

packages nor the beneficial marketing uses to which CPNI can be made.<sup>235</sup> We agree with commenters that it is desirable for carriers to provide integrated telecommunications service packages,<sup>236</sup> and that the 1996 Act contemplates one-stop shopping, as past "product market" distinctions between local and long distance blur.<sup>237</sup> We are not persuaded, however, that the single category approach alone promotes these benefits. We believe the total service approach also accommodates these interests. The total service approach, for example, places no restriction on the offering of integrated service packages.<sup>238</sup> Moreover, the carrier can use CPNI to market other offerings within an existing category of service, and when a customer subscribes to more than one, can share CPNI for marketing all offerings within the customer's total existing service. In this way, the total service approach allows a carrier to use a customer's account information to improve the quality of the service to which the customer currently subscribes, without the fatal statutory, privacy, and competitive flaws of the single category approach.

65. On this basis, we likewise reject arguments in support of the two category approach that restrictions on using CPNI to market a carrier's wireline and wireless services only would serve to perpetuate artificially a landline/CMRS distinction and thereby discourage innovative, integrated services.<sup>239</sup> BellSouth argues that such CPNI sharing is crucial to effective joint marketing, and that treating CMRS as a separate service category for purposes of section 222 thus would thwart the joint marketing relief granted to carriers through section 601(d) of the 1996 Act.<sup>240</sup> As discussed in the *CMRS Safeguards Order*, we disagree

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<sup>235</sup> California Commission Reply at 4 (CPNI is not necessary for one-stop shopping).

<sup>236</sup> See, e.g., Bell Atlantic Comments at 2, 3-4, 6; Bell Atlantic Reply at 4-6, att.; BellSouth Comments at 9-10; CBT Comments at 4; GTE Comments at 10; GTE Reply at 1-2, 3-4; SBC Comments at 8; SBC Reply at 7; U S WEST Comments at 4-7, 11; U S WEST Reply at 7; U S WEST *ex parte* (filed Feb. 19, 1997) at 10.

<sup>237</sup> AT&T Comments at 2-3, 11; AT&T Reply at 6-7.

<sup>238</sup> For example, customers that desire CMRS offerings as options in their telecommunications service can certainly have them as such. See U S WEST Comments at 12. In another example, carriers are perfectly free to develop and promote "innovative, integrated services such as GTE's Tele-Go." GTE Comments at 12; GTE Reply at 4 n.4.

<sup>239</sup> BellSouth Comments at 12; GTE Comments at 12; GTE Reply at 4 n.4; see also U S WEST Comments at 12-14 (CMRS is simply a means of receiving wireline-like service without a tether to a physical plant; CPNI sharing promotes quality product development); BOC Coalition *ex parte* (filed Nov. 19, 1996) at 8 (CPNI sharing between wireline and CMRS will improve product quality as the Commission recognized when it refused to prohibit AT&T from disclosing CPNI to McCaw because it wanted to encourage one-stop shopping (citing *McCaw Transfer Order*)).

<sup>240</sup> BellSouth Comments at 11-12 (citing *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 601(d), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152)); see also PacTel Reply at 6 n.8 (asserting that CMRS should not be a separate category if doing so would be inconsistent with the CMRS joint marketing

that the joint marketing relief granted by Congress in section 601(d) renders the Commission without power to regulate the nature of the joint marketing.<sup>241</sup> We believe the CPNI restrictions set forth herein are a reasonable exercise of our authority consistent with section 601. Under the total service approach, where a customer obtains CMRS and local or long distance service from the same carrier, CPNI from the customer's entire service can be used to market related offerings, and improve the customer's existing service. Carriers are fully able to communicate with their existing customers and solidify the customer-carrier relationship. This is precisely the benefit for which Congress contemplated, and customers expect, that CPNI would be used. Moreover, as CompTel points out, the principal "inefficiency" and bar to the offering of integrated service alleged under *Computer II* and *Computer III* -- the inability of sales personnel to respond to customer inquiries regarding other telecommunications service offerings -- is explicitly eliminated by section 222(d)(3).<sup>242</sup> Section 222(d)(3) provides that nothing in section 222 prohibits a carrier from using, disclosing, or permitting access to CPNI "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."<sup>243</sup>

66. To be sure, under the total service approach carriers may not use CPNI without prior customer approval to target customers they believe would be receptive to new categories of service. While this limitation under the total service approach might make incumbent carriers' marketing efforts less effective and potentially more expensive than the single category approach,<sup>244</sup> we disagree that this is a wholly undesirable outcome or contrary to what Congress intended. The 1996 Act was meant to ensure, to the maximum extent possible, that, as markets were opened to competition, carriers would win or retain customers on the basis of their service quality and prices, not on the basis of a competitive advantage conferred solely due to their incumbent status. We agree with several parties that the single category approach, in contrast with the total service approach, would give incumbent carriers

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provision of the 1996 Act).

<sup>241</sup> *CMRS Safeguards Order* at ¶¶ 82-85. *supra* note 51.

<sup>242</sup> CompTel Reply at 4.

<sup>243</sup> 47 U.S.C. § 222(d)(3). *See infra* at Part VIII.D (relying on section 222(d)(3), among other things, to replace safeguards under *Computer III* involving access restrictions, with use restrictions). On this basis we also reject U S WEST's claim that restricting access to CPNI for purposes of product offerings is a form of passive structural separation that the Commission has repeatedly found not to be in the public interest. U S WEST Comments at 5, app. A.

<sup>244</sup> AT&T Comments at 2, 10 (restricting intra-firm use of CPNI makes product development and marketing more costly and less efficient, thereby raising prices and reducing the quality and variety of service); AT&T Reply at 4 (same).

an unwarranted competitive advantage in marketing new categories of services.<sup>245</sup> New entrants, but not incumbents, would be forced to incur the costs to obtain approval for access to and use of CPNI, and may be placed at a competitive disadvantage because not all customers will approve access. This environment, in turn, might discourage new entrants, thus thwarting the 1996 Act's goals of encouraging competition and investment in new technology as well as accelerating the rapid deployment of advanced telecommunications.<sup>246</sup>

67. Finally, we reject the claim put forth by several proponents of the single category approach that narrower interpretations of section 222(c)(1)(A) would result in significant administrative burdens for carriers.<sup>247</sup> On the contrary, we conclude that the total service approach is the least onerous administratively. Under the total service approach, unlike under the category and discrete offering approaches, a carrier will be able to use the customer's entire customer record in the course of providing the customer service. Moreover, given our decisions to permit oral, written, or electronic approval under section 222(c)(1),<sup>248</sup> and to impose use rather than access restrictions,<sup>249</sup> the total service approach addresses any concern that CPNI restrictions will disrupt the customer-carrier dialogue, and the carriers' ability to provide full customer service.

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<sup>245</sup> California Commission Reply at 2-3, 5; CompTel Reply at 3; MCI Comments at 3; MCI Reply at 3; Sprint Comments at 3; TRA Reply at 9-10. *See also* CompTel Reply at 3-4 (approach based on three categories also allows one-stop shopping, but, unlike the single category approach, it places incumbents and new entrants on equal footing). *But see* ACTA Comments at 4-5 (one-stop shopping marketing may be useful in competing successfully); USTA Comments at 4 (one-stop shopping will enhance competition by permitting customers to comparison shop for similar or better service packages more easily because they need to make fewer calls).

<sup>246</sup> California Commission Reply at 3.

<sup>247</sup> In particular, SBC and USTA argue that a multiple category definition of telecommunications service would specifically burden small companies. SBC Reply at 8; USTA Comments at 3. According to USTA, smaller carriers would have to (1) establish internal procedures to differentiate between "discrete" services; (2) educate employees on differences between "discrete" services; (3) explain to customers why they are requesting to use information, thereby slowing service representatives' handling of calls; (4) design and deploy hardware and software systems to track approval granted; and (5) designate special employees to work with customers who restrict their CPNI. USTA Comments at 3. ALLTEL likewise agrees that multiple category approaches would make mid-size and smaller carriers, which now offer a variety of services, establish costly, elaborate internal business procedures. ALLTEL Comments at 4-5; ALLTEL Reply at 1. Such short-term immediate costs, according to USTA, would be financially prohibitive for most of the companies which have never had CPNI restrictions. USTA Comments at 3.

<sup>248</sup> *See infra* Part V.C.

<sup>249</sup> *See infra* Part VIII.D.

