representative.[28]

If an ILEC were actually to first learn of a customer's intention to switch in that manner, winback or retention marketing might be appropriate, since the ILEC would not be misusing any carrier proprietary information. That is typically not what happens in the real world, however. Contrary to the ideal scenarios depicted in the ILECs' petitions, customers do not, except in very rare circumstances, call their ILECs to let them know they are thinking of leaving and requesting a renegotiated monthly telephone bill. In almost all instances, ILECs actually first learn of a customer's switch when they receive the changeover order from the CLEC or the PIC change order from an IXC. Accordingly, the Commission should not fashion its CPNI implementation policy around an assumption that ILECs typically or often learn of a customer's intent to switch carriers directly from the customer in a voluntary communication initiated by the customer.

If, however, the Commission nevertheless decides to permit ILECs to use winback or retention marketing in the situation where they first learn of the customer's intentions from the customer, MCI requests that the Commission adopt the presumption proposed in MCI's Comments in response to the Further Notice, under which an ILEC would be presumed to have learned of a customer's intention to switch carriers in the provision of underlying local or access service to another carrier, rather

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[28] USTA Pet. at 7-8; BellSouth Pet. at 17 & n. 40.

than from the customer directly. Such a presumption could be rebutted, for example, by means of a recording of the inbound call.

The Commission should also make it clear that if ILECs are to be permitted to engage in winback or retention marketing in those situations where they can demonstrate that they learned of the intended switch directly from the customer, such marketing must not be conducted in a manner that exploits their monopoly position. For example, as MCI previously reported in this proceeding, Ameritech was found liable by the Michigan Public Service Commission for improperly attempting to "win back" customers wanting to switch to MCI in the course of three-way confirmation calls involving such customers, MCI and Ameritech representatives. Rather than simply asking the customer to confirm the switch to MCI during such calls, as required by the Michigan PSC, Ameritech used the opportunity to pressure customers not to switch and sometimes put the other two parties on hold for unreasonable lengths of time.[29] Thus, any winback or retention marketing by the ILECs, if allowed at all, must be strictly controlled and permitted only in the narrow circumstances discussed above.

In the past, some ILECs have complained that MCI's approach would create a double standard. Of course, that is not the case. No carrier may use carrier proprietary information for its own

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[29] See MCI News Release, "MCI Applauds Michigan PSC Ruling Finding Ameritech Practices Improper," May 12, 1998, attached as Exhibit A.

marketing purposes. It is simply that in the winback or retention marketing situation, ILECs are typically the only carriers that are in a position to use monopoly-derived carrier proprietary information. If, in fact, other carriers somehow are able to use carrier proprietary information for such marketing, that should also be prohibited.

GTE asserts that MCI's point about misuse of carrier proprietary information has nothing to do with winback marketing because "[w]in back is limited to information about a LEC's customers, not those other carriers."[30] It is not clear what GTE is trying to say here. Perhaps GTE fails to understand the difference between CPNI and customer-specific carrier proprietary information. The information used for winback marketing may be "about a LEC's customers," but that is irrelevant to the distinction that must be drawn here. Where the information comes to the ILEC on account of its role as the underlying service provider to a local service reseller that has won the customer's business, such as where it receives a changeover order from the reseller, that information is the proprietary information of the reseller and may not be used by the ILEC, even though the information is "about" the ILEC's soon-to-be-former local service subscriber.

Similarly, where an ILEC that has been providing local and long distance service to a customer receives a PIC change order from an IXC that has won the customer's long distance business,

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[30] GTE Pet. at 36, n. 62.

the PIC change information is the proprietary information of the IXC and may not be used by the ILEC. Thus, whether or not the information about an intended change of carriers concerns the soon-to-be-former customer of an ILEC, the ILEC may not use such information if it is derived from the ILEC's provision of service to a reseller or IXC that has won the customer.

USTA claims that the Commission "adopted the limitation on the use of CPNI for customer retention efforts without a record to support its conclusion,"[31] but as MCI has previously explained, that is incorrect. MCI discussed the issue last year in this proceeding in the context of its own experiences with ILECs' abuse of their monopoly status as the underlying network facilities-based service providers to CLECs reselling local service.[32]

B. Forbearance From the Application of the Winback Prohibition to ILECs Should be Denied

GTE and Bell Atlantic also request, in the alternative, forbearance from the application of the winback prohibition for all carriers. They argue that the rule is not necessary to ensure just and reasonable pricing, since it has nothing to do with pricing and, in fact, may inhibit price competition. They also claim that it is not necessary to protect consumers, since

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[31] USTA Pet. at 8.

