

DOCKET FILE COPY ORIGINAL
RECEIVED

MAY 26 1998

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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)
)
Implementation of the)
Non-Accounting Safeguards of)
Sections 271 and 272 of the)
Communications Act of 1934, as)
Amended)

CC Docket No. 96-115

CC Docket No. 96-149

PETITION OF MCI TELECOMMUNICATIONS CORPORATION
FOR RECONSIDERATION AND CLARIFICATION

MCI TELECOMMUNICATIONS CORPORATION

Frank W. Krogh
Mary L. Brown
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2372

Its Attorneys

Dated: May 26, 1998

No. of Copies rec'd
List ABCDE

024

TABLE OF CONTENTS

Summary iii

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO WITHDRAW THE APPLICATION OF NONDISCRIMINATION REQUIREMENTS TO CPNI. 2

 A. Background and Commission Decision

 B. The Flaws in the Commission's Decision Not to Apply Nondiscrimination Rules to CPNI Require Reconsideration and Reversal on Multiple Grounds 6

 1. Lack of Adequate Notice 6

 2. The Commission's Approach Ignores the "Except as Required by Law" Clause in Section 222(c)(1) . . . 7

 3. The Commission's Rationale is Inapplicable to MCI's Approach to Nondiscrimination 8

 4. The Same Nondiscrimination Rules Apply With Even Greater Force to Non-CPNI Customer Information..11

 5. The Same Nondiscrimination Rules Should be Applied to the BOCs and All Other ILECs Under Sections 201(b) and 202(a) in Any Event 18

 6. A Third-Party Administrator Might be a Useful Mechanism to Ensure Nondiscriminatory Access to CPNI With a Minimum of Ongoing Commission Involvement 21

 C. The Commission at Least Should Confirm its Previous Conclusion That CPNI and Other Customer Information Constitutes a UNE Under Section 251(c)(3) 21

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION LIMITING THE COVERAGE OF SECTION 222(d)(1) 23

 A. Background and Decision 23

 B. The Commission's Decision Serves None of the Goals of Section 222 and is Not Compelled by the Statutory Language 24

C.	Alternatively, Section 222(c)(1) Should be Interpreted to Allow One Carrier to Disclose CPNI to Another Without Customer Approval to Enable the Latter to Initiate Service	28
D.	Nondiscrimination Rules Should Also Apply to Carriers' Disclosure of CPNI Without Customer Approval for the Initiation of Service	29
E.	If the Commission Does Not Grant Any Relief on the Issue of Disclosure of CPNI to Initiate Service, it Should Allow Carriers to Notify Customers That Failure to Approve Such Disclosure May Disrupt the Installation of Service	32
F.	The Need for an Unequivocal Statement That CPNI is a UNE Under Section 251(c)(3) is Equally Vital for Access to CPNI to Initiate Service	33
III.	THE "AUDIT TRAIL" REQUIREMENT IS EXCESSIVELY BURDENSOME AND, AS SET FORTH IN THE ORDER, IS UNNECESSARY	34
IV.	MCI REQUESTS CLARIFICATION OF VARIOUS ISSUES TO FACILITATE CARRIER COMPLIANCE WITH SECTION 222	43
A.	Service Definition Issues	43
1.	The Total Service Approach	43
2.	IntraLATA Toll Services	46
B.	The Definition of CPNI	48
C.	"Win-Back," or Retention, Marketing as an ILEC Abuse	49
D.	CPNI Laundering	52
V.	CONCLUSION	55

SUMMARY

Although the Commission's Order adequately implements most of the CPNI protections in Section 222 of the Communications Act, MCI seeks reconsideration of the Order on several grounds, particularly as to the Commission's decision not to apply nondiscrimination rules to CPNI.

First, the Public Notice seeking further comments in the CPNI docket did not provide adequate notice to interested parties that the Commission was considering reversing its decision in the Non-Accounting Safeguards Order to apply Section 272 nondiscrimination safeguards to CPNI. Instead, the Public Notice raised issues as to the manner in which Section 272 should apply to CPNI. Additionally, the Commission's interpretation of Section 222(c)(1) fails to recognize the opening clause of that provision: "[e]xcept as required by law." Since the term "law" must include Section 272(c)(1), Section 222(c)(1) must be read to allow the disclosure of CPNI where "required by" Section 272(c)(1). It is therefore not a justification for the decision that Section 272 does not apply to CPNI that such application might result in the disclosure of CPNI where Section 222(c)(1) might not otherwise allow such disclosure. That is the result of any statutory exception.

