carriers may use CPNI, without customer approval, only for telecommunications-related purposes, instead of the language of section 222(c)(1)(A), which expressly limits carrier use to the "provision of the service from which [the CPNI] is derived."[120]

34. We likewise reject parties' suggestions that we interpret section 222(c)(1)(A) based on prior Commission decisions, including the *McCaw* orders,[121] various *Computer III* orders,[122] as well as the Common Carrier Bureau's opinion in *BankAmerica v. AT&T*,[123] which permitted the sharing of customer information among affiliated companies based on the existing business relationship and the perceived benefits of integrated marketing. First, with respect to prior Commission decisions, the 1996 Act, and section 222 in particular, altered the regulatory landscape which served as the backdrop for those decisions. Congress adopted a specific provision regarding CPNI that differs in fundamental respects from the Commission's

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[120] Sprint Reply at 9. For the reasons stated above, we also reject AT&T's related argument that the 1996 Act's definitions of telecommunications and telecommunications service are equivalent in all material respects to the Commission's definition of "basic service" under the *Computer III* framework, thus suggesting that Congress intended to include all of a carrier's basic telecommunications services within the meaning of section 222(c)(1). AT&T Comments at 6; AT&T *ex parte* (filed Apr. 30, 1997) at att. at 1.

[121] *In Re Application of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5886 (1994) (*McCaw Transfer Order*); *In Re Application of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11786, 11795, 11799 (1995) (*McCaw Recon. Order*); *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (*SBC v. FCC*) (collectively referred to as *McCaw* orders). *See, e.g.*, AT&T Comments at 9-11; AT&T Reply at 3-4; SBC Comments at 8; U S WEST Comments at 4.

[122] *BOC CPE Relief Order*, 2 FCC Rcd 143 at 147, *supra* note 34; *BOC Safeguards Order*, 6 FCC Rcd 7571 at 7610, *supra* note 32; *Motion of Southwestern Bell Mobile Systems, Inc. for a Declaratory Ruling that Section 22.903 and Other Sections of the Commission's Rules Permit the Cellular Affiliate of a Bell Operating Company to Provide Competitive Landline Local Exchange Service Outside the Region in Which the Bell Operating Company is the Local Exchange Carrier*, Memorandum Opinion and Order, CWD 95-5, 11 FCC Rcd 3386, 3395 (1995) (*SBMS Waiver Order*); *Phase II Recon. Order*, 3 FCC Rcd 1150, 1162, *supra* note 32; *Third Computer Inquiry*, Notice of Proposed Rulemaking, CC Docket No. 85-229, 50 Fed. Reg. 33581, 33592 n.58 (1985); *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph*, Memorandum Opinion and Notice of Proposed Rulemaking, CC Docket No. 85-26, 102 FCC 2d 627, 639-40 (1985), Order, 102 FCC 2d 655, 693 (1985), *supra* note 32 for additional procedural history, (collectively referred to as *Computer III* orders). *See, e.g.*, AT&T Comments at 9-11; AT&T Reply at 4; Bell Atlantic Comments at 6; SBC Comments at 8; U S WEST Comments at 4.

[123] *BankAmerica Corp. v. AT&T*, File Nos. E-90-211, E-90-212, and E-90-213, Memorandum Opinion, 8 FCC Rcd 8782, 8787 (1993) (*BankAmerica v. AT&T*). *See, e.g.*, Bell Atlantic Comments at 6; U S WEST *ex parte* (filed Dec. 2, 1996) at 6 & n.13.

existing CPNI regime. While the Commission previously may have permitted more sharing of information under the rubric of *Computer III* and within a pre-1996 Act environment that limited carriers' market entry, we conclude that Congress drew a specific and different balance in section 222. To the extent our prior decisions are relevant at all to the interpretation of section 222(c)(1)(A), they suggest Congress deliberately chose not to encourage the kind of information sharing that the Commission may have permitted in the past, and which is now proposed by advocates of the single category approach. For these reasons, we similarly reject parties' reliance on other statutes, particularly the *Cable Television Consumer Protection and Competition Act* (1992 Cable Act)[124] and the *Telephone Consumer Protection Act of 1991 (TCPA)*,[125] as well as the Commission's implementation of those Acts.[126] Neither of these statutes contains the specific and unique language of section 222 which expressly limits a carrier's "use" of customer information.[127] Again, to the extent other provisions are probative, they indicate that Congress was clear when it intended to exempt information sharing within the context of the existing business relationship from general consumer protection provisions, but chose not to in section 222.

35. On the other hand, we also conclude, contrary to the suggestion of its proponents, that the discrete offering approach is not required by the language of

[124] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. § 551)(*1992 Cable Act*). *See, e.g.*, Bell Atlantic Comments at 8; BellSouth Comments at 9; BOC Coalition *ex parte* (filed May 21, 1997) at 16; PacTel *ex parte* (filed Nov. 22, 1996) at 11; USTA Comments at 5; U S WEST Comments at 8, 12 n.30.

[125] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991)(codified at 47 U.S.C. § 227)(*TCPA*). BellSouth Comments at 9.

[126] *In the Matter of the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992) (*TCPA Notice*). AT&T Comments at 8-9; AT&T Reply at 9. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*TCPA Order*). BellSouth Comments at 9; SBC Comments at 9; SBC Reply at 7; U S WEST Comments at 16-17 n.41; U S WEST *ex parte* (filed Oct. 17, 1996) at 4; U S WEST *ex parte* (filed Feb. 19, 1997) at 4. U S WEST also cites the Consumer Credit Reporting Reform Act of 1996, 142 Cong. Rec. H. 11,746 § 2402(e)(4)(i) (Sept. 28, 1996). U S WEST *ex parte* (filed Dec. 2, 1996) at 6 & n.16.

[127] The Act allows a general sharing of information "to render a cable service *or other services* provided by cable operator to the subscriber." 47 U.S.C. § 551 (emphasis added). This language is in contrast to section 222(c)(1)'s restriction on carrier CPNI use only for the provision of "the telecommunications service from which the information was derived" or "services necessary to, or used in, the provision of such telecommunications service." For discussion of TCPA, and Commission's implementation of that Act, *see infra* Part V.B.2.

section 222(c)(1)(A).[128] Although the statutory language makes clear that carriers' CPNI use is limited in some respect, and thus fails to support the single category approach, it does not dictate the most narrow possible interpretation (*i.e.*, the discrete offering approach). Nor does the statutory language, however, rule out a more general subscription-based understanding of the phrase "telecommunication service from which such [CPNI] is derived," consistent with the total service approach. As discussed *infra*, we believe as a policy matter that the discrete category approach is not desirable because it is not required to protect either customers' reasonable expectations of privacy or competitors' interests.[129] Rather, 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, but which restricts carriers from using CPNI in connection with categories of service to which customers do not subscribe.[130] The total service approach permits CPNI to be used for marketing purposes only to the extent that a carrier is marketing alternative versions, which may include additional or related offerings, of the customer's existing subscribed service. The carrier's use of CPNI in this way fairly falls within the language of "the provision of the telecommunications service from which such information is derived"[131] because it allows the carrier to suggest more beneficial ways of providing the service to which the customer presently subscribes.

36. Our rejection of the discrete category approach, and support for the total service approach, is also informed by our understanding of the relationship between sections 222(c)(1)(A) and (d)(1). Specifically, the Texas Commission explains its discrete offering interpretation of section 222(c)(1)(A) as limiting the carriers' CPNI use to the "initiation, provisioning, billing, etc. of, or necessary to," the discrete feature of service subscribed to by the customer.[132] We believe this view essentially interprets the scope of section 222(c)(1)(A) as being no broader than section 222(d)(1), which provides that carriers may use, disclose, or permit access to CPNI to, among other things, "*initiate*" and "*render*" telecommunications services.[133] Although both sections 222(c)(1) and (d) establish exceptions

[128] Proponents argue that the discrete offering interpretation is supported in particular by section 222(c)(1)'s singular use of the term "*a* telecommunications *service*," and section 222(f)(1)(A)'s definition of CPNI as "information that relates to . . . use of *a* telecommunications *service subscribed to by any customer*." *See, e.g.*, CPSR Reply at 7; NTIA Further Reply at 11; Texas Commission Comments at 6-7.

[129] *See* discussion *infra* ¶ 57.

[130] *See* discussion *infra* ¶ ¶ 55-57.

[131] 47 U.S.C. § 222(c)(1)(A).

[132] Texas Commission Comments at 8.