[32] See Response to Commission Staff Questions Re: CC Docket No. 96-115 at 18-19, attached to ex parte letter from Frank W. Krogh, MCI, to William F. Caton, Acting Secretary, FCC, dated Aug. 15, 1997.

it will have no effect on them other than to provide them with more useful information about service and pricing options. Finally, they argue that elimination of the rule would be in the public interest because that would provide more opportunities for consumers to obtain lower prices. In that sense, GTE claims, the rule itself is anticompetitive.[33]

Here, too, MCI opposes forbearance from application of the winback prohibition for ILECs exploiting carrier proprietary information. As in the case of the forbearance arguments concerning service package enhancements, the ILECs' approach to forbearance in the winback context is too narrowly focused. For example, as the BOC Forbearance Order demonstrates, that the immediate focus of the rule is not on pricing is not the end of the analysis in applying the first forbearance criterion. It is necessary to assess the ultimate effect of the rule on competition and the impact of forbearance from application of the rule on the reasonableness of carriers' practices in light of such competitive effects.

In this case, forbearance would allow ILECs to forestall competition by using their informational advantages arising from their monopoly roles to retain customers intending to switch to competitive carriers. Such exploitation of monopoly advantages would constitute an unreasonable practice, within the meaning of Section 10(a)(1), and preventing such exploitation is necessary to protect consumers and to further the public interest, within

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[33] See, e.g., GTE Pet. at 37-39.

the meaning of Section 10(a)(2) and (a)(3), respectively. The ultimate negative impact on consumers of the diminished competition resulting from such tactics will outweigh any immediate benefits, since the long-term development of local competition is the only sure protection for consumers. Thus, none of the forbearance criteria are met in the case of ILEC use of carrier proprietary information for winback or retention marketing. The ILECs' requests for forbearance should therefore be denied.

III. CARRIERS OTHER THAN CMRS PROVIDERS SHOULD NOT BE PERMITTED TO USE CPNI TO MARKET CPE AND INFORMATION SERVICES WITHOUT CUSTOMER APPROVAL

Various parties request that some or all carriers be permitted to use CPNI to market some or all CPE and information services without customer approval, based on a number of different rationales. Most of these parties point out various inadequacies in the Bureau's Clarification Order that necessitate further relief.[34] Some parties request such relief only for CMRS providers, while others request such relief for all competitive carriers or small and rural carriers. MCI agrees with the CMRS providers that the unique relationship of such services with related CPE and information services justifies the use of CPNI derived from the provision of CMRS to market such CPE and information services without customer approval. Such use of CPNI is appropriate either under the total service approach or as

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[34] See, e.g., BellSouth Pet. at 14-16.

"necessary to, or used in, the provision of" CMRS under Section 222(c)(1)(B). Forbearance relief would also be appropriate for the use of CPNI to market CPE and information services in connection with CMRS.[35]

MCI opposes, however, any such relief for the use of CPNI to market any CPE or information services outside the CMRS context. None of the parties seeking reconsideration or forbearance on this issue has presented the same type of justification that has been demonstrated for CMRS-related CPE and information services. All such requests should therefore be denied.

A. No Relief Should be Granted as to Non CMRS-Related CPE

1. Reconsideration as to the Use of CPNI to Market CPE Without Customer Approval Should be Denied

A number of ILECs request that they be allowed to use CPNI without customer approval to market CPE in connection with various services. GTE, Bell Atlantic and TDS argue that the Commission should permit CPNI to be used without customer approval for the marketing of CPE used in connection with ADSL and other Digital Subscriber Line services and other advanced services, such as ATM and ISDN.[36] GTE argues that customers expect carriers to use CPNI to market all of the necessary components of such services. Facilitating the marketing of such services, in turn, will supposedly take long-duration Internet

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[35] See, e.g., Omnipoint Pet. at 3-13.

