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MICHAEL L. GLASER L.L.C.

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LAW OFFICES OF MICHAEL L. GLASER, L.L.C. TELECOMMUNICATIONS AND NEW TECHNOLOGIES TELECOM REPORT

Michael L. Glaser, L.L.C. has substantial experience in regulatory and enforcement proceedings before the Federal Communications Commission ("FCC") and state regulatory agencies, and in litigation involving telecommunications matters in the federal and state courts. We present below, for your information, various recent regulatory and court rulings affecting the telecommunications industry. We are available to assist you in such matters.

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U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT UPHOLDS THE FEDERAL COMMUNICATION COMMISION'S NUMBER PORTABILITY ORDER

The U.S. Court of Appeals on April 28, 2009, upheld the Federal Communication Commission's ("FCC") Order on Number Portability (the "Order"). The FCC's Order had been challenged by the National Telecommunications Cooperative Association ("NCTA") as inconsistent with the federal Regulatory Flexibility Ac t ("RFA") and contended the Order was arbitrary and capricious under the Administrative Procedure Act ("APA").The RFA requires the FCC, among other things, to publish an analysis of the impact of a final rule on small business The Court denied both NCTA contentions.

As most of you know, number portability means the ability of telephone customers to keep a telephone number when switching service providers. In 1996 the FCC issued an Order requiring local exchange carriers ("LECs") to ensure number portability to persons changing carriers but remaining in the same physical location. The FCC issued number portability to facilitate competition among wire line carriers by eliminating the inconvenience to customers of having to switch telephone numbers when changing carriers.

In 2003, the FCC issued a second order requiring LECs to port numbers to wireless carriers providing service in the same area (the "Intermodal Portability Order".) This new requirement, known as "intermodal portability" means that local wire line carriers must

route telephone calls to wireless carriers. To accomplish this, local exchange carriers must transmit wire line telephone signals to what is known as "point of interconnection", which is a point where wire line signals are converted into wireless signals. Points of interconnection, however, are sometimes far from LECs, and LECs must bear certain costs in routing signals over those distances.

Several LECs challenged the FCC's Intermodal Portability Order. They argued that the FCC had violated the RFA which, as noted above, directs federal agencies to publish an analysis of how a final rule will affect small business. The FCC responded to this challenge by claiming that the Order was exempt from the RFA because it constituted an interpretive rule. In 2005, the D.C. Circuit concluded that the Intermodal Portability Order was not exempt from the RFA, and found that the Order was a Legislative Rule. Therefore, the Court granted a LECs' petition to review with respect to the RFA claim and stayed the Intermodal Order until the FCC completed the flexibility analysis. The Court also remanded the matter to the FCC. *See U.S. Telecom Assoc. v. FCC,* 400 F.3d 29, 43 (D.C. Cir. 2005).

In 2008, the FCC published the analysis under the RFA and the stay of the Order expired. The NCTA, an association of rural telephone carriers, challenged the regulatory flexibility analysis that the FCC issued on remand. The NCTA argued that the FCC violated the RFA and the APA by not describing the effects on small business.

The D.C. Circuit disagreed with the NCTA's argument that the FCC Order did not comply with the RFA. The Court held that the RFA requires the FCC to publish analyses addressing certain delineated topics. The Court held that the FCC had addressed all the legally mandated subject areas in its analyses.

NCTA also contended the FCC's Order was arbitrary and capricious under the APA because the FCC did not reasonably address the Order's impact on small businesses.

The APA requires that the FCC's rules be reasonable and reasonably explained. Additionally, the RFA makes the interest of small businesses a relevant factor for FCC's rules. Thus, the APA and the RFA require that rules that impact small businesses be reasonable and reasonably explained. In determining whether a rule is reasonable and reasonably explained, the Court's review of the FCC's action is narrow, and the Court must not substitute its judgment for that of the FCC. This is particularly true with regard to the FCC's predictive judgments about the likely economic affects of a rule.

