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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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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	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: May 8, 1998

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SUMMARY

CTIA and GTE seek temporary relief from certain aspects of the CPNI Order pending the Commission's resolution of their forthcoming petitions for permanent forbearance from or reconsideration of the Order. As a procedural matter, any deferral or stay should not be confined to certain portions of the Order or certain service providers but should be granted across the board as to the entire Order and as to all carriers. There is nothing in these requests that would justify temporary relief from the Order for CMRS providers but not all other carriers.

The Commission should grant CTIA's request for clarification that a carrier's customer names and addresses do not constitute CPNI. As MCI has previously explained, customer names, addresses and telephone numbers do not fall within the definition of CPNI in Section 222(f)(1).

The Commission should deny the GTE and other CTIA requests that go beyond the CMRS context. GTE argues that the Commission should temporarily forbear from, or stay, the application of Section 222 to the marketing of CPE used in connection with ADSL service and other advanced services. GTE thereby seeks to have the Commission expand the ILECs' protected monopoly to include this new technology, even though it is not inherently a local service. Furthermore, GTE admits that it has a temporary ADSL modem distribution monopoly but yet seeks to shut out potential competition by using its exclusive control over the customer's

local service CPNI to market the necessary equipment before a competitive market has a chance to develop. This is precisely the type of situation that led to Commission to find that restricting the use of CPNI in the marketing of CPE is necessary to protect competitive concerns regarding CPNI use.

GTE's request for relief for any use of CPNI to expand on current service packages would essentially gut Section 222(c)(1) and result in a major rewriting of the Order. Under GTE's proposal, anytime a carrier provided to a customer services from two of the three service categories discussed in the Order -- such as local and wireless -- it could use CPNI derived from those services to market any other service, including long distance. Such an approach would be directly contrary to the entire competitive and privacy rationale behind Section 222, as articulated in the Order. A LEC in that situation would, in effect, be exploiting its monopoly-derived local customer base advantage in order to expand into the long distance market and would deprive the customer of effective control over his or her CPNI in the same manner as would be accomplished by the "single category" approach rejected in the Order. The competitive and consumer injury that would result from such an evisceration of Section 222 require denial of GTE's request.

MCI is not prepared at this point to comment in detail on the win-back proposals prior to the reconsideration round of pleadings. The win-back prohibition, however, should at least remain applicable to ILECs abusing their monopoly role.

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COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby responds to the Public Notice requesting comments on two recent filings submitted in this docket: one by the Cellular Telecommunications Industry Association (CTIA) and the other by GTE Service Corporation (GTE).[1] CTIA filed a Request for Deferral and Clarification of certain aspects of the Second Report and Order in this docket (Order) as applied to commercial mobile radio service (CMRS) providers,[2] and GTE filed a Petition for Temporary Forbearance or, in the Alternative, Motion for Stay of those and other aspects of the Order. As explained more fully below, although MCI takes no position at this time on those aspects of the requested relief affecting CMRS providers, it strongly objects to other relief requested by CTIA and GTE that

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[1] Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification, CC Docket No. 96-115, DA 98-836 (released May 1, 1998).

[2] Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27 (released Feb. 26, 1998).

would gut some of the most important competitive and consumer privacy protections in the Order.

A. The CTIA and GTE Requests

Although styled differently, these two filings overlap considerably. They both seek deferral or a stay of, or forbearance from, certain aspects of the Order as applied to CMRS providers. The Order interpreted and applied Section 222 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act),[3] which governs carriers' use and disclosure of customer proprietary network information (CPNI). CTIA and GTE seek relief from certain aspects of the Order pending the Commission's resolution of their forthcoming petitions for permanent forbearance from or reconsideration of the Order.[4] Because the comment cycle on these requests is so short, MCI is not prepared to address the merits of most of the CMRS-related issues they raise. Instead, MCI will comment on those issues in response to their petitions for reconsideration or clarification of the Order, now due on May 26, 1998.

