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May 22, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington DC 20554

Re: Ex Parte Presentation
CC Docket # 96-115 (Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information)

Dear Ms. Salas:

On Friday, May 22, 1998, Randall Coleman, representing the Cellular Telecommunications Industry Association ("CTIA"), delivered a copy of CTIA's Petition for Reconsideration and Petition for Forbearance from the FCC's rules on CPNI, to Rosalind Allen, Deputy Bureau Chief, Wireless Telecommunications Bureau.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and its attachment are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Cleveland Lawrence III

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May 22, 1998

Ms. Rosalind Allen
Deputy Bureau Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, NW Room 5002
Washington DC 20554

Re: CC Docket # 96-115 (Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information)

Dear Ms. Allen:

Please find the enclosed courtesy copy of CTIA's Petition for Reconsideration and Petition for Forbearance from the rules on CPNI.

If you have any questions regarding this petition, please contact me at 202-736-3256.

Sincerely,

Randall Coleman

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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	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION FOR RECONSIDERATION
AND
PETITION FOR FORBEARANCE

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May 20, 1998

TABLE OF CONTENTS

Page

I. SUMMARY 2

II. SECTIONS 64.2005(b)(1) and (b)(3) WILL HARM CMRS SUBSCRIBERS, CARRIERS AND COMPETITION. 4

A. Adoption of the New CPNI Rules, and CTIA's Request for Deferral and Clarification. 4

B. Section 64.2005(b)(1) Restricts Integrated Marketing of CMRS Equipment and Services That Benefits Customers and Promotes Competition. 7

C. Section 64.2005(b)(3) Suppresses Competition But Has No Countervailing Benefits. 10

III. RECONSIDERATION OF THE RULES IS REQUIRED BECAUSE THEY UNDERMINE THE GOALS OF SECTION 222, MISINTERPRET THAT PROVISION, AND CONFLICT WITH COMMISSION POLICIES TOWARD CMRS. 14

A. The Rules Undermine the Goals of Section 222. 14

B. The Order Ignores the Distinct Federal Policy Toward CMRS Regulation and Improperly Grafts Landline Regulations Onto CMRS. 17

C. The Rules Violate, Without Explanation, Basic Commission Policies Toward CMRS. 21

D. Section 222 Does Not Compel Severing CMRS Equipment from the Sale of CMRS Itself. 25

E. Section 222 Does Not Compel Severing CMRS From Wireless Information Services. 27

F. Exclusion of CMRS Equipment and Information Services Is Inconsistent With Inclusion of Inside Wiring. 30

G. Section 222 Does Not Prohibit CMRS Providers From Engaging in Pro-Competitive Retention and Win-back Efforts Using CPNI. 31

IV. FORBEARANCE FROM ENFORCING THE RESTRAINTS ON USING CPNI IN BUNDLED CMRS OFFERINGS AND CMRS WIN BACK EFFORTS WILL NOT HARM CONSUMERS AND WILL SERVE THE PUBLIC INTEREST. 34

A. Enforcement of the CPNI Rules Is Not Necessary to Ensure Just and Reasonable Practices 35

B. Enforcement of CPNI Restraints Is Not Necessary to Protect Consumers. 38

C. Forbearance Is Consistent With the Public Interest. 39

V. CONCLUSION 43

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	)	

PETITION FOR RECONSIDERATION AND PETITION FOR FORBEARANCE

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby requests that the Commission reconsider and modify new Sections 64.2005(b)(1) and (b)(3) of the rules governing the use of customer proprietary network information ("CPNI"), insofar as they apply to the provision of commercial mobile radio services ("CMRS"). In the alternative, CTIA asks that the Commission forbear pursuant to Section 10 of the Act from imposing these requirements on CMRS providers.

