customer approvals for the use or disclosure of CPNI should not be considered marketing. As MCI explained in its Opposition to other parties' petitions for reconsideration, the solicitation of customer approvals is more in the nature of the type of account maintenance "housekeeping" that is performed continually in the provision of telecommunications service. Thus, using BOC customer list information for customer approval solicitation does not conflict with the BNA rules.

For the same reason, SBC is incorrect in asserting that the use of customer list information to solicit customer approvals is another activity encompassed within the Section 272(g)(3) exemption.[39] Such solicitation is not marketing. Thus, the provision and use of customer lists for such purposes is fully subject to the nondiscrimination requirements of Section 272(c)(1). In any event, as explained above, the use of CPNI is not covered by the Section 272(g)(3) exemption, and the use of customer lists to solicit customer approval to use CPNI is even further removed from the joint marketing covered by Section 272(g).

Moreover, the BNA rules must now be read in conjunction with Section 272. Accordingly, if a BOC chooses not to make customer list information available to a requesting carrier for customer approval solicitation purposes, the BOC may not use such

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11 FCC Rcd. 6835 (1996), aff'd, AT&T Corp. v. FCC, 113 F.3d 225 (D.C. Cir. 1997).

[39] SBC Comments at 14.

information, in any form, for such purposes, nor may it provide such information to its affiliate for similar purposes.

US West also objects to MCI's argument that, because a BOC's customer base represents a monopoly legacy, rather than the result of marketing effort, a BOC customer list does not constitute proprietary information. US West asserts that "a number of carriers refused to provide [such] information on proprietary grounds" prior to the passage of the 1996 Act and states that customer list information remains proprietary to the extent it is not SLI.[40] Aside from such claims by unnamed carriers, US West provides no response to MCI's argument that a monopoly-derived customer list is not proprietary.

SBC quarrels with MCI's assertion of need for such customer lists, stating that it is MCI and other IXCs that have a head start in the long distance market, not the BOCs. BellSouth makes a similar argument against the application of nondiscrimination rules generally to CPNI.[41] SBC also asserts that since the long distance market is more "fragmented" than the local service market, BOCs are more disadvantaged than IXCs in not knowing the identity of their subscribers' long distance carriers.[42] SBC and BellSouth are mixing apples and oranges.

Taking MCI as an example, it only has current CPNI for a fraction of the subscribers in any BOC's service territory,

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[40] US West Opp. at 13, n. 30.

[41] BellSouth Comments at 15-16.

[42] SBC Comments at 14.

whereas the BOC has current CPNI for almost all such subscribers. As SBC points out, the long distance market is more fragmented than the local service market. Thus, in the coming joint marketing contests, as BOCs obtain authority to provide in-region long distance service state by state, the BOCs will have a more complete statewide CPNI database than any IXC.

The BOCs' CPNI is derived from the provision of local service; as BellSouth points out, they need customer approval to use their CPNI for long distance marketing. Once they do secure the customer's approval, however, the CPNI may be used for joint local and long distance service marketing. MCI needs the BOCs' customer lists in order to solicit customers' approvals to obtain their CPNI from the BOC. Even then, MCI will be far from caught up with any given BOC, since not all of the BOC's customers will consent to disclosure of their CPNI to MCI. BOCs do not have a similar need to know their subscribers' presubscribed IXCs, since the fragmented nature of the long distance market makes that information inherently less useful, especially within any given state, and since the BOCs already have CPNI for almost every customer in any given state. Thus, none of the BOCs has rebutted MCI's position that the BOCs should be required to provide customer list information to requesting carriers in order to solicit customer approvals to use or disclose their CPNI.

Among the categories of non-CPNI customer-specific information that should be subject to the Section 272 nondiscrimination requirements are primary interexchange carrier

(PIC) information and "PIC-freeze" information. Some of the ILECs dispute MCI's explanation that such data is not CPNI, but, aside from asserting the opposite conclusion, they do not explain how the identity of a customer's long distance carrier is the "type" of service used by the customer.[43] As the Clarification Order found, the information in a carrier's customer list is not CPNI; neither is any customer's PIC choice CPNI. GTE argues that a customer's PIC is shown on telephone bills and is therefore CPNI under Section 222(f)(1)(B),[44] but such information does not "pertain to" the details of the service, such as call records.[45] GTE also claims that PIC-freeze information is CPNI because it indicates a customer's preference for how service changes should be accomplished.[46] How changes in service providers should be processed, however, does not relate to the "type" of service chosen by the customer, but, rather, is a generic procedural choice.