[133] 47 U.S.C. § 222(d)(1).

to the general CPNI use and sharing prohibitions, and overlap in certain respects,[134] these provisions must be given independent effect.[135] Had Congress intended to permit carriers to use CPNI only for "rendering" service, as suggested under the discrete offering approach, and as explicitly provided in section 222(d)(1), it would not have needed to create the exception in section 222(c)(1)(A). In contrast, by interpreting section 222(c)(1)(A) as we do, to permit some use of CPNI for marketing purposes, we give meaning to both statutory provisions. Indeed, in contrast with the various parties' views concerning the scope of section 222(c)(1)(A), commenters that addressed the meaning of section 222(d)(1) uniformly suggest that it does not extend to a carrier's use of CPNI for marketing purposes.[136]

37. The legislative history confirms our view that in section 222 Congress intended neither to allow carriers unlimited use of CPNI for marketing purposes as they moved into new service avenues opened through the 1996 Act, nor to restrict carrier use of CPNI for marketing purposes altogether. Specifically, although the general purpose of the 1996 Act was to expand markets available to both new and established carriers, the legislative history makes clear that Congress specifically intended section 222 to ensure that customers retained control over CPNI in the face of the powerful carrier incentives to use such CPNI to gain a foothold in new markets. The Conference Report states that, through section 222, Congress sought to "balance both competitive and consumer privacy interests with respect to CPNI."[137] Congress further admonishes that "[i]n new subsection 222(c) the use of CPNI by telecommunications carriers is *limited*, except as provided by law or with the approval of the customer."[138] Contrary to Congressional intent as expressed in the legislative history, the single category approach asserts a broad carrier right, affording customers virtually no control over intra-company use of their CPNI. This approach would undermine section 222's focus on balancing customer privacy interests,[139] and likewise would potentially harm competition. Carriers already in possession of CPNI could leverage their control of CPNI in one market to

[134] *See* discussion *infra* ¶ 82.

[135] *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 978 (1991) ("When two parts of a provision . . . use different language to address the same or similar subject matter, a difference in meaning is assumed.")(citing *Walton v. Arizona*, 497 U.S. 639, 669-670 (1990)).

[136] *See, e.g.*, MCI Further Comments at 11-12 & n.20; MCI *ex parte* (Aug. 15, 1997) at 3-4; SBC Comments at 13.

[137] Joint Explanatory Statement at 205, *supra* note 2.

[138] *Id.* (emphasis added).

[139] *See, e.g.*, NTIA Further Reply at 13; Texas Commission Comments at 7-8; TRA Reply at 9.

perpetuate their dominance as they enter other service markets.[140] In these respects, therefore, the legislative history wholly fails to support the single category approach. On the other hand, the legislative history makes no mention of any need or intention to restrict the carrier's use of CPNI to market discrete offerings within the service subscribed to by the customer. In this regard, therefore, the legislative history likewise does not support the discrete offering approach.

38. Thus, contrary to U S WEST's suggestion, we do not believe that; because express service distinctions were eliminated during the Conference Agreement, Congress intended to abandon them.[141] Rather, Congress may well have deleted specific reference to local and long distance services in section 222(c)(1)(A) because they were superfluous. The repeated use of the singular "service" and the restrictive language "the telecommunications service from which such [CPNI] is derived" in section 222(c)(1) serves to draw these same service distinctions. Moreover, although service distinctions are not expressly referenced in the language of section 222(c)(1)(A), they are retained in the statutory definition of CPNI, which describes information contained in the bills pertaining to "telephone exchange service or telephone toll service"[142] In this definition, Congress also describes CPNI in terms of "*a* telecommunications service *subscribed to by any customer,*"[143] which additionally suggests that Congress understood the scope of section 222(c)(1) to be limited according to the total service *subscribed to* by a customer.

39. Furthermore, in contrast with the single category approach, the limitations on carriers' use or disclosure of CPNI to the total service subscribed to by the customer would restrict carriers from using or disclosing CPNI without customer approval to target customers for new service offerings opened only through the 1996 Act, and accordingly would restrict carriers' opportunity to leverage large stores of existing customer information to their exclusive competitive advantage. Such CPNI limitations also further customer's privacy goals as they restrict the use to which carriers can make of CPNI for purposes beyond the parameters of the existing service relationship. As such, the total service approach protects the privacy and competitive interests of customers, and thereby appropriately furthers the

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[140] *See, e.g.*, California Commission Reply at 2-3; NTIA Further Reply at 13-14; Texas Commission Comments at 7; TRA Reply at 9-10; Washington Commission Comments at 4.

[141] U S WEST Comments at 10-11; *see also* SBC Comments at 7 (noting that traditional service distinctions are not referenced in the statutory text).

[142] Section 222(f)(1)(B) provides: "[t]he term 'customer proprietary network information' means -- (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(f)(1)(B). *Cf.* Frontier Comments at 4 (three category approach aligns with the two major service classifications in the 1996 Act -- "telephone exchange service" and "telephone toll service").

[143] 47 U.S.C. § 222(f)(1)(B).

balance of these interests that Congress expressly directed, as explained in the Conference Agreement.[144]

40. We also reject U S WEST's claims, in support of the two category approach, that Congress' *failure* to mention CMRS in the legislative history suggests that it did not view CMRS as a separate service offering,[145] but rather that CMRS is more appropriately treated as a technology or functionality of both local and long distance telecommunications service.[146] We do not find Congress' silence in connection with CMRS as dispositive, and reject the notion that CMRS is not a separate service offering. Indeed, as the Commission recently recognized in its *Second Annual CMRS Competition Report*,[147] although CMRS offerings are increasingly becoming substitutes for *each other* in the public's perception,[148] and may someday directly compete with wireline service, "wireless services do not yet approach the ubiquity of wireline telephone service."[149] Moreover, we believe that the two category approach would not protect sufficiently privacy and competitive concerns, and would thereby violate the statutory intent expressly set forth in the legislative history. As Arch, Frontier,

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[144] Joint Explanatory Statement at 205, *supra* note 2. As discussed *supra* ¶ 35, although the discrete category approach is also protective of privacy and competitive interests, as several parties suggest, *see, e.g.*, CFA Comments at 4; CPSR Reply at 6-7; NTIA Further Reply at 10, 12, 13; Texas Commission Comments at 7-8; we do not believe it is the only, or most appropriate balance. Unlike the total service approach, it fails to factor reasonable considerations of convenience and benefit to the customer that accompany permitting carriers to use CPNI for certain marketing purposes within the existing service relationship.

[145] U S WEST Comments at 10, 12.

[146] *Id.* at 13.

[147] *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Second Report, FCC 97-75 (rel. March 25, 1997) (*Second Annual CMRS Competition Report*).

[148] *Id.* The report acknowledged that, while mobile telecommunications initially consisted primarily of discrete services, inter-service competition has increased dramatically, particularly with respect to cellular, PCS, paging and interconnected SMR.

[149] *Id.* at 53. On the other hand, because CMRS offerings are viewed as substitutes of each other, we decline to designate two separate categories for narrowband CMRS (*e.g.*, paging and narrowband PCS) and broadband CMRS (*e.g.*, cellular, SMR, broadband PCS), as Arch proposes. Arch Comments at 6. Rather, we agree with AirTouch, PageNet and PCIA that CMRS should be viewed in its entirety. AirTouch Comments at 2 n.2; PageNet Comments at 2-3; PCIA Comments at 3-4. We likewise reject, as unsupported, U S WEST's suggestion that, if we do not let all CMRS float, we should at least let paging and broadband PCS float because paging is "used in" the provision of a telecommunications service under 222(c)(1)(B), and broadband PCS is a form of exchange access that offers functionalities like wireline service. U S WEST Comments at 14.

and AirTouch observe, allowing CMRS to "float" between the local and interexchange categories may give incumbent carriers a competitive advantage.[150]

41. We also disagree with MCI's argument in support of the two category approach that Congress solely intended for the new CPNI requirements set forth in section 222 to protect against carriers using CPNI already in their possession to advantage them as they moved into new service markets opened only through the 1996 Act.[151] MCI contends that, because wireline carriers could enter the CMRS market even before passage of the 1996 Act, CMRS should be considered "as a type of service that can fit into either the local or interexchange category and that should be treated the same as the predominant category provided by the carrier in question."[152] This argument is not supported by the statutory language, and we reject it accordingly. Section 222 contains no exclusion, express or implied, for CPNI related to services provided in markets previously open to competitors, nor does the legislative history support this interpretation. Moreover, we further reject MCI's suggestion that because entry of wireline carriers into the CMRS market was previously permissible, no CPNI regulation is needed as a matter of policy. That argument is belied by the fact that, even before the 1996 Act, the Commission's regulations afforded considerable CPNI protection related to cellular service.[153] Moreover, we believe that the statutory balance of privacy and competitive interests would be undermined if we were to remove those restrictions that prevent carriers from using wireline CPNI without customer approval to target new CMRS customers. Indeed, the elimination of such restrictions would offer LECs, in particular, a substantial and unjustified competitive advantage because they could use local wireline CPNI (available based on their historic monopoly status, but not available to their CMRS competitors) to target local customers that they believe would purchase their CMRS service.[154]

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[150] Arch Comments at 3-4; AirTouch *ex parte* (filed Apr. 17, 1997) at 2.