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership covers all CMRS providers, including 48 of the 50 largest cellular and broadband PCS providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

I. SUMMARY

CMRS consumers are enjoying the benefits of increasing competition and the deployment of new features and services. Two of the new CPNI rules, however, undermine those benefits by imposing unjustified and arbitrary restraints on CMRS carriers' ability to communicate with their own customers. Section 64.2005(b)(1) restricts CMRS providers from advising customers about wireless equipment and many service offerings. Section 64.2005(b)(3) prohibits carriers' use of a customer's CPNI in competing to retain or win back a customer.

These rules needlessly inhibit wireless marketing practices that the Commission has found to be legal and pro-competitive. They impair bundling of mobile services and equipment, despite Commission policy that such bundling helps consumers, increases competition and promotes network buildout. They impair the deployment of spectrum-efficient digital technology and prevent customers from learning about voice mail and other offerings that best meet their communications needs. The anti-win back rule imposes an unprecedented restraint of trade that will frustrate the vigorous price competition that results when carriers are vying for the same customer.

Reconsideration. Revisions to these rules to permit CMRS bundling and win back efforts are warranted for many reasons:

- Rather than achieving Section 222's goals of promoting competition and aligning the use of CPNI with customer expectations, application of the rules to CMRS frustrates and undermines these goals.

- The Commission improperly applies landline concepts and concerns about landline competition to CMRS and ignores the different, deregulatory approach that Congress and the Commission have chosen for CMRS.

- The rules are inconsistent with many of the Commission's policies toward CMRS, but the Commission did not, as it must, harmonize the rules with those policies.

- Nothing in Section 222 compels these harmful results. The Commission incorrectly interpreted Section 222 to require restricting the use of CPNI in offering CMRS equipment and information services. To the contrary, both the language and the goals of Section 222 warrant permitting the use of CPNI to offer these services. The Commission's incorrect reading also conflicts with its decision to allow use of CPNI to market inside wiring.

- Similarly, the Commission wrongly held that Section 222 prohibits customer win-back efforts using CPNI. The anti-win back rule is not required by the law, lacked requisite notice, is seriously anticompetitive, and should be rescinded CMRS.

Forbearance. Even were the Commission to continue to believe that Section 222 requires applying these rules to CMRS, the Commission would then be required to <u>forbear</u> from enforcing them. Section 10 of the Act mandates forbearance where, as here, each statutory element is met. Enforcement of the rules as to CMRS is not necessary to preclude unjust or unreasonable rates or practices or to protect consumers. The other new CPNI rules are fully adequate to protect customers' privacy interests and expectations. Sections 64.2005(b)(1) and (b)(3), in

contrast, will impede wireless carriers' communications with their own subscribers and impair customers' expectations. Forbearance will also serve the public interest, because it will encourage deployment of digital and other new wireless services, will promote more competition to keep and win back customers, and will enable wireless customers to obtain the right services to meet their mobile communications needs. CTIA thus requests, in the alternative, that the Commission invoke Section 10 to forbear from enforcement of these restrictions as to CMRS.

II. SECTIONS 64.2005(b)(1) and (b)(3) WILL HARM CMRS SUBSCRIBERS, CARRIERS AND COMPETITION.

A. Adoption of the New CPNI Rules, and CTIA's Request for Deferral and Clarification.

Section 222 of the Communications Act[2] governs the use and disclosure of CPNI by telecommunications carriers. This Petition concerns the Commission's application of only one provision of Section 222, and only insofar as it applies to CMRS. Subsection 222(c)(1) states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains

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[2] 47 U.S.C. § 222. This provision was added to the Communications Act by Section 702 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

> 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 telecommunication 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.

The Commission implemented this provision by adopting new rules, codified at 47 C.F.R. § 64.2001 et seq.[3] The rules were intended to achieve and balance both pro-competitive and customer privacy goals. Order at ¶ 3. The Commission found these goals would best be achieved by adopting a "total services approach," in which "we permit carriers to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier." Id. at ¶ 4. Applying that approach, it identified three categories of service – CMRS, local and interexchange – and limited the use of CPNI to the types of

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[3] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Information and Other Customer Information, Second Report and Order, FCC 98-27, released February 26, 1998 ("Order"). A summary of the Order was published in the Federal Register on April 24, 1998. This Petition for Reconsideration is therefore timely under 47 C.F.R. § 1.429.

service to which the customer had subscribed while permitting unrestricted use of CPNI within each category.

