooses to switch his or her voice service from a cable company to Verizon, Verizon submits an LNP LSR to that company. Thus, the same information that is available to Verizon in the case of a customer shift from Verizon to a cable provider is available to the cable provider in the case of a customer shift from the cable provider to Verizon. If the cable provider wishes, it can engage in a retention program structured like Verizon's. *See id.* ¶ 60.

45. Furthermore, just as Verizon seeks to retain customers, so do complainants when Verizon has attracted one of their customers. Unlike Verizon, which must allow a competitive service provider to cancel Verizon voice service on a customer's behalf, cable operators typically require customers to call them directly to cancel video or broadband service. This gives the cable operator one final opportunity to persuade the customer not to switch his or her service, and to provide incentives for the customer to remain with the cable operator. Verizon does not have a comprehensive way to demonstrate just how widespread this practice is, but has been able to gather anecdotal evidence from employees showing that cable companies do try to retain customers who want to disconnect cable service and switch to FiOS TV. For example, one Verizon employee in eastern Pennsylvania (in the Lansdale central office) called Comcast to cancel cable service in October 2007, because the customer was switching to FiOS TV. Comcast

offered the customer a reduced rate for its "triple play" service and also offered to pay any early termination fee. Another employee in Fairfax County, Virginia, reports that Cox left the customer a message in between the time that the customer called to cancel Cox service and before the customer had FiOS installed. Cox informed the customer that they were on a "special list" and would reduce the customer's bill by $70 per month. Many Verizon employees unsurprisingly choose to migrate from a cable company's service to FiOS once FiOS is available in the employees' area. Many such employees have reported that the incumbent cable provider attempted to retain them prior to the migration. *See id.* ¶ 61.

46. A significant percentage of Verizon winbacks from cable companies that involve a number port are cancelled before the migration is completed. Although Verizon does not always know in such cases whether the retention effort by the cable company was triggered by a call originated by the customer or by some other source of information, the high percentage of customers may suggest that the cable company is taking advantage of an aspect of the migration process in order to attempt to retain the customer. *See id.* ¶ 62.

RESPONSE TO NUMBERED PARAGRAPHS

Verizon, while denying any allegation not specifically admitted herein, responds to the numbered paragraphs of the complaint in accordance with 47 C.F.R. § 1.724(b).

47. Paragraph 1: Verizon admits the allegations of the first three sentences and the last three sentences of this paragraph on information and belief. Verizon admits on information and belief that BHN currently provides voice service throughout the Tampa and Central Florida areas; admits that BHN competes with Verizon in the Tampa area; denies that BHN has suffered legally cognizable harm as a result of Verizon's retention marketing practices; and denies that Verizon's practices are unlawful; further answering, Verizon avers that its retention marketing practices are lawful for the reasons set forth in the legal analysis below.

48. Paragraph 2: Verizon admits the allegations of the first sentence and the last three sentences of this paragraph on information and belief. Verizon is without knowledge or information sufficient to form a belief as to the truth of allegations concerning Comcast's corporate structure in the remaining sentences of this paragraph.

49. Paragraph 3: Verizon admits the allegations of the first, third, sixth, seventh, and eighth sentences of this paragraph on information and belief. Verizon is without knowledge or information sufficient to form a belief as to the truth of allegations concerning TWC's corporate structure; Verizon admits the remaining allegations of the second sentence of this paragraph on information and belief. Verizon denies that TWC has suffered legally cognizable harm as a result of Verizon's retention marketing practices and denies that Verizon's practices are unlawful; further answering, Verizon avers that its retention marketing practices are lawful for the reasons set forth in the legal analysis below; Verizon admits the remaining allegations of the fourth sentence of this paragraph on information and belief. The allegation that Sprint provides

wholesale telecommunications services to TWC is a legal conclusion not requiring a response; to the extent a response is required, Verizon admits that TWC has presented evidence that Sprint provides wholesale telecommunications services to TWC; Verizon admits the remaining allegations of the fifth sentence of this paragraph on information and belief.

50. Paragraph 4: Verizon admits the allegations of the first sentence of this paragraph. Verizon admits that defendants are wholly owned directly or indirectly by Verizon Communications Inc.; Verizon does not understand and therefore does not admit or deny the allegation that Verizon Communications Inc. "control[s]" defendants; to the extent a response is required, Verizon denies this allegation; Verizon admits the remaining allegations of the second sentence of this paragraph. Verizon admits the allegations of the third sentence of this paragraph.

51. Paragraph 5: Verizon admits the allegations of paragraph 5.

52. Paragraph 6: The allegation that joinder of complainants' causes of action is appropriate is a legal conclusion not requiring a response; to the extent a response is required, Verizon does not challenge the joinder of complainants' causes of action pursuant to section 1.723(a) of the Commission's rules; Verizon admits that complainants allege that Verizon is engaged in materially identical marketing practices; Verizon denies that those marketing practices violate sections 222 and 201 of the Communications Act for the reasons set forth in the legal analysis below; the allegation that "each Complainant relies on processes for submitting the carrier-to-carrier information . . . that are essentially identical in all respects material to this Complaint" is a legal conclusion not requiring a response; to the extent a response is required, Verizon denies this allegation because, as set forth in the legal analysis below, there are material differences among complainants at least with regard to their relationships with their wholesale

partners; further answering, Verizon denies that the information submitted is "carrier-to-carrier" information because, as set forth in the legal analysis below, (1) the information is submitted by the carrier on behalf of a retail customer as the customer's agent, and (2) at least in the case of BHN and Comcast, information is not submitted by a carrier; further answering, Verizon denies that it "improperly relies" on any information; further answering, Verizon avers that its retention marketing practices are lawful for the reasons set forth in the legal analysis below. Verizon admits that it has common defenses to complainants' claims; further answering, Verizon avers that some of its defenses vary based on the identity of the complainant for the reasons set forth in the legal analysis below.

53. Paragraph 7: Verizon denies that "incumbent LECs . . . serve a large majority of landline subscribers"; further answering, Verizon denies that the "voice services marketplace" is limited to landline subscribers; further answering, Verizon avers that incumbent LECs serve widely varying percentages of voice-service subscribers depending on the particular geographic area; further answering, Verizon does not understand and therefore cannot respond to the allegation that complainants are "new entrants" to the voice-services market; Verizon is without knowledge or information sufficient to form a belief as to the truth of allegations pertaining to the manner in which complainants "must build their respective subscriber bases."

54. Paragraph 8: Verizon admits the allegations of the first sentence of this paragraph on information and belief.[4] The allegation of the second sentence of this paragraph that "Competitive Carriers" provide "telecommunications services" is a legal conclusion not requiring a response; to the extent a response is required, Verizon denies that affiliates of BHN

[4] The allegations in footnote 10 of paragraph 8 are legal argument not requiring a response; to the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents.

and Comcast provide common-carrier service to BHN and Comcast, respectively, for the reasons set forth in the legal analysis below; Verizon admits that TWC has presented evidence that Sprint provides telecommunications services to TWC; Verizon admits that processes that the "Competitive Carriers" use to provide notification to Verizon of their intent to port out a number served by Verizon are industry-standard processes; Verizon does not understand and therefore cannot respond to the allegation that the processes are "substantially similar for each Complainant for purposes of this Complaint"; to the extent a response is required to this allegation, Verizon denies this allegation because, as set forth in the legal analysis below, there are material differences among complainants at least with regard to their relationships with their wholesale partners.[5] The allegation that "[a]ny differences that might exist as between these processes are not material" is a legal conclusion not requiring a response; to the extent a response is required, Verizon denies this allegation because, as set forth in the legal analysis below, there are material differences among complainants at least with regard to their relationships with their wholesale partners.

