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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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SUMMARY

There is no basis in Section 222 for customer imposed restrictions on a carrier's use and disclosure of CPNI beyond the already strict privacy protections that Section 222 provides. Such additional restrictions would serve no articulable interest, would upset the balance struck in Section 222 between privacy and competitive goals, and may have unintended consequences resulting in a greater intrusion on customers' privacy.

Congress delineated a carrier's "duty" with respect to CPNI in Section 222(c)(1), and elected not to impose the types of restrictions proposed in the Further Notice. Congress' choice is entitled to great weight in deciding what customer restrictions on CPNI should be authorized under the Commission's general rulemaking authority.

MCI has commented on a number of occasions on various ILECs' abuses involving carrier proprietary information. To protect such information, the Commission should define what is included in the category of carrier proprietary information and state the rules that will be applied to implement Section 222(a) and (b). MCI believes that once those two steps have been taken, more specific database safeguards will not be necessary.

Subsection 222(a) covers any proprietary information that one carrier obtains from or learns about another from any source. Subsection (b) covers any proprietary information that one carrier obtains from another for the purpose of providing a telecommunications service. Because these provisions cover all proprietary information relating to customers, they include all

of the categories of information covered by the definition of CPNI, as well as customer information that is not CPNI. Obviously, a carrier should not be able to avoid the coverage of these provisions by wrongly claiming that the information was not obtained on a confidential basis.

Section 222(a) is enforced through Sections 222(b) and (c). It would however, still be useful for the Commission to remind all carriers of their duty to protect the confidentiality of others' proprietary information. Where a carrier claims to have obtained certain information from a public source that has also been provided on a confidential basis by another carrier, there should be a rebuttable presumption that the information was actually obtained confidentially.

Carriers should be instructed that, under Section 222(b), they may not use any confidential information, obtained from another carrier for the purpose of providing a telecommunications service, for any other purpose, especially marketing. The same confidentiality presumption as proposed above for subsection (a) should apply to subsection (b).

Finally, MCI is adamantly opposed to any locational restrictions on the storage or availability of CPNI records, irrespective of the origin of the CPNI. Such locational restrictions will become unworkable as telecommunications carriers strive for greater efficiency. U.S. carriers would ultimately be handicapped by such restrictions in the emerging global competition among multinational carriers.

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MCI Telecommunications Corporation (MCI), by its undersigned counsel, submits these comments in response to the Further Notice of Proposed Rulemaking (Further Notice) issued with the Second Report and Order in these dockets (Order).[1] The Further Notice raises three additional issues related to the interpretation and application of Section 222 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act):[2] whether a customer may restrict a carrier's use of customer

[1] Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (released Feb. 26, 1998). The Second Report and Order, which comprises paragraphs 1-202 of this release, will be referred to throughout as the Order. The Further Notice is contained in paragraphs 203-10.

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151 et seq.

proprietary network information (CPNI) for any marketing purposes; whether any additional protections are necessary for carrier proprietary information under Section 222(a) and (b); and whether carriers should be prohibited from storing domestic CPNI abroad.

A. Customer Restrictions on CPNI

Section 222(c)(1) prohibits carriers from using, disclosing, or permitting access to CPNI without customer approval for purposes other than providing or marketing the total service offering provided to the customer or providing services necessary to or used in the provision of such services. The Commission seeks comment on whether customers should be able to restrict the use or disclosure of CPNI to a greater extent -- i.e., by restricting the use or disclosure of their CPNI for the marketing of additional services within the total service offering already being provided by the carrier. The Commission suggests that permitting such restrictions would further the privacy protections in Sections 222(a) and (c) as well as the privacy - competition balance struck in Section 222.[3]

There is clearly no basis in Section 222 for such an imposition of greater restrictions on a carrier's use or disclosure of CPNI. As is explained in Part B below, subsection (a) is of a general nature and is enforced through the more

[3] Further Notice at ¶¶ 204-05.

specific prohibitions in subsections (b) (as to carrier proprietary information), and (c) (as to CPNI). Subsection (c), in turn, places no restrictions on carriers' use or disclosure of CPNI in connection with the total service offering already being provided to a given customer. Thus, the customer has no authority under any part of Section 222 to deny her carrier the use or disclosure of her CPNI in connection with the total service offering she is currently receiving from the carrier.

