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Federal Communications Commission  
Washington, DC 20554

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MAY 26 1998

In the Matter of )  
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Implementation of the Telecommunications )  
Act of 1996 )  
  
Telecommunications Carriers' Use of )  
Customer Proprietary Network Information )  
and Other Customer Information )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 96-115

DA 98-836

**PETITION FOR RECONSIDERATION OF THE  
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

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May 26, 1998

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## SUMMARY

If implemented as drafted, the Commission's CPNI rules will wreak havoc with the well established business and marketing practices of the wireless industry. CMRS providers, unlike landline carriers, have a long history of marketing wireless services jointly with CPE and information services, and wireless customers have benefited from, and come to expect such one-stop shopping. Not only will restricting wireless carriers' use of CPNI defeat the reasonable expectations of wireless customers, but imposing these restrictions on such short notice will cause great hardship in the wireless industry, which has not been subject to limitations on CPNI use in the past.

In drafting Section 222, Congress intended to protect the privacy of telecommunications customers. Congress also, however, intended to encourage vigorous competition among providers of telecommunications services, as such competition inevitably accrues to the benefit of the American public by producing a wider variety of reasonably priced services. Unfortunately, in the instant *Order*, the Commission has drafted rules that attempt to protect customer privacy at the expense of competition. In order to imbue its regulatory scheme with this Congressionally-envisioned balance, the Commission should re-assess whether Section 222 was intended to interfere with a wireless carrier's ongoing relationship with its existing customers and reconsider the following three rules as neither mandated by Section 222 nor supported by sound policy considerations

**First**, Section 64.2005(b)(1) should be reconsidered to the extent it requires customer approval before a CMRS provider may use CPNI to market mobile equipment. Wireless CPE must be tuned by the carrier to the proper frequency and air interface in order to send and receive the radio transmissions that constitute commercial mobile service. Therefore, carriers that derive

CPNI from CMRS should be permitted to use this CPNI to market paging units and PCS handsets because, under Section 222, such wireless CPE is “necessary to ... the provision of” CMRS. As a matter of policy, customers expect carriers to jointly market wireless services and wireless CPE because of the inter-related nature of the two products. In fact, customers would be significantly inconvenienced if they had to shop separately for CPE that was compatible with each wireless service offering that was presented to them by carriers.

*Second*, Section 64.2005(b)(3) should be reconsidered in order to permit carriers to use CPNI to “win back” a customer. Indeed, because such win back efforts allow customers to play carriers off against one another in order to negotiate lower rates, the Commission should encourage, rather than prohibit such a direct form of price competition. Further, as a matter of statutory interpretation, Section 222 is silent on this issue, thereby indicating that Congress did not demand this degree of consumer “protection.” In addition, the Commission has already determined that a customer’s consent for a carrier’s use of his or her CPNI is valid until that consent is revoked. Therefore, carriers should be permitted to use CPNI to win back former customers who have not revoked their consent.

*Third*, and finally, the Commission should reconsider Section 64.2005(b)(1) to the extent it prohibits the use of CPNI to market voicemail or other information services that are intertwined with the underlying wireless offering. In crafting this rule, the Commission relied on the clean demarcation between telecommunications services and information services that has evolved in the context of “traditional telephone,” or landline service. This dichotomy, however, has never existed in the wireless context, where there are an ever increasing number of service offerings—such as electronic mail and voicemail messaging units—where the commercial mobile service and the information service are inextricably intertwined. Therefore, because

information services are “necessary to, or used in” the provision of these combined CMRS/information service offerings, under Section 222, carriers should be permitted to use CMRS-derived CPNI to market them. Further, because these new and innovative service offerings are among the most popular commercial mobile products on the market today, the joint marketing of information services and CMRS should be encouraged as consistent with the pro-competitive intent of the 1996 Act.

## TABLE OF CONTENTS

I. INTRODUCTION .....	2
II. THE <i>SECOND CPNI ORDER</i> UNNECESSARILY DISRUPTS THE BUSINESS AND MARKETING PLANS OF CMRS PROVIDERS .....	3
III. THE <i>SECOND CPNI ORDER</i> FAILS TO STRIKE THE PROPER BALANCE BETWEEN COMPETITIVE AND CONSUMER PRIVACY INTERESTS .....	5
A. Contrary To The Commission’s Decision, Section 222 Does Not Require Customer Approval Before A CMRS Provider May Use CPNI To Market Mobile Equipment, And Consumers Benefit From Such Integrated Marketing .....	7
B. The Commission’s Anti-Win Back Rule Deprives Consumers Of Potential Cost Savings and Is Not Mandated By The 1996 Act .....	9
C. Section 222 Permits Wireless Carriers To Market Voicemail and Other Similar Services and Customers Expect Such Integrated Marketing .....	11
IV. CONCLUSION.....	14

