

**UNITED STATES DISTRICT COURT
MEMORANDUM**

Date: May 18, 2006
To: Counsel
Re: Verizon, et al. v. South Dakota, et al., CIV 04-3014
From: Judge Kornmann

Counsel should give me their comments as to whether the recent controversial order entered by the FCC will have any effect on this lawsuit. As you can see, I have not spent any time looking at this lawsuit at this time but hope to devote my attention to it soon.



CHARLES B. KORNMANN
UNITED STATES DISTRICT JUDGE
United States Courthouse
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Zachary Peterson

feel pressured to sign. American Rights at Work added that 62 percent of respondents said management took a neutral position on unionization during card-check campaigns, and 33 percent said that management stayed neutral during an NLRB-supervised election.

Freeman told BNA March 21 that the survey only included respondents who had gone through a union organizing campaign because such individuals are most knowledgeable regarding the issues that arise during the process. "Most Americans have never heard the term 'card check' and have no knowledge of what happens when most [people] have tried to form unions," Freeman said. Survey respondents included both those who supported and opposed unionization, she added.

Center Favors Polling of Public. However, Sarah Longwell, a spokeswoman for the Center for Union Facts, told BNA March 21 that the American Rights at Work survey lacks credibility because it did not survey the general public as a whole. She suggested that by surveying workers who have gone through organizing campaigns, the results could be skewed in favor of those who are more sympathetic toward union organizing and toward card checking.

"There is a big difference between polling people who tried to organize in the past and polling the general public," Longwell told BNA.

The Center for Union Facts commissioned the Opinion Research Corp., an independent polling organization, to conduct its survey. When asked which method of organizing is most fair and democratic, respondents were given the option of "a traditional secret ballot election similar to how we elect government officials," or "a petition style process called 'card check' where votes are publicly known." Longwell called on American Rights at Work to release its survey questions; representatives of that organization declined, saying they are being kept under wraps until a full article is published. They emphasized that other university professors reviewed the questions to ensure that they were fair.

Longwell added that secret-ballot elections are the best response to coercion from management or union representatives because the voting results are kept private. Kriesky—co-author of the American Rights at Work survey—said there is a difference between management and union coercion, since employers can use their ability to hire, fire, and change work schedules to sway votes, something labor cannot do.

The reports of the surveys are posted at <http://www.americanrightsatwork.org/docUploads/Factoverfiction%5FFINAL%2Epdf> (American Rights at Work) and <http://www.unionfacts.com/news.cfm?id=13> (Center for Union Facts).

Telecommunications—Broadband

FCC Lets Verizon Petition Take Effect To Deregulate All Broadband Services

By failing to act, the Federal Communications Commission allowed a petition filed by Verizon Telephone Cos. to take effect March 20 that completely deregulates all of its broadband services by lifting rate regulation and all other common carrier

regulation such as interconnection, universal service, and law enforcement access.

Verizon filed a petition Dec. 20, 2004, requesting that the FCC forbear from applying Title II common carrier requirements or Computer Inquiry rules to the extent that they might ultimately be construed to apply to any of Verizon's broadband services. The FCC was required to act by March 19.

FCC Commissioner Michael Copps decried the lack of process preceding such a major policy shift. "Here we permit a forbearance petition to go into effect that erases decades of communications policy in a single stroke," he said.

"As a legal matter this approach is suspect," Copps said. "There is no appealable order. There is no document, no stitch of analysis, no trace of discussion, nothing that a court can use to gauge where the commission is coming from," he said.

Deregulation. The FCC's nonaction on the petition has the effect of essentially eliminating Title II common carrier regulation from almost all of Verizon's lines and networks—with the exception of copper lines to the home used exclusively for voice service.

According to Copps, by failing to act, the FCC could be responsible for bringing about the following results:

- National and local law enforcement agencies could find that key networks are no longer subject to the Communications Assistance for Law Enforcement Act.

- The contribution base for universal service could be put in jeopardy. Without the universal service fund many areas of the country, particularly rural areas, would not have phone service, much less the possibility of broadband. "By pulling a whole swath of services out of the obligation to contribute, universal service could be on newly shaky ground. This will only enhance the urban and rural divide in communications."

- Consumers may no longer have the privacy protections intended by Congress, even at a time when phone records are being sold over the Internet.

- Verizon could be relieved of any duty to interconnect with any other carrier. Prices to interconnect can be set at rates designed to squeeze out competition from intermodal providers.

- Access for millions of Americans with disabilities could be undermined.

- Verizon could increase rates without any regulatory oversight. Services like special access are the backbone of business communications in this country. Now, business customers could see these rates skyrocket and competitors who rely on this input squeezed out of the market.

- Aggrieved parties could lose their right to seek enforcement action against Verizon at the commission, Copps said. Carriers, individuals, municipal organizations, and state commissions will be stripped of their Section 208 right to complain to the FCC about any discriminatory or unlawful practices Verizon may engage in.

