

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Implementation of the Telecommunications Act of 1996
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information;
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended)
CC Docket No. 96-115
CC Docket No. 96-149

ORDER ON RECONSIDERATION AND PETITIONS FOR FORBEARANCE

Adopted: August 16, 1999

Released: September 3, 1999

By the Commission: Commissioner Furchtgott-Roth approving in part, concurring in part and issuing a statement; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. On February 26, 1998, the Commission released the *CPNI Order*¹ adopting rules implementing the new statutory framework governing carrier use and disclosure of customer proprietary network information (CPNI) created by section 222 of the Communications Act (hereinafter "the Act").² CPNI includes, among other things, to whom, where, and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.³

1. This order on reconsideration is issued in response to a number of petitions for reconsideration, forbearance, and/or clarification of the *CPNI Order*.⁴ In this order we modify the *CPNI Order*, in part, to preserve the consumer protections mandated by Congress while more narrowly tailoring our rules, where necessary, to enable telecommunications carriers to comply with the law in a more flexible and less costly manner.

2. The Telecommunications Act of 1996 (1996 Act) became law on February 8, 1996.⁵ Although most of the provisions in the 1996 Act aim to implement Congress' intent that the 1996 Act "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to

¹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998) (*CPNI Order*). The Commission also released a *Further Notice of Proposed Rulemaking* on February 26, 1998 seeking comment on three general issues that principally involve carrier duties and obligations established under sections 222(a) and (b) of the Act. *CPNI Order*, 13 FCC Rcd at 8200-04, ¶¶ 203-10. We do not address the Further Notice issues in this order on reconsideration.

² 47 U.S.C. § 222.

³ *CPNI Order*, 13 FCC Rcd at 8064, ¶ 2. See 47 U.S.C. § 222(f)(1).

⁴ A number of parties also filed comments and reply comments. See Appendix A.

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act); codified at 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as the "Communications Act" or "the Act."

competition,"⁶ section 222 addresses a different goal. CPNI is extremely personal to customers as well as commercially valuable to carriers.⁷ As we stated in the *CPNI Order*:

Congress recognized . . . that the new competitive market forces and technology ushered in by the 1996 Act had the potential to threaten consumer privacy interests. Congress, therefore, enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition.⁸

3. As the Commission previously noted in the *CPNI Order*, section 222 is largely a consumer protection provision that establishes restrictions on carrier use and disclosure of personal customer information.⁹ The aim of section 222 stands in contrast to the other provisions of the 1996 Act that seek primarily to "[open] all telecommunications markets to competition,"¹⁰ and mandate competitive access to facilities and services. Section 222 reflects Congress' view that as competition increases, it brings with it the potential that consumer privacy interests will not be adequately protected by the marketplace. Thus, section 222 requires *all* carriers, whether or not a market is competitive, to protect CPNI and embodies the principle that customers must be able to control their personal information from unauthorized use, disclosure, and access by carriers.¹¹ Where information is not specific to the customer, or where the customer so directs, section 222 permits the free flow or dissemination of information beyond the existing customer-carrier relationship.¹²

4. In most circumstances, the constraints placed on carriers by section 222 only restrict the use or disclosure of CPNI *without* customer approval.¹³ When carriers are prevented from using a customer's CPNI by section 222, and the rules we promulgated in the *CPNI Order*,

⁶ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (*Joint Explanatory Statement*).

⁷ *CPNI Order*, 13 FCC Rcd at 8064, ¶ 2.

⁸ *CPNI Order*, 13 FCC Rcd at 8064, ¶ 1.

⁹ *CPNI Order*, 13 FCC Rcd at 8065, ¶ 3.

¹⁰ *Joint Explanatory Statement* at 1.

¹¹ *CPNI Order*, 13 FCC Rcd at 8065, ¶ 3.

¹² *CPNI Order*, 13 FCC Rcd at 8065, ¶ 3.

¹³ See, e.g., 47 U.S.C. § 222(c)(1) (telecommunications carriers may use, disclose, or permit access to its customer's CPNI with approval of customer); 47 U.S.C. § 222(c)(2) (telecommunications carriers shall disclose CPNI to any person designated by customer upon affirmative written customer request).

carriers need only obtain the customer's approval to use that customer's CPNI. Once a carrier has acquired customer approval, carrier use or disclosure of CPNI, in most cases, is unrestricted. Thus, section 222 enables customers to relinquish the presumption of privacy as they see fit.

5. Congress' determination in section 222 to balance competitive interests with consumers' interests in privacy and control over CPNI governed the Commission's reasoning and conclusions in the *CPNI Order*. This order is no different: we seek to carry out vigilantly Congress' consumer protection and privacy aims, while simultaneously reducing the burden of carrier compliance with section 222 by eliminating unnecessary expense and administrative oversight where customer privacy and control will not be sacrificed.

II. OVERVIEW

6. By this order, we respond to the requests for reconsideration, clarification and forbearance as follows:

(a) We deny the petitions for reconsideration which ask us to amend the CPNI rules to differentiate among telecommunications carriers.¹⁴

(b) We decline to modify or forbear from the total service approach adopted in the *CPNI Order* because the total service approach keeps control over the use of CPNI with the customer and best protects privacy while furthering fair competition. We also clarify a number of aspects of the total service approach in response to petitioners' requests.¹⁵

(c) We grant, in part, the petitions for reconsideration which request that we allow all carriers to use CPNI to market customer premises equipment (CPE) and information services under section 222(c)(1) without customer approval. We conclude that all carriers may use CPNI, without customer approval, to market CPE. We further conclude that CMRS carriers may use CPNI, without customer approval, to market all information services, while wireline carriers may do so for certain information services. We deny the petitions for forbearance on these issues.¹⁶

(d) We eliminate the restrictions on a carrier's ability to use CPNI to regain customers who have switched to another carrier, contained in Section 64.2005(b)(3) of our rules. We find that "winback" campaigns are consistent with Section 222(c)(1). The Order concludes, however, that if a carrier uses information regarding a customer's decision to switch carriers derived from

¹⁴ See discussion *infra* Part IV.

¹⁵ See discussion *infra* Part V.A.

¹⁶ See discussion *infra* Part V.B.

its wholesale operations to retain the customer, such conduct violates the prohibitions in section 222(b) against use of proprietary information gained from another carrier in marketing efforts.¹⁷

(e) We address various aspects of a customer's approval to use CPNI consistent with section 222. We also grandfather a limited set of pre-existing notifications to use CPNI and adopt the conclusions reached in the Common Carrier Bureau's *Clarification Order*.¹⁸ We also eliminate, in an effort to reduce confusion and regulatory micro-management, section 64.2007(f)(4) of our rules, which requires a carrier's solicitation for approval, if written, to be on the same document as the carrier's notification.¹⁹ Further, we affirm our decision to exercise our preemption authority on a case-by-case basis for state rules that conflict with our own.²⁰

(f) We lessen the regulatory burden of various CPNI safeguards while continuing to require that carriers protect customer privacy. We modify our flagging requirement so that carriers must clearly establish the status of a customer's CPNI approval prior to the use of CPNI, but leave the specific details of compliance with the carriers.²¹ In so doing, we allow the carriers the flexibility to adapt their record keeping systems in a manner most conducive to their individual size, capital resources, culture and technological capabilities. Similarly, we amend our rules to eliminate the electronic audit trail requirement and instead require carriers to maintain a record of their sales and marketing campaigns that use CPNI.²²

(g) We affirm our conclusion in the *CPNI Order* that the most reasonable interpretation of the interplay between sections 222 and 272 is that section 272 does not impose any additional obligations on the Bell operating companies (BOCs) when they share their CPNI with their section 272 affiliates.²³ We also adopt the Common Carrier Bureau's conclusion in the *Clarification Order* that a customer's name, address and telephone number are "information" for the purposes of section 272(c)(1), and consequently, if a BOC makes such information available to its 272 affiliate, it must then make it available to non-affiliated entities.²⁴

¹⁷ See discussion *infra* Part V.C.

¹⁸ See discussion *infra* Part VI.A.

¹⁹ See discussion *infra* Part VI.B.

²⁰ See discussion *infra* Part VI.C.

²¹ See discussion *infra* Part VII.D.

²² See discussion *infra* Part VII.E.

²³ See discussion *infra* Part VIII.A.

²⁴ See discussion *infra* Part VIII.B.

(h) We find that the relationship of sections 222 and 254 does not confer any special status to carriers seeking to use CPNI to market enhanced services and CPE in rural exchanges to select customers.²⁵ Moreover, the Order rejects the contention that the Commission should apply the requirements of sections 201(b), 202(a) and 272 to incumbent local exchange carriers (ILECs) to impose a duty on ILECs to electronically transmit a customer's CPNI to any other entity that obtains a customer's oral approval to do so.²⁶

III. BACKGROUND

A. The CPNI Order

7. On May 17, 1996, the Commission initiated a rulemaking, in response to various formal requests for guidance from the telecommunications industry, regarding the obligation of carriers under section 222 and related issues.²⁷ The Commission subsequently released the *CPNI Order* on February 26, 1998.²⁸ The *CPNI Order* addressed the scope and meaning of section 222, and promulgated regulations to implement that section. It concluded, among other things, as follows: (a) carriers are permitted to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customers' existing service relationship; (b) before carriers may use CPNI to market outside the customer's existing service relationship, carriers must obtain express written, oral, or electronic customer approval; (c) prior to soliciting customer approval, carriers must provide a one-time notification to customers of their CPNI rights; (d) in light of the comprehensive regulatory scheme established in section 222, the *Computer III* CPNI framework is unnecessary; and (e) sections 272 and 274 impose no additional CPNI requirements on the Bell Operating Companies (BOCs) beyond those imposed by section 222.

B. The Clarification Order

8. On May 21, 1998, in response to a number of requests for clarification of the

²⁵ See discussion *infra* Part VIII.C.

²⁶ See discussion *infra* Part VIII.D.

²⁷ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*NPRM*).

²⁸ *CPNI Order*, 13 FCC Rcd at 8061. The Commission also issued a *Further Notice of Proposed Rulemaking* seeking comment on: (a) the customer's right to restrict carrier use of CPNI for all marketing purposes; (b) the appropriate protections for carrier information and additional enforcement mechanisms; and (c) the foreign storage of, and access to, domestic CPNI. *CPNI Order* at 8200-04, ¶¶ 203-10.

CPNI Order, the Common Carrier Bureau released a *Clarification Order*.²⁹ This order addressed several issues. It concluded that independently-derived information regarding customer premises equipment (CPE) and information services is not CPNI and may be used to market CPE and information services to customers in conjunction with bundled offerings.³⁰ In addition, it clarified that a customer's name, address, and telephone number are not CPNI.³¹ Moreover, it stated that a carrier has met the requirements for notice and approval under section 222 and the Commission's rules if it has both provided annual notification to, and obtained prior written authorization from, customers with more than 20 access lines in accordance with the Commission's former CPNI rules.³² Finally, it determined that carriers are not required to file their certifications of corporate compliance, which carriers are required to issue by the *CPNI Order*, with the Commission.³³

C. The Stay Order

9. In the *CPNI Order*, the Commission required, among other things, that carriers develop and implement software systems that "flag" customer service records in connection with

²⁹ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order, 13 FCC Rcd 12390 (1998) (*Clarification Order*). In addition to several *ex parte* requests for clarification, CTIA filed a request for deferral and clarification on April 24, 1998, and GTE filed a petition for temporary forbearance or, in the alternative, motion to stay on April 29, 1998. *Clarification Order*, 13 FCC Rcd at 12391, n.2. GTE has since withdrawn its motion. GTE Withdrawal of Petition (filed Dec. 2, 1998). CTIA requested that the Commission defer for 180 days the effective date of sections 64.2005(b)(1) and (b)(3) of the Commission's rules, insofar as they apply to CMRS. CTIA Request at 1. We did not stay these rules before they went into effect, and we decline to stay them now. See discussion *infra* Part III.C. These rules, however, are both modified herein. See Parts V.B. and C, *infra*. CTIA also requested that we confirm that CPNI refers only to information about the type and amount of service customers purchase, not the names and addresses of the customers themselves. CTIA Request at 4. In addition, CTIA requested that we clarify that the new "win-back" rule would not apply until after a customer is no longer receiving service from its original carrier. CTIA Request at 5. We also deny these requests as they are addressed elsewhere in this order and the *Clarification Order*. See, e.g., discussion *infra* Parts V.C.2 and VIII.B.

³⁰ *Clarification Order*, 13 FCC Rcd at 12392-95, ¶¶ 2-7.

³¹ *Clarification Order*, 13 FCC Rcd at 12395-97, ¶¶ 8-9.

³² *Clarification Order*, 13 FCC Rcd at 12397-99, ¶¶ 10-12.

³³ *Clarification Order*, 13 FCC Rcd at 12399, ¶ 13. On July 22, 1998, three carriers filed petitions requesting reconsideration of the *Clarification Order*. Comcast Petition for Reconsideration (filed July 22, 1998); Vanguard Petition for Reconsideration and Clarification (filed July 22, 1998); GTE Petition for Reconsideration (filed July 22, 1998). The Common Carrier Bureau has referred these petitions to the full Commission, and as discussed more fully below, we hereby affirm the *Clarification Order*. See discussion *infra* Parts V.B. and VI.A. As such, the petitions are denied.

CPNI and that carriers maintain an electronic audit mechanism ("audit trail") that tracks access to customer accounts.³⁴ The Commission chose to defer the enforcement of these rules until eight months after the effective date of the rules: January 26, 1999.³⁵ On September 24, 1998, however, the Commission stayed, until six months after the release date of an order addressing these issues on reconsideration, the enforcement of actions against carriers for noncompliance with applicable requirements set forth in the Commission's rules.³⁶

IV. CONSISTENT TREATMENT FOR ALL CARRIERS

A. Incumbents vs. CLECs

10. Section 222(c)(1) restricts the ability of telecommunications carriers to use CPNI without customer approval. In the *CPNI Order*, we concluded that "Congress did not intend to, and we should not at this time, distinguish among carriers for the purpose of applying Section 222(c)(1)."³⁷ We found, based upon the language of the statute itself, that section 222 applies to all carriers equally and, with few exceptions, does not distinguish among classes of carriers.³⁸ Various parties on reconsideration, however, seek reversal of this conclusion.³⁹ One group of petitioners advocates that we impose stricter CPNI restrictions on incumbent carriers than competitors, based upon the greater potential for anticompetitive use or disclosure of CPNI by ILECs. We previously rejected this very argument in the *CPNI Order*.⁴⁰ These parties have not raised any arguments or facts that persuade us to reverse our conclusion that section 222 is intended to apply to all segments of the telecommunications marketplace regardless of the level of competition present in any segment. Accordingly, we affirm that section 222 does not distinguish between classes of carriers and applies to all carriers equally.

B. Wireline vs. Wireless

34 *CPNI Order*, 13 FCC Rcd at 8198-99, ¶¶ 198-99.

35 *CPNI Order*, 13 FCC Rcd at 8200, ¶ 202.

36 *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order, 13 FCC Rcd 19390, 19390-91, ¶ 2 (1998) (*Stay Order*).

37 *CPNI Order*, 13 FCC Rcd at 8098, ¶ 49.

38 *CPNI Order*, 13 FCC Rcd at 8098-99, ¶ 49.

39 CompTel Petition at 10-15; LCI Petition at 7-15; e.spire Comments at 3-4; Comcast Reply at 4-5.

40 *CPNI Order*, 13 FCC Rcd at 8098-99, ¶ 49.

11. Other petitioners highlight the differences between wireless and wireline regulation and request that the Commission treat CMRS carriers differently for purposes of the CPNI rules.⁴¹ These petitioners assert that notwithstanding section 222's mandate to apply its restrictions to "all telecommunications providers," the Commission has often distinguished among various classes of providers when it was appropriate to do so.⁴² In fact, as one petitioner notes, until Congress passed section 222, CMRS providers had not been subject to any Commission regulation in their use of CPNI.⁴³

12. Moreover, several parties believe that the impact of compliance with the *CPNI Order* will cause CMRS providers to bear disproportionate burdens.⁴⁴ Comcast asserts that CMRS providers generally do not have a monopoly base or a nationwide market scope to cushion the impact of compliance.⁴⁵ Vanguard states that independent CMRS providers are hardest hit when compared to integrated companies, and that CMRS providers must bear these costs without the benefit of the ability to use CPNI to cross-market to large, installed bases.⁴⁶ Vanguard also states that these burdens--often in the form of additional regulation, including E911, local number portability, Year 2000 compliance, universal service requirements, and the conversion to digital technology--pose significant hardships.⁴⁷

13. Again, we return to the text of section 222, which applies to "telecommunications carriers" generally.⁴⁸ Congress enacted section 222 at a time when the wireless industry had been subject to less regulatory requirements than wireline carriers. Congress was fully aware that CMRS providers, and CLECs for that matter, were to evolve in more competitive environments. Notwithstanding, there is nothing in the statute or its legislative history to indicate that Congress intended that the CPNI requirements in section 222 should not apply to wireless carriers. Given the opportunity to exclude competitive carriers from the scope of section 222, we must give

41 See generally ALLTEL Petition; Comcast Petition; CTIA Petition; Omnipoint Petition; PCIA Petition; RAM Technologies Petition; Vanguard Petition.

42 Comcast Petition at 6; CTIA Petition at 18; Vanguard Petition at 5-7 (e.g., providing for transition period under Section 254(k)'s universal service subsidy and tariff notice requirements for dominant and nondominant wireline carriers).

43 Vanguard Petition at 1-2.

44 Comcast Petition at 2-3, 8; CTIA Petition at 15-28.

45 Comcast Petition at 2.

46 Vanguard Petition at 8-9.

47 Vanguard Petition at 7-8.

48 47 U.S.C. § 222.

meaning to the fact that Congress did not exempt them. Moreover, the underlying policy objective of section 222 is to protect *consumers*, while balancing competitive interests. We believe that the privacy interests of CMRS customers are no less deserving of protection than those of wireline customers, although the differences in customer expectations may warrant different approaches. We note too that this reconsideration lightens the impact of compliance with the CPNI rules on all carriers by providing flexibility for technological differences in administrative systems with regard to the electronic safeguards rules, which should be beneficial to all companies, including independent CMRS providers.⁴⁹ Finally, we note that a few parties urge the Commission to forbear from enforcing CPNI obligations on CMRS providers generally.⁵⁰ We address these arguments in Part V.B.3.d., *infra*. Therefore, we deny those petitions for reconsideration that seek different treatment for CMRS carriers.

C. Small and Rural Carriers

14. Still other carriers request that we treat rural and small carriers differently.⁵¹ As we noted in the *CPNI Order*, however, the Commission's CPNI rules apply to small carriers just as they apply to other sized carriers "because we are unpersuaded that customers of small businesses have less meaningful privacy interests in their CPNI."⁵² Petitioners have not raised any new arguments or facts that persuade us to reverse this conclusion with respect to these carriers. Thus, we will not distinguish among carriers based upon the number or density of lines they serve either.

V. CARRIER'S RIGHT TO USE CPNI WITHOUT CUSTOMER APPROVAL

A. The Total Service Approach

1. Background

15. In the CPNI Order, the Commission addressed the instances in which a carrier could use, disclose, or permit access to CPNI without prior customer approval under section

49 See discussion *infra* Part VII.

50 360° Communications Petition at 3, Bell Atlantic Petition at 20; *see also* Bell Atlantic Mobile Comments at 1; Arch Communications Comments at 7-9.

51 See discussion *infra* Part VII.I. See *also* CenturyTel Reply at 2-5 ("Rural carriers should have the flexibility to continue their present and customary marketing and business practices with existing subscribers.").

52 See *CPNI Order*, 13 FCC Rcd at 8214, ¶ 236. See *also* Independent Alliance Petition at 4-5 ("The Alliance is not seeking forbearance from section 222 obligations, recognizing fully that the privacy interests of the customers of small and rural carriers warrant protection.").

222(c)(1)(A).⁵³ Section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in the provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publication of directories."⁵⁴

16. After considering the record, statutory language, history, and structure of section 222, we concluded that Congress intended that a carrier's use of CPNI without customer approval should depend on the service subscribed to by the customer. Accordingly, the Commission adopted the "total service approach" which allows carriers to use a customer's entire record, derived from complete service subscribed to from that carrier, to market improved services within the parameters of the existing customer-carrier relationship.⁵⁵ The total service approach permits carriers to use CPNI to market offerings related to the customer's existing service to which the customer presently subscribes.⁵⁶ Under the total service approach, the customer retains ultimate control over the permissible marketing use of CPNI, a balance which best protects customer privacy interests while furthering fair competition. Presented with the opportunity to permit or prevent a carrier from accessing CPNI for marketing purposes, the customer has the ability to determine the bounds of the carrier's use of CPNI.

2. Petitions for Reconsideration

17. GTE urges the Commission to reconsider the total service approach to allow carriers to use, without customer consent, CPNI derived from the provision of a package of telecommunications services in order to market other telecommunications services to which a customer does not subscribe.⁵⁷ This "package approach" is only a slight variation of the "single category approach," which we specifically analyzed and rejected in the *CPNI Order*.⁵⁸ The single category approach would have permitted carriers to use CPNI obtained from the provision of any telecommunications service, including local or long distance or CMRS, to market any other service offered by the carrier, regardless of whether the customer subscribes to such service from

53 *CPNI Order*, 13 FCC Rcd at 8081-100, ¶¶ 27-51.

54 47 U.S.C. § 222(c)(1).

55 *CPNI Order*, 13 FCC Rcd at 8080, 8083-84, 8087-88, ¶¶ 23-24, 30, 35.

56 *CPNI Order*, 13 FCC Rcd at 8087-88, ¶ 35.

57 GTE Petition at 26-29; U S WEST *ex parte* (filed January 22, 1999) (U S WEST supports GTE's position in this regard).

58 *CPNI Order*, 13 FCC Rcd at 8083, 8085-8091, ¶¶ 29, 33, 39.

that carrier.⁵⁹ Similarly, GTE's proposal would allow a carrier to market to customers any services or enhancements to the package that GTE offers, regardless of the services to which the customer has subscribed. For instance, GTE could decide, based on CPNI, that a customer who subscribes only to local service is a suitable candidate for a promotional cellular service plan, where the customer has not consented to such a solicitation.⁶⁰ GTE argues that "[i]n the case of packaged services, the customer will regard the package, not the components, as comprising his or her total service offering."⁶¹ We reject GTE's proposal because, like the single category approach, it removes control over CPNI from the customer. GTE would define and change the contents of the package at its discretion. As a practical consequence, GTE's marketing would be limited only by what GTE chooses to include in the package, even if that includes everything that GTE is capable of offering.

18. We decline to grant GTE reconsideration on this issue because that would vitiate the total service approach and the attendant protection of a customer's sensitive information. The hallmark of the total service approach is that the customer, whose privacy is at issue, establishes the bounds of his or her relationship with the carrier. We note, however, that to the extent a customer already subscribes to a particular service or subscribes across services, GTE or any carrier can use the customer's CPNI to market or create enhancements to those services. Congress could not have intended an interpretation of section 222 that leaves the consumer without privacy protection. We concluded in the *CPNI Order*, and nothing has persuaded us otherwise here, that the total service approach best protects customer privacy while furthering fair competition. GTE seeks to use CPNI derived from the provision of certain telecommunications services to market other telecommunications services to which the customer does not subscribe. We conclude that this would not further the privacy goals that Congress sought to achieve in Section 222. Over time, the total service approach rewards successful carriers who offer integrated packages by enabling marketing in more than one category but in a manner that respects customer privacy.⁶²

19. GTE requests, in the alternative, that the Commission adopt a rule that permits the use of CPNI for the limited purpose of identifying customers from whom it would like to solicit

59 *CPNI Order*, 13 FCC Rcd at 8083, ¶ 29.

60 *See* GTE Petition at 27.

61 GTE Petition at 27.

62 We note that both Ameritech and BellSouth also request reconsideration of the total service approach to the extent it disallows them from using CPNI, without customer approval, to market to their customers bundled packages which include the telecommunications service being subscribed to and related CPE and/or information services. Ameritech Petition at 7; BellSouth Petition at 5-6. We deal with these requests *infra* at Part V.B.2.

express, affirmative approval to use their CPNI for marketing out-of-category services.⁶³ MCI supports the use of CPNI in this way.⁶⁴ We conclude that such use of CPNI is implicit in section 222(c)(1) because the solicitation of approval is a logical prerequisite to actually obtaining approval. The carrier's use of CPNI under these limited circumstances, therefore, is merely a part of the process of obtaining approval. Thus, the use of CPNI for solicitations of approval to use CPNI to market services outside the bounds of the existing customer-carrier relationship necessarily falls under the customer approval exception stated in section 222(c)(1).⁶⁵ We agree with GTE that customer privacy would not be diminished by such an interpretation because carriers must still obtain the customer's express consent before using the customer's CPNI for marketing to the customer or for any other purpose.⁶⁶ We note, moreover, that our interpretation serves customer privacy, convenience, and control as it allows carriers to identify customers more likely to be interested in approval solicitations, while preserving the requirement under section 222 that carriers obtain express, affirmative customer approval.

20. NTCA urges us to reconsider the total service approach because it is particularly disadvantageous to small, rural LECs looking to launch new service offerings.⁶⁷ We addressed and rejected this argument in the CPNI Order.⁶⁸ NTCA has presented no new evidence to persuade us that its members are disproportionately affected in any cognizable way by these requirements.

3. Petitions for Forbearance

21. Alternatively, GTE and Ameritech seek forbearance from the application of the total service approach to the marketing of out-of-category packages or service enhancements to

⁶³ GTE Petition at 29.

⁶⁴ MCI Comments at 14.

⁶⁵ Section 222(c)(1) states that "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1).

⁶⁶ GTE Petition at 29.

⁶⁷ NTCA Petition at 3-4; NTCA Comments at 2. NTCA also points out that the number of carriers subject to CPNI restrictions has increased from nine to several thousand. NTCA Petition at 3.

⁶⁸ *CPNI Order*, 13 FCC Rcd at 8099-100, ¶ 50 (rejecting similar arguments raised by SBT and USTA). *See also* discussion *supra* Part IV.C.

customers.⁶⁹ After careful review, we believe the forbearance test is not met. Forbearance under section 10 of the Act⁷⁰ is required where:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Section 10(b) provides that, in making the determination whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.

22. Section 10(a)(1). GTE and Ameritech assert that the ability to offer service packages will not result in unreasonable or discriminatory rates.⁷¹ According to GTE, any service package will necessarily include at least one service that the Commission recognizes as competitive (*i.e.*, long distance or CMRS) and is supplied by nondominant carriers.⁷² As such, the market will assure that competitive elements of the service packages are priced reasonably. Moreover, under current regulation noncompetitive services will also be available on an unbundled basis from a dominant carrier at rates subject to state and federal regulation.⁷³ The net result, GTE contends, is that service packages will not involve unreasonable or unlawfully

⁶⁹ Ameritech Petition at 5-8 (the Commission should forbear from the application of Section 222(c)(1)(A)); GTE Petition at 30. While 360° Communications also mentions the total service approach in its petition for forbearance, it argues for forbearance from enforcement of CPNI rules generally for CMRS providers. 360° Communications Petition at 3-6. Consequently, we address 360° Communications arguments in greater detail, *infra*, at V.B.3.d.

⁷⁰ 47 U.S.C. § 160.

⁷¹ Ameritech Petition at 6; GTE Petition at 30.

⁷² GTE Petition at 30.