MCI does have one procedural comment as to the CTIA and GTE requests overall, however, and that is that any deferral or stay should not be confined to certain portions of the Order or

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

[4] In the case of CTIA, relief is sought for 180 days in order to give the Commission enough time to decide the reconsideration issues.

certain service providers but should be granted across the board as to the entire Order and as to all carriers. MCI is not persuaded that cellular carriers are so uniquely burdened by the Order that they deserve special treatment. CTIA complains that the prior customer approval requirement in Section 222(c)(1) is uniquely burdensome to CMRS providers, "[s]ince CMRS providers (unlike many landline carriers) have never been subject to CPNI-related disclosure programs."[5] MCI and most other interexchange carriers (IXCs) have never been subject to CPNI requirements either, so that hardly justifies unique relief, albeit temporary, for CMRS providers. Full compliance with the Order will be burdensome and costly for all of MCI's operations, just as it is for CMRS providers.

CTIA adds that "CMRS providers know from years of competitive marketing experience that any customer communication program takes many months before even a percentage of customers respond, and many will never bother to do so."[6] That, of course, is true for all carriers, and was specifically rejected by the Commission as a basis for a less strict customer approval requirement.[7] There is therefore nothing in these requests that would justify temporary relief from the Order for CMRS providers

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[5] CTIA Request at 14.

[6] Id.

[7] See Order at ¶ 105.

but not all other carriers.[8]

In addition to the CMRS-related issues raised by both requests, CTIA also requests that the Commission clarify the Order by confirming that the definition of CPNI does not include the names and addresses of customers. GTE requests temporary relief in two other non-CMRS-specific situations. First, it wants to be able to use CPNI to market CPE used in connection with Asymmetric Digital Subscriber Line (ADSL) and other advanced services. Second, GTE requests that a carrier providing a customer a service package that includes at least two of the three categories of service discussed in the Order -- local, interLATA and CMRS -- be allowed to use CPNI derived from such services to market services in the third category. As explained herein, these two GTE requests are extremely anticompetitive and should be denied.

Finally, both CTIA and GTE request that the "win-back" prohibition set forth in the Order be stayed or deferred. In the case of GTE, such temporary relief is sought for all carriers, not just CMRS providers. CTIA also requests that the Commission

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[8] Thus, if CMRS providers are granted relief pending a final decision on all reconsideration petitions, all carriers should be granted equivalent relief as to the entire Order. The only exception would be in a situation where reconsideration would still be pending when the first Bell Operating Company (BOC) receives authorization under Section 271 to enter the in-region interLATA service market in a particular state. At that time, there must be CPNI rules fully effective to avoid undermining the main competitive goals of Section 222. In that case, any general stay or deferral of the Order would have to terminate in order to prevent greater harm than would be caused by denial of stay relief.

clarify that the win-back prohibition would not apply until after a customer is no longer receiving service from its original carrier. Although, as in the case of all of these issues, MCI intends to comment more fully during the reconsideration pleading cycle, MCI will provide a preliminary response to the win-back relief requests herein.

B. Customer Names, Addresses and Telephone Numbers Should Not be Considered CPNI

MCI agrees with CTIA that a carrier's customer names and addresses do not constitute CPNI. As MCI explained in an ex parte filing in this docket, customer names, addresses and telephone numbers are not covered by either part of the definition of CPNI in Section 222(f)(1).[9] They clearly do not constitute "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a ... carrier" under subsection (A), nor do they constitute "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier" under subsection (B), since they do not "pertain[] to" the "telephone ... service" itself.[10] This CTIA request for

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[9] 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 (MCI August 15 Response).

[10] See AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., No. A 96-CA-397 SS (W.D. Tex. Oct. 4, 1996) at 7("information contained in the bills pertaining to

clarification should therefore be granted.

