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Federal Communications Commission
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In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	CC Docket No. 96-115

GTE Petition for Forbearance, Reconsideration, and/or Clarification

GTE SERVICE CORPORATION, AND ITS AFFILIATED DOMESTIC TELECOMMUNICATIONS, WIRELESS, AND LONG DISTANCE COMPANIES

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SUMMARY

GTE believes that in several important respects the *CPNI Second Order* is contrary to customer expectations and in conflict with the healthy development of competitive markets. Where the *CPNI Second Order's* conclusions are based on statutory interpretation, GTE requests the alternative remedies of reconsideration or forbearance. Congress may have drafted Section 222 in broad terms, but in Section 10 it *mandated* forbearance in the public interest whenever application of Section 222 is not needed to ensure reasonable rates, or protect consumers.

GTE requests reconsideration or forbearance of the *CPNI Second Order's* restrictions on the use of CPNI without a burdensome notice and approval process:

- to market customer premises equipment that is integral to wireless and advanced wireline services and is not part of a package;
- to market voice mail, store-and-forward, and short message services that are integral to telecommunications services;
- to market enhancements to packages of telecommunications services; and
- to win back customers who have terminated service.

In each of these cases, nothing in Section 222, fairly interpreted, requires restrictions on the use of CPNI. Under the Commission's "total service approach" touchstone, customers will expect and want to hear from their carrier on specialized, necessary CPE, message storage-type information services needed for efficient use of telecommunications service, enhancements to service package on competitive terms, and offers to better meet the needs of lost customers. For these reasons, the Commission should reconsider its overly restrictive interpretations of Section 222.

If the Commission maintains its reading of the statute, it *must* forbear from enforcing the above-referenced CPNI restrictions because each of Section 10's elements have been met.

First, the CPNI use restrictions have nothing to do with making carrier charges, practices, classifications, or regulations be reasonable and nondiscriminatory.

Moreover, competition in the marketplace plus the Commission's back-stop authority under Sections 201, 202, and 208 are sufficient to prevent unreasonableness and discrimination.

Second, restricting the use of CPNI is not necessary to protect consumers. Competition and back-stop regulation also fully protect customers from excessive charges and privacy is not a concern where approval of CPNI use may fairly be inferred. In the particular cases at issue, the customer-carrier total service relationship embraces necessary, specialized CPE, efficiency-promoting message storage services, and service package enhancements, and customer win back contacts.

Third, forbearance from these CPNI restrictions is in the public interest, as well. It will increase customer awareness of service options, decrease customer confusion due to overbroad marketing contacts, and reduce carrier marketing expenses. Forbearance will enhance carriers' ability to introduce new services and promote greater competition in telecommunications and affiliated markets, with no counterbalancing detriments to competition.

The Commission should reconsider and revamp its rules to:

- Allow carriers to use CPNI without express approval to market CPE used for CMRS because customers expect that CMRS devices will be marketed along with CPE, and a contrary rule will disrupt the orderly migration of analog customers to digital service.

- Permit the use of CPNI without express approval to market CPE that is necessary to enable the introduction of advanced services, such as ADSL, where the availability of the CPE may be limited, yet critical to the success of the new service; and

- Allow the use of CPNI without express approval to market voice mail, store-and-forward, and short message services because such services are used as an integral part of both telephone service and CMRS.

- Recognize that enhancements to service packages are within the total service relationship, in order to aid the growth of meaningful competition.

- Abandon the anti-win back rule, which is contrary to the Constitution as well as the Act, and which prevents normal marketing relationships between carrier and customers.

In addition to these issues of major significance, GTE seeks clarification or reconsideration of several matters on which the *CPNI Second Order* is silent or unclear: notice requirements that appear different for written and oral solicitations; notice and record keeping requirements for customer initiated calls; scope of audit requirements; and contents of notices.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	CC Docket No. 96-115

GTE Petition for Forbearance, Reconsideration, and/or Clarification

GTE Service Corporation and its affiliated domestic telecommunications,[1] wireless,[2] and long distance[3] companies (collectively "GTE") hereby petition the Commission to forbear from applying certain provisions of Section 222 of the Telecommunications Act of 1996 and the Commission's rules thereunder and/or to

[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc. and GTE Communications Corporation.