## C. Scope of Carrier's Right Pursuant to Section 222(c)(1)(B)

### 1. Background

68. Section 222(c)(1) of the Act provides that, "except 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.*"<sup>250</sup> In the *Notice*, the Commission stated that CPNI obtained from the provision of any telecommunications service may not be used to market CPE or information services without prior customer authorization, and sought comment on which "services" should be deemed "necessary to, or used in" the provision of such telecommunications service.<sup>251</sup> The Commission also sought comment on whether carriers, absent customer approval, may use CPNI derived from the provision of one telecommunications service to perform installation, maintenance, and repair for any telecommunications service, either under section 222(c)(1)(B) because they are "services necessary to, or used in, the provision of such telecommunications service," or under section 222(d)(1) because the CPNI is used to "initiate, render, bill and collect for telecommunications services."<sup>252</sup>

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<sup>250</sup> 47 U.S.C. § 222(c)(1)(emphasis added).

<sup>251</sup> *Notice* at 12526, ¶ 26.

<sup>252</sup> *Id.* See *infra* Part IV.D. for discussion of section 222(d)(1).

69. Commenters focus on whether CPE, information services,<sup>253</sup> or installation, maintenance, and repair services, should be deemed "services necessary to, or used in, the provision of such telecommunications service."

## 2. Discussion

70. As a threshold matter, given the wide range of views on the interpretation of section 222(c)(1)(B), we reject U S WEST's assertion that we simply craft rules repeating, verbatim, the statutory language.<sup>254</sup> We clarify, however, that we do not attempt here to catalogue every service included within the scope of section 222(c)(1)(B), but rather address the specific offerings that have been proposed in the record as falling within that section, in particular, CPE, certain information services, and installation, maintenance, and repair services. In so doing, we construe section 222(c)(1)(B), like section 222(c)(1)(A), to reflect the understanding that, through subscription to service, a customer impliedly approves its carrier's use of CPNI for purposes within the scope of the service relationship. As we conclude in Part IV.B.2 *supra*, we believe that customers' implied approval in section 222(c)(1)(A) is limited to the total service subscribed to by the customer. We likewise believe that section 222(c)(1)(B) most appropriately is interpreted as recognizing that customers impliedly approve their carrier's use of CPNI in connection with certain *non*-telecommunications services. This implied approval, however, is expressly limited to those services "necessary to, or used in, the *provision of such telecommunications service*." Through this limiting language, we believe carriers' CPNI use is confined only to certain *non*-telecommunications services (*i.e.* those "services" either "necessary to" or "used in"), as well as to those services that comprise the customer's total service offering (*i.e.* "such [section 222(c)(1)(A)] telecommunications service").

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<sup>253</sup> Commenters generally refer to "enhanced services" and "information services" interchangeably. As discussed *supra* note 30, the term "enhanced services" was used in the context of our *Computer II* and *Computer III* proceedings to refer to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). The Act defines the term "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). In the *Non-Accounting Safeguards Order* the Commission held that all "enhanced services" are "information services," and that "adjunct-to-basic" services would be considered telecommunications services. We accordingly consider commenters' reference to "enhanced services," apart from those services formerly classified as adjunct-to-basic, to mean information services. For discussion of adjunct-to-basic services, see *infra* at ¶¶ 73-74.

<sup>254</sup> U S WEST Comments at 15; U S WEST *ex parte* (filed Dec. 2, 1996) at 4-5.

71. *CPE and Certain Information Services.* Based on the statutory language we conclude that, contrary to the position advanced by several parties,<sup>255</sup> a carrier may not use, disclose, or permit access to CPNI, without customer approval, for the provision of CPE and most information services because, as other commenters assert,<sup>256</sup> they are not "services necessary to, or used in, the provision of such telecommunications service" under section 222(c)(1)(B). First, with respect to CPE, the exception in section 222(c)(1)(B) is expressly limited to non-telecommunications "services." CPE is by definition customer premises *equipment*, and as such historically has been categorized and referred to as equipment.<sup>257</sup> We give meaning to the statutory language, and find no basis to extend the exception in section 222(c)(1)(B) to include equipment, even if it may be "used in" the provision of a telecommunications service. Accordingly, we conclude that the statutory limitation to "services" excludes CPE from section 222(c)(1)(B), and carriers cannot use CPNI derived from their provision of a telecommunications service for purposes in connection with CPE.

72. Second, we conclude that, while the information services set forth in the record (e.g., call answering,<sup>258</sup> voice mail<sup>259</sup> or messaging,<sup>260</sup> voice storage and retrieval services,<sup>261</sup> fax store and forward,<sup>262</sup> and Internet access services<sup>263</sup>) constitute non-telecommunications "services," they are not "necessary to, or used in" the carrier's provision of telecommunications service. Rather, we agree with the observation of several commenters

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<sup>255</sup> See, e.g., Ameritech Comments at 4-5; Ameritech Reply Comments at 5-6; Bell Atlantic Comments at 2, 3-5; BellSouth Reply Comments at 6; CBT Comments at 6; GTE Comments at 12 n.25; NYNEX Comments at 12-13; PacTel Comments at 4; PacTel Reply at 6-7; PacTel *ex parte* (filed Aug. 22, 1996) at 6, 12; SBC Reply at 9 n.32; USTA Reply at 5; U S WEST Comments at 14-15.

<sup>256</sup> AICC Comments at 9; CompuServe Comments at 4-5; ITAA Comments at 4; ITAA Reply at 4-7 & n.19; MCI Reply at 5; MCI *ex parte* (filed Aug. 15, 1997) at 1-2; Sprint Reply at 7-8; TRA Reply at 6.

<sup>257</sup> See, e.g., *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989)(court refers to CPE as "equipment," but characterizes the installation and maintenance of inside wiring as "services"); *Computer Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982)(describes CPE as equipment). See also MCI *ex parte* (filed Aug. 15, 1997) at 1 (since CPE is not a service, it does not fall within the meaning of section 222(c)(1)(B)).

<sup>258</sup> Bell Atlantic Comments at 4-5; NYNEX Comments at 12-13.

<sup>259</sup> Ameritech Comments at 6; U S WEST *ex parte* (filed Dec. 2, 1996) at 4.

<sup>260</sup> NYNEX Comments at 12-13; U S WEST Comments at 15.

<sup>261</sup> Arch Comments at 7-8.

<sup>262</sup> U S WEST Comments at 15; U S WEST *ex parte* (filed Dec. 2, 1996) at 4.

<sup>263</sup> U S WEST *ex parte* (filed Dec. 2, 1996) at 4.

that, although telecommunications service is "necessary to, or used in, the provision of" information services, information services generally are not "necessary to, or used in, the provision of" any telecommunications service.<sup>264</sup> As ITAA notes,<sup>265</sup> telecommunications service is defined under the Act in terms of "transmission,"<sup>266</sup> and involves the establishment of a transparent communications path. The transmission of information over that path is provided without the carrier's "use" of, or "need" for, information services. In contrast, information services involve the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*."<sup>267</sup> Indeed, the statute specifically excludes from the definition of information service "any use of any such [information service] capability for the management, control, or operation of a telecommunications system *or the management of a telecommunications service*."<sup>268</sup> Because information services generally, and in particular those few identified in the record (*i.e.*, call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services),<sup>269</sup> are provided to consumers independently of their telecommunication service, they neither are used by the carrier nor necessary to the provision of such carrier's service.

73. Contrary to NYNEX's argument, we conclude that Congress' designation of the publishing of directories as "necessary to, or used in" the provision of a telecommunications service does not require a broad reading of section 222(c)(1)(B) that encompasses all information services.<sup>270</sup> We are persuaded that section 222(c)(1)(B) covers services like those formerly characterized as "adjunct-to-basic," in contrast to the information services such as call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services, that the parties identified in the record.<sup>271</sup> As noted

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<sup>264</sup> See, e.g., Sprint Reply at 7-8; MCI *ex parte* (Aug. 15, 1997) at 1-2; ITAA Reply at 5-6.

<sup>265</sup> ITAA Reply at 5.

<sup>266</sup> 47 U.S.C. § 153 (43) ("[T]elecommunications means the *transmission*, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received") (emphasis added); 47 U.S.C. § 153 (46) ("[T]elecommunications service means the offering of telecommunications service for a fee directly to the public . . .").

<sup>267</sup> 47 U.S.C. § 153(20)(emphasis added).

<sup>268</sup> *Id.* (emphasis added).

<sup>269</sup> See *supra* notes 258-263.

<sup>270</sup> NYNEX Comments at 13; NYNEX Reply at 5.