[151] MCI Comments at 3-4.

[152] *Id.*

[153] For example, under rule 22.903(f), the Commission restricted CPNI sharing between a BOC wireline company and its cellular affiliate. 47 C.F.R. § 22.903(f).

[154] The Commission previously has recognized that local service CPNI is likely to provide carriers substantial benefits in marketing CMRS to new customers. That concern formed the basis for the Commission's adoption of section 22.903(f) of its rules. Moreover, in the *McCaw* orders, *supra* note 121, the Commission permitted AT&T to share CPNI with its cellular affiliate only after finding that the CPNI derived from interexchange services would have comparatively little competitive value. *McCaw Recon. Order*, 10 FCC Rcd 11786, 11793, ¶ 10. In those orders, the Commission implicitly recognized that local service CPNI, in contrast, would afford LECs considerable competitive benefit in connection with the wireless market because it would allow them strategically to target new customers. While prior Commission CPNI precedent is of limited relevance because of the changes effected by the new statute, we nevertheless note that the rationale underlying

42. Finally, we also reject the various arguments advanced by GTE, PacTel, USTA, and U S WEST that our adoption of an interpretation more limited than the single or two category approaches raises Constitutional concern.[155] In particular, they variously claim that such restriction on intra-company sharing of CPNI would: constitute a taking without just compensation;[156] seriously impair carriers' ability to communicate valuable commercial information to their customers in violation of the First Amendment;[157] and violate Equal Protection principles because CPNI rules would discriminate against certain telecommunications service providers to promote competition by another class of providers (*e.g.*, cable providers that can use CPNI with implied consent).[158]

43. We reject the Constitutional takings arguments because, to the extent CPNI is property, we agree that it is better understood as belonging to the customer, not the carrier.[159]

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the *McCaw* orders thus supports our conclusion that the two category approach should be rejected. We also are not persuaded by those comments, *see, e.g.*, AT&T Comments at 8-9, 10; AT&T Reply at 8-9; SBC Comments at 8-9, suggesting that *McCaw* either compels the two category approach, or supports its adoption.

[155] Although GTE, PacTel, and USTA only argue that approaches narrower than the three category approach would violate the Constitution, because U S WEST presents similar claims regarding any approach narrower than the single or two category approaches, we address all constitutional arguments generally as if directed toward the total service approach. GTE Comments at 14-16; PacTel Reply at 6 n.9; USTA Comments at 7-8; U S WEST Comments at 7, 19.

[156] *See, e.g.*, GTE Comments at 13-14; PacTel Reply at 6 n.9; USTA Comments at 7-8; U S WEST Comments at 19; U S WEST *ex parte* (filed Apr. 4, 1996); U S WEST *ex parte* (filed Sept. 9, 1997) at 2.

[157] U S WEST *ex parte* (filed June 2, 1997) at 2. *See also* GTE Comments at 14-15 (ability of carriers to inform customers of new or additional services effectively is part of the constitutionally protected "free flow of commercial information"); PacTel Reply Comments at 6 n.9 (agrees with U S WEST that excessive CPNI restrictions will impair carriers' ability to communicate commercial information to their customers); USTA Comments at 7 (carrier's commercial business information is underpinning for protected commercial speech between it and its customers).

[158] USTA Comments at 8-9 (non-carrier competitors, such as cable operators, have no comparable restrictions on their use of non-telecommunications customer information to target customers for new telecommunications service offerings). In addition, U S WEST and USTA raise takings and equal protection challenges regarding our interpretations of sections 222(c)(1) and 222(c)(3), which govern the disclosure of LEC aggregate customer information. We address these Constitutional claims *infra* Part VI.

[159] *See, e.g.*, CPI Reply at 12 (customer, not the carrier, generates the information); CPI Further Comments at 2 (same); ITAA Reply at 7-8 & n.21 (section 222 confirms that both carriers and customers have a proprietary interest in CPNI); LDDS Worldcom Reply at ii, 9 (customer, not carrier, has the right to determine ultimate uses of CPNI); MCI Reply at 2-3 & n.3 (CPNI does not constitute carrier property simply because the carrier obtains the information from its provision of service to the customer).

Moreover, contrary to the contentions raised by some parties,[160] even assuming carriers have a property interest in CPNI, our interpretation of section 222(c)(1)(A) does not "deny all economically beneficial" use of property, as it must, to establish a successful claim.[161] Under the total service approach, carriers can use CPNI for a variety of marketing purposes which promote the interests of customers and carriers alike.[162] In addition, with customer approval, carriers are free to use CPNI to offer any combination of one-stop shopping.[163] Accordingly, the total service approach does not deny carriers all economically beneficial use of CPNI; rather, carriers are free to market and discuss with their customers whatever service offerings they want, in whatever combination. On this basis we also reject U S WEST's claim that our interpretation may abridge the carrier's ability to communicate with its customers, and thereby violate its First Amendment rights. Government restrictions on commercial speech will be upheld where, as here, the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn.[164] Section 222(c)(1)(A), and our total service approach, promote the substantial governmental interests of protecting the privacy of consumers and promoting fair competition.[165] We thus conclude that these Constitutional claims are without merit.

44. We likewise reject parties' Equal Protection challenges based on section 222's limitation to telecommunications carriers alone. In order to sustain an equal protection challenge, parties must prove the law has no rational relation to any conceivable legitimate legislative purpose.[166] We conclude that Congress' decision to extend the CPNI limitations in section 222 only to telecommunications carriers, and not, for example to cable operators, does not support a Constitutional claim. The information telecommunications carriers obtain from

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[160] U S WEST *ex parte* (filed Sept. 9, 1997) at 4-5, 7 (claims that anything less than the single or two category approach combined with a notice and opt-out form of approval would, for instance, fatally cripple product development and design, tracking of consumer buying trends, and the ability to match certain types of consumers with offerings they would find attractive); GTE Comments at 13-14 (CPNI sharing restrictions meet two-part test for what constitutes denying all economically beneficial use of property).

[161] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[162] *See* discussion *infra* ¶ ¶ 63, 64.

[163] *See, e.g.*, CPI Reply at 12; ITAA Reply at 7-8 & n.21.

[164] *Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980). As discussed in greater detail *infra* ¶ ¶ 106-107, we also reject U S WEST's contention that an express approval requirement under section 222(c)(1) would violate the First Amendment rights of carriers and customers.

[165] *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

[166] *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

their customers, including who, where and when they call, is considerably more sensitive and personal than the information cable operators obtain concerning their customers (*e.g.*, whether they have premium or basic service). Given the differences in the type of information at issue, Congress' decision to mandate a higher level of privacy protection in the context of section 222, applicable to telecommunications carriers, than in section 551 of the 1992 Cable Act applicable to cable operators, is plainly rational.[167]

45. *Non-Telecommunications Offerings.* Several carriers argue that certain non-telecommunications offerings, in addition to being covered by section 222(c)(1)(B), also should be included within any service distinctions we adopt pursuant to section 222(c)(1)(A), including inside wiring, customer premises equipment (CPE), and certain information services.[168] Based on the statutory language, however, we conclude that inside wiring, CPE, and information services do not fall within the scope of section 222(c)(1)(A) because they are not "telecommunications services."[169] More specifically, section 222(c)(1)(A) refers expressly to carrier use of CPNI in the provision of a "telecommunications service."[170] In contrast, the word "telecommunications" does not precede the word "services" in section 222(c)(1)(B)'s phrase "services necessary to, or used in."[171] The varying use of the terms "telecommunications service" in section 222(c)(1)(A) and "services" in section 222(c)(1)(B) suggests that the terms deliberately were chosen to signify different meanings. Accordingly, we believe that Congress intended that carriers' use of CPNI for providing telecommunications services be governed solely by section 222(c)(1)(A), whereas the use of CPNI for providing non-telecommunications services is controlled by section 222(c)(1)(B).