The NCTA raised four specific objections to the FCC's regulatory flexibility analysis. First, the NCTA contended that the Intermodal Portability Order requires small business to incur unreasonably high implementation costs. The FCC, however, found little support for implementation of cost estimates offered by persons who commented on the FCC's proposed rule. Moreover, the FCC noted that estimates would not impose a significant economic burden on small entities even if they were taken at face value. Thus, the FCC concluded that its chosen approach best balances the impact of the costs that may be associated with the wire line to wireless intermodal porting rules for small carriers and the public interest benefits of those requirements. The Court held that the FCC's explanation was reasonable and reasonably explained.

Second, the NCTA argued that the FCC's Intermodal Portability Order also burdens small businesses with significant and disproportionate transport costs, the costs incurred by routing a telephone call from one carrier to another. In responding to this argument, the

FCC pointed out that any problems associated with transport costs were not unique to intermodal porting, and that the FCC would address this issue comprehensively rather than piecemeal. The FCC is currently considering transport costs in a separate rulemaking proceeding, an inter-carrier compensation proceeding. The Court held that because the FCC's Intermodal Portability Order is not the source of the transport costs problem, and because the FCC is already performing the review of transport costs in the inter-carrier compensation proceeding, NCTA's argument was misplaced and should be raised in that proceeding. Although the NCTA pointed to the Court that the inter-carrier compensation proceeding has been pending for several years, the Court assumed that the FCC would complete its work soon on this approach. If not, the Court indicated that an appropriate party may file a petition for mandamus in connection with the FCC's inter-carrier compensation proceeding.

Third, the NCTA argued that the FCC should have imposed additional mitigating measures to lighten the burden of the Order on small businesses. The Court held that the FCC had the expertise to address this issue, and the FCC's explanation that the Intermodal Portability Order fulfilled statutory objections by advancing both competition and the interest of consumers, and would not impose significant implementation costs of small businesses. The Court concluded that the FCC had reasonably explained mitigating measures were not necessary.

Finally, the NCTA asserted that the inadequately addressed alternative policy options, that is, the FCC could have either issued a temporary stay of the intermodal porting requirements for small wire line carriers until the conclusion of the inter-carrier

compensation proceeding, or limit the scope of the intermodal portability requirement so that wire line carriers would have to port only to wireless carriers with nearby points of interconnection. The Court noted that the FCC, however, persuasively explained that such approaches would have the effect of denying many wire line consumers the benefit of being able to port their numbers to wireless carriers. The NCTA also suggested that the FCC could have created a partial or blanket exemption from the wire line to wireless carrier intermodal porting requirements for small entities. The FCC rejected such exemptions on the grounds that they would discourage competition and would harm consumers in small or rural areas across the United States by preventing them from being able to port on a permanent basis. The Court held that the FCC's rejection of these alternative approaches was both reasonable and reasonably explained.

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U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT TO CONSIDER LEGALITY OF AT&T'S ARBITRATION CLAUSE IN ITS WIRELESS CONTRACTS

The U.S. Court of Appeals for the Third Circuit ("Court of Appeals" or "Court") will consider AT&T Mobility's appeal of a New Jersey district court's denial of the wireless carrier's attempt to compel arbitration and dismiss a complaint challenging their termination fees and related provisions.

In March, the U.S. District Court in New Jersey denied AT&T Mobility's motion to compel arbitration in a lawsuit by a group of former customers seeking class action status. AT&T Mobility's customer service agreement, which all wireless customers sign, contains a

provision that requires the customer and AT&T to "arbitrate all disputes and claims arising out of or relating to" the wireless services agreement. In addition, the agreement contains a class action waiver prohibiting consumers from bringing any complaint against AT&T as a class.

The U.S. Court of Appeals for the Ninth Circuit and the California Supreme Court have found that the arbitration clauses contained in AT&T Mobility's Service Agreement as well as in other wireless carriers' service agreements, are unenforceable and unconscionable because consumers are denied their right to file class action lawsuits.

After these rulings, AT&T contended that it implemented a more consumer-friendly arbitration clause in its wireless contracts that does not render AT&T immune from liability because it offered consumers the option to file complaints against AT&T under the Service Agreement in small claims court. AT&T's revised Service Agreement, however, still contains the provision prohibiting consumers from filing class action lawsuits against AT&T.