[2] GTE Wireless Incorporated and GTE Airfone Incorporated.

[3] GTE Communications Corporation, Long Distance division.

reconsider or clarify parts of the *CPNI Second Order*[4] and the Common Carrier Bureau's ("CCB") *Clarification Order*[5] in this proceeding.[6]

I. The Commission Has Authority To Forbear from Applying Section 222 and Its Rules Implementing Section 222

The *CPNI Second Order* reaches a number of conclusions based on the Commission's interpretation of the meaning of Section 222. As will be shown below, GTE believes that the Commission erred in certain of its conclusions. However, even if the Commission concludes that its interpretation of Section 222 is correct, in certain circumstances it would be appropriate to forbear from applying the statute.

The Telecommunications Act of 1996 added Section 10 to the Communications Act of 1934, as amended. Section 10 requires the Commission to forbear from applying any regulation, or any provision of the Communications Act, to

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[4] Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-115 (released February 26, 1998), 63 Fed. Reg. 20326 (April 24, 1998) ("*CPNI Second Order*" or "*Order*").

[5] Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order, CC Docket No. 96-115 (rel. May 21, 1998) ("*Clarification Order*"). The *Clarification Order* clarifies some of the rules in the *CPNI Second Order*, notably, that a customer's name, address and telephone number do not constitute CPNI and that information derived from the sale of CPE or information services as part of a package is not CPNI. However, in other respects, the *Clarification Order* leaves many important issues unresolved. Therefore, GTE urges the Commission to take action as outlined herein.

[6] On April 29, 1998, GTE filed a Petition for Temporary Forbearance or, in the Alternative, Motion for Stay, which requested interlocutory relief on the most critical issues pending action by the Commission on this Petition. Attached to that filing were declarations by GTE officials describing the factual basis for relief. Copies of these declarations are attached hereto in support of this Petition.

telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.[7] Section 10 provides that:

> [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 or some of its or their geographic markets, if the Commission determines that —
>
> (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.[8]

In making the public interest determination, Section 10 requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[9]

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[7] 47 U.S.C. § 160.

[8] *Id. (emphasis added).*

[9] 47 U.S.C. § 160(b). New Section 10(b) also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

If the Commission determines that the affected carriers do not have market power, the first criterion for forbearance under Section 10 (reasonable rates) will be satisfied.[10] Non-dominant carriers "by definition" do not have market power.[11] Section 10 also mandates forbearance for dominant carriers if the three criteria are met.[12] In addition to nondominance, other factors can satisfy the first criterion. For example, Section 201 or Section 202 of the Communications Act will still apply to the affected carriers' service offerings or practices, and the Commission can address any issue of unlawful rates through the exercise of its authority to investigate and adjudicate complaints under Section 208.[13] Similarly, the Commission's other rules, such as accounting safeguards, may adequately prevent unreasonable or discriminatory practices.[14] Even if forbearance creates some risks of discrimination, the Commission

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[10] Hyperion Telecommunications, Inc., Petition Requesting Forbearance, CCB/CPD Docket No. 96-3, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 ¶ 23 (1997) ("*Hyperion Order*")

[11] *Id.*; The Commission's policy since the Competitive Carrier Proceeding has consistently been that a carrier is nondominant unless the Commission makes or has made a finding that it is dominant. *See* In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, First Report and Order, 12 FCC Rcd. 15982, ¶ 358 (1997) (*Access Charge Reform Order*); 47 C.F.R. § 61.3(u) (defining non-dominant carrier as "[a] carrier not found to be dominant").

[12] In the Matters of Bell Operating Companies Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, CC Docket No. 96-149, Memorandum Opinion and Order, DA 98-220 ¶ 26 (rel. Feb. 6, 1998) ("*Section 272 Order*").

[13] 47 U.S.C. § 208. *See Hyperion Order* ¶ 25.

