STATEMENT OF
CHAIRMAN KEVIN J. MARTIN, DISSENTING

Re: Bright House Networks, LLC et al., Complainant v. Verizon California Inc., et al., Defendants.

I have consistently maintained that it is important to create a regulatory environment that promotes competition and investment, setting rules of the road so that all players can compete on a level playing field. Today, a majority of the Commission voted to allow complainants--players providing a bundle of services over one platform (cable VoIP)—to gain an advantage over their competitors—players providing those same bundled services over a different platform (traditional telephone service). Specifically, the majority decided to prohibit some companies from marketing to retain their customers, even though the marketing practices prohibited today are similar to the aggressive marketing techniques engaged in by the complainants themselves (when they provide cable video service). To reach this result, the majority has created new law, holding that these complainants are "telecommunications carriers" for purposes of obtaining this competitive advantage, but that they are not "telecommunications carriers" for other purposes, such as complying with the obligations of "telecommunications carriers."

I am concerned that today's decision promotes regulatory arbitrage and is outcome driven; it could thwart competition, harm rural America, and frustrate regulatory parity. Therefore, I must dissent from today's decision.

In its *Recommended Decision*, the Enforcement Bureau (Bureau) recommended that the Commission, among other things, deny the cable Complainants' claims that Verizon's practices violate section 222(b) of the Act.[1] The Bureau interpreted section 222(b) to apply only where a telecommunications carrier receives another carrier's proprietary information so that the *receiving carrier* can provide a telecommunications service. The Bureau concluded that Verizon's actions, as the receiving carrier, did not violate section 222(b) because Verizon's role in the number porting process does not involve the provision of a "telecommunications service." Although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier "telecommunications service."

The Bureau further concluded that even assuming *arguendo* that section 222(b) could be construed to refer to the *submitting carrier's* provision of "telecommunications service," section 222(b)'s marketing ban would not apply to Verizon's receipt of information from Comcast's and Bright House's affiliates because the record lacked evidence that those affiliates are, in fact, "telecommunications carriers." Comcast and Bright House pointed to their affiliates' state certificates and interconnection agreements, and to self-certifications during the proceeding that the affiliates are common carriers. However, the Bureau found that Complainants failed to show that the affiliates publicly hold themselves out as offering telecommunications indiscriminately to any and all potential customers.

As I have said before, all consumers should enjoy the benefits of competition. Competition is the best protector of the consumer's interest and the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Customer retention marketing is a form of aggressive competition that has the potential to benefit consumers through lower prices and expanded service offerings. Moreover, the cable companies engage in such practices to keep their video customers from switching to other providers. I am therefore disappointed that the Commission would prohibit these

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[1] *In the Matter of Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, File No. EB-08-MD-002, Recommended Decision, DA 08-860 (EB rel. Apr. 11, 2008) (*Recommended Decision*).

practices, which promote competition and benefit consumers and particularly disappointed that they would do so and prohibit practices from only one class of companies.

I also fear that today's decision will have a negative impact on rural carriers and customers in rural America. Today's action rests in part on a questionable conclusion that Comcast's and Bright House's affiliates are "telecommunications carriers." This finding affords the affiliates the privileges of a "telecommunications carrier," including the right to interconnection, even though there is scant evidence that the affiliates have ever offered telecommunications to the public and no evidence that they have provided telecommunications to any entity other than Bright House and Comcast. This will bind our hands and have far-reaching consequences, particularly for small rural local exchange carriers around the country, such as Vermont Telephone Company, who may be forced to interconnect with similar entities that have no intention of providing telecommunications to the public or assuming the obligations of a "telecommunications carrier." For example, will such entities assume the obligations of "telecommunications carriers," such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements?

Part of the job of being a Commissioner is that you are required to make hard or difficult decisions and those decisions have implications for the entire industry. For example, what constitutes a "telecommunications carrier"?

Here the majority wants to grant the Complaint but not really answer that question. They have avoided making a difficult decision by embracing the novel idea that a company can be classified as a carrier for a provision or even a subprovision of a statute but not another provision or subprovision of the very same statute. Naturally, they do so without citing any statutory basis or authority for such an inherently arbitrary approach. Yet they had no choice but to create such an argument if they were to find in favor of Comcast and Bright House.

The majority's attempt to dodge the issue and deny the consequences of today's action by holding that we are determining that the Competitive Carriers are carriers for purposes of 222(b) based on the specific record and specific facts of this case but not for other purposes makes no sense and is not legally sustainable. A provider either is or is not a "telecommunications carrier." This "pick and choose, rule by rule" approach is the very height of arbitrary and capricious conduct by the Commission, and is a thinly veiled attempt by the majority to reach a desired result without accepting responsibility for the legal consequences of their action.

