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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its comments in support of the Cellular Telecommunications Industry Association ("CTIA") and GTE requests filed in the above-referenced proceeding.[1/] As shown below, the Commission should further study the likely impact of its CPNI rules on CMRS and CMRS customers and providers *before* those rules go into effect so that the Commission can make an informed decision about how its rules should apply to the unique service relationship that CMRS providers have with their customers.

1/ Implementation of the Telecommunications Act of 1996: 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, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-115, 96-149, FCC 98-27 (rel. February 26, 1998) ("*Second Report and Order*").

I. INTRODUCTION.

The Commission in a *Notice* dated May 1, 1998, requested comments on the *Request for Deferral And Clarification* (the "Request") filed in this proceeding on April 24, 1998 by CTIA and the *Petition for Temporary Forbearance or, In The Alternative, Motion for Stay* (the "Petition") filed in this proceeding by GTE Service Corporation ("GTE") on April 29, 1998. Vanguard submits these comments in support of the Request and the CMRS-related relief sought in the Petition.[2/]

Vanguard is a medium-sized, independent cellular carrier, serving approximately 675,000 customers in 29 cellular MSAs and RSAs in 10 states. Vanguard is particularly concerned about the impact of the new CPNI rules on mid-sized and smaller carriers, and on CMRS providers generally. Indeed, there are three distinct reasons for postponing the effective date of the CPNI rules as to CMRS providers.

First, Congress did not intend and the statute does not require that the rules treat all telecommunications services and service providers identically. Second, CMRS is a unique type of telecommunications service rendered under extremely competitive conditions, with distinct consumer expectations. Third, these unique aspects of CMRS and the public interest necessitate CPNI rules that take cognizance of market realities that the present rules ignore. Indeed, the record in this proceeding does not include sufficient CMRS-specific information to allow a well

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2/ GTE in Section I.A and B of its Petition discusses the use of CPNI to market and introduce new services such as ADSL. Vanguard takes no position on the use of CPNI for such ILEC marketing of ADSL. Vanguard notes, however, that unlike the CMRS-related issues raised by GTE and CTIA, there is no immediate need for Commission action on ADSL relief, as there is no bar to offering ADSL to GTE's existing customers. Consequently, this issue can be timely addressed through the normal channel of a petition for reconsideration.

informed decision as to the impact of imposing the Commission's interpretation of Section 222's requirements on CMRS providers and their customers. Accordingly, the Commission should defer application of its CPNI rules pending Commission study of CMRS provider practices and CMRS customer expectations. Any CPNI rules applied to CMRS should be tailored to the unique characteristics of CMRS and recognize the dynamics of the competitive CMRS market.

II. CONGRESS DID NOT INTEND AND THE STATUTE DOES NOT REQUIRE THAT THE RULES TREAT ALL TELECOMMUNICATIONS SERVICES AND SERVICE PROVIDERS IDENTICALLY.

Section 222(c)(1) of the Communications Act provides:

> (1) Privacy Requirements for Telecommunications Carriers. - Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[3/]

Section 222 mandates that the Commission analyze each "telecommunication service" and with respect to that service make the following determinations: (1) to what extent the "provision" of the services use CPNI; (2) what services are "necessary to . . . the provision of" that service and the extent to which the provision of such "necessary" services uses CPNI; and (3) what other services are "used in the provision of" telecommunications services and the extent to which the provision of these "used in" services requires use of CPNI. The results of this analysis will vary depending on the telecommunications service being considered because telecommunications

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3/ 47 U.S.C. § 222(c)(1).

services differ so significantly.[4] For this reason, any analysis that treats all telecommunications services as if they are the same is inherently flawed (and the Commission concluded there are at least 3 categories of service: long distance, local and CMRS). A "one size fits all" approach ignores the unique characteristics of each service and forces all service providers to adhere to CPNI rules that necessarily are ill-suited to some providers.

One example that highlights this principle is the difference between landline and CMRS telephones. Landline telephones transmit and receive landline service without special programming, which means landline service providers suffer no detriment if they are prohibited from using CPNI to market landline telephones. Both GTE and CTIA cogently explain the degree to which both analog and digital subscriber handsets are an integral part of the provision of CMRS service. In other words, it is not reasonable to expect wireless providers to market service without also marketing handsets.

Moreover, Congress' purpose in enacting Section 222(c)(1) was to protect consumer privacy. Traditionally, the scope of a privacy interest is determined by the reasonable expectation of those whose privacy interests are at issue.[5] Thus, in interpreting Section 222(c)(1), the Commission must not lump together all telecommunications services but, rather, must analyze the expectations of consumers with respect to their use of a particular type of telecommunications service.