55. Paragraph 9: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9.

56. Paragraph 10: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of this paragraph with respect to when the relevant Competitive Carrier submits its LSRs; Verizon admits that the Competitive Carriers submit LSRs to Verizon notifying Verizon that a Verizon customer has decided to port his or her number to a new carrier; Verizon denies, for the reasons set forth in the legal analysis below, that

[5] The allegations in footnote 11 of paragraph 8 are legal argument not requiring a response; to the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents.

an LSR submitted to notify Verizon that a Verizon customer has decided to port his or her number to a new carrier is related to any "wholesale" service that Verizon provides; Verizon denies that the submission of the LSR and the porting of the number are essential to the initiation of retail service by a new retail service provider. Verizon admits the remaining allegations of the second sentence of this paragraph, except Verizon denies that Verizon establishes the date for the execution of the number port; further answering, Verizon avers that the entity submitting the LSR requests a date for execution of the port in the LSR. *See* Counter-Statement of Facts, *supra*, ¶ 27.

57. Paragraph 11: Verizon denies that Verizon's wholesale organization offers LNP functionality to Competitive Carriers; further answering, Verizon avers that it offers LNP functionality to retail subscribers as set forth in the legal analysis below; as relevant to this complaint, Verizon denies, for the reasons set forth in the legal analysis below, that LNP functionality is related to any "wholesale" service that Verizon provides; further answering, Verizon alleges that Verizon Partner Solutions is the group within Verizon that receives the LSR notifying Verizon of the LNP request, *see* Joint Decl. ¶ 24; Verizon admits that it provides LNP functionality in accordance with the Commission's regulations. The characterization of the Commission's regulations is legal argument not requiring a response; to the extent a response is required, Verizon avers that the Commission's regulations provide the best evidence of their contents. Verizon denies the allegations of the third sentence of this paragraph as stated; further answering, Verizon avers that certain interconnection agreements recite that the parties to the agreements will provide number portability in accordance with the Commission's regulations. *See*, *e.g.*, Compl. Exh. D (T. Johnson Aff.), Attach. 1 at 29.

58. Paragraph 12: Verizon denies that a number port cannot be completed without the participation of the incumbent LEC. *See* Joint Decl. ¶ 40. Verizon denies that it takes steps to execute the port requested by the Competitive Carrier; further answering, Verizon's role in the LNP process is described in the Counter-Statement of Facts above. *See* Counter-Statement of Facts, *supra*, ¶¶ 11-27. Verizon admits that it assigns a 10-digit trigger to the customer's telephone number and that it confirms the subscription record with the NPAC database, as described above. *See id.* ¶¶ 23, 25. Verizon admits that, if requested by the customer directly or through an agent, Verizon disconnects the customer's retail service; further answering, Verizon avers that the service may be disconnected after the Competitive Carrier executes the port by sending a port activation message to NPAC but further avers that the disconnection of service does not depend on the sending of a port activation message by the Competitive Carrier. *See* Joint Decl. ¶ 41.

59. Paragraph 13: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegation that "[t]hese established processes have enabled Complainants to deliver competitive voice services to millions of subscribers"; the allegation that complainants' provision of voice service to their subscribers has "finally deliver[ed] on the promise of facilities-based competition embodied in the Telecommunications Act of 1996" is legal argument not requiring a response; to the extent a response is required, Verizon admits that competition by complainants is facilities-based competition.

60. Paragraph 14: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of this paragraph. Verizon denies the allegations of the second sentence of this paragraph as stated; further answering, Verizon avers that, in cases where a subscriber has decided to remain with Verizon and that decision is verified

by a third party, Verizon has issued jeopardy notices to the "Competitive Carriers" in connection with certain orders and that it has placed port requests "in conflict" in the NPAC database. *See* Counter-Statement of Facts, *supra*, ¶¶ 36, 37. Verizon admits that, until such conflict is resolved, the port request is blocked. Verizon admits that it cancels the service order generated by the Competitive Carrier's port request. *See* Joint Decl. ¶ 51.

61. Paragraph 15: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first and second sentences of this paragraph. Verizon admits that it has contacted customers, encouraged them to remain with Verizon, and offered them attractive price incentives and gift cards. *See* Counter-Statement of Facts, *supra*, ¶¶ 31, 33, 41.

62. Paragraph 16: Verizon admits the allegations of this paragraph, except Verizon denies that it cancelled retained customers' orders with complainants; further answering, Verizon avers that, when a Verizon customer elects to remain with Verizon, Verizon informs the entity that submitted the LSR. *See* Counter-Statement of Facts, *supra*, ¶ 36.

63. Paragraph 17: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of this paragraph; further answering, Verizon avers that it has retained customers who called Verizon only after receiving retention marketing materials. Verizon denies that it is using information obtained in the first instance from the LSRs submitted by the Competitive Carriers as the basis for its retention marketing efforts; further answering, Verizon avers that its retention marketing program is described above. *See* Counter-Statement of Facts, *supra*, ¶¶ 29, 30, 32.

64. Paragraph 18: The first sentence of this paragraph contains no allegations requiring a response. Verizon denies the remaining allegations of this paragraph as stated.

Further answering, Verizon avers that the generation of its retention marketing "lead list" is described above. *See* Counter-Statement of Facts, *supra*, ¶¶ 29, 30.

65. Paragraph 19: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents; further answering, Verizon denies that it has violated sections 222 and 201 of the Communications Act for the reasons set forth in the legal analysis below.

66. Paragraph 20: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies, for the reasons set forth in the legal analysis below, that, in this area, the Commission has drawn a distinction based on the time the marketing occurs.

67. Paragraph 21: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, for the reasons set forth in the legal analysis below, Verizon denies that the Commission has drawn a "bright-line distinction between retention marketing and winback marketing"; Verizon denies that its retention marketing program creates any conflict of interest; Verizon denies that its retention marketing efforts are inconsistent with a "level playing field"; Verizon denies that it has a "unique window"; Verizon denies that complainants lack an equivalent opportunity to enhance their own marketing efforts; Verizon denies that complainants are forced to undertake their marketing efforts from scratch; Verizon denies that the result is either unfair or anticompetitive. Further answering, Verizon avers that the result benefits consumers and competition.

68. Paragraph 22: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of this paragraph. To the extent the allegations of this paragraph characterize the complaint, they do not require a response.

69. Paragraph 23: Verizon admits the factual allegations of this paragraph but, for the reasons set forth in the legal analysis below, denies the legal conclusion that its practices are unlawful.