"There are other vitally important issues that may suffer from the impact of our failure to act," Copps said. "Longstanding policies—from pricing flexibility standards to accounting rules to notice required for service withdrawal—may all be in play now," he said.

"No doubt in the days and weeks ahead this commission will be compelled to seek promises from the peti-

tioner and issue follow-on orders in a reactionary attempt to clean up the wreck," Capps said.

FCC Split Along Party Lines. Under the 1996 Telecommunications Act, the commission has up to 15 months to act on forbearance petitions. If the commission does not act, the petition is "deemed" to take effect automatically. An order approving the petition had circulated among commissioners, but it could not gain a majority as of March 19.

The petition follows an August 2005 decision by the FCC to declare digital subscriber line service an "information service" along the lines of cable modem service. Under that order, facilities-based wireline broadband Internet access service providers are no longer required to separate out and resell the transmission component of their service. See 74 U.S.L.W. 2090.

This forbearance petition affects all other broadband services by Verizon, which include high-capacity business lines. According to the FCC, Verizon stated that its request for relief excludes traditional special access services (DS1 and DS3 services) and TDM-based optical networking. Verizon said that it would continue to make these services available as wholesale common carrier services, the FCC said.

Computer Inquiry rules, which were also eliminated by the petition, essentially require carriers to make available their networks to unaffiliated Internet service providers at the same rates, terms, and conditions. In its petition, Verizon argued that the business broadband market is highly competitive and therefore it should not be considered a "dominant" carrier subject to regulation.

On Feb. 17, Verizon wrote to the commission further clarifying that it was not seeking forbearance from federal universal service obligations for the services at issue in its petition.

The commission has a pending rulemaking that will prospectively address what services are to be assessed and the basis for such assessment, Verizon wrote. "Therefore, regardless of a decision to forbear here, Verizon will continue to pay federal universal service on the services that are subject to the petition (to the extent those services are subject to an obligation today), pending the commission's decision in the universal service rulemaking docket," it stated.

Nonaction Consistent With Similar Relief. In defense of the FCC's nonaction on the Verizon petition, FCC Chairman Kevin Martin and Commissioner Deborah Tate issued a joint statement.

"The narrowed petition, and the corresponding relief afforded to Verizon, is consistent with and similar to the relief provided in recent commission decisions regarding broadband services, packet switching, and fiber facilities," they said.

"In those decisions, the commission determined to relax regulations where competition was significant and where regulations acted as a disincentive to deploy new broadband technologies," they stated.

Generally, promoting broadband deployment is one of the highest priorities of the FCC, Martin and Tate stated.

"Today, we take another step in establishing a regulatory environment that encourages such investments and innovation by granting Verizon's petition for regulatory relief of its broadband infrastructure and fiber capabilities. This relief will enable Verizon to have the

flexibility to further deploy its broadband services and fiber facilities without overly burdensome regulations," they stated.

FCC 'Abdicates Oversight' Responsibility. Commissioner Jonathan S. Adelstein released a separate statement expressing his opposition to the grant of Verizon's forbearance petition. "By failing to act, the Commission abdicates oversight of the telecommunications services used by America's most technology-dependent consumers," Adelstein said. "This course raises the specter of price hikes and fewer choices for businesses, banks, universities, government agencies and other high volume users of communications services, in addition to consumers in Rural America."

By failing to act on Verizon's petition, the FCC prejudged important open proceedings and ignored precedent, Adelstein said.

The FCC has helped Verizon at the expense of virtually everyone else, including small and rural telephone companies, and business users of all sizes. Furthermore, the FCC has created "an artificial crisis, unnecessarily jeopardizing core policy protections, including universal service, law enforcement access, consumer privacy, and interconnection, that are codified in the Communications Act, even as Congress comprehensively considers reform of our existing telecommunications law."

The FCC's notice that Verizon's petition for forbearance is granted by operation of law and statements of commissioners on the nonaction are posted at <http://www.fcc.gov/> on the FCC Web site.

Trademarks—Infringement

Bush Signs Counterfeiting Bill Criminalizing Fake Labels, Packaging

President Bush March 16 signed legislation that criminalizes the trafficking in counterfeit labels and packaging, even when the labels or packaging are shipped separately from the goods to which they will be ultimately attached.

The Stop Counterfeiting in Manufactured Goods Act (Pub. L. No. 109-181) closes a legal loophole created by the decision in *United States v. Giles*, 213 F.3d 1246 (10th Cir. 2000). In that case, the government prosecuted the defendant for making and selling counterfeit Dooney & Burke designer handbag labels that third parties could later affix to counterfeit goods. The U.S. Court of Appeals for the Tenth Circuit held that trafficking in counterfeit trademarks that are not actually attached to any "goods or services" is not a violation of the federal criminal infringement statute.

The new law expands the criminal sanctions set forth in 18 U.S.C. § 2320 to cover not just the sale of the counterfeit goods themselves, but also the "labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto."

Bush hailed the measure as "an important step forward" in confronting the threat of counterfeiting. "Counterfeiting hurts workers because [it] undercuts