⁷³ GTE Petition at 30.

discriminatory charges or terms.⁷⁴ Ameritech adds that years of carrier use of CPNI has not led to adverse consequences.⁷⁵

23. The primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of the total service approach is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

24. Section 10(a)(2). GTE asserts that prohibiting the use of CPNI without approval to market package enhancements is not necessary to protect consumers.⁷⁶ Ameritech believes CPNI protection is not necessary where, like here, the use is consistent with customer expectations.⁷⁷ Customers, according to GTE, will welcome enhancements to the package that are tailored to their needs as determined by analyzing their CPNI.⁷⁸

25. We conclude that the second criterion for forbearance is not met because customers' privacy interests would not be adequately protected absent the total service approach. GTE and Ameritech would have us forbear from enforcing the total service approach when consumer protection is a primary concern of section 222. Specifically, the customer approval process for the use of CPNI is necessary to protect customers' privacy expectations because, as stated in the CPNI Order, we do not believe that we can properly infer that a customer's decision to purchase one type of service offering constitutes approval for a carrier to use CPNI to market other service offerings to which the customer does not subscribe.⁷⁹ Nor are we aware of any other law, regulation, agency or state requirement that would substitute for the effectiveness of our approach. The total service approach protects customer privacy expectations by placing the control over the approval process in the hands of the customer. The total service also approach protects customers in many instances where they would not realize potentially sensitive, personal information had been accessed or used. The GTE and Ameritech approaches lack this crucial element of consumer protection.

26. Section 10(a)(3). GTE believes forbearance is in the public interest because of the reduction in carriers' administrative costs to communicate with customers where a carrier can use

⁷⁴ GTE Petition at 30.

⁷⁵ Ameritech Petition at 6.

⁷⁶ GTE Petition at 30.

⁷⁷ Ameritech Petition at 6.

⁷⁸ GTE Petition at 30.

⁷⁹ *CPNI Order*, 13 FCC Rcd at 8110, ¶ 63.

CPNI to market across service categories without the need for customer approval.⁸⁰ GTE also heralds the improved ability of CLECs to introduce new, improved and branded combinations of competitive services and products.⁸¹ The public also benefits, according to GTE and Ameritech, from receiving information without artificial constraints based on service categories.⁸²

27. We find that forbearance would not be in the public interest. The privacy goals of the statute are not met where carriers can use CPNI without customer approval to sell products and services outside the existing customer-carrier relationship. Although reducing the administrative costs to carriers may assist these companies in competing with other carriers, we find that any potential benefit is outweighed by the need to protect customer privacy. Customers who are interested in obtaining more information can arrange to do so easily by granting consent for their carriers' use of CPNI.

28. Pursuant to section 10(b) of the Act, we have evaluated whether forbearance from the total service approach will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. We agree that, as a general matter, reducing carriers' administrative and regulatory costs promotes competitive market conditions and would improve the ability of new entrants to introduce new, improved combinations of competitive services and products. However, we are concerned that the GTE and Ameritech proposals, which eliminate the boundaries we have established for the use of CPNI, may unreasonably deprive other telecommunications carriers the opportunity to compete for a customer's business. The ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage on those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers and interexchange carriers with a large existing customer base. This, in turn, poses a significant risk to the development of competition. For this reason, as well, we cannot find that forbearance is in the public interest.

4. Requests for Clarification

29. Several petitioners request clarification of aspects of the total service approach and its application in specific contexts. We address these requests below.

a. Multiple Lines and Carriers

30. MCI requests clarification as to whether the total service approach should be

⁸⁰ GTE Petition at 31.

⁸¹ GTE Petition at 31.

⁸² Ameritech Petition at 6; GTE Petition at 31.

applied on a subscriber line-by-line basis or to the subscriber's services overall.⁸³ To illustrate the significance of this distinction, MCI uses the example of a customer with two lines, each line having a different presubscribed interexchange carrier (PIC).⁸⁴ MCI queries whether each PIC is considered the customer's sole long-distance carrier for that line, so that the carrier must limit to that line its use of CPNI to market other long distance service or whether the carrier can market long distance services to both lines. MCI poses a second, related question, whether a customer can have more than one carrier in any given service category, thus allowing both carriers to market other services in the same category to that customer.⁸⁵

31. We believe that the total service approach applies to the *customer's* total telecommunications service subscription, and proper use of CPNI is not necessarily limited to the line from which it was derived. Section 64.2005(a) of our rules permits a telecommunications carrier to use CPNI for the purpose of marketing service offerings among the categories of service already subscribed to by the customer from the same carrier.⁸⁶ Although MCI proposes to use CPNI from one line to market to another line of the same customer, the use of CPNI is permissible because it remains within the category of service. As to MCI's second question, we do not limit a customer's choice to select more than one carrier in a given service category. For the same reasons cited above, where the use of CPNI remains within a service category, a carrier is able to market that same service to the customer without the need for express customer approval. In this manner, a carrier's attempt to garner more of the customer's business is pro-competitive and does not impinge on a customer's privacy.

b. Codification of Service Categories

32. MCI and CommNet request that the Commission explicitly state that all telecommunications services fall within three groupings--local, interLATA, and CMRS.⁸⁷ MCI believes that this will assist carriers in deciding whether a particular service feature fits within the boundaries of the carrier's total service offering.⁸⁸

33. We decline to do so because it would have the effect of grafting onto the total

⁸³ MCI Petition at 45.

⁸⁴ MCI Petition at 45.

⁸⁵ MCI Petition at 44-45.

⁸⁶ 47 C.F.R. § 64.2005(a).

⁸⁷ CommNet at Petition at 10-11 (Commission should define and codify "total service relationship" as constituting "zero, one, two or three" categories of service); MCI Petition at 43-44.

⁸⁸ MCI Petition at 43-44.

service approach one of the critical flaws of the so-called "three category" approach. As explained in greater detail in the *CPNI Order*, the three category approach parsed telecommunications services into the three traditional service distinctions--local, interLATA, and CMRS.⁸⁹ Given the dynamic nature of the telecommunications industry, we can not assume that all services necessarily fall into such categories. We believe the total service approach is sufficiently flexible to incorporate new and different categories without periodic reviews to ascertain whether changes in the competitive environment should translate into changes in service categories.⁹⁰ Rather, we agree with U S WEST that it is unnecessary to modify the total service approach in this regard or to further codify the three service categories in the rules.⁹¹

c. Use of CPNI to Market Paging

34. In the *CPNI Order*, the Commission determined that CMRS should be viewed in the entirety, when considering the "total service approach."⁹² CommNet urges the Commission to revise its rules to make it clear that the service categories to which the "total service" relationship applies are only local exchange service, interexchange service, and CMRS, so that a paging carrier could use CPNI to market cellular service and *vice versa*.⁹³ U S WEST objects on the grounds that the language of the current rule was taken directly from the statute and that the categories may blur over time and may disappear as customers migrate to single source providers.⁹⁴

35. We find that our rules are clear that under the total service approach, a CMRS carrier may use CPNI to market any CMRS service, including paging and cellular service.⁹⁵ Therefore, no revision of the rules is required.

d. IntraLATA Toll Services

⁸⁹ *CPNI Order*, 13 FCC Rcd at 8082, ¶ 28.

⁹⁰ *CPNI Order*, 13 FCC Rcd at 8105-06, ¶ 58.

⁹¹ U S WEST Comments at 20; *see also*, 47 C.F.R. § 64.2005(a) which provides that: "[a]ny telecommunications carrier may use, disclose, or permit access to CPNI for the purpose of providing or marketing service offerings among the categories of service (*i.e.*, *local, interexchange, and CMRS*) already subscribed to by the customer from the same carrier, without customer approval." (emphasis added).

⁹² *CPNI Order*, 13 FCC Rcd at 8091, ¶ 40, n.149.

⁹³ CommNet Petition at 10-11.

⁹⁴ U S WEST Comments at 20-21.

⁹⁵ *See* 47 C.F.R. § 64.2005(a).

36. In the *CPNI Order*, the Commission concluded that insofar as both local exchange carriers and interexchange carriers currently provide short-haul toll, it should be considered part of both local and long-distance service.⁹⁶ We further concluded that permitting short-haul toll to "float" between categories would not confer a competitive advantage upon either interexchange or local exchange carriers.⁹⁷ MCI concludes that the provision of short-haul toll may only be considered part of carrier's "primary service category" and requests that we make such a clarification.⁹⁸

37. We agree with MCI that our prior conclusion requires clarification. MCI argues that if a local exchange carrier is providing local service, then it may use a customer's local service CPNI to market intraLATA toll to that customer, and vice-versa, and if an interexchange carrier is providing long distance service to a customer, then it may use that customer's long distance CPNI to market intraLATA toll to him or her, and vice versa.⁹⁹ We reject MCI's proposal that we link short-haul toll to the carrier's "primary service category." Rather, we conclude that short-haul toll shall be considered as falling within the category of service the carrier is already providing to the customer. For example, a carrier may use CPNI from short-haul toll to market local services only if the carrier is already providing local service. Long distance carriers providing intraLATA toll service, however, need obtain customer approval to use intraLATA toll CPNI to market local service. Likewise, local exchange carriers would need customer approval to use intraLATA toll CPNI to market interLATA long distance service. GTE argues that such a rule is unfair and anticompetitive because it would prohibit local carriers from using intraLATA toll CPNI to market long distance services, but would allow long distance carriers to market intraLATA services or vice versa.¹⁰⁰ As explained above, however, in GTE's example, long distance carriers need to obtain a customer's permission to use intraLATA toll CPNI to market local services. In this way, the rule is fair to both interexchange and local exchange carriers and treats them symmetrically.

B. Use of CPNI to Market Customer Premises Equipment and Information Services

1. Background

⁹⁶ *CPNI Order*, 13 FCC Rcd at 8104-05, ¶ 57.

⁹⁷ *CPNI Order*, 13 FCC Rcd at 8104-05, ¶ 57.

⁹⁸ MCI Petition at 47.

⁹⁹ MCI Petition at 47.

¹⁰⁰ GTE Comments at 14.

38. Section 222(c)(1) states that, "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."¹⁰¹ In the *CPNI Order*, we concluded that Congress intended that section 222(c)(1)(A) govern carriers' use of CPNI for providing *telecommunications services* and that section 222(c)(1)(B) governs carriers' use of CPNI for *non-telecommunications services*.¹⁰² Based upon the language of section 222(c)(1), we further concluded that: (1) inside wiring, CPE, and certain information services do not fall within the scope of section 222(c)(1)(A) because they are not "telecommunications services;"¹⁰³ and (2) CPE and most information services do not fall under section 222(c)(1)(B) because they are not "services necessary to, or used in, the provision of such telecommunications service."¹⁰⁴ We now find that the phrase "services necessary to, or used in, the provision of such telecommunications service" should be given a broader reading than the one given in the *CPNI Order*. The record produced on reconsideration persuades us that a different statutory interpretation is permissible, and importantly, would lead to appropriate policy results consistent with the statutory goals. Therefore, we conclude that section 222(c)(1)(B) allows carriers to use CPNI, without customer approval, to separately market CPE and many information services to their customers. We further clarify that the tuning and retuning of CMRS units and repair and maintenance of such units is a service necessary to or used in the provision of CMRS service under section 222(c)(1)(B). Finally, we deny petitioners' requests that we forbear from applying these restrictions for related CPE and information services.¹⁰⁵

2. Petitions for Reconsideration

39. *Customer Premises Equipment and Information Services under Section 222(c)(1)*. We grant the petitions for reconsideration that argue that CPE and certain information services are "necessary to, or used in, the provision of" telecommunications services, and therefore use of CPNI derived from the provision of a telecommunications service, without customer approval, to

¹⁰¹ 47 U.S.C § 222(c)(1).

¹⁰² *CPNI Order*, 13 FCC Rcd at 8095, ¶ 45.

¹⁰³ *CPNI Order*, 13 FCC Rcd at 8095, ¶ 45.

¹⁰⁴ *CPNI Order*, 13 FCC Rcd at 8116, ¶ 71.

¹⁰⁵ See discussion *infra* Part V.B.3.

market CPE and information services would be permitted under section 222(c)(1)(B).¹⁰⁶ Under our previous interpretation, the exception was narrowly construed, resulting in very few services for which CPNI could be shared.¹⁰⁷ Indeed, we rejected all CPE because it was not a "service" and most information services¹⁰⁸ because they were not necessary to or used in the carrier's provision of the telecommunications service.¹⁰⁹ While this interpretation is not inconsistent with the statutory language, we are persuaded that the better interpretation is that the exception includes certain products and services provisioned by the carrier with the underlying telecommunications service to comprise the customer's total service. This is because those related services and products facilitate the underlying telecommunications service and customers expect that they will be used in the provisioning of that service offering.¹¹⁰ Our new interpretation accords with the Commission's stated intention in the *CPNI Order* to revisit and if necessary revise its conclusions regarding customer expectations as those expectations changed in the marketplace with advancements in technology or as new evidence of the evolution of customer expectations becomes available to the Commission.¹¹¹ Such evidence has now been made available to us by the record developed on reconsideration.

40. When evaluated as a whole, the exception can be reasonably interpreted to include those products used in the provision of telecommunications, including directories and CPE. First, we find statutory support for this interpretation through the only example Congress included in the exception—the publishing of directories.¹¹² As described in the *CPNI Order*, directories are "necessary to and used in" the provision of service because without access to phone numbers, customers cannot complete calls.¹¹³ A directory is not a "service," but rather, like CPE, is a product. Consistent with the statutory exception, however, the "*publishing*" of the directory is a

¹⁰⁶ BellSouth Petition at 5; Comcast Petition at 12; Frontier Petition at 10-11; Omnipoint Petition at 7-8; TDS Petition at 8-9; Vanguard Petition at 9-10.

¹⁰⁷ *CPNI Order*, 13 FCC Rcd at 8095, ¶ 45.

¹⁰⁸ *CPNI Order*, 13 FCC Rcd at 8115, ¶ 69, n. 253.

¹⁰⁹ *CPNI Order*, 13 FCC Rcd at 8096, ¶ 46.

¹¹⁰ The Commission has previously found that when examining the functional differences between integrated service packages and individual services, it was required to take into account "the perspectives of both the nature of the services involved and customer perceptions of the services." *AT&T Communications Revisions to Tariff FCC No. 12*, 6 FCC Rcd 7039, 7042(1991), *aff'd sub nom. Competitive Telecommunications Association v. FCC*, 998 F.2d 1058 (1993).

¹¹¹ *See CPNI Order*, 13 FCC Rcd at 8080, ¶ 24, n.98.

¹¹² 47 U.S.C. § 222(c)(1)(B).

¹¹³ *CPNI Order*, 13 FCC Rcd at 8119, ¶ 74.

service—the service by which the carrier provisions the product necessary to, or used in, the customer's telecommunications service. Thus, Congress' publishing of directories example supports including those products as well as services provisioned by the carrier that are used in and necessary to the customer's telecommunications service.¹¹⁴ We believe that our previous interpretation construed the term "services" in isolation from the phrase "necessary to, or used in." While it is obvious that CPE itself is not a service, the provision of CPE is a service that is necessary to, or used in the provision of the underlying telecommunications service. Customers cannot make, or complete, calls without CPE. This is consistent with Congress' example of the publishing of directories in section 222. Therefore, this finding concerning CPE is limited to section 222. Also, the CPE that is included in this exception is limited to CPE that is used in the provision of the telecommunications service from which the CPNI is derived.

41. Second, our broader statutory interpretation appropriately protects the customer's reasonable expectations of privacy in connection with CPNI, which many petitioners argue is the appropriate test for determining the limitations on the use of CPNI without a customer's approval.¹¹⁵ On the one hand, as described below, our new interpretation sets appropriate limits, consistent with the statutory language, on those information services and CPE "necessary to, or used in," the customer's service. In this way, our new interpretation advances the principle of customer control that we set forth in the *CPNI Order*.¹¹⁶ On the other hand, the record establishes that our prior restrictive interpretation, excluding all CPE and information services, leads to anomalous results and does not advance the principle of customer convenience embodied in the provision.¹¹⁷ For example, we concluded that carriers could use CPNI to market caller ID to their customers, but could not use it to market caller ID CPE that is necessary for the customer to be able to receive the service.¹¹⁸ We are thus persuaded that CPE and many information services properly come within the meaning of section 222(c)(1)(B) as we describe below.¹¹⁹

¹¹⁴ BellSouth Petition at 8; Comcast Petition at 13; PrimeCo Petition at 5.

¹¹⁵ Ameritech Petition at 2-4; BellSouth Petition at 6-10; NTCA Petition at 5-7; Omnipoint Petition at 8; USTA Petition at 5.

¹¹⁶ *CPNI Order*, 13 FCC Rcd at 8101-02, ¶ 53.

¹¹⁷ *CPNI Order*, 13 FCC Rcd at 8101-02, ¶ 53.

¹¹⁸ Bell Atlantic Petition at 7; BellSouth Petition at 8-9; NTCA Petition at 6. Other petitioners also argue that such a reading allows carriers to offer digital subscriber lines (DSL) or asymmetric digital subscriber lines (ADSL) but not the modems which are necessary for a subscriber to use such lines. Bell Atlantic Petition at 6; GTE Petition at 15-18; TDS Petition at 8-10.

¹¹⁹ In response to RAM Technologies' request for clarification, given our revised statutory interpretation, we find that the tuning or retuning of wireless subscriber units, and the repair and maintenance of those units are *services* "necessary to, or used in" the provision of wireless telecommunications services. RAM Petition at 3.

42. In the wireless context, our regulation of CMRS providers and the history of the industry has allowed the development of bundles of CPE and information services with the underlying telecommunications service.¹²⁰ Thus, information services and CPE offered in connection with CMRS are directly associated and developed together with the service itself. Indeed, we are persuaded by the record and our observations of the development of the CMRS market generally that the information services and CPE associated with CMRS are reasonably understood by customers as within the existing service relationship with the CMRS provider.¹²¹ Customers expect to have CPE and information services marketed to them along with their CMRS service by their CMRS provider.¹²² Accordingly, we conclude that such CPE and information services come within the meaning of "necessary to, or used in," the provision of service. In the CMRS context, carriers should be permitted to use CPNI, without customer approval, to market information services and CPE to their CMRS customers.

43. The wireline industry has developed somewhat differently from CMRS and, while the analysis is the same, the results concerning how carriers may use CPNI accordingly differ from the wireless industry. The provision of CPE, like the publishing of directories, is a service which is used in and generally necessary to the provision of the telecommunications service. For at least the past ten years, all wireline companies have been able to market CPE along with their telecommunications service.¹²³ Petitioners argue that by erecting a CPNI approval requirement with respect to CPE, the Commission frustrates customers' one-stop shopping expectations and stymies carriers' abilities to offer complete service solutions that customers want and have come to expect.¹²⁴ Simply put, customers expect their carriers to market CPE to them.¹²⁵ No evidence has been produced on the record which shows that allowing wireline carriers to market CPE to their customers, using CPNI without customer consent, violates customers' expectations. We are convinced that such usage by carriers would be beneficial to customers as new and advanced products develop. Therefore, wireline carriers should be permitted to use CPNI, without customer approval, to market CPE to their customers.

¹²⁰ See *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and Order, 7 FCC Rcd 4028 (1992).

¹²¹ Alltel Petition at 6-7; Bell Atlantic Petition at 6; Comcast Petition at 14-15; CTIA Petition at 37; Frontier Petition at 11; GTE Petition at 10-12; Metrocall Petition at 7-9; PrimeCo Petition at 6-9; RAM Petition at 7-9.

¹²² AT&T Petition at 5-8; PageNet Petition at 4-6; Vanguard Petition at 9-11.

¹²³ *In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, 2 FCC Rcd 143 (1987), *aff'd sub nom. Illinois Bell Telephone Company v. FCC*, 883 F.2d 104 (1989).

¹²⁴ SBC Petition at 4.

¹²⁵ LCI Petition at 8-10; SBC Petition at 2-6.

44. Within the broader reading of the statute, we find that certain wireline information services should also be considered necessary to, or used in, the provision of the underlying telecommunications service. In the *CPNI Order*, the Commission listed several information services that it believed should not be considered necessary to, or used in, the underlying telecommunications service: call answering, voice mail or messaging, voice storage and retrieval services, and fax storage and retrieval services.¹²⁶ Applying the broader reading of the statute, along with the new evidence on the record, we now believe that all of these services should be considered necessary to, or used in, the provision of the underlying telecommunications service because customers have come to depend on these services to help them make or complete calls.¹²⁷ The record indicates that customers have come to expect that their service provider can and will offer these services along with the underlying telecommunications service.¹²⁸ Therefore, carriers may use CPNI, without customer approval, to market call answering, voice mail or messaging, voice storage and retrieval services, and fax storage and retrieval services.¹²⁹

45. We continue to exclude from this list, as the Commission did in the *CPNI Order*, Internet access services.¹³⁰ Despite contrary claims from some petitioners,¹³¹ there is no convincing new evidence on the record that shows that such services are necessary to, or used in, the making of a call, even in the broadest sense. There is also no evidence, currently, that customers expect to receive such services from their wireline provider, or that they expect to use such services in the way that they expect to receive or use the above-listed services.¹³²

46. We will, however, add protocol conversions to the list of services that carriers may market using CPNI without customer approval. In its petition, Bell Atlantic requests that we

¹²⁶ *CPNI Order* 13 FCC Rcd at 8116-17, ¶ 72.

¹²⁷ Bell Atlantic Petition at 7-9; BellSouth Petition at 10-11; SBC Petition at 7; TDS Petition at 6.

¹²⁸ Bell Atlantic Petition at 7-9; BellSouth Petition at 10-11; SBC Petition at 7; TDS Petition at 6.

¹²⁹ LECs and CMRS providers may continue to use CPNI, without customer approval, to market the former "adjunct-to-basic" services listed in the *CPNI Order*. *CPNI Order* 13 FCC Rcd at 8117-18, ¶ 73. See also 47 C.F.R. § 64.2005(c)(3).

¹³⁰ We note that the Internet access services being addressed here are the dial-up services. We have previously determined that xDSL services are telecommunications services. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24029-24030 (1998).

¹³¹ Bell Atlantic Petition at 8; TDS Petition at 7.

¹³² If, in the future, it becomes apparent that customer expectations, and the public interest, requires that we reconsider our determination here, we will entertain requests to do so.

redefine protocol conversion as a telecommunications service.¹³³ A protocol conversion assists terminals or networks operating with different protocols to communicate with each other.¹³⁴ Bell Atlantic asserts that protocol conversions that do not alter the underlying information sent and received should not be defined as information services.¹³⁵ We do not believe that protocol conversions should be redefined as a telecommunications service but because protocol conversions are necessary to the provision of the telecommunications service, in the instances where they are used, protocol conversions should be included in the group of information services listed above.¹³⁶ Accordingly, we grant Bell Atlantic's request to use CPNI to market, without customer approval, protocol conversions.

3. Petitions for Forbearance

a. Introduction

47. In the alternative, many parties urge the Commission to forbear from prohibiting CMRS providers and wireline carriers from using CPNI to market CPE and/or information services without customer approval.¹³⁷ As we described in detail *supra*, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to

¹³³ Bell Atlantic Petition at 8-9.

¹³⁴ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955, ¶ 101, n.229. "'Protocol processing' is a generic term, which subsumes 'protocol conversion' and refers to the use of computers to interpret and react to the protocol symbols as the information contained in a subscriber's message is routed to its destination. 'Protocol conversion' is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks." *Id.* (citing *IDCMA Petition for Declaratory Ruling That AT&T's Interspan Relay Service is a Basic Service*, Memorandum Opinion & Order, 10 FCC Rcd 13717, 13717-18, n.5 (Com. Carrier Bureau 1995)).

¹³⁵ Bell Atlantic Petition at 9.

¹³⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104; *see also* 47 U.S.C § 153(20). In the *Non-Accounting Safeguards Order*, we specifically rejected the argument that "information services" only refers to services that transform or process the content of the information transmitted by an end-user because the statutory definition makes no reference to the term content, but only requires that an information service transform or process information. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 104. To the extent that we have in the past, however, treated certain protocol processing services as telecommunications services, because they result in no net protocol conversion to the end-user, we continue to do so for CPNI purposes. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, ¶ 106.

¹³⁷ 360° Communications Petition at 3-6; Ameritech Petition at 7-8; Bell Atlantic Petition at 10-12, 13-16, 20-22; CTIA Petition 35-42; CommNet Cellular Petition at 4-9; GTE Petition at 12-15, 18-21, 24-26, 30-32; PageNet Petition at 5, n.3; PCIA Petition for Forbearance at 9-12, 13-15; PrimeCo Petition at 11-15; USTA Petition at 5-6; SBC Comments at 2-5.

ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.¹³⁸

b. CMRS Providers

48. In the preceding section, we granted the petitions for reconsideration to allow CMRS providers to use CPNI, without customer approval, to market CPE and information services to their customers. Therefore, we deny as moot the petitions for forbearance from section 222's prohibition against CMRS providers using CPNI to market, without customer approval, CPE and information services.¹³⁹

c. Wireline Carriers

49. In the preceding section, we granted the petitions for reconsideration to allow wireline carriers to use CPNI, without customer approval, to market CPE and some information services to their customers. Therefore, we deny as moot the petitions requesting that we forbear from enforcing section 222's prohibition against wireline carriers to use CPNI to market CPE and information services such as call answering, voice mail or messaging, voice storage and retrieval services, fax storage and retrieval services, and protocol conversions.¹⁴⁰ Bell Atlantic has requested that we forbear from enforcing section 222's prohibition against using CPNI without prior customer consent to market all information services.¹⁴¹ As explained below, we deny this request.

50. Section 10(a)(1). In support of its request for forbearance, Bell Atlantic argues

¹³⁸ See discussion *supra* Part V.A.3.

¹³⁹ 360° Communications Petition at 3-6; Ameritech Petition at 7-8; Bell Atlantic Petition at 10-12, 13-16, 20-22; CTIA Petition 35-42; CommNet Cellular Petition at 4-9; GTE Petition at 12-15, 18-21, 24-26, 30-32; PageNet Petition at 5, n.3; PCIA Petition for Forbearance at 9-12, 13-15; PrimeCo Petition at 11-15; USTA Petition at 5-6; SBC Comments at 2-5. To the extent that the petitioners who filed petitions for forbearance on these issues believe that we have mischaracterized their petitions, we invite them to ask us for clarification.

¹⁴⁰ Ameritech Petition at 2-6 (requesting forbearance for use of CPNI to market CPE and voicemail); GTE Petition at 18-21, 24-26 (requesting forbearance for use of CPNI to market CPE, voicemail, store and forward services, and short messaging service); SBC Comments at 5-9 (requesting forbearance to use CPNI to market CPE and voicemail). Again, to the extent that we have mischaracterized any of the petitioners' arguments, we invite them to request a clarification.

¹⁴¹ Bell Atlantic Petition at 9-16.

that enforcement of the CPNI prohibition is not necessary to ensure that the charges, practices, classifications, or regulations are reasonable and non-discriminatory. Bell Atlantic states that the BOCs must obtain all underlying telecommunications services that they use to provide information services at the same unbundled tariff rates that are available to their competitors and that the BOCs are subject to similar nondiscrimination requirements with respect to the installation and maintenance of wireline telecommunications service in connection with information services as they are for CPE.¹⁴²

51. The primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of the restrictions on the use of CPNI to market those information services that are not "necessary to, or used in, the provision of" telecommunications services are not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

52. Section 10(a)(2). Bell Atlantic contends that CPNI restrictions are not necessary to protect consumers because the use of CPNI would not result in unreasonable rates and because such use would be consistent with consumers' expectations. Bell Atlantic notes that consumers have benefitted for more than a decade from Bell company integrated provision of telecommunications and information services without the need for prior consent to use CPNI. They also argue that the information services market is competitive, thus obviating the need for any CPNI obligations, and that enforcement of such obligations would simply serve to confuse consumers by frustrating their efforts to easily obtain information about telecommunications and information services in the course of a single contact with a carrier representative.¹⁴³

53. We are unable to conclude that forbearing from enforcement of restrictions on the use of CPNI for marketing all information services would satisfy the second criterion. We note, however, that the "integrated" services that Bell Atlantic identifies include the information services which we have found above to be necessary to, or used in, the provision of the underlying telecommunications service. We have, on reconsideration, identified those types of information services for which our broader interpretation of section 222(c)(1)(B) is more in line with customer expectations and congressional intent. For these services, forbearance is not necessary. With regard to other information services such as Internet access, we find that enforcing section 222(c)(1)(B) is still necessary to protect consumers. Requiring prior consent protects customers in many instances where they would not realize potentially sensitive, personal information had been accessed or used. As noted above, there is no evidence, currently, that customers expect to receive such services from their wireline provider, or that they expect to use such services in the

¹⁴² Bell Atlantic Petition at 13-14.