In determining whether the general duty stated in subsection (a) and the policies reflected in subsection (c) should nevertheless be implemented by authorizing such restrictions, under the Commission's "necessary and proper" clause in Section 4(i),[4] it is significant that Congress chose not to do so in the provision that was intended to carry out its CPNI policies. Apparently, Congress did not think that it would serve any significant privacy interest to authorize customers in subsection (c)(1) to restrict their carrier's use or disclosure of their CPNI in connection with services it was already offering them. Moreover, the privacy interest in CPNI reflected in subsection (a) was carried out through the restrictions in subsection (c). Thus, a carrier's "duty" with respect to CPNI is entirely spelled out in subsection (c)(1). Congress' choice is entitled to great weight in deciding what customer restrictions on CPNI should be authorized under the Commission's general rulemaking authority.

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[4] 47 U.S.C. § 154(i).

It would also serve no articulable interest to go beyond the already strict privacy protections of Section 222. To the extent that carriers are denied the use of CPNI in marketing to their customer base, they may have to make more "cold calls," thereby resulting in a greater intrusion on customers' privacy than otherwise would have occurred. Thus, the proposed restriction might have unintended consequences contrary to its goal.

Moreover, to the extent that aggressive marketing itself is a concern, there are already a variety of ways in which customers can protect themselves. Customers may: request to be put on "Do Not Call"/"Do Not Mail" suppression lists, as mandated by the Telephone Consumer Protection Act of 1991 and implementing regulations; request to be put on the Direct Marketing Association's Telephone Preference and Mail Preference services, which are voluntary but quite effective; and contact individual list brokers and ask to be put on a suppression list. It is difficult to see what remaining significant privacy interest would be protected by denying a carrier the use of CPNI in order to target its marketing that would not also be protected by any of these other techniques. The use of existing privacy protections is clearly preferable to twisting Section 222 out of shape to accomplish such minimal ends.

Furthermore, to add to customers' ability to restrict the use or disclosure of CPNI in this manner is not merely unauthorized by Section 222, but would also upset the balance

struck in Section 222 between privacy and competitive goals and thus would actually conflict with Section 222. The restriction contemplated in the Further Notice would not, as the Further Notice suggests, advance competitive goals as well as protect customer privacy. Rather, by making marketing less effective, such a restriction, to the extent it were utilized by customers, would tend to hamper competition.

Allowing customers to restrict a carrier's use of CPNI for the marketing of additional services within the carrier's total service offering to the customer would make marketing less effective because the carrier would not be able to consider the customer's CPNI in deciding whether, or how, to market to that customer. Alternative data that might serve as a proxy for the insights achievable through the review of CPNI are not as useful and are more expensive to collect. By depriving carriers of such marketing data, or forcing a greater drain on resources to gather less useful alternative data, such a restriction would make marketing significantly less effective.

The Commission should harbor no illusions that such an impact would be competitively neutral. From the start, MCI has found that marketing, particularly telemarketing, has been the great equalizer for new entrants and smaller competitors. Without telemarketing, MCI never would have rearranged the telecommunications landscape as it has in the past 25 years. Effective telemarketing has always been and remains absolutely

essential to viable competition. Anything that makes telemarketing less effective thus diminishes the vigor of competition, which, in turn, tends to protect incumbents.

To take such a step therefore would undermine the entire market-opening thrust of the 1996 Act. Accordingly, whatever minimal benefit such a restriction on CPNI use might have on competition would be vastly outweighed by the detrimental effect it would have on competition. In thereby upsetting the balance between competition and privacy in Section 222, such a restriction would thus undermine Congress' intent. Such a restriction therefore should not be authorized.