[36] See, e.g., TDS Pet. at 8-9.

calls off of the public switched telephone network (PSTN), presumably by putting them on the LECs' packet-switched networks used to provide ADSL and other advanced services.[37]

GTE and TDS add that ADSL and other advanced services modems are not standardized but must be specific to the provider's particular network and will not be available through retail channels, at least initially.[38] Such modems are therefore inherently part of the ADSL service and should be considered within a carrier's total local telephone service offering, since customers would consider them to be part of an improvement to local service. According to GTE, provision of ADSL modems should therefore be considered within the provision of ADSL service within Section 222(c)(1)(A) or necessary to or used in such service under Section 222(c)(1)(B).[39]

GTE's anticompetitive motive is revealed in its admission that ADSL modems are not available through retail channels, at least right now.

> Due to market uncertainty, during the initial roll-out of ADSL, the modem manufacturer will likely produce a limited quantity of modems <u>specifically for GTE</u>. After the market develops, this situation may change.[40]

In other words, GTE has an equipment distribution monopoly for a limited time, and it needs to exploit that monopoly to the

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[37] GTE Pet. at 15-16.

[38] <u>See, e.g.</u>, TDS Pet. at 8-9.

[39] GTE Pet. at 16-18.

[40] <u>Id.</u> at 16-17 (emphasis added).

fullest while it is in a position to do so. One way to do that, of course, is to shut out potential competition by using its exclusive control over the customer's local service CPNI, without customer approval, to market the necessary equipment before a competitive market has a chance to develop.

GTE suggests that the modems will become more widely available "[a]fter the market develops," but the competitive modem distribution market will not develop if GTE and other ILECs monopolize it now. It is especially inappropriate to consign the nascent ADSL and related equipment markets to GTE and the other ILECs in light of the work going on now under the auspices of the Universal ADSL Working Group (UAWG), which includes GTE, other ILECs, MCI, other competitive carriers and equipment manufacturers. According to its home page, the UAWG is developing technical standards leading toward a "universal" consumer version of ADSL, providing consumers with assurance that products and services will work together. The UAWG foresees Universal ADSL modems being a preferred PC modem technology by 2000.

Thus, it is especially crucial during the next couple of years that nothing interfere with the uninhibited development of a competitive ADSL equipment market. Nothing could be worse for such competition than to allow ILECs to use their monopoly-derived local service CPNI without customer approval to market ADSL equipment. Such an approach would permit ILECs to sew up the ADSL and related equipment markets before competitors had a

chance to identify and market to the ILEC customers most likely to desire such services. TDS raises a concern that the restriction on the use of CPNI in these circumstances may inconvenience customers by withholding necessary information from them about equipment that is necessary to be able to use the advanced services they desire.[41] If, however, the Commission were to permit targeted customer approval solicitations, as MCI suggests herein, that should not be an obstacle to full customer awareness of all of the necessary facts. TDS' complaint that securing such approval would be too burdensome for small carriers, discouraging them from entering new markets, is not credible.[42] In any event, if a small carrier faces unique circumstances, it can seek a partial waiver of the CPNI rules.

Thus, GTE has it backwards -- that there may be fewer sources of supply of ADSL equipment in the short run is no reason to forestall competition by allowing ILECs to exploit their CPNI advantages. Indeed, it is especially crucial during this period that the CPNI rules be strictly enforced. Typically, the roll-out of any new service follows a similar pattern; i.e., it is available only from a narrow group of carriers at first, followed by a wider source of supply as the market develops. The narrowness of the range of suppliers at the outset has never been considered any reason to allow bundling of the new service and related equipment or any other policy that would interfere with

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[41] TDS Pet. at 9.

[42] TDS Pet. at 10.

the development of a separate equipment market.

Accordingly, this is precisely the type of situation that led the Commission to find that "restricting CPNI use in the CPE market" is necessary to "protect competitive concerns regarding CPNI use."[43] Granting the relief sought by GTE thus would undermine the competitive goals of Section 222 and do permanent, severe damage to the developing ADSL market and other advanced service markets, as well as to the related equipment markets.

Other ILECs raise similar arguments covering a wider range of CPE. BellSouth and other ILECs request that CPE generally, or at least "specialized CPE needed for specialized services," such as Caller ID/Call Waiting-related CPE, be treated as part of a carrier's related total service offering under Section 222(c)(1)(A) or as necessary to or used in the provision of the service with which it is used under Section 222(c)(1)(B).[44] Bell Atlantic argues that various types of CPE, including Caller ID and Call Waiting-related CPE, are covered by Section 222(c)(1)(B).[45] Ameritech argues that any CPE that is "reasonably related to" a carrier's telecommunications service offerings should be treated as within the total service relationship in Section 222(c)(1)(A).[46] ALLTEL requests that the Commission eliminate restrictions on the use of CPNI to market CPE

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[43] Order at ¶ 75.