¹⁴³ Bell Atlantic Petition at 14-15.

way that they expect to receive or use more integrated services. Nor are we aware of any other law, regulation, agency or state requirement that would substitute for the effectiveness of a prior consent requirement, which protects customer privacy expectations by placing the control over the use of CPNI for purposes of marketing non-integrated information services in the hands of the customer.

54. Section 10(a)(3). Bell Atlantic also argues that the Commission has already found, under Computer III, that it is in the public interest to permit the Bell Companies to use CPNI, subject to an “opt-out” option, because this approach enables Bell companies to engage in integrated marketing and sales of basic and enhanced services.¹⁴⁴ Bell Atlantic asserts, therefore, that the Commission has already made the public interest finding required under section 10(a)(3). We concluded in the CPNI Order, however, that “[u]nlike the Commission’s pre-existing policies under Computer III, which were largely intended to address competitive concerns, section 222 of the Act explicitly directs a greater focus on protecting customer privacy and control.”¹⁴⁵ We further concluded that “[t]his new focus embodied in section 222 evinces Congress’ intent to strike a balance between competitive and customer privacy interests different from that which existed prior to the 1996 Act, and thus supports a more rigorous approval standard for carrier use of CPNI than in the prior Commission Computer III framework.”¹⁴⁶ More specifically, we concluded that an opt-out scheme does not provide any assurance that consent for the use of a customer’s CPNI would be informed, and found that opt-out does not adequately protect customer privacy interests.¹⁴⁷ Bell Atlantic, therefore, is incorrect in its assertion that our conclusions in Computer III dictate our findings relating to the public interest. We also conclude that the record on forbearance suggested here does not convince us that the privacy goals of the statute are met where carriers can use CPNI without express customer approval to sell services outside the existing customer-carrier relationship. We accordingly find that Bell Atlantic’s request for forbearance of section 222’s affirmative approval requirement is generally inconsistent with the public interest. Customers who are interested in obtaining more information can arrange to do so easily by granting consent for their carriers’ use of CPNI. We have found no public interest benefits that would outweigh these concerns.

¹⁴⁴ See Bell Atlantic Petition at 15-16, citing *Amendment to Sections 64.702 of the Commission’s Rules and Regulations, Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof, and Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Report and Order, CC Docket 85-229, 2 FCC Rcd 3072, 3095, ¶ 155 (1987) (Third Computer Inquiry); Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150, 1162-63, ¶ 97 (1988); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, CC Docket No. 90-623, 6 FCC Rcd 7571, 7609-10 ¶ 85 (1991).

¹⁴⁵ *CPNI Order*, 13 FCC Rcd at 8135, ¶ 96.

¹⁴⁶ *CPNI Order*, 13 FCC Rcd at 8135, ¶ 96.

¹⁴⁷ *CPNI Order*, 13 FCC Rcd at 8130-32, ¶ 91.

55. Pursuant to section 10(b) of the Act, we have evaluated whether forbearance from the prior consent requirement will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. As we concluded above, the ability to use CPNI from an existing service relationship to market new services to a customer bestows an enormous competitive advantage for those carriers that currently have a service relationship with customers, particularly incumbent exchange carriers and interexchange carriers with a large existing customer base. This, in turn, poses a significant risk to the development of competition. Therefore, to the extent that Bell Atlantic is requesting forbearance from section 222's restrictions on the use of CPNI to market Internet access service, we find that such forbearance would neither promote competition nor enhance competition among telecommunications service providers. For instance, we recently stated that, although many Internet service providers (ISPs) "compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a BOC, to reach its customers."¹⁴⁸ Because of the competitive advantage that many BOCs retain, we concluded that we would not remove certain safeguards designed to protect against BOC discrimination despite the competitive ISP marketplace. We reach a similar conclusion here: giving wireline carriers, particularly ILECs, the right to use CPNI without affirmative customer approval to market Internet access services could damage the competitive Internet access services market at this point in time. Accordingly, we deny Bell Atlantic's petition for forbearance on this issue.

d. Forbearance from all CPNI Rules for CMRS Providers

56. A few parties urge the Commission to forbear from imposing any CPNI obligations on CMRS providers.¹⁴⁹ Forbearance from enforcing all CPNI rules against CMRS carriers, according to one petitioner, will permit many beneficial and pro-competitive marketing practices to continue.¹⁵⁰ The Commission must forbear from enforcing its rules or any statutory provision where the criteria of the forbearance test, set out in Part V.A.3, *infra*, are satisfied. For the reasons discussed below, we deny this request.

¹⁴⁸ *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, FCC 99-36, 14 FCC Rcd 4289, 4301, ¶ 16 (1999).

¹⁴⁹ 360° Communications Petition at 3; Bell Atlantic Petition at 20; PageNet Petition at 5, n.3. *See also* Bell Atlantic Mobile Comments at 1. Arch Communications seeks forbearance from the application of those CPNI rules designed for markets with dominant carriers possessing market power. Arch Communications Comments at 7, n.22. While we are sensitive to the issues concerning market power and monopoly derived CPNI, we note, however, that the CPNI rules are designed to apply to all carriers in all markets, including competitive markets such as interexchange service.

¹⁵⁰ 360° Communications Petition at 6.

57. Section 10(a)(1). According to 360° Communications, CMRS providers are constrained by market forces from charging unjust or unreasonable prices or engaging in unreasonable practices because the CMRS marketplace is highly competitive.¹⁵¹ Customers who disapprove of a carrier's use of CPNI simply will change carriers.¹⁵² Thus, the argument goes, for a carrier to maintain its customer base, it must not abuse or improperly use CPNI.¹⁵³ Bell Atlantic Mobile adds that these competitive forces in the CMRS market supplemented by sections 201 and 202 of the Act provide sufficient discipline against attempts to engage in unjust or unreasonable practices.¹⁵⁴ Moreover, Arch claims that CPNI rules prevent CMRS carriers from marketing their services in the most efficient manner.¹⁵⁵ The new rules, therefore, are unnecessary to prevent unreasonable or unjust carrier behavior.¹⁵⁶

58. As we have previously stated, the primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of the CPNI rules for CMRS carriers is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

59. Section 10(a)(2). 360° Communications asserts that the new CPNI rules are unnecessary to protect the privacy interests of CMRS customers.¹⁵⁷ In the absence of prior CPNI restrictions,¹⁵⁸ CMRS customers have come to expect CMRS carriers to use their CPNI for "beneficial marketing practices" and, 360° Communications further contends, that a sudden change in these practices will cause significant consumer confusion and harm.¹⁵⁹ Arch avers that because of intense competition, CMRS carriers have every incentive to respect the privacy

¹⁵¹ 360° Communications Petition at 5.

¹⁵² 360° Communications Petition at 5.

¹⁵³ 360° Communications Petition at 5.

¹⁵⁴ Bell Atlantic Mobile Comments at 3-4.

¹⁵⁵ Arch Communications Comments at 9.

¹⁵⁶ 360° Communications Petition at 5.

¹⁵⁷ 360° Communications Petition at 5.

¹⁵⁸ Bell Atlantic Petition at 11, 14 (CMRS consumers have benefitted from more than a decade of carriers' use of CPNI without need for affirmative customer consent).

¹⁵⁹ 360° Communications Petition at 6; *see also* Bell Atlantic Petition at 15.

interests of their customers¹⁶⁰ who can freely switch carriers.

60. We are unable to find that CMRS customers' privacy interests would be adequately protected absent section 222 and the rules promulgated in this proceeding. We are concerned, for example, that customers would be harmed by elimination of the restriction on carriers' use of CPNI to identify or track customers who call competing service providers contained in section 64.2005(b)(1) of our rules. Section 222 and our implementing rules protect customers in many instances where they would not realize potentially sensitive, personal information had been accessed or used. Moreover, we would be remiss in our duty under the statute if we created an environment in which CMRS customers' only recourse was to switch carriers after discovering that their CPNI had been used without authorization. Nor are we aware of any other law, regulation, agency or state requirement that would substitute for the effectiveness of our rules implementing section 222. Consequently, the second criterion for forbearance has not been met.

61. Section 10(a)(3). 360° Communications argues that the public interest is served by the continuation of legitimate, beneficial marketing practices that have helped consumers manage their CMRS service costs and spurred competition by enabling carriers to differentiate themselves in the marketplace by offering new and enhanced service bundles.¹⁶¹ Arch asserts that the central issue raised by the CPNI rules is that they prevent each competitive CMRS carrier from treating each of its customers as a unique individual.¹⁶²

62. We do not find that forbearance from section 222 and our CPNI rules for all CMRS providers is consistent with the public interest. Complete forbearance¹⁶³ would eliminate section 222's procedures for the protection of both customers and carriers, such as the process for transferring CPNI from a former carrier to a new carrier pursuant to a customer's written request¹⁶⁴ and the obligation to protect carrier proprietary information.¹⁶⁵ Pursuant to section 10(b) of the Act, we have evaluated whether forbearance from section 222 for CMRS carriers will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. On one hand, forbearance could promote a free flow of information from the carrier to the consumer, potentially decreasing the

¹⁶⁰ Arch Communications Comments at 8.

¹⁶¹ 360° Communications Petition at 5.

¹⁶² Arch Communications Comments at 9.

¹⁶³ See 360° Communications Petition at 3, 5-6; Bell Atlantic Petition at 20; see also Arch Communications Comments at 7; Bell Atlantic Mobile Comments at 1.

¹⁶⁴ 47 U.S.C. § 222(c)(2).

¹⁶⁵ 47 U.S.C. § 222(b).

carriers' costs of marketing. Increased competition for subscribers could result in the further reduction of rates, particularly in an already competitive market. On the other hand, it would appear that any such benefits would be marginal, at best, especially in light of the actions taken herein that reduce the regulatory impact of section 222 compliance¹⁶⁶ and the continued importance of protecting consumers' privacy expectations. On balance, we find that forbearance from the full range of CPNI protections would undermine consumer privacy to an extent that outweighs the potential benefits demonstrated on the record in terms of carrier cost savings. Therefore, we conclude that there is insufficient basis for a public interest finding under the third criterion.

C. Use of CPNI to Market to Former and "Soon-to-be Former" Customers

1. Background

63. The *CPNI Order* adopted section 64.2005(b)(3) to prohibit a carrier from using or accessing CPNI to regain the business of a customer who has switched to another provider.¹⁶⁷ The Commission decided as a matter of statutory interpretation that once a customer terminates service from a carrier, CPNI derived from the previously subscribed service may not be used to retain or regain that customer.¹⁶⁸ Specifically, the Commission foreclosed the use of CPNI for customer retention purposes under section 222(c)(1) because it felt such use was not carried out in the "provision of" service, but rather, for the purpose of retaining a customer that has already taken steps to change its provider.¹⁶⁹ The *CPNI Order* also precluded the use of CPNI under

¹⁶⁶ We note that this order on reconsideration lightens the impact of compliance with the CPNI rules by allowing CMRS providers to use CPNI, without customer approval, to market CPE and information services to their customers. This order also eliminates the prohibition on the use of CPNI for winback purposes. Further, this order also provides flexibility for technological differences in administrative systems with regard to the electronic safeguards rules, which should be beneficial to all companies, including CMRS providers. Moreover, with respect to independent CMRS providers, the practical effect is that many of the CPNI rules will not apply to them (or any single service category provider). Restrictions on marketing telecommunications service offerings impose minimal burdens on a carrier that remains within one category.

¹⁶⁷ Section 64.2005(b)(3) states that: "[a] telecommunications carrier may not use, disclose or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider." 47 C.F.R. § 64.2005(b)(3).

¹⁶⁸ *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

¹⁶⁹ *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85. Section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable [CPNI] in the provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publication of directories." 47 U.S.C. § 222(c)(1).

section 222(d)(1), insofar as such use would be undertaken to market a service, rather than to "initiate" a service within the meaning of that provision.¹⁷⁰

64. A significant majority of the petitioners have requested that the Commission reconsider or forbear from the restrictions of section 64.2005(b)(3), which has been referred to as the "winback" prohibitions.¹⁷¹ As noted by various petitioners, the concept of "winback" can be divided into two distinct types of marketing: marketing intended either to (1) regain a customer or (2) retain a customer.¹⁷² Regaining a customer applies to marketing situations where a customer has already switched to and is receiving service from another provider.¹⁷³ Retention marketing, by contrast, refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider.¹⁷⁴ For the purposes of this section, we shall use the term "winback" to refer only to the first situation, where the customer has already switched to and is receiving service from another provider.¹⁷⁵

2. "Winback"

a. Background

65. Petitioners challenge the winback restrictions on a variety of grounds. Some

¹⁷⁰ *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85. Section 222(d)(1) provides that: "[n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers . . . (1) to initiate, render, bill, and collect for telecommunications services; . . ." 47 U.S.C. § 222(d)(1).

¹⁷¹ 360° Communications Petition at 10-11; ALLTEL Petition at 7; AT&T Petition at 2-5; Bell Atlantic Petition at 16-17; Bell South Petition at 16-18; Comcast Petition at 16-18; CTIA Petition at 10-13, 31-42; Frontier Petition at 7-10; GTE Petition at 34; MCI Petition 49-52; Omnipoint Petition at 17-19; PageNet Petition at 2-4; PCIA Petition at 9-11; PCIA Petition for Forbearance at 15-16; PrimeCo Petition at 9-10; SBC Petition at 8-10; USTA Petition 6-9; Vanguard Petition at 12-14. *See also*, Airtouch Comments at 9-12; Ameritech Comments at 3; Arch Communications at 4-5; Cable & Wireless Comments at 2; CelPage Comments at 11; e.spire Comments at 4; Intermedia Communications Comments at 2; Sprint Comments at 4; U S WEST Comments at 3; RCA Reply Comments at 5; Time Warner Telecom Reply Comments at 4-9; PCIA Petition for Forbearance (filed June 29, 1998) at 15-16. *But cf.* Allegiance Telecom Comments at 5-8; ALTS Comments at 1-5; Cable and Wireless Comments at 2-5; Commonwealth Telecom Comments at 5-8; Focal Communications Comments at 5-8; KMC Telecom Comments at 5-8.

¹⁷² MCI Petition at 49; Omnipoint Petition at 17; USTA Petition at 6-7; Cable & Wireless Comments at 2-3; SBC Comments at 19, n. 44; TRA Comments at 7.

¹⁷³ Omnipoint Petition at 18; USTA Petition at 6-7; Sprint Comments at 3-4.

¹⁷⁴ MCI Petition at 49; Omnipoint Petition at 18.

¹⁷⁵ We discuss and limit certain types of retention marketing in Part V.C.3, *infra*.

petitioners allege that the winback restrictions are not compelled by the statute¹⁷⁶ and are antithetical to the concepts embodied in the Communications Act of 1934, as amended.¹⁷⁷ Certain petitioners argue that if the Commission believes the winback rule is a reasonable interpretation of section 222, it should exercise its authority under section 10 to forbear from enforcing this provision because the anti-competitive effects outweigh any protection to customer privacy.¹⁷⁸ Various parties argue that the Commission violated section 553 of the Administrative Procedures Act by promulgating winback rules without adequate notice, comment and explanation.¹⁷⁹ Finally, a number of parties claim that the winback restrictions constitute an impermissible "taking" of their property rights under the Fifth Amendment.¹⁸⁰ In contrast, other parties generally support the Commission's adoption of winback restrictions in some instances, but urge the Commission to place additional restrictions on ILEC use of CPNI.¹⁸¹

b. Discussion

66. On reconsideration, we conclude 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. After reviewing the fuller record on this issue developed on reconsideration, we are persuaded that winback campaigns are consistent with section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon their privacy rights. Accordingly, we reverse our position and eliminate rule 64.2005(b)(3).

67. On reconsideration, we believe that section 222(c)(1)(A) is properly construed to allow carriers to use CPNI to regain customers who have switched to another carrier. While section 222(c)(1) is susceptible to different interpretations, we now think that the better reading

¹⁷⁶ 360° Communications Petition at 11; AT&T Petition at 2; PageNet Petition at 2; PCIA Petition at 9-10 (no congressional mandate to implement winback rule); Vanguard Petition at 14 (FCC not constrained to adopt such a rule); USTA Petition at 8 (lack of clear and irrefutable congressional directive in statute or legislative history); Arch Communications Comments at 5; AT&T Comments at 4; CelPage Comments at 10.

¹⁷⁷ BellSouth Petition at 16-17; GTE Petition at 35; USTA Petition at 7-8.

¹⁷⁸ Bell Atlantic Petition at 17; GTE Petition at 36.

¹⁷⁹ Bell Atlantic Petition at 16; PrimeCo Petition at 9; Omnipoint Petition at 17; SBC Petition at 8; USTA Petition at 6; but *cf.* Commonwealth *ex parte* (filed February 17, 1999) at 1-6; Focal Communications *ex parte* (filed February 17, 1999) at 1-6; KMC Telecom *ex parte* (filed February 17, 1999) at 1-6.

¹⁸⁰ BellSouth Petition at 18; GTE Petition at 36.

¹⁸¹ AT&T Petition at n.3; Frontier Petition at 8-9; MCI Petition at 49-52; Allegiance Telecom Comments at 5-8; ALTS Comments at 1-5; Cable and Wireless Comments at 2-5; Commonwealth Telecom Comments at 5-8; e.spire Comments at 4; Focal Communications Comments at 5-8; Intermedia Communications Comments at 3; KMC Telecom Comments at 5-8; LCI Reply Comments at 7; Time Warner Telecom Reply Comments at 4-9.

of this language permits use of CPNI of former customers to market the same category of service from which CPNI was obtained to that former customer. We agree with those petitioners who argue that the use of CPNI in this manner is consistent with both the language and the goals of the statute.¹⁸² Section 222(c)(1)(A) permits the use of CPNI in connection with the "provision of the telecommunications service from which the information is derived."¹⁸³ The marketing of service offerings within a given presubscribed telecommunications service is encompassed within the "provision of" that service.¹⁸⁴ In developing the total service approach, the Commission recognized that marketing is implicit in the term "provision" as used in section 222(c)(1).¹⁸⁵ The *CPNI Order* stated that "we believe that the best interpretation of section 222(c)(1) is the total service approach, which affords carriers the right to use or disclose CPNI for, among other things, *marketing related offerings* within customers' existing service for their benefit and convenience."¹⁸⁶ While we recognize that this discussion in the CPNI Order also referred to the customer's "existing" service, we now conclude upon further reflection that our focus should not be so limited. Common sense tells us that customers are aware of and expect that their former carrier has information about the services to which they formerly subscribed. Businesses do not customarily purge their records of a customer when that customer leaves. We therefore disagree with ALTS' assertion that extending winback marketing for the same service to a former customer is an indefensible stretch of the total service approach.¹⁸⁷

68. Because customer expectations form the basis of the total service approach, they properly influence our understanding of the statute, a goal of which is to balance competitive concerns with those of customer privacy.¹⁸⁸ Customers expect carriers to attempt to win back their business by offering better-tailored service packages,¹⁸⁹ and that such precise tailoring is

¹⁸² 360° Communications Petition at 11; AT&T Petition at 2; Frontier Petition at 8; PageNet Petition at 2.

¹⁸³ 47 U.S.C. § 222(c)(1)(A).

¹⁸⁴ *CPNI Order*, 13 FCC Rcd at 8102, ¶ 54.

¹⁸⁵ *CPNI Order*, 13 FCC Rcd at 8087, ¶ 35.

¹⁸⁶ *CPNI Order*, 13 FCC Rcd at 8087, ¶ 35 (emphasis added). *See also id.* at 8081, ¶ 25 ("Under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service and is neither extended to permit CPNI use *in marketing* all of a carrier's telecommunications offerings regardless of whether subscribed to by the customer, nor narrowed to permit use only in providing a discrete service feature.")(emphasis added).

¹⁸⁷ ALTS Comments at 4.

¹⁸⁸ *See* BellSouth Petition at 17; GTE Petition at 34; SBC Petition at 9.

¹⁸⁹ 360° Communications Petition at 10; GTE Petition at 33; Vanguard Petition at 13.

most effectively achieved through the use of CPNI.¹⁹⁰ Winback restrictions may deprive customers of the benefits of a competitive market.¹⁹¹ Winback 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.¹⁹²

69. Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies.¹⁹³ Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange.¹⁹⁴ We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.

70. We are also unpersuaded by the allegations that an incumbent carrier's use of CPNI in winback campaigns amounts to a predatory practice designed to prevent effective market entry by new competitors.¹⁹⁵ Contrary to the commenters' suggestions, we believe such use of CPNI is neither a *per se* violation of section 201 of the Communications Act, as amended, nor the antitrust laws. While excessively low pricing and other exclusionary practices may contravene antitrust law, commenters proffer neither facts nor convincing arguments that their legal conclusion is a realistic concern. Prior to the adoption of the rules promulgated under 1996 Act, incumbent carriers were able to use CPNI to regain customers lost to competitors. Assuming incumbent LECs have sufficient market power to engage in predatory strategies, they are

¹⁹⁰ CTIA Petition at 11; PageNet Petition at 3.

¹⁹¹ ALLTEL Petition at 7; AT&T Petition at 3-4; Omnipoint Petition at 18; PageNet Petition at 4; PCIA Petition at 10; PrimeCo Petition at 9; SBC Petition at 9; USTA Petition at 7; Sprint Comments at 1-2.

¹⁹² Omnipoint Petition at 18; PageNet Petition at 4; PrimeCo Petition at 9.

¹⁹³ MCI Comments at 20-21; Time Warner Telecom Reply Comments at 4.

¹⁹⁴ Allegiance Telecom Comments at 5-9; Commonwealth Telecom Comments at 5-9; Focal Communications Comments at 5-9; KMC Telecom Comments at 5-9; Time Warner Telecom Reply Comments at 8.

¹⁹⁵ Allegiance Telecom Comments at 10-12; Commonwealth Telecom Comments at 10-12; Focal Communications Comments at 10-12; KMC Telecom Comments at 10-12.

constrained in their ability to raise and lower prices by our tariff rules and non-discrimination requirements.¹⁹⁶ Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

71. Thus, we conclude that the statute permits a carrier evaluating whether to launch a winback campaign to use CPNI to target valued former customers who have switched service providers. The carrier legitimately obtained that CPNI in its capacity as the customer's telecommunications provider. Importantly, such CPNI use does not impact customer privacy in any substantial respect because the former customer-carrier relationship previously enabled the carrier to use this same telecommunications usage information.¹⁹⁷ We believe this interpretation of section 222(c)(1) best comports with notions of consumer privacy, competition and customer control.

72. An important limitation derived from the statutory language is that the carrier may use CPNI of the former customer to offer that customer the service or services to which the customer previously subscribed. It would be inconsistent with the total service approach for a carrier to use such CPNI to offer new services outside the former customer-carrier relationship.

73. Some petitioners assert that winback is permissible under the exceptions enumerated in Section 222(d)(1) that allow the use of CPNI without customer approval to "render" or "initiate" service.¹⁹⁸ Based upon our decision that the use of CPNI to winback customers is consistent with section 222(c)(1), we decline to reach these arguments. Similarly, we need not address arguments concerning the constitutionality of, propriety under the APA, and forbearance from,¹⁹⁹ the former rule. Consequently, we eliminate section 64.2005(b)(3). We therefore do not need to reach the clarification petitions submitted on the former rule.²⁰⁰

¹⁹⁶ See, e.g., 47 C.F.R. §§ 61.41, 61.42, 62.45. See generally 47 U.S.C. § 202; *AT&T Communications Revisions to Tariff FCC No. 12*, 6 FCC Rcd 7039 (1991), *aff'd sub nom. Competitive Telecommunications Association v. FCC*, 998 F.2d 1058 (1993).

¹⁹⁷ AT&T Comments at 4-5.

¹⁹⁸ See 47 U.S.C. § 222(d)(1); AT&T Petition at 2-3; CTIA Petition at 32; PCIA Petition at 10; Omnipoint Petition at 18; Vanguard Petition at 14.

¹⁹⁹ Bell Atlantic Petition at 17-20; CTIA Petition at 35-42; GTE Petition at 37-39; PCIA Petition for Forbearance at 15-16; PrimeCo Petition at 15-16. To the extent that petitioners request that the Commission forbear from restricting the use of CPNI in customer retention efforts, we address those arguments in the following section, Part V.C.3.

²⁰⁰ Comcast Petition at 18 (clarification sought regarding the circumstances where a customer has "switched to another carrier"). See also PCIA Petition at 11 (supposed conflict created where a customer properly gives express approval to a carrier to use CPNI until that approval is revoked and the inability of a carrier to engage in winback under the former rule); GTE Petition at 34 (same); PrimeCo Petition at 10 (same).

3. Retention of Customers

a. Background

74. As noted above, the *CPNI Order* also prohibited a carrier's access to or the use of the CPNI of a "soon-to-be-former" customer to market the same services to retain that customer.²⁰¹ The *CPNI Order* did not distinguish between marketing for the purpose of retaining customers versus regaining them. As explained above, on reconsideration, we believe that use of CPNI to regain former customers falls within the ambit of section 222(c)(1). We conclude here that use of CPNI to retain customers ordinarily does not come under section 222(c)(1), and in such instances would likely violate section 222(b).²⁰²

75. Several petitioners ask the Commission to reconsider Section 64.2005(b)(3) to permit use of CPNI for the retention of soon-to-be former customers without customer approval.²⁰³ On the other hand, other petitioners request that the Commission expressly prohibit ILECs from engaging in retention marketing.²⁰⁴ These petitioners claim that ILECs are using information derived solely from their status as providing carrier-to-carrier services to their competitors in an anti-competitive manner.²⁰⁵ Petitioners argue that the use of another carrier's order, including a carrier or customer request to lift a PIC freeze, is clearly and separately forbidden by sections 222(b) and 201(b).²⁰⁶ As a remedy, MCI suggests, and both TRA and Intermedia agree, that the Commission should conclude that CPNI includes the identity of a chosen carrier.²⁰⁷ Intermedia urges the Commission to mandate that ILECs maintain a bright-line separation between ILEC presubscription operations, retail operations, and wholesale

²⁰¹ *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

²⁰² 47 U.S.C. § 222(b) provides: "[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.*" (emphasis added).

²⁰³ SBC Petition at 8; USTA Petition at 6.

²⁰⁴ Frontier Petition at 9; MCI Petition at 50.

²⁰⁵ Frontier Petition at 9; MCI Petition at 49-50; *see also* Cable & Wireless Comments at 4; TRA Comments at 7-8.

²⁰⁶ AT&T Petition at 2-3, n.3 (referring to *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85 & n.316.)