70. Paragraph 24: Verizon admits the factual allegations of this paragraph but, for the reasons set forth in the legal analysis below, denies the legal conclusion that its practices are unlawful.

71. Paragraph 25: Verizon admits the allegations of this paragraph.

72. Paragraph 26: Verizon admits the factual allegations of this paragraph but denies the legal conclusions that its practices violate Florida state law and that they are independent of federal law.

73. Paragraph 27: Verizon incorporates by reference its responses to paragraphs 1 through 26 above.

74. Paragraph 28: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, for the reasons set forth in the legal analysis below, Verizon denies that it has violated section 222(b) of the Communications Act; further answering, Verizon avers that section 222(b) provides the best evidence of its contents.

75. Paragraph 29: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, and for the reasons set forth in the legal analysis below, Verizon denies the allegations.[6]

76. Paragraph 30: Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph. To the extent the allegations of this paragraph characterize the complaint, they do not require a response.

77. Paragraph 31: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, and for the reasons set forth in the legal analysis below, Verizon denies the allegations.

78. Paragraph 32: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents; further answering, as set forth in the legal analysis below, the Commission has expressly overruled the order upon which complainants rely in this paragraph. *See CPNI Reconsideration Order*,[7] 14 FCC Rcd at 14445, ¶ 67, 14450, ¶ 79.

79. Paragraph 33: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations and avers that the Commission's orders provide the best evidence of their contents.

---

[6] Verizon is without knowledge or information sufficient to form a belief as to the truth of the allegation in footnote 48 of paragragh 29 that information "about specific sales to specific people" is "inherently highly confidential."

[7] Order on Reconsideration and Petitions for Forbearance, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409 (1999) ("*CPNI Reconsideration Order*").

80. Paragraph 34: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations and avers that the Commission's orders provide the best evidence of their contents.

81. Paragraph 35: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents.

82. Paragraph 36: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon avers that the Commission's orders provide the best evidence of their contents.

83. Paragraph 37: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations and avers that the Commission's orders provide the best evidence of their contents; further answering, for the reasons set forth in the legal analysis below, Verizon denies that its retention marketing practices violate section 222(b) of the Communications Act.

84. Paragraph 38: Verizon admits that the orders cited by complainants are final; Verizon denies that it never sought reconsideration or judicial review of any of the orders; further answering, Verizon avers that it sought reconsideration of the *1998 CPNI Order*.[8] The remaining allegations of the paragraph are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

[8] Second Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd 8061 (1998) ("*1998 CPNI Order*").

85. Paragraph 39: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

86. Paragraph 40: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

87. Paragraph 41: The allegations of the first sentence of this paragraph are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below. As set forth in the legal analysis below, Verizon denies that it is providing a wholesale input that is a necessary component of a retail telecommunications service. The remaining allegations of the second sentence of this paragraph are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below. Verizon admits that it is legally required to provide number portability. Verizon denies that a carrier's obligation to provide number portability is triggered by a request for such provision from another carrier; further answering, Verizon avers that section 52.23(b)(1) of the Commission's rules speaks for itself. The allegations of the fifth sentence of this paragraph are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below. Verizon does not understand and therefore cannot respond to the allegations of the sixth sentence of this paragraph; to the extent a response is required, Verizon avers that the allegations appear to characterize the Commission's rules and orders, which provide the best evidence of their contents. Verizon admits that its wholesale organization offers what it markets as an "LNP service," which is available under tariff or

commercial agreement; further answering, Verizon avers that the service is a database-lookup service offered to carriers and is irrelevant to this complaint because it has nothing to do with the process of porting a Verizon customer's number to a new service provider. *See* Joint Decl. ¶ 23 n.1. The allegations of the eighth sentence of this paragraph are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

88. Paragraph 42: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

89. Paragraph 43: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

90. Paragraph 44: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the Commission's rules and orders provide the best evidence of their contents.[9]

91. Paragraph 45: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

---

[9] Verizon denies the allegation in footnote 85 of paragraph 44 that "[r]etention marketing occurs at a time when consumers are least able to compare the new service with Verizon's"; further answering, Verizon avers that Verizon's retention marketing program provides consumers with accurate information about services and prices at a time when it benefits consumers most. *See* Counter-Statement of Facts, *supra*, ¶ 40. The remaining allegations in footnote 85 are legal argument not requiring a response; to the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

92. Paragraph 46: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

93. Paragraph 47: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the Commission's rules and orders provide the best evidence of their contents.

94. Paragraph 48: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies that the Commission has ever relied on "this understanding of its rules in finding one facilities-based carrier liable for slamming another facilities-based carrier's customer"; further answering, Verizon avers that, in both of the Commission orders cited by complainants, the Commission found a carrier liable for slamming where the carrier changed a subscriber's service without obtaining third-party verification, *see* Order, *Embarq Communications, Inc.; Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, 20 FCC Rcd 1391, 1393, ¶ 4 (CGAB 2005); Order, *AT&T Corp.; Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, 22 FCC Rcd 1196, 1198, ¶ 4 (CGAB 2007). Verizon denies the remaining allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the Commission's rules and orders provide the best evidence of their contents.

95. Paragraph 49: Verizon incorporates by reference its responses to paragraphs 1 through 26 above.

96. Paragraph 50: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, and for the reasons set forth in the legal analysis

below, Verizon denies that it has violated section 222(a) of the Communications Act; further answering, Verizon avers that section 222(a) provides the best evidence of its contents.

97. Paragraph 51: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the Commission's rules and orders provide the best evidence of their contents.

98. Paragraph 52: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the Commission's rules and orders provide the best evidence of their contents.

99. Paragraph 53: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the provisions of the Communications Act provide the best evidence of their contents.

100. Paragraph 54: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below.

101. Paragraph 55: Verizon incorporates by reference its responses to paragraphs 1 through 26 above.

102. Paragraph 56: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, and for the reasons set forth in the legal analysis below, Verizon denies that it has violated section 201(b) of the Communications Act; further answering, Verizon avers that section 201(b) provides the best evidence of its contents.

103. Paragraph 57: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the provisions of the Communications Act provide the best evidence of their contents.

104. Paragraph 58: The allegations of this paragraph are legal argument not requiring a response. To the extent a response is required, Verizon denies the allegations for the reasons set forth in the legal analysis below; further answering, Verizon avers that the provisions of the Communications Act provide the best evidence of their contents.

105. Paragraph 59: Complainants' prayer for relief does not require a response. To the extent a response is required, Verizon denies that complainants are entitled to any relief.

AFFIRMATIVE DEFENSE

Pursuant to 47 C.F.R. § 1.724(e), Verizon sets forth the following affirmative defense, for which it incorporates by reference paragraphs 1-105 of its Answer.

Failure To State a Claim Upon Which Relief Can Be Granted

For the reasons set forth in the legal analysis below, the complaint fails to state a claim upon which relief can be granted.