[44] BellSouth Pet. at 5-9.

[45] Bell Atlantic Pet. at 5-7.

[46] Ameritech Pet. at 2-5.

generally.[47] LCI and CompTel request such relief only for competitive carriers.[48] The ILECs argue that customers' expectations will be frustrated if they are not told about CPE used with their services.[49] SBC argues that if CPE were included within the scope of Section 222(c)(1)(B), it would apply to all carriers equally, thus providing no competitive advantage, and points to the robustly competitive nature of the CPE market.[50]

Various ILECs liken CPE to inside wiring, another product the provision of which was treated as a service necessary to or used in the provision of a telecommunications service under Section 222(c)(1)(B). They conclude that the offering, installation, maintenance and repair of CPE is a service necessary to or used in the provision of telecommunications service.[51] BellSouth argues that, especially in the case of "specialized CPE," such as Caller ID display units, the related service has no utility without the CPE. It points out that the Commission has defined inside wiring as "`the customer premises' portion of the telephone plant," and thus no different from customer premises equipment.[52] Bell Atlantic points out that inside wiring has been defined to include certain items that

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47 ALLTEL Pet. at 6-7.

48 LCI Pet. at 7-11; CompTel Pet. at 14-18.

49 See, e.g., BellSouth Pet. at 6-7.

50 SBC Pet. at 5-6.

51 See, e.g., USTA Pet. at 3-5.

52 BellSouth Pet. at 9 (emphasis in original).

constitute CPE, and to that extent, the Commission has already found that the installation of some CPE is part of a carrier's total service offering. It argues that there is no reason to draw a distinction now between CPE that is part of inside wiring and other types of CPE.[53]

The problem is, of course, that CPE cannot be transformed into a "service" by putting words like "offering" in front of it. The installation of inside wiring is clearly distinguishable, since it is the installation that is crucial; no one buys wiring for do-it-yourself telecommunications service installation. That some inside wiring might include certain CPE cannot change the essential distinction between the installation of inside wiring and the sale of CPE. This leaves Section 222(c)(1)(B) out as a possible source of authority for what the ILECs are requesting.

Moreover, CPE should not be considered part of a carrier's total service offering. Whether or not all carriers might be free to treat CPE in such a manner, ILECs would reap a disproportionate benefit from such an approach, since they possess more CPNI that could be used for such marketing. As a practical matter, the types of CPE that the petitioners are focusing on are used with local services, primarily. Since ILECs possess vastly greater amounts of CPNI than CLECs, being allowed to use CPNI to market such CPE without customer approval will greatly favor the ILECs. Thus, treating CPE as part of a carrier's total service offering would defeat the competitive

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[53] Bell Atlantic Pet. at 4-5.

goals of Section 222.[54]

Ameritech suggests that the Commission's "implied consent" rationale for the total service approach in the Order requires that the types of CPE that customers would expect a carrier to market to them should be included within the total service approach. It cites a survey showing that a high proportion of customers believe that it is appropriate for their local telephone company to offer products such as Caller ID Display units and telephones.[55] The problem is that Ameritech asked the wrong question. Nothing in the Order prevents a carrier from marketing or jointly marketing any services and products. It only prevents the use of CPNI for marketing in certain circumstances. The competitive goals of those restrictions, embodied in legislative language that limits unapproved CPNI use to the provision of "the telecommunications service from which such information is derived," cannot be overridden by a survey.

Although the competitive risks are reduced in the case of requests that competitive carriers or small carriers be allowed to use CPNI without customer approval to market CPE, the statutory arguments for such relief remain just as weak. CPE is no more a part of a non-CMRS competitive carrier's total service offering under Section 222(c)(1)(A) than it is a part of an

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[54] For the same reasons, USTA is incorrect in asserting, at 5, that including the provision of CPE within the scope of Section 222(c)(1)(B) would not shift the competitive balance in the CPE market.

[55] Ameritech Pet. at 3-5.

ILEC's total service offering, nor is it a "service" that is necessary to or used in the provision of a telecommunications service under Section 222(c)(1)(B).