²⁰⁷ MCI Petition at 51-52; Intermedia Communications Comments at 5; TRA Comments at 8.

operations.²⁰⁸

b. Discussion

76. We conclude that section 222 does not allow carriers to use CPNI to retain soon-to-be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service. We conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly. Congress expressly protected carrier information in section 222(a) by creating a duty to protect the confidentiality of proprietary information of other carriers, including resellers.²⁰⁹ Section 222(b) restricts the use of such proprietary information and contains an outright prohibition against the use of such information for a carrier's own marketing efforts. As stated in the *CPNI Order*, Congress' goals of promoting competition and preserving customer privacy are furthered by protecting competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information through their provision of wholesale services.²¹⁰

77. The Commission previously determined that carrier change information is carrier proprietary information under section 222(b).²¹¹ In the *Slamming Order*, the Commission stated that pursuant to section 222(b), the carrier executing a change "is prohibited from using such

²⁰⁸ Intermedia Communications Comments at 5. Intermedia also suggests, based on Frontier's assertion, that the Commission should modify section 64.2005(b) of the rules by adding:

"[A telecommunications] carrier may not use any information--including customer name, address, and telephone number--derived from the provision of carrier-to-carrier services, including the identity of the competitor, to regain the business of a customer who has switched to another service provider [prior to effectuating the switch]." *Id.*

²⁰⁹ Section 222(a) provides: [e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a carrier."

²¹⁰ *CPNI Order*, 13 FCC Rcd at 8201-02, ¶ 206. We note that the *CPNI Order* sought comment on what, if any, safeguards are necessary to protect the confidentiality of carrier information and whether additional regulation is warranted. *Id.* Accordingly, we will revisit these issues in a future order.

²¹¹ *Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, FCC 98-334, 14 FCC Rcd at 1567-9, ¶¶ 97-101 (rel. Dec. 23, 1998) ("*Slamming Order*") (concluding that Section 222(b) prohibits executing carriers from using carrier change information to verify a subscriber's decision to change carriers after such change has been verified by the submitting carrier).

information to attempt to change the subscriber's decision to switch to another carrier."²¹² Thus, where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b). We concede that in the short term this prohibition falls squarely on the shoulders of the BOCs and other ILECs as a practical matter. As competition grows, and the number of facilities-based local exchange providers increases, other entities will be restricted from this practice as well.

78. We agree with SBC and Ameritech that section 222(b) is not violated if the carrier has independently learned from its retail operations that a customer is switching to another carrier; in that case, the carrier is free to use CPNI to persuade the customer to stay, consistent with the limitations set forth in the preceding section. We thus distinguish between the "wholesale" and the "retail" services of a carrier. If the information about a customer switch were to come through independent, retail means, then a carrier would be free to launch a "retention" campaign under the implied consent conferred by section 222(c)(1).

c. Petitions for Forbearance

79. A number of petitioners seek forbearance from restrictions that limit the ability of a carrier to retain a soon-to-be former customer who has indicated an intent to switch carriers.²¹³ Petitioners request forbearance from the application of rules prohibiting retention marketing, however, as part of their overall requests that the Commission forbear from applying winback restrictions generally.²¹⁴ Because the Commission has revised its interpretation and eliminated rule 64.2005(b)(3),²¹⁵ that portion of their petitions is moot.

80. As we described in detail supra, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of

²¹² *Slamming Order*, 14 FCC Rcd 1508, at 1572-3, ¶ 106.

²¹³ Bell Atlantic Petition at 17, n.16 (stating that it offers, as part of a winback program, an analysis of existing customer's calling patterns and services in order to retain that customer); CTIA Petition at 40 (observing that customer retention and winback efforts are intensely procompetitive for CMRS customers) PCIA Petition for Forbearance at 16 (espousing view that customer retention campaigns are a major tool of CMRS providers); GTE Petition at 33, 37-39; PrimeCo Petition at 15-16.

²¹⁴ Bell Atlantic Petition at 16-20; CTIA Petition at 34-42; PCIA Petition for Forbearance at 15-16; GTE Petition at 33, 37-39; PrimeCo Petition at 15-16.

²¹⁵ 47 C.F.R. § 64.2005(b)(3).

consumers; and (3) forbearance is consistent with the public interest.²¹⁶ For the reasons discussed below, we conclude the forbearance standard has not been met to the extent that carriers would seek to use CPNI to regain a soon-to-be former customer, precipitated by the receipt of a carrier-to-carrier order.

81. Section 10(a)(1). Petitioners assert that limiting the use of CPNI in retention efforts is not necessary to ensure just, reasonable, and nondiscriminatory rates.²¹⁷ For example, Bell Atlantic asserts that when a carrier attempts to retain a customer who has decided to switch to a competitor, a carrier will likely offer the customer lower, or at least not higher, rates than the customer was previously receiving.²¹⁸ Because these same rates have to be available to other customers, Bell Atlantic reasons that by definition there can be no discrimination.²¹⁹ GTE adds that because the rule has nothing to do with pricing, elimination of the rule cannot have a negative effect on pricing, and that the rule works to prevent carrier initiated price breaks.²²⁰

82. We agree with GTE that the primary focus of the CPNI rules is not, nor ever has been, intended to ensure reasonable rates or practices. Therefore, we determine that enforcement of section 222's prohibition against allowing a carrier to use proprietary information that it receives by virtue of fulfilling carrier-to-carrier orders in a "wholesale" capacity is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

83. Section 10(a)(2). Petitioners assert that retention restrictions are not necessary to protect customers generally.²²¹ Bell Atlantic argues that use of CPNI for retention aids in the early detection of slamming.²²² In the *Slamming Order*, however, the Commission cited concern that executing carriers would have the incentive and ability to delay or deny carrier changes, using the detection of slamming as an excuse in order to benefit themselves or their affiliates.²²³ In

²¹⁶ See discussion *supra* Part V.A.3.

²¹⁷ E.g., Bell Atlantic Petition at 17.

²¹⁸ Bell Atlantic Petition at 17.

²¹⁹ Bell Atlantic Petition at 17.

²²⁰ GTE Petition at 37-38. See PrimeCo Petition at 15.

²²¹ Bell Atlantic Petition at 18-19; GTE Petition at 38; PCIA Petition for Forbearance at 15. See PrimeCo Petition at 15.

²²² Bell Atlantic Petition at 19.

²²³ *Slamming Order*, 14 FCC Rcd 1508 at 1568, ¶ 99 (section 222(b) prohibits a carrier receiving a customer change request from another carrier from contacting the customer for additional verification).

addition, GTE asserts that there are no privacy concerns in a retention situation.²²⁴ Although we agree that privacy concerns are not particularly jeopardized in winback situations, generally, that does not mean that enforcement of this restriction is unnecessary to protect customers. Rather, we conclude that consumers' substantial interests in a competitive and fair marketplace would be undermined if this restriction was not enforced. Consequently, the second criterion is not satisfied.

84. Section 10(a)(3). Finally, petitioners contend that customer retention is in the public interest.²²⁵ We are not persuaded, however, that permitting carriers to unfairly use information that they obtain in a "wholesale" capacity is in the public's interest. First, Bell Atlantic and CTIA assert that customer retention campaigns place consumers in the attractive position of having two competitors simultaneously vying for the consumers' business.²²⁶ Although we acknowledge that in the short-run allowing carriers to use carrier proprietary information to trigger retention campaigns may result in lower rates for some individual customers, for the reasons stated above we do not believe that this would be the result over the long-term. Moreover, CTIA adds that forbearance is consistent with the public interest and Commission precedent because it will prevent CMRS carriers from incurring the significant costs of revamping their marketing practices.²²⁷ According to CTIA, the Commission has twice determined that cost savings to carriers from forbearance supports a section 10(a) public interest finding.²²⁸ We do not agree that permitting incumbent carriers to save costs at the expense of competing carriers, as would be the case under these circumstances, is in the public interest. We conclude that there is insufficient basis for a public interest finding in this instance under the third criterion. Therefore, we deny the forbearance petitions on this issue.

D. Disclosure of CPNI to New Carriers When a Customer is "Won"

85. In the *CPNI Order* we definitively concluded that the term "initiate" in section

²²⁴ GTE Petition at 38.

²²⁵ E.g., Bell Atlantic Petition at 19-20; CTIA Petition at 40; PCIA Petition for Forbearance at 16.

²²⁶ Bell Atlantic Petition at 19-20; CTIA Petition at 40-41.

²²⁷ CTIA Petition at 41-42.

²²⁸ CTIA Petition at 41-42 (citing *Federal Communications Bar Ass'n Petition for Forbearance Under Section 310(d) of the Communications Act*, Memorandum Opinion and Order, FCC 98-18 (rel. Feb. 4, 1998) 13 FCC Rcd 6293 (1998) ("*FCBA Forbearance Order*") and *Bell Operating Companies Petition for Forbearance from the Application of Section 272 of the Communications Act*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627 (Comm. Car. Bureau 1998) ("*BOC Forbearance Order*"). See PrimeCo Petition at 16.

222(d)(1) does not require that a customer's CPNI be disclosed by a carrier to a competing carrier who has "won" the customer as its own.²²⁹ We found that section 222(d)(1) applies only to carriers already possessing the CPNI, within the context of the existing service relationship, and not to any other carriers merely seeking access to CPNI.²³⁰ We noted, however, that section 222(c)(1) does not prohibit carriers from disclosing CPNI to competing carriers upon customer approval.²³¹ Accordingly, we reasoned that although an incumbent carrier is not required to disclose CPNI pursuant to section 222(d)(1) or section 222(c)(2) absent an affirmative written request, local exchange carriers may need to disclose a customer's service record upon oral approval of a customer to a competing carrier prior to its commencement of service as part of a local exchange carrier's section 251(c)(3) and (c)(4) obligations.²³² In this way, we concluded, section 222(c)(1) permits the sharing of customer records necessary for the provisioning of service by a competitive carrier.²³³ Finally, we also noted that a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to that customer who wishes to subscribe to a competing carrier's service, may well constitute an unreasonable practice in violation of section 201(b), depending on the circumstances.²³⁴

86. We reject MCI's various requests for disclosure of CPNI by former carriers, *without* customer approval, to new carriers to enable the new carriers to initiate service. TRA supports some of,²³⁵ and several carriers oppose some or all of MCI's requests.²³⁶ For the reasons stated below, we deny MCI's petition in this regard.

87. First, MCI and TRA ask that we find that section 222(d)(1) allows "one carrier to disclose CPNI to another to enable the latter to initiate service *without* customer approval"²³⁷ thereby reversing our conclusion in the *CPNI Order*. Neither MCI nor TRA has presented any new facts or arguments that the Commission did not fully consider in the *CPNI Order* regarding

²²⁹ *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

²³⁰ *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

²³¹ *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

²³² *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

²³³ *CPNI Order*, 13 FCC Rcd at 8125-26, ¶ 84.

²³⁴ *CPNI Order*, 13 FCC Rcd at 8126-27, ¶ 85.

²³⁵ TRA Comments at 5-6.

²³⁶ *E.g.*, Ameritech Comments at 11-12; Bell Atlantic Comments at 7-8; GTE Comments at 22, n.68; SBC Comments at 15-17; U S WEST Comments at 10-12.

²³⁷ MCI Petition at 27-28; TRA Comments at 5-6.

the interpretation of section 222(d)(1). We therefore deny MCI and TRA's request that we reverse this portion of the *CPNI Order*.

88. Second, MCI also requests that the Commission, in any case, find that section 222(c)(1) authorizes the disclosure of CPNI *without* customer approval.²³⁸ MCI argues that the disclosure of CPNI by a carrier in order for another carrier to initiate the same category of service as the disclosing carrier falls within "the [disclosing carrier's] provision of" service under section 222(c)(1)(A) and is, therefore, permitted in the absence of customer approval.²³⁹ We find that MCI's request is contrary to our conclusion in the *CPNI Order* that the language of 222(c)(1)(A) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of *an existing customer relationship*.²⁴⁰ We reasoned that such an inference is appropriate because the customer is aware that his or her carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI *within the existing relationship*.²⁴¹ We are not persuaded that the disclosure of CPNI to a different carrier to initiate service *without* customer approval for that disclosure would be contemplated by a customer as a carrier's use of his or her CPNI within the existing customer-carrier relationship. As such, we deny MCI's request.

89. Third, MCI also asserts that sections 272, 201(b), and 202(a) require BOCs and other ILECs that disclose CPNI to affiliates without customer approval in order to initiate service to likewise disclose CPNI to any other requesting carrier "needing it to initiate service."²⁴² As described above, the *CPNI Order* stated that a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to a customer who wishes to subscribe to a competing carrier's service may well constitute an unreasonable practice in violation of section 201(b), depending on the circumstances.²⁴³ Moreover, we discuss at length the interaction of sections 272 and 222 elsewhere in this order, and affirm our previous conclusion that section 272 imposes no additional CPNI requirements on BOCs sharing CPNI with their section 272 affiliates.²⁴⁴ MCI has not provided any reasonable basis for altering these conclusions. Further, we are not persuaded by MCI's unsupported request that section 202(a) would require such relief. Accordingly, we deny

²³⁸ MCI Petition at 28-29.

²³⁹ MCI Petition at 28-29; MCI Reply at 38.

²⁴⁰ *CPNI Order*, 13 FCC Rcd at 8080, ¶ 23.

²⁴¹ *CPNI Order*, 13 FCC Rcd at 8080, ¶ 23.

²⁴² MCI Petition at 29.

²⁴³ *CPNI Order*, 13 FCC Rcd at 8126, ¶ 85.

²⁴⁴ See discussion *infra* Part VIII.A

MCI's request.

90. Fourth, MCI further argues that if the Commission does not grant any of the relief requested, then it should allow carriers to notify customers that their failure to approve the disclosure of CPNI to a new carrier may disrupt the installation of any new service they may request.²⁴⁵ MCI concludes that this would require a modification of the *CPNI Order's* requirement that notification of a customer's CPNI rights should not imply that approval is necessary to ensure the continuation of services to which the customer subscribes or the proper servicing of the customer's account.²⁴⁶ As MCI has not persuaded us, however, that a customer's failure to approve such a disclosure may disrupt the installation of service, we deny MCI's request.

91. Finally, MCI requests that the Commission "reconfirm" that CPNI is an unbundled network element "that BOCs and other ILECs must provide to all requesting carriers under section 251(c)(3) of the Act."²⁴⁷ This is not a fair characterization of the *CPNI Order's* conclusion. Rather, the *CPNI Order* held that local exchange carriers may need to disclose a customer's service record upon oral approval of a customer to a competing carrier prior to its commencement of service as part of a local exchange carrier's section 251(c)(3) and (c)(4) obligations.²⁴⁸ This conclusion does not indicate, as MCI has implied, that CPNI is an unbundled network element subject to section 251(c)(3)'s unbundling requirements separate from the Commission's requirement that incumbent carriers provide unbundled access to operations support systems and the information they contain.²⁴⁹ Therefore, MCI incorrectly concludes that the *CPNI Order* found that CPNI is an unbundled network element. In any case, the United States Supreme Court recently concluded that the Commission's unbundling rule, section 51.319 of the Commission's rules,²⁵⁰ should be vacated.²⁵¹ As a result, the Commission reopened CC Docket 96-98 to refresh the record on the issues of (1) how, in light of the Supreme Court ruling, the Commission should interpret the standards set forth in section 251(d)(2) of the Telecommunications Act of 1996; and (2) which specific network elements the Commission

²⁴⁵ MCI Petition at 32-33.

²⁴⁶ MCI Petition at 33. See *CPNI Order*, 13 FCC Rcd at 8162-63, ¶ 138; 47 C.F.R. § 2007(2)(iii).

²⁴⁷ MCI Petition at 21-23, 33-34.

²⁴⁸ *CPNI Order*, 13 FCC Rcd at 8126, ¶ 84.

²⁴⁹ *CPNI Order*, 13 FCC Rcd at 8126, ¶ 84 & n.315.

²⁵⁰ 47 C.F.R. § 51.319 (1997).

²⁵¹ *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 736 (1999).

should require incumbent LECs to unbundle.²⁵²

VI. “APPROVAL” UNDER SECTION 222(c)(1)

A. Grandfathering Pre-existing Notifications

92. On May 21, 1998, the Common Carrier Bureau released the *Clarification Order* clarifying several issues in the *CPNI Order*.²⁵³ Among other things, the *Clarification Order* made it clear that carriers that have complied with the *Computer III* notification and prior written approval requirements in order to market enhanced services to business customers with more than 20 access lines are also in compliance with section 222 and the Commission's rules.²⁵⁴ CompTel and LCI request that the Commission reverse the *Clarification Order's* conclusion.²⁵⁵ We decline to do so for the reasons discussed below and, in fact, hereby adopt the *Clarification Order*.

93. As discussed in the *Clarification Order*, the framework established under the Commission's *Computer III* regime, prior to the adoption of section 222, governed the use of CPNI by the BOCs, AT&T, and GTE to market CPE and enhanced services.²⁵⁶ Under this framework, those carriers were obligated to: (1) provide an annual notification of CPNI rights to multi-line customers regarding enhanced services, as well as a similar notification requirement that applied only to the BOCs regarding CPE; and (2) obtain prior written authorization from business customers with more than 20 access lines to use CPNI to market enhanced services.²⁵⁷ The *CPNI Order*, however, replaced the *Computer III* CPNI framework in all material respects.²⁵⁸ In its

²⁵² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket 96-98, FCC 99-70, Second Further Notice of Proposed Rulemaking (rel. April 16, 1999).

²⁵³ *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket Nos. 96-115, Order, 13 FCC Rcd 12390 (1998) (*Clarification Order*).

²⁵⁴ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12. The *Clarification Order* noted, however, that carriers must still provide notification and obtain approval pursuant to the rules promulgated under the *CPNI Order* to use CPNI to market telecommunications services that fall outside the scope of their existing service relationship to business customers with more than 20 access lines that have already given *Computer III* authorizations. *Id.*, at 12399, n.30.

²⁵⁵ CompTel Petition at 22; LCI Petition at 18. *See also* Intermedia Comments at 14.

²⁵⁶ *Clarification Order*, 13 FCC Rcd at 12397-98, ¶ 10.

²⁵⁷ *Clarification Order*, 13 FCC Rcd at 12397-98, ¶ 10.

²⁵⁸ *CPNI Order*, 13 FCC Rcd at 8187, ¶ 180.

place, the *CPNI Order* established requirements compelling carriers to provide customers with specific one-time notifications prior and proximate to soliciting express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B).²⁵⁹ The *CPNI Order* further established an express approval mechanism for such solicitations as it is the "best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI" and will also "limit the potential for untoward competitive advantages by incumbent carriers."²⁶⁰

94. The *Clarification Order* noted that, like the requirements established in the *CPNI Order*, "the notification obligation established by the *Computer III* framework required, among other things, that carriers provide customers with illustrative examples of enhanced services and CPE, expanded definitions of CPNI and CPE, information about a customer's right to restrict CPNI use at any time, information about the effective duration of requests to restrict CPNI, and background information to enable customers to understand why they were being asked to make decisions about their CPNI."²⁶¹ The *Clarification Order* determined that these *Computer III* notifications comply materially with the form and content of the notices required by the *CPNI Order*.²⁶² In addition, the *Clarification Order* concluded that the *Computer III* requirement to obtain prior written authorization constitutes a form of express, affirmative approval, as required by section 222.²⁶³ Accordingly, the *Clarification Order* concluded that carriers that complied with the *Computer III* notification and prior written approval requirement in order to market enhanced services to such carriers are also in compliance with section 222 and the Commission's rules.²⁶⁴

95. CompTel, LCI, and Intermedia assert that the *Computer III* authorizations received from business customers with more than 20 lines are invalid and, as such, that conclusion of the *Clarification Order* should be reversed.²⁶⁵ In support of their positions, they all note that the *CPNI Order* rules require that notification be proximate to and precede customer

²⁵⁹ *CPNI Order*, 13 FCC Rcd at 8128, ¶ 87.

²⁶⁰ *CPNI Order*, 13 FCC Rcd at 8130-31, ¶ 91.

²⁶¹ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

²⁶² *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

²⁶³ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

²⁶⁴ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

²⁶⁵ CompTel Petition at 22; LCI Petition at 18; Intermedia Comments at 14.

authorization, although that was not required under the *Computer III* regime.²⁶⁶ Moreover, CompTel asserts, the rules promulgated under section 222 require that carriers inform customers that their service will not be affected by refusing to sign CPNI waivers "whereas BOCs frequently told customers they might have to change account representatives if they did not grant a waiver."²⁶⁷ Finally, LCI and Intermedia argue that as the *Computer III* consents were given prior to the advent of local competition, business customers may have felt "compelled" to grant consent in a monopoly environment.²⁶⁸ For these reasons, CompTel and LCI assert that the *Computer III* consents at issue were not "informed."²⁶⁹

96. Ameritech opposes reversing the *Clarification Order*, arguing that even the rules promulgated under the *CPNI Order* do not require that customer authorizations "evaporate" in the event that the competitive environment changes.²⁷⁰ Furthermore, Ameritech contends that when BOCs informed customers that they may have to change account representatives if they did not waive their CPNI rights it was probably the result of the Commission's "mechanical blocking" requirements for personnel that were involved in the marketing of enhanced services.²⁷¹ Bell Atlantic also opposes reversing the *Clarification Order* in this respect, arguing that the notifications followed the rules then in effect and that customers were told that their authorizations were effective until revoked.²⁷² Bell Atlantic argues that there is no public interest reason to require carriers and customers to repeat the affirmative authorization process.²⁷³

97. We agree with the Bureau that carriers that have complied with the *Computer III*

²⁶⁶ CompTel Petition at 22; LCI Petition at 18; Intermedia Comments at 14. Section 64.2007(f) of the Commission's rules requires that "[p]rior to any solicitation for customer approval, a telecommunications carrier must provide a one-time notification to the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI." 47 C.F.R. § 64.2007(f). Moreover, section 64.2007(f)(3) states that "[a] telecommunications carrier's solicitation for approval must be proximate to the notification of a customer's CPNI rights." 47 C.F.R. § 64.2007(f)(3).

²⁶⁷ CompTel Petition at 22. Section 64.2007(f)(2)(iii) of the Commission's rules states, in relevant part, that "[t]he notification must . . . clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes." 47 C.F.R. § 2007(f)(2)(iii).

²⁶⁸ LCI Petition at 18; Intermedia Comments at 14.

²⁶⁹ CompTel Petition at 22; LCI Petition at 18.

²⁷⁰ Ameritech Comments at 13.

²⁷¹ Ameritech Comments at 13.

²⁷² Bell Atlantic Reply at 8.

²⁷³ Bell Atlantic Reply at 8.

notification and prior written approval requirements in order to market enhanced services to certain large business customers should be deemed in compliance with section 222 and the Commission's rules.²⁷⁴ For the reasons stated in the *Clarification Order*, we agree that the *Computer III* framework required carriers to provide these large business customers with adequate notice and obtain express, affirmative approval in material compliance with the form and content of those required by section 222 and the Commission's rules.²⁷⁵ Although it is true that the *Computer III* consents were given prior to the advent of local competition, we believe that the detailed notice and express, affirmative consent required under that regime compensate for this deficiency. Moreover, we are not persuaded by CompTel's assertion that the BOCs warnings that they *may* have to change the customer's account representatives put undue pressure on these business customers to relent. Finally, we also conclude that although some of the *Computer III* annual notifications may not have been "proximate to" the carrier solicitations as required by section 222, the *Computer III* regime's annual notification requirement and limitation to business customers with more than 20 access lines—requirements that we note are more stringent than required by section 222—materially satisfy the concerns we intended to address by the proximate notification requirement promulgated in the *CPNI Order*. As such, we agree with the Bureau that the *Computer III* notifications are in material compliance with section 222 and the Commission's rules, and adopt the reasoning and conclusions of the *Clarification Order* as our own.

98. Other carriers request that the Commission "grandfather" authorizations obtained subsequent to the enactment of section 222, but prior to the promulgation of rules in the *CPNI Order*.²⁷⁶ AT&T requests that the Commission clarify that the rules promulgated in the *CPNI Order* have prospective application only and, as such, that AT&T may continue to rely on approvals it obtained from customers in an attempt to comply with section 222 prior to the *CPNI Order*.²⁷⁷ Bell Atlantic, CWI, and Sprint support AT&T's request.²⁷⁸ All four of these carriers argue that it would be confusing to customers and a waste of resources to require the resolicitation of these authorizations.²⁷⁹ U S WEST and GTE agree that such authorizations

²⁷⁴ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12. The *Clarification Order* noted that carriers must still provide notification and obtain approval pursuant to the rules promulgated under the *CPNI Order* to use CPNI to market telecommunications services that fall outside the scope of their existing service relationship to business customers with more than 20 access lines that have already given *Computer III* authorizations. *Id.* at n.30.

²⁷⁵ *Clarification Order*, 13 FCC Rcd at 12398-99, ¶ 12.

²⁷⁶ AT&T Petition at 18-22; CWI Comments at 5-7; GTE Comments at 24; Sprint Comments at 9-10; U S WEST Comments at 15-18; LCI Reply at 5.

²⁷⁷ AT&T Petition at 18.

²⁷⁸ CWI Comments at 6; Sprint Comments at 9; Bell Atlantic Reply at 7.

²⁷⁹ AT&T Petition at 20; CWI Comments at 6; Sprint Comments at 9; Bell Atlantic Reply at 8.

should be grandfathered, but only where they are in writing.²⁸⁰ In contrast, however, MCI opposes any grandfathering.²⁸¹

99. Several carriers requesting that we "grandfather" these authorizations have provided descriptions of varying detail of their solicitations. AT&T's description was the most detailed. Subsequent to the enactment of section 222, but prior to the *CPNI Order*, AT&T apparently solicited millions of its customers for consent to use their CPNI to market new products and services to them by reading prepared solicitations to them over the phone during inbound and outbound calls.²⁸² AT&T's various versions of its script all essentially stated that AT&T would like to inform the customer about "other" AT&T products and services from time-to-time and requested permission to use the customer's "account information" to aid in this purpose.²⁸³ AT&T argues that the "non-trivial" percentage of customers who declined to authorize the use of their CPNI indicates that customers "understood AT&T's explanation, understood their rights, and—where it was given—consent was informed."²⁸⁴ To "ameliorate" the possibility that customers may not have been fully advised of their rights, AT&T has offered to send customers who gave their approval to AT&T's solicitations written notices of their rights including an explanation that they have a right to withdraw their approval.²⁸⁵ We conclude, based upon the evidence presented in the record of this proceeding, that AT&T's solicitations constitute a good faith effort to materially comply with section 222 provided they are supplemented with the curative written notification of rights AT&T has offered to distribute. Accordingly, we find that AT&T may continue to rely on the approvals given, provided the approvals were obtained in the manner detailed above, so long as AT&T supplements those approvals with a written notice to customers of their rights including an explanation that they have the right to withdraw their approval.

100. The descriptions provided by the other carriers are too brief to analyze whether their solicitations were adequate. For example, Sprint only states that it "informed [several hundred thousand] customers that they had to give their permission to enable Sprint to review their account information in order to inform them about other Sprint-branded services and

²⁸⁰ GTE Comments at 24; U S WEST Comments at 16.

²⁸¹ MCI Comments at 45-48.

²⁸² AT&T Petition at 19 and Appendix A.

²⁸³ AT&T Petition at Appendix A.

²⁸⁴ AT&T Petition at 20. Of the 27.9 million customers solicited, 24 million agreed to AT&T's request. *Id.* at 19-20.

²⁸⁵ AT&T Petition at 21.

products."²⁸⁶ CWI merely states that it "requested CPNI use approval from consumers who became customers after the 1996 Communications Act was enacted" and that it "amended its order forms to include a CPNI notice and approval section in its terms and conditions."²⁸⁷ Finally, Bell Atlantic briefly notes that it "provided written notice to thousands of its customers of their CPNI rights and secured written release from many of those customers."²⁸⁸ We conclude that these descriptions are inadequate to make a determination about whether the notices given and the solicitations made are in material compliance with section 222.

101. Other than AT&T, the parties in this proceeding have not provided sufficient detail describing their solicitations for the Commission to make a determination of material compliance. We urge them to examine the showing made by AT&T as discussed above. We will accept further waiver requests that are materially compliant with section 222, provided the carriers requesting waivers can make a showing similar to the one made by AT&T.