B. Carrier Proprietary Information

The Commission seeks comment on what safeguards, if any, are needed to protect the confidentiality of carrier information, including that of resellers and information service providers, under Section 222(a) and (b). The Commission states its belief that Congress' goals of promoting competition and preserving privacy would be furthered by protecting carriers' competitively sensitive information through such means as, for example, personnel and mechanical access restrictions.[5]

MCI agrees that the protection of carrier information is an important goal of Section 222. MCI has commented in CC Docket No. 96-115 on a number of occasions on various incumbent local

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[5] Further Notice at ¶ 206.

exchange carriers' (ILECs') abuses of carrier information, including billing and carrier selection information. MCI believes that the Commission should take two steps to protect carrier proprietary information: first, define what is included in the category of carrier proprietary information, and then, state the rules that will be applied. Given the unqualified nature of the prohibition in Section 222(b) and carriers' apparent willingness to abide by whatever rules are set for carrier information, MCI does not believe that more specific safeguards need be imposed, once those two steps are taken.

1. The Coverage of Section 222(a) and (b)

In defining what carrier information is protected, it would be useful to review the language of Section 222(a) and (b). Section 222(a) states, in relevant part:

> (a) IN GENERAL. - Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers ... including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

In setting out the general coverage of Section 222 as to carrier proprietary information, this provision specifies information "of, and relating to" other carriers. This would appear to encompass any confidential information that a carrier learns about another from any source. Thus, the general protection of Section 222 extends to confidential information about the operations and facilities of a carrier.

Section 222(b) states:

> (b) CONFIDENTIALITY OF CARRIER INFORMATION. - A telecommunications carrier that receives or obtains proprietary information from another carrier for the purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

It is not clear whether this subsection is intended to cover a narrower category of carrier information than subsection (a), since it specifically addresses information that one carrier "receives or obtains ... from" another "for the purposes of providing any telecommunications service," rather than any information "of, and relating to, other" carriers. As a practical matter, the two descriptions will probably cover about the same universe, since almost any proprietary information that one carrier learns about another is received or obtained from the other, as opposed to being the fruits of an independent investigation. Moreover, almost any information that one carrier learns about another will be for the purpose of providing a telecommunications service, although that would leave out information learned for the purpose of providing an information service or billing services.

In short, subsection (a) covers any proprietary information that one carrier obtains from or learns about another from any source. This would include customer information, such as CPNI, billing information and customer lists, and confidential information about the carrier's operations and facilities. Subsection (b) covers any proprietary information that one

carrier obtains from another for the purpose of providing a telecommunications service. This would include all of the types of information covered by subsection (a) except for information learned for the purpose of providing information services and other non-telecommunications purposes.[6]

Presumably, the terms "confidential" and "proprietary" in subsections (a) and (b) have their usual meanings in the tort law and Freedom of Information Act (FOIA) contexts.[7] Information thus is covered by these provisions if its disclosure or use would cause commercial injury. Also, a fact might be covered by these provisions if it is learned from another carrier on a confidential basis but not covered if it is first learned from a non-confidential source. Obviously, a carrier should not be able to avoid the coverage of these provisions by such tactics as using a list of customers derived from the provision of service to another carrier and then contacting those customers to learn new information from them. A customer list is valuable proprietary information, even if it could be replicated from public sources, precisely because it represents a tremendous

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[6] Carrier proprietary information is also typically protected by contractual provisions, as will be discussed below. Nothing in Section 222 appears to limit carriers' abilities to voluntarily provide greater, or accept less, protection for such information pursuant to contract than that afforded by Section 222(a) and (b).

[7] See Sections 0.457-0.461 of the Commission's Rules and Regulations, 47 C.F.R. §§ 0.457-0.461, for the Commission's FOIA regulations, including the provisions applicable to confidential commercial information at Section 0.457(d).

culling effort by the customers' carrier.

