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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	CC Docket No. 96-115

Petition for Temporary Forbearance or, In the Alternative, Motion for Stay

GTE SERVICE CORPORATION, AND ITS AFFILIATED DOMESTIC TELECOMMUNICATIONS, WIRELESS, AND LONG DISTANCE COMPANIES

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SUMMARY

Several of the Commission's decisions in the *CPNI Second Order* are likely to result in unintended customer confusion and disruption. Specifically, restricting the use of CPNI:

- to market customer premises equipment that is integral to wireless and advanced wireline services;
- to market voice mail, store-and-forward, and short message services that are integral to telecommunications services;
- to market enhancements to packages of telecommunications services; and
- to win back customers who have terminated service.

This disruption to carriers' ability to serve their customers is not in the public interest, and does not serve the goals of competition or privacy sought by section 222 of the Act. GTE will soon file a petition that requests the Commission to forbear from applying section 222 and/or reconsider its *Order*. In the meanwhile, pending development of a more complete record and further consideration of the public interest and other applicable factors, serious harm will be done if section 222 is to be applied as the Commission has decided. The normal remedy of a stay may be insufficient to prevent harm during the time it will take the Commission to develop a more complete record and take action to ameliorate these problems, because the Commission relies, in whole or in part, on its interpretation of section 222's meaning.

Thus, GTE asks the Commission, as appropriate, to exercise the broad authority given to it by section 10 of the Act to forbear from applying section 222, temporarily and only in limited specific circumstances, or, in the alternative, to stay its *Order* pending definitive action.

Section 10 permits the Commission to forbear from applying any provision of the Act if it concludes that: enforcement is not necessary to ensure that rates and practices are proper, or to protect consumers, and that forbearance is in the public interest. Here, the Commission needs only to consider the effect of temporary forbearance at

this time, a relatively low threshold. Alternatively, the Commission can stay the effectiveness of its rules to avoid a harmful result. In either case, this petition demonstrates that the necessary criteria have been met for the limited circumstances that involve the most urgent likelihood of customer disruption and confusion.

First, the Commission should temporarily forbear from applying, or stay, the prohibition on use of CPNI to market certain CPE and information services. It should

- allow carriers to use CPNI to market CPE used for CMRS because customers expect that CMRS devices will be marketed along with CPE, and a contrary rule will disrupt the orderly migration of analog customers to digital service;
- permit the use of CPNI to market CPE that is necessary to enable the introduction of advanced services, such as ADSL, where the availability of the CPE may be limited, yet critical to the success of the new service; and
- allow the use of CPNI to market voice mail, store-and-forward, and short message services because such services are used as an integral part of both telephone service and CMRS.

Second, the Commission should temporarily forbear from applying, or stay, restrictions on the use of CPNI to market enhancements to packages of telecommunications services, which is necessary for the growth of meaningful competition.

Third, the Commission should, at least temporarily, not enforce its anti-win-back rule, which is contrary to the Constitution as well as the Act, and which prevents normal marketing relationships between carrier and customers.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	CC Docket No. 96-115

Petition for Temporary Forbearance or, In the Alternative, Motion for Stay

GTE Service Corporation and its affiliated domestic telecommunications,[1] wireless,[2] and long distance[3] companies (collectively "GTE") hereby move the Commission to forbear temporarily from applying provisions of section 222 of the Telecommunications Act of 1996, until it may act on GTE's Petition for Forbearance,

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[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc. and GTE Communications Corporation.

[2] GTE Wireless Incorporated and GTE Airfone Incorporated.

[3] GTE Communications Corporation, Long Distance division.

Reconsideration, and Clarification (the "Final Relief Petition"), and to the extent that relief cannot be granted by a stay of the Commission's Rules. GTE will file its Final Relief Petition within 30 days of Federal Register publication of the *Second Report and Order*[4] in this proceeding. Where appropriate, GTE also requests that the Commission stay the effectiveness of certain provisions of the *Order*, and the rules adopted therein, pending action by the Commission on Final Relief Petition.