B. Oral and Written Notification

1. Background

102. Section 64.2007 of the Commission's Rules sets out several requirements for carriers who wish to obtain a customer's consent for the use of that customer's CPNI. Carriers must obtain customer *approval* to use, disclose, or permit access to CPNI for marketing purposes. Prior to seeking customer approval, however, carriers must provide a one-time *notification* to the customer of her or his rights to restrict the use or disclosure of, and access to, her or his CPNI. Carriers may provide oral or written notification. Once a customer is notified of her or his rights, the carrier may undertake a *solicitation* of the customer's approval. Solicitation for approval must be proximate to the notification. If the solicitation for approval is written, then it "must not be on a document separate from notification,"²⁸⁹ even if the solicitation is included in the same envelope.

103. Vanguard requests that the Commission clarify the requirements established in the *Order* for telecommunications providers seeking customer consent for the use of CPNI.²⁹⁰

²⁸⁶ Sprint Comments at 9.

²⁸⁷ CWI Comments at 8.

²⁸⁸ Bell Atlantic Reply at 8.

²⁸⁹ 47 C.F.R. §64.2007(f)(4).

²⁹⁰ Vanguard Petition at 18-19.

Vanguard expresses concern that the rules will hinder providers from obtaining consent at the time of the execution of initial customer agreements. Specifically, Vanguard requests clarification that:²⁹¹

it would be appropriate to provide customers with a basic disclosure of the nature of their CPNI rights at or near the signature line of a customer agreement, with both a specific, direct reference to a more complete disclosure elsewhere in the document and an opportunity for the customer to choose whether or not to consent to the use of that customer's CPNI.

U S WEST opposes the clarification requested by Vanguard on the grounds that carriers should be left with flexibility in implementing the rules, and a notification in the body of the contract could be just as compliant as at the signature line.²⁹²

104. GTE requests clarification of the “one-time” notification rules,²⁹³ noting that, under section 64.2007(f)(3), solicitation of approval to use CPNI must be proximate to the notification of a customer's CPNI rights. Further, section 64.2007(f)(4) requires that, if the solicitation for consent is in writing, then it must be in the same notification document. GTE concludes that these rules conflict—oral requests for consent can follow written notification at any time proximate to the notification, which GTE interprets as within one year of the solicited consent, but written requests for consent cannot (*i.e.*, they must be in the same document as the written notification). GTE requests that the Commission “clarify that written notice followed proximately by either written or oral solicitation is sufficient and is consistent with the FCC's finding that ‘one-time’ notice is sufficient.”²⁹⁴ GTE contends that this would require amending section 64.2007(f)(4).

105. SBC also requests that the Commission clarify that written notification followed by either an oral or written solicitation for approval is appropriate under the one-time notification scheme.²⁹⁵ SBC posits that, as both oral and written notification offer advantages over the other in particular circumstances, it is preferable to furnish providers with the flexibility to use either approach. Frontier asserts that the Commission “did not justify” the requirement that written

²⁹¹ Vanguard Petition at 18-19.

²⁹² U S WEST Comments at 24.

²⁹³ GTE Petition at 39.

²⁹⁴ GTE Petition at 39.

²⁹⁵ SBC Comments at 24-25.

solicitations for approval to use CPNI be in the same document as written notifications.²⁹⁶ Frontier argues that the Commission indicated elsewhere in the *Order* that notification must be made prior to solicitation, notification is required only once, and carriers may solicit customers multiple times. Frontier suggests that the Commission may have meant to require that *if* the solicitation and notification are contained in the same document, then the notification must come first. Finally, from a policy perspective, Frontier claims that this rule provides an incentive for carriers to rely upon less reliable and auditable oral notifications.²⁹⁷

106. Omnipoint requests that, for CMRS providers, the Commission replace its "opt-in" requirement for approval of the use of CPNI with an "opt-out" rule.²⁹⁸ MCI opposes Omnipoint's proposal, claiming that the CMRS market doesn't present any better case for "opt-out" than does the wireline market, that an "opt-out" proposal would favor large carriers with greater CPNI resources, and that carriers are not likely to solicit approvals so intrusively as to drive their customers away.²⁹⁹

2. Discussion

107. We find that Omnipoint has presented no new circumstances that warrant reversal of the Commission's conclusion that the requirement of affirmative consent is consistent with Congressional intent, as well as with the principles of customer control and convenience.³⁰⁰ Nor has Omnipoint shown that wireless carriers should not be subject to the requirement of affirmative consent.

108. We conclude, however, that the Commission should not attempt to micro-manage the methods by which carriers meet their obligations to secure customer consent. As long as the carrier can show that the rules previously promulgated, which ensure that the customer has been clearly notified of his or her right to refuse consent before the CPNI is used and that the notification clearly informs the customer of the consequences of giving or refusing consent, have been complied with, the consent will be effective. However, we note that those rules are specific in the requirements for written notification, *e.g.*, that the notice must be clearly legible, use sufficiently large type, and be placed in an area so as to be readily apparent to the customer.³⁰¹

²⁹⁶ Frontier Petition at 5-7.

²⁹⁷ Frontier Petition at 7.

²⁹⁸ Omnipoint Petition at 16-17.

²⁹⁹ MCI Comments at 54-55.

³⁰⁰ *CPNI Order*, 13 FCC Rcd at 8130-8141, ¶¶ 91-102.

³⁰¹ 47 C.F.R. § 64.2007(f)(v).

We intend to be vigilant in enforcing these rules, as we have in enforcing the rules against slamming, which similarly provide for clear and unambiguous notice to the telephone subscriber who signs a letter of agency for authorizing a change in his or her primary interexchange carrier.³⁰² This policy is also consistent with the Commission's recent action to help ensure that consumers are provided with essential information in phone bills in a clear and conspicuous manner.³⁰³ We will entertain complaints that carriers have not met these requirements on a case-by-case basis.

109. We clarify, at Vanguard's request, that its plan for obtaining consent at the time of the execution of initial customer agreements would be appropriate assuming Vanguard provides "complete disclosure"³⁰⁴ prior to seeking customer approval as required by section 64.2007(f) of the Commission's rules, and is otherwise compliant with the remainder of section 64.2007.³⁰⁵ In other words, seeking customer consent at the time of execution of initial customer agreements is not prohibited by our rules.³⁰⁶ We also concur with U S WEST's assertion, however, that carriers should be left with flexibility in implementing our rules.³⁰⁷ Accordingly, Vanguard's proposal is merely one option among many that could comply with our rules.

110. Moreover, in keeping with our desire to avoid micro-management of the notification and authorization process, we shall grant SBC, Frontier, and GTE's requests that we eliminate section 64.2007(f)(4) of the Commission's rules. Section 64.2007(f)(4) requires that a carrier provide a solicitation for approval to use a customer's CPNI, if written, in the same

³⁰² 47 C.F.R. § 64.1150(e).

³⁰³ *Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CC Docket No. 98-170 (Sept. 17, 1998).

³⁰⁴ Vanguard Petition at 18.

³⁰⁵ 47 C.F.R. § 2007.

³⁰⁶ We note, however, that the Commission, in its slamming rules, and in their enforcement, has required that the letter of agency be a separate document. 47 C.F.R. § 64.1150(b),(c); Long Distance Services, Inc., Apparent Liability for Forfeiture, File No. ENF-97-003, 13 FCC Rcd 4444 (Comm. Car. Bur. 1998). The Commission took this action in view of the consumer complaints showing that "abuse, misrepresentation, and consumer confusion occurs when an inducement and an LOA are combined in the same document in a deceptive or misleading manner." *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, CC Docket No. 94-129, 13 FCC Rcd 9560, 9571 (1995). We will be monitoring the performance of carriers under the CPNI rules to determine whether we should similarly require carriers to obtain consent for use of CPNI in a separate document.

³⁰⁷ U S WEST Comments at 24.

document containing the one-time notification of the customer's CPNI rights.³⁰⁸ These carriers argue that this section results in some confusion when read with the rest of section 64.2007. We agree that section 64.2007(f)(4) appears to contradict section 64.2007(f)(1) of our rules, which permits carriers to provide notification though *oral*, as well as written methods.³⁰⁹ Moreover, we agree with Frontier that the rule may create a disincentive for carriers to rely upon less reliable and auditable oral notifications. Of course, this was not our intent. In light of these reasons, and our desire avoid micro-management, we will delete section 64.2007(f)(4) from our rules.

C. Preemption of State Notification Requirements

111. In the *CPNI Order*, we declined to exercise our preemption authority, although we concluded that in connection with CPNI regulation we "may preempt state regulation of intrastate telecommunications matters where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from the intrastate aspects."³¹⁰ Rather, we stated that we would examine any conflicting state rules on a case-by-case basis once the states have had an opportunity to review the requirements we adopted in the *CPNI Order*.³¹¹ At that time we noted that state rules that are vulnerable to preemption are those that (1) permit greater carrier use of CPNI than section 222 and the Commission's rules allow, or (2) seek to impose additional limitations on carriers' use of CPNI.³¹² We also indicated, however, that state rules that would not directly conflict with the balance or goals set by Congress were not vulnerable to preemption. Such a rule, for example, might specify information that must be contained in the carrier's notice in addition to the information specified in the *CPNI Order*.³¹³

112. On reconsideration, we affirm our decision to exercise our preemption authority on a case-by-case basis. We reject AT&T's request that the Commission "revisit [its] conclusion and hold that the FCC notice requirements are preemptive and that a state may not prescribe

³⁰⁸ Section 64.2007(f)(4) states that: "[a] telecommunications carrier's solicitation for approval, if written, must not be on a document separate from the notification, even if such document is included within the same envelope or package." 47 C.F.R. § 64.2007(f)(4).

³⁰⁹ 47 C.F.R. § 64.2007(f)(1).

³¹⁰ *CPNI Order*, 13 FCC Rcd at 8075-78, ¶ 16-18.

³¹¹ *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

³¹² *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

³¹³ *CPNI Order*, 13 FCC Rcd at 8077-78, ¶ 18.

additional notice requirements."³¹⁴ AT&T argues that not doing so could put carriers at risk of expending millions of dollars soliciting customer approvals only to find that the notice does not comply with subsequently enacted state requirements.³¹⁵ While it is possible that states might impose additional CPNI conditions that could require the expenditure of resources, we conclude it would be inappropriate for the Commission to speculate in this proceeding about what such conditions might be and how much compliance might cost. AT&T further asserts that, at a minimum, the Commission should hold that any additional state requirements should have prospective effect only, and may not serve to invalidate CPNI authorizations previously and validly obtained in accordance with section 222 and the Commission's rules.³¹⁶ We note that while deciding to address preemption requests on a case-by-case basis, we reserve the right to consider the potential costs and burdens imposed by any state requirements that would apply retroactively. For these same reasons, we also deny GTE's request that we find that "additional CPNI use restrictions will be expeditiously preempted, particularly where other federal statutes, such as 47 U.S.C. § 227(c), already address customer privacy concerns."³¹⁷

113. Neither AT&T nor GTE has presented any new facts or arguments that require us to reconsider our prior ruling. Both GTE and AT&T point to the Comments of the Texas Public Utility Commission, which describe and attach a CPNI rule under consideration by the Texas Commission, as support for the need to reconsider our conclusion on preemption in the *CPNI Order*.³¹⁸ They assert that the proposed Texas rule is in conflict with the *CPNI Order* and the Commission's rules.³¹⁹ That Texas, or any other state, might implement CPNI rules that may be in conflict with our rules was certainly considered in the *CPNI Order*. If such an event occurs, AT&T, GTE, or any other party may request that we preempt the alleged conflicting rules. We will then consider the specific circumstances at that time.

D. Details of CPNI Notice

114. Section 64.2007 of our rules establishes the minimum form and content requirements of the notification a carrier must provide to a customer when seeking approval to

³¹⁴ AT&T Petition at 22.

³¹⁵ AT&T Petition at 22-23; AT&T Reply at 9.

³¹⁶ AT&T Petition at 23.

³¹⁷ GTE Reply at 9-10.

³¹⁸ AT&T Reply at 9-10; GTE Reply at 9-10; *see also* Texas PUC Comments at 1-4 and Attachment.

³¹⁹ AT&T Reply at 9-10; GTE Reply at 9-10.

use CPNI.³²⁰ Section 64.2007(f)(2)(ii) requires that the notification must specify, inter alia, “the types of information that constitute CPNI” and “the specific entities” that will receive it.³²¹ GTE requests that the Commission clarify the rule to permit carriers to avoid exhaustively specifying all types of CPNI and all of a carrier’s subsidiaries and affiliates that may receive CPNI.³²² We decline to do so. The minimum requirements of section 64.2007 were not crafted to provide precise guidance, but rather as general notice requirements.³²³ The rule seeks to strike an appropriate balance between giving carriers flexibility to craft CPNI notices tailored to their business plans and ensuring that customers are adequately informed of their CPNI rights.³²⁴

115. Thus, at a minimum, a carrier must inform a customer of the types of CPNI it intends to use. We wish to ensure that any decision by a customer to grant or deny approval is fully informed³²⁵ and that we reduce the potential for carrier abuse.³²⁶ Also, to the extent a carrier intends to disseminate a customer’s CPNI, the customer has a right to know the entities that will receive the CPNI derived from his or her calling habits. Contrary to GTE’s assertion, we don’t believe that a customer necessarily will be confused by the name of the recipient.³²⁷ Importantly, the customer should have the option of restricting access to CPNI among the carrier’s intended recipients of his or her personal information.

VII. SAFEGUARDS UNDER SECTION 222

A. Background

116. In the *CPNI Order*, the Commission concluded that “all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI by their employees or agents, or by unaffiliated third parties.”³²⁸ To this end, we required carriers to develop and implement software systems that “flag” customer service records in connection with

³²⁰ 47 C.F.R. § 64.2007.

³²¹ 47 C.F.R. § 64.2007(f)(2)(ii).

³²² GTE Petition at 43-44.

³²³ *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

³²⁴ *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

³²⁵ *CPNI Order*, 13 FCC Rcd at 8161-62, ¶ 136.

³²⁶ *CPNI Order*, 13 FCC Rcd at 8161, ¶ 135.

³²⁷ GTE Petition at 43.

³²⁸ *CPNI Order*, 13 FCC Rcd at 8194, ¶ 191.

CPNI,³²⁹ and maintain an electronic audit mechanism ("audit trail") that tracks access to customer accounts.³³⁰ In addition, the *CPNI Order* stated that carriers were to: train their employees as to when it would be permissible to access customers' CPNI; establish a supervisory review process that ensures compliance with CPNI restrictions when conducting outbound marketing; and, on an annual basis, submit a certification signed by a current corporate officer attesting that he or she has personal knowledge that the carrier is in compliance with the Commission's requirements.³³¹ Because the Commission anticipated that carriers would need time to conform their data systems and operations to comply with the software flags and electronic audit mechanisms required by the Order, we deferred enforcement of those rules until eight months from when the rules became effective: specifically, January 26, 1999.³³²

117. Following the release of the *CPNI Order*, several petitioners sought reconsideration of a variety of issues, including the decision to require carriers to implement the use of flags and audit trails.³³³ Other carriers sought reconsideration of the *CPNI Order's* employee training and discipline requirement in section 64.2009(b) of the Commission's rules, as well as the supervisory review requirement in section 64.2009(d) of the Commission's rules.³³⁴ On September 24, 1998, in response to concerns raised by a number of parties, the Commission

³²⁹ Section 64.2009(a) of the Commission's rules states that "Telecommunications carriers must develop and implement software that indicates within the first few lines of the first screen of a customer's service record the CPNI approval status and reference the customer's existing service subscription." 47 C.F.R. § 64.2009(a). See *CPNI Order*, 13 FCC Rcd at 8198, ¶ 198.

³³⁰ Section 64.2009(c) of the Commission's rules requires that: "Telecommunications carriers must maintain an electronic audit mechanism that tracks access to customer accounts, including when a customer's record is opened, by whom, and for what purpose. Carriers must maintain these contact histories for a minimum period of one year." See *CPNI Order*, 13 FCC Rcd at 8198-200, ¶ 199.

³³¹ See *CPNI Order*, 13 FCC Rcd at 8198-200, ¶¶ 199-202. In the *Clarification Order* the Common Carrier Bureau clarified that carriers are not required to file such certifications with the Commission. *Clarification Order*, 13 FCC Rcd at 12399, ¶ 13. Rather, the *CPNI Order* merely directed carriers to ensure only that these corporate certifications be made publicly available. *Id.* As we noted in the order, the Commission similarly requires commercial broadcasters to keep publicly available inspection files on site. *CPNI Order*, 13 FCC Rcd at 8199, ¶ 201, n.695 (citing 47 C.F.R. § 73.3526). We likewise require that carriers make these certifications available for public inspection, copying, and/or printing at any time during regular business hours at a centrally located business office of the carrier.

³³² See *CPNI Order*, 13 FCC Rcd at 8200, ¶ 202.

³³³ 360° Communications Petition at 12; ALLTEL Petition at 8-9; Ameritech Petition at 8-11; AT&T Petition at 8-18; Bell Atlantic Petition at 22-23; BellSouth Petition at 18-23; Frontier Petition at 3-5; GTE Petition at 41-42; Independent Alliance Petition at 2-8; LCI Petition at 2-6; MCI Petition at 34-43; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

³³⁴ TDS Petition at 15; USTA Petition at 14.

ruled in the *Stay Order* that it would not seek enforcement actions against carriers regarding compliance with the CPNI software flagging and audit trail requirements as set forth in 47 C.F.R. Section 64.2009(a) and (c) until six months after the release date of this order on reconsideration.³³⁵ We concluded that it serves the public interest to extend the deadline for the initiation of enforcement of the software flagging and audit trail rules so that the Commission could "consider recent proposals to tailor our requirements more narrowly and to reduce burdens on the industry while serving the purposes of the CPNI rules."³³⁶

118. On November 9, 1998, PCIA filed a petition for reconsideration of the *Stay Order* requesting that the Commission retract the additional requirement for deployment of systems pending the Commission's reconsideration of the *CPNI Order*.³³⁷ Several parties supported PCIA's petition³³⁸ and PCIA filed a Reply.³³⁹ We deny PCIA's petition, however, as we have granted *infra*, in part, the petitions for reconsideration with respect to the flagging and audit trail requirements.³⁴⁰ Thus, although new systems implemented prior to the expiration of the stay period will be required to comply with the new rules promulgated in this order, we believe the new rules are significantly less burdensome. We have considered the potential impact of our rules in this area on carriers' year 2000 (Y2K) remedial efforts and their plans to stabilize their networks over the Y2K conversion. We expect, however, that the increased flexibility, reduction in compliance burden and additional time for implementation that we grant here will greatly reduce the risk of such impact.³⁴¹ Thus, and in light of the facts before us, we believe that our rules will have no significant detrimental effect on carriers' Y2K efforts. We conclude that it is in the public interest to extend the stay period an additional two months so as not to impede those efforts for carriers that chose to implement electronic safeguards under the modified rules. Accordingly, the Commission will not seek enforcement actions against carriers regarding compliance with sections 64.2009(a) and (c) of the Commission's rules until eight months after the release date of this order on reconsideration.

119. An industry coalition (Coalition) comprised of a combination of thirty-one industry

³³⁵ *Stay Order*, 13 FCC Rcd at 19393, ¶ 6.

³³⁶ *Stay Order*, 13 FCC Rcd at 19392, ¶ 4.

³³⁷ PCIA Petition (filed November 9, 1998).

³³⁸ Ameritech Comments (filed Dec. 10, 1998); BellSouth Comments (filed Dec. 10, 1998); CTIA Comments (filed Dec. 10, 1998); NTCA Comments (filed Dec. 10, 1998).

³³⁹ PCIA Reply (filed Dec. 23, 1998).

³⁴⁰ *See* discussion *infra* Part VII.D. and E.

³⁴¹ *See* discussion *infra* Part VII.C.

representatives has proposed specific amendments to sections 64.2009(a), 64.2009(c), and 64.2009(e) of the Commission's rules (Coalition Proposal).³⁴² After consideration of this proposal and other comments in the record, we adopt modifications to our flagging and audit trail requirements as set forth below.

B. Notice

120. In the *NPRM*, we tentatively concluded that "all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI by their employees or agents, or by unaffiliated third parties."³⁴³ We further noted that we previously required AT&T, the BOCs, and GTE to implement computerized safeguards and manual file indicators to prevent unauthorized access to CPNI, and sought comment on whether such safeguards should continue to apply to those carriers.³⁴⁴ The *NPRM* also tentatively concluded that we should not specify safeguard requirements for other carriers, but sought comment on the issue.³⁴⁵

121. We reject CompTel's assertion that the Commission failed to give adequate notice of the "systems modifications" announced in the *CPNI Order*³⁴⁶ because, in fact, the *NPRM* stated that the Commission might require carriers other than AT&T, the BOCs, and GTE to implement computerized safeguards and manual file indicators, and solicited comment on the issue.³⁴⁷ CompTel further argues that the Commission did not properly notice or receive comment on "the types of computer modifications that are appropriate or on the costs associated with computer modification," and, as such, the Commission should reconsider its computerized flagging and audit trail requirements.³⁴⁸ As we do, in fact, modify the flagging and audit trail rules on reconsideration to allow carriers to institute non-computerized systems, we grant CompTel's

³⁴² Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Celia Nogales, Ameritech (dated January 11, 1999) and attachment. The Commission also received a jointly written letter in support of the Coalition proposal. Letter to Chairman William E. Kennard, Commissioner Furchtgott-Roth, Commissioner Ness, Commissioner Powell, and Commissioner Tristani from CompTel, CTIA, Independent Alliance, ITTA, NTCA, OPASTCO, Rural Cellular Association, Small Business in Telecommunications, and USTA, CC Docket No. 96-115 (filed April 16, 1999).

³⁴³ *NPRM*, 11 FCC Rcd at 12528, ¶ 35.

³⁴⁴ *NPRM*, 11 FCC Rcd at 12528, ¶ 35.

³⁴⁵ *NPRM*, 11 FCC Rcd at 12528-29, ¶ 36.

³⁴⁶ CompTel Petition at 23. *See also* NTCA Comments at 7-9 (arguing that flagging and audit trail requirements were based upon inadequate record).

³⁴⁷ *NPRM*, 11 FCC Rcd at 12528-29, ¶ 36.

³⁴⁸ CompTel Petition at 24.

Petition in this regard.³⁴⁹

122. We also reject NTCA's argument that our description of the projected reporting, record-keeping, and other compliance requirements of the rule we proposed in the NPRM was inaccurate.³⁵⁰ As we described *supra*, the NPRM tentatively concluded that we would *not* require carriers other than AT&T, the BOCs, and GTE to implement specified safeguard requirements as those carriers had been required to under *Computer III*. Thus, the NPRM's Initial Regulatory Flexibility Analysis correctly stated that there were no projected reporting, record-keeping, or other compliance requirements for small business entities as a result of the NPRM.³⁵¹

C. Evidence of Cost of Compliance

123. When we established the flagging and audit trail requirements in the *CPNI Order*, the evidence before us was that carriers could, with relative ease, modify their systems to accommodate these requirements.³⁵² Based upon many of the petitions filed on reconsideration, however, it does not appear that all of the relevant facts were before the Commission at that time. Numerous petitioners have now presented evidence that the safeguards we adopted would be costly to implement. For example, AT&T predicts that it will cost \$75 million to develop and implement systems to comply with the flagging requirement and over \$270 million to comply with the audit trail requirement.³⁵³ BellSouth estimates it will cost at least \$75 million to create a computer system to comply with the audit trail requirement.³⁵⁴ LCI estimates that modification of its systems will cost "many millions of dollars."³⁵⁵ Sprint estimates the cost of modifying its systems to comply with the audit trail requirements at \$19.6 million.³⁵⁶ Several carriers also warn that the implementation of these systems may interfere with their Year 2000 compliance efforts.³⁵⁷

124. A number of parties also present evidence that the safeguard requirements of the

³⁴⁹ See, *infra*, Sections VII.D. and E.

³⁵⁰ NTCA Petition at 8.

³⁵¹ *NPRM*, 11 FCC Rcd at 12534, ¶ 55.

³⁵² *CPNI Order*, 13 FCC Rcd at 8198, ¶ 198 & n.689; *id.*, at 8198-99, ¶ 199 & n.692.

³⁵³ AT&T Petition at 14.

³⁵⁴ BellSouth Petition at 21.

³⁵⁵ LCI Petition at 4.

³⁵⁶ Sprint Petition at 4.

³⁵⁷ AT&T Petition at 9; Omnipoint Petition at 15; Sprint Petition at 2. See Bell Atlantic Petition at 22.

CPNI rules are particularly burdensome for small and rural carriers.³⁵⁸ For example, the Independent Alliance asserts that its members estimate that it will cost between \$150,000 and \$200,000 to implement the flagging and audit trail requirements.³⁵⁹ The Independent Alliance provides the example of one carrier that serves 3,600 customers that will have an average cost of implementation of between \$42 and \$56 per customer.³⁶⁰ In support of its request, NTCA cites a poll of its members concerning their current state of technology and the costs associated with implementing the Commission's auditing and tracking requirements. NTCA states that more than 60 per cent of its members responded, and that while 98 percent of the responding rural companies with more than 5,000 access lines have mechanized customer service records, only 73 percent of companies with less than 1,000 access lines do.³⁶¹ NTCA points out that of those respondents that are mechanized, less than 10 percent have the ability to add a field to indicate CPNI approval status.³⁶² NTCA maintains that the estimated cost of adding that field averages out to \$50,000 per entity, or \$12 per line on average and for the smallest rural telephone companies, \$38,500 per entity, or \$64 per line.³⁶³ NTCA further states that fewer than 7 percent of the rural telephone companies who responded to the survey have electronic audit capability, and NTCA's members estimate that they would be required to spend between \$60,000 and \$70,000 for that capability.³⁶⁴ Finally, TDS asserts that it will cost \$630,000 to modify its system for flagging.³⁶⁵ TDS argues that many of the costs of compliance with the flagging and audit trail requirements will place a heavier burden on small and rural carriers because they cannot be spread across a large customer base.³⁶⁶

D. The Flagging Requirement

125. Upon reconsideration, based upon the new evidence before us, we agree with the petitioners that we should modify the flagging requirement promulgated in the *CPNI Order* for all

³⁵⁸ ALLTEL Petition at 4; Independent Alliance Petition at 2; NTCA Petition at 9; TDS Petition at 16; *see* CenturyTel Reply at 7-10; RCA Reply at 8-10.

³⁵⁹ Independent Alliance Petition at 7.

³⁶⁰ Independent Alliance Petition at 7 & n.16.

³⁶¹ NTCA Petition at 9.

³⁶² NTCA Petition at 9.

³⁶³ NTCA Petition at 9.

³⁶⁴ NTCA Petition at 9.

³⁶⁵ TDS Petition at 12.

³⁶⁶ TDS Petition at 16.

carriers.³⁶⁷ The goal of the CPNI flagging rule is to ensure that carriers are aware of the status of, and observe, a customer's CPNI approval status prior to any use of that customer's CPNI.³⁶⁸ The Coalition proposes that we modify our rule to require carriers to train their marketing personnel to determine a customer's CPNI status prior to using that customer's CPNI for "out of category" marketing, and to make customer approval status available to such personnel in a readily accessible and easily understandable format.³⁶⁹ As is only now evident from the new evidence presented on reconsideration, implementation of the flagging rules promulgated in the *CPNI Order* will require significant expenditures of monetary and personnel resources for most carriers, regardless of size. Although we agree in principle that the Coalition's proposal will achieve the goals of the flagging requirements at a substantially reduced cost, we conclude that the Coalition's proposal can be modified to even simpler, less regulatory terms. We find that the carriers are in a better position than the Commission to create individual systems which ensure that their employees check each customer's CPNI approval status prior to any use of that customer's CPNI for out of category marketing. Accordingly, we amend section 64.2009(a) of our rules to state that telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI. This modification will permit all carriers to develop and implement a system that is suitable to, among other things, its unique size, capital resources, culture, and technological capabilities. By way of example, carriers that do not presently keep computerized records need not implement an electronic method of verifying approval status; carriers that already have computerized records could implement flags or adopt procedures whereby they access a separate database to verify approval status; or carriers could develop a combination of computerized and non-computerized systems as they see fit.