The Commission recognized that CMRS and landline services should be distinguished in applying Section 222(c)(1). It then, however, abandoned that distinction in defining what constituted "CMRS," and instead imposed restrictions that force CMRS providers to sever many integrated offerings of wireless service and equipment. The Order declares that "CMRS" does not include "CPE" or "information services," but only "basic" and "adjunct to basic services." Section 64.2005(b)(1) states:

> A telecommunications carrier may not use, disclose, or permit access to CPNI derived from its provision of local service, interexchange service, or CMRS, without customer approval, for the provision of CPE and information services, including call answering, voice mail or messaging, voice storage and retrieval services, fax store and forward, and Internet access services.

A second rule, Section 64.2005(b)(3), prohibits use of CPNI to market even the narrowly-defined "CMRS" in a situation where such marketing is particularly pro-competitive. Once a CMRS customer advises its carrier that it is changing carriers, the rule appears to prevent the original carrier from accessing the customer's CPNI for use in retaining or winning back that customer – even if that CPNI would be used to offer the customer

lower rates or other pro-competitive incentives not to switch. Section 64.2005(b)(3) states:

> 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.

These rules are scheduled to take effect on May 26, 1998. Nearly a month ago, on April 24, CTIA filed a "Request for Deferral and Clarification" of the rules, which documented the harms that these rules will cause CMRS carriers and their customers, and asked that their effective date as to CMRS be postponed for 180 days. CTIA's Request was unopposed. The Commission has, however, not acted on it.

B. Section 64.2005(b)(1) Restricts Integrated Marketing of CMRS Equipment and Services That Benefits Customers and Promotes Competition.

Product integration is not only a fact of life in the wireless industry; it is key to the industry's rapid growth and to customers' ability to meet their mobile communications needs. New Section 64.2005(b)(1), however, drives a wedge through integrated CMRS offerings by forcing carriers to segregate their marketing of equipment and the wide array of features and services they offer. The rule ignores the technical reasons, competitive factors, and consumer expectations that have led to

the high degree of integration of wireless service and product offerings. The record of comments on CTIA's Request shows that the new rule will impede the rapid growth of CMRS and will particularly harm new entrants and smaller CMRS providers - results that directly conflict with Commission policies.[4]

Unlike landline telephone service, in which "CPE" and "information" services are generally sold independently of the "basic" service, wireless equipment and transmission service is technically inseparable, and customers expect that they will be offered service and equipment together. The handset is itself a radio transmitter which must be service-activated and programmed with unique information for each subscriber, such as the Mobile Identification Number ("MIN" or "IMSI"), Electronic Serial Number ("ESN") and authentication or other security codes to prevent fraud. The carrier is selling not merely a phone, but programming and other services needed to use the phone.

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[4] E.g., Comments of Rural Cellular Ass'n at 3; 360 Degree Communications at 4-5, AirTouch Communications at 2-5, Vanguard Cellular Systems, Inc. at 5-7; Omnipoint Communications, Inc. at 2-3 ("At a time when the Commission is engaged in a full biennial review of its rules for the purpose of reducing regulatory burdens, it is troubling that the costs of compliance with the Second Report and Order may result in severe economic harm, particularly for emergent carriers such as Omnipoint.").

The deployment of high-quality digital mobile services illustrates why integrated marketing of service and equipment is technically essential. Digital service requires a digital handset; an analog phone will not work. Broader use of digital technology thus depends on carriers' ability to market digital handsets as part of the digital service offered to customers. Yet Section 64.2005(b)(1) appears to build a wall between using CPNI to sell customers digital service, and the use of that same CPNI to sell the same customers the phone that they need. This makes no sense and clearly disserves customers' interests.