46. Commission precedent has treated "information services" and "telecommunications services" as separate, non-overlapping categories, so that information

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[167] *See* discussion *supra* note 127. Moreover, under the 1992 Cable Act, carriers are not permitted to disclose private customer information relating to "any viewing or other use by the subscriber of a cable service or other service provided by the cable operator" without prior written or electronic consent. 57 U.S.C. § 551(c)(2)(C)(ii). Therefore, in connection with personal customer information, cable operators and telecommunication carriers face similar statutory restrictions. Based on the statutory distinctions, we also reject the suggestion that we interpret section 222 as we interpreted the 1992 Cable Act to ensure that cable operators and other non-telecommunications service providers do not receive a competitive advantage because section 222 only extends to telecommunications carriers. USTA Comments at 9; PacTel *ex parte* (filed Nov. 22, 1996) at 11.

[168] *See, e.g.*, Bell Atlantic Comments at 1-2, 4-5; PacTel Comments at 4; PacTel Reply at 6-7; BOC Coalition *ex parte* (filed Aug. 22, 1996) at 6.

[169] We discuss whether these offerings come within the meaning of section 222(c)(1)(B) *infra* Part IV.C.

[170] 47 U.S.C. § 222(c)(1)(A).

[171] 47 U.S.C. § 222(c)(1)(B).

services do not constitute "telecommunications" within the meaning of the 1996 Act.[172] Accordingly, we conclude that carriers may not use CPNI derived from the provision of a telecommunications service for the provision or marketing of information services pursuant to section 222(c)(1)(A).[173] We likewise conclude that inside wiring and CPE do not fall within the definition of "telecommunications service," and thus do not fall within the scope of section 222(c)(1)(A).

47. We recognize that the Commission has permitted CMRS providers to offer bundled service, including various "enhanced services" and CPE, prior to the 1996 Act. We disagree with PacTel, however, that, consistent with section 222(c)(1)(A), CMRS providers should be able to use CMRS-derived CPNI without customer approval to market these offerings when they provide CMRS to a customer.[174] The 1996 Act defines "mobile service"

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[172] *Universal Service Report and Order*, 12 FCC Rcd 8776, 9180, ¶ ¶ 788-89 (found that information service providers need not make universal service contributions, and are exempted from Title II regulation, because they do not provide "telecommunications"); *see also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, ¶ ¶ 104-05, *supra* note 45 (treated information services as distinct from telecommunications). We note, however, that Congress has directed the Commission to undertake a review of its implementation of the provisions of the 1996 Act relating to universal service, including, among other things, the Commission's interpretations of the statutory definitions of "telecommunications" and "telecommunications service." Pub. L. 105-119, § 623, 111 Stat. 2440 (1997) (Universal Service Report); *see also Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*, Public Notice, CC Docket No. 96-45 (Report to Congress), DA 98-2 (rel. Jan. 5, 1998). We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

[173] *See, e.g.*, AICC Comments at 9 (enhanced services, like alarm monitoring, should not be included in the local service category); MCI Reply at 5 (CPE and information services are not "telecommunications" because they do not constitute "transmission . . . of information . . ."); MFS Comments at 3-4 ("information service" and "telecommunications service" have different statutory definitions). We note, however, that many of the services that commenters list as "enhanced services" or "information services" are, in fact, "adjunct-to-basic" services. *See* discussion *infra* ¶ ¶ 73-74 for description of what constitutes former adjunct-to-basic services. The Commission concluded in *Non-Accounting Safeguards Order* that adjunct-to-basic services constitute "telecommunications services" rather than "information services." *Non-Accounting Safeguards Order* at 21,958, ¶ 107. Accordingly, under the total service approach, such services would fall within the meaning of "telecommunications service" in section 222(c)(1)(A) as well as section 222(c)(1)(B). *See* discussion *infra* ¶ ¶ 73-74 (adjunct-to-basic services constitute services under section 222(c)(1)(B)).

[174] PacTel *ex parte* (filed January 10, 1997) at 7. More specifically, PacTel cites: the Commission's conclusion that cellular, CPE, and enhanced services could be provided in one subsidiary in *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Commissions Services by Bell Operating Companies*, CC Docket No. 84-637, 57 Rad. Reg. 2d 989 (1985); and the Commission's authorization of bundled cellular CPE and service offerings in *Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, 7 FCC Rcd 4028 (1992). PacTel *ex parte* (filed Nov. 19, 1996) at 4-5. PacTel further claims that CMRS is broadly defined and has never been subdivided into basic and enhanced services. *Id.* (*citing Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994)). Moreover,

in pertinent part as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . ."[175] "Radio communication service," in turn, is defined in terms of "the *transmission* by radio of writings, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[176] These definitions do not include information services or CPE within the meaning of CMRS. Accordingly, while nothing in section 222(c)(1) prohibits CMRS providers from continuing to bundle various offerings consistent with other provisions of the 1996 Act,[177] including CMRS-specific CPE and information services, they cannot use CPNI to market these related offerings as part of the CMRS category of service without customer approval, because even when they are bundled with a CMRS service, they do not constitute CMRS and are not telecommunications services.

48. On the other hand, we also conclude that, to the extent that services formerly described as adjunct-to-basic are offered by CMRS providers, these should be considered either within the provision of CMRS under section 222(c)(1)(A), or as services necessary to, or used in, CMRS under section 222(c)(1)(B).[178] Thus, for example, a CMRS provider can use CMRS CPNI to market a call forwarding feature to its existing customer because call

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PacTel contends that, like the Commission, Congress recognized that CMRS-related CPE and information services should be considered part of wireless service as well, when, in other pre-Act legislation, it did not differentiate between mobile service and "enhanced service" in its definition of "commercial mobile service." PacTel *ex parte* (filed Jan. 10, 1997) at 6 (citing Omnibus Budget Reconciliation Act of 1993, § 601(d) (Pub.L.No. 103-66, Title VI § 6002(d), 107 Stat. 312, 395-96 (1993)). In the alternative, PacTel argues that all CPE and information services related to CMRS should be treated as "services necessary to, or used in the provision of such telecommunications service." PacTel *ex parte* (filed Nov. 19, 1996) at 6. *See* discussion *infra* ¶ 77.

[175] 47 U.S.C. § 153(27).

[176] 47 U.S.C. § 153(33).

[177] *See generally CMRS Safeguards Order, supra* note 51.

[178] Services formerly known as adjunct-to-basic that may be offered by CMRS providers include, for example, call forwarding or call waiting. The Commission historically viewed these services as different from information services because they are necessary or used in call completion. *See, e.g., 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*, Memorandum Opinion & Order, 101 FCC 2d 349 (1985) (*NATA Centrex Order*), recon., 3 FCC Rcd 4385 (1988)(describing adjunct-to-basic and enhanced services). Although the Commission's conclusion in the *Non-Accounting Safeguards Order* that adjunct-to-basic services constitute "telecommunications services" rather than "information services" was in the context of the provision of local wireline service, we see no basis to restrict that conclusion to the wireline context. *See* discussion *infra* at ¶ ¶ 73-74 for a more detailed description of formerly adjunct-to-basic services and how they come within the meaning of section 222(c)(1)(B).

forwarding was classified as an adjunct-to-basic service, but not to market an information service. In addition, we agree with the result advocated by WTR, and conclude that a reasonable interpretation of section 222(c)(1)(A) permits carriers to use, disclose, or permit access to CPNI for the limited purpose of conducting research on the health effects of their service.[179] In particular, we believe that, integral to a carrier's provision of a telecommunications service is assuring that the telecommunications service is safe to use. Insofar as customers expect that the telecommunications service to which they subscribe is safe, use of CPNI to confirm as much would not violate their privacy concerns, but rather would be fully consistent with notions of implied approval. The research proposed by WTR, which uses CPNI disclosed by carriers relating to the time and duration of wireless telephone usage to determine the health risks posed to users of hand-held portable wireless telephones, comes within the provision of CMRS service and therefore the meaning of section 222(c)(1)(A).[180]

49. *Special Treatment for Certain Carriers.* We conclude 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). Based on the statutory language, it is clear that section 222 applies to all carriers equally and, with few exceptions, does not distinguish among classes of

[179] While we agree with WTR's basic premise that section 222 reasonably permits carriers to use, disclose, or permit access to CPNI for the purpose of conducting research on the health effects of CMRS, we conclude that this specific use of CPNI constitutes an integral component of the actual provision of a telecommunications service within the scope of section 222(c)(1)(A), rather than a "service necessary to, or used in, the provision of such telecommunications service," within the scope of section 222(c)(1)(B). *See generally* WTR Reply (arguing that section 222(c)(1)(B) is applicable to the use of CPNI for research purposes). Because of our conclusion here, there also is no need to exercise our forbearance authority under section 10 of the Act to produce the same result, as alternatively requested by WTR. WTR *ex parte* (filed Oct. 9, 1997) at 2.