Unlike CPE used in connection with CMRS, there is no regulatory history or licensing regime treating CPE used in connection with wireline services as an element of such services. Wireline services and related CPE are not as intertwined as CMRS and related CPE. That is why a separate, fully competitive CPE market has developed irrespective of the degree of competition in the service markets for which the CPE is used. Accordingly, there is no reason to treat CPE used in connection with wireline services as part of the service offering under Section 222(c)(1)(A) or as necessary to or used in the provision of such service under Section 222(c)(1)(B).

2. Forbearance Allowing the Use of CPNI to Market CPE Without Customer Approval Should be Denied

In the alternative, various ILECs request that the Commission forbear from the application of Section 222(c)(1) to the marketing of various categories of CPE: in the case of GTE, CPE used for advanced services such as ADSL, ATM and frame relay; in the case of Bell Atlantic, Caller ID/Call Waiting-related CPE; and in the case of Ameritech and USTA, any CPE related to any service.[56] According to those carriers, such forbearance meets the criteria of Section 10.

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[56] GTE Pet. at 18-21; Ameritech Pet. at 5-6; USTA Pet. at 5-6.

They argue that enforcement of Section 222(c)(1) as to equipment is not necessary to ensure reasonable practices or charges in connection with any telecommunications service, under Section 10(a)(1), since such application of Section 222(c)(1) to equipment does not affect any service. Moreover, the ADSL market is so competitive that application of Section 222(c)(1) is not necessary to ensure reasonableness or nondiscrimination, according to GTE.[57] Bell Atlantic argues that the services with which the CPE is used are either regulated or subject to competition and that such services must be made available separately from any CPE at an unbundled rate, precluding any concerns as to reasonableness.[58]

They claim that Section 10(a)(2) is satisfied, since enforcement of Section 222(c)(1) as to CPE is not necessary for the protection of consumers. In fact, they argue, forbearance would enable customers to obtain information they need about products they would want and thus would permit CPNI use in line with customers' expectations and "implied consent."[59] Bell Atlantic argues that the Commission already found, a decade ago in the CPE Reconsideration Order, that it is in consumers' interests for the BOCs to use CPNI in the joint marketing of network services and CPE and accordingly allowed opt-out approval for use of CPNI for such purpose. Bell Atlantic concludes that

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[57] GTE Pet. at 19.

[58] Bell Atlantic Pet. at 10.

[59] Ameritech Pet. at 5-6.

such a policy has been proven effective by the intense competition in CPE.[60]

They argue that Section 10(a)(3) is satisfied, since forbearance would be consistent with the public interest. Bell Atlantic argues that the intense competition that developed in CPE since opt-out approval was authorized in the CPE Order and CPE Reconsideration Order shows that the unapproved use of CPNI to market CPE would be in the public interest.[61] GTE bases its public interest conclusion on the fact that forbearance would enable GTE to roll out ADSL and other advanced services effectively, thereby mitigating a principal source of PSTN blockage and overload. It argues that competition will not be harmed, since the necessary modems can only be obtained from the ADSL service provider or the end user's information service provider (ISP), and this is true of any other ADSL provider.[62]

As in the previous discussions of forbearance, these analyses are too narrow in scope. For example, forbearance does not satisfy the first criterion of Section 10(a) simply because CPE, rather than a telecommunications service, is directly involved. Section 10(a)(1) is satisfied only if enforcement of the rule in question "is not necessary to ensure that the charges, practices ... by, for, or in connection with that telecommunications carrier or ... service are just and

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[60] Bell Atlantic Pet. at 11-12.

[61] Id. at 12.

[62] GTE Pet. at 20-21.

reasonable...." (Emphasis added). Thus, the practices of a carrier in connection with any service or product must be reviewed in deciding whether to allow forbearance.[63] Moreover, it is also necessary to consider whether enforcement of Section 222(c)(1) as to CPE is necessary to ensure that the charges and practices in connection with the service itself will be reasonable.

In assessing whether the first criterion under Section 10(a)(1) will be met, it is not enough that the ADSL market and other advanced service markets are fully competitive now or that the other local services with which CPE is to be used are regulated and that all such CPE must be made available separately from the related service. As discussed above, if ILECs are permitted to use their vast, monopoly-derived CPNI databases to market CPE to be used with advanced or other services without customer approval, they will be able to significantly forestall the development of competition in such services and CPE.