The federal district court found that the revised Service Agreement did not fix the problem posed by class action waivers. The district court held that the waiver allows AT&T to escape liability and immunizes AT&T mobility from claims that would be suitable for a class action resolution. Furthermore, the district court held that there was no evidence that AT&T's arbitration clause actually provided the fair-market for settlement which would operate as efficient as a class action would.

It should be noted that several courts apart from the Ninth Circuit and the California Supreme Court have found that AT&T's arbitration clause containing a class action waiver is unenforceable because it is unconscionable.

The Third Circuit's ruling on the AT&T appeal is expected later this year.

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U.S. SUPREME COURT BARS PRICE-SQUEEZE CLAIMS IN PACIFIC BELL TELEPHONE CO., ET AL V. LINKLINE COMMUNICATIONS, INC., ET AL.

On February 25, the U.S. Supreme Court ruled unanimously in favor of AT&T, Inc. in *Pacific Bell Telephone Co., et al. v. Linkline Communications, Inc., et al.*, 555 U.S. ___ (2009). The Supreme Court reversed a decision by the U.S. Court of Appeals for the Ninth Circuit by extending its analysis in *Verizon Communication, Inc. v. Law Offices of Curtis V. Trinko*, 540, U.S. 398 (2004), to price squeeze claims. The Supreme Court held that a price squeeze claim may not be brought under Section 2 of the Sherman Antitrust Act when the defendant has no antitrust duties to deal with its competitors.

AT&T, which owns Pacific Bell, owns and operates lines used for digital subscriber line ("DSL") services. AT&T is legally required as a condition of a recent merger to provide wholesale DSL transport service to independent telecommunication providers at a price no greater than the retail price of AT&T's DSL service. Linkline is an independent internet

service provider ("ISP") that purchased wholesale DSL access from AT&T and then competed with AT&T's retail DSL services.

In July 2003, Linkline and several other ISPs filed a complaint against AT&T under Section 2 of the Sherman Act, for allegedly monopolizing the DSL market. In the complaint, Linkline alleged that AT&T sought to maintain its monopoly control of DSL access to the internet by refusing to deal, denying access to essential facilities, and by squeezing Linkline's profit margins by charging artificially high wholesale rates for DSL transport and low retail rates for DSL internet service. Linkline asserted that AT&T's conduct was intended to drive competing ISPs from the market by depriving them of sufficient margin between the wholesale and retail prices that enable them to compete with AT&T.

In January 2004, the Supreme Court issued its decision in *Trinko*, holding that the antitrust laws impose no duty upon firms to deal with their competitors, even though those firms had enjoyed a monopoly position. In the *PacBell* case, AT&T moved to dismiss Linkline's claims on the grounds that they were barred by *Trinko*. The federal District Court for the Central District of California dismissed all but the price squeeze claims, finding that *Trinko* did not address the price squeeze issue. On appeal, the Ninth Circuit upheld the district court's ruling, concluding that the price squeeze claims were not barred by *Trinko*, since that case did not involve a price squeeze theory.

In reversing the Ninth Circuit, the Supreme Court concluded that the underlying rationale of its decision in *Trinko* applied with equal force to price squeeze claims. The Supreme Court held that *Trinko* makes it clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly had no duty to deal under terms and

conditions that the competitors find commercially advantageous. Thus, the Supreme Court held that if there is no duty to deal at the wholesale level and no predatory pricing at the retain level, then a firm is certainly not required to price both of these services in a manner that preserves its competitors' profit margin.

The Supreme Court held that Linkline's complaint failed to state a duty to deal claim under *Trinko*, and also failed to state a predatory pricing claim under the Supreme Court's holding in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). This case would require Linkline to show that prices are below costs and there is a dangerous probability of AT&T's ability to recoup its losses by driving out competitors. Linkline had filed an amended complaint in the district court to pursue the predatory claim. Consequently, the Supreme Court remanded the case to the district court to determine whether the amended complaint satisfies the Supreme Court's pleading standard articulated in *Bell Atlantic Corp. v. Trombly*, 550 U.S. 544 (2007), and whether Linkline should be granted leave to further amend its complaint to bring a claim under the *Brooke Group* case. We reported to you the Supreme Court's heightened pleading standard articulated in the *Bell Atlantic* case in our May/June 2007 newsletter. The newsletter is available on our website at www.telecomattorneys.com under the newsletter tab.