<sup>271</sup> *Non-Accounting Safeguards Order* at 21,954, ¶ 99 n.225; *NATA Centrex Order*, 101 FCC 2d 349 (1985) recon., 3 FCC Rcd 4385 (1988)(describing adjunct-to-basic and enhanced services). See *supra* notes 258-263.

*supra*, before the 1996 Act, the Commission recognized that certain computer processing services, although included within the literal definition of enhanced services, were nevertheless "clearly 'basic' in purpose and use" because they "facilitate use of traditional telephone service."<sup>272</sup> Examples 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.<sup>273</sup> With respect to these services, the Commission stated that such computer processing applications were "used in conjunction with 'voice' service"<sup>274</sup> and "help telephone companies provide or manage basic telephone services," as opposed to the information conveyed through enhanced services.<sup>275</sup> Although the Commission subsequently recognized these adjunct-to-basic services as being telecommunications services in the *Non-Accounting Safeguards Order*, their appropriate service classification remained unclear at the time that Congress passed the 1996 Act. Accordingly, we believe the language in section 222(c)(1)(B), "services necessary to, or used in, the provision of such telecommunications service," reaches these adjunct-to-basic services, which are "used in" the carrier's provision of its telecommunications service. On this basis, we agree with those parties arguing that services such as call waiting,<sup>276</sup> caller I.D.,<sup>277</sup> call forwarding,<sup>278</sup> SONENT,<sup>279</sup> and ISDN<sup>280</sup> would fall within the language of section 222(c)(1)(B); therefore, carriers need not obtain express approval from the customer to use CPNI to market those services. We disagree, however, that other services, now classified as information services, such as call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services,<sup>281</sup> would come within its meaning.

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<sup>272</sup> See *supra* note 173. *NATA Centrex Order* at 358-61, ¶¶ 23-24 (emphasis added).

<sup>273</sup> *Non-Accounting Safeguards Order* at 21.958, ¶ 107 n.245; *NATA Centrex Order* at 359-61, ¶ 24-28.

<sup>274</sup> *NATA Centrex Order* at 358, ¶ 23 (emphasis added).

<sup>275</sup> *NATA Centrex Recon.* at 4391, ¶ 45. See also *NATA Centrex Order* at 360 ¶ 26 (speed dialing and call forwarding facilitate "establishment of a transmission path over which a telephone call may be completed").

<sup>276</sup> NYNEX Comments at 12-13.

<sup>277</sup> Bell Atlantic Comments at 4-5; CBT Comments at 6; NYNEX Comments at 12-13; USTA Reply at 5.

<sup>278</sup> NYNEX Comments at 12-13.

<sup>279</sup> Bell Atlantic Comments at 4-5.

<sup>280</sup> *Id.* at 4-5.

<sup>281</sup> See *supra* notes 258-263.

74. Our interpretation is supported by Congress' example of the publishing of directories. The publishing of directories, like those services formerly described as adjunct-to-basic, can appropriately be viewed as necessary to and used in the provision of complete and adequate telecommunication service. As the Commission reasoned, in connection with finding directory assistance to be an adjunct-to-basic service: "[w]hen a customer uses directory assistance, that customer accesses information stored in a telephone company data base. . . . [Such] service provides only that information about another subscriber's telephone number *which is necessary to allow use of the network* to place a call to that other subscriber."<sup>282</sup> As with directory assistance services, if listings are not published, many calls cannot, and will not, be made. In this way, the publishing of directories is likewise necessary to facilitate call completion. This is the view taken by numerous state courts that have explicitly found that the publishing of telephone listings is a necessary component of the provision of basic telephone service.<sup>283</sup> In contrast, most information services are not "used in, or necessary to" the provision of the carrier's telecommunications service.<sup>284</sup>

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<sup>282</sup> *NATA Centrex Order* at 360 ¶ 26 (emphasis added). By contrast, the Common Carrier Bureau, in concluding that reverse directory service is an enhanced service, and not adjunct to basic, reasoned: "[W]e find that the primary purpose for [the reverse directory] service is not to facilitate call completion. We conclude that unlike directory assistance, which the Commission has found adjunct to basic because it provides information necessary to make a call, the reverse-search capability provides additional information that is not necessary to make a call (because the subscriber already has the telephone number) and which could be used for a number of other purposes." *In the Matter of U S WEST Communications, Inc.*, CC Docket No. 90-623, Order, 11 FCC Rcd 1195, 1199-1200, ¶ 30 (1995).

<sup>283</sup> The Supreme Court of North Carolina has held that the publishing of a directory is an essential part of providing reasonably adequate telephone service. *State of North Carolina ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 391 S.E.2d 487, 490-91 (N.C.S.Ct. 1990). Similarly, the United States Court of Appeals for the District of Columbia Circuit affirmed the Public Service Commission of the District of Columbia's order finding that "the basic light-faced classified listings, which all subscribers are entitled to as part of their service, perform a necessary reference function in connection with telephone service." *Classified Directory Subscribers Ass'n v. Public Service Comm'n of the District of Columbia*, 383 F.2d 510, 511 (D.C. Cir. 1967). See also *Mountain States Tel. & Tel. Co. v. Public Service Comm'n of Wyoming*, 745 P.2d 563, 570 (1987) ("[A] listing of telephone numbers like the white pages is part and parcel of the 'service to or for the public.'"); *Solomon v. Public Serv. Comm'n*, 286 A.D. 636, 639 (1955) ("If the Telephone Company publishes a classified directory for use by the public, the listing therein of a particular customer or associates of a customer becomes an important part of the telephone service.").

<sup>284</sup> ITAA Reply at 5-7; see also Sprint Reply at 7 (argues that CPE is only used by the customer and not the carrier and therefore does not come within section 222(c)(1)(B)). Based on our reasoning above, even if we accept U S WEST's suggestion to interpret "necessary" under section 222(c)(1)(B) as we did in connection with section 251(c)(6) in the *Local Competition Order*, information services would not come within the statutory meaning of section 222(c)(1)(B). U S WEST *ex parte* (filed Dec. 2, 1996) at 5 n.10 & n.11 (citing the *Local Competition Order* at 15.794, ¶ 579).

75. As a matter of statutory construction, we find that the language of section 222(c)(1)(B) is clear and unambiguous, and does not permit the interpretation that CPE and most information services are "services necessary to, or used in, the provision of such telecommunications service." But even if that language is ambiguous, we are unpersuaded by parties' contrary arguments based on the legislative history and policy considerations. Specifically, we disagree with U S WEST's claim that the absence in section 222 of an express CPE and information services marketing prohibition, which was contained in the House bill, indicates that Congress intended to allow CPNI use for marketing CPE and information services without customer approval.<sup>285</sup> We do not believe that this legislative history indicates Congress' intent one way or the other. Because any change from prior versions is not explained in the Conference Report, we decline to speculate about the possible reasons underlying the revisions to this provision. Moreover, as ITAA and CompuServe argue, including information services within the scope of section 222(c)(1)(B) may give an unfair competitive advantage to incumbent carriers in entering new service markets.<sup>286</sup> Accordingly, restricting CPNI use in the CPE market is consistent with Congress' express intent that, as part of the balance, we protect competitive concerns regarding CPNI use.

76. We also reject suggestions that restrictions on CPNI sharing in the context of CPE and information services would be contrary to customer expectations,<sup>287</sup> as well as detrimental to the goals of customer convenience<sup>288</sup> and one-stop shopping.<sup>289</sup> As ITAA

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<sup>285</sup> U S WEST Comments at 15 n.36.

<sup>286</sup> ITAA Comments at 4; CompuServe Comments at 4; *see also* ATSI *ex parte* (filed Oct. 29, 1996) at 2 (Commission should ensure that the CPNI custodian (*i.e.*, the carrier) and an information service provider will be in the same position when offering competing information services).

<sup>287</sup> *See, e.g.*, Ameritech Comments at 5-6 (because CPE and information services have many natural affinities with telecommunications services, customers might expect them to be combined, *e.g.*, voice mail); Ameritech Reply at 6-7 (same); AT&T *ex parte* (filed Oct. 8, 1996) at 1-2 (customers do not recognize basic/enhanced/CPE distinction); BellSouth Reply at 6 (voice messaging service is viewed by customers as part of their communications service, especially in states where it must be offered under tariff); USTA Reply at 5; *see also* Ad Hoc Reply at 5-6 (carriers can use CPNI to market CPE and other services that are "necessary to, or used in" providing a telecommunications service (*e.g.*, caller ID terminals), but not if they are only "related to" that service (*e.g.*, PBX equipment or Centrex service to local exchange)); Ameritech Comments at 5 (should permit use of CPNI to develop and market CPE and certain information services because they are natural "adjuncts" to telecommunications services); Ameritech Reply at 5-6 (same); AT&T Comments at 8 n.5 (same); AT&T Reply at 5-6 & n.11 (same); GTE Comments at 12 n.25 (same); GTE Reply at 4 n.4 (same).

