one of those groups allows the use of CPNI derived therefrom to market any other service in that group to that customer. Perhaps because the Commission rejected the "three category" approach to the service definition issue,[43] it tended to shy away from discussing its total service approach in terms of service categories, which made its discussion of the service definition issue less clear than would be optimal to facilitate compliance with the Order.

The "related offerings" that a carrier would be able to market using a customer's CPNI appear to be services within the same "service categor[y]" -- local, interLATA or CMRS -- that the carrier is already providing to the customer,[44] but the Commission did not quite say that. Accordingly, it would be helpful if the Commission defined its total service approach more concretely so that carriers could be sure whether a particular service feature were within or outside the boundaries of the carrier's total service offering.

Related to the overall issue of the boundaries of the "total service offering" approach to the service definition problem is the question of whether a customer may be considered to have more than one carrier in any given service category, thus allowing both carriers to market other services in the same category to that customer. For example, many customers, especially business customers, have more than one long distance carrier. Large

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[43] See Order at ¶ 58.

[44] Order at ¶ 30. See also, Order at ¶¶ 65-66.

customers allocate their long distance business among two or more carriers, depending on such factors as traffic load. Other customers might take personal 800 service from one carrier but otherwise be presubscribed to another.

In all of these situations, it is not clear how the total service offering approach applies to the various carriers involved. MCI takes the position that, in these situations, the competitive, privacy and customer control purposes of Section 222 would all be satisfied if both carriers were considered to be the customer's long distance carrier, since the customer has obviously chosen both carriers. Thus, Section 222(c)(1) ought to allow both carriers to use CPNI to market other long distance services to the customer without his approval.

One subset of this question is whether the total service approach should be applied on a subscriber line-by-line basis or to the subscriber's services overall. For example, if a customer has one PIC for one line and another PIC for another, each PIC might be considered the customer's sole long distance carrier for the line presubscribed to that carrier and thus the only carrier that may use CPNI to market other long distance services to the customer, without his approval, for that line. On the other hand, if an overall approach is used, both carriers might be considered to be long distance carriers for the customer and thus allowed to use CPNI to market long distance service as to both lines. In MCI's view, the latter approach is more in keeping with all of the goals of Section 222 and should be adopted.

The Commission should also make it clear that the provision of a calling card does not automatically constitute the provision of any service for CPNI purposes. In some cases, such as BOC calling cards, the provision of a calling card is simply a billing mechanism. If carriers are permitted to treat the issuance of a calling card, without more, as the provision of any of the services that could be billed using the card, such cards could become a "Trojan Horse" for the premature use of CPNI without customer approval.

For example, if a BOC were allowed to treat every one of its calling card holders who bills long distance calls on his BOC card as a long distance customer, once the BOC is authorized to provide in-region long distance service, it could then use, without customer approval, local service CPNI to market long distance services to all such card holders, who comprise a large segment of its monopoly local service customer base. Such premature use of monopoly-derived local service CPNI would eviscerate the competitive and privacy goals of Section 222. It is crucial that the Commission explicitly close off this possibility before any BOC obtains Section 271 authorization.

2. <u>IntraLATA Toll Services</u>

Related to these service definition issues is the treatment of intraLATA (short haul) toll service. The Commission seems to have adopted the treatment advocated by MCI -- namely, that intraLATA toll may be considered to be part of a carrier's

primary service category. Thus, a LEC may use local service CPNI to market intraLATA toll, and vice-versa,[45] and an IXC may use long distance service CPNI to market intraLATA toll and vice-versa. In that way, intraLATA toll service may be said to "float" between the local and long distance categories.[46]

MCI's only question is the extent to which the Commission intended to allow the intraLATA toll category to float between the local and long distance categories. MCI's view is that the competitive goals of Section 222 are only served if intraLATA toll is lumped together with a carrier's primary service category. If carriers are free to lump it with either local or long distance at their option, the LECs will be unduly advantaged. They already have a head start in the intraLATA toll market, which has only recently been opened to competition. If they were allowed to use CPNI derived from their provision of intraLATA toll service to market long distance service without customer approval, they would have an undeserved entree into long distance service by virtue of their past monopoly in intraLATA toll service.

