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

Sections 64.2005(b)(1) and (b)(3) also conflict with many key Commission policies to promote wireless services. The Order does not even acknowledge this serious problem, let alone attempt to reconcile its inconsistent actions. Similar lapses by the Commission in failing to harmonize its policies have been found to be unlawful as arbitrary and capricious rulemaking.[14]

First, the Commission has held that there are "significant public interest benefits associated with the bundling of cellular CPE and service," finding that "bundling is an efficient promotional device which reduces barriers to new customer and which can provide new customers with CPE and cellular service more economically than if it were prohibited."[15] Both the Justice Department and the Federal Trade Commission endorsed the benefits to consumers, competition and lower prices from bundling of mobile services and equipment. The FCC, DOJ and FTC

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[14] See, e.g., Mobile Communications Corp. v. FCC, 77 F.3d 1399, 1407 (D.C. Cir. 1996) (remanding FCC decision that failed to reconcile new position with previous policy); Monroe Communications Corp. v. FCC, 900 F.2d 351, 357 (D.C. Cir. 1990).

[15] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992) ("Bundling Order").

all concluded that consumers not only expect, but benefit from, bundling.[16] The new rule, however, undermines those benefits.

Second, the Commission has touted the benefits of investments in spectrum-efficient digital technologies, and has encouraged CMRS carriers to build out digital systems.[17] Both cellular and PCS carriers have done so, but now need digital service customers in order to recoup the massive costs of this buildout. Expansion of digital service requires customers to upgrade their handsets. By severing the sale of digital service from digital equipment, the rule directly frustrates broader purchase and use of digital service, and thus subverts this Commission goal as well.

Third, the Commission has encouraged "seamless" mobile service so that customers may make and receive calls with their

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[16] The Commission found that the high cost of handsets impeded expansion of cellular service, and that by permitting bundling, more customers would subscribe. This analysis proved correct -- bundling has allowed carriers to offer phones at extremely low prices. Now, however, Section 64.2005(b)(1) impedes this practice. In the name of protecting CMRS consumers, the rule in fact injures them.

[17] E.g., Bundling Order, supra, 7 FCC Rcd at 4031; Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957 (1994) (noting benefits to consumers and spectrum efficiency of digital technologies).

handsets wherever they travel.[18] PCS providers have begun offering dual mode, dual band handsets that promote seamless service, because these handsets enable PCS customers to complete calls using cellular systems' spectrum in areas where technically compatible PCS service is not available. But the rule impairs expansion of seamless service by restricting PCS carriers from using service-related CPNI to market dual mode phones.

Fourth, the Commission has held that "one-stop" shopping in which wireless customers can purchase at the same time both equipment and CMRS service serves the public interest.[19] The new rule undercuts the efficiencies to both customers and carriers of wireless one-stop shopping.

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[18] For example, the Commission requires all CMRS providers to offer "roaming" to CMRS subscribers of other carriers, because it has found that roaming advances the public interest goal of "nationwide, ubiquitous, and competitive wireless voice communications." Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd 9462 (1996).

[19] The Commission proclaimed the public benefits of combined offerings to cellular customers in Craig O. McCaw, 10 FCC Rcd 11786, 11795-96 (1995): "We believe that the benefits to consumers of 'one-stop shopping' are substantial. . . . One-stop shopping promotes efficiency and avoids customer confusion."

Fifth, the Commission has held that the public interest is served by not restricting the "flexible" use of CMRS spectrum. It found that allowing CMRS providers the freedom to offer an unlimited variety of services over their licensed frequencies promotes spectrum efficiency, intensifies competition, and benefits consumers.[20] The Order, however, reverses this policy. It invokes the terms "basic," "adjunct-to-basic," and "information" services to draw a line between those services that can and cannot be sold using CPNI without prior customer approval. These are landline concepts, based on regulatory concerns arising from landline carriers' market power, which are irrelevant and foreign to wireless services. The new rule conflicts with the policy to promote flexible CMRS service offerings, by forcing carriers to draw lines between different services. The Order did not explain how the new rules could be reconciled with that policy, because it failed to acknowledge the policy at all. This was arbitrary decisionmaking.

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[20] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 8965, 8967 (1996) (unrestricted use "will stimulate wireless competition in the local exchange market, encourage innovation and experimentation in development of wireless services, and lead to a greater variety of service offerings to consumers.").