<sup>288</sup> U S WEST *ex parte* (filed Dec. 2, 1996) at 4 (permitting carriers to offer CPE on a service call increases consumer efficiencies because the customer receives the CPE, and corresponding service, more quickly).

notes, CPNI is not required for one-stop shopping.<sup>290</sup> Our interpretation of section 222(c)(1)(B) does not prohibit carriers from bundling services that they are otherwise able to bundle under the 1996 Act, or from marketing integrated service offerings. The restrictions merely would require the carrier to obtain customer approval before using CPNI for such purposes.<sup>291</sup>

77. Finally, we reject parties' contentions that we should permit carriers to use CPNI in connection with CPE and information services because the Commission in the past permitted more information sharing.<sup>292</sup> PacTel argues that CMRS-related CPE and information services come within the meaning of section 222(c)(1)(B) because the Commission previously had not restricted CMRS carriers' use of CMRS CPNI to market these offerings.<sup>293</sup> While it is true that the Commission previously had allowed CMRS carriers to use CMRS CPNI to market CMRS-related CPE and information services, Congress was well aware of the Commission's treatment of CMRS CPNI, and of our framework of nonstructural safeguards in connection with CPE and information services. In its place, Congress enacted section 222 which extends to all telecommunications carriers and thus all

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<sup>290</sup> See, e.g., Ameritech Comments at 5; Ameritech Reply at 6; Bell Atlantic Reply at 4-6; USTA Reply at 4-5; AT&T Reply at 6; Bell Atlantic Comments at 1-2, 4-5. See also U S WEST *ex parte* (filed Dec. 2, 1996) at 5 n.11 (public interest is advanced by broad interpretation of "necessary" with respect to customer-carrier transactions, where customers are trying to meet their needs in the most efficient way possible); GTE Comments at 12 n.25 (consumers benefit from joint marketing of CPE and information services with basic services); CBT Comments at 6 (features such as caller ID may enhance local, long distance, or wireless service).

<sup>291</sup> ITAA Reply at 7 n.19.

<sup>292</sup> See discussion *supra* ¶ 64 regarding how CPNI restrictions in connection with section 222(c)(1)(A) do not undermine one-stop shopping goals. We note further that, in the specific context of CPE and information services, the CPNI restrictions announced herein may have even less effect on carriers' joint marketing efforts. As Ameritech and MCI point out, customer information derived from the provision of any non-telecommunications service, such as CPE or information services, is not covered by section 222(c)(1), and thus may be used to provide or market any telecommunications service regardless of telecommunications service categories or customer approval. Ameritech Comments at 5 n.6; MCI Reply at 5 n.8 (except for section 275(d) alarm monitoring restrictions).

<sup>293</sup> See, e.g., U S WEST Comments at 15 & n.37 (citing *BOC CPE Relief Order on Recon supra* note 34, where the Commission recognized that allowing CPNI use for CPE and enhanced services can benefit the public interest); Ameritech Comments at 6 (citing *BOC Safeguards Order*, 6 FCC Rcd at 7610, ¶ 85).

<sup>294</sup> PacTel *ex parte* (filed Jan. 10, 1997) at 2-10; see also Arch Comments at 7-8 (voice storage and retrieval services should be deemed "used in" provision of CMRS, as they routinely are coupled with CMRS); AT&T Reply at 5-6 & n.11 (cellular CPE is necessary to or used in provision of cellular service); CBT Comments at 6 (services like cellular need the associated CPE); U S WEST *ex parte* (filed Dec. 2, 1996) at 4 n.8 (CMRS CPE is so specialized that it must often be made available at the point of service sale in order for service to begin in a timely fashion).

telecommunications services, and which contains no exception for CMRS-related CPE and information services. Moreover, we note that the efficiencies gained through permitting CPNI use for marketing enhanced services, described by the Commission in a pre-1996 Act proceeding, were in the context of an inbound call.<sup>294</sup> Section 222(d)(3) expressly permits use of CPNI upon the approval of the customer in this inbound context, and therefore, would not preclude the one-stop shopping envisioned by the Commission in that order. Thus, while the Commission previously chose to balance considerations of privacy and competition that permitted more sharing of information in these contexts, Congress struck a different balance in section 222, which now controls.<sup>295</sup> We also note, however, that the record in this proceeding does not indicate whether, as a matter of policy, carriers should be prohibited from marketing CPE under the total service approach. Section 64.702(e) of the Commission's rules specifies that CPE is separate and distinct from the provision of common carrier communications services.<sup>296</sup> It nevertheless may be appropriate in the future for us to examine whether the public interest would be better served if carriers were able to use CPNI, within the framework of the total service approach, in order to market CPE.

78. *Installation, Maintenance, and Repair Service.* We conclude that, pursuant to section 222(c)(1)(B), a carrier may use, disclose, or permit access to CPNI, without customer approval, in its provision of inside wiring installation, maintenance, and repair services. We note at the outset that commenters responded quite generally to the *Notice's* question on this issue, with several concluding, with little or no discussion, that "carriers may use CPNI derived from the provision of one telecommunications service to perform installation, maintenance, and repair for any telecommunications service" under section 222(c)(1)(B).<sup>297</sup> Apart from the context of inside wiring, we are uncertain as to what other installation, maintenance, and repair services parties contend that CPNI could be used. Because commenters failed to specify their views further, we reject as unsupported and unclear, the general claim that CPNI derived from the provision of "one telecommunications service" may be used to provide installation, maintenance, and repair services for *any* telecommunications

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<sup>294</sup> Ameritech Comments at 6 (citing *BOC Safeguards Order*, 6 FCC Rcd at 7610, ¶ 85, *supra* note 32).

<sup>295</sup> See discussion *supra* ¶ 34 (describing that, to the extent Commission's prior orders are inconsistent with the new statutory scheme, section 222 prevails), and discussion *infra* Part VIII regarding the *Computer III* framework (same). We likewise reject U S WEST's contention that the 1992 Cable Act controls our construction of section 222(c)(1)(B). U S WEST Comments at 8-10. Although the 1992 Cable Act's general and unrestricted term "other service" may support broad sharing of customer information in the cable context, Congress did not use such language in section 222(c)(1)(B), but rather used the limiting language "necessary to, or used in." See discussion of the 1992 Cable Act *supra* ¶ 34.

<sup>296</sup> 47 C.F.R. § 64.702 (e).

<sup>297</sup> See, e.g., Ameritech Comments at 11-12 & n.12; CBT Comments at 6-7; PacTel Comments at 5; Sprint Comments at 4; Sprint Reply at 7, 7 n.15; USTA Reply at 5; U S WEST Reply at 5-6.

service.<sup>298</sup> Nevertheless, the record supports permitting the provision of inside wiring installation, maintenance, and repair services under section 222(c)(1)(B), and we accordingly limit our discussion of installation, maintenance, and repair services to inside wiring-related services.

79. Specifically, we are persuaded that installation, maintenance, and repair of inside wiring is a service both "necessary to" and "used in" a carrier's provision of wireline telecommunications service.<sup>299</sup> As such, carriers may use, without customer approval, CPNI derived from wireline service for the provision of inside wiring installation, maintenance, and repair services.<sup>300</sup> As U S WEST points out, inside wiring has little purpose beyond physically connecting the telephone transmission path.<sup>301</sup> We also agree with PacTel that the carrier's "provision" of a telecommunications service includes keeping the telecommunications service in working order through installation, maintenance, and repair services.<sup>302</sup> The Commission's decision in the *Universal Service Order* regarding intra-school and intra-library connections supports our interpretation. In that order, the Commission found that the installation and maintenance of internal connections constitute "additional services" and thus are eligible for universal service support under section 254 of the 1996 Act.<sup>303</sup>

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<sup>298</sup> On this basis, we similarly reject as unsupported Arch's general claim that installation, maintenance, and repair of telecommunications "equipment" are services necessary to provision of the telecommunications service. Arch Comments at 7.