LEGAL ANALYSIS

VERIZON'S RETENTION MARKETING PROGRAM COMPORTS WITH THE STATUTE AND THE COMMISSION'S RULES

Verizon's retention marketing program provides concrete consumer benefits and intensifies competition for mass-market customers. By providing timely, accurate information to consumers, Verizon's retention marketing program helps consumers to make the best choice of services and to take advantage of superior value. And there is no claim that Verizon's program threatens any long-term harm to the competitive process by impeding any rival from competing on the merits. Consumers receive an unalloyed benefit.

Verizon's retention marketing program complies with the Communications Act and the Commission's rules. Section 222(b) of the Act permits Verizon's retention marketing program because, first of all, Verizon does not receive another carrier's proprietary information for the purpose of providing a telecommunications service. Section 222(b) is not implicated for the independent reason that Verizon does not use another carrier's proprietary information in its marketing. Furthermore, because Verizon's retention marketing effort depends on information that Verizon obtains by virtue of its role as a *retail* service provider – not by virtue of its provision of any *wholesale* telecommunications service or network facility to another carrier – the program is authorized under the Commission's rules governing use of customer proprietary network information ("CPNI") and carrier proprietary information.

Complainants' contrary arguments gloss over the language of the statute and ignore the plain language of the Commission's orders. The Commission has made clear that section 222(b) is implicated only when a carrier uses information received from a carrier-customer to compete with that wholesale customer in the retail market. A decade ago – even five years ago – most mass-market voice providers depended on Verizon to provide underlying facilities and services.

That is no longer true. Put simply, Verizon may lawfully use in its marketing information that is provided to Verizon in its capacity as a *retail* provider, on behalf of Verizon's *retail* customer. That is what occurs here.

A. Verizon's Retention Marketing Program Is Consistent with Section 222(b)

Section 222(b) provides that "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b). Complainants cannot make out a violation of section 222(b) without proving *both* (1) that Verizon received proprietary information *for the purpose of providing a telecommunications service and* (2) that Verizon uses another carrier's proprietary information in its own marketing efforts. Complainants fail to carry their burden with respect to either element of their claims.

1. When an LNP Notification Is Submitted, Verizon Does Not Receive Information for Purposes of Providing Any Telecommunications Service

By its plain terms, section 222(b) does not apply unless a telecommunications carrier – here, Verizon – "receives or obtains" information for "purposes of providing any telecommunications service." 47 U.S.C. § 222(b). That is not the case here, because Verizon's role in porting out its retail customer's telephone number does not constitute a "telecommunications service" as defined in the Act.

The statute defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." *Id.* § 153(46). Verizon's role in the LNP process does not satisfy this statutory definition for at least two independent reasons. *First*, Verizon's role in the LNP process does not involve an offering of *telecommunications* – that is, an offer to "transmi[t], between or among points specified by the user, . . . information of the user's choosing." *Id.* § 153(43). *Second,* Verizon does not receive any fee for its role in the LNP process. *See* Counter-Statement of Facts, *supra,* ¶ 14. Nor is Verizon's *cancellation* of its retail customer's service a telecommunications service – it is, rather, the termination of service.

Contrary to complainants' argument, section 222(b) applies by its terms only when a carrier receives another carrier's proprietary information so that *the receiving carrier* can provide a telecommunications service. Section 222(b) includes both an affirmative requirement and a prohibition: the requirement is that the carrier that receives information "*shall use* such information only *for such purpose*" – that is, "for purposes of providing any telecommunications service." 47 U.S.C. § 222(b) (emphases added). If the receiving carrier is not using the information that it "receives or obtains" to provide "any telecommunications service," then section 222(b)'s affirmative injunction – that the information be used only for that purpose – cannot apply. The prohibition in the last clause of section 222(b) – which provides that a receiving carrier "shall not use *such information* for its own marketing efforts," *id.* (emphasis added) – thus likewise applies only where the information is provided to the receiving carrier for purposes of providing a telecommunications service.

The Commission's orders confirm that section 222(b) applies only where the receiving carrier provides a telecommunications service by making clear that concerns regarding potential violations of section 222(b) are limited to circumstances where "the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service" – that is, where the carrier relies on information that it possesses "by virtue of its status as the underlying network-facilities or service provider." *CPNI Reconsideration Order*, 14 FCC Rcd at 14449-50, ¶¶ 77, 78; *see also 1998 Slamming Order*, 14 FCC Rcd at 1574-75, ¶ 109 (noting concern that "monopoly service provider" may learn "that the submitting carrier needs service provisioning for a new subscriber"). As the Commission explained, "Congress' goals of promoting competition and preserving customer privacy are furthered" when "competitively-sensitive information of other carriers" is protected "from network providers *that gain access to such information through their provision of wholesale services.*" *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 77 (emphasis added). The Commission, in interpreting section 222(b), "thus distinguish[ed] between the 'wholesale' and the 'retail' services of a carrier." *Id.* at 14450, ¶ 79.

Verizon does not provide to complainants or to their wholesale partners any wholesale service that would afford Verizon advance notice of a competitor's intention to provide telephone service to particular customers. Verizon does not, for example, provide complainants network facilities or services for resale for purposes of serving an individual customer. The request to cancel Verizon's customer's service and to port out the customer's number is made by the new service provider on behalf of the retail customer as that customer's agent. That request is not, in form or substance, a request for "provision of carrier-to-carrier service," *id.* at 14449, ¶ 77, and therefore does not fall within the reach of section 222(b).

Complainants do not argue that Verizon's role in the LNP process constitutes a telecommunications service, but instead claim that "Verizon's provision of local number portability . . . is no different" from provision of a telecommunications service for purposes of section 222(b). Compl. ¶ 41. Complainants ignore the plain terms of the statute: section 222(b) is limited by its terms to information received "for purposes of providing any *telecommunications service*," 47 U.S.C. § 222(b) (emphasis added), a defined term that Congress must be understood to have used advisedly, *see North Broward Hosp. Dist. v. Shalala*, 172 F.3d

90, 93 (D.C. Cir. 1999) ("If the intent of Congress is clear, it must be given effect."). Moreover, Verizon's role in the LNP process does not involve the provision of *any* service to any requesting carrier.[10] Complainants rely on the language of section 251(b)(2) and the Commission's rules, which refer to local exchange carriers' obligation to "provide" number portability. 47 U.S.C. § 251(b)(2); 47 C.F.R. § 52.23(b)(1). But the capability to port numbers is provided not to any particular carrier, but to customers, who gain the ability to maintain their telephone number when switching providers. See 47 C.F.R. § 52.21(*l*) (defining "number portability" as "the ability of *users* . . . to retain . . . existing telecommunications numbers . . . when switching from one telecommunications carrier to another") (emphasis added). It is, after all, the *customer* – not the new service provider – who determines whether to port a telephone number. And, as described above, the number portability system depends on an independent administrator for its function; Verizon does not cause a number to "port out," but simply takes appropriate steps to facilitate the number port, which is executed by the *new* service provider. *See* Counter-Statement of Facts, *supra*, ¶¶ 21-26.

Complainants also argue that section 222(b) nevertheless applies because information is provided to Verizon so that *some* telecommunications carrier – specifically, complainants' wholesale partners or affiliates – can provide a telecommunications service, even if not Verizon. *See* Compl. ¶ 39. The Commission has never read the statute that way, and it is contrary to the statute's language and structure. The statute applies where *the receiving carrier* "use[s]" another carrier's proprietary information for "purposes of providing any telecommunications service." 47 U.S.C. § 222(b). For reasons discussed above, that is not the case here.