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

Section 64.2005(b)(1) prohibits using CPNI to sell CPE without prior customer approval. The Commission based this rule not on public interest or policy considerations, but solely on its reading of Section 222, which it asserted compelled the prohibition. It found that CPE was not a "service[ ] necessary to, or used in the provision of such telecommunication service" under 222(c)(1)(B), and thus that the "unambiguous" language required restricting CMRS providers from using CPNI to market CMRS-related equipment. Order at ¶ 75.

The Order adopts an overly literal and unnecessary interpretation of Section 222(c)(1)(B) to exclude CMRS equipment. It thus needlessly impedes practices that the Commission has long held benefit competition and wireless customers. There are numerous reasons why Section 222(c)(1) allows CMRS providers to market wireless equipment with transmission service.

At the outset, the Order appears to adopt inconsistent rationales. It rejects arguments that the use of CPNI to market CPE should be allowed on policy grounds by asserting that the Act left it no room to do so: "We give meaning to the statutory language, and find no basis to extend the exception in section

222(c)(1)(B) to include 'equipment.'" Order at ¶ 71. But it later states, "It nevertheless may be appropriate in the future for us to examine whether the public interest would be better served if carriers were able to use CPNI, within the framework for the total service approach, in order to market CPE." Id. at ¶ 77. Since the Commission concedes there may be public interest benefits to the use of CPNI to market CPE, it should have assessed them.[21]

The Commission should alternatively have held that wireless handsets constitute "service" because they are an integral part of every CMRS provider's Title III radio service license. A CMRS provider's duties under Title III as well as Title II justify construing Section 222(c)(1) to allow CMRS providers to integrate their marketing of services and related equipment.

Each CMRS provider must obtain a radio service license under Title III of the Act that encompasses CMRS equipment. That license authorizes the provider to operate a system of

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[21] The D.C. Circuit recently reversed the Commission for adopting a "wooden" definition of a term in Section 275(a)(2) of the 1996 Act. There too, the Commission believed its interpretation was compelled by the literal language of the provision. There too, the Commission had not considered the broader public interest goals and policies of the Act or the practical problems its definition would create. Alarm Industry Communications Committee v. FCC, 131 F.3d 1066 (D.C. Cir. 1997).

"land stations," generally antennas at fixed locations such as on towers or buildings, and "mobile stations," the handsets or mobile phones used by subscribers. The entire system of land and mobile stations constitutes the Title III "service" under the Act and the Commission's own rules. CMRS handsets are fundamentally different from a landline phone, since landline CPE is not a transmitter subject to Title III and is not that carrier's responsibility. See 47 C.F.R. Parts 15 and 68.

The Order distinguishes Title II "telecommunications services" and CPE, but fails to consider the separate Title III service definitions, which clearly encompass mobile equipment. CMRS Mobile Stations are part of the Title III "service" for which the CMRS provider holds a license; and they must be maintained as a condition of that license.[22]

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

Section 64.2005(b)(1) also prohibits the use of CPNI to sell "information" services without prior customer approval.

Again, the Commission based this rule not on public interest or policy considerations, but solely on its reading of the phrase "services necessary to, or used in the provision of such telecommunication service" in 222(c)(1)(B) to exclude CMRS "information" services. Order at ¶ 75. The statutory language does not require this reading.

The term "used" means services that are functionally related to the underlying telecommunications service. The Order too narrowly interprets Section 222(c)(1)(B) to exclude services that are not physically and simultaneously used with the telecommunications service. The more natural reading of the term "used," however, includes services which are functionally related to the underlying telecommunications service. As the Order notes, Section 222 permits the use of CPNI to offer services that customers consider to be related and thus expect to be contacted about. Given that the CMRS industry has always integrated offerings of all services that can be offered over

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(...continued)

[22] For example, Section 22.927, one of the rules governing cellular licensees, states: "Mobile stations that are subscribers in good standing to a cellular system . . . are considered to be operating under the authorization of that cellular system. Cellular system licensees are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems."

mobile handsets, interpreting Section 222(c)(1)(B) to include CMRS-related information services would match customer expectations.

The Commission's reading of Section 222(c)(1)(B) is also inconsistent with Congress' inclusion of directories in that provision as an example of services that are "used" in the underlying telecommunications service. A directory of landline subscribers and their phone numbers is functionally related to and helpful in customers' use of landline services, but it is certainly not "used in" that service as the Commission has narrowly construed that term.