[14] *Section 272 Order* ¶¶ 28, 41.

may condition forbearance on nondiscrimination safeguards, where appropriate, in order to reap the public interest benefits of forbearance.[15] However, the first criterion does not require the imposition of a condition to bring third parties into parity with some advantage held by the affected carriers, where those third parties would not have the advantage without forbearance.[16]

Under the second statutory criterion for forbearance, the Commission must determine whether the statute or rules are necessary to protect consumers. In cases where the market—or other rules or conditions—will assure that rates and practices are just and reasonable and nondiscriminatory under criterion one, criterion two is also satisfied.[17] Criterion two can also be met if forbearance will allow the affected carriers to realize economies that have the potential to reduce prices[18] or if a decision not to forbear could compromise system integrity and reliability to consumers' detriment.[19]

Under the third criterion for forbearance, the Commission must determine whether forbearance is consistent with the public interest. This criterion may be satisfied if forbearance reduces transaction costs for service providers or reduces the administrative burden on service providers and the Commission.[20] Section 10(b)

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[15] *Id.* ¶ 34.

[16] *Id.* ¶ 36.

[17] *Hyperion Order* ¶ 26; *Section 272 Order* ¶ 44.

[18] *Id.*

[19] *Id.*

[20] *Id.* ¶ 27.

requires the Commission, in determining whether forbearance from enforcing a provision of the Communications Act or a regulation is in the public interest, to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. This will be true if forbearance reduces impediments on a carrier's ability to introduce services or facilitates market entry of new providers of telecommunications services.[21] A finding that forbearance will promote competition among providers of telecommunications services may be the basis for a Commission finding that forbearance is in the public interest.[22] On the other hand, Section 10(b) does not require a showing that forbearance would enhance competition among providers of telecommunications services.[23] Instead, cost savings and increases in reliability can be sufficient to conclude that forbearance is consistent with the public interest.[24]

II. The Commission Should Reconsider Its Interpretation of Section 222(c)(1) or Forbear from Applying Section 222 To Prohibit Use of CPNI Without Customer Approval To Market Certain CPE and Information Services

The Commission adopted a restriction against carrier use of CPNI to market most customer premises equipment ("CPE") and information services, reasoning that CPE and information services do not fall within the scope of Section 222(c)(1)(A)

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[21] *Id.*

[22] *Section 272 Order* ¶ 45.

[23] *Id.* ¶ 46-48.

[24] *Id.* ¶ 46.

because they are not "telecommunications services."[25] The Commission also concluded that, under Section 222(c)(1)(B), CPE and certain information services such as voice mail are not "services necessary to, or used in, the provision of such telecommunications service."[26] According to the Commission, CPE is not a "service"[27] and information services such as voice mail are not "necessary to, or used in" the carrier's provision of telecommunications service.[28]

GTE believes that the Commission incorrectly determined that Section 222(c)(1)(B) acts as a blanket prohibition against the use of CPNI with respect to the following services and products:

A. CPE for CMRS (such as wireless handsets);

B. CPE for advanced services (such as ADSL modems); and

C. Voice mail, short message, and other store-and-forward services for wireline and CMRS.

Section 222(c)(1)(B) of the Act explicitly allows the use of CPNI for "services necessary to, or used in, the provision of such telecommunications service[s]."[29] These products and services bear a relationship to CMRS that is indistinguishable from other "services", such as inside wiring, and "adjunct-to-basic" services, which the Commission

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[25] *CPNI* Second *Order* ¶ 45.

[26] *Id.* ¶ 71.

[27] *Id.* ¶.

[28] *Id.* ¶ 72.

[29] 47 U.S.C. § 222(c)(1)(B).

found to be included in Section 222(c)(1)(B).[30] Thus, the Commission's definition of "necessary" is impermissibly narrow.