[10] Complainants note – but cannot make anything of – the fact that an LNP notification is submitted on a Local Service Request form. *See* Compl. ¶ 41. Use of an LSR is an industry standard that facilitates service-provider-to-service-provider communication, but the label on the form does not affect the substance of the transaction.

Furthermore, and in any event, complainants fail to establish that the information that Verizon receives is for the purposes of provision of a telecommunications service by *any* carrier. Complainants do not even argue that their retail VoIP service is a telecommunications service – a question the Commission has never resolved. *See generally* Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 (2004). Instead, relying on the *Time Warner Order*,[11] complainants argue that Sprint (in the case of TWC) or affiliates (in the case of BHN and Comcast) provide *wholesale* telecommunications services. *See* Compl. ¶ 39. But complainants do not provide any evidence to show that any proprietary information provided to Verizon to facilitate the number port and cancellation of the customer's retail service is "for purposes of" the provision of any wholesale telecommunications service by Sprint or the affiliates. Nor could they do so, because the information provided in the LSR is unrelated to the transmission services that complainants' partners provide at wholesale. Complainants' failure to provide such evidence – which would be required even under their own incorrect legal theory – requires that the complaint be denied. *See, e.g.*, Memorandum Opinion and Order, *San Diego Tel. Co. v. MCI WorldCom*, 17 FCC Rcd 12252, 12254, ¶ 6 (2002) ("The Commission's formal complaint rules place the burden of . . . documenting a violation of the Act on the complainant; they do not require the defendant to prove that it has not violated the Act.").

In the case of BHN and Comcast, moreover, complainants fail to establish that any services that their affiliates provide to them are provided on a common-carrier basis. *Cf.* Compl. Exh. D (T. Johnson Aff.) ¶ 4 ("Where Sprint provides wholesale services to Time Warner Cable, it does so as a 'common carrier' because it is willing to serve all similarly situated

---

[11] Memorandum Opinion and Order, *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, To Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (WCB 2007) ("*Time Warner Order*").

facilities-based VoIP providers on nondiscriminatory terms and conditions."). Neither BHN nor Comcast provides any evidence that their affiliates offer to provide any transmission services that they provide to BHN or Comcast to all similarly situated customers. *See Time Warner Order*, 22 FCC Rcd at 3518, ¶ 12 ("[T]he question . . . is whether the relevant wholesale telecommunications 'services' are offered 'directly to the public, or to such classes of users as to be effectively available directly to the public.' ") (quoting 47 U.S.C. § 153(46)). To the contrary, for all that appears in the complaint, the affiliates provide the transmission services involved in the provision of VoIP services solely to their sister companies. Accordingly, BHN and Comcast have failed to show that any information Verizon receives from their affiliates is received "from another carrier" and, therefore, have failed to show that section 222(b) is implicated. *Cf. id.* at 3520, ¶ 14 ("we emphasize that the rights of telecommunications carriers . . . are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers").

2. *Verizon Does Not Use Any Other Carrier's Proprietary Information in Its Retention Marketing Program*

Verizon's retention marketing program is consistent with section 222(b) for an additional reason: Verizon's retention marketing program depends on the fact that Verizon's own customer has cancelled service – information that Verizon legitimately obtains as part of its retail operations – rather than on any other carrier's proprietary information. When a carrier submits an LNP-only LSR to Verizon, most of the required "fields" of information simply identify the customer, the carrier, and the timing of the port. Complainants argue that the fact that another carrier has won a particular customer and the timing of the intended service change are proprietary. *See* Compl. ¶ 29 n.48. But, assuming for the sake of argument that the *identity* of the winning carrier is proprietary information, the fact that Verizon's own customer has cancelled his or her retail service with Verizon on a certain date is not *another* carrier's proprietary information; rather, it is information that any retail carrier requires to effect the timely disconnection of a customer's service.

Indeed, Verizon must obtain information about a retail customer's decision to cancel service from the customer (or the customer's authorized agent) irrespective of whether the customer intends to switch service to another carrier or to stop service at his or her current telephone number altogether. This is not a situation where Verizon "would have no knowledge . . . of a consumer's decision to change carriers, were it not for [its] position as a provider of switched access services" or other wholesale service. *1998 Slamming Order*, 14 FCC Rcd at 1573, ¶ 106. Rather, that information is obtained by "the retail arm of an executing carrier . . . through its normal channels in a form available throughout the retail industry," and therefore is not another carrier's proprietary information subject to the restrictions of section 222(b). *2003 Slamming Order*,[12] 18 FCC Rcd at 5110, ¶ 27.

That Verizon includes in its lead list disconnecting customers who are porting their numbers to another service provider does not mean that Verizon is using another carrier's proprietary information. Verizon seeks to reach out to customers who have not spoken with a Verizon representative – and who are leaving Verizon's network – to ensure that they are informed about Verizon's competitive pricing and retention offers; Verizon assembles its lead list with that goal. *See* Counter-Statement of Facts, *supra*, ¶¶ 28-30. Customers who are porting their numbers usually have had no contact with a Verizon service representative, because their new service providers have submitted the disconnect and porting requests on the customers'

[12] Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 5099 (2003) ("*2003 Slamming Order*").

behalf. For that reason, Verizon directs its retention marketing efforts to those customers. *See id.*

In any event, the fact that a retail customer has decided to port his or her telephone number from Verizon to another carrier is information that Verizon receives in its capacity as a facilities-based provider of *retail* service and has nothing to do with provision of telecommunications service to another carrier. As the Commission has made clear, whether to port a telephone number is a decision for the retail customer. *See First Number Portability Order*,[13] 11 FCC Rcd at 8357, ¶ 8 ("LECs are obligated under the statute to provide number portability *to customers*") (emphasis added); *Third Number Portability Order*,[14] 13 FCC Rcd at 1176, ¶ 142 (discussing recovery of costs "related to providing long-term number portability to *end users*") (emphasis added). Under industry-standard process flows, a carrier is entitled to receive advance notice of its customer's decision to port his or her number. When the new service provider submits an LNP order, it does so on behalf of Verizon's existing customer – indeed, the industry-standard *LNP* process requires the new service provider to obtain authorization to act on the retail customer's behalf. *See* Counter-Statement of Facts, *supra*, ¶ 13. If the customer does not port the telephone number, the carrier may reassign that telephone number to another customer. Accordingly, the customer's request to port a number likewise is *Verizon's* information, not another carrier's information.

Furthermore, Verizon does not use the identity of the new carrier in its retention marketing efforts. Verizon's automated systems take five specific pieces of information from each service order to use in its retention marketing efforts – the name, telephone number,

[13] First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) ("*First Number Portability Order*").

[14] Third Report and Order, *Telephone Number Portability*, 13 FCC Rcd 11701 (1998) ("*Third Number Portability Order*").

disconnect order number, disconnect date, and address of customers with pending disconnect orders. Unless the customer volunteers the information, Verizon's retail representatives would not even be aware of the identity of the customer's new service provider. *See id.* ¶¶ 30, 35.