Another major flaw in the Commission's approach is its failure to analyze MCI's proposed nondiscrimination rule on its own terms separate from the multi-carrier approval solicitation proposal that the Commission found to be so similar to MCI's

approach. The two are quite different, since MCI's approach would not require CPNI disclosure inconsistent with the other provisions of Section 222 or inhibit BOC use of CPNI, unlike the multi-carrier approval solicitation approach.

MCI also urges the Commission to confirm that specific information on BOC customers not subject to CPNI restrictions are subject to Section 272's nondiscrimination requirements. Customer names, addresses, telephone numbers, PIC information and PIC-freeze information should be considered non-CPNI customer-specific information. If a BOC uses such information for marketing on behalf of its Section 272 affiliate or discloses such information to its affiliate, that information must also be disclosed simultaneously to all requesting entities on a real-time electronic basis without customer approval. The Commission should also reconfirm that all customer-specific information constitutes a UNE subject to the obligations of Section 251(c)(3) and the Local Competition Order, requiring nondiscriminatory access to all BOC and ILEC CPNI.

MCI also requests that the Commission apply the same nondiscrimination rules to all ILECs through the requirements of sections 201(b) and 202(a) of the Act, regardless of whether the Commission grants reconsideration on the issue of the application of Section 272's nondiscrimination requirements to CPNI. Thus, where a BOC or other ILEC uses CPNI for marketing on behalf of its interexchange affiliate or discloses CPNI to its affiliate, once it has obtained the customer's oral approval for such use or

disclosure, Sections 201(b) and 202(a) require that it transmit CPNI electronically to all requesting entities.

Secondly, the Commission should reconsider its ruling to restrict the scope of Section 222(d)(1). That provision should be interpreted to permit one carrier to disclose CPNI to another carrier in order for the receiving carrier to initiate and provide service to a particular customer. The competitive goals of Section 222 would be advanced more effectively if subsection (d)(1) were interpreted to permit carriers to disclose CPNI to other carriers in order to initiate service. Requiring that the carrier needing CPNI to initiate service seek the customer's approval for such disclosure serves none of the statutory purposes of customer control and privacy intended by Section 222(c)(1). By this point, the customer has selected the new carrier and expects the new carrier will have access to all information needed for deployment of the requested service.

Moreover, the nondiscrimination requirements of Sections 272, 201(b), and 202(a) should also apply to carriers' disclosure of CPNI without prior customer approval. Thus, regardless of how the Commission interprets sections 222(c)(1) or (d)(1), a BOC or other ILEC disclosing CPNI to its affiliate to initiate service without the customer's consent must provide CPNI to all other requesting carriers needing CPNI to initiate service.

Furthermore, nondiscrimination requires that where local service CPNI is needed to initiate local service, it should be provided immediately upon request, since the BOC or ILEC has been using

such CPNI for its own provision of local service.

MCI's request that CPNI is a UNE also applies to the use or disclosure of CPNI to initiate service. Such disclosure should be implemented on a nondiscriminatory real time electronic basis.

Third, the Commission's decision to utilize an "audit trail" mechanism to ensure compliance with rules promulgated in this proceeding is excessively burdensome and unnecessary. Requiring carriers to maintain an electronic audit mechanism that tracks access to customer accounts and records whenever customer records are opened for any reason would be impossible for MCI to implement. As a more feasible alternative, MCI proposes an audit trail system limited to the accessing of customer records for sales and marketing purposes. Such a narrowed requirement would be more possible to implement and would accomplish all of the Commission's compliance goals.

Lastly, MCI requests clarification of the Order to facilitate carrier compliance with Section 222 in several respects, including service definition issues, the definition of CPNI, and clarification of the win-back marketing prohibition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION OF MCI TELECOMMUNICATIONS CORPORATION
FOR RECONSIDERATION AND CLARIFICATION

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby petitions for reconsideration and clarification of the Second Report and Order in these dockets (Order).¹ Although the Order adequately implemented most of the protections for customer proprietary network information (CPNI) in Section 222 of the Communications Act, as amended by the Telecommunications Act of 1996 (1996 Act), the Commission took a wrong turn in reversing its decision in the Non-Accounting Safeguards Order² to apply the Section 272 nondiscrimination

¹ Second Report and Order and Further Notice of Proposed Rulemaking, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 98-27 (released Feb. 26, 1998).

² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed

safeguards to CPNI. Unless the Commission reconsiders that reversal or otherwise applies nondiscrimination rules to the Bell Operating Companies' (BOCs') and other incumbent local exchange carriers' (ILECs') use of CPNI, the competitive goals of Section 222 will be undermined. MCI also requests that the Order be clarified in certain respects in order to facilitate carrier compliance.

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO WITHDRAW THE APPLICATION OF NONDISCRIMINATION REQUIREMENTS TO CPNI

A. Background and Commission Decision

Noting that the Non-Accounting Safeguards Order held that CPNI is subject to the nondiscrimination requirements of Section 272(c)(1), MCI argued in CC Docket No. 96-115 that the latter provision requires that where a BOC obtains its customer's approval to use her CPNI on behalf of its Section 272 affiliate or to disclose it to the affiliate, it must also provide a customer's CPNI to any third party whenever that entity can demonstrate that it also has obtained such customer's approval. In other words, although Section 222(c)(1) by itself allows, but does not require, a carrier to use or disclose CPNI with the customer's oral approval, the nondiscrimination requirements of Section 272(c)(1) make that otherwise permissive authorization in Section 222(c)(1) mandatory where an interexchange carrier (IXC) or other requesting entity demonstrates that it has obtained the

Rulemaking, 11 FCC Rcd 21905 (1996), recon. pending (subsequent history omitted), at ¶ 222.

customer's oral approval, just as the BOC obtains customer approval on behalf of its affiliate as a prerequisite to use or disclosure of CPNI.³ An entity seeking such disclosure under Section 222(c)(1) should be permitted to demonstrate that it has obtained the customer's oral approval by any reasonable means.

MCI also argued that the same nondiscrimination rules should apply to ILECs through the application of the more general requirements of Sections 201(b) and 202(a) of the Act. Moreover, to enable other entities to fully exercise such nondiscrimination rights, MCI also proposed that BOCs should also be required to provide all requesting IXCs with complete customer lists so that the IXCs can seek such customer approvals and submit them to the appropriate local provider.⁴

In the Order, however, the Commission reversed course and determined that Section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their Section 272 affiliates.⁵ In so holding, however, the Commission painted with a broader brush than was necessary and rejected MCI's approach for reasons that do not logically apply to it.

The Commission's concern with the application of nondiscrimination rules to CPNI arose from what it viewed as a

³ See Further Comments of MCI Telecommunications Corporation at 11-15, 20, CC Docket No. 96-115 (March 17, 1997) (MCI Further Comments).

⁴ Ex parte letter from Frank W. Krogh, MCI, to Magalie Roman Salas, Secretary, FCC, at 2, CC Docket No. 96-115 (Feb. 9, 1998) (MCI February 9 ex parte).

⁵ Order at ¶ 169.

conflict between the customer control and privacy goals of Section 222 and Section 272. If a BOC were required to turn over CPNI to a requesting third party whenever it shared such CPNI with its affiliate, it would be forced to either disclose CPNI without the customer's approval or not share CPNI with its affiliate even for a customer already being served by the affiliate. In either case, according to the Commission, Section 222, as otherwise interpreted in the Order, would be violated: in the former situation, such disclosure would violate Section 222(c)(1) and undermine privacy interests; in the latter case, the BOC's inability to share CPNI for the provision of a service already being offered to a customer would be inconsistent with the "total service approach" to Section 222(c)(1).⁶

Application of Section 272 to CPNI sharing might also require that when a BOC seeks customer approval to share CPNI with its affiliate for marketing purposes, it must simultaneously solicit approval for CPNI sharing on behalf of all other requesting carriers. The Commission was concerned that it would not be feasible to implement such a blanket approval solicitation requirement because of the difficulty of giving adequate notice and opportunity for informed approval in such circumstances. Furthermore, the burden of having to carry out such a multi-carrier solicitation would, as a practical matter, shut down BOCs' efforts to seek CPNI approval from customers for their own

⁶ Id. at ¶ 158, 161-62.

or their affiliates' marketing.⁷

The Commission then applied the same reasoning to the significantly different approach that MCI advocated, saying that it "raises similar concerns."⁸ The Commission conceded that, unlike the multi-carrier approval solicitation approach, "[r]equiring that BOCs disclose CPNI to unrelated entities upon oral customer approval when they share CPNI with their section 272 affiliates upon oral approval, would not necessarily be inconsistent with the policies or language of section 222."⁹ Nevertheless, it lumped that approach together with the approval solicitation requirement proposal because it could see "no principled basis" upon which to distinguish them and then elaborated on its reasons for rejecting the approval solicitation approach.¹⁰ The Commission added that its interpretation of Section 222 otherwise carried out its competitive goals sufficiently to render the application of Section 272 "not essential."¹¹

⁷ Id. at ¶¶ 159, 163.