C. The Commission Should Deny the GTE and Other CTIA Requests That Go Beyond the CMRS Context

1. GTE's Request for Relief as to the Marketing of CPE Used in Connection With Advanced Services Would Lock Out Incipient Competition

GTE argues that the Commission should temporarily forbear from, or stay, the application of Section 222 to the marketing of CPE used in connection with ADSL service and other advanced services. GTE argues that customers expect GTE to use CPNI to market all of the necessary components of such services. Facilitating the marketing of such services, in turn, will supposedly take long-duration Internet calls off of the public switched telephone network (PSTN), presumably by putting them on the local exchange carriers' (LECs') packet-switched networks used to provide ADSL and other advanced services.

GTE adds that ADSL modems are not standardized but must be specific to the ADSL provider's particular network and will not be available through retail channels, at least initially. Such modems are therefore inherently part of the ADSL service and should be considered within a carrier's total local telephone service offering, since customers would consider them to be part of an improvement to local service. Provision of ADSL modems should therefore be considered within the provision of ADSL service within Section 222(c)(1)(A) or necessary to or used in

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telephone exchange service or telephone toll service" is information "regarding customer usage, times, etc.").

such service under Section 222(c)(1)(B), according to GTE.

GTE states that because its roll-out of ADSL was only recently announced, the Commission did not have an opportunity to consider the unique nature of these services in the Order. GTE accordingly requests that the Commission temporarily forbear from the application of Section 222(c)(1) to the marketing of CPE for advanced services such as ADSL. Such forbearance meets the criteria of Section 10, according to GTE, since it would enable customers to obtain information they need about products they would want and would enable GTE to roll out ADSL and other advanced services effectively, thereby mitigating a principal source of PSTN blockage and overload. In the alternative, GTE requests a stay of Section 222(c)(1) as applied to the marketing of CPE for the same reasons. It argues that competition will not be harmed, since the necessary modems can only be obtained from the ADSL service provider or the end user's information service provider (ISP), and this is true of any other ADSL provider.

It is hard to imagine a more powerful case for denial of the relief GTE seeks than the rationale advanced by GTE. GTE explicitly characterizes such advanced services and related equipment as being "within the local telephone total service offering,"[11] which would suggest that they are not within the IXCs' service offerings. GTE would thus have the Commission expand the incumbent LECs' (ILECs') protected monopoly to include this new technology, even though it is not inherently a local

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[11] GTE Petition at 17.

service. GTE also does not provide any useful bright lines to distinguish advanced services CPE from all other CPE, thus introducing a potential competitive imbalance between self-styled advanced service providers using CPNI to market related CPE without customer approval and other providers of fungible, but not "advanced," services required to obtain customer approval before they use CPNI to market related CPE.

Even aside from those tremendous problems, GTE's anticompetitive motive is revealed in its admission that ADSL modems are not available through retail channels, at least right now.

> Due to market uncertainty, during the initial roll-out of ADSL, the modem manufacturer will only produce a limited quantity of modems <u>which will only be supplied to GTE</u>. After the market develops, this situation may change.[12]

In other words, GTE has an equipment distribution monopoly for a limited time, and it needs to exploit that monopoly to the fullest while it is in a position to do so. One way to do that, of course, is to shut out potential competition by using its exclusive control over the customer's local service CPNI to market the necessary equipment before a competitive market has a chance to develop.

GTE suggests that the modems will become more widely available "[a]fter the market develops," but the competitive modem distribution market will not develop if GTE monopolizes it now. Accordingly, this is precisely the type of situation that

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[12] <u>Id.</u> at 16 (emphasis added).

led the Commission to find that "restricting CPNI use in the CPE market" is necessary to "protect competitive concerns regarding CPNI use."[13] Granting the temporary relief sought by GTE thus would undermine the competitive goals of Section 222 and do permanent, severe damage to the developing ADSL market and other advanced service markets, as well as to the related equipment markets. Thus, either forbearance or a stay is out of the question, since competition and the public interest would be severely harmed by such relief.