If complainants believe that industry-standard flows should be revised or changed so that the old provider does not receive an LSR, they should raise the matter in appropriate industry fora. This much is clear, however: if complainants proposed an industry rule under which carriers would refrain, on a reciprocal basis, from retention marketing efforts, such an agreement could well be challenged under the antitrust laws because of the harm such an agreement could cause consumers. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (noting that agreements not to compete among horizontal competitors are *per se* unlawful). Yet complainants are trying to enlist the Commission to achieve the same anticompetitive result.

3. The Apparent Policy Underlying Section 222(b) Does Not Apply

The distinction that section 222(b) draws between proprietary information that a provider of wholesale telecommunications receives from its wholesale customer, on the one hand, and the retail-oriented information that is at issue here is one that makes sense in light of the competitive environment that prevailed when section 222(b) was adopted.

As the Commission has noted, in 1996, Congress would have understood that incumbent LECs were, in most areas, monopoly providers of local service. *See 1998 Slamming Order*, 14 FCC Rcd at 1574-75, ¶ 109. Interexchange carriers and local-market entrants depended on incumbents' access services, resale of incumbents' service, and use of unbundled network elements, but incumbents would only rarely be in the same position vis-à-vis their rivals. *See CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 78 ("[w]e concede that in the short term this prohibition" on use of information gained "by virtue of [a carrier's] status as the underlying network-facilities or service provider" "falls squarely on the shoulders of the [Bell operating companies] and other ILECs"). Use of wholesale customers' information to market to retail customers could thus have provided incumbents with an advantage not available to interexchange carriers and local-market entrants, and Congress could have been concerned that the resulting competitive imbalance would impede the development of a competitive market. But no such concern applies here, because cable providers are independent facilities-based competitors that do not need to obtain wholesale services from Verizon to serve a retail customer; competition in voice services is firmly established. There is thus no asymmetry in allowing all facilities-based providers to use information derived from a retail service cancellation request to engage in retention marketing.

B. Verizon's Retention Marketing Program Is Authorized by the Commission's Rules

Complainants do not claim that the Commission has ever ruled that use of an LNP notification to trigger retention marketing is unlawful, because the Commission has never done so. To the contrary, the Commission's rules cannot be read to reach the conduct at issue here without distorting them well beyond their meaning and purpose. In both the CPNI and slamming dockets, certain carriers have asked the Commission to adopt a presumption of illegality with respect to, or a *per se* prohibition on, retention marketing – that is, marketing aimed at "soon-to-be-former customers who have chosen to switch carriers, but have not yet been switched over." *2002 CPNI Order*,[15] 17 FCC Rcd at 14918, ¶ 132 n.305 (internal quotation marks omitted). The

[15] Third Report and Order and Third Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 17 FCC Rcd 14860 (2002) ("*2002 CPNI Order*").

Commission has refused. Instead, the Commission has made clear that retention marketing like Verizon's is lawful and pro-competitive.

1. The Commission Has Authorized Use in Retention Marketing of Information That a Carrier Learns of in Its Retail Capacity

In the 1999 *CPNI Reconsideration Order*, the Commission squarely ruled that "all carriers should be able to use CPNI to engage in winback marketing campaigns to target valued former customers that have switched to other carriers." 14 FCC Rcd at 14445, ¶ 67. The Commission has made clear that the same rule applies to retention marketing: such marketing is permitted when "a carrier's retail operations . . . legitimately obtain notice that a customer plans to switch to another carrier." *2002 CPNI Order*, 17 FCC Rcd at 14971, ¶ 131. In rejecting arguments that such use of CPNI was prohibited under section 222, the Commission likewise rejected claims that retention marketing is either unreasonable or anticompetitive. *See CPNI Reconsideration Order*, 14 FCC Rcd at 14447, ¶ 71 ("Contrary to the commenters' suggestions, we believe such use of CPNI is neither a *per se* violation of section 201 of the Communications Act . . . nor the antitrust laws."). To the contrary, the Commission has recognized that retention marketing "facilitates direct competition on price and other terms, for example, by encouraging carriers to 'out bid' each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs." *Id.* at 14446, ¶ 69. "[D]eeming any winback or retention effort[s], including those based on information learned through the carrier's retail operations, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits." *2002 CPNI Order*, 17 FCC Rcd at 14918, ¶ 133 (second alteration and ellipses in original; internal quotation marks omitted).

The Commission has since confirmed that carriers may use information that they obtain by virtue of their role as retail carrier to engage in retention marketing. *See id.* at 14917, ¶ 131 ("we recognize that a carrier's retail operations may, without using information obtained in violation of section 222(b), legitimately obtain notice that a customer plans to switch to another carrier" and engage in retention marketing in those circumstances) (footnote omitted); *cf. 2003 Slamming Order*, 18 FCC Rcd at 5110, ¶ 27 ("[A]n executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived *exclusively* from its status as an executing carrier.") (emphasis added).

Verizon's retention marketing program is permitted under these rules. The marketing efforts at issue here are triggered when Verizon's *retail* operations are alerted to a customer's cancellation of retail service and the porting out of his or her number. There is no dispute that, when a retail customer calls Verizon to cancel service, Verizon is permitted to engage in marketing designed to persuade that customer to remain with Verizon. When a carrier submits an LNP request on a retail customer's behalf, it is acting as the authorized agent of the customer, both for purposes of disconnecting the customer's retail service and for purposes of initiating a number port.[16] *Cf. Time Warner Order*, 22 FCC Rcd at 3522, ¶ 16 ("where a LEC wins back a customer from a VoIP provider, the number should be ported to the LEC that wins the customer *at the customer's request*") (emphasis added). As a result, that request – pursuant to industry-standard processes – conveys the retail customer's retail service cancellation request. Indeed, the carrier necessarily is acting as the customer's agent because the new carrier has no independent authority to ask Verizon to cancel service or port out the customer's number. *See, e.g.*, Inter-

[16] Complainants do not question that their wholesale partners submit these requests as agents of the retail customer. Instead, they argue that this fact should be disregarded because "virtually every carrier-to-carrier request is made on behalf of the retail customer." Compl. ¶ 46. This is incorrect. A carrier does not purchase a telecommunications service as a retail customer's agent simply because it uses that wholesale service as an input in providing retail service to the customer, any more than a car manufacturer purchases steel or tires as an agent for the customer who ultimately buys the car.

Service Provider LNP Operations Flows at 2 (July 9, 2003) (Joint Decl. Attach. 22) (Flow Step 3: new service provider "obtains authority . . . from end-user to act as the official agent on behalf of the end-user"). Regardless of whether the customer submits his or her request to disconnect retail service directly or authorizes a carrier to submit the request on his or her behalf, the two situations are functionally and legally equivalent – in both situations, Verizon's retail operations "legitimately obtain notice that a customer plans to switch to another carrier," *2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131, and thus may engage in retention marketing.