Because these provisions cover all proprietary information concerning customers, they include all of the categories of information that are covered by the definition of CPNI, as well as customer information that is not CPNI, such as customer lists, discussed above. Often, however, customer information covered by subsection (b) that happens to fall within one of the categories listed in the definition of CPNI in subsection (f)(1)(A) will not actually be CPNI, at least not for the carrier obtaining the information. That is because, other than certain information appearing on bills, the definition of CPNI only covers certain types of information "that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship," whereas a carrier obtaining proprietary information about a customer from another carrier might not be the customer's own carrier.

The typical example of a situation where customer information would be carrier proprietary information but not CPNI would be where a facilities-based carrier obtains proprietary information from a reseller about the reseller's customer for the purpose of providing service to that customer. For the facilities-based carrier, such information would be covered by subsection (b) but would not constitute CPNI, since the end user is not its customer.

One type of carrier proprietary information on which MCI has

commented previously is the subject of primary interexchange carrier (PIC) selections and PIC changes, as well as the related issue of local carrier selections and changes. As MCI has explained previously, a subscriber's "PIC" choice, and information revealing that choice, should be viewed as carrier proprietary information under Section 222(b), since it is customer list-type information that a local exchange carrier (LEC) acquires by virtue of its provision of access service to the customer's chosen interexchange carrier (IXC). The LEC may learn of the subscriber's choice either from the subscriber or, as is much more likely, from the selected IXC, but in either case, the LEC learns this information only because the IXC depends on it for interconnection to the customer.[8] Thus, the LEC only learns of the subscriber's choice on account of its role as the necessary interconnecting carrier between the subscriber and the IXC. That choice, and information revealing that choice, accordingly, is proprietary customer information of the chosen IXC.

A similar analysis applies to a subscriber's choice of local

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[8] Although, in those instances where the LEC learns of the PIC selection or change from the customer, it technically is not "receive[d] or obtaine[d] ... from another carrier," it would be anomalous and unworkable to treat those instances differently from the typical situation, in which the LEC receives an automated PIC change order from the selected IXC. All such PIC selection and PIC change information should be treated as carrier proprietary information.

service provider. That choice, and information revealing that choice, should be considered the proprietary information of the chosen competitive LEC (CLEC). The ILEC learns of this choice only by virtue of its provision of the underlying service to the CLEC. Thus, where an ILEC learns from a CLEC that the CLEC will be reselling the ILEC's service to a customer, that information should be covered by subsection (b).

In both cases, once the carrier selection is implemented, the carrier selection information remains confidential. If a LEC claims that it subsequently independently learned of a customer's carrier selection from a non-confidential source, there should be a rebuttable presumption that the subsequent information was "tainted" by the LEC's previous knowledge. The LEC would have to bear a heavy burden to demonstrate that its maintenance of the customer's IXC selection or its provision of the underlying service to the CLEC's customer had no effect on its later securing of information as to those carrier selections.

One collateral issue raised by this situation is whether and how CLECs can secure the ILEC provisioning information they need to initiate service to new customers they have won from an ILEC. An element of that information will be the customer's PIC selection, which the CLEC needs in order to ensure proper interconnection for the selected IXC. That the customer's PIC selection is the IXC's proprietary information should not create any obstacle to the CLEC's access to that information, since,

under Section 222(b), the ILEC would be turning over that information "for such purpose" -- i.e., the provision of access service to the selected IXC. In other words, the IXC's confidentiality interests in the PIC information would be fully protected by such disclosure to the CLEC and, in fact, such disclosure is absolutely necessary to protect the IXC's interests.[9]

2. The Prohibitions of Sections 222(a) and (b)

Once having defined what is covered by Section 222(a) and (b), the Commission should set forth the rules applicable to such information. Although Section 222(a) is a general provision, largely of a hortatory nature, and is enforced through Sections 222(b) and (c), it still would be useful for the Commission to remind all carriers of their duty to protect the confidentiality of others' proprietary information, including customer information that is not CPNI and billing information, that they first learn from any non-public source for any purpose. Where a carrier claims to have obtained certain information from a public source that has also been provided on a confidential basis by another carrier, there should be a rebuttable presumption that the information was actually obtained confidentially first.