There are three specific requirements imposed by the *CPNI Second Order* that, if allowed to become effective, would cause immediate and irreparable harm to consumers and carriers with no offsetting public interest benefits. Specifically, GTE requests the Commission to temporarily forbear from applying section 222, or stay the *Order*, with respect to the following:

- Section 222(c)(1) of the Act and section 64.2005(b)(1) of the Rules[5] to the extent that they prohibit use of CPNI to market CPE that is packaged with a wireless or advanced telecommunications service, or to market voice mail or other store-and-forward message services, including wireless short message service, used to enhance a telecommunications service.

- Section 222(c)(1) of the Act and section 64.2005(b) of the Rules[6] to the extent that they prohibit a carrier from using CPNI derived from a packaged service

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[4] Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (released February 26, 1998), 63 Fed. Reg. 20326 (April 24, 1998) ("*CPNI Second Order*" or "*Order*").

[5] "A telecommunications carrier may not use, disclose, or permit access to CPNI derived from its provision of local service, interexchange service, or CMRS, without customer approval, for the provision of CPE and information services ... ." *CPNI Second Order*, Appendix B at B-3.

[6] "A telecommunications carrier may not use, disclose, or permit access to CPNI to market to a customer service offerings that are within a category of service to which the customer does not already subscribe to from that carrier, unless the carrier has

(Continued...)

offering that includes two service categories to market an expanded package that includes all these and other services on a packaged basis.

- Section 222(c)(1) of the Act and section 64.2005(b)(3) of the Rules[7] to the extent they prohibit a carrier from using CPNI to retain a customer or win back a lost customer.

As will be shown in the Final Relief Petition, while there are other issues in need of further consideration or clarification, the above three points are those which would cause the most immediate harm to consumers, carriers, and the public interest.

I. The Commission Has Authority To Forbear Temporarily or To Grant a Stay With Respect to the Limited Matters Addressed in This Petition.

The *CPNI Second Order* reaches a number of conclusions based on the Commission's interpretation of the meaning of section 222. GTE acknowledges that the Commission may not have time, nor the benefit of further development of the record, to reflect further upon these interpretations before harm is done, perhaps inadvertently. Accordingly, GTE requests a limited, temporary forbearance of application of section 222 (as interpreted by the Commission), pending action on GTE's Final Relief Petition, which will demonstrate that the Commission erred in certain of its conclusions, or that—even if correct—in certain circumstances it would be appropriate to enter a final order forbearing from applying the statute. To the extent that the Commission determines that a stay of its rules is insufficient to grant the relief

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(...Continued)
customer approval to do so ... ." *Id.*

[7] A telecommunications carrier may not use, disclose, or permit access to a former customer's CPNI to regain the business of the customer who has switched to another service provider." *Id.*

requested in this petition, it should forbear from applying those provisions using its authority under section 10 of the Telecommunications Act.

Section 10 requires the Commission to forbear from applying any provision of the Act if the agency determines that: (1) enforcement is not necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is in the public interest. In assessing whether forbearance is in the public interest, section 10 requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. As explained below, in this instance, the forbearance would meet statutory requirements set out in section 10.

There is no limitation in section 10 that would prevent the Commission from a temporary forbearance. Surely Congress intended that the Commission have flexibility in the application of section 10, in order to best promote the goals of reasonable and nondiscriminatory rates, consumer protection, and the public interest. The Commission need only reach affirmative conclusions on the three section 10 criteria with respect to the relatively short time period during which it considers final relief. In addition, the Commission may rely on the existing record in this proceeding as well as this petition without a lengthy further pleading cycle.

The Commission also has authority to stay the effectiveness of the *CPNI Second Order*. Generally, the Commission will stay the effective date of its rules or orders upon

showing of "good cause."[8] In assessing whether "good cause" exists to warrant a stay, the Commission may use the four-factor test adopted in *Virginia Petroleum Jobbers*.[9] However, the Commission's rules also offer a more expedited method for obtaining a stay of its rules. Pursuant to section 1.103 of its rules, the Commission will stay an order on its own motion or the motion of any party without satisfaction of the four-part test adopted in *Virginia Petroleum Jobbers* if it concludes that the public interest would best be served by ruling on the issues raised in a petition for reconsideration prior to requiring affected parties to comply with the requirements at issue.[10]

The Commission has stayed rules pursuant to section 1.103 where it determined that application of the rule could be disruptive to consumers and that its current record is insufficient to address issues raised in the petitions for reconsideration. In a relatively recent order, the Commission agreed that a temporary stay of enforcement is applicable where, "after adoption of the rule, the Commission conclude[s] that its implementation may lead to unanticipated and unintended consequences."[11] In fact, a

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[8] *See* 47 C.F.R. § 1.429(k).