That the local services with which the CPE is used are regulated does not support forbearance, because the 1996 Act overall and Section 222 in particular are looking toward the ultimate deregulation of local service with the development of local competition. The current regulation of local services thus

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[63] For example, in the BOC Forbearance Order, in deciding whether to grant forbearance from the application of Section 272 to BellSouth's reverse directory service, an information service, the Commission reviewed the reasonableness of BellSouth's practices in connection with that service under Section 10(a)(1).

cannot salvage a forbearance request that would allow ILECs to forestall such competition. Such a negative impact on competition through the exploitation of a monopoly-based advantage makes the unapproved use of CPNI in these circumstances an unreasonable practice in connection with the provision of both the services involved and the related CPE.

As to the second forbearance criterion, the harm to competition of unapproved use of CPNI in these circumstances, as discussed above, will ultimately have a negative effect on the choices and rates that consumers of advanced services and other local services face. Thus, enforcement is necessary to protect consumers. That the Commission allowed the use of opt-out approval for the use of CPNI to market CPE a decade ago has been rendered irrelevant by the 1996 Act and the nascent competition that has developed in local services. A decade ago, there was no need to consider the possible impact on local service competition of the use of CPNI to market CPE. Now, it is crucial that the ILECs not be allowed to exploit any monopoly-derived advantages to forestall competition from other carriers that do not possess the ILECs' tremendous CPNI databases.

Finally, forbearance would not be in the public interest. GTE claims that

> [c]ompetition will not be affected adversely because, for the time being, the necessary modem can only be obtained through the ADSL service provider or the end user's ISP, and this is true of any other competing ADSL providers, as well as GTE.[64]

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[64] GTE Pet. at 20.

The problem is that there will not be any other competing providers if GTE and other ILECs are able to forestall competition, as discussed above. That there are so few sources of ADSL CPE is a reason for strict enforcement of Section 222(c)(1), not forbearance from its application. GTE argues that forbearance is not anticompetitive because carriers are free to use CPNI to market ADSL service, and they may sell ADSL modems along with the service.

Again, the problem is that they will also forestall competition in the supply of modems if they can use CPNI without approval to sell the modems, and since the service and the modems will be marketed together, they will also forestall local service competition. If GTE is so concerned about consumers not being able to obtain the equipment they need to use with ADSL service, and has difficulty in securing their approval to use their CPNI to market such equipment, it can take steps to make sure that its customers have sufficient information about other sources of supply of such equipment, such as the manufacturer.

Finally, for the reasons already stated, Bell Atlantic's point that opt-out CPNI approval has not prevented the development of CPE competition does not meet the public interest criterion, since the ILECs' use of their CPNI advantage to market CPE will tend to forestall local service competition. Thus, none of the forbearance criteria can be satisfied in the case of the unapproved use of CPNI to market CPE to be used with advanced services and other local services.

B. No Relief Should be Granted as to Non CMRS-Related Information Services

1. Reconsideration as to the Use of CPNI to Market Information Services Without Customer Approval Should be Denied

Various ILECs request that voice mail, related store-and-forward services and short message services be considered part of a carrier's total service offering under Section 222(c)(1)(A) or "necessary to or used in the provision of" telecommunications services under Section 222(c)(1)(B).[65] Bell Atlantic and TDS also request such relief for Internet access, and Bell Atlantic requests relief for protocol conversion functions.[66] ALLTEL requests such relief for information services generally.[67] To the extent that such relief would extend beyond information services provided in connection with CMRS, MCI opposes such requests. Most of the ILECs' arguments on this point involve the CMRS context;[68] they never make a persuasive case for the wireline context. Voice mail, for example, may be a convenient addition to a package of local services, but it is not "necessary to, or used in the provision of," those services.[69]

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[65] See, e.g., BellSouth Pet. at 9-11

[66] See, e.g., TDS Pet. at 7

[67] ALLTEL Pet. at 6-7.

[68] See, e.g., GTE Pet. at 22-23; BellSouth Pet. at 11-13.