E. The Audit Trail Requirement

126. We also agree with the petitioners, based upon the new evidence before us, that

³⁶⁷ Coalition Proposal at 1; 360° Communications Petition at 12; ALLTEL Petition at 8-9; AT&T Petition at 13-15; Bell Atlantic Petition 22-23; Comptel Petition at 22-24; Frontier Petition at 3-5; Independent Alliance Petition at 2-8; LCI Petition at 2-6; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

³⁶⁸ See *CPNI Order*, 13 FCC Rcd at 8198, ¶ 198.

³⁶⁹ Coalition Proposal at 1. The Coalition's proposal for section 64.009(a) is as follows:

Each carrier shall establish guidelines that direct its marketing personnel to determine a customer's CPNI approval and service subscription status prior to the use of CPNI for any offering outside of the service category (i.e., local, interexchange, and CMRS) to which the customer subscribes with that carrier. The carrier shall make such approval and status information available, either electronically or in some other manner, to marketing personnel in a readily accessible and easily understandable format.

we should modify the *CPNI Order's* electronic audit trail requirement.³⁷⁰ This requirement was broadly intended to track access to a customer's CPNI account, recording whenever customer records are opened, by whom, and for what purpose.³⁷¹ As AT&T points out, the *CPNI Order's* electronic audit trail requirement would generate "massive" data storage requirements at great cost.³⁷² As it is already incumbent upon all carriers to ensure that CPNI is not misused and that our rules regarding the use of CPNI are not violated we conclude that, on balance, such a potentially costly and burdensome rule does not justify its benefit. As an alternative to the *CPNI Order's* electronic audit trail requirement, the Coalition has proposed that we require the creation of such a record, but only with respect to "marketing campaigns."³⁷³ We find that the Coalition proposal is too narrow because, as MCI noted in an *ex parte* meeting with the Common Carrier Bureau, many carriers distinguish between "sales" and "marketing."³⁷⁴ We determine that carriers must maintain a record, electronically or in some other manner, of their sales and marketing campaigns that use CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, the date and purpose of the campaign, and what products or services were offered as part of the campaign. We will also require carriers to retain the record for a minimum of one year. We amend section 64.2009(c) accordingly.

F. The Corporate Officer Certification

127. The Coalition also requests that we amend the Officer Certification rule to eliminate the requirement that the corporate officer signing the certification have personal

³⁷⁰ Coalition Proposal at 2; Ameritech Petition at 8-11; AT&T Petition at 8-13, 15-17; Bell Atlantic Petition 22-23; BellSouth Petition at 18-23; Comptel Petition at 22-24; Frontier Petition at 3-5; GTE Petition at 41-42; Independent Alliance Petition at 2-8; LCI Petition at 2-6; MCI Petition at 34-43; NTCA Petition at 7-11; Omnipoint Petition at 15-16; Sprint Petition at 2-6; TDS Petition at 11-16; USTA Petition at 9-15.

³⁷¹ *CPNI Order*, 13 FCC Rcd at 8198-99, ¶ 199.

³⁷² Letter from Judy Sello, Senior Attorney, AT&T to Carol Matthey, Chief, Policy & Program Planning Division, Common Carrier Bureau, dated January 12, 1999.

³⁷³ Coalition Proposal at 2. The Coalition proposal for section 64.2009(c) is as follows:

Each carrier shall maintain a file, electronically or in some other manner, of its marketing campaigns that use CPNI, that includes a description of the campaign and the CPNI that was used in the campaign, its date and purpose, and what products or services were offered as part of the campaign. The file must be kept for a minimum of one year.

³⁷⁴ MCI January 12, 1999 *Ex Parte*.

knowledge that the carrier is in compliance with the Commission's CPNI rules.³⁷⁵ This we decline to do. Our revisions of the flagging and audit trail requirements in this order will allow telecommunications carriers more flexibility in determining how they will ensure their compliance with our CPNI rules. This flexibility puts the responsibility squarely on the carriers to ensure their compliance. This flexibility, and its concurrent responsibility, requires that some officer of the carrier have personal knowledge that the scheme designed by the carrier is adequate and complies with our CPNI rules. Because neither the petitioners nor the Coalition have persuaded us that personal knowledge on the part of an officer is unnecessary, we will not omit that requirement from our rule. We will, however, amend the rule to omit the word "corporate" because, as some parties explain, not all carriers are organized as corporations.³⁷⁶

128. We agree with CenturyTel's observation, however, that section 64.2009(e) of our rules, as currently written, requires carrier certification of compliance with all of our CPNI rules, a statement which may not necessarily be true.³⁷⁷ Therefore, we will also amend Section 64.2009(e) to require that telecommunications carriers have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis stating that the operating procedure established by the carrier *is or is not* in compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate detailing how the carrier's operating procedure is and/or is not in compliance.³⁷⁸

G. Other Safeguard Provisions

129. Parties also seek reconsideration of other safeguard provisions.³⁷⁹ USTA seeks reconsideration of the *CPNI Order's* employee training and discipline requirements in section 64.2009(b) of the Commission's rules, as well as the supervisory review requirement in section

³⁷⁵ Coalition Proposal at 2. The Coalition proposes the following modification of section 64.2009(e):

A telecommunications carrier must have an officer, as an agent of the carrier, sign a compliance certificate on an annual basis that the carrier is in compliance with the rules in this subpart. A statement explaining how the carrier is in compliance with the rules in this subpart must accompany the certificate.

³⁷⁶ Letter to Carol Matthey, Chief, FCC Common Carrier Bureau, Policy & Program Planning Division, from Judy Sello, AT&T at 3 (dated January 12, 1999) (explaining Coalition Proposal).

³⁷⁷ CenturyTel Comments at 10.

³⁷⁸ We also decline to adopt the Coalition's request for clarification regarding what constitutes a foundation for the officer certification. Section 64.2009(e) as amended details what the officer must certify.

³⁷⁹ TDS Petition at 15; USTA Petition at 14.

64.2009(d) of the Commission's rules.³⁸⁰ USTA argues that these requirements are "unnecessary" and misplace the focus on how, rather than whether, carriers are complying with section 222.³⁸¹ TDS requests reconsideration of the training requirement alone.³⁸² TDS asserts, among other things, that even if the flagging and audit trail requirements were not required, detailed training would be "essential and difficult because of the complexity of the CPNI information use rules."³⁸³ In other words, both argue that these rules are unduly burdensome. We do not agree. As we acknowledged in the *CPNI Order*, these rules "will impose some additional burdens on carriers, particularly carriers not previously subject to our *Computer III* CPNI requirements."³⁸⁴ In light of the important role these rules play in safeguarding the proper use of CPNI, however, we are not persuaded that these rules are so burdensome that they warrant modification. Moreover, as we have taken steps on reconsideration to allow carriers to decide for themselves how to implement the flagging and audit trail rules, the rules are now even less burdensome. It is, in fact, the continued application of the employees training and discipline rules, and the officer certification requirement, that permits us to make the substantial modifications of the flagging and audit trail requirements on reconsideration. Thus, we conclude the remaining requirements in section 64.2009 are reasonable as presently written.

H. Petitions for Forbearance

130. We deny both as moot NTCA and PCIA's petitions for forbearance from enforcement of the audit trail and flagging rules.³⁸⁵ As we described in detail *supra*, section 10 of the Act requires the Commission to forbear from regulation when: (1) enforcement is not necessary to ensure that the carrier's charges and practices are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.³⁸⁶ Both PCIA and NTCA premise their forbearance arguments upon the fact that the flagging and audit trail requirements, as detailed in the *CPNI Order*, require the

³⁸⁰ USTA Petition at 14.

³⁸¹ USTA Petition at 15.

³⁸² TDS Petition at 15.

³⁸³ TDS Petition at 15.

³⁸⁴ *CPNI Order*, 13 FCC Rcd at 8196, ¶ 194.

³⁸⁵ NTCA Petition at 7-11 (requesting forbearance for all rural carriers); PCIA Petition for Forbearance at 16-20 (requesting forbearance for all carriers).

³⁸⁶ *See supra*, Part V.A.3.

implementation of electronic safeguards.³⁸⁷ For example, among other things, PCIA asserts that flagging and audit trail requirements will require unreasonable expense because they require "re-engineered" computer systems, and create additional Year 2000 compliance efforts for carriers.³⁸⁸ NTCA argues that the costs associated with implementing the computerized solution required by our old flagging and audit trail rules will require "outrageous" expense, and asserts that there are "far less expensive, less burdensome, and less complicated ways of achieving the [rules'] goal."³⁸⁹ As we have explained above, based upon the new evidence the parties presented on reconsideration, we agree with both NTCA and PCIA that the rules we promulgated in the *CPNI Order* are unduly burdensome. We deny these forbearance petitions, however, because we conclude that the revised flagging and audit trail requirements resolve NTCA and PCIA's criticisms of the former rules and the basis for their forbearance requests. Under our new rules carriers, including NTCA and PCIA members, may establish non-computerized systems of their own design to comply with our requirements.

I. Small and Rural Carriers

131. We recognize, in light of the new evidence presented to the Commission, that the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. Our modification of the flagging and audit trail requirements in this order, however, effectively moots the requests we received from the parties seeking special treatment for small and rural carriers with respect to these requirements.³⁹⁰ In particular, under the amended rules, carriers are not required to maintain flagging and audit capabilities in electronic format. Rather, the amended rules leave it to the carriers' discretion to determine what sort of system is best for their circumstances. Thus, carriers whose records are not presently maintained in electronic form are not required to implement electronic systems if they do not wish to do so. We deny, therefore, the Independent Alliance's petition to exempt small and rural carriers from the provisions of sections 64.2009(a) and (c) because we have amended our rules to accommodate, in part, the concerns of small and rural carriers.³⁹¹ Likewise, we deny NTCA's request that rural telecommunications companies should be eligible for a blanket waiver of the flagging and audit trail provisions,³⁹² and TDS's request for reconsideration of the flagging and

³⁸⁷ NTCA Petition at 10.

³⁸⁸ PCIA Petition for Forbearance at 18-20.

³⁸⁹ NTCA Petition at 8-10.

³⁹⁰ ALLTEL Petition at 8-9; Independent Alliance Petition at 2-9; NTCA Petition at 11; TDS Petition at 11-16. *See also* CenturyTel Reply at 5.

³⁹¹ Independent Alliance Petition at 2-9.

³⁹² NTCA Petition at 11.

tagging rules for small and mid-sized carriers, for the same reason.³⁹³ Finally, on the same basis, we reject ALLTEL's request that we reconsider the application of the "enforcement time frames and other requirements to rural and small carriers."³⁹⁴

J. Adequate Cost Recovery

132. We deny TDS' request that the Commission provide a mechanism, in the form of a "nationwide averaged [and] clearly identified flat charge on all customers," to recover the costs that carriers will incur complying with section 222, the *CPNI Order*, and the Commission's rules.³⁹⁵ TDS asserts, without providing any estimation of costs, that compliance costs "are likely to be staggering."³⁹⁶ TDS bases its estimation of the cost of compliance primarily upon the software flag, audit trail, other record keeping, and training requirements in the *CPNI Order*.³⁹⁷ As we have now amended our rules to allow carriers the freedom to implement these safeguards in a more effective and flexible manner, we believe that carrier costs will be significantly reduced from the costs estimated by carriers subsequent to the *CPNI Order*. Accordingly, we reject TDS's request for a separate cost recovery mechanism at this time.

K. Enforcement of CPNI Obligations

133. In this Order, we have amended our rules to reflect a deregulatory approach which leaves many of the specific details of compliance to the carriers. However, we intend to enforce the rules, as amended, zealously. We expect carriers to protect the confidentiality of the CPNI in their possession in accordance with our rules. Carriers will be subject to penalties for improper use of CPNI.³⁹⁸ Moreover, failure to develop and implement a compliance plan to safeguard CPNI consistent with our rules will form a separate basis for liability.³⁹⁹ We also note that we will address, in a separate order, the enforcement and compliance issues raised in response to the

³⁹³ TDS Petition at 11-16.

³⁹⁴ ALLTEL Petition at 8-9. We note, in addition, that we have extended the time frame for enforcement of the flagging and audit trail requirements to eight months from the release of this order. *See* discussion *supra* Part VII.A.

³⁹⁵ TDS Petition at 16-17.

³⁹⁶ TDS Petition at 17.

³⁹⁷ TDS Petition at 16.

³⁹⁸ 47 C.F.R. § 64.2005, 64.2007.

³⁹⁹ 47 C.F.R. § 64.2009.

FNPRM.⁴⁰⁰

VIII. SECTION 222 AND OTHER ACT PROVISIONS

A. Section 222 and Section 272

1. Background

134. Section 272(c)(1) states that, "[i]n its dealings with its [section 272 affiliates], a Bell operating company . . . may not discriminate between the company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."⁴⁰¹ The Commission concluded in the *Non-Accounting Safeguards Order* that: (1) the term "information" in section 272(c)(1) includes CPNI; and (2) the BOCs must comply with the requirements of both sections 222 and 272(c)(1).⁴⁰² The Commission, however, declined to address the parties' other arguments regarding the interplay between section 272(c)(1) and section 222 to avoid prejudging issues that would be addressed in the *CPNI Order*.⁴⁰³ The Commission also declined to address the parties' arguments regarding the interplay between section 222 and section 272(g), which permits certain joint marketing between a BOC and its section 272 affiliate.⁴⁰⁴ The Commission emphasized, however, that, if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.⁴⁰⁵

135. In the *CPNI Order* the Commission overruled the *Non-Accounting Safeguards Order*, in part, concluding that the most reasonable interpretation of the interplay between sections 222 and 272 is that the latter does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates when they share information with their

⁴⁰⁰ *CPNI Order*, 13 FCC Rcd at 8200-202, ¶ 203-207 (we sought comment, *inter alia*, as whether the adoption of additional enforcement mechanisms are necessary to ensure carrier compliance or encourage appropriate discharge of a carrier's duty under section 222, such as compensation to other carriers harmed by anticompetitive behavior as a result of misuse of proprietary information).

⁴⁰¹ 47 U.S.C. § 272(c)(1).

⁴⁰² *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, ¶ 222.

⁴⁰³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, ¶ 222.

⁴⁰⁴ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22050, ¶ 300.

⁴⁰⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22050, ¶ 300.

section 272 affiliates according to the requirements of section 222.⁴⁰⁶ The Commission reached this conclusion only after recognizing an apparent conflict between sections 222 and 272.⁴⁰⁷ We noted in the *CPNI Order* that, on the one hand, certain parties argued that under the principle of statutory construction the "specific governs the general," and that section 222 specifically governs the use and protection of CPNI, but section 272 only refers to "information" generally.⁴⁰⁸ As such, they claimed that section 222 should control section 272.⁴⁰⁹ On the other hand, under the same principle of construction, other parties argued that section 272 specifically governs the BOCs' sharing of information with affiliates, whereas section 222 generally relates to all carriers.⁴¹⁰ Therefore, they asserted, section 272 should control section 222.⁴¹¹ Because either interpretation is plausible, it was left to the Commission to resolve the tension between these provisions, and to formulate the interpretation that, in the Commission's judgment, best furthers the policies of both provisions and the statutory design.⁴¹² We determine that interpreting section 272 to impose no additional obligations on the BOCs when they share CPNI with their section 272 affiliates according to the requirements of section 222 most reasonably reconciles the goals of these two principles.⁴¹³

2. Discussion

136. We affirm our conclusion in the *CPNI Order* that the most reasonable interpretation of the interplay of sections 222 and 272 is that section 272 does not impose any additional obligations on the BOCs when they share CPNI with their section 272 affiliates.⁴¹⁴ We disagree with the parties that argue that we misinterpreted the relationship between section 222 and 272. A number of carriers assert that section 272 sets out additional requirements for BOCs with respect to the transfer of CPNI to section 272 affiliates than are required by section 222

⁴⁰⁶ *CPNI Order*, 13 FCC Rcd at 8174-75, 8179, ¶ 160, 169.

⁴⁰⁷ *CPNI Order*, 13 FCC Rcd at 8174, ¶ 158.

⁴⁰⁸ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴⁰⁹ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴¹⁰ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴¹¹ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴¹² *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴¹³ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

⁴¹⁴ *CPNI Order*, 13 FCC Rcd at 8179, ¶ 169.

alone.⁴¹⁵ For the same reasons described in the *CPNI Order*, however, we conclude that our prior interpretation of the relationship between sections 222 and 272 is correct.⁴¹⁶

137. At the outset, we reject MCI's argument that there was not adequate notice that the Commission might reverse its conclusion in the *Non-Accounting Safeguards Order* relating to CPNI.⁴¹⁷ On February 20, 1997, in a *Public Notice* issued subsequent to the *Non-Accounting Safeguards Order*, but prior to the *CPNI Order*, the Commission sought comment on specific questions for the CPNI rulemaking proceeding.⁴¹⁸ Although the *Public Notice* did not specifically seek comment on whether the *Non-Accounting Safeguards Order's* conclusion should be reversed, it did pose a series of detailed questions relating to the interplay between sections 222 and 272. For example, the *Public Notice* inquired whether:

. . . the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of . . . services . . . and information . . ." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

Parties were, therefore, on notice that we might reconsider our conclusion concerning the relationship between sections 222 and 272. Accordingly, we affirm our conclusion that notice was adequate.

138. We further disagree with MCI's claim that the Commission's "approach" is flawed by its "failure to analyze MCI's proposed nondiscrimination rule on its own terms."⁴¹⁹ MCI asserts without support that it previously proposed—presumably in its comments or reply comments to the *NPRM*—that section 272(c)(1) requires that BOCs that obtain a customer's approval to use his or her CPNI on behalf of a section 272 affiliate or to disclose CPNI to a section 272 affiliate must likewise provide customer CPNI to any third party that can demonstrate

⁴¹⁵ AT&T Petition at 23-24; CompTel Petition at 2-10; MCI Petition at 6-21; Sprint Petition at 6-8; Intermedia Comments at 6-9; WorldCom Comments at 3-7; TRA Comments at 2-5.

⁴¹⁶ Ameritech Comments at 9-11; Bell Atlantic Comments at 2-5; BellSouth Comments at 14-16; SBC Comments at 9-14; U S WEST Comments at 6-10.

⁴¹⁷ MCI Petition at 6-7.

⁴¹⁸ *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Public Notice, CC Docket No. 096-115, DA 97-385 (rel. Feb. 20, 1997) (*Public Notice*).

⁴¹⁹ MCI Petition at 8.

that it has also obtained that customer's oral approval.⁴²⁰ MCI contends that the Commission "admitted" that MCI's proposal is consistent with section 222, but improperly rejected the proposal.⁴²¹ Although we addressed the substance of this argument in the *CPNI Order*, it is not clear that it was MCI that raised the argument at that time. In any case, MCI's contention apparently refers to our conclusion that requiring BOCs to disclose CPNI to unrelated entities upon oral customer approval when they share CPNI with their section 272 affiliates upon oral approval is not necessarily inconsistent with section 222.⁴²² MCI fails to mention, however, that we further concluded that if that aspect of section 272(c)(1) was applicable, there would be no principled basis upon which not to impose other obligations required by that section. We concluded that if section 272(c)(1)'s non-discrimination obligation applies to the form of customer approval then it would also apply when BOCs solicit customer approval to share CPNI with their 272 affiliates.⁴²³ In other words, section 272(c)(1) would seemingly require BOCs to solicit customer authorizations on behalf of other carriers when soliciting for such authorizations on behalf of their own BOC affiliates. We further concluded that such a requirement would present insurmountable hurdles for BOC compliance with section 222.⁴²⁴ We noted that requiring BOCs to solicit approval for unspecified "all other" entities would neither constitute effective notice nor informed approval as customers cannot knowingly approve release of their CPNI unless and until they are made aware of the identity of the party that will receive the CPNI.⁴²⁵ Alternatively, we also noted, it would be difficult as a practical matter for BOCs to provide specific notice, and obtain informed approval, for each entity that so requests.⁴²⁶ MCI is incorrect, therefore, that we failed to analyze this proposal on its own terms. We did so and rejected it in the *CPNI Order*. Accordingly, we affirm our previous conclusion based upon our prior reasoning.

139. We also reject MCI and TRA's argument that the "except as required by law" clause in section 222(c)(1) encompasses, at least in part, section 272(c)(1).⁴²⁷ Both parties conclude that as a result of their interpretation of this clause there is no conflict between sections

⁴²⁰ MCI Petition at 2, 8-10.

⁴²¹ MCI Petition at 9.

⁴²² *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

⁴²³ *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

⁴²⁴ *CPNI Order*, 13 FCC Rcd at 8176-77, ¶ 163.

⁴²⁵ *CPNI Order*, 13 FCC Rcd at 8177, ¶ 163.

⁴²⁶ *CPNI Order*, 13 FCC Rcd at 8177, ¶ 163.

⁴²⁷ MCI Petition at 7-8; TRA Comments at 3.

222 and 272, and that section 272 trumps section 222.⁴²⁸ Bell Atlantic and SBC oppose this interpretation.⁴²⁹ SBC and Bell Atlantic respectively counter that Congress intended the "except required by law" clause as an exception (1) for disclosures pursuant to court order,⁴³⁰ and (2) to law enforcement agencies, regulators, and other public officials as required by subpoena regulation, statute, or other legal process.⁴³¹ Bell Atlantic also argues that if Congress meant to include section 272 as an exception to section 222 then it would have specifically included a reference to the section as it has done in other parts of the Act.⁴³² Although SBC and Bell Atlantic have proposed possible interpretations of this clause, we do not agree that those are the only interpretations. Unfortunately, the legislative history provides little guidance either way,⁴³³ and MCI and TRA's position is also plausible. Thus, we conclude that the meaning of this clause is ambiguous. As such, we must interpret this clause in a way that best reflects the statutory design and furthers the policies of the 1996 Act. We conclude, for the same reasons as those we previously described in the *CPNI Order*,⁴³⁴ that the "except as required by law" clause does not encompass section 272.

140. We affirm the *CPNI Order's* conclusion that the term "information" in section 272(c)(1) does not include CPNI⁴³⁵ despite CompTel and Intermedia's assertion that such an interpretation is contrary to the plain meaning of the Act and should be reconsidered. They argue that where Congress intended to limit the term "information" it did so explicitly, but the term

⁴²⁸ MCI Petition at 7-8; TRA Comments at 3.

⁴²⁹ Bell Atlantic Comments at 3-4; SBC Comments at 11.

⁴³⁰ SBC Comments at 11.

⁴³¹ Bell Atlantic Comments at 3.

⁴³² Bell Atlantic Comments at 4 & n.2.

⁴³³ The only related reference in the legislative history is a statement in the Joint Explanatory Statement's description of the Senate bill, and not the Conference agreement, which states as follows:

[i]n general, a BOC may not share with anyone customer-specific proprietary information without the consent of the person to whom it relates. Exceptions to this general rule permit disclosure in response to a court order or to initiate, render, bill and collect for telecommunications services.

Joint Explanatory Statement at 203.

⁴³⁴ *CPNI Order*, 13 FCC Rcd at 8175-79, ¶ 161-69.

⁴³⁵ *CPNI Order*, 13 FCC Rcd at 8171-72, 8174, ¶ 154, 158.

"information" in section 272(c)(1) is not qualified or limited in that way.⁴³⁶ Moreover, both argue that the fact that section 272(g)(3) contains the only exception to section 272(c) specifically created by Congress adds weight to its broad construction of the term "information" in section 272(c)(1). Finally, Intermedia argues that the definition of CPNI as "*information* that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service . . ." indicates that CPNI falls squarely within the category of "information" in section 272(c)(1). Taken in context of the entire Act, it is not readily apparent that the meaning of "information" in section 272 necessarily includes CPNI. As we stated in the *CPNI Order*, the sections read together could also indicate that section 222's specific definition of CPNI is meant to govern the more general use of the term "information" in section 272(c)(1).⁴³⁷

141. While the legislative history is silent about the meaning of "information" in section 272(c)(1), the structure of the Act indicates strongly that the provision is susceptible to differing meanings. Indeed, as the courts have cautioned, the Commission is bound to move beyond dictionary meanings of terms and to consider other possible interpretations, assess statutory objectives, weigh congressional policy, and apply our expertise in telecommunications in determining the meaning of provisions.⁴³⁸ In this instance, we believe that the structure of the Act belies petitioners' contention that the term "information" has a plain meaning that encompasses CPNI. In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating those constraints. As a practical matter, the interpretation proffered by petitioners would bar BOCs from sharing CPNI with their affiliates: the burden imposed by the nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown.⁴³⁹ We do not believe that is what Congress envisioned when it

⁴³⁶ CompTel Petition at 4-5.

⁴³⁷ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160. 47 U.S.C. § 222(f)(1) defines CPNI, in part, as:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier . . .

⁴³⁸ *See Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

⁴³⁹ *CPNI Order*, 13 FCC Rcd at 8174, ¶ 159.

enacted sections 222 and 272. Rather, as we concluded in the *CPNI Order*, we find it a more reasonable interpretation of the statute to conclude that section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs.⁴⁴⁰ For these reasons, we find that the "plain meaning" argument raised by Comptel and Intermedia is not persuasive, and further that their meaning is not the one Congress most likely intended. Therefore, we affirm our previous conclusion.

142. In addition, we are not persuaded by CompTel's assertion that there is no indication that section 222 was intended to trump section 272 because the Commission previously recognized, in the *First Report and Order*, that section 222's obligations are not exclusive.⁴⁴¹ We held in the *First Report and Order* that customer authorization pursuant to section 222(c)(1) does not extend to any CPNI subject to the Section 275(d) prohibition.⁴⁴² Section 275(d) prohibits local exchange carriers from the using or recording "in any fashion the occurrence or contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of such local exchange carrier, or any other entity."⁴⁴³ Thus, section 275(d) specifically describes a subset of CPNI, namely information concerning the occurrence of calls received by alarm monitoring service providers, that may not be used by local exchange carriers for marketing of alarm monitoring services on their own behalf or on behalf of any other entity.⁴⁴⁴ Because Congress unambiguously prohibited the use of such CPNI in section 275(d), we concluded that the specific prohibition in section 275(d) controls the general CPNI rules described in section 222.⁴⁴⁵ This stands in stark contrast to the difficult task of reconciling sections 222 and 272.⁴⁴⁶

143. Moreover, we do not agree with WorldCom's assertion that the Commission ignored section 272(b)(1). WorldCom argues that Section 272(b)(1) requires that a section 272 affiliate "operate independently from the Bell operating company," and prohibits the section 272

⁴⁴⁰ *CPNI Order*, 13 FCC Rcd at 8175, ¶ 160.

⁴⁴¹ CompTel Petition at 6.

⁴⁴² *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, Report and Order, CC Docket No. 96-115, 11 FCC Rcd 9553, 9557, ¶ 9 (*First Report and Order*).

⁴⁴³ 47 U.S.C. § 275(d).

⁴⁴⁴ 47 U.S.C. § 275(d).

⁴⁴⁵ *See First Report and Order*, 11 FCC Rcd at 9557, ¶ 9.