F. The ILECs Have Not Rebutted MCI's Argument That the

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[43] See, e.g., Bell Atlantic Opp. at 5-6; US West Opp. at 23-24. US West also states that the Commission should not opine on this issue while it is pending in the Operations and Billing Forum. Id. at 23, n. 52. US West does not explain how that technical standards forum will be resolving CPNI issues, however.

[44] GTE Comments/Opp. at 23.

[45] See AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co., No. A 96-CA-397 SS (W.D. Tex. Oct. 4, 1996), slip op. at 7 (Section 222(f)(1)(B) refers to "the facts, the data, the raw knowledge regarding customer usage, times, etc.").

[46] GTE Comments/Opp. at 24.

Same Nondiscrimination Requirements Should Apply to All ILECs Under Sections 201(b) and 202(a)

GTE and Sprint also challenge MCI's argument that the same nondiscrimination requirements apply to all ILECs, including the BOCs, through Sections 201(b) and 202(a) of the Act. GTE argues that there is no basis to conclude that the broad nondiscrimination requirements of those provisions impose a specific disclosure obligation under Section 222.[47] GTE does not explain why that should be the case, however, and the Commission has already found in the Order that there is no such bar to the application of Sections 201(b) and 202(a) to require ILECs to disclose CPNI to third parties.[48]

Sprint argues that MCI's approach is undercut by Congress' decision to limit the scope of Section 272 to the BOCs and that the Commission therefore should not read into Sections 201(b) and 202(a) the same requirements that are imposed by the more specific terms of Section 272(c)(1). Sprint also claims that the different statutory standards coincide with the lesser degree of market power exercised by the non-BOC ILECs, given their smaller sizes. Sprint agrees with MCI's position as to the anticompetitive nature of Southern New England Telephone Company's (SNET's) PIC-freeze practices, but concludes that such conduct does not justify invoking Sections 201 and 202 in the manner advocated by MCI to all ILECs. Finally, Sprint states

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[47] GTE Comments/Opp. at 21.

[48] See Order at ¶¶ 85 & n. 316, 166.

that if Sections 201 and 202 could be applied in the manner suggested by MCI, the same requirements could be applied to nondominant carriers as well.[49]

Although it is true that the nondiscrimination requirements of Sections 201 and 202 are not perfectly congruent with those of Section 272(c)(1), Sprint has not explained why, in a given situation, the two sets of requirements could not impose the same outcome. In other words, where particular conduct would have an unreasonable effect, there is no reason why such conduct could not violate the Section 201(b) and 202(a) prohibitions against unreasonable practices as well as the absolute prohibitions in Section 272(c)(1).[50]

Sprint suggests that the ILECs' lesser size and scope is a reason not to find such unreasonableness in the case of ILEC refusals to provide CPNI on a nondiscriminatory basis to unaffiliated entities, but the Commission indicated in the Order that such practices "involving use or disclosure of customer information that unreasonably favors the incumbent LEC" would violate Section 201(b).[51] Sprint has not explained why it would not be unreasonable for the ILECs to gain a competitive advantage

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[49] Sprint Opp. at 6-8.

[50] See 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, DA 98-220 (released Feb. 6, 1998)(BOC Forbearance Order), at ¶¶ 81-84 (certain discriminatory conduct violates both the "just and reasonable" standard in Section 10(a)(1) and the absolute nondiscrimination standard in Section 272(c)(1)).

[51] Order at ¶ 85, n. 316.

by refusing to provide unaffiliated entities access to CPNI on the same basis as the ILECs' own long distance operations. As in the case of the BOCs, it is a monopoly-derived customer database advantage that is being exploited in order to gain a favorable competitive advantage, and it should be equally forbidden.

GTE also claims that requiring an ILEC to disclose CPNI to a third party "merely based upon that party's oral representation that a customer has authorized the release of his CPNI would impermissibly erode the protections of Section 222."[52] It is the customer's approval that would be oral, however, not the third party's representation; the third party could transmit its notification of the customer's approval electronically or by some other reasonable means under MCI's approach.[53]

GTE also argues that MCI's approach "would remove carriers' ability to obtain adequate and reasonable assurance that the consumer did, in fact, give approval for the release of CPNI."[54] As MCI also proposed, however, if it becomes necessary for the third party to back up its notification that it has obtained the customer's approval for CPNI disclosure, it should be permitted to do so by any reasonable means -- such as audiotape recording,

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[52] GTE Comments/Opp. at 21.