[9] *Virginia Petroleum Jobbers Association. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Under that test, a petitioner must demonstrate that: (1) it likely will succeed on the merits on review; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of the stay.

[10] *See* 47 C.F.R. § 1.103(a). Although the Commission can and should grant relief under section 1.103 of the Rules, the facts presented in this Motion also satisfy the *Virginia Petroleum Jobbers* criteria.

[11] *See* Policies and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15739, 15742 (1997).

few years earlier, the Commission articulated three such consequences that will be remedied through the grant of a stay.[12]

First, the Commission determined that it would grant a stay to avoid premature compliance with a questionable rule. Specifically, the Commission noted that "[w]e believe the public interest would best be served by ruling on the issues raised in the pending petitions for reconsideration before requiring affected parties to take actions to comply."[13] Second, the Commission concluded that its rules should be stayed where doing so would "allow the Commission to develop a complete record ... and make a more informed decision."[14] Third, the Commission concluded that it would grant a stay in order to avoid industry and consumer confusion.[15] In essence, the Commission will stay the effective date of an order if it is persuaded that serious issues are present that warrant resolution prior to enforcement of the rule, without applying the *Virginia Petroleum Jobbers* factors. Such issues exist here. In fact, granting a stay in this instance will avoid each of the three situations outlined above and will further the public interest.

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[12] *See* Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers, 11 FCC Rcd 856 (1995).

[13] 11 FCC Rcd at 857.

[14] *Id.*

[15] "[A] brief stay will be less disruptive to consumers and industry than allowing the requirements to take effect before the issues ... are fully resolved." *Id.*

II. The Commission Should Temporarily Forbear from, or Stay, Applying the Prohibition on Use of CPNI To Market Certain CPE and Information Services.

The Commission adopted a restriction against carrier use of CPNI to market most CPE and information services, reasoning that CPE and information services do not fall within the scope of section 222(c)(1)(A) because they are not "telecommunications services."[16] The Commission also concluded that, under section 222(c)(1)(B), CPE and certain information services such as voice mail are not "services necessary to, or used in the provision of, such telecommunications service." According to the Commission, CPE is not a "service"[17] and information services such as voice mail are not "necessary to, or used in" the carrier's provision of telecommunications service.[18] The Commission, however, recognized that certain services fall within these provisions, such as inside wiring, and "adjunct-to-basic" services.[19]

The *Order*'s broad conclusions failed to address specifically and in detail how certain types of CPE and information services are necessary to or used in telecommunications services. GTE believes that the Commission, after further consideration of a fuller record, will conclude that the public interest requires that the CPE and information services referred to in this petition may be marketed using telecommunications service CPNI. Whether the Commission reaches this conclusion

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16 *CPNI* Second *Order* ¶ 45.

17 *Id.* ¶ 71.

18 *Id.* ¶ 72.

19 *Id.* ¶¶ 73, 78-80 and rule section 64.2005(c)

by revising its interpretation of the statute, or by forbearance, temporary relief is appropriate at this time to avoid customer disruption. Thus, GTE requests temporary relief, pending fuller consideration, to allow it to use CPNI to market (1) CPE for CMRS (such as wireless handsets), (2)CPE for advanced services (such as ADSL modems), and (3) voice mail, short message, and other store-and-forward services for wireline and CMRS. Enforcement of the *Order* with the Commission's restrictive interpretation will prevent GTE, and other carriers, from using CPNI to benefit customers who obtain both a communications service and CPE and/or information services.

A. The Commission Should Temporarily Forbear from, or Stay, Applying the Prohibition on Use of CPNI To Market CPE Used for CMRS.

GTE believes that the Commission incorrectly determined that section 222(c)(1)(B) acts as a blanket prohibition against the use of CPNI. Rather, that section of the Act explicitly allows the use of CPNI for "services necessary to, or used in, the provision of such telecommunications services."[20] In any event, the use of CPNI to market CPE used for CMRS and advanced services (such as ADSL), and to market message storage services, such as voice mail and short message service, in connection with the underlying telecommunication service, should be allowed under section 10. Temporary relief is necessary to avoid service disruption and customer confusion.