The Order excludes CMRS information services from Section 222(c)(1)(B) because they are not physically used in the actual provision of the underlying service, but neither are phone directories physically used in the provision of landline service. Directories are even less related to the communication service than CMRS voice mail, which at least uses the radio service. Congress's reference to directories confirms that the proper reading of Section 222(c)(1)(B) is to permit the use of CPNI to market services that are related to the underlying service, and wireless information services are, for reasons of technology and customer convenience, closely related to CMRS. For this reason as well, the Commission's exclusion of

information services as part of CMRS cannot be reconciled with the Act's specific provisions or with its general purposes.

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

The Order (at ¶ 78) held that inside wiring installation and maintenance is a "service" under Section 222(c)(1)(B) which can be offered using CPNI derived from a telecommunications service. This conflicts with the Order's refusal to treat wireless equipment and information services in the same manner. In both cases, equipment and service are intertwined. The Commission placed inside wiring within the scope of a Section 222(c)(1)(B) "service" because it found that inside wiring is "necessary to or used in" a telecommunications service. This is equally true of CMRS equipment and information services. Inside wiring is no more necessary to a landline subscriber's ability to receive landline service than a handset is to a CMRS subscriber's ability to receive mobile service.

The Commission noted that a carrier's provision of inside wiring includes "keeping the telecommunications service in working order." Order at ¶ 79. CMRS carriers also program and maintain mobile handsets to keep their service in working order. Every phone must be programmed with a unique ESN, MIN or other data unique to the customer. The CMRS carrier "services" this

equipment just as it "services" inside wiring. Ensuring that the call reaches the customer by keeping in good repair the last link in mobile communication is conceptually identical to repairing the last link in landline communication.

CMRS equipment and information services are in fact more closely tied to service and customer expectations than is inside wiring. The CMRS provider is by rule responsible for handsets, advises customers how to use them, repairs them, and reprograms them to receive new features or to change the customer's mobile number. Because it is the customer's own carrier who provides these functions, customers expect that their carrier will contact them about equipment and the features and services they can obtain through that equipment. Landline carriers, by contrast, have no obligations to provide inside wiring installation and repair; customers can and do use other vendors. Yet the rules reach the opposite, arbitrary result, by allowing the use of CPNI to sell inside wiring but not CMRS handsets and services.

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

New Section 64.2005(b)(3) frustrates the most vigorous competition among wireless providers – when they are vying for the same individual account – and deprives customers of the

clear benefits of that competition. This anticompetitive result is not required by Section 222 and lacks a rational basis.

The Commission reached this rule by deciding that, because Section 222(c)(1) allows the use of CPNI without prior approval only for the "provision" of service, efforts to retain a customer are not allowed because they do not involve "provision" of service. But Section 222(c)(1) does not warrant, let alone compel, this construction. Here again, the Commission reads prohibitions into the statute that are not there. As discussed in Part II(C) of this Petition, when a CMRS customer contacts his or her carrier to terminate service, the carrier often seeks to keep that customer by offering new services or different price plans. The carrier will access the customer's CPNI to determine how to seek to retain that customer. The purpose of customer retention <u>is</u> the "provision" of service.

Section 64.2005(b)(3) was also invalidly promulgated because the Commission did not provide notice that it was being considered. The <u>Notice of Proposed Rulemaking</u> was silent as to any rule that would affect customer retention efforts. As a result, the <u>Order</u> (at ¶ 85) offers only three sentences in explaining it. The Commission may not validly impose a new rule without giving advance indication that such a rule would be

considered.[23] The Commission's adoption of the anti-win back rule effectively took the "notice" out of notice-and-comment rulemaking.

There is also no information in the record that would support the Commission's bald claim that use of CPNI to retain a customer "is outside of the customer's existing service relationship." Order at ¶ 85. There is nothing to show that privacy expectations would be harmed or undermined by the use of CPNI in retention efforts. To the contrary, customers would likely be surprised if their service provider failed to make an effort to retain them upon learning of their decision to switch to a competitor. Given the lack of any notice or record support for the anti-win back rule, it must be rescinded.[24]

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

[24] An agency must "examine the relevant data and articulate a rational connection between the facts found and the choices made." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1993). Here there was no relevant record data at all, let alone the requisite "rational connection" between that record and the rule.

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.