⁸ Id. at ¶ 163.

⁹ Id.

¹⁰ Id.

¹¹ Id. at ¶¶ 164-65.

B. The Flaws in the Commission's Decision Not to Apply Nondiscrimination Rules to CPNI Require Reconsideration and Reversal on Multiple Grounds

1. Lack of Adequate Notice

There are a number of flaws in the Commission's approach to the nondiscrimination issue. First, there was no notice of the possibility that the Commission might reverse its decision in the Non-Accounting Safeguards Order that the "information" that must be provided in a nondiscriminatory manner under Section 272(c)(1) includes CPNI. The entire discussion of nondiscrimination in the Public Notice seeking further comments in the CPNI docket was based on the applicability of Section 272 to CPNI. The Public Notice repeated the conclusion in the Non-Accounting Safeguards Order that "the nondiscrimination provisions of section 272(c)(1) govern the BOCs' use of CPNI and that BOCs must comply with the requirements of both section 222 and section 272(c)(1)."¹² The only issues that were raised involved the manner in which Section 272 applies to CPNI; there was no hint in the Public Notice that Section 272 might not apply to CPNI at all.¹³

By contrast, the Public Notice clearly raised the issue of whether the term "basic telephone service information," as used in the electronic publishing context in Section 274(c)(2)(B), includes CPNI and, more generally, whether Section 222 affects implementation of the joint marketing provisions of Section 274

¹² See Public Notice, Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking, CC Docket No. 96-115, DA 97-385 (released Feb. 20, 1997).

¹³ See id., Attachment at 4-6.

at all.¹⁴ The contrasting approach to the interplay of Sections 222 and 274 in the Public Notice makes the absence of any similar issue as to the applicability of Section 272 to CPNI even more striking. Because of this lack of notice, the Commission's decision to reverse itself on the applicability of Section 272 to CPNI is invalid.¹⁵ The Commission must therefore reconsider this aspect of the Order and determine how Section 272 applies to CPNI.

2. The Commission's Approach Ignores the "Except as Required by Law" Clause in Section 222(c)(1)

Perhaps because it gave no notice that the applicability of Section 272 to CPNI was still in play, the Commission failed to address a crucial factor in any such analysis, namely, the first five words in Section 222(c)(1). That provision begins, "[e]xcept as required by law," which modifies all of the restrictions that follow. That exception is parallel to, and thus just as important as, the customer approval exception to the restrictions in Section 222(c)(1). Furthermore, there is no reason to believe that the "law" to which this exception refers should not encompass other provisions in the 1996 Act. Indeed, it would violate accepted canons of statutory construction to interpret this exception to exclude other provisions in the very

¹⁴ Id. at 2 and Attachment at 6.

¹⁵ See McElroy Electronics Inc. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993) (FCC decision reversed because it provided inadequate notice).

same enactment. Accordingly, Section 222(c)(1) must be interpreted so as to provide for any use or disclosure of CPNI "as required by" Section 272(c)(1), whether or not Section 222(c)(1) would otherwise permit such disclosure.

Thus, it will not do for the Commission to simply find, as it did in the Order, that Section 272(c)(1) cannot be applied to CPNI because it would require the disclosure of CPNI where Section 222(c)(1) might not otherwise allow disclosure. That is the effect of any exception. Rather, the Commission must harmonize the two provisions in a way that gives Section 272 the role in CPNI disclosure that is contemplated in the phrase "[e]xcept as required by law." This exception also resolves the conundrum that the Commission discusses in paragraph 160 of the Order as to whether Section 272 or Section 222 should control. Section 272 creates an exception to Section 222. Thus, the Commission is precluded from deciding as a matter of statutory policy interpretation that the application of Section 272 to CPNI is unnecessary to achieve the competitive goals of Section 222. Congress has already required that BOCs disclose CPNI to unaffiliated entities "as required by" Section 272. In the following discussion, MCI addresses what Section 272 requires.