<sup>299</sup> Bell Atlantic Comments at 2, 4-5; NYNEX Comments at 12-13; NYNEX Reply at 5; PacTel Comments at 5; Sprint Comments at 4; Sprint Reply at 7; U S WEST Reply at 5-6; U S WEST *ex parte* (filed Dec. 2, 1996) at 4. See also Ad Hoc Reply at 5-6 (would allow use of CPNI to market CPE, inside wiring, and other services that are "necessary to or used in" providing a telecommunications service); CBT Comments at 6-7 (carrier should be able to use CPNI to perform installation, maintenance, and repair under 222(c)(1)(B)).

<sup>300</sup> Because inside wiring installation, maintenance, and repair is not used in or necessary to CMRS, however, CMRS-only CPNI could not be used in the provision of such inside wiring services.

<sup>301</sup> U S WEST Reply at 5-6; U S WEST *ex parte* (filed Dec. 2, 1996) at 4. See also Bell Atlantic Comments at 5 (without inside wiring, "telephone signals will never reach beyond the customer's rate demarcation point").

<sup>302</sup> PacTel Comments at 5.

<sup>303</sup> *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9016-22, ¶¶ 451-61 (1997). As previously noted, *supra* note 7, the Commission will be reporting to Congress on universal service matters in April 1998. We further note, however, that the *Universal Service Order* is consistent with several earlier decisions where the Commission blurred any distinction between inside wiring and its installation, maintenance, and other servicing. For example, in explaining how telephone companies were historically prevented from either requiring customers to buy or pay a charge for using inside wire that had previously been installed, or from prohibiting customers from removing or maintaining inside wire using sources of their own choosing, the Commission stated: "From the deregulation of inside wire, . . . would come

80. We further believe that our conclusion is fully consistent with customer expectation,<sup>304</sup> and thereby furthers the statutory principles of customer control and convenience embodied in section 222.<sup>305</sup> Although inside wiring installation, maintenance, and repair services may be purchased separately from telephone services, they constitute non-telecommunications services that carriers effectively need and use in order to provide wireline telecommunications services. We believe such services represent core carrier offerings that are both necessary to and used in the provision of existing service, which is precisely the purpose for which both Congress intended, and we believe customers expect, that CPNI be used. Because we conclude that such CPNI use by carriers is within customers' expectations, we do not believe that our interpretation of section 222(c)(1)(B) jeopardizes privacy interests. Moreover, insofar as the Commission did not restrict LEC use of CPNI to market inside wiring maintenance contracts prior to the 1996 Act, our interpretation of section 222(c)(1)(B) will not increase any existing competitive advantage.

#### D. Scope of Carrier's Right Pursuant to Section 222(d)(1)

##### 1. Background

81. The Commission observed in the *Notice* that section 222(d)(1) enables carriers to use, disclose, or permit access to CPNI "to initiate, render, bill, and collect for telecommunications services."<sup>306</sup> After generally acknowledging that section 222 restricts the

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unregulated and highly competitive markets for all telephone-related *services* performed on the customer side of the demarcation point separating the customer premises from the telephone network." *Telecommunications Services Inside Wiring*, Notice of Proposed Rulemaking, CS Docket No. 95-184, 11 FCC Rcd 2747, 2766-67, ¶¶ 40-41 (1996)(emphasis added). *See also, e.g., Detariffing the Installation and Maintenance of Inside Wiring*, Memorandum Opinion and Order, CC Docket No. 79-105, 1 FCC Rcd 1190, 1190, ¶ 1 n.1 (1986)("In a physical sense, inside wiring refers to 'the customer premises' portion of the telephone plant which connects station components to each other and to the telephone network. . . . For accounting purposes, inside wiring includes both the costs of the wiring described above and the labor and other costs associated with installing that wiring on the customer's side of the demarcation point.").

<sup>304</sup> Ameritech Reply at 6 (customers expect carriers to use CPNI to market "reasonably associated" services, such as local service and inside wiring); Sprint Comments at 4 (customers expect good service to involve installation, maintenance, and repair of the subscribed telecommunications service); Sprint Reply at 7 & n.15 (same).

<sup>305</sup> Accordingly, we reject ITAA's argument that a construction of section 222(c)(1)(B) permitting use of CPNI to market inside wiring, among other things, would "undo the statute altogether." ITAA Reply at 6-7 & n.19.

<sup>306</sup> *Notice* at 12526, ¶ 26. Specifically, section 222(d)(1) provides in pertinent part: "[N]othing in this section 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 -- (1) to initiate, render, bill, and collect for telecommunications services: . . ." 47 U.S.C. § 222(d)(1).

unapproved use of CPNI for any purpose other than those specified in section 222(c)(1) and the exceptions listed in section 222(d), the Commission sought specific comment on whether carriers, absent customer approval, may use CPNI derived from the provision of one telecommunications service to perform installation, maintenance, and repair for any telecommunications service to which a customer subscribes, either under section 222(d)(1) because they are used "to initiate, render, bill, and collect for telecommunications services" or section 222(c)(1)(B).<sup>307</sup>

## 2. Discussion

82. In the context of installation, maintenance, and repair of inside wiring, we conclude that section 222(d)(1), as well as section 222(c)(1)(B), permit carrier use of CPNI without customer approval for the provision of such services.<sup>308</sup> We agree with virtually all commenters that section 222(d)(1)'s permission for carriers to use CPNI "to initiate, render, bill, and collect for telecommunications services" includes the actual installation, maintenance, and repair of inside wiring.<sup>309</sup>

83. Our conclusion is consistent with Equifax's concerns that we not interpret sections 222(d)(1) as well as 222(d)(2) in a manner that impedes carriers' access to information for the purpose of billing, fraud prevention, and related services, as well as the carriers' ability to provide the required information.<sup>310</sup> We agree that section 222(d)(2)'s exception for the disclosure 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, such services"<sup>311</sup> includes the use and disclosure of CPNI by carriers to prevent fraud. Sections 222(d)(1) and (2) establish that the carrier and public's interest in accurate billing and collecting for telecommunications services and in preventing fraud and abuse outweigh any privacy interests of those who might attempt to avoid payment of their bills or perpetrate a fraud.

84. Contrary to the claims of AT&T and MCI,<sup>312</sup> we further conclude, however, that the term "initiate" in section 222(d)(1) does not require that CPNI be disclosed by

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<sup>307</sup> *Id.* See *supra* Part IV.C for discussion of section 222(c)(1)(B).

<sup>308</sup> Based on the lack of clarity in the record on what parties mean by "installation, maintenance, and repair services" we again limit our discussion to the context of inside wiring.

<sup>309</sup> NYNEX Comments at 12 n.15; PacTel Comments at 5; SBC Comments at 13.

<sup>310</sup> Equifax Reply at 5.

<sup>311</sup> 47 U.S.C. § 222(d)(2).

<sup>312</sup> AT&T Comments at 5, 18; MCI Further Comments at 11-12; *but see* Bell Atlantic Reply at 9-10.

carriers when competing carriers have "won" the customer. We agree with GTE that section 222(d)(1) applies only to carriers already possessing the CPNI, within the context of the existing service relationship, and not to carriers seeking access to CPNI.<sup>313</sup> We note, however, that section 222(c)(1) does not prohibit carriers from disclosing CPNI to competing carriers, for example, upon customer "approval." Accordingly, although an incumbent carrier is not required to disclose CPNI pursuant to section 222(d)(1) or section 222(c)(2)<sup>314</sup> absent an affirmative written request, local exchange carriers may need to disclose a customer's service record upon the oral approval of the customer to a competing carrier prior to its commencement of service as part of the LEC's obligations under sections 251(c)(3) and (c)(4).<sup>315</sup> In this way, section 222(c)(1) permits any sharing of customer records necessary for the provisioning of service by a competitive carrier, and addresses the competitive concerns raised by AT&T and MCI.

85. Furthermore, a carrier's failure to disclose CPNI to a competing carrier that seeks to initiate service to a customer that wishes to subscribe to the competing carrier's service, may well, depending upon the circumstances, constitute an unreasonable practice in violation of section 201(b).<sup>316</sup> We also do not believe, contrary to the position suggested by AT&T,<sup>317</sup> that section 222(d)(1) permits the former (or soon-to-be former) carrier to use the CPNI of its former customer (*i.e.*, a customer that has placed an order for service from a competing provider) for "customer retention" purposes. Consequently, a local exchange

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<sup>313</sup> GTE Reply at 10.

<sup>314</sup> 47 U.S.C. § 222(c)(2).