2. GTE's Request for Relief for any Use of CPNI to Expand on Current Service Packages Would Essentially Gut Section 222(c)(1)

GTE requests temporary forbearance from or a stay of the application of Section 222 to the marketing of additional service categories to customers already being provided a package of at least two of the three categories of service discussed in the Order. CLECs will be competing largely by offering integrated packages of services, according to GTE, and the service categories discussed in the Order will become increasingly irrelevant to the users of such packages, who will regard the service relationship as defined by the package, not the categories making up the package.

GTE claims that forbearance is warranted, asserting that incumbent carriers will have to offer any services making up a package on an individual basis under tariff and that competition

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[13] Order at ¶ 75.

will not be harmed, since carriers will have more effective means to penetrate new markets. In the alternative, GTE requests a stay for the same reasons and points out that the Order itself speculates that once a carrier is providing all three categories of services to a customer, "`[t]he categories would ... disappear naturally....'"[14]

Although GTE presents this issue as a relatively innocuous request, such relief would result in a major rewriting of the Order. As a practical matter, there is little difference between a total offering that includes two service categories and an integrated service package that includes the same services. Thus, under GTE's proposal, anytime a carrier offered services from two of the three categories to a customer, it could use CPNI derived from those services to market any other service. For example, a LEC providing local and wireless services to a customer could use the CPNI derived from those services to market long distance service without customer approval.

Such an approach would be directly contrary to the entire competitive and privacy rationale behind Section 222, as articulated in the Order. A LEC in that situation would, in effect, be exploiting its monopoly-derived customer base advantage in order to expand into the long distance market and would deprive the customer of effective control over his or her CPNI. Indeed, the result in such situations would be no different from the single category approach, which the Commission

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[14] GTE Petition at 26 (citing Order at ¶ 58).

rejected as "affording customers virtually no control over intra-company use of their CPNI" and because "[c]arriers already in possession of CPNI could leverage their control of CPNI in one market to perpetuate their dominance as they enter other service markets."[15]

It is irrelevant, as GTE argues, that the service categories "would ... disappear naturally" once a carrier were providing all three categories of services to a customer. The heart of the competitive struggle that Section 222 is intended to address is marketing by carriers attempting to break into new markets[16] and thus aimed at new prospects. Once a customer is taking all three categories of service from a carrier, the struggle has been resolved, at least to the extent that the use of that customer's CPNI must be restricted. Until that point, however, the statutory principles of customer convenience and control underlying Section 222 require that approval be sought before using CPNI to market a new service category.[17] The Commission recognized that, as GTE argues,[18] incumbent carriers' penetration of new markets would be somewhat less effective if customer approval had to be sought before using CPNI, but

> [t]he 1996 Act was meant to ensure ... that, as markets were opened to competition, carriers would win or

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[15] Order at ¶ 37.

[16] See id.

[17] See id. at ¶ 56.

[18] See GTE Petition at 26 (penetration of new markets would be more effective if forbearance granted).

> 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.[19]

The competitive and consumer injury resulting from the evisceration of Section 222 under GTE's approach dooms any stay or temporary forbearance relief. One can only assume that GTE is not serious in suggesting that the Order be gutted in this manner.

3. The Win-Back Prohibition Should at Least Remain Applicable to ILECs Abusing Their Monopoly Role

Both CTIA and GTE seek temporary relief from the rule prohibiting the use of CPNI for "win-back" marketing to customers who have decided to switch to another carrier. GTE appears to seek more expansive relief from the win-back rule than does CTIA, since GTE requests that it be eliminated for all service providers, not just CMRS providers, under the rationale that win-back marketing is pro-competitive.