3. The Commission's Rationale is Inapplicable to MCI's Approach to Nondiscrimination

Another major flaw in the Commission's approach is its failure to analyze MCI's proposed nondiscrimination rule on its own terms. The Commission professed to discern no principled

basis upon which to distinguish that approach from the multi-carrier approval solicitation proposal, but the two are quite different. If a BOC were required to disclose CPNI to a third party demonstrating customer oral approval, none of the implementation problems raised by the approval solicitation approach would be presented. Each party would seek its own approval from the customer, who could accept or deny on an individual basis with no concern as to impact on unknown carriers. BOCs would not be precluded or even inhibited from seeking their own customer approvals by such an approach, since no third party disclosure would have to be made until such party notified the BOC that it had obtained appropriate customer approval. Thus, as the Commission admitted, MCI's approach is consistent with Section 222 as otherwise interpreted in the rest of the Order.

Accordingly, there is a principled basis upon which to distinguish the two approaches. MCI's approach is eminently workable and does not tread on any other Section 222 goals, unlike the multi-carrier approval solicitation approach. Thus, the Commission has not provided any rational basis for rejecting MCI's approach. That other elements of the interpretation of Section 222 in the Order also address competitive goals does not, as the Commission finds, make Section 272 superfluous. The "[e]xcept as required by law" provision requires that Section 272's requirements be applied to CPNI, whether or not the Commission believes that to be necessary as a matter of policy.

Moreover, even aside from that clause, the advantage of MCI's approach, unlike the other approaches to nondiscrimination discussed in the Order, is that the two provisions can be entirely harmonized, with no conflicts with any Section 222 goal. Furthermore, MCI's approach satisfies the Commission's objective of ensuring that all carriers obtain customer approval before using CPNI to market offerings outside the customer's existing service relationship, thus preventing any group of carriers from obtaining a competitive advantage.¹⁶

Accordingly, MCI requests that the Commission reconsider the Order to require, pursuant to Section 272, that where a BOC uses CPNI for marketing on behalf of its Section 272 affiliate or discloses CPNI to its affiliate, once it has obtained the customer's approval for such use or disclosure, it must disclose CPNI to any other entity demonstrating customer approval. Such disclosure must be made as to any customer giving her approval for such disclosure to another entity, whether or not the BOC has disclosed that customer's CPNI to the affiliate or the BOC or its affiliate has used that customer's CPNI for marketing.

In order to enable IXCs and other competitive carriers to exercise their nondiscrimination rights, each BOC should make its entire customer list, containing only subscriber names, addresses and telephone numbers,¹⁷ available to all requesting entities as

¹⁶ See Order at ¶ 167.

¹⁷ The Bureau has concluded that customer names, addresses and telephone numbers do not constitute CPNI. See Order, CC Docket No. 96-115, DA 98-971 (released May 21, 1998).

soon as the BOC discloses any portion of such a list or similar database to its affiliate or the BOC or its affiliate decides to use any portion of such a list or similar database to contact customers to seek their approval to use CPNI, whichever occurs earlier. This customer list information is itself subject to nondiscrimination requirements, as discussed in the next section.

Because timing is so crucial to effective marketing, and to ensure nondiscrimination, CPNI should be transmitted on a real-time electronic basis to a requesting entity immediately upon its notification to the BOC that it has obtained the customer's oral approval. The requesting entity should also be able to transmit its notification of approval electronically, so that, for example, an IXC's customer representative can transmit a notification of approval and receive the BOC's CPNI for that customer electronically in return, all while he is on the telephone with the customer.

If it becomes necessary for the requesting entity to back up a notification of approval, it should be permitted to demonstrate within some reasonable period of time -- perhaps five business days -- that it obtained the customer's oral approval prior to its notification of approval and receipt of the CPNI. Customer approval could be shown by any reasonable means.

4. The Same Nondiscrimination Rules Apply With Even Greater Force to Non-CPNI Customer Information

Whether or not the Commission grants reconsideration of the nondiscrimination issues generally, it should at least make it

clear that the same nondiscrimination principles should be applied to any BOC customer information that is not CPNI and confirm the scope of non-CPNI customer information. The Commission reaffirmed the applicability of Section 272(c)(1) to "the BOCs' sharing of all other information (i.e., non-CPNI) ... with their section 272 affiliates,"¹⁸ so it should not be a stretch for the Commission to confirm that such non-CPNI information subject to Section 272 includes non-CPNI customer-specific information.