Complainants argue that the retail disconnect information that triggers Verizon's retention marketing is not "independent" of the "carrier change information obtained from the LSR." Compl. ¶ 45. But the question is not whether the retail disconnect is independent of the LSR – to the contrary, there is no dispute that the disconnect order is prompted, indirectly, by the submission of an LSR. Rather, the question is whether Verizon has used any information that it is prohibited from using under the statute and the Commission's rules, rather than using only information that it has obtained by virtue of its role as a retail service provider. Here, the information that triggers Verizon's retention marketing is information that Verizon legitimately receives as a retail carrier and that does not implicate the provision of any wholesale service. This does not mean that any exception "devour[s]" any rule, *id.*: the Commission's rules apply when a carrier receives information for the purpose of providing wholesale services or facilities, and that does not occur here.

Complainants' additional arguments are based on overruled law and misstatements of this Commission's rules. They rely, first of all, on the *1998 CPNI Order*, which prohibited the use of CPNI for winback and retention marketing. *See id.* ¶ 32 (citing 13 FCC Rcd at 8126, ¶ 85). But the Commission expressly reconsidered that restriction a year later. As noted above, the

Commission ruled in the *CPNI Reconsideration Order* that carriers *may* use CPNI for winback *and* for retention marketing without violating any restriction on use of CPNI. *See supra* p. 48. Indeed, complainants do not even argue that Verizon's retention marketing program violates section 222(c) – which limits carriers' use of CPNI.

Complainants also argue that there is a "bright line rule" distinguishing winback from retention marketing. Compl. ¶ 34; *see also id.* ¶ 21 (arguing for a "bright-line distinction between retention marketing and winback marketing"). But that is simply incorrect: the Commission specifically *refused* to draw the bright-line rule that complainants advocate. *See 2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131 ("we decline to impose a presumption that all retention efforts are illegal").[17]

Whenever the Commission has placed restrictions on the use of carrier-to-carrier information in retention marketing, it has been careful to limit that restriction to information provided for purposes of the provision of wholesale facilities or services to a requesting carrier. *See 1998 Slamming Order*, 14 FCC Rcd at 1574-75, ¶ 109 (carrier may gain access to information because "the submitting carrier needs service provisioning for a new subscriber"); *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 78 (addressing situation "where a carrier exploits advance notice of a customer change *by virtue of its status as the underlying network-facilities or service provider*") (emphasis added); *2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131 n.302 (quoting *CPNI Reconsideration Order*). As explained above, such a restriction does not apply here.

[17] It is not surprising that the Commission suggested that cases of permissible retention marketing might be the "exception, not the rule." *2002 CPNI Order*, 17 FCC Rcd at 14917, ¶ 131 n.302. Complainants themselves insist that the advent of widespread facilities-based mass-market competition is of relatively recent vintage. *See* Compl. ¶ 13.

2. *Restrictions on Use of Carrier Change Information by "Executing Carriers" Do Not Apply Here*

Complainants also refer to restrictions on "executing carrier[s]" using "information gained from a carrier change request" for marketing purposes, Compl. ¶¶ 36-37 (internal quotation marks omitted); *see also 1998 Slamming Order*, 14 FCC Rcd at 1572, ¶ 106, but any such restrictions are inapplicable here for two basic and independent reasons.

First, as described above, the information that prompts Verizon's marketing efforts is the retail service disconnect order, which is information that Verizon's retail operations obtain for the purpose of carrying out retail service functions. Use of that information is expressly authorized under the Commission's orders.

Second, in the circumstances at issue here, Verizon is not an executing carrier as defined in the Commission's rules because Verizon does not "effect[ ] a request that a subscriber's telecommunications carrier be changed." 47 C.F.R. § 64.1100(b).[18] Verizon's role in the carrier change process is limited to its participation as the original (or "old") service provider in the LNP process. *See generally Second Number Portability Order*, 12 FCC Rcd 12281; Joint Decl. ¶¶ 23-24, 39-40. Verizon has no ability to effect a change in the subscriber's telecommunications carrier. Rather, the carrier change is effected by the neutral LNP database administrator, pursuant to the orders of the *new* service provider. The role of the old service provider is essentially limited to one of confirmation of the validity and timing of the LNP

[18] The Commission's rules state that a carrier may be treated as an executing carrier if it were "responsible for any unreasonable delays in the execution of carrier changes or for the execution of unauthorized carrier changes," 47 C.F.R. § 64.1100(b), but there is no such allegation here. Verizon is not suggesting that the Commission's slamming rules do not apply in this context, *cf.* Compl. ¶ 48, but they are not implicated because complainants do not allege that Verizon is responsible for any delay in the execution of a carrier change or for any unauthorized carrier changes.

request – indeed, the entire process could proceed without any participation by the old service provider. *See* Counter-Statement of Facts, *supra*, ¶¶ 21-26; Joint Decl. ¶¶ 35-40.

These facts distinguish this situation from the circumstances the Commission contemplated in the *1998 Slamming Order* and the *CPNI Reconsideration Order*. In those orders, the Commission considered circumstances in which a local carrier gains knowledge of a pending carrier change by virtue of its "position as a provider of" either "switched access services," *1998 Slamming Order*, 14 FCC Rcd at 1573, ¶ 106, or "wholesale services" – either network facilities or telecommunications services provided for resale, *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 77. And the Commission made clear that the restriction on marketing in those circumstances was based on the prohibition in section 222(b). *See 1998 Slamming Order*, 14 FCC Rcd at 1573, ¶ 106 ("[I]n the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information."); *CPNI Reconsideration Order*, 14 FCC Rcd at 14450, ¶ 77 ("[s]ection 222(b) restricts the use of such proprietary information" of other carriers). Here, the cable operators do not allege that Verizon provides them any telecommunications service; section 222(b) does not apply for reasons fully explained above. The Commission has never extended its rules to prohibit retention marketing where, as here, the old carrier is providing no wholesale service to the new carrier.

The *VoIP LNP Order*[19] does not support complainants. In that order, the Commission imposed LNP and numbering administration support requirements on interconnected VoIP providers and their numbering partners. In so doing, the Commission observed that, "when an

---

[19] Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531 (2007) ("*VoIP LNP Order*").

interconnected VoIP provider obtains NANP telephone numbers and LNP capability through a numbering partner, the interconnected VoIP provider does not itself execute the port of the number from a technical perspective." 22 FCC Rcd at 19549, ¶ 32. The Commission's observation is unobjectionable: a VoIP provider's numbering partner would execute the porting-in of a number when it sends an execute message to NANP. But the Commission did not purport to modify its definition of "executing carrier," which does not apply to the confirmatory role played by a service provider when its customer's number is ported *out*, at least so long as the carrier does not interfere with execution of the port. *Cf. id.* at 19549, ¶ 32 n.107.

Complainants also argue that Verizon's retention marketing program somehow "blur[s] the distinction between its role as a neutral executing carrier and its objectives as a marketplace competitor." Compl. ¶ 36 (internal quotation marks omitted). Even leaving aside the point that Verizon is *not* an executing carrier, there is no evidence that Verizon's retention marketing program has affected its participation in the LNP process flows in any way. To the contrary, the evidence shows that Verizon's LNP performance is exemplary and unaffected by its retention marketing efforts. *See* Counter-Statement of Facts, *supra*, ¶ 38.