[69] This is not to say that voice mail is not a necessary element of a total local service package in order to enable local service resale competition to develop. The Section 222 issue is whether the voice mail service is technically necessary to

SBC, BellSouth, TDS and NTCA argue that these information services are little different from, and are perceived by customers as no different from, the "adjunct to basic" functions, such as Caller ID and Call Waiting, that are considered part of the total service offering.[70] Similarly, Ameritech argues that customers perceive such information services as being part of their overall service relationship with the carrier, and the "implied consent" rationale for the total service approach should apply to such services.[71] Bell Atlantic argues that all of the information services for which it seeks relief are necessary to complete a communication.[72] BellSouth argues that "necessary to" in Section 222(c)(1)(B) should be read in the same manner as it has in other statutory contexts, as meaning "useful," rather than strictly necessary to the provision of a telecommunications service. It cites the example of voice mail as a service that customers perceive to be a useful service control function, along with call waiting or call forwarding, and thus part and parcel of their local service.[73]

In marketing terms, these parties may be correct. Information services, however, cannot be part of a total

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provide a telecommunications service, rather than whether the two should be provided together.

[70] E.g., NTCA Pet. at 6-7; BellSouth Pet. at 6-7; TDS Pet. at 6.

[71] Ameritech Pet. at 3-5.

[72] Bell Atlantic Pet. at 7-9.

[73] BellSouth Pet. at 10.

telecommunications service offering within the meaning of Section 222(c)(1)(A), because, technically, they are not "telecommunications" services.

More importantly, the unapproved use of CPNI to market such services will tend to disrupt the uninhibited competition that now exists in information services. Since all of the information services these parties discuss are used largely with local services, local service CPNI will be extremely useful in marketing such information services. The ILECs thus would be able to leverage their monopoly-derived local service CPNI advantage in the information services market if they were allowed to use such CPNI without customer approval to market information services. Such leveraging of monopoly advantages would forestall competition in all of the information services used with local service, thereby defeating the competitive goals of Section 222.

TDS argues that the inability to use CPNI to market Internet access without customer approval will make it more difficult for rural LECs to bring this service to their customers' attention and asserts that such access through the LEC is often the only option reasonably available for rural areas to gain access to the Internet.[74] If, in fact, other competitive alternatives are not available in a certain area for Internet access or other information services, a LEC serving such an area could seek a partial waiver of the CPNI rules in order to make up for the lack of alternative sources of supply. The Commission's general

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[74] TDS Pet. at 7.

approach to the interpretation of Section 222(c)(1), however, should not be based on the experiences of a few rural LECs. It is even more crucial in this early phase of Internet development than for most information services that ILECs not be able to delay the development of Internet competition and local service competition by exploiting their CPNI advantages.

2. Forbearance Allowing the Use of CPNI to Market Information Services Without Customer Approval Should be Denied

Various ILECs' requests for forbearance relief in the alternative should also be denied. Their arguments parallel their forbearance arguments as to the use of CPNI to market CPE and are equally invalid.[75] They argue that forbearance would meet the first criterion of Section 10(a) because limiting the use of CPNI to market information services is not necessary to ensure just and reasonable rates and practices in connection with any telecommunications service. As the analysis involving BellSouth's reverse directory services in the BOC Forbearance Order demonstrates, however, that is not an adequate review of the first forbearance criterion under Section 10(a). Whether an information or telecommunications service is involved, the competitive impact of forbearance must be considered.

GTE argues that no carrier has market power in these competitive information services markets, and Bell Atlantic argues that such services are subject to the Computer III

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[75] See, e.g., Ameritech Pet. at 5-6.

nondiscrimination safeguards,[76] but, as the BOC Forbearance Order also demonstrates, that analysis does not go far enough. Permitting the unapproved use of CPNI to market information services would allow the ILECs to exploit their monopoly-derived CPNI advantages to gain a competitive advantage in a market that is vulnerable to such abuses. Moreover, being able to use CPNI to market information services will give ILECs an advantage in marketing packages of telecommunications and information services that will delay the development of local service competition. Such an anticompetitive impact would cause such use of CPNI to be an unreasonable practice.

The same competitive impact defeats their arguments with regard to the other forbearance criteria. It is not enough to argue that forbearance might facilitate carrier marketing of information services in line with customers' expectations.[77] The ultimate impact on competition must be analyzed. The current competitive nature of the information services market is not sufficient to protect consumers if CPNI may be used to market information services without approval. The anticompetitive impacts of such CPNI use on both information and telecommunications service markets, as discussed above, will ultimately harm consumers. Bell Atlantic argues that the joint marketing of local and information services without prior CPNI approval that has been permitted under Computer III demonstrates

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[76] See, e.g., GTE Pet. at 24.

[77] See Ameritech Pet. at 5-6.