<sup>315</sup> 47 U.S.C. § 251(c)(3), (4). *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15763-64, 15766-67, ¶¶ 518, 521-23 (1996)(*Local Competition Order*) *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *vacated in part on reh'g, Iowa Utils. Bd. v. FCC*, 120 F.3d 753, *further vacated in part sub nom. California Public Utilities Comm'n v. FCC*, 124 F.3d 734 (8th Cir. 1997), *writ of mandamus issue sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. Jan. 22, 1998), *petition for cert. granted* (collectively, *Iowa Util. Bd.*). Order on Recon., 11 FCC Rcd 13042 (1996). Second Order on Recon., 11 FCC Rcd 19738 (1996). Third Order on Recon and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recon. pending; In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 1997 WL 522784, FCC 97-298 (rel. Aug. 19, 1997) at ¶ 139 n.341; *see also PacTel ex parte* (filed Feb. 3, 1997) at 3 (written authorization may not be needed for the release of CPNI to a competitor who has won away a carrier's customer).

<sup>316</sup> 47 U.S.C. § 201(b). We agree with MCI that section 201(b) remains fully applicable where it is demonstrated that carrier behavior is unreasonable and anticompetitive. MCI Further Comments at 13. As MCI suggests, this may be shown in any number of contexts involving use or disclosure of customer information that unreasonably favors the incumbent LEC to the disadvantage of the competing LEC.

<sup>317</sup> AT&T *ex parte* (filed Nov. 17, 1997).

carrier is precluded from using or accessing CPNI derived from the provision of local exchange service, for example, to regain the business of a customer that has chosen another provider. The use of CPNI in this context is not statutorily permitted under section 222(d)(1), insofar as such use would be undertaken to market a service to which a customer previously subscribed, rather than to "initiate" a service within the meaning of that provision. Nor do we believe that the use of CPNI for customer retention purposes is permissible under section 222(c)(1) because such use is not carried out "in [the] provision" of service, but rather, for the purpose of retaining a customer that had already undertaken steps to change its service provider. Customer approval for the use of CPNI in this situation thus may not be appropriately inferred because such use is outside of the customer's existing service relationship within the meaning of section 222(c)(1)(A).

## V. "APPROVAL" UNDER SECTION 222(c)(1)

### A. Overview

86. Under sections 222(c)(1), (c)(2), and (d)(3), a carrier may (or must) use, disclose, or permit access to CPNI upon the customer's approval. In contrast to sections 222(c)(2) and (d)(3) of the Act, in which Congress made clear the form of customer approval,<sup>318</sup> section 222(c)(1) does not specify what kind of approval is required when it permits a carrier upon "approval of the customer" to use, disclose, or permit access to CPNI for purposes beyond the limited exceptions set forth in sections 222(c)(1)(A) and (B).<sup>319</sup> Because the form of approval has bearing on carriers' use of CPNI as a marketing tool, we received considerable comment concerning the proper interpretation of "approval" under section 222(c)(1). In general, parties offer three separate views, ranging from a most restrictive interpretation that would require approval to be in writing, to a permissive one, where carriers merely would need to provide customers with a notice of their intent to use CPNI, and a mechanism for customers to "opt-out" from this proposed use (notice and opt-out).<sup>320</sup>

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<sup>318</sup> Section 222(c)(2) provides that: "[a] telecommunications carrier shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2). Section 222(d)(3) provides, in pertinent part, that: "[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] 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." 47 U.S.C. § 222(d)(3).

<sup>319</sup> 47 U.S.C. § 222(c)(1). Section 222(c)(1) also permits a carrier to use, disclose, or permit access to CPNI as required by law. 47 U.S.C. § 222(c)(1).

<sup>320</sup> A notice and opt-out mechanism also is referred to as a "negative option." We refer to oral, electronic, and written forms of approval collectively as "affirmative" or "express" approval.

87. We conclude that the term "approval" in section 222(c)(1) is ambiguous because it could permit a variety of interpretations. We resolve that ambiguity by implementing the statute in a manner that will best further consumer privacy interests and competition, as well as the principle of customer control. We conclude that carriers must obtain express written, oral, or electronic approval for CPNI uses beyond those set forth in sections 222(c)(1)(A) and (B). Further, in order to ensure that customers can provide informed approval under section 222(c)(1), we require that carriers give customers explicit notice of their CPNI rights prior to any solicitation for approval. By implementing the approval requirements of section 222(c)(1) in this manner, we will minimize any unwanted or unknowing disclosure of CPNI by customers, consistent with Congress' concern for consumer privacy interests. In addition, as explained below, we determine that this form of approval will minimize the competitive advantages that might otherwise accrue unnecessarily to incumbent carriers.

## B. Express Versus Notice and Opt-Out

### 1. Background

88. The Commission sought comment in the *Notice* on which methods carriers may use to obtain customer approval consistent with section 222.<sup>321</sup> The Commission recognized that, in the *Computer III* proceedings, prior to the 1996 Act, it established certain authorization requirements applicable solely to the enhanced services operations of AT&T, the BOCs, and GTE, and to the CPE operations of AT&T and the BOCs.<sup>322</sup> Under these *Computer III* rules, for example, the BOCs, AT&T, and GTE are required to provide multi-line business customers with written notification of their right to restrict CPNI use.<sup>323</sup> Absent customer direction to the contrary, we permit these carriers to use their respective CPNI for marketing purposes as proposed in their notice. This notice and opt-out approach does not extend, however, to business customers with twenty or more access lines. For these large business customers, we require the BOCs and GTE to obtain affirmative written authorization

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<sup>321</sup> *Notice* at 12526, ¶ 27.

<sup>322</sup> *Id.* at 12516, ¶¶ 4-5; *Computer III supra* note 32. We discuss the *Computer III* rules specifically, and eliminate them in favor of the framework established by Congress in section 222. *see* discussion *infra* Part VIII.

<sup>323</sup> Customers with two or more access lines are multi-line customers. *Computer III Phase II Order*, 2 FCC Rcd at 3093-97 ¶¶ 141-174, *supra* note 32; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note 33.

before using CPNI to market enhanced services.<sup>324</sup> The Commission invited comment in the *Notice* on whether these *Computer III* requirements should remain in view of section 222.<sup>325</sup>

89. The Commission also sought comment in the *Notice* on a number of alternative methods by which carriers may obtain customer approval under section 222(c)(1). The Commission noted, for example, that carriers may choose a written method, in the form of a letter or billing insert sent to the customer that contains a summary of the customer's CPNI rights and is accompanied by a postcard that the customer could sign and return to the carrier to authorize CPNI use.<sup>326</sup> The Commission sought comment on the privacy and competitive implications, as well as the costs and benefits, of requiring carriers to obtain prior written approval before they could use, disclose, or permit access to customer CPNI.<sup>327</sup>

90. Alternatively, the Commission sought comment on whether section 222(c)(1) allows carriers to engage in outbound telemarketing to obtain oral customer approval for CPNI use.<sup>328</sup> The Commission observed that sections 222(c)(2) and (d)(3) give rise to conflicting inferences as to whether approval can be oral.<sup>329</sup> The Commission noted, for example, that section 222(c)(2) requires telecommunications carriers to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer," and that the absence of a similar written requirement in section 222(c)(1) suggests that oral approval is permitted under that provision.<sup>330</sup> On the other hand, section 222(d)(3) provides that telecommunications carriers may use, disclose, or permit access to CPNI "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."<sup>331</sup> The Commission stated that section 222(d)(3) could be interpreted to suggest that oral consent was not permissible for a broader purpose or a longer duration, or, in the alternative, to allow a carrier to use CPNI to provide a customer with information for the duration of an inbound call, even if the customer has otherwise

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<sup>324</sup> *BOC Safeguards Order*, 6 FCC Rcd at 7605-14 ¶¶ 76-89, *supra* note 32; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45 ¶ 45, *supra* note 33.

<sup>325</sup> *Notice* at 12530, ¶ 41.

<sup>326</sup> *Id.* at 12527, ¶ 29.

<sup>327</sup> *Id.* at 12527, ¶ 31.