3. Complainants Cannot Pursue a Claim Not Based on a Violation of the Statute

Complainants argue that, because the Commission's orders regarding section 222(b) are final, Verizon cannot challenge their interpretation of the statute. *See* Compl. ¶ 38. Because the Commission's prior orders support Verizon, not complainants, the argument is irrelevant. Furthermore, it is legally wrong. As defendants in a complaint proceeding, Verizon *can* challenge the application of the Commission's rules to the conduct at issue here. *See, e.g.*, *Murphy Exploration & Prod. Co. v. United States Dep't of Interior*, 270 F.3d 957, 958-59 (D.C. Cir. 2001) (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)). And, assuming for the sake of argument that the Commission's rules reach conduct that is not covered by section 222(b), the complaint could not proceed under section 208, which is limited to "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a). A violation of a Commission rule that did not implement a statutory provision would not be actionable under section 208. *See Conboy v. AT&T Corp.*, 241 F.3d 242 (2d Cir. 2001).

C. Verizon's Retention Marketing Program Complies with Section 222(a)

Complainants' reliance on section 222(a) is a makeweight. That provision simply states that carriers have a duty to protect the confidentiality of proprietary information of various persons. *See* 47 U.S.C. § 222(a). There is no allegation that Verizon has released any proprietary information to third parties, the situation that section 222(a) apparently contemplates. If, as complainants argue, the prohibition on using confidential information for marketing purposes were "contain[ed] within" section 222(a), Compl. ¶ 53, then section 222(b) would be surplusage. Such a reading of the statute is unreasonable. *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."), *superseded in part by statute on other grounds as recognized in Johnson v. Home State Bank*, 501 U.S. 78, 83 n.4 (1991); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).

In any event, Verizon is using the information that complainants knowingly provide precisely as intended – to generate the internal service orders required to terminate the customer's service and to allow his or her number to be ported to the new service provider, in accordance with the customer's request. It is these retail operations that trigger retention marketing. As explained above, Verizon does not use any other carrier's proprietary information in its marketing.

D. Verizon's Retention Marketing Program Does Not Violate Section 201(b)

The Commission did not accept any claim regarding supposed violations of section 201(b) into the Accelerated Docket. *See* Letter from Alex Starr, Chief, Enforcement Bureau – MDRD, FCC, to Christopher Savage et al., at 2 (Jan. 7, 2008). The issue is therefore not properly before the Commission in this proceeding. In any event, complainants raise no argument under this provision that is not subsumed under the arguments already raised under section 222. Indeed, Verizon already has introduced evidence that cable providers engage in retention marketing efforts that are equivalent to Verizon's own efforts. *See* Counter-Statement of Facts, *supra*, ¶¶ 45-46. Even if those efforts involve services that are not interstate telecommunications services – such as video services and broadband Internet access – industry practices with respect to all communications services are highly relevant to the justness and reasonableness of Verizon's own retention marketing program.

E. Verizon's Retention Marketing Program Promotes the Pro-Competitive Goals Underlying the Commission's Rules

The policy considerations that led the Commission to reject both a prohibition on all customer-retention marketing and a presumption of illegality for such efforts argue strongly against complainants' claim that Verizon's retention marketing program runs afoul of the Commission's rules. As the Commission has recognized, in the past several years, the communications marketplace has undergone fundamental transformations. Mass-market voice consumers can now choose from a wide variety of technologies and providers for voice services; cable operators have emerged as the strongest competitors for voice services and also are the leading providers for high-speed Internet access services to mass-market customers. Cable also remains the dominant provider of video services. Verizon has responded to competition by investing massively in its FiOS network, to offer customers a superior alternative for voice, broadband, and video services.

As the cable industry itself has recognized, cable competitors offer a robust, facilities-based alternative to incumbent LECs' local service offerings, and they do so without relying on LECs for the provision of last-mile local network facilities.[20] Furthermore, cable incumbents enter the market for provision of telephone service from a position of strength: they have an established customer base, the ability to offer a competitive package of services, and, in some cases, a monopoly on the provision of wireline video services. The Commission's focus on facilities-based competition is based on the recognition that intense competition between independent rivals promises the greatest consumer benefit. And that is precisely what is happening: Verizon is fighting for its customers in the best possible way – by offering attractive service packages and pricing incentives. There is (and can be) no serious argument that Verizon's retention marketing program has any impact on complainants' ability fairly to compete for, win, and retain customers. Verizon's retention marketing program thus provides consumers a concrete benefit – no customer will remain with Verizon unless Verizon offers a more attractive deal than the available alternative – without any risk of diluting competition in the market in the long run.

Complainants' effort to kill Verizon's retention marketing program is even harder to justify because cable incumbents engage in retention marketing with respect to video and

[20] *See*, *e.g.*, Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5712, ¶ 93 n.268 (2007) ("'[C]able is offering real, facilities-based competition to incumbent [LECs] across the country . . . . Consumers are reaping the benefit of this competition[.]'") (quoting comments of Advance/Newhouse Communications et al.) (second alteration in original).

broadband services. *See* Counter-Statement of Facts, *supra*, ¶¶ 45-46.[21] Complainants' suggestion that retention marketing is bad for consumers – *see* Compl. ¶ 44 n.85 – is impossible to square with their own actions in the marketplace. More important, in a competitive world in which voice services often are sold as one component of a service bundle that includes broadband and video services, a regulatory rule that places no restrictions on retention marketing for video and broadband services while prohibiting comparable efforts with respect to voice services would be irrational. To be sure, it may be expensive for cable providers to win and retain voice customers, just as it is expensive for Verizon to win and retain those customers (and broadband and video customers as well). That reflects the competitiveness of the market, and there is nothing "unfair" or "anticompetitive" about it.

Complainants argue that the Commission – while "'acknowledg[ing] that . . . retention campaigns may result in lower rates for some individual customers'" – has found that consumers would not benefit "'over the long-term.'" Compl. ¶ 44 (quoting *CPNI Reconsideration Order*, 14 FCC Rcd at 14452-53, ¶ 85). But the Commission made this finding in 1999 – when the competitive landscape was entirely different. The Commission need not consider now whether affording new entrants – still dependent on incumbents' networks – "protections" from unrestricted competition could help to promote a more competitive environment in the long run. *Id.* ¶ 42. Complainants make no argument, however, that the judgment applies in current market conditions involving competition between fully independent service providers. There is and can be no serious claim by any of the complainants that Verizon's retention marketing program threatens any long-term harm to competition. There is only consumer gain.

[21] Verizon has only limited information concerning these efforts and intends to develop the factual basis for this defense in discovery.

In short, complainants are not asking the Commission to protect the competitive process. Rather, they are asking the Commission to protect cable providers *from* an effective and consumer-benefiting form of competition and to establish an unlevel playing field in the bargain. The Commission's rules should not be distorted to produce that result.

CONCLUSION

The Commission should deny the complaint.

Respectfully submitted,

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

AARON M. PANNER
EVAN T. LEO
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (facsimile)

Counsel for Verizon

February 21, 2008