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[20] 47 U.S.C. § 222(c)(1)(B).

1. The Use of CPNI To Market CPE Used for CMRS Is Necessary Because CPE Is an Integral Part of CMRS.

As indicated in the attached declaration of Marc Lefar, customer equipment for CMRS[21] is usually provided as a part of the CMRS service package. When customers sign up for CMRS service, they expect to—and do—obtain both the handset and the wireless telecommunications service. Later, they expect their carrier to inform them about new services *and* equipment.

CMRS CPE is network-specific and therefore is linked directly to the network that it is on. Every carrier must program the phone with the correct network configuration to ensure that it works directly with its system. Today technologies that are offered are GSM 1.9 GHz, analog 800 MHz, digital CDMA 800 MHz, digital TDMA 800 MHz, CDMA 1.9 GHz, and TDMA 1.9 GHz. The near future will see combinations of the 1.9 and 800 digital and analog phones thus further increasing the available technologies. Consumer confusion is likely if there is no linkage readily available between the service and the CPE.

CMRS CPE is integral to the provision of CMRS. In fact, CMRS carriers (or their agents) cannot provide what the customer views as a service without including a handset, pager, or other CPE that is compatible in frequency and modulation with the CMRS that the customer will obtain. Importantly, the CPE must be specifically programmed for that customer's service. This CPE has little or no use or purpose beyond completing the radio communications path for CMRS and—without

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[21] Such equipment includes handsets, power cabling, hands-free or car kits, CDPD modems, antenna, batteries, and charging stands.

reconfiguration—would not be usable for any other CMRS. Although CPE for CMRS may be purchased separately from the CMRS service, compatible, correctly programmed CPE is needed by the customer in order to obtain CMRS service from his or her carrier of choice.

Moreover, customers consider CPE and CMRS to be part of the same service and typically buy both from the same source at the same time. Therefore, CPE is within customers' expectations of their total service offering with respect to CMRS -- the customers' privacy interests are not compromised by allowing CPNI to be used by carriers to market CPE for CMRS. Customer expectations also justify including CPE within the CMRS total service offering, for customers have given implied approval of the use of CMRS-derived CPNI for that service's CPE.

2. The Commission Should Temporarily Forbear From Applying Section 64.2005(b)(1) of the Rules or Section 222(c)(1) of the Act to the Marketing of CPE for CMRS.

Pending full development and consideration of an appropriate record, the Commission should temporarily forbear from applying section 64.2005(b)(1) and section 222(c)(1)of the Rules of the Act to the marketing of CPE for CMRS. Such forbearance is required under the three criteria of section 10 of the Act.

Section 10(a)(1). First, such use of CPNI does not involve the charges, practices, classifications, or regulations of telecommunications service and, therefore, the rule and the application of the statute are not needed to prevent unreasonableness or discrimination. Even if there were some relationship to these issues, the short time of a temporary forbearance assures there can be no adverse impact.

Section 10(a)(2). Second, as indicated above, the enforcement of the rule or application of the statute is not needed to protect consumers, who do not have a reasonable expectation of privacy in these circumstances. Moreover, a brief period of forbearance while the Commission considers permanent relief will not cause harm to customers. Indeed, forbearance will not even inconvenience customers because carriers have been using CPNI within their respective marketing programs for quite some time with no discernible objections. Instead, the enforcement of the rule would harm customers by either denying them information about products they would be interested in, or subjecting them to marketing for products that they are very unlikely to want or be unable to use given their particular CMRS configuration. Thus, the prohibition on the use of CPNI without express customer approval is contrary to customer expectations and implicit approval.

Section 10(a)(3). Finally, temporary forbearance is in the public interest because it will permit CMRS carriers to migrate high volume analog customers to digital service and decrease system blockage, as well as permitting CMRS customers to receive information about new and improved services and products.