The Commission does not address the harms the new rules will cause to CMRS because it finds that Section 222 leaves it no choice but to impose these rules. Part III of this Petition shows why this finding was incorrect. Even if, however, the Commission continues to believe that its view of Section 222 compels application to CMRS of Sections 64.2005(b)(1) and (3), it should forbear from enforcing these restrictions. Congress included in the 1996 Act a mandatory forbearance provision that requires the Commission not to enforce provisions of the Act or its rules (with certain exceptions not pertinent here) if certain findings are made. Section 10(a) of the Act, 47 U.S.C. § 153(a), provides in relevant part:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any of some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Forbearance from enforcement of the restrictions on bundling equipment and information services and the prohibition on customer win backs as to CMRS is clearly warranted. CTIA's Request for Deferral, the comments in response and this Petition provide an ample basis for the Commission to grant forbearance. No party opposed CTIA's Petition. No party disputed CTIA's showing that the rules are not needed to protect consumers but in fact deprive consumers of the benefits of bundling and vigorous competition for their business. CTIA believes that, given the strength of that information and the lack of any contrary evidence, the Commission not only can but must forbear.

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

Application of Sections 64.2005(b)(1) and (b)(3) to CMRS is not needed to guard against unreasonable rates and practices. CMRS rates are, of course, not regulated by the Commission or by the states, and the new rules in any event do not attempt to regulate rates for any wireless service or equipment. Nor is

enforcement of those rules needed to preclude unjust or unreasonable practices.

First, in a highly competitive industry such as CMRS where no carrier is dominant, marketplace realities ensure that carriers act in a just and reasonable manner. The Commission has held that competition in the wireless industry is the best insurance against unreasonable practices, noting that carriers will have little incentive to engage in such practices because they will risk loss of their business to competitors.

Second, should a CMRS provider attempt to engage in unjust or unreasonable practices, Sections 201, 202 and 208 of the Act are available as enforcement remedies. The Commission has relied on these provisions as arming it with sufficient enforcement powers to police unjust or unreasonable practices. For example, in 1994, it forbore from enforcing Section 203's tariff requirements on CMRS providers.[25] At that time, the Act's sole forbearance provision was Section 332(c)(1)(A). While it applied only to CMRS providers, it contained the same tests for forbearance that the 1996 Act incorporated into new Section 10. The Commission found that enforcement of Section 203 was not

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[25] Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411, 1478-81 (1994).

necessary to protect consumers against unjust or unreasonable practices because Sections 201, 202 and 208 were available:

> [T]he continued applicability of Sections 201, 202 and 208 will provide an important protection in the event there is a market failure. . . . Compliance with Sections 201, 202 and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.[26]

The same analysis applies here. Given the continued availability of Sections 201, 202 and 208 to review the practices of CMRS providers, address complaints, and protect consumers, as well as the many other CPNI rules, Sections 64.2005(b)(1) and (b)(3) meet no additional need for protection.

Third, the Commission has held that bundled CMRS offerings, far from being unjust or unreasonable, in fact are beneficial because they improve competition, enable more customers to subscribe to mobile service, and promote lower prices. The Commission specifically pointed to the benefits of packaging CMRS equipment through subsidizing the cost of handsets as pro-competitive.[27] Similarly, communicating offers to customers of

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[26] Id., 9 FCC Rcd at 1478-79.

[27] Bundling Order, supra; Craig O. McCaw, supra.

digital wireless service, voice mail, enhanced text messaging and other new services are clearly reasonable practices that should be encouraged. Forbearance from enforcing restrictions on these practices is thus justified.

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

This second test of Section 10(a) is equally satisfied. The CMRS industry has traditionally integrated equipment and service offerings, and customers expect to receive communications about those offerings. Restricting those communications as Sections 64.2005(b)(1) and (b)(3) do will only harm consumers by interfering with their ability to receive information. Forbearance would not open up any customer information for use by CMRS carriers that has previously been shielded against use. Moreover, CTIA seeks forbearance only from two subparts of one of the many new CPNI rules. The remaining rules provide ample protection of consumer privacy interests by ensuring that carriers cannot use CPNI for purposes beyond the customer-carrier relationship without customer approval and by regulating carriers' internal use of CPNI.