⁴⁴⁶ *CPNI Order*, 13 FCC Rcd at 8174-75, ¶ 160.

affiliate from providing or coordinating any of its CPNI-related functions with the BOC when read in conjunction with section 222.⁴⁴⁷ WorldCom apparently believes that the "operate independently" requirement of section 272(b)(1), when read in conjunction with section 222, demonstrates Congressional intent to establish a statutory dichotomy between CPNI and CPNI-related services used, disclosed, or accessed by other unaffiliated entities.⁴⁴⁸ WorldCom is incorrect, however, that we "ignored" section 272(b)(1). Rather, the Commission directly addressed this argument in the *CPNI Order*.⁴⁴⁹ Thus, we deny reconsideration on this basis as WorldCom has not presented any new arguments or facts we did not already consider.

144. Finally, several parties also argue that our interpretation of the interplay of sections 222 and 272 gives BOC affiliates an unfair competitive advantage over other competitors.⁴⁵⁰ These parties raise no new arguments or facts on reconsideration of this point that we did not already consider. We previously identified in detail specific mechanisms in section 222 that address such competitive concerns.⁴⁵¹ We therefore deny these parties' requests for reconsideration of this conclusion.

B. Disclosure of Non-CPNI Information Pursuant to Section 272

145. The Commission noted in a footnote in the *CPNI Order* that BOC non-discrimination obligations under section 272 would apply to the sharing of all other information and services with their section 272 affiliates.⁴⁵² The Common Carrier Bureau further concluded in the *Clarification Order* that a customer's name, address, and telephone number are not CPNI.⁴⁵³ The Bureau reasoned that "[i]f the definition of CPNI included a customer's name, address, and telephone number, a carrier would be prohibited from using its business records to contact any of its customers to market any new service that falls outside the scope of the existing service

⁴⁴⁷ WorldCom Comments at 6.

⁴⁴⁸ WorldCom Comments at 6.

⁴⁴⁹ *CPNI Order*, 13 FCC Rcd at 8179, ¶ 168 & n.582.

⁴⁵⁰ AT&T Petition at 23-24; CompTel Petition at 7-10; Sprint Petition at 7; Intermedia Comments at 9.

⁴⁵¹ *CPNI Order*, 13 FCC Rcd at 8177-78, ¶ 164-67.

⁴⁵² *CPNI Order*, 13 FCC Rcd at 8177, ¶ 164, n.573 ("We note, however, that our interpretation does not render the BOCs' nondiscrimination obligations as to 'information' or 'services' in section 272 meaningless. The requirement would apply to the BOCs' sharing of all other information (i.e., non-CPNI) and services with their section 272 affiliates.").

⁴⁵³ *Clarification Order*, 13 FCC Rcd at 12396-97, ¶ 9.

relationship with those customers.⁴⁵⁴

146. We agree with the Common Carrier Bureau's clarification and adopt its reasoning and conclusion as our own. Accordingly, we grant MCI's request that we clarify that a customer's name, address, and telephone number are "information" for purposes of section 272(c)(1), and if a BOC makes such information available to its affiliate, then it must make that information available to non-affiliated entities.⁴⁵⁵ We reject U S WEST's bald assertion that requiring disclosure of this information would raise "serious constitutional issues, such as those already presented by U S WEST." U S WEST does not explain which constitutional issues it considers implicated by this determination. To the extent that U S WEST means to incorporate any constitutional arguments raised by U S WEST and addressed in the *CPNI Order*, we reject those arguments for the reasons set forth in that order.⁴⁵⁶ We also deny U S WEST's request that the Commission hold that section 222 controls all issues involving customer information, rather than issues pertaining to CPNI.⁴⁵⁷ We are not persuaded that any portion of section 222 indicates that Congress intended such a result, nor does U S WEST delineate any portion of section 222 that would support its argument. Finally, we reject SBC's argument that, although this information is not CPNI, it is an activity that is encompassed within the joint marketing exception in section 272(g)(3) of the 1996 Act because "use of lists of such information is an integral part of—indeed, is likely the first step of—the overall marketing of long distance services."⁴⁵⁸ Such a consideration is outside the purview of this proceeding.

147. MCI also argues that the Commission should find that a customer's PIC choice and PIC-freeze status are not CPNI as defined in section 222(f)(1).⁴⁵⁹ Several carriers oppose MCI's argument.⁴⁶⁰ MCI asserts that the identity of a customer's carrier is not information concerning the "type" of service under section 222(f)(1)(A) and is not information "pertaining to" the service itself under section 222(f)(1)(B) despite the fact that the customer's PIC choice appears on the

⁴⁵⁴ *Clarification Order*, 13 FCC Rcd at 12396-97, ¶ 9.

⁴⁵⁵ MCI Petition at 13. We note, as the Bureau did, that our conclusion is not intended to override any other obligations carriers may have with respect to customer information, such as those imposed under section 64.1201 of the Commission's rules relating to carrier disclosure of customer billing names and addresses. *See Clarification Order*, 13 FCC Rcd at 12396, ¶ 9, n.20.

⁴⁵⁶ U S WEST Comments at 14.

⁴⁵⁷ U S WEST Comments at 14-15.

⁴⁵⁸ SBC Comments at 14.

⁴⁵⁹ MCI Petition at 14.

⁴⁶⁰ *E.g.*, Bell Atlantic Comments at 5-6; GTE Comments at 23-24; U S WEST Comments at 23-24.

customer's telephone bill.⁴⁶¹ MCI argues that PIC-freeze information does not meet the definition of CPNI for like reasons. We are not persuaded by MCI's statutory interpretation. We conclude that a customer's PIC choice falls squarely within the definition of CPNI set out in both sections 222(f)(1)(A) and (B), and that PIC-freeze information meets the requirements of section 222(f)(1)(A). Finally, we agree with GTE that this result is consistent with the privacy goals set out by Congress in section 222.⁴⁶²

C. Section 222 and Section 254

148. CenturyTel also argues that restricting the use of CPNI in marketing enhanced services and CPE to existing customers in rural exchanges is inconsistent with Universal Service provisions of the Act.⁴⁶³ CenturyTel argues that section 222(c) of the Act permits a carrier to use CPNI in the provision of new service if "...required by law or with approval of the customer... ." CenturyTel further argues that the Commission failed to include the "required by law" exception to the restrictions on the use of CPNI, and only included the "customer approval" exception in its rules⁴⁶⁴. CenturyTel maintains that the Commission must harmonize the two provisions of law by inserting the "required by law" exception to the CPNI rules, and recognizing that Congress's Universal Service requirements provide an additional exception to the CPNI restrictions.⁴⁶⁵ CenturyTel maintains that the Commission should permit rural telephone companies, as defined in section 153(37) of the Act to use, disclose, or permit access to CPNI to market to an existing customer in rural areas served by the rural telephone company categories of service to which that customer does not already subscribe.⁴⁶⁶

149. NTCA makes a similar argument. NTCA argues that the Commission is under a statutory mandate to promote the delivery of advanced telecommunications capability to rural areas on a reasonable and timely basis.⁴⁶⁷ NTCA points out that very often in a rural area, there is

⁴⁶¹ MCI Petition at 16. MCI further discloses that it has argued in its Comments to the *FNPRM* in the *CPNI Order* that a customer's PIC choice and PIC changes are carrier proprietary information of the interexchange carrier. *Id.* As such, MCI argues, a local exchange carrier may not use such information for marketing purposes. *Id.* We decline to address this argument in this proceeding because it is more appropriately left to the *FNPRM*.

⁴⁶² GTE Comments at 24 ("Given the privacy and consumer protection interests at stake, PIC and PIC-freeze information is precisely the type of information that customers want to be kept confidential from third parties.").

⁴⁶³ CenturyTel Reply at 5.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 6.

⁴⁶⁶ *Id.* at 7.

⁴⁶⁷ NTCA Petition at 4.

only one provider of telecommunications service, and the carrier does not benefit from an unfair competitive advantage by promoting new services or equipment to its subscribers.⁴⁶⁸ NTCA therefore requests that the Commission reconsider its "total service approach", stating that it disadvantages small LECs seeking to expand the array of services rural customers demand. TDS, in addition, asserts that restrictions on the use of CPNI to market information services run counter to the goal of affordable telecommunications and information services of section 254(b)(3) of the Act.⁴⁶⁹

150. We disagree with the arguments made by CenturyTel and NTCA. As stated in Section V.A of this Order, we affirm the "total service approach" for all carriers. We find no reason to impose different notification requirements on large and small carriers. As we stated in the *CPNI Order*, concerns regarding customer privacy are the same irrespective of the carrier's size or identity.⁴⁷⁰ Further to the extent that CenturyTel and NTCA are requesting to use CPNI, without customer approval, to market CPE and certain information services, those requests have been granted above.⁴⁷¹ We also disagree with CenturyTel and NTCA's argument that section 254 requires the use of CPNI to allow rural carriers to implement Congress' Universal Service standards. Section 254 envisions that rural carriers would introduce and make available new technology to all of its customers. The CPNI rules in no way discourage rural carriers from doing that. In fact, one could argue that some of the CPNI rules require a carrier to make all of its customers aware of such new technology rather than using CPNI to pick and choose which customers to market the new technology to. The basis of CenturyTel and NTCA's arguments, however, is that they do not want to market the new technology to all of its customers. They want to make it available only to certain customers that they select by using their customers' CPNI. We fail to see how section 254 requires this outcome.

D. Application of Nondiscrimination Rules Under Sections 201(b) and 202(a)

151. We reject MCI's argument that the nondiscrimination requirement described in section 272 should be applied to all ILECs through the requirements of sections 201(b) and 202(a).⁴⁷² MCI asserts that "the leveraging of dominance in one telecommunications market in order to gain a competitive advantage in another telecommunications market is an unreasonable

⁴⁶⁸ *Id.*

⁴⁶⁹ TDS Petition at 7.

⁴⁷⁰ *CPNI Order*, 13 FCC Rcd at 8161, ¶ 134.

⁴⁷¹ *See* Part V.B, *supra*.

⁴⁷² MCI Petition at 18-21. *See also* LCI Petition at 15; AT&T Reply at 22-23 & n. 24. Several parties oppose MCI's proposition. GTE Comments at 20-22; Sprint Comments at 6-8; Independent Alliance Reply at 8-9.

and unjust practice in violation of Section 201(b).⁴⁷³ MCI further asserts that it is a violation of section 202(a) "[f]or an ILEC to favor its own affiliate with local service CPNI and other customer-specific information that is not made available to competitors" as such an action would provide an "undue or unreasonable preference or advantage" to such an affiliate.⁴⁷⁴ Thus, MCI concludes sections 201(b) and 202(a) require that an ILEC, including BOCs, must electronically transmit a customer's CPNI to any other entity that has obtained that customer's oral approval upon the ILEC's use of such CPNI for marketing on behalf of its interexchange affiliate or disclosure of the CPNI to its affiliate.⁴⁷⁵

152. We agree with GTE that there is no justification to conclude, as a matter of statutory construction, that the broad non-discrimination requirements of these sections impose a specific disclosure obligation on ILEC use of CPNI.⁴⁷⁶ In any case, the same privacy concerns we identified in our discussion of the relationship between sections 222 and 272 apply here equally. For instance, requiring the disclosure of CPNI to other companies to maintain competitive neutrality would defeat, rather than protect, customers' privacy expectations and control over their own CPNI.⁴⁷⁷ We conclude that the specific consumer privacy and consumer choice protections established in section 222 supersede the general protections identified in sections 201(b) and 202(a). Thus, we are not persuaded that section 201(b) or section 202(a) require the result MCI seeks. Accordingly, we reject MCI's request.

IX. OTHER ISSUES

A. Status of Customer Rewards Program

153. Section 64.2005(b) of the Commission's Rules prohibits a telecommunications carrier from using, disclosing, or permitting access to CPNI to market to a customer, without customer approval, service offerings that are within a category of service to which the customer does *not* already subscribe.

154. Omnipoint and Vanguard contend that when a carrier provides free rewards, such as free equipment, for the purpose of retaining its accounts, the prohibition in section 64.2005(b)

⁴⁷³ MCI Petition at 18-19.

⁴⁷⁴ MCI Petition at 19.

⁴⁷⁵ MCI Petition at 19.

⁴⁷⁶ GTE Comments at 21.

⁴⁷⁷ *CPNI Order*, 13 FCC Rcd at 8176, ¶ 162.

should not apply because (1) the customer subscribes to the service for which the reward is provided; and (2) the reward is free, and therefore is not “marketed.”⁴⁷⁸ Omnipoint and Vanguard request clarification because they claim that carriers are more likely to offer rewards if they are able to target them to high-volume or long-term customers, and if carriers do not need to seek customer approval.⁴⁷⁹ No party has objected to this proposal.

155. We agree with Omnipoint and Vanguard that, where a carrier uses CPNI to provide free rewards to its customer, such use of CPNI is within the scope of the carrier-customer relationship. As such, the use of the CPNI is limited to the existing service relationship between the carrier and the customer. Therefore, although the provision of free rewards is a marketing activity, it does not violate the Act or our rules, provided the telecommunications service being marketed is the service currently subscribed to by the customer.⁴⁸⁰

B. Non-telecommunications Services Listed on Telephone Bill

156. CPNI is defined in section 222(f)(1)(B) of the Act as including “information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.” However, section 222(c)(1) prohibits a carrier's use of CPNI only where it receives the CPNI “by virtue of its provision of a telecommunications service.”

157. In the Common Carrier Bureau's *Clarification Order*, the Bureau said that “customer information derived from the provision of any non-telecommunications service, such as CPE or information services . . . may be used to provide or market any telecommunications service”⁴⁸¹ Omnipoint asks the Commission to clarify that section 222 does not prohibit the use of customer information derived from non-telecommunications services bundled with telecommunications services merely because charges for those services appeared on a customer's telephone bill. Omnipoint contends that its position logically follows from the statement in the *Clarification Order*.⁴⁸² U S WEST agrees with Omnipoint's position, but contends that the statute is clear, and no clarification is required.⁴⁸³

⁴⁷⁸ Omnipoint Petition at 19; Omnipoint Reply at 8; Vanguard Petition at 15-16.

⁴⁷⁹ Omnipoint Petition at 19; Omnipoint Reply at 8; Vanguard Petition at 15-16.

⁴⁸⁰ Vanguard Petition at 16.

⁴⁸¹ *Clarification Order*, 13 FCC Rcd at 12392-93, ¶ 3.

⁴⁸² Omnipoint Petition at 19-20.

⁴⁸³ U S WEST Comments at 24-25.

158. Section 222(c)(1) prohibits the use of CPNI only where it is derived from the provision of a telecommunications service. Consequently, we find that information that is not received by a carrier in connection with its provision of telecommunications service can be used by the carrier without customer approval, regardless of whether such information is contained in a bill generated by the carrier. Therefore, consistent with the *Clarification Order*, customer information derived from information services that are held not to be telecommunications services may be used, even if the telephone bill covers charges for such information services.

C. Provision of Calling Card As "Provision" of Service

159. LECs often offer so-called "post-paid" calling cards that enable customers to complete long distance calls over a particular interexchange carrier's network when the customer is away from home. Such cards enable a customer to have the calls billed subsequently on the customer's local bill issued by the LEC. MCI asks the Commission to clarify that LECs may not use CPNI garnered in such circumstances to market services that the LEC offers absent permission from the customer.⁴⁸⁴

160. We grant MCI's request for clarification. In the traditional LEC post-paid calling card situation, the LEC serves merely as a billing and collection agent on behalf of the interexchange carrier, much as the LEC does when a customer places long distance calls from home through the customer's pre-subscribed interexchange carrier (IXC). In both instances, the customer has established a customer-carrier relationship for the provision of interexchange services with the IXC that carried the customer's call over its network. The LEC, on the other hand, is standing in the place of the IXC only for billing and collection purposes, a service which the IXC could have chosen to provide itself. Where a LEC acts as a billing and collection agent, it may not use CPNI without the customer's permission under the total services approach.

D. Use of CPNI to Prevent Fraud

161. Section 222(d)(2) of the Act permits the use of CPNI to "protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to services . . ." Section 64.2005 of the Commission's Rules provides that a telecommunications carrier may use, disclose, or permit access to CPNI, without customer approval, for a number of purposes, but does not mention the

⁴⁸⁴ MCI Petition at 46.

use of CPNI in connection with fraud prevention programs.⁴⁸⁵

162. Comcast requests that the Commission clarify its rules to specify that (1) carriers are authorized to use CPNI in connection with fraud prevention programs; and (2) such use is permissible even after a customer has terminated service from the carrier making such use of the customer's CPNI.⁴⁸⁶ U S WEST argues that there is no need for the clarification requested by Comcast, because the statute is clear.⁴⁸⁷

163. We agree that Section 222(d)(2) on its face permits the use of CPNI in connection with fraud prevention programs, and does not limit such use of CPNI that is generated during the customer's period of service to any period of time. Since our rules do not cover the use of CPNI for fraud prevention programs, we will amend our rules to do so, in order to eliminate the possibility of misinterpretation.

E. Definition of "Subscribed" in Section 222(f)(1)(A)

164. We grant MCI's request for clarification of the meaning of the phrase "service subscribed to by any other customer" in section 222(f)(1)(A).⁴⁸⁸ Section 222(f)(1) defines CPNI, in part, as follows:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service *subscribed* to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and

(B) information contained in the bills pertaining to the telephone exchange service or telephone toll service received by a customer of a carrier . . .⁴⁸⁹

MCI concludes that section 222(f)(1)(A) does not cover casual traffic, but section 222(f)(1)(B) does.⁴⁹⁰ MCI further argues that under the usual meaning of the term "subscribed service," casual

⁴⁸⁵ 47 C.F.R. § 64.2005.

⁴⁸⁶ Comcast Petition at 19.

⁴⁸⁷ U S WEST Comments at 21.

⁴⁸⁸ MCI Petition at 48-49.

⁴⁸⁹ 47 U.S.C. § 222(f)(1) (emphasis added).

⁴⁹⁰ MCI Petition at 48-49.

traffic such as its 1-800-COLLECT service calls would not be included because they are carried outside any subscribed service relationship.⁴⁹¹ MCI asserts that a comparison of section 222(f)(1)(A) with section 222(f)(1)(B) "may shed some light on this question" as it more broadly defines CPNI as information contained in telephone bills.⁴⁹² We conclude that MCI's reading of section 222(f)(1) is reasonable and clarify that casual traffic reflected in a customer's telephone bill is CPNI under 222(f)(1)(B), but is not "subscribed" service in 222(f)(1)(A).

F. CPNI "Laundering"

165. MCI requests clarification that "the status of information as CPNI or carrier proprietary information [under section 222] is not lost or altered if [a] carrier discloses or transmits such information to an affiliated or unaffiliated entity, whether or not that entity transfers such information to other parties or back to the original carrier."⁴⁹³ MCI argues that the original carrier retains all of the obligations imposed by section 222 for such information, no matter where the CPNI or carrier proprietary information ultimately "resides."⁴⁹⁴ As such, MCI concludes that carriers must take steps to safeguard all such information, especially information that is transmitted to third parties in the course of providing service.⁴⁹⁵ MCI also seeks clarification that there is a rebuttable presumption that customer-specific information in a carrier's files was received on a confidential basis or through a service relationship governed by section 222.⁴⁹⁶ MCI argues that the burden should be on the carrier to rebut the presumption through records showing the time and manner of its first receipt of the information.⁴⁹⁷ MCI further asserts that customers should not be permitted to approve the use of CPNI that is also carrier proprietary information because carrier proprietary information is "absolutely protected under section 222(b)."⁴⁹⁸

166. We agree that as the stewards of CPNI and carrier proprietary information carriers must take steps to safeguard such information. Moreover, we find that implicit in section 222 is a

⁴⁹¹ MCI Petition at 48.

⁴⁹² MCI Petition at 48-49.

⁴⁹³ MCI Petition at 53. *See also* TRA Comments at 8.

⁴⁹⁴ MCI Petition at 53.

⁴⁹⁵ MCI Petition at 53.

⁴⁹⁶ MCI Petition at 53.

⁴⁹⁷ MCI Petition at 54.

⁴⁹⁸ MCI Petition at 54.

rebuttable presumption that information that fits the definition of CPNI contained in section 222(f)(1) is in fact CPNI. We decline, however, to speak to MCI's other clarification requests as they regard issues relating to carrier proprietary information in section 222(b) and enforcement mechanisms to ensure carrier compliance with both sections 222(a) and (b). As the *Further Notice of Proposed Rulemaking (FNPRM)* in this docket seeks comment on those specific issues, we would not want to prejudice resolution of those issues in this order.⁴⁹⁹

G. Acts of Agents of Wireless Providers

167. Vanguard argues that sales agents of CMRS providers are not subject to Commission rules, and that CMRS providers should not be held responsible for the use of CPNI independently obtained by agents because it would be difficult or impossible for CMRS providers to enforce these obligations on agents. Vanguard contends that difficulties arise because agents may sell the services of competing providers and their contracts do not expire in the near future.⁵⁰⁰

168. MCI responds that carriers are always responsible for the acts of their agents and, if they share CPNI with agents, must take all steps necessary to ensure that the agent does not misuse CPNI.⁵⁰¹ Omnipoint proposes that carriers should not be held responsible for the *ultra vires* acts of agents and should not be liable for an independent agent's conduct unless the carrier has ratified it.⁵⁰²

169. We find that telecommunications service providers will be responsible for the actions of their agents to comply with our CPNI rules to the extent that telecommunications service providers share CPNI with their agents. Moreover, telecommunications service providers will be responsible for the actions of agents with respect to the use of CPNI acquired by their agents. It is well established that principals are responsible for the actions of their agents.⁵⁰³ In the absence of such a rule, the important consumer protections enacted by Congress in section 222 may be vitiated by the actions of agents.

170. We believe that telecommunications service providers can meet these requirements through the private contract arrangements they have with their agents. Carriers would normally have negotiating leverage to enforce this requirement in the case of agents who serve more than

⁴⁹⁹ *CPNI Order*, 13 FCC Rcd at 8200-202, ¶ 203-207.

⁵⁰⁰ Vanguard Petition at 18-19; Vanguard Reply at 6-7.

⁵⁰¹ MCI Comments at 57--58.

⁵⁰² Omnipoint Reply at 9.

⁵⁰³ *See, e.g., United States v. Park*, 421 U.S. 658, 670, 95 S. Ct. 1903, 1910 (1975); *McAndrew v. Mularchuk*, 33 N.J. 172, 189, 162 A. 2d 820, 830 (Sup. Ct. N.J., 1960).

one carrier, since all carriers would be required to enforce the same rules. To the extent that it may be shown that some carriers would not be able to enforce these requirements, the Commission will address the exceptions on a case-by-case basis.

H. Information Known to Employees

171. Section 222(f)(1)(A) defines CPNI, in part, as including information “that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship.”⁵⁰⁴ We reject Comcast's argument that, based upon this definition, CPNI should not include “institutional knowledge” of the attributes of a particular customer's account gained by a carrier's employee from his or her work on the customer's account over the years if the employee does not actually access the customer's record,⁵⁰⁵ and U S WEST's argument that so long as an employee does not use a customer's record containing that customer's CPNI, the employee has not violated section 222.⁵⁰⁶ We are not persuaded that section 222(f)(1)(A) implies an exception based on whether the information acquired as part of the carrier-customer relationship is reduced to writing or is kept in the memory of a carrier representative. Thus, if a customer tells a carrier's employee information that otherwise fits the definition of CPNI provided in section 222(f)(1)(A), then that information is CPNI, no matter how the information is retained by the carrier.

I. Use of CPNI Under Section 222(d)(3) During Inbound Calls

172. Several carriers request that the Commission clarify the requirements for obtaining customer approval under section 222(d)(3).⁵⁰⁷ This section states that “[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents . . . to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.”⁵⁰⁸ In other words, for purposes of an inbound call—*i.e.*, a call to a carrier initiated by a customer—a carrier may use a customer's CPNI to market to that customer, but only if so authorized by the customer and only for the

⁵⁰⁴ 47 U.S.C. § 222(f)(1)(A).

⁵⁰⁵ Comcast Petition at 18.

⁵⁰⁶ U S WEST Comments at 21-22.

⁵⁰⁷ GTE Petition at 40-41; TDS Petition at 10-11; MCI Comments at 56; SBC Comments at 21.

⁵⁰⁸ 47 U.S.C. § 222(d)(3).

duration of the inbound call.

173. We agree with GTE, MCI, and SBC⁵⁰⁹ that the detailed notification outlined in section 64.2007(f) of our rules is not necessary prior to soliciting a customer's approval to use his or her CPNI for the duration of an inbound call.⁵¹⁰ It is unduly burdensome to require carriers to comply with the rule in light of the limited coverage of section 222(d)(3).⁵¹¹ Moreover, the rule reflects a discussion in the *CPNI Order* of the content of the general notification requirements under section 222(c)(1), and not those required for section 222(d)(3).⁵¹² Accordingly, we clarify that section 64.2007(f) does not apply to solicitations for customer approval under section 222(d)(3).

174. We deny, however, TDS's request that we reconsider our prior conclusion that section 222(d)(3) requires an affirmative customer approval.⁵¹³ We previously stated in the *CPNI Order* that section 222(d)(3) "contemplates oral approval."⁵¹⁴ TDS asserts that "[i]t would better implement the exception Congress intended to provide for inbound marketing to infer approval [under section 222(d)(3)] from the call unless the customer indicates otherwise on the call."⁵¹⁵ We conclude that a plain reading of the statute contradicts TDS's conclusion: if Congress meant consent to be inferred from the mere fact that the customer initiated the call, it would not have required that the customer both initiate the call *and* "approve[]" of the use of such information to provide such service.⁵¹⁶ We deny TDS's request for reconsideration for this reason and because TDS has not presented any new arguments or facts that the Commission did not consider in the *CPNI Order* with regard to this issue.

175. Finally, pursuant to GTE's request, we clarify that carriers need not maintain

⁵⁰⁹ GTE Petition at 40-41; MCI Comments at 56; SBC Comments at 21.

⁵¹⁰ 47 C.F.R. § 64.2007(f).

⁵¹¹ We believe, however, that in order for a customer to provide informed consent carriers must advise each customer—prior to soliciting permission to use his or her CPNI pursuant to section 222(d)(3)—of the specific CPNI the carrier wishes to use, the purpose for which the CPNI will be used, that the authorization to use the CPNI will only last for the duration of the call, and that a denial of approval will not affect the provision of any services to which the customer subscribes.

⁵¹² *CPNI Order*, 13 FCC Rcd at 8161-65, ¶¶ 135-42.

⁵¹³ *TDS Petition* at 11.

⁵¹⁴ *CPNI Order*, 13 FCC Rcd at 8147-48, ¶ 111; *see also id.* at 8152, ¶ 118.

⁵¹⁵ *TDS Petition* at 10-11.

⁵¹⁶ 47 U.S.C. § 222(d)(3).

records of notice and approval of carrier use of CPNI during inbound calls under section 222(d)(3).⁵¹⁷ Section 64.2007(e) of the Commission's rules requires that carriers maintain customer notification and approval records for one year.⁵¹⁸ Notifications and approvals under section 222(c)(1) and 222(d)(3), however, are markedly different in scope. Notifications and approvals under section 222(c)(1) are valid until revoked or limited by the customer, whereas notifications and approvals for inbound calls pursuant to section 222(d)(3) are only valid for the duration of each call. Therefore, unlike the retention of records of notifications and approvals under section 222(c)(1), which we previously concluded would facilitate the disposition of individual complaint proceedings if the sufficiency of a customer's notification or approval is challenged at some later time,⁵¹⁹ requiring the retention of records of section 222(d)(3) notifications and approvals would provide little evidentiary value because the notification and customer's authorization to use CPNI automatically evaporate upon completion of the call. We do not find any advantage to requiring carriers to retain such records for purposes of section 222(d)(3). As such, we conclude that such a requirement would place an unnecessary burden on carriers.