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Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
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Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	DA 98-836

**PETITION FOR RECONSIDERATION OF THE  
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA")<sup>1</sup> hereby submits its Petition for Reconsideration regarding the Second Report and Order in the above-captioned docket.<sup>2</sup> In drafting Section 222, Congress did not intend to limit the new products and services a carrier could offer its existing customers. Therefore, PCIA respectfully requests that the

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<sup>1</sup> PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

<sup>2</sup> *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 (Feb. 26, 1998), 63 Fed. Reg. 20326 (April 24, 1998) ("Second CPNI Order" or "Order").

Commission reconsider its decision to restrict the use of CPNI to: (1) market customer premises equipment ("CPE") that is integral to wireless services; (2) win back customers who have terminated service; and (3) market information services that are inextricably intertwined with wireless services.

## I. INTRODUCTION

In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress created Section 222, which established rules for carrier use and disclosure of customer proprietary network information ("CPNI") and other customer information obtained by carriers in their provision of telecommunications services. In an attempt to administer and clarify Section 222, the Commission released its *Second CPNI Order* on February 26, 1998. This *Order* modifies the FCC's rules and procedures regarding CPNI and implements Section 222 as follows:

- Carriers may use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier.
- Before carriers may use CPNI to market service outside the customer's existing service relationship, they must obtain written, oral, or electronic customer approval.
- Carriers must provide a one-time notification of customers' CPNI rights prior to any solicitation for approval.

As the record in this proceeding reflects, the *Second CPNI Order* was directly challenged upon its release when GTE filed a petition for forbearance from the application of or, alternatively, for stay of the Commission's new CPNI rules.<sup>4</sup> In response to this filing, the

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<sup>4</sup> See *Petition for Temporary Forbearance or In The Alternative, Motion for Stay*, CC Docket No. 96-115 (filed April 29, 1998). See also *CTIA Request For Deferral and Clarification*, CC Docket No. 96-115 (filed Apr. 24, 1998).

Commission established a pleading cycle,<sup>4</sup> and the recently filed comments illustrate the widespread concern over the rules established in the *Second CPNI Order*. Notably, twenty-three out of the twenty-four opening round commenters indicated support for some form of stay, deferral, or forbearance from the Commission's rules.

PCIA urges the Commission to take note of the disruptive nature its rules will have on the business operations of wireless carriers and consumer expectations.<sup>5</sup> The Commission should therefore reconsider its *Second CPNI Order* to: (1) avoid unnecessarily disrupting the business and marketing plans of CMRS providers; and (2) properly balance both competitive interests and consumer interests in implementing the new CPNI rules.

## **II. THE SECOND CPNI ORDER UNNECESSARILY DISRUPTS THE BUSINESS AND MARKETING PLANS OF CMRS PROVIDERS**

As explained in PCIA's comments supporting GTE's petition for stay, the *Second CPNI Order* will do tremendous economic damage to the highly competitive CMRS industry by effectively preventing carriers from retaining their customers. As technological advances and competitive pressures dictate, CMRS providers are constantly advertising new, diverse, and better products, hoping to both capture another carrier's customers and stimulate growth by

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<sup>4</sup> *FCC Public Notice*, "Pleading Cycle Established For Comments On Telecommunications Carriers' Use Of Customer Proprietary Network Information And Other Information Request For Deferral And Clarification," FCC 98-836 (May 1, 1998) ("*Public Notice*") at 1.

<sup>5</sup> In its recent *Clarification Order*, the Commission provided a number of clarifications that were helpful to telecommunications carriers in understanding certain ambiguous provisions of the *Second CPNI Order: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information* (Order), CC Docket No. 96-115 (May 21, 1998) ("*Clarification Order*"). This *Clarification Order*, does not, however, go nearly far enough in conforming the Commission's CPNI rules to consumer expectations and business practices in the wireless industry.

adding new customers. In response to this vigorously competitive marketplace,<sup>6</sup> wireless providers have developed marketing programs that quickly present existing customers with their “latest and greatest” service offerings as soon as they become available.

Further, in the CMRS industry, there have been virtually no marketing boundaries between telecommunications services, such as paging and wireless telephony; CPE, such as pagers and PCS handsets; and related information services, such as voicemail and electronic mail. This lack of marketing boundaries has created a commercial atmosphere in which consumers enjoy one-stop shopping for all of their wireless communications needs. It is especially significant that this one-stop shopping approach has developed in a free market, unconstrained by any CPNI restrictions. In such a consumer-oriented marketing environment, use of consumer information is essential to meeting customer needs.