[180] We note that, in informal discussions, WTR explained the safeguards it employs in handling pre-1996 Act CPNI. They include (1) carriers encrypting the last four digits of the customer's telephone number before sending data to WTR to maintain security during transit; (2) the information being written to disk by WTR upon receipt, being stripped of any individually identifying characteristics (*e.g.*, address, account number, and customer social security number), and being encrypted by giving each customer record a unique identifying number; (3) the original tapes from the carrier being either destroyed or returned to the carrier; (4) the encrypted information remaining in a separate database in a secure location with only specified staff members given access to unencryption programs and with one individual being responsible for the "key" file necessary to run such programs; (5) employees signing confidentiality agreements, receiving adequate training regarding the handling of the sensitive information, and being subject to various discipline upon any violations. Moreover, the study results presented by WTR are in aggregate form, with no individuals identified or personal information released. WTR *ex parte* (filed Oct. 9, 1997) at exhibit A at 5-6. Based upon these minimum study protocols, we believe the privacy of consumer information is appropriately safeguarded during the epidemiological research WTR proposes, consistent with the meaning of section 222(c)(1)(A).

carriers.[181] Accordingly, we reject the argument raised by several parties that we should permit broader CPNI sharing for competitive LECs, but not for incumbent LECs,[182] or that we should limit the total service approach to entities without market power.[183] As several parties suggest, customers' privacy interests are deserving of protection, regardless of which telecommunications carrier serves them, for customers' privacy expectations do not differ based upon the size or identity of the carrier.[184] Moreover, we disagree with the suggestions of ICG, LDDS WorldCom, and Sprint that we should impose stricter restrictions on incumbent or dominant carriers, based on their greater potential for anti-competitive use or disclosure of CPNI.[185] We believe at this time that the regulations and safeguards implemented in this order fully address competitive concerns in connection with all carriers' use, disclosure, or permission of access to CPNI.

50. We also decline to forbear from applying section 222(c)(1), or any of our associated rules, to small or competitive carriers, as SBT requests.[186] First, SBT has not explained adequately in its comments how it meets the three statutory criteria for forbearance.[187] Second, while SBT points out that competitive concerns may differ according to carrier size, it does not persuade us that customers of small businesses have less meaningful privacy interests in their CPNI. We thus disagree with SBT that the three category approach gives large carriers flexibility to develop and meet customers' needs, but may unnecessarily limit small business as competition grows.[188] Even if, as SBT alleges, a large carrier can base the design of a new offering on statistical customer data and market widely, but a small business can best meet specialized subscriber needs if it offers CMRS, local, and interexchange service tailored to the specific subscriber, the total service approach

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[181] Sections 222(c)(3) and (e) establish additional requirements in connection with aggregate customer information and subscriber list information, respectively, which are applicable only to LECs. 47 U.S.C. § § 222(c)(3), 222(e).

[182] ICG urges us to apply the single category approach for competitive LECs, but not for incumbent LECs. ICG Comments at 5.

[183] Sprint Comments at 4.

[184] *See, e.g.*, CompuServe Comments at 6-7; BellSouth *ex parte* (filed Oct. 17, 1996) at 3; BOC Coalition *ex parte* (filed Aug. 22, 1996) at 3.

[185] ICG Comments at 5; LDDS WorldCom Comments at 8; LDDS WorldCom Reply at 4-5; Sprint Comments at 4.

[186] SBT Comments at 1, 2-3.

[187] *See generally* 47 U.S.C. § 160.

[188] SBT Comments at 2-3, 5.

allows tailored packages. We likewise disagree, therefore, with USTA that small carriers could be competitively disadvantaged in any interpretation of section 222(c)(1)(A) other than the single category approach.[189] Rather, we are persuaded that the total service approach provides all carriers, including small and mid-sized LECs, with flexibility in the marketing of their telecommunications products and services. In fact, if SBT's claims that small businesses typically have closer personal relationships with their customers are accurate, then small businesses likely would have less difficulty in obtaining customer approval to market services outside of a customer's service existing service.

51. We also agree with a number of parties that there should be no restriction on the sharing of CPNI among a carrier's various telecommunications-related entities that provide different service offerings to the same customer.[190] By its terms, section 222(c)(1)(A) generally limits "a telecommunications carrier that receives or obtains [CPNI] by virtue of its provision of a telecommunications service" to use, disclose, or permit access to CPNI only in "its provision of the telecommunications service from which such information is derived."[191] This language does not limit the exception for use or disclosure of CPNI to the corporate parent. Rather, we believe the language reasonably permits our view that the CPNI limitations should relate to the nature of the service provided and not the nature of the entity providing the service. In particular, under the total service approach, we interpret the scope of section 222(c)(1)(A) to permit carriers to use or disclose CPNI based on the customer's implied approval to market related offerings within the customer's existing service relationship. To the extent a carrier chooses to (or must)[192] arrange its corporate structure so that different affiliates provide different telecommunications service offerings, and a customer subscribes to more than one offering from the carrier, the total service approach permits the sharing of CPNI among the affiliated entities without customer approval. In contrast, if a customer subscribes to less than all of the telecommunications service offered by these affiliated entities, then CPNI sharing among the affiliates would be restricted under the total service approach. In this circumstance, the restriction is not based on the corporate structure, but rather on the scope of the service subscribed to by the customer.

52. For the reasons described herein, we believe that the sharing of CPNI permitted under the total service approach among affiliated telecommunications entities best balances

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[189] USTA Comments at 3.

[190] *See, e.g.*, AT&T Further Comments at 8-9; AT&T Further Reply at 7-8; Bell Atlantic/NYNEX Further Comments at A-3; BellSouth Further Comments at 16; BellSouth *ex parte* (filed Oct. 17, 1996) at 3; CBT Further Comments at 2; PacTel Further Comments at 9-10; SBC Further Comments at 7-8; U S West *ex parte* (filed Dec. 2, 1996) at 6.

[191] 47 U.S.C. § 222(c)(1)(A).

[192] *See, e.g.*, 47 U.S.C. § 272 (requiring BOCs to establish separate affiliates for the provision of, among other things, long distance service).

the goals of section 222 to safeguard customer privacy and promote fair competition. Under a contrary interpretation, carriers would have to change their corporate structure in order to consolidate a customer's service record consistent with the total service approach. If other business considerations counselled against such corporate restructuring, the customer would ultimately suffer because it would not receive the advantages associated with the information sharing permissible under the total service approach. Moreover, we agree that CPNI distinctions based solely on corporate structure would be confusing and inconvenient for customers.[193] For all these reasons, we reject such an alternative interpretation.

b. Statutory Principles of Customer Control and Convenience

53. In addition to finding that the total service approach is most consistent with the statutory language and legislative history, we are persuaded that, as a policy matter, the total service approach also best advances the principles of customer control and convenience implicitly embodied in sections 222(c)(1) and (c)(2). These statutory principles, as discussed below, in conjunction with our experience regulating carriers' CPNI use, guide our interpretation of the scope of section 222(c)(1)(A). We agree with the observation of numerous commenters that Congress intended that section 222(c) would protect customers' reasonable expectations of privacy regarding personal and sensitive information, by giving customers control over CPNI use, both by their current carrier and third parties.[194] First, as CPI observes,[195] this principle of customer control is manifested in section 222(c)(2), which provides: "A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer."[196] In this provision, Congress requires that carriers must comply with the express desire of the customer regarding disclosure of CPNI, and in so doing establishes the customer's right to direct who receives its CPNI and when it may be disclosed.[197] Second, section 222(c)(1) requires carriers to obtain customer "approval" when they seek to use, disclose, or permit access to CPNI for purposes beyond those specified in sections 222(c)(1)(A) and 222(c)(1)(B). By requiring that carriers obtain approval, Congress ensured that customers would be able to control any "secondary" uses to which carriers could

[193] USTA Comments at 4; USTA Reply at 3-4.

[194] *See, e.g.*, ALLTEL Further Reply at 3; Bell Atlantic/ NYNEX Further Reply at 9; BOC Coalition *ex parte* (filed May 21, 1997) at 3; CPI Reply at 3-4; PacTel *ex parte* (filed Feb. 21, 1997) at 11; TRA Reply at 9.

[195] CPI Further Comments at 2-3.