Mobile technologies also integrate a variety of related services such as directory assistance, call forwarding, roaming, and messaging, which have always been offered and purchased with the underlying cellular or other mobile service. Digital technology provides the capability for many new features that can provide information and data to customers. Much of the CMRS market is being built on state-of-the-art voice mail, data and information delivery technologies. Carriers in this highly competitive market differentiate themselves by investing in and offering these latest technologies.

Section 64.2005(b)(1), however, also imposes a wall between the sale of different services based on whether or not they are "basic," "adjunct to basic," "enhanced," or "information"

services. It thus permits a wireless carrier to access a customer's CPNI to determine whether to market short messaging service, but not to tell that same customer about voice mail, a service that is equally integrated into the carrier's service offering. This unnatural demarcation, which neither wireless technology nor customers recognize, undermines carriers' ability to differentiate their offerings, frustrates customers' access to improved CMRS services, and impairs wider use of radio spectrum -- all counter to Commission objectives.

C. Section 64.2005(b)(3) Suppresses Competition But Has No Countervailing Benefits.

The CMRS industry is marked by an increasing number of competitors and customer switching, called "churn." Data filed in other Commission proceedings documents annual churn rates of 30 percent.[5] The deployment of new PCS systems which directly compete for customers of existing cellular carriers has forced all CMRS carriers to work even harder to retain customers, who now benefit from having not one but four or five or more CMRS

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[5] E.g., Telephone Number Portability, CC Docket No. 95-116, Petition for Forbearance of the Cellular Telecommunications Industry Association, Comments of Primeco Personal Communications, February 10, 1998, at 9-10 (citing Anderson Consulting study, which concludes that "wireless customers churn at annual rates of 30% . . . and that such rates may increase beyond 40% in the future").

carriers in most markets to choose from. Carriers invest significant resources (often several hundreds of dollars) in signing up each new customer, including advertising, sales commissions, and the costs of retail stores. Given the ease and frequency with which customers switch carriers and the many choices they have among carriers, CTIA's members have enormous financial incentives to retain or win back customers who decide to switch.[6] When a carrier learns that a customer is leaving, the carrier will invest extensive effort to retain that customer by, among other things, offering incentives, which often include lower prices, not to switch.

The Commission has repeatedly applauded steadily declining CMRS prices as evidence of increasing competition.[7] CMRS win-back programs contribute significantly to the declines in CMRS prices that the Commission has championed. These programs, however, do not work without access to a customer's CPNI.

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[6] Telephone Number Portability, supra, Comments of Telecommunications Resellers Ass'n at 11 (noting that "'churn' is 'competition'" and that the CMRS market can be characterized by "'the fury of churn' and the 'fierce battle to gain and retain elusive customers.'").

Review of the customer's records is necessary so that the carrier can identify what particular offerings and pricing packages best fit the customer's usage, and might induce the customer to remain or return.

Section 64.2005(b)(3) cripples these pro-competitive customer retention efforts by restricting a CMRS carrier from accessing customers' CPNI in order to persuade them not to leave or to come back. The significant investment in signing up new CMRS customers, the level of competition among both existing and new CMRS entrants, and the level of churn are far higher in the mobile services market than in landline markets, making the anticompetitive impact of Section 64.2005(b)(3) particularly serious for CMRS.

Although the Order permits such access after obtaining the customer's affirmative consent, in practice this is unworkable. A carrier which is forced to read the customer the required litany of rights and obligations before it can access CPNI and before it can even advise the customer of the purpose of the

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(...continued)

[7] Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 12 FCC Rcd 11266 (1997). That report proclaimed, "The Commission has continued systematically to remove regulatory barriers in order to facilitate competition." Id. at 11274. Yet here

(continued...)

call has little chance of retaining the customer. Win-back efforts using direct mail would be precluded altogether, unless written or separate verbal authorization is first solicited and given. But such efforts would make no sense to customers and would impose major costs on CMRS carriers that will divert resources from pro-competitive retention efforts.