Failure to forbear would, conversely, harm consumers. Wireless subscribers want to learn about the latest technologies, features and offerings that are available to meet their

individual mobile communications needs. To consider upgrading to digital service, they need to know about their digital phone options; to choose a particular digital technology, they need to learn what equipment is compatible; to make communications with their homes and offices more efficient, they need to know what voice mail and delayed messaging services are available. CTIA can think of no other industry where customers are deprived of obtaining information about how to better use the products and services they obtain. Yet that would be the impact of applying Sections 64.2005(b)(1) and (b)(4) to CMRS. There is no conceivable consumer benefit to doing so.

C. Forbearance Is Consistent With the Public Interest.

Finally, forbearance from enforcement of these CPNI restraints would also be "consistent with the public interest," the final element of Section 10(a). As shown in CTIA's Petition for Deferral and the universal support for that Petition from other commenters, Sections 64.2005(b)(1) and (b)(3) have no cognizable public interest benefit because they subvert, rather than protect, competition and customer expectations.

The Commission has already determined that bundling of CMRS equipment and services serves the public interest because it promotes competition, helps customers obtain the service they

need, and encourages lower prices. The Commission has never diverged from those findings, and even in the Order it did not question or challenge them, but merely concluded that Section 222 compelled it to restrict bundling. Forbearance will prevent the new CPNI rules from interfering with those clear public interest benefits. Indeed this is precisely the situation that Congress intended for using forbearance - where literal application of a statutory provision would achieve unintended and particularly (as here) harmful results.

The public interest benefits of forbearing from enforcement of the ban on using CPNI to retain and win back CMRS customers are equally compelling. As CTIA has explained above and as the comments in the record confirm, customer retention and win back efforts are intensely pro-competitive. They place the customer in the attractive position of having two competitors directly vying for its business at the same time, and being able to leverage one against the other. A carrier which is threatened with the loss of a customer will often seek to negotiate a lower-priced package of services. The customer can then take that offer, turn to the competing carrier and ask that it meet or beat that offer. Carriers cannot productively engage in win back efforts, however, unless they can access a customer's CPNI

to ascertain what price plans and packages may attract the customer to remain or return.

The Commission has held that where forbearance promotes competition, the "public interest" test of Section 10(a)is met. Because CMRS win back efforts using CPNI are clearly pro-competitive, and because Section 64.2005(b)(3) would flatly prohibit them, forbearance is consistent with the public interest.

Forbearance is also consistent with the public interest because it will prevent CMRS carriers from incurring significant additional costs that they will otherwise have to expend in revamping virtually all of their marketing practices. The record on CTIA's earlier Request identifies many cost-effective integrated CMRS marketing plans that allow carriers to compete most efficiently, and explains why those plans must now be disrupted, diverting substantial resources that could otherwise be used for network buildout and other pro-competitive actions.

The Commission recently determined on two occasions that cost savings to carriers from forbearance supports a Section 10(a) finding that forbearance is consistent with the public interest. It first granted forbearance from Section 310(d) of the Act, which requires prior approval of pro forma transfers of control, to wireless licensees. It found that the public

interest test was met in part because "forbearance will also eliminate a significant and unnecessary expenditure of carrier and Commission resources."[28]

The Commission also relied on costs to carriers in granting a petition for forbearance from Section 272 of the 1996 Act, which establishes separate affiliate requirements for the provision of certain services by Bell Operating Companies. The BOCs petitioned for forbearance from applying these requirements to Enhanced 911 services. The Commission granted forbearance, finding that each of the Section 10 criteria were met. In addressing the third test, it concluded that forbearance to permit integrated E911 services was "consistent with the public interest" in part because integration "produces substantial cost savings."[29]

These prior forbearance decisions are directly applicable here and support the finding that forbearance would be consistent with the public interest because of the enormous costs that CMRS providers will otherwise be required to bear.

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28 Federal Communications Bar Ass'n Petition for Forbearance Under Section 310(d) of the Communications Act, FCC 98-18, relased February 4, 1998.

29 Bell Operating Companies Petition for Forbearance from the Application of Section 272 of the Communications Act, CC Docket No. 96-149, DA 98-220 (Common Carrier Bureau, released February 6, 1998, at ¶¶ 46-49.

V. CONCLUSION

For the above reasons, the Commission should reconsider and modify Sections 64.2005(b)(1) and (b)(3) to state that they do not apply to the provision of CMRS-related equipment and services. In the alternative, the Commission should forbear from the application of these restrictions to CMRS.

Respectfully submitted,

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Dated: May 20, 1998