[196] 47 U.S.C. § 222(c)(2).

[197] Indeed, section 222(c)(2) is titled "Disclosure on Request by Customers." *Id.*

make of their CPNI, and thereby restrict the dissemination of their personal information.[198] Third, the principle of customer control also is reflected in sections 222(c)(1)(A) and (B), which permit carrier use of CPNI absent customer approval only in certain limited circumstances. The restricted scope of the carrier's right to use CPNI under these provisions -- *only* in the provision of the telecommunications service from which the CPNI is derived, or services necessary to or used in that service -- evidences Congress' recognition that a customer's subscription to service constitutes only a limited form of implied approval.[199]

54. While sections 222(c)(1)(A) and (B) embody the principle that customers wish to maintain control over their sensitive information, those provisions also manifest the principle that customers want convenient service, as some commenters have observed.[200] The notion of implied approval evidences Congress' understanding that customers desire their service to be provided in a convenient manner, and are willing for carriers to use their CPNI without their approval to provide them service (and, under section 222(c)(1)(B), services necessary to, or used in, such service) within the parameters of the customer-carrier relationship. Indeed, we agree with commenters that Congress recognized through sections 222(c)(1)(A) and (B) that customers expect that carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service.[201] Accordingly, as many commenters observe, what the customer expects or understands is included in its telecommunications service represents the scope and limit of its implied approval under section 222(c)(1)(A).[202] As discussed below, we conclude that the total service approach, based on the customer's entire service subscription, best reflects these underlying principles of customer control and convenience.

55. *Customers do not expect that carriers will need their approval to use CPNI for offerings within the existing total service to which they subscribe.* We believe it reasonable to conclude that, where a customer subscribes to a diverse service offering -- a mixture of local, long distance, and CMRS -- from the same carrier or its subsidiary or affiliated companies, the customer views its telecommunications service as the total service

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[198] CPSR Reply at 7 (privacy regulations traditionally limit "secondary uses" of information -- *i.e.*, information gathered for one purpose can only be used for related purposes, or unrelated purposes that the customer authorizes). *See* discussion *infra* Part V for what constitutes adequate approval.

[199] Arch Comments at 7.

[200] *See, e.g.*, CFA Comments at 1-2; CPI Reply at 3-4, 7.

[201] *See, e.g.*, BellSouth Comments at 8; BellSouth Reply at 3; CBT Comments at 4; USTA Comments at 4; USTA Reply at 3-4.

[202] *See, e.g.*, AT&T Comments at 2-3, 8-9; Bell Atlantic Comments at 1-2; BellSouth Further Comments at 12-13; CPI Further Comments at 2-3; GTE *ex parte* (filed July 17, 1997) at 2; PacTel Reply at 6 n.9; SBC Comments at 8-9; Sprint Comments at 3-4; Texas Commission Comments at 7-8; U S WEST Comments at 13.

offering that it has purchased, and can be presumed to have given implied consent to its carrier to use its CPNI for all aspects of that service. We find no reason to believe that customers would expect or desire their carrier to maintain internal divisions among the different components of their service, particularly where such CPNI use could improve the carrier's provision of the customer's existing service. We agree with Sprint and MCI that customers choosing an integrated product will expect their provider to have and use information regarding all parts of the service provided by that company, and will be confused and annoyed if that carrier does not and cannot provide complete customer service.[203] For this reason, many of those parties favoring either the two or three category approach, while not advocating the total service approach explicitly, nevertheless support its principal tenet that, if customers' subscriptions change, perhaps in response to new integrated carrier offerings, the scope of section 222(c)(1)(A) must likewise change.[204] The total service concept is supported by some advocates of the discrete offering approach as well, who foresee customer movement toward a more comprehensive service offering.[205]

56. We believe the total service approach maximizes both customer control and convenience. Customers retain control over the uses to which carriers can make of their

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[203] Sprint Comments at 3-4; MCI *ex parte* (Aug. 15, 1997) at 13-14. In this regard, we agree with the observations of single category approach advocates that sharing of CPNI within one integrated firm does not raise significant privacy concerns because customers would not be concerned with having their CPNI disclosed within a firm in order to receive increased competitive offerings. AT&T Comments at 7-9; AT&T Reply at 8-10; PacTel *ex parte* at 3-6 (survey results); U S WEST Comments at 5, 11; U S WEST *ex parte* (filed Oct. 17, 1996) at 3-5; U S WEST *ex parte* (filed Feb. 19, 1997) at 4-6. *See also* SBC Comments at 9 (customers are unlikely to object to carrier use of CPNI that benefits them, particularly because it is more convenient and less confusing when CPNI is not limited by the technology used (*i.e.*, wireline v. wireless) or by whether the offerings are provided by one carrier or by affiliated carriers); CBT Comments at 4 (restrictive interpretation of telecommunications service will confuse customers); USTA Comments at 4 (customers do not think in terms of regulatory fiats of distinctive service offerings or technologies, or legal corporate jurisdictional separations like those among affiliates). Where we disagree with these single category supporters is their view that such customer expectation extends beyond using CPNI to improve the existing service relationship, as discussed above, particularly where such use ultimately can produce anticompetitive effects that are harmful to the consumer.

[204] CompTel Comments at 4-6; CompTel Reply at 2; CPI Reply at 8-9; GTE Comments at 11-12; GTE Reply at 4; LDDS WorldCom Comments at 8; LDDS WorldCom Reply at 2-3; NTCA/OPASTCO Reply at 3; NYNEX Comments at 10-11; NYNEX Reply at 4-5; PacTel Comments at 3-4; Sprint Comments at 2-3; Sprint Reply at 8; Washington Commission Comments at 5.

[205] For example, the Texas Commission supports the sharing of CPNI for integrated service packages. Texas Commission Comments at 8. CPSR recognizes that service categories will change as technologies develop, even if discrete, narrowly-defined offerings continue to form the building blocks of any "bundled" service. CPSR Reply Comments at 7. *But see* CFA Comments at 4-5 (advocates that limits on the use of CPNI evolve to encompass additional service offerings within the three service categories once local markets are opened to competition).

CPNI, for example, to market services outside the total service offering currently subscribed to by the customer. This limitation, in turn, comports with our view that customers reasonably expect that carriers will not use or disclose CPNI beyond the existing service relationship. Once a carrier has successfully marketed a new offering to the customer, however, that offering would become part of the "telecommunication service" subscribed to by the customer, and the customers' entire service record would be available to the carrier to improve the existing customer-carrier relationship. The customer's interest in receiving service in a convenient manner is thereby also served. In these ways, the total service approach serves the statutory principles of customer convenience and control, and best reflects customers' understanding of their telecommunication service.

57. By contrast, neither the discrete offering approach nor the three category approach serves the statutory principle of customer convenience or reasonably reflects customers' expectations of what constitutes their telecommunications service. Prior to the 1996 Act, Commission policy permitted carriers to use CPNI to market related service offerings.[206] Given this environment, we conclude that customers expect and desire, for example, that their local service carrier will make them aware of all local service offerings.[207] The discrete offering approach, on the other hand, would prevent a carrier, absent customer approval, from improving the range and quality of service offerings currently provided to the customer and tailoring service packages for a customer's existing service needs.[208] On this basis, we reject NYNEX's position that short-haul toll should be included only within the local service category.[209] Rather, we agree with commenters that, insofar as both LECs and IXCs currently provide short-haul toll, it should be part of both local and long-distance service.[210] Also, permitting short-haul toll to "float" between the local and the interexchange offerings should not confer upon any carrier a competitive advantage, contrary to what

[206] We disagree with the Texas Commission's view that customers, having purchased their desired telecommunications offering, do not want to receive telemarketing from their carrier or any other vendor for related service offerings. Texas Commission Comments at 7. In any event, under our rules implementing the TCPA, consumers can ensure that a company which makes an unwelcome telephone solicitation will not call more than once.

[207] MobileMedia Reply at 2-3.

[208] *See, e.g.*, BellSouth Reply at 5; CBT Comments at 4; CompTel Comments at 5; SBC Comments at 8; SBC Reply at 7; Sprint Reply at 9.

[209] NYNEX Comments at 8-10, 9 n.13; NYNEX Reply at 4, 4 n.7; *see also* TRA Comments at 15 (disagrees that short-haul toll service should be treated as both a local and an interexchange telecommunications service); TRA Reply at 10-11, 10 n.23 (same).

[210] LDDS WorldCom Reply at 3-4; MCI Comments at 3-4; MCI Reply at 4-6; Sprint Reply at 8.

