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TelecomLAW

AT&T and Verizon: Two summer telecom sizzlers

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It's summer, which usually marks the time when things calm down in Washington, D.C. and elsewhere.

Based on the importance and intensity of some high profile telecom issues, however, you'd never know it. That is, unless the FCC and courts wanted to spit out the big stuff in anticipation of a long summer vacation.

During the last 10 days of June, two major issues truly caught my attention for different, but important, reasons. Each is important for telecommunications users to at least be aware of, so their potential effects — or their effects — on business operations can be monitored. Specifically, the issues involve AT&T in an antitrust action and Verizon and its use, or misuse, of customer proprietary network information.

AT&T antitrust case granted 'certiorari'

At the close of its current term, the U.S. Supreme Court agreed to hear a case next year brought initially by LinkLine Communications and several other small California ISPs. This case alleges AT&T predecessors priced wholesale access to its networks at such a high level that competitors who sought to use it to deliver their own services effectively were priced out of the market. In fact, according to an attorney representing LinkLine and the other plaintiffs, the wholesale price charged by AT&T was more than the retail price offered to end-users.

What's particularly interesting about this case is that it takes battle between incumbent local exchange carriers (ILECs) — such as Verizon and AT&T — and competitive local exchange carriers (CLECs) — such as Paetec and One Communications, among others — into the area of competitive process and antitrust law, and away from the areas of administrative and contract law, for a new spin (perhaps) on an old issue. The case is *Pacific Bell Telephone Co. d/b/a AT&T California v. LinkLine Communications Inc.*, 07-512. Stay tuned.

CPNI issue and more FCC games

It's no secret that the environment inside the FCC has been reasonably unpleasant for much of the term of the Martin administration. On June 21, however, things truly came to a head: While the chairman was out of the country, Republican Commissioner Robert McDowell announced he would not join Chairman Martin in supporting Verizon's

position on the use of customer information. McDowell, instead, said he would join the other three commissioners in supporting Comcast, Time Warner Cable Inc. and Bright House Networks, all of which opposed the chairman and Verizon's position.

This FCC isn't known for its bipartisan activity, but its indicative of the current environment in which the four commissioners (two Republicans and two Democrats) may stand together to oppose the chairman.

Interestingly, the tone of this particular memorandum and order is more snide and snarky than any I recall reading.

The issue involved a case brought against Verizon by several cable companies and is based on Verizon's use of CPNI (customer proprietary network information) for purposes other than those for which the information was intended. The information in question involved customers who chose to port (or move) numbers from Verizon to other carriers, and who then subjected to unwarranted and, according to the FCC, unlawful, sales pitches to be retained. Verizon's approach occurred before these customers even could qualify as "winback" targets. ("Winback" is a term denoting customers who leave a particular carrier for another, only to be

sought back by the original carrier. In most cases, the agent who secures a winback is rewarded handsomely.)

In fact, Verizon lost this round because it was not treating all customers in the same way, but it was using information obtained without explicit permission from one part of its business to affect another, despite existing rules to the contrary.

The issue of CPNI clauses has been raised a number of times, both at conferences and in this space. The FCC's new CPNI policies went into effect December 2007, requiring an opt-in by the end user before such data can be shared. Still, it remains an area fraught with landmines, particularly where competition exists, either between providers or between companies offering overlapping services.

A client of mine is in an area of cable television business. Its inbound toll-free telephone network, which also supports customer service operations, is provided by a well-known carrier now in the midst of expanding from simply a phone company to a business that offers content (i.e. programming). In addition to providing phone lines, it's also providing cable television services. It would be a HUGE — and I might add, unfair — advantage for the phone network provider if it used the data about my client's traffic patterns and volume with its cable television division as it works to improve and enhance competi-

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tive cable offerings, particularly to the extent that the two companies will compete. For this reason, special attention must be paid to these clauses so confidential information remains confidential. Period.

By the way, on July 8 the Consumers Union announced support for the FCC's action against Verizon's tactics in an *amicus* brief filed with the Federal Appeals Court for the D.C. Circuit. In this document, according to Broadcasting & Cable, Consumers Union argued that while Verizon's marketing program — in the form of discounts, gift

cards and information about alternatives — “may afford some short-term savings,” it does so “at the expense of the competitive process in general.”

Martha Buyer is an attorney concentrating in the practice of telecommunications law. Her clients range from Fortune 500 companies to small family-owned businesses where she has provided a range of telecommunications consulting and legal services, primarily geared to support corporate end-users working with carriers and equipment providers. Buyer can be contacted at martha@marthabuyer.com.