<sup>328</sup> *Id.* at 12527, ¶ 30.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 12527, ¶ 31.

restricted the carrier's use of CPNI.<sup>332</sup> The Commission sought comment on how section 222(c)(1) should be interpreted in light of these other provisions.<sup>333</sup>

## 2. Discussion

91. As noted above, while section 222(c)(1) requires customer approval for carrier use of CPNI outside the scope of sections 222(c)(1)(A) and (B), it does not expressly state the form of this approval. In order to implement this provision, we therefore must determine what method of approval will best further both privacy and competitive interests, while preserving the customer's ability to control dissemination of sensitive information. We conclude, contrary to the position of a number of parties,<sup>334</sup> that an express approval mechanism is the best means to implement this provision because it will minimize any unwanted or unknowing disclosure of CPNI.<sup>335</sup> In addition, such a mechanism will limit the potential for untoward competitive advantages by incumbent carriers. Our conclusion is guided by the natural, common sense understanding of the term "approval," which we believe generally connotes an informed and deliberate response.<sup>336</sup> An express approval best ensures such a knowing response. In contrast, under an opt-out approach, as even its proponents admit,<sup>337</sup> because customers may not read their CPNI notices, there is no assurance that any

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<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> ALLTEL Comments at 5-6; Ameritech Comments at 9; AT&T Comments at 3; Bell Atlantic Comments at 7; BellSouth Comments at 18; CBT Comments at 8; GTE Comments at 3, 6; NYNEX Comments at 15; PacTel Comments at 5; SBC Comments at 10; USTA Comments at 5; U S WEST Comments at 17-19.

<sup>335</sup> Arch Reply at 4-5; California Commission Reply at 6-7; CompTel Reply at 4-6; CPSR Reply at 10-11; Frontier Comments at 7-8; ITAA Reply at 4, 9-12; LDDS WorldCom Reply at 8; MCI Reply at 8; Sprint Reply at 4-5; TRA Reply at 6, 8, 11-12; Washington Commission Comments at 6-7.

<sup>336</sup> Indeed, a canvass of definitions of "approve" from a variety of sources confirms that the root of the term is "to prove," which connotes an active, affirmative meaning. *See, e.g.,* Webster's New International Dictionary of the English Language 133 (2nd ed. 1934)(1. To demonstrate the truth or correctness of; to establish as the fact or as being sound; to corroborate; to authenticate; 2. To afford proof of, as by active demonstration); Webster's Third New International Dictionary of the English Language Unabridged 106 (1971) (1. To demonstrate the truth or correctness of; establish as fact or as being sound; 2. test, try; 3. to make or show to be worthy of approbation or acceptance; to offer proof of by active demonstration; manifest or display actually or practically; exhibit; 5. to express often formally agreement with and support of or commendation of as meeting a standard); The American Heritage Dictionary of the English Language (1976) (1. regard favorably; commend by word or action; consider right or good; 2. To confirm or consent to officially; to sanction; ratify).

<sup>337</sup> *See, e.g.,* Bell Atlantic Reply at 7; GTE Comments at 5-6, 9.

implied consent would be truly informed.<sup>338</sup> We agree with the observations of MCI and Sprint that, insofar as customers may not actually consider CPNI notices under a notice and opt-out approach, they may be unaware of the privacy protections afforded by section 222, and may not understand that they must take affirmative steps to restrict access to sensitive information.<sup>339</sup> We therefore find it difficult to construe a customer's failure to respond to a notice as constituting an informed approval of its contents. Accordingly, we adopt a mechanism of express approval because we find that it is the best means at this time to achieve the goal of ensuring informed customer approval.

92. We are not persuaded by the statutory argument raised by the BOCs, AT&T, and GTE that Congress' requirement of an "affirmative written request" in section 222(c)(2) means that Congress intended to permit notice and opt-out when it required only "approval" in section 222(c)(1).<sup>340</sup> While we agree that we should give meaning to Congress' use of two different terms in sections 222(c)(1) and (c)(2), we believe that Congress' use of "approval" in section 222(c)(1) can more reasonably be construed to permit oral, in addition to written approval, rather than to require notice and opt-out. Our interpretation is consistent with the suggestion by several parties that Congress intended to recognize the existing customer-carrier relationship through permitting "approval" in section 222(c)(1), which governs the *existing* carrier's use, disclosure, and permission of access to CPNI, as opposed to requiring an "affirmative written request" as in section 222(c)(2), which governs disclosure to "any party."<sup>341</sup> We are not persuaded, however, that Congress intended for its encouragement of the customer-carrier relationship to translate to support for notice and opt-out within the meaning of section 222(c)(1). Rather, insofar as oral approval promotes customer and carrier convenience, as discussed *infra*, we believe that Congress sought to facilitate the existing customer-carrier relationship by permitting "approval" that is oral, in addition to written, in both sections 222(c)(1) and (d)(3), but not notice and opt-out as well. In addition, we are not persuaded that use of the term "affirmative" in section 222(c)(2) suggests that the absence of such term in section 222(c)(1) evinces Congressional support for an opt-out method because a common sense interpretation of "approval" suggests a knowing acceptance, which opt-out cannot ensure. We also reject the argument that Congress contemplated that approval in

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<sup>338</sup> Frontier Comments at 7-8; ITAA Reply at 11-12; MCI Reply at 8; Sprint Reply at 5; *see also* California Commission Comments at 8 (notice and opt-out raises concerns regarding the verification and accuracy of CPNI notices).

<sup>339</sup> MCI Reply at 8; Sprint Reply at 5.

<sup>340</sup> Ameritech Comments at 9-10; AT&T Comments at 13; BellSouth Comments at 18; GTE Comments at 7; NYNEX Comments at 15; PacTel Comments at 7; SBC Comments at 10; U S WEST Comments at 15.

<sup>341</sup> *See, e.g.*, ALLTEL Comments at 5-6; Ameritech Reply at 7; Bell Atlantic Comments at 7-9; GTE Comments at 6, 7-8; NYNEX Comments at 16-17; USTA Comments at 5.

section 222(c)(1) would be notice and opt-out based on an existing business relationship.<sup>342</sup> Because section 222(d)(3) explicitly excepts from the general CPNI restrictions a carrier's use of CPNI to engage in "inbound telemarketing . . . [and other] services" for the duration of the call if the customer that placed the call grants express (oral) approval, we conclude that Congress could not have contemplated that the only form of approval in the context of an existing business relationship would be notice and opt-out. The exception in section 222(d)(3), which permits a form of express approval, is applicable only in the context of an existing business relationship.

93. We likewise reject U S WEST's claim that the earliest versions of what became H.R. 1555 requires that we interpret "approval" to permit notice and opt-out.<sup>343</sup> U S WEST argues that a change in language from "affirmative request," used in H.R. 3432 (introduced in 1993 during the first session of the 103rd Congress), to "approval" in the subsequent bill H.R. 3626 (introduced in 1994 during the second session of the 103rd Congress) signifies Congress' intent not to require affirmative approval in what later became H.R. 1555 (introduced in 1995, during the 104th Congress), directly preceding section 222(c)(1) of the Act. Based on established principles of statutory interpretation, we generally accord little weight to textual changes made to such early predecessor bills in the preceding Congressional session, unless the reason for such changes are explained in relevant legislative history.<sup>344</sup> Even if we consider the earlier language, we are not persuaded that a change from "affirmative request" to "approval" was intended to be substantive. It is equally plausible (and we believe more likely) that the sponsors of these bills viewed the term approval, as we do, to be synonymous with affirmative request, and made the change for other stylistic reasons.<sup>345</sup>

94. In contrast, we believe that, although the legislative history offers no specific guidance on the meaning of "approval" in section 222(c)(1), the language in the Conference Report, explaining that section 222 strives to "balance both competitive and consumer privacy interests with regard to CPNI,"<sup>346</sup> strongly supports our conclusion that express approval is the better reading of the statutory language. In contrast with notice and opt-out, an express

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<sup>342</sup> ALLTEL Comments at 5-6; Ameritech Comments at 9; AT&T Comments at 3; Bell Atlantic Comments at 7; BellSouth Comments at 18; CBT Comments at 8; GTE Comments at 3, 6; NYNEX Comments at 15; PacTel Comments at 5; SBC Comments at 10; USTA Comments at 5; U S WEST Comments at 16-17.

<sup>343</sup> U S WEST *ex parte* (filed Sept. 11, 1997) at App. B.

<sup>344</sup> *Mead Corp. v. B. E. Tilley*, 490 US 714, 723 (1989); *Rastelli v. Warden*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal Co. v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984).

<sup>345</sup> For example, the drafters could have chosen to use "approval" rather than "affirmative request" to better distinguish it from the "affirmative *written* request" requirement, in what later became section 222(c)(2).