It is well-settled law that statutory terms must be interpreted by examining both the language at issue and the language and design of the statute as a whole.[31] Most recently, the Commission was reluctant to interpret Congress's use of the word "necessary" in Section 251 in a restrictive manner. That Section requires incumbent LECs to allow collocation of "equipment *necessary* for interconnection or access to unbundled network elements. . . ."[32] The Commission, however, took a flexible view toward the word "necessary" where it stated:

> [a]lthough the term "necessary," read most strictly, could be interpreted to mean "indispensable," we conclude that for the purposes of section 251(c)(6) "necessary" does not mean "indispensable" but rather "used" or "useful."[33]

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[30] *CPNI Second Order* ¶¶ 73, 78-80 and rule Section 64.2005(c)

[31] *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990); *United States Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

[32] 47 U.S.C. §251(c)(6) (emphasis added).

[33] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98. First Report and Order, 11 FCC Rcd 15499, ¶ 579 (1996) (*Local Competition Order*). While GTE believes that the Commission erred in its interpretation of the term "necessary" in Section 251(d)(2) because (amongst other reasons) it ignored the language and design of that statute as a whole (*see AT&T Corp. v. Iowa Utilities Board*, No. 97-826, Brief of GTE (filed May 18, 1998), at 51-52, 60-62), the design of Section 222 should have caused the Commission to interpret the term "necessary" more generously. In other words, proper statutory construction dictates that the Commission should have interpreted the term "necessary" in Section 251(d)(2) in a restrictive manner, but that the Commission should interpret the same term in Section 222(c)(1)(B) in a flexible fashion.

The Commission concluded that its reading of the statute would "promote fair competition consistent with the purposes of the Act."[34] Competitive concerns in the CPNI context require a flexible reading of the word "necessary." In fact, a generous reading of the word necessary is unavoidable because Congress included the words "or used in" in Section 222(c)(1)(B). Thus, in reading the statute as a whole, the context surrounding the use of the word "necessary" in Section 222 indicates that its meaning was not meant to be rigid or inflexible.[35]

The *Order*'s broad conclusions fail to address specifically the facts about how these particular types of CPE and information services are "necessary to, or used in the provision of ... telecommunications service[s]" and, thus, would fall within Section 222(c)(1)(B). The *Clarification Order* recognizes the importance of the use of CPNI in the context of marketing bundled services packaged with CPE.[36] The *Clarification Order* removes any doubt that information derived from CPE sold in a package is not "CPNI" and may be used to market new packages that include CPE or to market telecommunications services. However, the *Clarification Order* leaves standing the rule that any information that is "CPNI" cannot be used to market CPE or information

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[34] *Id.*

[35] *See Armour & Co. v. Wantock*, 323 US 126, 129-30 (1944) (rejecting a reading of the term "necessary" to mean "indispensable," "essential," or "vital" because such a reading would have been too rigid for a word that should "be harmonized with its context.").

[36] *Clarification Order* ¶¶ 4-7.

services that are not part of a service package. Therefore, GTE urges the Commission to reconsider its analysis on the basis of the facts discussed below.

Even if the Commission does not change its interpretation of the applicability of Section 222(c)(1), Section 10 requires that the Commission forbear from applying Section 222 to prevent the use of CPNI to market these services and products.

A. CPE Used for CMRS

1. Section 222(c)(1)(B) Allows the Use of CPNI Without Customer Approval To Market CPE Used for CMRS

Section 222(c)(1)(B) allows the use of CPNI for the telecommunications service itself (which the Commission has correctly identified as the customer's perception of his or her total service relationship with the carrier) and also services that are necessary to or used in the provision of the telecommunications service. CPE for CMRS is an integral part of CMRS—in a very real sense it *is* the service as the customer perceives it, and most certainly it is within the customer's total service relationship with the carrier. *A fortiori*, the CPE is necessary to and used in the provision of CMRS.

As indicated in the attached declaration of Marc Lefar, customer equipment for CMRS[38] is usually provided as a part of the CMRS service package. When customers sign up for CMRS service, they expect to—and do—obtain both the handset and the wireless telecommunications service. Later, they expect their carrier to inform them

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[37] *Clarification Order* ¶¶ 4-7.

[38] Such equipment includes handsets, power cabling, hands-free or car kits, CDPD modems, antenna, batteries, and charging stands.

about new services *and* equipment. CMRS switches, transmitters, and handsets together constitute the "telecommunications service."