Although Section 222(a) contains no explicit prohibition or enforcement mechanism, the Commission should make it clear that a

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[9] Most of the other provisioning information that the CLEC needs from the ILEC to initiate service, such as the service features used by the customer, is CPNI.

carrier's failure to observe its duty to protect carrier proprietary information may subject it to liability under Section 201(b) of the Communications Act. Such an enforcement mechanism is necessary, for example, to protect information that one carrier provides to another for the purpose of billing. ILECs have tried to escape their duty to protect billing information provided to them by IXCs by claiming that it is actually CPNI, their use of which has been approved by the customer under Section 222(c)(1).[10] The Commission should make it clear that such abuses will not be tolerated.

Similarly, carriers should be instructed that, under Section 222(b), they may not use any confidential information, obtained from another carrier for the purpose of providing a telecommunications service, for any other purpose, especially marketing. The same confidentiality presumption as proposed above for subsection (a) should apply to subsection (b). It should also be irrelevant that the information might have been obtained from another carrier on an automatic basis without any communication between them, such as information derived from handling an interconnected call.

Where information might constitute CPNI as well as carrier proprietary information, the more absolute protection of

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[10] See AT&T Communications of California, et al. v. Pacific Bell, et al., No. 96-1691 SBA (N.D. Cal. June 3, 1996)(granting preliminary injunction against Pacific Bell's misuse of IXC billing data), aff'd, No. 96-16476 (9th Cir. Mar. 14, 1997).

subsection (b) should apply. Thus, such information should not be used or disclosed even with customer approval, since there is no such exception in subsection (b).

Finally, the Commission should make it clear that, pursuant to Sections 222(a) and (b), LECs should not use PIC information and PIC change information for their own marketing or other purposes unrelated to the provision of access service to the selected IXC, and ILECs should not use local carrier selection information for marketing or other purposes unrelated to the provision of the underlying service to the selected CLEC. The Commission partially addressed this problem in the Order, in its discussion of the "winback" issue. There, the Commission held that a carrier may not use CPNI to win back a customer that it learns has chosen a competing carrier.[11]

That holding, however, does not answer the more competitively sensitive question of a LEC's use of other carriers' proprietary information. The identity of a customer's chosen carrier, per se, does not appear to fall within any of the categories of CPNI described in Section 222(f).[12] Thus, the

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[11] Order at ¶ 85.

[12] While the carrier's name appears on the bill, that does not make the carrier's identity CPNI under Section 222(f)(1)(B), since that is not information "pertaining to telephone ... service." See Response to Commission Staff Questions Re: CC Docket No. 96-115 at 4-8, attached to ex parte letter from Frank W. Krogh, MCI, to William F. Caton, Acting Secretary, FCC, dated Aug. 15, 1997.

Commission's ruling might not preclude the real abuse in these situations -- namely, the LEC's use of the simple fact of the customer's decision to choose another carrier, a fact that does not appear to constitute CPNI, to market its own service. That gap should be plugged immediately.[13]

3. No Additional Safeguards Are Needed

If the Commission defines the coverage of Section 222(a) and (b) and sets out the principles that should be applied in implementing those provisions, as discussed above, MCI does not believe that any additional database protections, such as access restrictions, or other safeguards are necessary to enforce Section 222(a) and (b). Other than the controversial PIC selection situation, most carriers seem reasonably willing to protect other carriers' proprietary information, once they know what the rules are and exactly what is covered. Businesses are used to having to safeguard others' confidential information, including competitors' information, and almost all of the relationships that cause carrier proprietary information to be provided to other carriers, such as resale, are governed by contracts that contain strict confidentiality provisions.

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[13] For a non-LEC, of course, the fact that its customer has chosen another carrier is not the proprietary information of the chosen carrier, since the non-LEC does not obtain such information from the chosen carrier for the purpose of providing service. Rather, it has learned the information because it will no longer be providing service.

Competitive carriers, such as MCI, also have a powerful incentive to protect other carriers' confidential information, since not doing so can have a detrimental effect on a firm's reputation, particularly among reseller customers. Accordingly, because of the business necessity of having to protect other carriers' proprietary information, no further safeguards should be necessary, once the definitions and principles are set out as discussed above.