As mentioned above, the Bureau has now determined that customer names, addresses and telephone numbers do not constitute CPNI.¹⁹ Since those data are not CPNI, they are not subject to any of the protections of Section 222.²⁰ Thus, Section 272(c)(1) should be interpreted to require that each BOC should make its entire list of subscriber names, addresses and telephone numbers available to all requesting entities as soon as the BOC discloses any portion of such a list or similar database to its affiliate or the BOC or its affiliate decides to use any portion of such a list or similar database to contact customers to seek their

¹⁸ Order at ¶ 164, n. 573.

¹⁹ See Order, CC Docket No. 96-115, DA 98-971 (released May 21, 1998).

²⁰ Although customer lists are generally proprietary information, that is because such lists reflect the value of a firm's marketing efforts. In the case of the BOCs, however, their local service subscribers are simply the monopoly legacy of the former Bell System. No marketing is or was ever involved. Thus, the rationale for protecting such lists as proprietary is inapplicable.

approval to use CPNI, whichever occurs earlier. Such requirement should also apply to nonpublished numbers if they are used by the BOC for marketing. Such list should be transmitted electronically on a real time basis to requesting entities, without customer approval, whether simultaneously with the disclosure of the list, similar database or portion thereof to the BOC's affiliate or simultaneously with the BOC's or affiliate's decision to use such information for marketing.

If the BOC discloses such non-CPNI customer data to its Section 272 affiliate as part of a customer record that also includes CPNI, the BOC should be required to strip out the non-CPNI data and provide it to all other requesting entities simultaneously. (The CPNI data should then be provided to requesting entities whenever they obtain customer approval.) This rule should especially be applied to non-CPNI data contained in billing name and address (BNA) information, universe lists and other compilations of customer-specific data for various purposes if those customer data compilations are used or disclosed for marketing by the BOC or its affiliate.

It is crucial that nondiscrimination requirements be applied to BOC customer lists, since, as mentioned above, such information is itself vitally necessary for IXCs and other carriers to exercise their nondiscrimination rights by seeking customer approval for access to CPNI in the hands of the BOCs. Such lists will enable requesting entities to partially overcome the tremendous head start the BOCs enjoy in access to almost all

telephone subscribers in their service territories. The requesting entities will be able to seek the approval of BOC subscribers for access to their CPNI and to notify the appropriate BOC that a particular customer has given his or her approval. Since most of each BOC's subscribers are not the customers of any particular IXC, other than AT&T, an IXC like MCI does not know the identity of the local service provider for most telephone subscribers in the United States. This would make it almost impossible to present the correct BOC with the customer's approval, once it is obtained. Of course, access to the BOCs' customer lists still cannot make up for the BOCs' monopoly-derived customer base advantages, but it is the minimum that Section 272(c)(1) and the competitive goals of Section 222 require.

Two other categories of non-CPNI customer information that should be subject to Section 272 are information about a subscriber's primary interexchange carrier (PIC) choice and so-called "PIC-freeze" information (i.e., an indicator on a subscriber's local exchange service account that his PIC is not to be changed unless he takes steps to remove the freeze). The Commission should clarify that these two categories of information do not constitute CPNI and thus are fully subject to Section 272.

Subpart (A) of Section 222(f)(1) states:

- (1) CUSTOMER PROPRIETARY NETWORK INFORMATION.
- The term 'customer proprietary network information' means-
- (A) 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, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

Section 222(f)(1)(B) adds, to the categories of information that constitutes CPNI, "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier...." In the context of Section 222, it would appear that this subpart includes only that information that "pertain[s] to telephone ... service." One case has suggested that this subpart "in its ordinary meaning must be simply the facts, the data, the raw knowledge regarding customer usage, times, etc."²¹ Such a reading makes sense, since the phrase "pertaining to" would not serve much purpose if anything that appeared on a bill were CPNI. Instead, Section 222(f)(1)(B) would simply say "information contained in the bills for telephone exchange service or telephone toll service received by a customer of a carrier...." The "pertaining to" language thus would seem to be a limitation on the category of information on telephone bills that actually constitutes CPNI.