CMRS CPE is network-specific and therefore is linked directly to the network that it is on. Every carrier must program the phone with the correct network configuration to ensure that it works directly with its system. Today, technologies that are offered are analog 800 MHz, digital CDMA 800 MHz, digital TDMA 800 MHz, CDMA 1.9 GHz, TDMA 1.9 GHz, and GSM 1.9 GHz. The near future will see combinations of the 1.9 and 800 digital and analog phones thus further increasing the available technologies. Consumer confusion is likely if there is no linkage readily available between the service and the CPE.

CMRS CPE is integral to the provision of CMRS. In fact, CMRS carriers (or their agents) cannot provide what the customer views as a service without including a handset, pager, or other CPE that is compatible in frequency and modulation with the CMRS that the customer will obtain. Importantly, the CPE must be specifically programmed for that customer's service. This CPE has little or no use or purpose beyond completing the radio communications path for CMRS and—without reconfiguration—would not be usable for any other CMRS. Although CPE for CMRS may be purchased separately from the CMRS service, compatible, correctly programmed CPE is needed by the customer in order to obtain CMRS service from his or her carrier of choice.

Moreover, customers consider CPE and CMRS to be part of the same service and typically buy both from the same source at the same time. Therefore, CPE is within customers' expectations of their total service offering with respect to CMRS—the

customers' privacy interests are not compromised by allowing CPNI to be used by carriers to market CPE for CMRS. Customer expectations also justify including CPE within the CMRS total service offering, for customers have given implied approval of the use of CMRS-derived CPNI for that service's CPE. Thus, to be consistent with the Commission's total service approach, as well as the facts about the functioning of CPE used for CMRS, the Commission should on reconsideration declare that carriers may use CPNI to market CPE used for CMRS without further customer approval.

The *Clarification Order* does not adequately recognize cuatomer expectations. For example, the *Clarification Order* prohibits a carrier from using CPNI to market new CPE without approval if it is not part of a new bundled plan.[39] This will impede carriers' ability to introduce CPE-based service improvements that would be of great interest to customers.

2. The Commission Should Forbear from Applying Section 222 To Prevent the Use of CPNI Without Customer Approval To Market CPE Used for CMRS Without Further Customer Approval

If, despite the reasons given above, the Commission continues to maintain that Section 222(c)(1) does not extend to CPE not contained in a bundled package, then Section 10 mandates that the Commission forbear from applying Section 222 to prevent use of CPNI to market CPE used for CMRS. All of the Section 10 criteria compel this result.

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[39] *Clarification Order* ¶ 7.

Section 10(a)(1). Nothing in the Communications Act requires that CPE used for CMRS have charges, practices, classifications, or regulations that are reasonable and nondiscriminatory and, therefore preventing the use of CPNI without customer approval to market CPE for CMRS is not necessary to ensure reasonableness and nondiscrimination regarding the CPE. Moreover, CMRS carriers are nondominant, and lack market power. *Ipso facto*, even with respect to the CMRS common carrier offering itself, the first criterion is satisfied, because the competitive market will prevent any unreasonableness or discrimination.

Section 10(a)(2). The enforcement of the rule or application of the statute is not necessary to protect consumers. As indicated above, the market and the Commission's general authority ensure reasonable rates for consumers. With respect to privacy, consumers do not expect that CMRS carriers will not be allowed to communicate with them, without Section 222 approval, regarding all aspects of their relationship with the carrier, including the CPE used for CMRS. Indeed, forbearance will not even inconvenience or surprise customers, because carriers have been using CPNI within their respective marketing programs for quite some time with no discernible objections. Instead, the enforcement of the rule would surprise and harm customers by either denying them information about products they would be interested in, or subjecting them to marketing for products that they are very unlikely to want or be unable to use given their particular CMRS configuration. Thus, the prohibition on the use of CPNI without express customer approval is not necessary to protect consumers and is contrary to customer expectations and implicit approval.