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U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT UPHOLDS THE FCC'S DECISION IN THE BRIGHTHOUSE NETWORKS CASE

On February 10, 2009, the FCC upheld the FCC's decision in *Bright House Networks, LLC v. Verizon Cal., Inc.,* 23 FCC Rcd. 10704, 10723 ¶ 48 (2008) ("Bright House Order"). The Bright House Order arose from complaints filed by Bright House Networks, LLC, Comcast Corporation, and Time-Warner Cable, Inc., three cable companies, about Verizon's practices of misusing information at a local service request ("LSR") to win back customers. When a telephone service provider loses a telephone customer, the customer is entitled to "port" the existing telephone number to a new service provider. The new carrier initiates an LSR which spurs the original provider into technical action to accomplish the change. The LSR also alerts the outgoing service provider to its loss of a customer, and providers may naturally be tempted to win back the customer.

Verizon California, Inc. ("Verizon"), an incumbent LEC, has competition from cable companies that provide voice services over Internet protocol ("VoIP"). Verizon used information provided by LSR to contact defecting customers and offer them various incentives to stay with Verizon, all before the customer's number is ported to the new provider. In the complaint, the cable companies argue that Verizon's retention efforts violated the Telecommunications Act's restrictions on a carrier's use of another carrier's proprietary information for marketing purposes, found in § 222(b) of the Act, 47 U.S.C. § 222(b). The FCC agreed and ordered Verizon to cease and desist from these efforts.

Verizon then sought review of the Bright House Order, arguing that FCC had misinterpreted § 222(b) by applying it where a telecommunications service is provided only by a carrier submitting an LSR (thecablecompanies), not one receiving it (Verizon).

The court, however, found the FCC's interpretation of § 222(b) reasonable, and rejected all of Verizon's contentions. Section 222(b) reads:

> A telecommunications carrier that receives or obtains propriety information from another carrier for purposes of providing any telephone communication service shall use such information only such purpose, and shall not use such information for its own marketing efforts.

47 U.S.C. § 222(b).

In the Bright House Order, the FCC stated that advance notice of a carrier change that one carrier is required to submit to another carrier is proprietary information under § 222(b). The court agreed with this interpretation. The court noted that the receiving carrier already knows its own customer's name and phone number, but the information that a competitor has just won the customer over, which is vital to the timing of Verizon's retention marketing, is proprietary information that a competitor discloses only because it must do so in order to effect the porting of the customer's telephone number.

Verizon contended, however, that the phrase "for purposes of providing any telecommunication service" only refers to information received for purposes of the receiving carrier's provision of a telecommunications service, and does not cover situations where the information is received for purposes of the submitting carrier's provision of such service. Without classifying the receiving carrier's role in the porting process as provision of a telecommunications service, a distinction is critical, as information provided to Verizon by means of an LSR enables the submitting carrier, not Verizon, to provide a telecommunications service.

The court held that the statutory language in § 222(b) is not ambiguously contrary to the FCC's interpretation. The court noted § 222(b) does not explicitly state which carrier is to provide the telecommunications service. Thus, the FCC looked to the context of § 222(b), including its own precedent, and reaching its interpretation of this section in the Bright House Order. Thus, the FCC in addressing the issue of "slamming", the practicing of submitting or executing an unauthorized change in a subscriber's telephone service provider, held that information so received may only be used by the executing carrier, that is, the losing competitor, to effectuate the provision of service by the submitting carrier to its customers. The Court held that the FCC's concern is to assure the losing carrier's neutral role in the execution of the porting process, and to make sure that Verizon's incentive on receiving an LSR is unambiguously to complete it promptly and effectively. Consequently, the FCC's determination is predicated on the elimination of apparent conflict of interest, compelling Verizon to first complete the result of another carrier's successful marketing before engaging in its own.

Accordingly, a carrier may not use information in an LSR to win back a customer who chooses another carrier, before completing the number porting process.

If there are any questions about this FCC decision, please let us know.

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If you have any questions about this Report or prior Reports, or other recent FCC or state regulatory rulings, or federal or state court decisions affecting telecommunications, or any of our services, please don't hesitate to contact us.

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