Indeed if such an approach were possible it would allow industry players and the Commission to circumvent the entire statutory scheme applied by picking and choosing which provisions and subprovisions of the statute applied by classifying and declassifying carriers without any factual or statutory distinction or basis.

Almost by definition this approach is arbitrary and capricious as it acknowledges that it does not want to be bound by the logic and legal rationale of the decision for any other purpose and preserves the flexibility to not apply the same statutory definition to any other aspect of the statute.

It is indefensible to say that these entities are telecommunications carriers under one part of the Act and not others; the Act makes no such distinction. The majority attempts to find precedent to support its approach. However, that precedent should not apply because "telecommunications carrier" is a specific statutory definition. The majority's refusal to say that these entities are "telecommunications carriers" for all purposes shows that, clearly, their holding is outcome driven, advances regulatory arbitrage, and reflects a cavalier refusal to live with the legal consequences of their decision.

In addition, this approach will bind our hands going forward, with broad implications for other rural carriers and consumers around the country, and will raise a host of questions. If these entities are "telecommunications carriers," as the majority holds today, I presume they are subject to the obligations of a "telecommunications carrier", such as the disabilities access requirements of section 255, the slamming requirements of section 258, and the CALEA requirements.

Here, however, the majority is not providing regulatory consistency, nor are they providing certainty, except for the certainty of providing a competitive advantage to one type of service provider platform over other platforms. Thus, consumers will be treated differently based on the platform over which they receive service.

In the past, some Commissioners have warned the Commission of the dangers of "inconsistent and arbitrary application" of the Commission's rules. Specifically, in concurring in the Commission's decision to uphold a Media Bureau denial of a set-top box waiver request, they stated that "[t]he result of these inconsistent decisions is that consumers will be treated differently, based on where they live and which MVPD they choose."[2] I agree that "[a]ll market players deserve the certainty and regulatory even-handedness necessary to spark investment, speed competition, empower consumers, and make America a stronger player in the global economy."[3] It is unfortunate that the majority did not follow that advice here.

Indeed, the majority does not respond to Verizon's claims.

> Section 222(b) protects proprietary information of telecommunications carriers. But the supposedly proprietary information at issue here, if it did belong to the service provider, would belong to the complainants (cable VoIP providers), not the CLEC submitting the information to Verizon – indeed, the CLECs are not even complainants. And complainants here do not claim to be telecommunications carriers under the Act. The Commission cannot designate a cable VoIP provider a telecommunications carrier for purposes of extending privileges granted under section 222(b) without subjecting those carriers to the *obligations* set forth in Title II. There is a single definition of "telecommunications carrier" in the Act. The Commission never has and could not classify the same service as a "telecommunications service" – and thus the entity that provides the service as a "telecommunications carrier" – for the purposes of one provision but not another *within the same statute*. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) (meaning of words in a statute cannot change with statute's application); *cf. American Council on Educ. v. FCC*, 451 F.3d 226, 234 (D.C. Cir. 2006) (noting that CALEA's text is "more inclusive" than definition of "telecommunications carrier" in the Act).[4]

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[2] Joint Statement of Commissioners Robert M. McDowell and Jonathan S. Adelstein Concurring, *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, CSR-7012-Z, Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices: Application for Review*, CS Docket No. 97-80, Memorandum Opinion and Order, 22 FCC Rcd 17113 (2007).

[3] Statement of Commissioner Robert M. McDowell, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

[4] Letter from Aaron M. Panner, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, File No. EB-08-MD-002, at 1 (filed June 20, 2008).

I am also troubled about the impact of today's decision on our ability to promote regulatory parity. Last month, I proposed to my fellow Commissioners a Notice of Proposed Rulemaking (NPRM) that would initiate an inquiry into customer retention marketing practices, including how to ensure that such practices are treated consistently across all platforms used to provide voice, video, and broadband Internet service.

I am concerned, however, that today's decision will preclude our ability to apply a consistent regulatory framework across platforms. Indeed, I anticipate that when the time comes, some of the same members of the majority will preserve today's competitive advantage for one industry over another by claiming that we lack statutory authority to establish such a consistent approach or regulatory level playing field. Despite the fact that the inconsistencies are a result of a novel interpretation of what can constitute a telecommunications carrier that they themselves established.

Indeed, the action we take today to afford the affiliates the full benefits of a telecommunications carrier without the corresponding obligations, coupled with a potential lack of statutory authority to later impose those obligations, is in direct conflict with any stated intent to provide regulatory parity through the NPRM.