NYNEX argues.[211] In fact, the intraLATA equal access and short-haul toll markets are competitive in several states.[212] Moreover, LECs are not disadvantaged because they can include their short-haul toll with their local service CPNI for marketing purposes.[213] We similarly reject a three category approach, for where a customer subscribed to more than one carrier offering, the rigid categories would prevent a carrier, absent customer approval, from using the customer's entire service record to offer alternative improved versions of the existing service.[214] Thus, although these approaches would afford customers control, it would be at the expense of customer convenience and would not reflect the customer's understanding of the total service relationship. We therefore reject these approaches as contrary to the Congressional design of section 222, as well as to one of the 1996 Act's general goals of avoiding excessive regulation.

58. We also reject the discrete offering and three category approaches because we share the concern expressed by many parties that such restrictive interpretations may be difficult to implement as service distinctions, and corresponding customer subscriptions, become blurred with market and technological advances.[215] The three category approach would require that we undertake a periodic review, beginning in the near future, to ascertain whether changes in the competitive environment translated into changes in service categories.[216] In contrast, if customers embrace "one-stop shopping," through market-driven integrated packages of service (*e.g.*, bundled offering of local and long-distance services), the flexibility of the total service approach would not require us to revisit or modify categories to accommodate these changes. The categories would instead disappear naturally as customers

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[211] NYNEX Comments at 9-10.

[212] USTA Comments at 4 n.6. *But see* NYNEX Comments at 8-9 (arguing that IXCs in numerous state and federal regulatory proceedings have pointed to a marginal presence of IXCs in the short-haul toll market).

[213] Sprint Reply at 8-9.

[214] *See, e.g.*, ACTA Comments at 4.

[215] *See, e.g.*, CompTel Comments at 5-6; CompTel Reply Comments at 2; CPI Reply at 8-9; GTE Comments at 11-12; GTE Reply at 4; LDDS WorldCom Comments at 8; LDDS WorldCom Reply at 2-3; NTCA/OPASTCO Reply at 3; NYNEX Comments at 10-11; PacTel Comments at 3-4; PacTel *ex parte* (filed Nov. 22, 1996) at 7; NYNEX Reply at 4-5; Sprint Comments at 2-3; Sprint Reply at 8; Washington Commission Comments at 5.

[216] *See, e.g.*, CPI Reply at 8-9; NYNEX Comments at 11. *See also* Washington Commission Comments at 5 (the term "telecommunications service" may attach a different meaning in the future, which may require changes to CPNI restrictions). *But see* MCI Reply at 6-7 (arguing that no specific date need be set to reevaluate categories because adequate FCC procedures already exist for seeking such review). Moreover, as CompTel observes, endemic to any such future classification would be the difficult and controversial task of placing "new" service offerings into the rigid categories. CompTel Comments at 5.

begin purchasing integrated packages, without need for Commission intervention.[217] Although the total service approach would still require that we maintain some service distinctions, unless and until customers subscribe to integrated products, it facilitates any convergence of technologies and services in the marketplace. Carriers have indicated, for example, that they are presently developing a hardwire cordless phone that can become a wireless product when taken a certain distance from its base. Under the total service approach, a carrier would be able to market related wireless and wireline offerings to a customer that subscribed to this product, and not be forced somehow to separate wireline CPNI from wireless.[218] Finally, the total service approach is also sufficiently flexible to accommodate future new service technologies that are beyond the three traditional categories, as such offerings would not be artificially forced into a service category.[219]

59. In supporting the total service approach, we are nevertheless cognizant of the dangers, described by Cox, that incumbent LECs could use CPNI anticompetitively, for example, to: (1) use calling patterns to target potential long distance customers; (2) cross-sell to customers purchasing services necessary to use competitors' offerings (*e.g.*, attempt to sell voice mail service when a customer requests from the LEC the necessary underlying service, call forwarding-variable); (3) market to customers who call particular telephone numbers (*e.g.*, prepare a list of customers who call the cable company to order pay-per-view movies for use in marketing the LEC's own OVS or cable service); and (4) identify potential customers for new services based on the volume of services already used (*e.g.*, market its on-line service to

[217] The total service approach therefore renders largely unnecessary GTE's position we should be receptive to CPNI-related forbearance petitions under section 10 of the Act which seek to eliminate service categories, if we should adopt our tentative conclusion. GTE Comments at 11-12; GTE Reply at 2. *See also* LDDS Worldcom Comments at 8 (unless the Commission determines in a section 10 proceeding that it should forbear from applying continued regulatory oversight of incumbent LECs' local exchange and exchange access services, the Commission should rule that an incumbent LEC may not use local exchange service CPNI to market non-local exchange services); LDDS Worldcom Reply at 3 (supports GTE's position).

[218] We note similarly that if customers subscribe to local, long distance and CMRS from the same carrier, this would effectively result in a "single category" of service, as advocated by the BOCs, AT&T and GTE, among others. The carrier would be able to market all related local, long distance and CMRS offerings without an express form of customer approval. On the other hand, if customers do not embrace integrated service, and subscribe to different service from several carriers, the total service approach appropriately limits the use to which these carriers can make of the CPNI to the existing service relationship. In any event, the market and customer subscriptions will drive carriers' permissible uses of CPNI, and will not be retarded by any rigid Commission-defined service classifications.

[219] One example of such a service may be open video systems (OVS). *See Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223 (1996) (*OVS Second Report and Order*) at ¶ 249. We note that, whether a new service offering should appropriately be considered as a separate type of service, or a related offering within a carrier's local or long distance service or CMRS, can only be decided upon an appropriate record, with the advent of the new service. The Commission will, of course, assist carriers as necessary, where such an issue arises in the future.

all residential customers with a second line).[220] We recognize that requiring carriers to obtain express customer approval for use of CPNI to target customers for new service offerings to which the customer does not subscribe protects against some, but not all, of these abuses. Nevertheless, our rejection of the discrete offering and three category approaches does not permit carriers to use CPNI anticompetitively within the customer's existing service. That is, while we interpret section 222(c)(1)(A) to permit carrier use of CPNI for marketing of related service offerings, using local service CPNI to track, for example, all customers that call local service competitors, would not be a permissible marketing use because such CPNI use would not constitute "its provision of" its service. Such action would violate section 222(c)(1) and, depending on the circumstances, may also constitute an unreasonable practice in violation of section 201(b).[221] As the Commission has found in the past, such anticompetitive use of CPNI violates the basic principles of competition, and to the extent such practices rise to the level of anticompetitive conduct, we can and will exercise our authority to prevent such discriminatory behavior.[222] In contrast, although carriers will benefit under the total service approach from being able to consolidate the customer's entire service record, we do not believe that this use of CPNI is anticompetitive or contrary to what Congress envisioned because such consolidation will not result in the targeting of new customers, but merely will assist carriers in better servicing their existing customers.

60. *Customers do not expect that carriers will use CPNI to market offerings outside the total service to which they subscribe.* We have concluded above that the single category approach is inconsistent with the language of section 222. We also believe that, as a policy matter, it inadequately promotes the goals underlying section 222. Several commenters, including the BOCs, AT&T, and GTE, argue that customers understand and desire for carriers to use, disclose, or permit access to CPNI freely within the same corporate family, regardless of whether the customer subscribes to the service offerings of the related entities.[223] As evidence, these parties offer a survey, commissioned by PacTel, which they claim shows consumer support for such information sharing, as well as an earlier study by

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[220] Cox *ex parte* (filed Feb. 20, 1997) at 4-5.

[221] 47 U.S.C. § 201(b). We note further that, in the accompanying *Further Notice of Proposed Rulemaking*, we seek comment on whether additional safeguards are necessary to protect the proprietary information of competing carriers from being used by network service carriers, pursuant to section 222(b). *See infra* Part IX.

[222] *See, e.g., California v. FCC*, 39 F.3d 919, 929 (9th Cir. 1994) (citing *Commission's Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service*, Docket No. 4000-U (GA. Pub. Svc. Comm'n June 4, 1991) at 27-34).

[223] *See, e.g.*, AT&T Comments at 2-3; AT&T Reply at 2-3; AT&T Further Comments at 9; Bell Atlantic Comments at 1-2, 3-4; Bell Atlantic Reply at 4-6; BellSouth Comments at 8; BellSouth Reply at 3-5; CBT Comments at 4; GTE Further Reply at 4-5; NCTA/OPASTCO Reply at 2; PacTel Further Comments at 9-10; SBC Comments at 8; SBC Reply at 7; USTA Comments at 4; U S WEST *ex parte* (filed Dec. 2, 1996) at 6.