Critically, however, CMRS providers must know where to target their marketing campaigns. In such a highly-competitive industry, there are no resources to waste on misdirected marketing programs. It is therefore essential that prior to launching a targeted marketing campaign, wireless providers know the size of the customer account, whether the customer is a consumer or a commercial customer, the customer’s minutes of usage, and to which services the customer currently subscribes.

The *Second CPNI Order* upsets the well-established marketing practices of the entire wireless industry, and does so on extremely short notice. One-stop shopping—including all types of telecommunications, CPE, and other services—is the *modus operandi* of the wireless

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<sup>6</sup> The FCC has concluded that there is a high level of competition in the wireless marketplace. See Third Annual Commercial Mobile Radio Service (CMRS) Report (May 14, 1998).

industry, and is essential to its future growth. In addition, while some carriers in the local exchange industry have traditionally been subject to CPNI restrictions, and already has compliance programs in place, the CMRS industry has no such regulatory tradition. Therefore, wireless carriers have had to assess *de novo* what steps they must take to comply with the *Second CPNI Order*, and to implement these measures.

Wireless providers are aware that violations of the Commission's rules are punishable by FCC forfeitures and possible license revocation. Therefore, they are working diligently to conform their business practices to this new regulatory regime. The adverse economic impact of the instant Order cannot, however, be underestimated. This is especially true in a highly competitive industry that has traditionally turned to its existing customers when seeking to market new services and equipment. The Commission should therefore reconsider its decision to impose the *Second CPNI Order's* requirements on CMRS providers, or at least modify these rules to fit the unique situation of wireless carriers.

### **III. THE SECOND CPNI ORDER FAILS TO STRIKE THE PROPER BALANCE BETWEEN COMPETITIVE AND CONSUMER PRIVACY INTERESTS**

There is little doubt that Section 222 was drafted in part to help protect the privacy interests of consumers. In drafting this section, however, Congress also explicitly recognized that it must foster the pro-competitive goals of the 1996 Act by directing a balance of "*both competitive and consumer privacy interests* with respect to CPNI."<sup>7</sup> The Commission concedes

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<sup>7</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess., 1 (1996) (Joint Explanatory Statement) (emphasis added).

as much, stating that “the balance struck by Congress aligns [privacy and competitive] interests for the benefit of the consumer.”<sup>8</sup>

Despite the delicate balance contemplated in the legislation, the *Second CPNI Order* appears to be under-girded by two implied assumptions that are decidedly anti-competitive and anti-consumer. First, the Commission seems to have assumed that privacy and competition are necessarily at odds with one another in the CPNI context. Second, there is the apparent assumption that the implementation of Section 222 requires a “zero sum game” ultimately resulting in preferences to privacy concerns that subtract from—and virtually eliminate—competitive concerns. This view is mistaken. Rather than rules that threaten to eliminate the well-established marketing programs of the entire CMRS industry, PCIA asserts that Congress intended exactly what it requested—a balanced approach to CPNI restrictions.

Although the Commission plays lip service to the concept of consumer expectations, it fails to demonstrate how its rules are consistent with the desires and expectations of consumers. In particular, wireless customers do not expect—or want—their existing service provider to seek their permission prior to offering the customer new products and services. Such an overly restrictive rule harms consumers by building unnecessary barriers between wireless customers and the new and innovative products and services they want and their carriers have to offer.

In sum, the *Second CPNI Order* seeks to unnecessarily “protect” consumers at too great a cost to the rational expectations of consumers and providers of wireless services. CPNI rules that will undermine the 1996 Act’s most basic goal of increased competition and rapid technological

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<sup>8</sup> *Second CPNI Order*, ¶ 3.

and economic development are neither in the public interest nor within the intent of Congress.<sup>9</sup>

Against this background, PCIA urges the Commission to re-assess whether Congress intended to limit the new products and services a carrier can offer its existing customers. Thus, the FCC should reconsider the following rules: (1) Section 64.2005(b)(1), to the extent it requires customer approval before a CMRS provider may use CPNI to market mobile equipment; (2) Section 64.2005(b)(3), which prohibits carriers from using CPNI to “win back” a customer; and (3) Section 64.2005(b)(1), to the extent it prohibits the use of CPNI to market voicemail or other information services that are intertwined with the underlying wireless offering.