In specific markets, GTE has capacity limitations with its analog cellular service. In order to alleviate these problems, and avoid service blockage for all customers of analog service, GTE must migrate a significant number of high volume customers to digital service. The only practical way to identify these high volume analog customers is to use CPNI. The rules allow GTE to use CPNI to identify high volume analog customers and offer them digital service. Also, GTE is allowed to package digital CMRS with digital CPE. However, the rules appear to prohibit GTE from marketing a

digital CMRS/CPE package if GTE used CPNI to identify the customers. It would be extremely confusing to customers if GTE were to urge customers to migrate to digital service, but could not provide information without approval on the necessary digital CPE as part of the new digital service. Because existing analog CPE will not work with digital wireless service, customers would be unlikely to respond to an offer of service without CPE. This would retard the migration effort and deny improved service to all CMRS customers, analog and digital alike.

There is an important public safety aspect that lends special urgency to the need for an effective digital migration of high volume users. Many customers rely on wireless service for personal safety and protection in the event of criminal threat, medical emergency, or highway accident. Indeed, for some customers, this is the principal reason to have a cellular phone. Such customers are very low volume users and typically do not strain current network capacities. Furthermore, many low volume customers would simply not purchase a digital handset because of the significantly higher cost which is typically associated with a digital handset. These low volume analog users would not be discriminated against nor would they be disadvantaged by permitting GTE to identify the high volume user for digital migration. To the contrary, the low volume user would actually benefit. If high volume users remain on the analog service, the blockage they cause could have serious consequences for other analog customers trying to get through quickly to 911.

Using a mass mailing to market digital wireless service to all analog customers is simply not practical. It is not feasible for GTE to market digital wireless service to all analog customers, without using CPNI to identify high volume users because the

response rate to a mass mailing would not deliver adequate capacity management capability to avoid high blocking levels which could compromise network quality.

The digital migration problem illustrates a more general adverse effect on customers caused by the present rule. Wireless carriers are constantly upgrading services and features, as well as handset capabilities. A service upgrade may require or be most effective with a new handset. For example, service plans with a large amount of included minutes may be offered to high volume users and be packaged with handsets with long battery life (*e.g.*, lithium ion batteries) or cigarette lighter adapter ("CLA") included. Service plans with fewer included minutes, packaged with easily affordable handsets, can be offered to customers who want service primarily for emergencies. Some customers (not necessarily all) will want to know about any new offering. Customers will be confused, and carriers handicapped in their ability to provide service, if the carrier cannot use CPNI to identify those customers who are most likely to benefit from a new product. Ultimately, the pace at which new services enter the marketplace and the hands of the public will be slowed. Such a result is contrary to the intent of the Telecommunications Act of 1996.

3. A Stay of the Commission's Rules Will Avoid Service Disruption and Customer Confusion.

In the alternative, a stay of the effectiveness of rule section 64.2005(b)(1) with respect to CPE used with CMRS is justified under section 1.103 of the rules. First, as the *Order* itself concedes, "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."[22] Second, the *Order* does not indicate that the Commission considered the special characteristics of CMRS CPE described above, which should lead it to conclude that the statute allows use of telecommunications CPNI to market CMRS CPE. A stay would give the Commission time to compile a record to make a reasoned decision on this issue.

Finally, stay is also needed to prevent immediate customer disruption as GTE migrates customers from analog to digital wireless service. Currently 800 MHz CMRS carriers are moving to digital systems to provide customers with greater clarity, reliability, privacy, and new features. CPNI is used to identify customers who use a significant quantity of analog minutes in areas where a digital system is planned or offered. This customer network usage information is broken down by cell site and hours of use. Successful migration of high-traffic analog customers to a carrier's digital platform is the key to ensuring the appropriate network quality is maintained and call blockage is kept within specific parameters, all of which is essential from the customer's and the carrier's perspective.

The above factors amply support a stay. There are no countervailing public interest factors. As indicated, a customer's reasonable expectation of privacy would not be affected by permitting carriers to use CPNI to market CPE for CMRS. Nor will competition be adversely affected by a stay. CMRS is an intensely competitive market already. If all carriers have the same right to use CPNI to market CPE, competition will proceed on a level playing field. Indeed, the most efficient method for competition to

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[22] *CPNI Second Order* ¶ 77.

truly thrive in the CPE-CMRS marketplace, is by an open information exchange between customers and their carriers regarding CPE and CMRS.

B. The Commission Should Temporarily Forbear from, or Stay, Applying the Prohibition on Use of CPNI To Market CPE That Is Necessary To Enable the Introduction of Advanced Services.