Section 10(a)(3). Forbearance is in the public interest because it will reduce CMRS carriers' administrative costs to communicate with customers, and improve the effectiveness of those communications. Forbearance also will allow CMRS carriers to use CPNI to offer customers improved CPE, e.g., handsets with greater range, that may increase overall system efficiency. Forbearance will enhance the ability of CMRS carriers to introduce new and improved competitive services and products.

Forbearance will reduce administrative costs because carriers can use CPNI to identify customers who are most likely to be interested in new services and thereby avoid the wasted expense of marketing to customers who are unlikely to benefit. However, without forbearance of the Commission's current interpretation of Section 222, as interpreted by the *Clarification Order*, GTE will be prohibited from marketing CPE that is not part of a new package if GTE used CPNI to identify the customers and would have to blanket its entire customer base in order to reach the appropriate market.

Using a mass mailing to market new CPE to all customers is not always practical. Customers will be confused, and carriers handicapped in their ability to provide service, if the carrier cannot use CPNI to identify those customers who are most likely to benefit from a new product. Ultimately, the pace at which new services enter the marketplace and the hands of the public will be slowed. Such a result is contrary to the intent of the Telecommunications Act of 1996. The enhancement of carrier-customer communication through forbearance will promote competition among CMRS

carriers by making it easier to introduce new services. This is a goal encouraged by Section 10(b).[40]

The above factors amply support forbearance. There are no countervailing public interest factors. As indicated, a customer's reasonable expectation of privacy would not be affected by permitting carriers to use CPNI to market CPE for CMRS. Nor will competition be adversely affected by a stay. CMRS is an intensely competitive market already. If all carriers have the same right to use CPNI to market CPE, competition will proceed on a level playing field. Indeed, the most efficient method for competition to truly thrive in the CPE-CMRS marketplace, is by an open information exchange between customers and their carriers regarding CPE and CMRS.

B. CPE That Is Necessary To Enable the Introduction of Advanced Services

1. Section 222(c)(1)(B) Allows the Use of CPNI Without Customer Approval To Market CPE That Is Necessary To Enable the Introduction of Advanced Services

As indicated in the attached declaration of Robert Harvey, GTE has recently announced the introduction of the first of several advanced services: Asymmetric Digital Subscriber Line ("ADSL") service. The facts discussed below support a conclusion that the ADSL modem is either within the provision of ADSL service under Section

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[40] It is no objection to forbearance to argue that any given carrier has an advantage over others with respect to its own customer base for which it has CPNI. In the first place, in the competitive CMRS market, any so-called "advantage" merely represent the reward the market gave to efficient suppliers. Perhaps more significantly, even without forbearance a rival carrier will not be entitled to use another carrier's CPNI, absent written approval. *See* Section *272 Order* ¶¶ 46-48.

222(c)(1)(A) or is necessary to, or used in, ADSL service under Section 222(c)(1)(B). However, because GTE's roll-out of ADSL was only recently announced, the Commission did not have an opportunity to consider these special attributes of such advanced services in the *CPNI Second Order*.

Customers will expect GTE to use CPNI to market all the necessary components of these services, including CPE. ADSL uses standard phone lines to deliver information at speeds up to 6 megabits per second ("Mbps). For example, a 4-Mbps ADSL modem can download a 60-second video clip in near-real time, a task that takes a 28.8-kbps modem 45 minutes. ADSL technology also allows simultaneous voice and data transmission. This service will enable end users to experience vastly improved Internet access. At the same time, it will prevent the degradation of telephone service for all customers by taking the ever-increasing number of long-duration Internet calls off of the public switched telephone network ("PSTN"). ADSL service gives a virtual private line connection that is on all day, and is separate from the PSTN and does not create any blockage on the PSTN.