CBT.[224] In general, the survey results purport to show that a majority of the public believes it is acceptable for businesses, particularly local telephone companies, to examine customer records to offer customers additional services.[225] PacTel claims that the Westin study also indicates that the public is confident that local telephone companies will use personal information responsibly, and will protect the confidentiality of such information.[226]

61. We are persuaded, however, that the Westin study may not accurately reflect customer attitudes, and fails to demonstrate that customers expect or desire carriers to use CPNI to market all the categories of services available, regardless of the boundaries of the existing service relationship. First, the Westin study does not identify the kind of telephone information at issue.[227] As Cox points out, the survey questions ask broadly whether it is acceptable for a customer's local telephone company to look over "customer records" to determine which customers would benefit from hearing about new services, without explaining the specific types of information that would be accessed.[228] Much CPNI, however, consists of highly personal information, particularly relating to call destination, including the

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[224] *See generally* PacTel *ex parte* (filed Dec. 12, 1996)(Westin study). PacTel commissioned Opinion Research Corporation of Princeton, New Jersey and Dr. Alan Westin, Professor of Public Law and Government at Columbia University, to develop, conduct, and report the results of a national survey of public opinion regarding carrier use of CPNI. The report, entitled "Public Attitudes Toward Local Telephone Company Use of CPNI," presents the findings of a telephone survey conducted during the period November 14-17, 1996, among a national probability sample of 1011 adults 18 years of age and older, living in private households in the continental United States (Westin study). CBT commissioned Aragon Consulting Group of St. Louis, Missouri, to conduct a similar study regarding carrier use of CPNI. Aragon Consulting Group conducted a total of 227 interviews with a random sample of CBT residential customers. The survey purports to demonstrate that customers expect their carriers to keep them apprised of new offerings. CBT Comments at 8 n.10 and Attachment A (CBT study). *See, e.g.*, AT&T Reply at 3; Bell Atlantic Comments at 6-7; Bell Atlantic Reply at 4-5, att.; Bell Atlantic *ex parte* (filed Feb. 11, 1997) at 1; CBT Comments at 4; GTE Reply Comments at 3-4; PacTel *ex parte* (filed Dec. 12, 1996) at att. A; USTA Reply at 4; U S WEST *ex parte* (filed Jan. 10, 1997) at 1-2.

[225] Westin study at 8.

[226] *Id.* at 5-7.

[227] For example, question 10 of the survey asks generally: "[W]hen you call your local telephone company to discuss your services, the customer service representative that you speak with normally looks up your billing and account service record. As a result of talking with you and seeing the services you already have, the representative may also want to offer you new services. On that call, do you consider it acceptable for the representative to offer you new services?" *Id.* at att. E, at 8. Similarly, question 11 asks generally: "[Y]our local telephone company may also look at its customer records to see which of its current customers it thinks would be most interested in, or benefit from hearing about new services. Do you consider it acceptable for your local telephone company to look over customer records for this purpose?" *Id.*

[228] Cox *ex parte* (filed Jan. 27, 1997) at 2.

numbers subscribers call and from which they receive calls, as well as when and how frequently subscribers make their calls. This data can be translated into subscriber profiles containing information about the identities and whereabouts of subscribers' friends and relatives; which businesses subscribers patronize; when subscribers are likely to be home and/or awake; product and service preferences; how frequently and cost-effectively subscribers use their telecommunications services; and subscribers' social, medical, business, client, sales, organizational, and political telephone contacts.[229]

62. Insofar as the Westin study failed to reveal to the respondents the specific uses of CPNI, we give little weight to the purported results as reflecting customer privacy expectations.[230] In addition, the wording and order of the questions in the survey may have predisposed respondents to thinking that the information available would be nonsensitive. In particular, question 10 refers to the examination of records by customer service representatives as "normal," and implies that the representative will be looking only at the services the customer has before offering new services.[231] Survey respondents may have assumed that this was the information customer service representatives would be examining in question 11. The survey did not clarify that customer service representatives would also potentially examine sensitive CPNI, such as destination-related information. In addition, respondents may have treated questions 10 and 11 as asking them whether they want to learn about new services within the existing service relationship, and not as involving whether they think their CPNI is sensitive information or whether they want it to be disseminated outside that service relationship. Because certain CPNI, such as destination information, can be regarded as highly personal, we conclude that some customers may not desire or expect carriers to use such information for all categories of telecommunications service available, but rather would wish to limit the dissemination of the information outside the service or services to which they subscribed. Indeed, contrary to U S WEST's assertion that customers do not suffer from "privacy angst," other sources suggest just the opposite. Within the last several months, numerous published articles have chronicled customer concern over the loss of privacy in this "information age."[232]

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[229] FBI *ex parte* (filed July 9, 1997) at 3, 9; Cox *ex parte* (filed Feb. 20, 1997). FBI also asserts that unauthorized access to CPNI raises significant national security, law enforcement, and public safety concerns. *See generally* FBI *ex parte* (filed July 9, 1997).

[230] Similar criticisms apply to CBT's survey results. CPNI was not described fully to those surveyed, and the examples of CPNI mentioned in the survey did not include call destination information. CBT Comments at app. A.

[231] *See supra* note 227.

[232] *See e.g.*, Joshua Quittner *et al.*, *Invasion of Privacy: Our Right to be Left Alone Has Disappeared, Bit by Bit, in Little Brotherly Steps*, Time Magazine, Aug. 25, 1997, at 28; Mike Mills, *"Call 54" Service Would Reveal Addresses in Md.*, Washington Post, Dec. 2, 1997, at D1; Linda Himelstein et al., *Web Ads Start to Click*, Business Week, Oct. 6, 1997, at 128; *Lexis-Nexis Agrees to Let Consumers See Data*, Los Angeles Times, June

63. Moreover, we do not believe 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, and that may not even have been previously available from that carrier. In the pre-1996 Act environment, although customers could shop among long distance providers, CMRS providers, and information service providers (and among all these providers' respective discrete service offerings), most customers, as a general matter, could not choose among carriers offering "one-stop shopping" because such comprehensive service packages did not exist.[233] This is particularly true in connection with local service because incumbent LECs were regulated monopolies and therefore customers had no choice, and could not even shop, among local service providers.[234] Accordingly, under these circumstances, it is highly unlikely that customers would have expected a carrier to which they subscribed for one service to use their CPNI for another service to which they did not subscribe - and which previously may have been unavailable - from that carrier.

64. Second, even if the survey accurately shows that customers desire "one-stop shopping," and would permit carriers to share information in order to offer improved service, our interpretation of section 222(c)(1) does not foreclose carriers' ability to offer integrated

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24, 1997, at D3; James B. Rule, *Our Data, Our Rules*, Washington Post, Oct. 7, 1997, at A17. The Federal Trade Commission (FTC) recently held a three day symposium on privacy in the Internet where use of personal information, even by the on-line provider, was hotly debated. Symposium, *Consumers' and Children's Privacy On-line, Computer Databases, and Unsolicited E-mail*, June 10-13, sponsored by the FTC, Washington, D.C. The Westin study itself found, in questions that directly and specifically probed customers privacy attitudes (in contrast with the CPNI-specific questions) that "public concerns over threats to privacy and the desire for better control over the uses made by companies of customer information are very high, and still rising." Westin study at 3. Specifically, a majority (55%) of those surveyed were very concerned and 13% somewhat concerned about threats to their privacy. More to the point, half (50%) agree strongly that consumers have lost all control over how personal information is handled, and another third (32%) agree somewhat. Westin study at 4. The depth of feeling is striking (half or more feeling strongly about the issue) in comparison to the tepid response given by customers when generally asked whether they want to receive information regarding telephone company offerings, in which only a small proportion (16%) were very interested. Westin study at att. at 7.

[233] We note, moreover, that in the pre-Act environment, information protection practices differed little from carrier to carrier. This was based both on the Commission's nonstructural safeguards explicitly restricting CPNI sharing, as well as the structural separations operating in fact to prohibit carrier CPNI use for marketing other service offerings. Customers, therefore, did not and could not select carriers on the basis of their privacy protection policies, and in this regard, generally had little or no choice in connection with their control of their CPNI. We agree with NTIA that, with the advent of competition, carrier policies concerning protection of personal information may very well factor into the customer's selection of their carrier. *NTIA Privacy Report* at 9 n.35, *supra* note 96. Because the competitive environment envisioned by the 1996 Act is in its nascency, however, neither customers nor carriers have developed such expectations or sophistication.

[234] LDDS Worldcom Further Reply at 3-4.