As indicated in the attached declaration of Robert Harvey, GTE has recently announced introduction of the first of several advanced services: Asymmetric Digital Subscriber Line ("ADSL") service. Customers will expect GTE to use CPNI to market all the necessary components of these services, including CPE. ADSL uses standard phone lines to deliver information at speeds up to 6 megabits per second ("Mbps). For example, a 4-Mbps ADSL modem can download a 60-second video clip in near-real time, a task that takes a 28.8-kbps modem 45 minutes. ADSL technology also allows simultaneous voice and data transmission. This service will enable end users to experience vastly improved Internet access. At the same time, it will prevent the degradation of telephone service for all customers by taking the ever-increasing number of long-duration Internet calls off of the public switched telephone network ("PSTN"). ADSL service gives a virtual private line connection that is on all day, and is separate from the PSTN and does not create any blockage on the PSTN.

ADSL, like a number of other advanced services that GTE anticipates offering in the near future, requires specialized CPE, in this case a modem, to complete the transmission path to the end user's location. Today, ADSL modems are not standardized but must be specific to the ADSL provider's particular network and, at least during the early stages of service delivery, ADSL modems for GTE's network will

not be available through retail channels.[23] Due to market uncertainty, during the initial roll-out of ADSL, the modem manufacturer will only produce a limited quantity of modems which will only be supplied to GTE. After the market develops, this situation may change. At present the only way an end user can obtain ADSL service is by renting or buying a suitable modem from the underlying ADSL service provider (GTE) or his Internet Service Provider ("ISP"). GTE will be making these modems available to ISP's so that they may make a bundled offering of the service to their customers. A similar limited distribution of CPE is likely during the early phase of other advanced services, such as VDSL (Very High Bandwidth Digital Subscriber Line).

1. The Use of CPNI to Market Specialized CPE for Advanced Services Is Necessary for Market Development.

ADSL modems are a functional part of the ADSL service, having virtually no use for any purpose other than to complete the transmission path of a specific provider's ADSL service. These modems are necessary for end user connectivity to the Internet, through the underlying ADSL provider (GTE) and his ISP. Thus, the ADSL modem is inherently part of the ADSL offering. Moreover, end users will consider the ADSL modem to be part of the ADSL service and GTE will make this equipment available directly to end users or through their ISPs.

GTE will be marketing ADSL service to ISPs so that they may offer the service to their customers.[24] The modems will be made available by GTE to both end users and

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[23] This is not unlike the situation that existed prior to the development of an industry standard for 56 Kbps analog modems. That is, an end user had to obtain a modem that was compatible with his ISP's chosen protocol.

[24] ADSL service will also be marketed to corporate LAN customers which similarly

(Continued...)

their ISPs because, although ADSL service will be marketed to ISPs , it is anticipated that some end users will order the service directly from GTE. Since these customers will be obtaining ADSL service directly from GTE rather than through an ISP, they will require that GTE make available to them the specialized modems which will provide their connectivity to the Internet.

Because ADSL CPE is within customer's expectations regarding ADSL service, privacy interests are not affected by allowing CPNI to be used to market ADSL modems as part of the initial rollout of the ADSL service. Such customer expectations also justify including ADSL modems within the local telephone total service offering, for customers have given implied approval of the use of CPNI to be notified of a service that will be regarded as an improvement to local service.

2. The Commission Should Temporarily Forbear from Applying Section 64.2005(b)(1) of the Rules or Section 222(c)(1) of the Act to the Marketing of CPE for Advanced Services Such as ADSL.

The above factors support a conclusion that the ADSL modem is either within the provision of ADSL service under section 222(c)(1)(A) or is necessary to, or used in, ADSL service under section 222(c)(1)(B). However, because GTE's roll-out of ADSL was only recently announced, the Commission did not have an opportunity to consider these special attributes of such advanced services in the *Order*. To avoid delay and disruption of making this service available to customers, the Commission should temporarily forbear from applying section 64.2005(b)(1) and section 222(c)(1) of the Act

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(...Continued)
provide Internet connectivity through telecommuting for their employees.

to the marketing of CPE for advanced services such as ADSL under the three criteria of section 10 of the Act, pending full development and consideration of an appropriate record.