Thus, LECs should only be allowed to treat intraLATA toll service together with their local services for CPNI purposes and should be prohibited from using intraLATA toll service CPNI for long distance marketing or vice-versa. The Commission should clarify its Order by specifying exactly how intraLATA toll

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[45] See Order at ¶ 57.

[46] Id.

service floats between the local and long distance categories so as to forestall such anticompetitive uses of intraLATA toll service CPNI. Moreover, the Commission should clarify the status of GTE and SNET for purposes of the intraLATA "float" rule. They should be considered primarily local carriers and thus prohibited from using intraLATA toll CPNI for long distance marketing or vice-versa. Otherwise, they will be able to take advantage of their monopoly head start in intraLATA toll service to stifle competition in the long distance market.

B. The Definition of CPNI

MCI also seeks clarification as to one other aspect of the definition of CPNI in Section 222(f)(1), namely, what is encompassed in the phrase "service subscribed to by any customer" in Section 222(f)(1)(A). MCI has not found anything in the legislative history as to what is a "subscribed" service in subpart (A) of the definition of CPNI. Under the usual meaning of the term, casual traffic, such as MCI's 1-800-COLLECT service calls, would not be included, since that is carried outside any subscribed service relationship.

The other part of the definition, in subpart (B) of Section 222(f)(1), may shed some light on this question, since it is not limited to "subscribed" services but, rather, as noted above, covers information "contained in the bills pertaining to [any] telephone ... service received by a customer of a carrier." The broader wording of subpart (B), at least as to the services

covered thereby, indicates that the difference was deliberate and that subpart (A) was intended to be limited to "subscribed" services in the ordinary meaning of the term. Accordingly, while subpart (A) does not appear to cover information about the "type" and other aspects of casual traffic, subpart (B) does cover the details of casual traffic that appear on telephone bills.

C. "Win-Back," or Retention, Marketing as an ILEC Abuse

As MCI explained in its comments on the Further Notice and again in response to the CTIA and GTE requests for temporary relief, the problem of "win-back" marketing as an anticompetitive tactic arises 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 retain the customer 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.

Thus, win-back marketing -- or, more properly, retention marketing -- by ILECs in this situation represents their exploitation of their monopoly status as the underlying local

network facilities providers. Moreover, since ILECs also implement PIC changes, an ILEC providing long distance service can exploit its monopoly control of the local switch to use its early knowledge of a customer's switch to another PIC to injure interexchange competition through retention marketing in the same way.

Such exploitation of the ILECs' role as underlying carriers or access providers in these situations not only misuses CPNI, but also misappropriates 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 proprietary information that it learns in the course of providing service to another carrier.[47] 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).

Accordingly, the Commission's win-back prohibition in the Order is both too broad and too narrow. The Order finds that Section 222 does not allow any carrier to use the CPNI of its former customer (i.e., a customer that has placed an order for service from a competing carrier) for customer retention purposes.[48] Such a rule is too broad because it covers all win-

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

[48] See Order at ¶ 85.

back or retention marketing, even by carriers that could not possibly be taking advantage of information derived from a monopoly position or information derived from providing service to another carrier. For a non-LEC, of course, the fact that its customer has chosen another carrier is not the proprietary information of the chosen carrier, since the non-LEC does not obtain such information from the chosen carrier for the purpose of providing service to that carrier. Rather, it has learned the information the way any retail service provider does, because it will no longer be providing service to the end user. Thus, no misuse of carrier proprietary information is involved. In that situation, a prohibition of win-back marketing is unnecessary to achieve any of the goals of Section 222. The prohibition should be directed only at retention marketing by ILECs.

The win-back prohibition in the Order is also too narrow because it covers only CPNI. As discussed above, the identity of a customer's chosen carrier, per se, does not appear to fall within any of the categories of CPNI described in Section 222(f)(1). Thus, the Commission's ruling might not preclude the real abuse in these situations -- namely, the ILEC's use of the simple fact of the customer's decision to choose another carrier, a fact that does not appear to constitute CPNI, to market its own service. That gap should be plugged immediately.[49]

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[49] MCI raised this issue in its comments on the Further Notice in the Order. Since the Order addresses win-back marketing, however, MCI is also raising the issue here in case the Commission decides not to resolve it in its decision on the Further Notice issues.