**A. Contrary To The Commission’s Decision, Section 222 Does Not Require Customer Approval Before A CMRS Provider May Use CPNI To Market Mobile Equipment, And Consumers Benefit From Such Integrated Marketing**

In drafting Section 64.2005(b)(1) of its rules, the Commission interprets Section 222(c)(1) as forbidding carriers from using CPNI that was derived from the provision of wireless services to market wireless CPE. The Commission should reconsider this decision, because it is not mandated by the pertinent statutory language, and flies in the face of the expectations of wireless customers and the business practices the wireless industry has developed to meet these customer expectations.

Section 222(c)(1) does not mandate the interpretation chosen by the Commission. The pertinent statutory language permits carriers to use the CPNI derived from “the provision of a telecommunications service,” in its “provision of the telecommunications service from which

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<sup>9</sup> See Joint Explanatory Statement at 1 (stating that the goal of the 1996 Act was to implement a “procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets competition”).

such information is derived” or “services necessary to, or used in, the provision of such telecommunications service.”<sup>10</sup> In the context of wireless services, there is little doubt that paging units and PCS handsets are “necessary ... to the provision” these services. Obviously, the radio transmissions that characterize these mobile services cannot be decoded or transmitted without wireless CPE that is specifically designed for each wireless service. Therefore, Section 222(c)(1) permits wireless service providers to the use their customers’ CPNI to market these customers wireless CPE.

The Commission further states that it “reject[s] suggestions that restrictions on CPNI sharing in the context of CPE ... would be contrary to customer expectations, as well as detrimental to the goals of customer convenience and one-stop shopping.”<sup>11</sup> Surprisingly, the Commission makes this statement in the face of strong record evidence to the contrary.<sup>12</sup> In defense of its rules, the Commission argues that its interpretation does not “prohibit” carriers from bundling wireless services and CPE, but rather that the restrictions “merely require the carrier to obtain customer approval” prior to doing so.<sup>13</sup>

There is, however, no sound policy reason to place this burden on wireless carriers because wireless customers do not distinguish CPE—such as PCS handsets and paging units—from the CMRS that underlies these wireless devices. There appears to be little need to do so because both CPE and CMRS are virtually always bought from the same carrier at the same time.

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<sup>10</sup> 47 U.S.C. § 222(c)(1).

<sup>11</sup> *Second CPNI Order*, ¶ 76.

<sup>12</sup> *See Second CPNI Order*, ¶ 76, n.287.

<sup>13</sup> *Second CPNI Order*, ¶ 76.

Indeed, carriers offer their services with CPE included in order to ensure that the CPE is tuned to the specific frequency that is assigned to the carrier and operates using the air interface that the carrier has chosen to deploy. It would be decidedly inconvenient for customers, for example, if a PCS provider using GSM technology chose not to package its personal communications service with a GSM handset that is tuned to the carrier's assigned frequency block.<sup>14</sup> Similarly, paging customers would be rightfully angry and puzzled if their paging provider sold them an advanced two-way messaging service but neglected to sell them the paging unit necessary to receive and send messages.

Therefore, CPE is well within customers' expectations of their total service offering with respect to CMRS. As such, it is not plausible that the use of CPNI derived from wireless services to market wireless CPE would adversely affect customer privacy. In fact, the rule appears to work against consumer interests because consumers have come to expect that CPE and CMRS will be marketed together. Requiring carriers to seek additional consent to use CPNI under these circumstances would deprive customers of a convenient form of sales and service to which they have become accustomed.

**B. The Commission's Anti-Win Back Rule Deprives Consumers Of Potential Cost Savings and Is Not Mandated By The 1996 Act**

Section 64.2005(b)(3) of the Commission's rules states that "[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." Because this rule is neither

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<sup>14</sup> This is increasingly true as the number of air interfaces increases. For example, while there was once only AMPS for broadband services, there is now AMPS, GSM, TDMA, and CDMA, all of which require unique CPE. As the number of two-way narrowband services continues to increase, there has been a similar increase in the different types of CPE necessary to support these services.

consistent with the expectations of wireless customers and common commercial practices in the wireless industry, nor mandated by Section 222, it merits reconsideration.

As a matter of policy, the Commission's overly broad anti-win back rule is not in the public interest because it will counteract the pro-competitive aims of the Act by hindering direct competition for consumers' commercial mobile business. As pointed out by a number of the parties commenting on the GTE Petition, carriers' attempts to win back former customers create one of the most direct and pro-consumer forms of price competition imaginable. This competition arises because a former customer knows exactly what his or her new service provider is charging for service and what the former provider previously charged. Armed with this information, the consumer can negotiate more favorable rates by playing the carriers off against one another. Thus, the Commission should reconsider its anti-win back rule because it squelches price-based competition and is inconsistent with the pro-competitive paradigm set forth in the 1996 Act.