X. PROCEDURAL ISSUES

176. As required by the Regulatory Flexibility Act (RFA),⁵²⁰ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*.⁵²¹ The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁵²²

I. Need for and Objectives of this Order on Reconsideration and the Rules Adopted Herein.

⁵¹⁷ GTE Petition at 41.

⁵¹⁸ 47 C.F.R. § 64.2007(e).

⁵¹⁹ *CPNI Order*, 13 FCC Rcd at 8155, ¶ 123.

⁵²⁰ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁵²¹ *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*FNPRM*).

⁵²² See 5 U.S.C. § 604.

177. In the Order on Reconsideration, the Commission reconsiders the rules promulgated in the *CPNI Order* in light of an expanded record to better balance customer privacy concerns with those of customer convenience with the effect of minimizing the impact of our requirements on all carriers, including small and rural carriers. We have amended our rules relating to flagging and audit trails for all carriers, which will have a beneficial impact on small carriers. Additionally, we modify our rules to permit all carriers to use CPNI to market CPE to their customers, without express approval. We also find that customers give implied consent to use CPNI to CMRS carriers for the purpose of marketing all information services, but only give implied consent to wireline carriers for certain information services. We further modify our rules to allow carriers to use CPNI to regain customers who have switched to another carrier.

II. Summary of Significant Issues Raised by Public Comments in Response to the FRFA.

178. As discussed in Section V, a number of small carriers or their advocates present evidence that the safeguard requirements of the CPNI rules are particularly burdensome for small and rural carriers.⁵²³ We recognize, in light of the new evidence presented to the Commission, that the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. Our modification of the flagging and audit trail requirements in this order, however, effectively moots the requests we received from the parties seeking special treatment for small and rural carriers with respect to these requirements. Moreover, the restrictions lifted on the marketing of CPE and information services will lessen the impact of compliance with our rules for small and rural carriers, generally, and enable these carriers to more efficiently use their marketing resources.

III. Description and Estimates of the Number of Small Entities Affected by the First Report and Order.

179. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the actions taken in this *Order on Reconsideration*.⁵²⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵²⁵ In addition, the term "small business" has the same meaning as the term "small

523 ALLTEL; Independent Alliance; NTCA; TDS; *see also* CenturyTel; RCA; US SBA.

524 *See* 47 U.S.C. § 603(b)(3).

525 *See* 47 U.S.C. § 601(6).

business concern" under the Small Business Act.⁵²⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵²⁷ The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.⁵²⁸ We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

180. Although affected ILECs may have no more than 1,500 employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they either are dominant in their field of operations or are not independently owned and operated, and are therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by SBA as "small business concerns."⁵²⁹

181. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.⁵³⁰ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities

526 47 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

527 Small Business Act, 15 U.S.C. § 632 (1996).

528 13 C.F.R. § 121.201.

529 13 C.F.R. § 121.210 (SIC 4813).

530 United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size F-123 (1995) (1992 Census)*.

because they are not "independently owned and operated."⁵³¹ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this order.

182. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports there were 2,321 such telephone companies in operation for at least one year at the end of 1992.⁵³² According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.⁵³³ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small entity telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by this order.

183. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).⁵³⁴ According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.⁵³⁵ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 small providers of local

531 15 U.S.C. § 632(a)(1).

532 1992 Census.

533 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

534 Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying into the TRS Fund by Type of Carrier) (Nov. 1997)*.

535 *Id.*

exchange service are small entities or small ILECs that may be affected by this order.

184. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.⁵³⁶ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by this order.

185. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.⁵³⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by this order.

186. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.⁵³⁸ Although it seems certain that some of these companies are not independently owned and operated, or have

536 *Id.*

537 *Id.*

538 *Id.*

more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by this order.

187. *Pay Telephone Operators.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 441 companies reported that they were engaged in the provision of pay telephone services.⁵³⁹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 441 small entity pay telephone operators that may be affected by this order.

188. *Wireless Carriers.* The SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.⁵⁴⁰ According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.⁵⁴¹ The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this order.

189. *Cellular Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the

539 *Id.*

540 *1992 Census.*

541 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 804 companies reported that they were engaged in the provision of cellular services.⁵⁴² Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by this order.

190. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.⁵⁴³ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by this order.

191. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined small entity in the auctions for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁵⁴⁴ For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than \$15 million for the preceding three calendar years.⁵⁴⁵ These regulations defining small entity in the context of broadband PCS auctions have been approved by the SBA. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any,

542 *Id.* This category includes PCS carriers.

543 *Id.*

544 *Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Red 7824 (1996).

545 *Id.*

small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

192. *Narrowband PCS Licensees.* The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of \$40 million or less.⁵⁴⁶ For purposes of this FRFA, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.⁵⁴⁷ Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the facts that nearly all radiotelephone companies have fewer than 1,000 or fewer employees⁵⁴⁸ and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this FRFA, that all the remaining narrowband PCS licenses will be awarded to small entities.

193. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.⁵⁴⁹ The rules adopted in this order may apply to SMR providers in the 800

546 *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket No. 90-314, Third Memorandum Opinion and Order and Further Notice, 10 FCC Rcd 175, 208 (1994).*

547 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

548 The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).*

549 *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).*

MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by this order.

194. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Thus, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. Moreover, there is no basis on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by this order.

195. *Resellers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under the SBA's rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.⁵⁵⁰ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by this order.

IV. Steps Taken to Minimize Significant Economic Impact on Small Entities and Small Incumbent LECs, and Alternatives Considered.

196. We recognize, in light of the new evidence presented to the Commission, that the flagging and audit trail requirements promulgated in the *CPNI Order* might have a disparate impact on rural and small carriers. We have amended the flagging and audit trail requirements, and as more fully discussed in Section V, the amended rules leave it to the carrier's discretion to

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id.

determine what sort of system is best for their circumstances. Thus, carriers whose records are not presently maintained in electronic form are not required to implement electronic systems if they do not wish to do so. We believe this modification of our rules will significantly minimize any adverse economic impact on small entities that our original rules may have had.

V. Report to Congress

197. The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this Order on Reconsideration, in a report to Congress pursuant to the Small business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this SFRFA will also be published in the Federal Register.

B. SUPPLEMENTAL FINAL PAPERWORK REDUCTION ANALYSIS

198. The *CPNI Order* from which this Order on Reconsideration issues proposed changes to the Commission's information collection requirements.⁵⁵¹ As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13,⁵⁵² the *CPNI Order* invited the general public and the Office of Management and Budget (OMB) to comment on the proposed changes.⁵⁵³ On June 23, 1998, OMB approved all of the proposed changes to our information collection requirements in accordance with the PRA.⁵⁵⁴

199. This Order on Reconsideration amends our rules to merely state that telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI, and must maintain an audit mechanism that tracks CPNI usage. We have removed the requirements of sections 64.2009(a) and (c) that carriers must develop and implement software that flags a customer's CPNI approval status and must maintain an electronic audit mechanism that tracks access to customer accounts. These amendments are new collections of information within the meaning of the PRA.⁵⁵⁵ Implementation of these requirements is subject to approval by the OMB, as prescribed by the PRA.

551 *CPNI Order*, 13 FCC Rcd at 8193-200, ¶¶ 190-202.

552 44 U.S.C. §§ 3501 *et seq.*

553 *CPNI Order*, 13 FCC Rcd at 8215-16, ¶ 239-242.

554 *Notice of Office of Management and Budget Action*, OMB No. 3060-0715 (June 23, 1998).

555 44 U.S.C. §§ 3501-3520.

XI. ORDERING CLAUSES

200. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 10, 222 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160, 222 and 303(r), the ORDER is hereby ADOPTED. The requirements in this Order shall become effective 30 days after publication of a summary thereof in the Federal Register.

201. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i) and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 222, the Petitions for Reconsideration, as listed in Appendix A hereto, ARE GRANTED to the extent indicated herein and otherwise DENIED.

202. IT IS FURTHER ORDERED that, pursuant to sections 1, 4(i), 10 and 222 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 160 and 222, the Petitions for Forbearance, as listed in Appendix A hereto, ARE DENIED.

203. IT IS FURTHER ORDERED that section 64.2005(b)(3) of Part 64 of the Commission's rules, 47 C.F.R. § 64.2005(b)(3), is REMOVED as set forth in Appendix B hereto.

204. IT IS FURTHER ORDERED that section 64.2007(f)(4) of Part 64 of the Commission's rules, 47 C.F.R. § 64.2007(f)(4), is REMOVED as set forth in Appendix B hereto.

205. IT IS FURTHER ORDERED, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that we shall not seek enforcement against carriers regarding compliance with sections 64.2009(a) and (c) of Part 64 of the Commission's rules, 47 C.F.R. §§ 64.2009(a) and (c), as amended herein, until eight months after the release of this Order.

206. IT IS FURTHER ORDERED that Part 64 of the Commission's rules, 47 C.F.R. § 64, is AMENDED as set forth in Appendix B hereto, effective 30 days after publication of the text thereof in the Federal register, unless a notice is published in the Federal Register stating otherwise. The information collections contained within become effective 70 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

207. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

Petitions for Reconsideration
Filed May 26, 1998

ALLTEL Communications, Inc. (ALLTEL)
AT&T Corp.
BellSouth Corporation
Comcast Cellular Communications, Inc.
Competitive Telecommunications Association (CompTel)
Independent Alliance (Alliance)
LCI International Telecom Corp.
MCI Telecommunications Corporation
Metrocall, Inc. (Metrocall)
Omnipoint Communications, Inc
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
RAM Technologies, Inc. (RAM)
SBC Communications Inc.
Sprint Corporation
TDS Telecommunications Corporation
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)

Petitions for Forbearance

Personal Communications Industry Association (PCIA)

Petitions for Reconsideration/Forbearance

360N Communications Company
Ameritech
Bell Atlantic Telephone Companies (Bell Atlantic)
Cellular Telecommunications Industry Association
CommNet Cellular Inc.
GTE Service Corporation (GTE)
National Telephone Cooperative Association (NTCA)
Paging Network, Inc.
PrimeCo Personal Communications, L.P.

United States Telephone Association

Comments

AirTouch Communications, Inc. (AirTouch)
Allegiance Telecom, Inc. (Allegiance)
ALLTEL Communications, Inc. (ALLTEL)
Ameritech
Arch Communications, Inc. (Arch)
Association for Local Telecommunications Services (ALTS)
AT&T Corp.
Bell Atlantic Telephone Companies
Bell Atlantic Mobile, Inc.
BellSouth Corporation
Cable & Wireless, Inc. (CWI)
Celpage, Inc.
Commonwealth Telecom Services, Inc. (Commonwealth)
e.spire Communications, Inc. (e.spire)
Focal Communications Corp.
Frontier Corporation (Frontier)
GTE Service Corporation
Intermedia Communications Inc. (Intermedia)
KMC Telecom, Inc.
MCI Telecommunications Corporation
National Telephone Cooperative Association
Public Utility Commission of Texas (PUCT)
Rural Cellular Association
SBC Communications Inc.
Sprint Corporation
Telecommunications Resellers Association (TRA)
U S West, Inc.
WorldCom, Inc.

Reply Comments

Ameritech
AT&T Corp.
Bell Atlantic Telephone Companies
BellSouth Corporation
Celpage, Inc.
Century Telephone Enterprises, Inc.
Competitive Telecommunications Association (CompTel)
Comcast Cellular Communications, Inc.
GTE Service Corporation

Independent Alliance
LCI International Telecom Corp. (LCI)
MCI Telecommunications Corporation
National Telephone Cooperative Association
Omnipoint Communications, Inc.
Personal Communications Industry Association
PrimeCo Personal Communications, L.P
RAM Technologies, Inc. (RAM)
Rural Cellular Association (RCA)
SBC Communications, Inc.
Sprint Corporation
Time Warner Telecom Inc.
Vanguard Cellular Systems, Inc.

APPENDIX B FINAL RULES

For the reasons set out in the preamble, 47 C.F.R. Part 64 is amended as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows: 47 U.S.C. 10, 201, 218, 226, 228, 332, unless otherwise noted.

2. § 64.2005(b)(1) is amended to read as follows:

(1) A wireless provider may use, disclose, or permit access to CPNI derived from its provision of CMRS, without customer approval, for the provision of CPE and information service(s). A wireline carrier may use, disclose or permit access to CPNI derived from its provision of local exchange service or interexchange service, without customer approval, for the provision of CPE and call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and protocol conversions.

3. In § 64.2005 remove paragraph (b)(3).

4. In § 64.2005, add paragraph (d) to read as follows:

(d) A telecommunications carrier may use, disclose, or permit access to CPNI to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.

5. In § 64.2007 remove paragraph (f)(4).

6. Paragraphs (a), (c) and (e) of § 64.2009 are amended to read as follows:

(a) Telecommunications carriers must implement a system by which the status of a customer's CPNI approval can be clearly established prior to the use of CPNI.

* * *

(c) All carriers shall maintain a record, electronically or in some other manner, of their sales and marketing campaigns that use CPNI. The record must include a description of each campaign, the specific CPNI that was used in the campaign, the date and purpose of the campaign, and what products or services were offered as part of the campaign. Carriers shall retain the record for a minimum of one year.

* * *

(e) A telecommunications carrier must have an officer, as an agent of the carrier, sign a

compliance certificate on an annual basis stating that the officer has personal knowledge that the company has established operating procedures that are adequate to ensure compliance with the rules in this subpart. The carrier must provide a statement accompanying the certificate explaining how its operating procedures ensure that it is or is not in compliance with the rules in this subpart.

**Statement of Commissioner Harold W. Furchtgott-Roth
Concurring in Part**

Re: *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards Of Section 271 and 272 of the Communications Act of 1934, As Amended. CC Docket Nos. 96-45 and 96-149.*

I support today's Order to the extent that it provides the relief requested by the petitioners. I question, however, the approach that the Commission has taken with respect to certain of the forbearance petitions. While I concur in the result reached in today's Order, I would have preferred reaching it through action taken on these petitions.

I am troubled that the Commission has decided to provide regulatory relief through reconsideration and then use that proceeding as part of the justification for denying full regulatory forbearance as requested. The Commission has determined that the simplest method of dealing with these petitions is to deny the forbearance relief at issue while at the same time providing relief in a separate proceeding. In particular, I am troubled by the approach that the Commission has taken with respect to carriers' use of customer proprietary network information (CPNI) to market customer premises equipment (CPE) and information services. In this respect, I agree with the well-reasoned statement of my colleague, Commissioner Tristani, to the extent that she believes that the Commission's reading of section 222(c)(1)(B) of the Act is "contrary to the plain language of what the Commission previously found to be a 'clear and ambiguous' provision."⁵⁵⁶ I only differ from Commissioner Tristani in that I would have reached the same conclusion as the Commission by granting the forbearance petitions on this issue.⁵⁵⁷ I do not understand why the Commission chooses to reach this outcome through a strained interpretation of the statute when the same relief is warranted, and more justifiable, through the forbearance mechanism.

Finally, I write to repeat my position that it is the Commission that may, by the express terms of the statute, extend the initial one-year period for acting on a petition for forbearance by

⁵⁵⁶ See Separate Statement of Commissioner Gloria Tristani, Dissenting in Part, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards Of Section 271 and 272 of the Communications Act of 1934, As Amended, CC Docket Nos. 96-45 and 96-149. I incorporate by reference Commissioner Tristani's persuasive position on the issue of the Commission's statutory interpretation of this section.

⁵⁵⁷ In fact, I would have gone farther than the Commission in this respect. I would have supported forbearance from the statute for purposes of marketing Internet access services as well. The market for these services is competitive, and I am not convinced that the section 10 criteria are not satisfied with respect to these services.

an additional 90 days if it finds that an extension is necessary to meet the requirements of section 10. I regret that, in the present matter, it was the Bureau and not the Commission that issued the order extending the deadline. Contrary to previous occasions, however, the Common Carrier Bureau, in this instance, consulted with the Commission prior to extending the deadline. Although I continue to believe that the Commission is charged with adopting an order extending the section 10 deadline, I refrain from dissenting on this ground, because in this case, the Bureau received a signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

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**Separate Statement of Commissioner Gloria Tristani,
Dissenting in Part**

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended. CC Docket Nos. 96-45 and 96-149.

I am forced to write separately, because I disagree with the majority in one major respect. I believe that the majority's reading of section 222(c)(1)(B) of the Act is contrary to the plain language of what the Commission previously found to be a "clear and unambiguous" provision.⁵⁵⁸ Accordingly, I believe that the Commission should have denied the petitions for reconsideration of our conclusion that carriers may not use customer proprietary network information (CPNI) to market customer premises equipment (CPE) and most information services without first obtaining customer approval.⁵⁵⁹

Section 222(c)(1)(B) sets forth an exception to the general prohibition against the use of CPNI without customer approval for information related to "services necessary to, or used in, the provision of . . . telecommunications service, including the publishing of directories."⁵⁶⁰ In the *CPNI Order*, the Commission concluded that CPE and most information services do not fall under section 222(c)(1)(B), because they are not "services necessary to, or used in, the provision of . . . telecommunications service."⁵⁶¹ I believe that this reading is compelled by the terms of the statute. Therefore, I must dissent from the majority's reading of section 222(c)(1)(B) to now include "*products and services provisioned by the carrier with the underlying telecommunications service.*"⁵⁶² The majority rests its interpretation on the grounds that such products and services are "related" to and "facilitate"

⁵⁵⁸ 47 U.S.C. § 222(c)(1)(B). *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8120, ¶ 75 (1998) (*CPNI Order*).

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I do not dissent from the majority's clarification that, like the provision of installation, repair, and maintenance of inside wiring in the wireline context, the tuning and retuning of CMRS units and repair and maintenance of such units is a service necessary to or used in the provision of CMRS service under section 222(c)(1)(B).

⁵⁶⁰ 47 U.S.C. § 222(c)(1)(B).

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CPNI Order, 13 FCC Rcd at 8116, ¶ 71.

⁵⁶² *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, ___ FCC Rcd ___, ___, ¶ 40 (1999) (*CPNI Recon*) (emphasis added).

the provision of an underlying telecommunications service and customers “expect” them to be jointly provisioned, a basis divorced from the language of section 222(c)(1)(B) itself.⁵⁶³

By reading the term “services” to include both products and services, the majority impermissibly expands the scope of the section 222(c)(1)(B) exception. I believe that had Congress intended the section 222(c)(1)(B) exception to extend to equipment, it would have said so explicitly, creating an exception for both services and equipment necessary to, or used in, the provision of telecommunications services. Instead, as the Commission held in the *CPNI Order*, the exception set forth in section 222(c)(1)(B), by its terms, is limited to “services.” CPE is by definition equipment, not a service.⁵⁶⁴ I am puzzled by the majority’s assertion that “its previous interpretation construed the term ‘services’ in isolation from the phrase ‘necessary to, or used in.’”⁵⁶⁵ Basic principles of statutory construction require that effect be given to every word of the statute, so that no word will be rendered meaningless.⁵⁶⁶ Because petitioners have not presented any new arguments, facts, or evidence that persuades me that we incorrectly interpreted the text of this section, I continue to believe that the statutory language precludes the inclusion of equipment within section 222(c)(1)(B), even if the equipment is “necessary to, or used in, the provision of . . . telecommunications service.”⁵⁶⁷

I am not persuaded by the majority’s reliance on the only example that Congress included in section 222(c)(1)(B), “the publishing of directories,” as justification for its reading of “services” to include “products and services.”⁵⁶⁸ The Commission previously expressly rejected the argument on which it now relies -- that the directory publishing example justifies a broader reading of section 222(c)(1)(B) -- in the *CPNI Order*. In that order, we stated that the publishing of directories is appropriately viewed as necessary to and used in the provision

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Id. at __, ¶ 41. An administrative agency may deviate from the text of a statute in very limited circumstances, such as to harmonize conflicts between statutes. *See, e.g., Citizens to Save Spencer County et al. v. E.P.A.*, 600 F.2d 844 (D.C. Cir. 1979). Here, the majority seeks to extend the permissible use of CPNI beyond the plain meaning of section 222, yet does not demonstrate statutory conflict, evidence of congressional intent contrary to the conclusion we reached in the *CPNI Order*, or other extraordinary circumstances that would provide legitimate grounds on which to reconsider the Commission’s previous action.

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CPNI Order, 13 FCC Rcd at 8116, ¶ 71 (stating that “CPE is by definition customer premises *equipment*, and as such historically has been categorized and referred to as equipment”).

⁵⁶⁵ *CPNI Recon*, __ FCC Rcd at __, ¶ 41.

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See, e.g., Carcamo-Flores v. INS, 805 F.2d 60, 66 (2d Cir. 1986) (stating that “[t]here is a presumption against construing a statute as containing superfluous or meaningless words”) (quoting *United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968)).

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See 47 U.S.C. § 222(c)(1)(B). Nor do I find merit in petitioners’ argument that inside wiring installation, maintenance, and repair services are tantamount to CPE under section 222(c)(1)(B). Comcast Petition at 13-14; CommNet Cellular Petition at 2-3; CTIA Petition at 25-29; Omnipoint Petition at 6-7; USTA Petition at 2-6; AT&T Comments at 9. While inside wiring is no more a service than CPE, it is not the inside wiring equipment itself that constitutes a service under section 222(c)(1)(B), but rather the installation, maintenance, and repair of the inside wire. *CPNI Order*, 13 FCC Rcd at 8124, ¶ 80.

⁵⁶⁸ 47 U.S.C. § 222(c)(1)(B). *CPNI Recon*, __ FCC Rcd at __, ¶ 41. *See also* Comcast Petition at 13-14; Omnipoint Petition at 5 (arguing that the inclusion in the statute of this example requires a broader reading than the Commission adopted in the *CPNI Order*); PrimeCo Petition at 6-7 (asserting that for many CMRS customers voicemail is a more useful and more important feature than the availability of published directories).

of complete and adequate telecommunications service.⁵⁶⁹ I am baffled by the majority's new reading of the directory publishing example to sweep products, and equipment in particular, into the language of section 222(c)(1)(B).

In adopting the argument of several petitioners that information services are "services necessary to, or used in, the provision of . . . telecommunications service" for purposes section 222(c)(1)(B), the majority has read "necessary to, or used in, the provision of . . . telecommunications services"⁵⁷⁰ to mean "provisioned by the carrier *with* the underlying telecommunications service."⁵⁷¹ We concluded in the *CPNI Order* that while information services, such as fax store and forward and Internet access services, constitute non-telecommunications "services," most such services are not "necessary to, or used in" the carrier's provision of telecommunications service. Rather, we reasoned that although telecommunications service is "necessary to, or used in, the provision of" any information services, information services generally are not "necessary to, or used in, the provision of" any telecommunications service.⁵⁷² While I acknowledge that information services can be an important component of the services that a customer receives from a telecommunications carrier, this fact alone does not change the conclusion that is compelled by the terms of the statute.

⁵⁶⁹ I am not persuaded by SBC's argument that the Commission failed to articulate a reasoned basis for its conclusion that services formerly characterized as "adjunct-to-basic," in contrast to information services, are covered under section 222(c)(1)(B). See *CPNI Order*, 13 FCC Rcd at 8118, ¶ 73 (stating that "[e]xamples of adjunct-to-basic services include speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking, call return, repeat dialing, call tracking, and certain centrex features") (citation omitted); SBC Petition at 7. See also NTCA Petition at 6-7. In drawing this distinction, the *CPNI Order* relied in part on Commission precedent. The Commission noted that it previously determined that the computer processing functions of adjunct-to-basic services are "used in conjunction with 'voice' service" and "help telephone companies provide or manage basic telephone services," as opposed to the information conveyed through enhanced services. *CPNI Order*, 13 FCC Rcd at 8118, ¶ 73 (emphasis in original) (citing *North American Telecommunications Association Petition for Declaratory Ruling under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 358, ¶ 23-24 (1985), recon., 3 FCC Rcd 4385 (1988)). Thus, the Commission interpreted the language of section 222(c)(1)(B) to reach these adjunct-to-basic services, which are "used in" the carrier's provision of its telecommunications service, to the exclusion of information services. I note that the Commission recently recognized adjunct-to-basic services as being telecommunications services, and our treatment of these services in the *CPNI Order* is consistent with that determination. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21958, ¶ 107 (1996).

⁵⁷⁰ 47 U.S.C. § 222(c)(1)(B).

⁵⁷¹ *CPNI Recon*, __ FCC Rcd at __, ¶ 40 (emphasis added).

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⁵⁷² 47 U.S.C. § 222(c)(1)(B); *CPNI Order*, 13 FCC Rcd at 8116, ¶ 72.

As the Commission has concluded previously, “the meaning of the term ‘necessary’ depends on the purposes of the statutory provision in which it is found.”⁵⁷³ The focus and placement of section 222 within the Act indicate Congress’s intent that the Commission augment consumer privacy protections. Section 222 reflects Congress’s view that with increased competition comes a risk that consumer privacy interests will not be protected by the marketplace. As a result, I continue to believe that control over the use of CPNI properly belongs in the hands of the customer. A narrow construction of the phrase “necessary to, or used in” best accomplishes the goals of the statute.⁵⁷⁴

In today’s decision, the majority also relies on what it concludes are customer expectations regarding how services will be provisioned as the touchstone of whether an offering falls within the section 222(c)(1)(B) exception, an approach that I believe cannot be squared with the language of that provision. For example, the majority’s reliance on the lack of record evidence showing that allowing wireline carriers to market CPE to their customers violates customer expectations is misplaced.⁵⁷⁵ Ultimately, regardless of what customers expect, the language of the provision itself governs. Similarly, the “principle of customer convenience”⁵⁷⁶ cannot be exalted above congressional intent in enacting the provision.

Accordingly, unlike the majority, I would decline to grant petitioners’ requests that, because of the integrated nature of certain information services with telecommunications service, we should distinguish among information services for purposes of section 222(c)(1)(B).⁵⁷⁷ In my view, none of the parties has presented a statutory basis for treating messaging services differently from other information services under section 222. As I note above, information services may well constitute an important component of the services a telecommunications carrier offers its customers. Nevertheless, these information services are not necessary to, or used in, the provision of the underlying telecommunications service.

In construing the phrase “services necessary to, or used in,”⁵⁷⁸ the Commission must be guided by the statute’s focus on the protection of customer privacy and hence narrowly

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See, e.g., In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9100, ¶ 618 (1997) (finding that the phrase “necessary for the provision of health care services . . . including instruction relating to such services” of section 254(h) means reasonably related to the provision of health care services, because a broad reading of the phrase is consistent with the purpose of that section). *See also Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (stating that a statute should be interpreted in light of the purposes that Congress sought to serve by its enactment).

⁵⁷⁴ For similar reasons, I do not agree with SBC and GTE that the term “necessary to” in section 222(c)(1)(B) should not be interpreted restrictively because in other proceedings the Commission has used the term “necessary” not to mean “indispensable” but rather “used” or “useful.” *See* GTE Petition at 8; SBC Petition at 7.

⁵⁷⁵ *CPNI Recon.*, __ FCC Rcd at __, ¶ 44.

⁵⁷⁶ *Id.* at __, ¶ 42.

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See Bell Atlantic Petition at 7-9; GTE Petition at 21-26; NTCA Petition at 6-7; SBC Petition at 7; TDS Petition at 6. *See also* PrimeCo Petition at 6-7 (asserting that voice mail enables CMRS customers to receive communications when the handset is temporarily out of service); Cable & Wireless Comments at 10 (urging the Commission to allow use of CPNI only when the information service is an integral part of or otherwise related to the underlying telecommunications service).

⁵⁷⁸ 47 U.S.C. § 222(c)(1)(B).

construe the statute in order to optimize consumer protections. A carrier need only obtain permission to use CPNI in order to market CPE or information services to its customers, a minimal burden when weighed against the purposes of section 222. I believe this approach best effectuates Congress's intent by balancing competitive interests with the consumers' interests in privacy and control over CPNI.