Both CTIA and GTE also argue that the "win-back" rule is inconsistent with Section 222, since the purpose in fact is to continue providing service, under Section 222(c)(1), or to render service, under Section 222(d)(1). GTE goes on to argue that the rule is at least overbroad, because it appears to apply even where the customer has given a general approval to use CPNI under Section 222(c)(1), which is valid until revoked. GTE argues that forbearance from application of the win-back rule meets the

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[19] Order at ¶ 66.

criteria of Section 10, since it is not necessary for the protection of consumers, who have implicitly approved the use of their CPNI during win-back situations and are clearly benefitted by win-back marketing attempts, and because the rule is anticompetitive.

CTIA also incorrectly argues that since there was no notice that a win-back rule was being proposed, there were no comments on the issue and there is, accordingly, no record support for it. Finally, CTIA alternatively requests that the "win-back" rule be narrowed to apply only after the customer is no longer receiving service from the original carrier.

MCI is not prepared at this point to comment in detail on these win-back proposals prior to the reconsideration round of pleadings, but it does wish to correct a number of misimpressions that these requests may create. First, there were comments on the win-back marketing issue, at least by MCI. MCI discussed the issue in the context of ILECs' abuse of their monopoly status as the underlying network facilities-based service providers to CLECs reselling local service. MCI has experienced situations where an ILEC, acting in its capacity as the underlying facilities-based carrier, learns from a changeover order that a customer intends to switch to MCI's local resold service. The ILEC then exploits that advance notice of the customer's intent to change local carriers by attempting to win the customer back before the change is actually carried out. The ILEC obtains such advance notice only because it is the monopoly underlying carrier

providing service to the local resale carrier.[20] Thus, contrary to CTIA's suggestion, there was record support for at least some restriction on win-back marketing.

MCI's concern over the ILECs' exploitation of their monopoly status as the underlying local network facilities providers also rebuts GTE's unfounded notion that win-back marketing is always pro-competitive. Not only is it used to stifle local competition, but, since ILECs also implement primary interexchange carrier (PIC) changes, an ILEC providing long distance service can exploit its monopoly control of the local switch to injure interexchange competition through win-back marketing in the same way.

Such exploitation of the ILECs' role as underlying carriers also rebuts GTE's statutory construction argument, since ILECs in this situation are not only misusing CPNI, but are also misappropriating carrier proprietary information protected under Section 222(b). There are no exceptions to Section 222(b); an underlying carrier must therefore never use for its own benefit information that it learns in the course of providing service to another carrier.[21] GTE cannot argue that the ILEC in the situations posited by MCI is using the information to continue providing service, since it is in fact attempting to prevent the local reseller or the chosen PIC from providing service.

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[20] See MCI August 15 Response at 18-19.

[21] See Comments of MCI Telecommunications Corporation at 13-16, CC Docket No. 96-115 (filed March 30, 1998).

Moreover, customers cannot consent, impliedly or otherwise under Section 222(c)(1), to underlying carriers' misuse of resellers' carrier proprietary information or the misuse of PIC change information, which are absolutely protected under Section 222(b).

Thus, GTE's request to gut the win-back prohibition completely, albeit on a temporary basis, is indefensible on each and every ground proffered by GTE and must be rejected. Temporary forbearance relief is out of the question, due to the injury to competition that would result if the win-back rule were not enforced as to ILECs in the circumstances discussed herein. As stated above, MCI is not in a position to comment on every aspect of the win-back rule raised by CTIA and GTE, but a stay of the rule as applied to ILECs exploiting their monopoly status vis-a-vis other CLECs and other PICs would clearly be disastrous.

D. Conclusion

For the reasons stated above, the Commission should deny the requested temporary relief to the extent discussed herein. MCI expresses no opinion on the other aspects of the relief requested by CTIA and GTE but reserves the right to comment on those issues, and to modify its views as stated herein, upon a more complete record at the reconsideration phase of this proceeding.

MCI also requests that any temporary relief granted in response to any aspect of the CTIA or GTE requests not be confined to certain types of service providers or portions of the Order but extend to the entire Order and the rules promulgated

thereby and apply to all carriers.

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