As a matter of statutory interpretation, the Commission's anti-win back rule is not mandated by Section 222. Preliminarily, because Section 222 makes no mention of win-back efforts, this rule appears to be a prophylactic attempt by the Commission to safeguard customer privacy in a manner not anticipated by Congress. Moreover, the rule arguably contradicts the Act's provision that allows the use of CPNI to "render" service to customers.<sup>15</sup> While not defined in the Communications Act, "render" is defined by the dictionary as "to give or make

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<sup>15</sup> 47 U.S.C. § 222(d)(1).

available.”<sup>16</sup> Therefore, attempts to win back customers fall within the meaning of “render” in that carriers are attempting to “make available” their services to former customers.

The Commission’s rule is also problematic because it would prohibit the use of CPNI for winning back customers that have previously given a carrier permission to use their CPNI to market them new services. In fact, the Commission’s anti-win-back rule highlights an internal inconsistency in its regulatory scheme. In particular, the anti-win back rule would effectively prohibit the use of CPNI for win back—even where approval has already been obtained. Rule 64.2007(f)(2)(ix), on the other hand, states that “any approval ... is valid until the customer affirmatively revokes ... such approval ...” Therefore, on reconsideration, the Commission should confirm that carriers can continue to use a former customer’s CPNI to win back that customer until the customer affirmatively revokes his or approval for such use.

**C. Section 222 Permits Wireless Carriers To Market Voicemail and Other Similar Services and Customers Expect Such Integrated Marketing**

Finally, Section 64 2005(b)(1) of the Commission’s rules prohibits wireless providers from using CMRS-derived CPNI to market information services that are used in conjunction with the wireless service from which the CPNI was obtained. Because, as applied to wireless services, this rule is neither mandated by Section 222 nor in the public interest, it merits reconsideration.

Statutorily, under Section 222(c)(1)(B), telecommunications carriers are permitted to use CPNI derived from one telecommunications service to market “services necessary to, or used in, the provision of such telecommunications service.”<sup>17</sup> In its *Order*, the Commission determined

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<sup>16</sup> Webster’s II New Riverside University Dictionary 995 (1988).

<sup>17</sup> 47 U.S.C. § 222(c)(1)(B).

that certain services like those formerly characterized as “adjunct-to-basic.” were “necessary to, or used in, the provision of” a telecommunications service, including “speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call return, repeat dialing, call tracking, and certain centrex features.”<sup>18</sup> The Commission drew this regulatory boundary because the aforementioned services “facilitate the use of *traditional telephone service*.”<sup>19</sup> Other services, however, including call answering, voicemail or messaging, fax store and forward, and Internet access services, were determined to be *not* “necessary to, or used in” the carrier’s provision of telecommunications service because they are “provided to consumers independently of their telecommunication service.”<sup>20</sup>

Because the aforementioned regulatory classifications are based on a landline model of telephony, the Commission should reconsider their application to wireless services. The use of a landline model is evidenced by the Commission’s “traditional telephone service” analogy to determine which services are “necessary to, or used in” a carrier’s service offering.<sup>21</sup> This analogy, however, has no validity when applied to the present day suite of wireless service offerings. For example, paging providers now offer messaging services that bundle a wireless notification system with a voice mailbox for messages. When the party is paged, he or she then uses either a wireless or wireline telephone to call the mailbox, and retrieves his or her messages. Similarly, there are a number of service offerings whereby a paging subscriber can be sent, and

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<sup>18</sup> *Second CPNI Order*, ¶ 73.

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.*, ¶ 72.

<sup>21</sup> *Id.*, ¶ 73.

respond to. Internet-originated electronic mail. Broadband PCS providers also offer products that combine voice services with voicemail in a single service offering.

In these examples, voicemail and Internet access are plainly “necessary to, or used in” the service offerings. In fact, the information services are integrally intertwined with the underlying wireless service in that without the information services, the integrated service offering would not exist. Yet, according to the instant *Order*, voicemail and Internet access are considered to be separate services from CMRS for the purposes of CPNI usage. The Commission should therefore re-analyze its regulatory classifications with modern wireless services in mind, and allow carriers to use CPNI derived from wireless services to market information services that are an integral part of these wireless services.

Finally, wireless customers expect to be offered one-stop shopping for wireless services bundled with information services, just as they expect to be offered wireless CPE and wireless services as a single product offering. In response to this consumer demand, wireless carriers have traditionally used CPNI derived from CMRS to market such wireless service/information service combinations, which are now among their most innovative and popular service offerings. Because this marketing strategy has benefited both the wireless industry and the American public, absent an absolute statutory mandate to do so, it should not be disturbed.