Since no single CMRS carrier has market power, the CPNI win-back rule is an overtly anticompetitive restraint of trade. Such restraints must have a compelling rationale to justify their harm to competition. The Order does not supply one. There is no evidence that permitting access to CPNI in this situation would in any way conflict with customers' privacy expectations. To the contrary, use of former customer information to win back customers is used in many industries as a successful competitive strategy -- and no other federal agency has decided, as the FCC has, to prohibit that practice.[8]

(...continued)

the Commission has added a barrier that directly impedes competition.

[8] The Wall Street Journal recently reported on the many win-back campaigns by catalog retailers: "Land's End Inc., for one, is digging into its mailing list and attempting to reactivate old customers. . . . The company is focusing the mailings to appeal to those customers' shopping tastes based on past practices." "Catalog Retailers Launch Titles in Quiet Quarter," The Wall Street Journal, April 20, 1998, at B11E.

III. RECONSIDERATION OF THE RULES IS REQUIRED BECAUSE THEY UNDERMINE THE GOALS OF SECTION 222, MISINTERPRET THAT PROVISION, AND CONFLICT WITH COMMISSION POLICIES TOWARD CMRS.

The Commission's application of Sections 64.2005(b)(1) and (b)(3) to wireless services is flawed in many respects. Each of these serious problems warrants amending these rules to allow use of CPNI in offering CMRS-related equipment and services and in efforts to win back CMRS customers. This action will serve the objectives of Section 222.

A. The Rules Undermine the Goals of Section 222.

The flat application of Sections 64.2005(b)(1) and (b)(3) to CMRS fails to implement Section 222 properly, because it undermines the law's competition objective as well as its goal to permit the use of CPNI within the existing customer-carrier relationship.

Section 222, the Commission declared, "balances principles of privacy and competition in connection with the use of and disclosure of CPNI." Order at ¶ 3. Although the Commission recognized that its task was to regulate the use of CPNI in the context of the competitive environments in which carriers operate, it gave no attention to the very different competitive structure for wireless services. The vigorous competition among wireless carriers today is responsible for (and in turn benefits

from) the integrated service and equipment offerings that CMRS carriers offer. The Commission failed to acknowledge this important point, and thus imposed rules that impede the very competition that Section 222 seeks to promote.

The Commission's narrow definition of "CMRS" to exclude mobile equipment and information services also violated the key premise for the new rules that CPNI could be used consistent with customer expectations; that is, where there was an "existing service relationship." The Order (at ¶ 23) stated:

> We believe that the language of Section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose and permit access to CPNI can be inferred in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship.

There was, however, no record evidence to support the Order's conclusion that mobile handsets and information services delivered through those handsets were outside the CMRS carrier-customer "relationship." The lines that the Commission drew to circumscribe the use of wireless CPNI were transported from the different technical, competitive and historical considerations as to landline services. There was nothing in the record that

supported the Commission's exceedingly narrow definition of the CMRS "existing service relationship." The Order consequently did not discuss either CMRS customer expectations or the unique problems and disruptions to carriers and consumers that will result from Sections 64.2005(b)(1) and (3). To the contrary, as the record on CTIA's Request for Deferral shows, CMRS customers fully expect their carriers to do precisely what the rules appear to prohibit -- offer them CMRS-related equipment and information services and try to keep them as subscribers. By impinging on those communications, the rules subvert rather than achieve customer expectations.

Although the new rules permit CMRS carriers to use CPNI to market equipment and services and to win back customers upon obtaining prior customer approval, that option is not feasible for CTIA's members. The affirmative approval requirements of the rules require CMRS providers to obtain permission from each individual customer. CTIA's members know from years of competitive marketing experience that any customer communication program takes many months before even a percentage of customers respond, and many will never do so. While the Commission refused to permit negative option or opt-out approval programs for CPNI, it again did not consider the particular benefits and costs of its affirmative approval rule for CMRS. It did not

address whether differences in the CMRS carrier-customer relationship and in the level of CMRS competition compared to landline services warranted allowing negative opt-outs for CMRS, yet nothing in Section 222 would prohibit this approach.