²¹ 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. The court denied AT&T's motion for preliminary injunction against Southwestern Bell's (SWB's) misappropriation for its own use of AT&T's billing database supplied to SWB in order for SWB to bill and collect for AT&T. Although MCI believes that the court erred in denying injunctive relief, such denial does not rely on the court's reading that "information contained in the bills pertaining to telephone exchange service or telephone toll service" is information "regarding customer usage, times, etc."

The identity of a customer's carrier would not appear to constitute information as to the "type" of service under subparagraph (A), nor is it "data ... regarding customer usage, times, etc." or otherwise information "pertaining to" the service itself under subparagraph (B). It obviously appears on telephone bills, but it does not "pertain to" any facts about the service itself. In short, the identity of a carrier says nothing about the service it provides. Thus, PIC information does not fall within either subpart of the definition of CPNI.

As MCI explained in its comments on the Further Notice of Proposed Rulemaking in the Order, information concerning a customer's PIC choice and PIC changes does constitute the proprietary information of the chosen carrier under Section 222(b), which a LEC may not use for its own marketing efforts, even with customer approval.²² Thus, BOCs should never use subscribers' PIC information for marketing purposes under any circumstances. If the Commission disagrees, however, MCI requests that the nondiscrimination rules discussed herein be applied to PIC information.

PIC-freeze information is clearly not CPNI, since it does not relate to the "quantity, technical configuration, type,

²² Comments of MCI Telecommunications Corporation at 11, CC Docket No. 96-115 (March 30, 1998). As MCI also explained, such status as carrier proprietary information does not create any obstacle to a LEC's turning over information as to a customer's PIC choice to a CLEC that has won the customer's local service business, since the purpose of such disclosure is to enable the CLEC to continue providing access service to the chosen PIC.

destination, and amount of use of a telecommunications service subscribed to by any customer" and is not information pertaining to telephone service that appears on a telephone bill. Rather, a PIC-freeze simply involves a procedure for changing a subscriber's choice of IXC.

Accordingly, if a BOC uses PIC-freeze information in any way related to marketing on behalf of its Section 272 affiliate's services or discloses such information to its affiliate, that information must also be disclosed simultaneously to all requesting entities. Knowledge that a customer has placed a freeze on its IXC choice has a significant impact on the marketing that is appropriate to that customer, which would give a BOC a tremendous advantage if it knew of customers' PIC-freezes and other IXCs did not. Nondiscriminatory access to PIC-freeze information is therefore crucial for the continued vitality of long distance service competition.

Because MCI generally does not know who has a PIC-freeze on his local service account, MCI will market its long distance services to many prospects who have freezes who also want to switch to MCI and do not remember that they have freezes or who do not understand the significance of such freezes. When MCI submits the PIC change order to the BOC or ILEC, however, it is rejected because of the freeze. Such rejections now account for 15% or more of all of MCI's orders, which constitutes a tremendous waste of time and resources and tens of millions of dollars in marketing costs, as well as frustrated and angry

customers. If a BOC or its affiliate were to use its knowledge of the BOC subscribers' PIC-freezes in the marketing of long distance service, it would be able to focus its marketing much more effectively, thereby realizing tremendous savings in marketing costs. Its advantage would be multiplied if none of its long distance competitors knew which subscribers had PIC-freezes and thus had to "fly blind" in their own marketing efforts. MCI accordingly requests that the Commission conclude that PIC-freeze information is not CPNI and is subject to Section 272's nondiscrimination requirements.²³

5. The Same Nondiscrimination Rules Should be Applied to the BOCs and All Other ILECs Under Sections 201(b) and 202(a) in Any Event

Whether or not the Commission grants reconsideration on the issue of the application of Section 272's nondiscrimination requirements to CPNI, the same nondiscrimination rules should still be applied to all ILECs through the requirements of Sections 201(b) and 202(a) of the Act. The leveraging of dominance in one telecommunications market in order to gain a competitive advantage in another telecommunications market is an unreasonable and unjust practice in violation of Section 201(b).²⁴ It is therefore unreasonable for any ILEC to use any

²³ It would also seem that, unlike CPNI, PIC-freeze information is something that a customer would want all long distance carriers to know, so that they would not bother the customer with offers the customer does not want.

²⁴ See AT&T Communications, 5 FCC Rcd. 3833 (1990), appeal dismissed, No. 90-1415 (D.C. Cir. Mar. 21, 1990), review denied,