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[4] For instance, long distance calling patterns have limited relevance to local exchange service but are useful in provisioning long distance services.

[5] *Second Report and Order* at ¶¶ 60-65; *See United States v. Herring*, 993 F.2d 784 (1993).

For these reasons, Vanguard supports CTIA and GTE in urging the Commission to tailor its CPNI rules so that the rules appropriately regulate CMRS consistent with the unique characteristics of that service, the market realities associated with the provision of that service and the expectations of the customers who use the service.

III. CMRS SERVICE PROVIDER PRACTICES AND CONSUMER EXPECTATIONS DIFFER FROM THOSE OF OTHER TELECOMMUNICATIONS SERVICES.

CMRS heretofore has not been subject to any regulation of the use of CPNI. Without government regulation, CMRS providers as an industry have self-regulated in this area, adopting programs that require reasonable use of CPNI and benefit CMRS consumers through competition that reduces consumer costs.

The CMRS industry always has integrated offerings of all services that can be offered over mobile handsets and CMRS customers expect that CMRS-related information services will be marketed to them through use of their CPNI. Similarly, CMRS equipment traditionally has been marketed and sold by CMRS providers and is programmed so as to be compatible with the particular transmission service used by the customer. Finally, the CMRS market always has been a market driven by vigorous competition among multiple competitors of all sizes. Traditionally, the CMRS market and the Commission's rules with respect to CMRS providers have permitted small and mid-sized competitors to offer consumers services and programs comparable to those offered by large CMRS providers.

These characteristics define the CMRS culture and form the basis for the privacy expectations of CMRS customers. To appropriately regulate this sensitive aspect of the CMRS provider/customer relationship, the Commission's rules must, at a minimum, take cognizance of the way CMRS services are delivered. The CPNI rules as they apply to CMRS service and CMRS service providers ignore these market realities and disserve the public interest.

Vanguard and other small and medium-sized carriers will be disproportionately disadvantaged by these rules. Medium-sized and small carriers rely heavily on surgical marketing efforts targeted to specific customer preferences and niche markets and niche services, unlike large carriers, cannot afford indiscriminate mass mailings and mass marketing efforts. Moreover, Vanguard needs access to CPNI on individual customers in developing new services. Individual CPNI can be used, for instance, to target customers for marketing trials before a service is rolled out on a wide scale. For mid-sized and smaller carriers, the ability to identify customers for such tests can be critical to the development of new services. The current rules could make it difficult for small and medium-sized carriers to develop new services and effectively compete with large carriers.

IV. THE RECORD IN THIS PROCEEDING LACKS SUFFICIENT CMRS-SPECIFIC INFORMATION TO ENABLE THE COMMISSION TO MAKE A WELL INFORMED DECISION AS TO WHETHER ITS EXISTING CPNI RULES SHOULD APPLY TO CMRS PROVIDERS AND THEIR CUSTOMERS.

Enforcement of the existing rules would be premature given that the record on which the Commission based its decision is void of the information necessary to conduct a CMRS-specific analysis of the type discussed above in Section II. Because the Commission interpreted Section 222 of the Act to require a uniform blanket rule that treats all telecommunications services

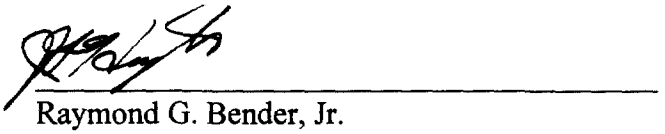
similarly, it failed to examine the CMRS-specific issues that are discussed above and in the *Request* and the *Petition.* The Commission's mandate to engage in reasoned decision making requires that it reexamine its CPNI rules to determine whether those rules are appropriate as they apply to CMRS. Pending such a reexamination, which should include an appropriate comment period to supplement the existing record, the effective date of the CPNI rules as they apply to CMRS providers and customers should be delayed.

V. CONCLUSION

To the extent that they seek a delay in the effective date of the CPNI rules as those rules apply to CMRS service and assert that the record here is incomplete and an inadequate basis for a reasoned determination by the Commission that the CPNI rules should apply to CMRS, Vanguard supports the *Request* and *Petition.*

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.



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May 8, 1998

CERTIFICATE OF SERVICE

I, Joslin Arnold, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 8th day of May, 1998, a copy of the foregoing "Comments of Vanguard Cellular Systems, Inc." was sent by hand delivery to the following:

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