C. Restrictions on Foreign Storage of Domestic CPNI

The Commission seeks comment on a request by the Federal Bureau of Investigation that carriers be prohibited from storing "domestic" CPNI in foreign countries for any purpose, including billing and collection. The FBI proposes an exception to this prohibition where a U.S. domestic customer consents to having his or her CPNI stored or accessed from a foreign country, as long as carriers keep a copy of that customer's CPNI within the U.S., so that such information is available promptly to law enforcement personnel. The FBI also requests that carriers be required to maintain a copy of U.S.-based customers' CPNI, regardless of whether they are U.S. domestic customers.[14]

MCI is adamantly opposed to any locational restrictions on the storage or availability of CPNI records, irrespective of the origin of the CPNI. To begin with, the notion of keeping

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[14] Further Notice at ¶¶ 208-10.

information within certain geographical boundaries, like produce or manufactured goods, makes no sense at all in the global information economy. It is often virtually impossible to identify the location of electronic data at any given point. CPNI and other information is transmitted automatically in the ordinary course of providing domestic and international service. It would be impossible for the Commission to try to put the toothpaste back in the tube by fiat.

Although the FBI's request is limited to what it calls domestic CPNI, which it defines as CPNI derived from telecommunications services rendered solely within the U.S., it will also become difficult to maintain such distinctions as multinational customers' services begin to converge into global packages. A particular call might be routed to various domestic and foreign points, using a platform located anywhere in the world. As the Internet becomes more widely used, the concept of the location of a transmission will become increasingly meaningless.

Even putting all of these conceptual difficulties aside, placing locational restrictions on any type of information will become unworkable as telecommunications carriers strive for greater efficiency and seamless global services. Placing artificial boundaries around CPNI will increase costs and decrease efficiencies, as decisions as to how to configure global services and structure billing and other operations are

increasingly constricted. U.S. carriers will ultimately be handicapped in the emerging global competition among multinational carriers.

Moreover, such restrictions are unnecessary and duplicative. All CPNI derived from the provision of domestic or international U.S. service, which includes all domestic CPNI, is subject to the use and disclosure restrictions of Section 222. Carriers already have a duty to protect all CPNI and may not disclose it without customer approval for any purpose other than for the provision of service. In order not to disclose it, they must provide reasonable protections for it, no matter where it is stored. Competitive carriers such as MCI have an especially powerful incentive to protect CPNI, given customers' privacy concerns and the availability of alternative providers. Thus, CPNI stored abroad is no more subject to "direct foreign access"[15] by unauthorized personnel than CPNI databases maintained in the U.S.

Accordingly, since carriers must protect all domestic CPNI under Section 222, all reasonable law enforcement, public safety and national security needs can be met without any greater restrictions on the location of such information. This is confirmed by the exception proposed by the FBI, under which a copy of all domestic CPNI would be kept in the U.S. If, as this exception suggests, the key issue is accessibility for law enforcement personnel to domestic CPNI, MCI suggests that the

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[15] See Further Notice at ¶ 208 n. 710.

optimal solution would be a requirement that all domestic CPNI be readily accessible from the U.S., so that it could be made available to law enforcement personnel under the appropriate conditions (e.g., upon a proper search warrant). Such an approach would meet the FBI's legitimate concerns without disrupting carriers' internal operations. The same approach should be used for all U.S.-based customers' CPNI, so that all such CPNI be readily available in the U.S.

D. Conclusion

For the reasons stated above, the Commission should not restrict carriers' use of CPNI to a greater degree than authorized by Section 222(c)(1); the Commission should define and set out principles applicable to carrier proprietary information; and the Commission should not prohibit carriers from storing CPNI abroad.

Respectfully Submitted,

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Dated: March 30, 1998

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing Comments of MCI Telecommunications Corporation was served this 30th day of March, 1997 by hand delivery or first class mail, postage prepaid, upon each of the following parties:

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