B. The Order Ignores the Distinct Federal Policy Toward CMRS Regulation and Improperly Grafts Landline Regulations Onto CMRS.

In its 1993 amendments to the Communications Act, Congress adopted a new, deregulatory paradigm for CMRS. That paradigm acknowledged the highly competitive structure of the wireless industry and determined that regulation of that industry should be commensurately much less intrusive.[9] Congress found that minimal regulation of CMRS would serve the public interest because it would promote vigorous competition, enhance service and stimulate innovation.[10]

In its subsequent decisions on CMRS regulation, the Commission has found that CMRS regulation must be clearly justified by evidence that government intervention was needed, and must also be narrowly drawn to solve an identified problem

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[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b) (1993).

[10] See H. Rep. No. 103-111, 103d Cong., 1st Sess. 259-60 (1993); H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

in the competitive CMRS market: "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need."[11]

New Sections 64.2005(b)(1) and (3) erase that distinct deregulatory approach to CMRS. They fail to recognize and incorporate the significant historical, technological and competitive differences between CMRS and landline services as those differences relate to CPNI.[12]

The Order assumes, for example, that CMRS-related phones, pagers and other equipment should be classified as "CPE" and thus placed on the opposite side of the CPNI "wall" from "service." This demarcation between equipment and service departs from both technical reality and regulatory history. In CMRS, unlike landline services, the provision of equipment and

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11 Petition of the Connecticut Dep't of Public Utility Control, Report and Order, 10 FCC Rcd 7025, 7031 (1995), aff'd, 78 F.3d 842 (3d Cir. 1996). See also Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order, 9 FCC Rcd 7988, 8003 (1994) (noting "the overarching Congressional goal of promoting opportunities for economic forces - note regulation - to shape the development of the CMRS market.").

transmission capability are intertwined and inseverable. The equipment operates as a transmitter and/or receiver that is programmed for the particular transmission service the customer subscribes to. It is an essential part of the overall "service" provided to customers, and is clearly "necessary to, or used in, the provision of" CMRS. Section 222(c)(1)(B) thus should be read to encompass such equipment. Landline CPE, in contrast, has no inherent transmission capability.[13]

This same flaw afflicts the rule's restriction on the use of CMRS-derived CPNI to offer CMRS information services. The Order does not reference any record evidence on customers' expectations as to what mobile services are functionally related

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(...continued)

12 The courts have reversed Commission decisions which fail to recognize and account for differences between different telecommunications services. See, e.g., Illinois Public Telecommunications Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); Petroleum Communications, Inc. v. FCC, 22 F.3d 1164 (D.C. Cir. 1994).

13 The Order also incorrectly assumes that mobile handsets should be treated as "CPE." But Section 3(46) of the 1996 Act defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route or terminate telecommunications" (emphasis added). CMRS handsets are not "employed" on particular "premises." Unlike landline CPE, which is affixed to the premises of a specific office or residence, mobile equipment can and does move anywhere. The Order improperly failed to consider whether the 1996 Act's new definition of CPE encompasses mobile handsets.

and thus can be sold using CPNI under Section 222(c)(1)(B). Rather, it draws a line between "basic" or "adjunct to basic" as opposed to "information" services. These terms have never had any legal or practical meaning for mobile services. There has been no independent market of wireless "information" service providers, CMRS carriers have not had to distinguish among these services, and consumers have benefited from being advised about these advanced offerings by their CMRS carrier.

Nothing in Section 222 indicates that Congress intended the Commission to so radically change the federal deregulatory paradigm for CMRS by transposing these landline concepts onto wireless, and nothing in the record supplies a policy basis for doing so. Instead, the statute clearly intends that any distinctions the Commission makes among different services be based on customer expectations and privacy interests. The Commission followed this intent in finding that it should separate CMRS, local and long distance services in applying the statute. But there is nothing in the record that suggests that wireless customer expectations or privacy interests diverge at some line drawn between "adjunct to basic" and "information" services. The Order thus incorrectly severed CMRS "information" services from the scope of Section 222(c)(1)(B).