Whether or not the Commission reconsiders the win-back prohibition as MCI requests, one clarification that is needed relates to the case where a carrier wins a customer back legitimately. In that situation, the question arises as to whether the carrier may use the customer's previous CPNI to the same extent as any other customer's CPNI. MCI believes that the carrier ought to be able to use such CPNI for any purpose that any other customer's CPNI can be used for, including the initiation of service under Section 222(d)(1) and for the provision of service under Section 222(c)(1). In the Order, the Commission's win-back prohibition was based partly on its view that "such use [of CPNI] would be undertaken to market a service to which a customer previously subscribed, rather than to 'initiate' a service within the meaning of [Section 222(d)(1)]."[50] Once such marketing has been completed successfully, however, the use of previous CPNI to initiate service would legitimately meet the criteria of Section 222(d)(1), and this rationale for the win-back prohibition would be irrelevant. Similarly, once the customer has chosen to return to a carrier, her CPNI will be useful for the provision of service and thus will legitimately meet the criteria of Section 222(c)(1). Thus, such use of CPNI should be allowed.

D. CPNI Laundering

Finally, another possible loophole that should be plugged is

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[50] Order at ¶ 85.

the potential for "CPNI laundering" -- transmitting of CPNI to a third party, which then returns the CPNI to the original carrier so that the carrier can claim that the information was not obtained from a customer and thus is not CPNI. The Commission should make it clear that, as to any given carrier, the status of information as CPNI or carrier proprietary information is not lost or altered if such carrier discloses or transmits such information to an affiliated or unaffiliated entity, whether or not that entity transfers such information to other parties or back to the original carrier. The original carrier retains all of the obligations as to such information imposed by Section 222, no matter where such information ultimately resides. Carriers therefore must take steps to safeguard all such information, especially information that is transmitted to third parties in the course of providing service.

Questions will also arise as to the actual origin of customer-specific information in a carrier's files. Carriers may claim that CPNI and other customer information was obtained from public or third party sources, rather than on a confidential basis or through a service relationship governed by Section 222. The Commission should state that where a carrier makes such a claim as to information that it also receives or received, or would be expected to obtain, on a confidential basis or through a service relationship governed by Section 222, there is a rebuttable presumption that the information was actually first obtained confidentially or through such a service relationship,

and that such information is therefore CPNI or carrier proprietary information, as the case may be. Carriers should therefore be prepared to rebut the presumption of confidentiality through records showing the time and manner of their first receipt of such information.

Such a presumption is especially important in the case of ILECs, since they receive so much information from other carriers that have no choice but to provide them such information, on account of the ILECs' local dominance. As discussed previously, ILECs derive a great deal of proprietary information from the provision of facilities-based local service to other CLECs for resale, as well as from the provision of access service to other IXCs. Where an ILEC claims that such information was actually derived from another source, it must be prepared to demonstrate that fact. Moreover, where the ILEC claims to have learned carrier proprietary information from the customer, rather than in the course of providing service to another carrier, the Commission should state that the possible dual status of such information as both CPNI and carrier proprietary information does not diminish the protections of Section 222(b) for carrier proprietary information. Thus, customers should not be able to approve the use of CPNI that is also carrier proprietary information, since the latter is absolutely protected under Section 222(b).[51]

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[51] This issue was also raised in MCI's comments on the Further Notice as to carrier proprietary information, but it also needs to be raised as a matter of clarification of the Order,

V. CONCLUSION

For the above-stated reasons, MCI accordingly requests that the Order be reconsidered and revised consistent with the points raised herein. Such revisions would more effectively implement the competitive goals and text of Section 222 by ensuring that BOCs and other ILECs not exploit their local bottleneck power through anticompetitive discrimination.

Respectfully Submitted,

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since it pertains to CPNI as well.

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing Petition for Reconsideration of MCI Telecommunications Corporation was served this 26th day of May, 1998 by hand delivery or first class mail, postage prepaid, upon each of the following parties:

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