<sup>346</sup> Joint Explanatory Statement at 205, *supra* note 2.

approval requirement best protects both privacy and competitive concerns.<sup>347</sup> We believe that imposing an express approval requirement provides superior protection for privacy interests because, unlike under an opt-out approach, when customers must affirmatively act before their CPNI is used or disclosed, the confidentiality of CPNI is preserved until the customer is actually informed of its statutory protections. This ensures that customers' privacy rights are protected against unknowing and unintended CPNI disclosure. We disagree with PacTel's contention that the use of CPNI does not pose the same privacy risks as the use of medical and financial records, and therefore that the express consent typically required for the use of such records is not warranted for CPNI.<sup>348</sup> Although PacTel observes that the content of phone calls is sensitive, it fails to recognize that call destinations and other details about a call, which constitute CPNI, may be equally or more sensitive.<sup>349</sup> Indeed, PacTel's own survey, the Westin study, reported finding that a majority (53 percent) of the public believes it is "very important" that telephone companies adopt strong privacy policies, which is indicative of the public's concern that this information may be abused, and should be considered sensitive.<sup>350</sup> Thus, even assuming that an opt-out approach can be appropriate for less sensitive customer information, such an approach would not be appropriate for the disclosure of personal CPNI. We also note that section 222 establishes various categories of customer information and different privacy protections for these categories. In particular, section 222 distinguishes among "CPNI" (e.g., sections 222(c)(1), 222(c)(2)), "aggregate information" (e.g., section 222(c)(3)),<sup>351</sup> and "subscriber list information" (e.g., section 222(e)). This suggests that Congress did not intend to require that customer information be delineated into further categories. We thus reject Cox's contention that the sensitivity of the CPNI should govern the form of express approval required.<sup>352</sup> The delineation of information categories in section 222 also undermines NTIA's and other commenters' suggestion that CPNI is not understood as personal or sensitive information, and

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<sup>347</sup> See, e.g., Arch Reply at 4-5; California Commission Reply at 8; Sprint Comments at 5; Sprint Reply at 5; Washington Commission Comments at 7.

<sup>348</sup> PacTel *ex parte* (filed Jan. 24, 1997) at Att. at 4-5. PacTel submitted an analysis of privacy issues authored by Privacy and Legislative Associates. PacTel specifically maintains that the following three factors customarily are used to rank the sensitivity of personal information: (1) the subject matter to which the information pertains; (2) the relationship between the individual about whom the information is collected and the collector of the information; and (3) the actual and potential use of the information. According to PacTel, an analysis of these three factors indicates that CPNI is not as sensitive as medical or financial records. *Id.* at 8.

<sup>349</sup> Cox *ex parte* (filed Jan. 27, 1997) at 2; FBI *ex parte* (filed July 7, 1997) at 3, 9.

<sup>350</sup> PacTel *ex parte* (filed Jan. 24, 1997) at Att. at 7.

<sup>351</sup> See discussion *infra* Part VI.

<sup>352</sup> Cox Further Reply at 3-4.

that a notice and opt-out approach is therefore appropriate.<sup>353</sup> Section 222 accords the most protection to CPNI, by requiring customer approval before it may be disseminated beyond the existing customer-carrier relationship.<sup>354</sup>

95. In connection with competitive concerns, we agree, as several parties suggest,<sup>355</sup> that notice and opt-out is likely to result in a greater percentage of implied "approvals," and thus may place certain carriers at a competitive disadvantage relative to incumbent carriers that possess most of the CPNI. Even if market forces provide carriers with incentives not to abuse their customer's privacy rights, as some parties suggest,<sup>356</sup> these forces would not protect competitors' concerns that CPNI could be used successfully to leverage former monopoly power into other markets. Moreover, because section 222 applies to all telecommunications carriers, and thus all services offered by such carriers (not merely CPE and enhanced services), we believe that there is greater incentive for carriers to use CPNI under this new statutory scheme, and thus greater potential for abuse. In particular, inasmuch as the 1996 Act sought to open new telecommunications markets to all carriers, such as the long distance and local markets, we believe that carriers may have greater incentive to use CPNI to gain a foothold in these new markets than they did under *Computer III*. This is particularly true for the long distance and local markets as entry into these markets would be more lucrative than the CPE and enhanced services markets that were the subject of *Computer III*. Furthermore, we believe that CPNI may be a more useful marketing tool in the context of entry into these service areas, in contrast with the limited context of CPE and enhanced services. Accordingly, we believe that an express approval requirement most appropriately balances the competitive and privacy concerns at stake when carriers seek to use, disclose, or permit access to CPNI for purposes beyond sections 222(c)(1)(A) and (B).

96. We recognize, as several parties point out,<sup>357</sup> that the Commission in the past

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<sup>353</sup> BellSouth Comments at 19-20; NTIA Reply at 27 n.36; PacTel Comments at 7-8; U S WEST Reply at 10.

<sup>354</sup> We note that, unlike the other parties, NTIA supports notice and opt-out in conjunction with a discrete offering interpretation of "telecommunications service" under section 222(c)(1). NTIA Reply at 9-14.

<sup>355</sup> Arch Reply at 5; California Commission Reply at 8; MCI Reply at 8; Sprint Comments at 5; *see also* TRA Reply at 8 (permitting notice and opt-out would undermine the intent of section 222 because it would result in greater use of CPNI, thereby advancing neither privacy nor competitive interests, but instead serving only to preserve the competitive advantage for incumbent carriers).

<sup>356</sup> BellSouth Reply at 13; MobileMedia Reply at 3; PacTel Comments at 6; PacTel Reply at 9; U S WEST Reply at 9.

<sup>357</sup> Ameritech Comments at 8; AT&T Comments at 15 n.18; AT&T Reply at 13 n.31; Bell Atlantic Comments at 8; BellSouth Comments at 3, 12, 14, 19; BellSouth Reply at 2-3; GTE Comments at 9; NYNEX Comments at 16; PacTel Comments at 7-8; USTA Comments at 5; U S WEST Comments at 16 & n.41. *See*

allowed a notice and opt-out mechanism for the use of CPNI to market enhanced services and CPE under the *Computer III* CPNI framework.<sup>358</sup> It is well-established, however, that an administrative agency may depart from precedent so long as it provides a reasoned justification.<sup>359</sup> Consistent with this principle, for the reasons described herein, we find that the enactment of section 222, and the framework and principles it embodies, justifies our adoption of an express approval requirement. Unlike the Commission's pre-existing policies under *Computer III*, which largely were intended to address competitive concerns,<sup>360</sup> section 222 of the Act explicitly directs a greater focus on protecting customer privacy and control. This 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.<sup>361</sup>

97. Other policies the Commission adopted in the past that permitted non-express approval are likewise distinguishable. For example, GTE cites prior decisions in the *Billing Name and Address (BNA)*<sup>362</sup> and *Caller ID* proceedings.<sup>363</sup> Contrary to GTE's contentions, we believe that the concerns associated with the disclosure of CPNI in section 222 are

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*Computer III*, *supra* note 32.

<sup>358</sup> See *infra* ¶ 176.

<sup>359</sup> *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (in determining whether an agency has provided a reasoned explanation for departing from precedent or treating similar situations differently, the court looks only to the reasons given by the agency).

<sup>360</sup> See, e.g., *BOC Safeguards Order*, 6 FCC Rcd at 7611 n.159, *supra* note 32.

<sup>361</sup> Given this new balance struck by Congress in section 222, we also decline to permit notice and opt-out based on arguments that such mechanisms are used commonly in other contexts. Ameritech Comments at 11 (opt-out is common commercial practice where there are numerous consumers); U S WEST Comments at 6-7, 16-17 (opt-out is used by direct marketing industries); PacTel Comments at 8 (opt-out procedures are used in a variety of different contexts); PacTel *ex parte* (filed Oct. 3, 1996) at 2-3 (same); PacTel *ex parte* (filed Jan. 16, 1997) at 7 (same).

<sup>362</sup> In *Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 FCC Rcd 8798, 8810 ¶¶ 68-73 (1993) (*BNA* proceeding), the Commission permitted the disclosure of BNA of unlisted or nonpublished subscribers, unless such subscribers affirmatively requested that the BNA not be disclosed. We also stated that LECs should inform unlisted and nonpublished subscribers of this right and advise them that the "presumption in favor of consent for disclosure [would] begin 30 days after those customers receive[d] those notices." GTE Comments at 8, 10.

<sup>363</sup> In the *Matter of Rules and Policies Regarding Calling Number Identification Service -- Caller ID, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 1764 (1994) (*Caller ID Order*); GTE Comments at 8, 10.