ADSL, like a number of other advanced services that GTE anticipates offering in the near future, requires specialized CPE, in this case a modem, to complete the transmission path to the end user's location. Today, ADSL modems are not standardized but must be specific to the ADSL provider's particular network and, at least during the early stages of service delivery, ADSL modems for GTE's network will not be available through retail channels.[41] Due to market uncertainty, during the initial

[41] This is not unlike the situation that existed prior to the development of an industry standard for 56 Kbps analog modems. That is, an end user had to obtain a modem that

(Continued...)

roll-out of ADSL, the modem manufacturer will likely produce a limited quantity of modems specifically for GTE. After the market develops, this situation may change. At present the only way an end user can obtain ADSL service from GTE or any other competing ADSL provider is by renting or buying a suitable modem from the underlying ADSL service provider or the Internet Service Provider ("ISP"). GTE will be making these modems available to ISP's so that they may make a bundled offering of the service to their customers. A similar limited distribution of CPE is likely during the early phase of other advanced services, such as VDSL (Very High Bandwidth Digital Subscriber Line).

ADSL modems are a functional part of the ADSL service, having virtually no use for any purpose other than to complete the transmission path of a specific provider's ADSL service. These modems are necessary for end user connectivity to the Internet, through the underlying ADSL provider and his ISP. Thus, the ADSL modem is inherently part of the ADSL offering. Moreover, end users will consider the ADSL modem to be part of the ADSL service and GTE will make this equipment available directly to end users or through their ISPs.

GTE will be marketing ADSL service to ISPs so that they may offer the service to their customers.[42] The modems will be made available by GTE to both end users and

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(...Continued)
was compatible with his ISP's chosen protocol.

[42] ADSL service will also be marketed to corporate local area netwokr ("LAN") customers which similarly provide Internet connectivity through telecommuting for their employees.

their ISPs because, although ADSL service will be marketed to ISPs, it is anticipated that some end users will order the service directly from GTE. Because these customers will be obtaining ADSL service directly from GTE rather than through an ISP, they will require that GTE make available to them the specialized modems which will provide their connectivity to the Internet.

All of these factors argue for treating ADSL CPE as part of the total service package for ADSL and finding that, in the nascent market, ADSL modems are as much of a "service" used in or necessary to a telecommunications service as is inside wiring. ADSL CPE will fall squarely within the customer's expectations regarding ADSL service due to the limited early market availability of the modems. While this may likely change in the future, for now customers would have no privacy expectation that a carrier would not use local service CPNI to market the entire, functional ADSL package, including the necessary modem. Customers have given implied approval of the use of CPNI to be notified of a service that will be regarded by many as an improvement to local service.

2. The Commission Should Forbear from Applying Section 222 To Prevent the Use of CPNI Without Customer Approval To Market CPE for Advanced Services Such as ADSL

As an alternative to reconsideration, the Commission should forbear from applying Section 222 to prevent the use of CPNI to market CPE for advanced services such as ADSL.

Section 10(a)(1). Nothing in the Communications Act requires that CPE used for advanced services have charges, practices, classifications, or regulations that are reasonable and nondiscriminatory and, therefore preventing the use of CPNI without customer approval to market such CPE that is not part of a bundled service package is

not necessary to ensure reasonableness and nondiscrimination regarding the CPE. Moreover, no carrier is dominant or has market power in the provision of ADSL or other advanced services because the market is so young. ADSL is envisioned as a competitive alternative to cable Internet access services. Cable companies are allowed to use their CPNI to market both the transmission service and the cable modem and the market's ability to police the charges for this advanced service is unchallenged.[43] Given this degree of competitiveness, the market will prevent any unreasonableness or discrimination. In any event, the Commission and State authorities can ensure that the charges, practices, classifications, or regulations of ADSL carriers are reasonable and nondiscriminatory without imposing a ban on the use of CPNI.

Section 10(a)(2). The enforcement of the rule or application of the statute is not necessary to protect consumers. As indicated above, the market and the Commission's general authority ensure reasonable rates for consumers. With respect to privacy, consumers do not expect that local or other carriers will not be allowed to communicate with them, without Section 222 approval, regarding improved Internet access packages that are complete and functional even though they include a currently scarce modem. The enforcement of the rule would confuse customers by either denying them information about products they would be interested in, or subjecting them to marketing for products that they are very unlikely to want or be unable to use given their particular usage of Internet access-type services. Thus, the prohibition on the use of CPNI

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[43] *See* Section 631 of the Act, 47 U.S.C. § 551.