Section 10(a)(1). First, such use of CPNI does not involve the charges, practices, classifications, or regulations of telecommunications service and, therefore, the rule is not needed to prevent unreasonableness or discrimination. Even if there were some relationship to these issues, the short time of a temporary forbearance assures there can be no adverse impact.

Section 10(a)(2). Second, the enforcement of the rule is not needed to protect consumers, who would not expect a privacy interest in these circumstances. To the contrary, the enforcement of the rule would harm customers by either denying them information about products they would be interested in, or subjecting them to marketing for products that they are very unlikely to want.

Section 10(a)(3). Finally, forbearance is in the public interest because it will permit GTE to begin an effective roll-out of ADSL and other advanced services without delay or customer confusion. This will assure that customers learn of opportunities for vastly improved Internet access and also mitigate a principal source of blockage and overload from the PSTN. Use of ADSL service by customers who formerly used the PSTN for extended calls to an ISP will help all members of the public by decreasing the likelihood of network blockage and avoiding the massive investments carriers are now required to make to "shore up" the PSTN.[25]

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[25] These investments could result in millions of dollars of stranded investment in the future if predictions of the immense growth rate of IP-based telephony are accurate.

3. A Stay of the Commission's Rules Will Permit Customers To Obtain Advanced Services Without Delay.

In the alternative, a stay of rule section 64.2005(b)(1) would be in the public interest because it would greatly improve GTE's ability to inform customers about this innovative service and other advanced services as they are introduced. Customers' privacy expectations will not be jeopardized because customers will expect that their local telephone company, which has the right to use CPNI without approval to market ADSL service, will be able to market the required modem. Competition will not be affected because, for the time being, the necessary modem can only be obtained through the ADSL service provider or the end user's ISP, and this is true of any other competing ADSL providers, as well as GTE. For these reasons a stay pending full consideration of this issue by the Commission would be in the public interest.

C. The Commission Should Temporarily Forbear from, or Stay, Applying the Prohibition on Use of CPNI To Market Voice Mail, Store-and-Forward, and Short Message Services, Which Are Used Integrally with Telephone Service and CMRS.

In the *Order*, the Commission lumped together "voice mail or messaging" and virtually all other information services when it concluded that these services do not fall under either section 222(c)(1)(A) or (B)[26] and, therefore, carriers need express approval from the customer to use CPNI to market those services. The Commission should temporarily forbear from, or stay, the application of this restriction pending consideration of the close relationships between voice mail in both wireline telephone service and wireless service, and the importance of short message service to wireless service.[27]

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[26] *CPNI Second* Order ¶ 47, 72-74.

[27] This is not to suggest that voice mail is a telecommunications service. To the

(Continued...)

1. The Use of CPNI to Market Voice Mail, Store-and-Forward, and Short Message Services Is Permitted by Section 222(c)(1) of the Act.

For many customers, carrier-provided voice mail and wireless short message service[28] have become an integral part of their telecommunications service. These services have traditionally been marketed together with the underlying telecommunications service. Customers think of them as part of their total service, and use them to augment the service. Only a handful of customers could ever distinguish the legal categories for vertical services—which of them are "telecommunications" versus which are not.

Voice mail and short message service serve the important function of receiving messages when a caller cannot get through to the person dialed. Incomplete calls may be due to the fact that the called party is talking on the line or working on the Internet, a CMRS handset is not within a coverage area or the customer cannot reach the phone (*e.g.*, elderly, disabled, small business with work offsite). Voice mail service is integral

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contrary, voice mail is properly classified as an information service. *See* Petition of Telecommunications Resellers Association for a Declaratory Ruling that Voice Messaging Services Must Be Made Available for Resale at Wholesale Rates Pursuant to section 251(c)(4) of the Communications Act, As Amended, CCB/CPD 98-16, Comments of GTE (filed April 21, 1998). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report to Congress*, FCC 98-67 (released April 10, 1998). While *forbearance from Section 222 regulation* is wholly appropriate based upon customer expectations and within the Commission's Section 10 discretion, this does not mean that the Commission has authority *to extend Section 251 regulation* to information services, as TRA and its supporters suggest.

[28] Short Message Service is an integration of the pager with Digital service. Digital handsets include a display that will allow a SMS message (alphanumeric page) to be presented to the customer.