[53] One approach would be to include in interconnection agreements a provision that the requesting carrier will not submit a request for CPNI, other than for the initiation of service, unless it has customer approval, together with an indemnification provision to cover instances where the carrier did not have such approval.

[54] GTE Comments/Opp. at 21.

third party verification or some other method -- just as a carrier must be able to demonstrate that it obtained the customer's oral approval to use the CPNI in its possession.[55] Contrary to GTE's insulting suggestion, there is no reason to expect that an IXC's claim that it has obtained a customer's oral approval for another carrier to disclose the customer's CPNI to the IXC is any less credible than an ILEC's assertion that it has obtained a customer's oral approval to use the CPNI in its possession.

G. Clarification is Needed on the Status of CPNI as an Unbundled Network Element

The ILECs are all over the lot on MCI's alternative request that the Commission confirm that CPNI constitutes an unbundled network element (UNE) that must be provided to requesting carriers on a nondiscriminatory basis under Section 251(c)(3) of the Act. As far as US West is concerned, MCI has already "won" that point, "since the Commission essentially granted to non-LEC carriers the relief that MCI claims it seeks."[56] GTE, on the other hand, appears to regard MCI's request as a novel idea that should be rejected, since ILECs' obligations to provide access to UNEs has already been defined in the Local Competition proceeding.[57]

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[55] See Order at ¶¶ 120-21.

[56] US West Opp. at 8, n. 21.

[57] GTE Comments/Opp. at 22.

SBC is even internally inconsistent, stating at one point that "[t]here is no support for such a conclusion; under no circumstances can Section 251 `trump' Section 222," and, in the next paragraph, that the Order states that "a carrier failing to disclose a customer's service record to a competing carrier" needing it to initiate service "operates at its own peril under Sections 201(b), 251(c)(3) and 251(c)(4) of the Act."[58] Ameritech argues that the Order merely states that "CPNI may need to be disclosed in the ordering phase upon oral approval ... in order to facilitate a ... [CLEC's] ability to serve that ... customer," but that CPNI is not itself a UNE, which is limited to technical information.[59]

Finally, Bell Atlantic takes an even harder line, asserting that the Commission only found that under Section 251, an ILEC needs to disclose certain information necessary for the provisioning of service but did not find that CPNI constitutes a UNE. Bell Atlantic argues that UNEs are either physical facilities or information provided by means of one of the physical elements of the network and that the requirement to provide UNEs is only triggered when the requesting carrier has subscribed to a physical element for which it needs to bill.[60]

The ILECs clearly need guidance on this issue, although US West is somewhat closer to the truth than the others. The

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[58] SBC Comments at 15.

[59] Ameritech Comments at 8.

[60] Bell Atlantic Opp. at 6-7.

Commission accordingly should reaffirm that CPNI and other customer information constitutes a UNE that BOCs and other ILECs must provide to all requesting carriers under Section 251(c)(3) of the Act on a nondiscriminatory basis. Moreover, contrary to the ILECs' interpretations, the provision of CPNI as a UNE should not be limited to the initiation of service. Thus, if a BOC or other ILEC uses CPNI for marketing upon the customer's oral approval, it must provide CPNI to any requesting carrier for marketing "upon the oral approval of customers."[61]

The ILECs' restrictive definitions of the term "unbundled network element" should not stand in the way of such a Commission finding, since the ILECs' views on that issue were rejected by the Eighth Circuit. In determining that operations support systems (OSSs) constitute UNEs, the Court rejected the ILECs' "narrow interpretation of the Act's definition of `network element'" as "limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B."[62]

The Court focused on the second sentence of the definition of "network element," which includes "features, functions, and capabilities ... including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other

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[61] Order at ¶ 166.

[62] Iowa Utilities Bd. v. FCC, 120 F.3d 753, 808 (8th Cir. 1997)(subsequent history omitted).

provision of a telecommunications service."[63] It observed that "the information and databases" of OSSs "constitute features, functions and capabilities that are provided through the use of software and hardware that is used in the commercial offering of telecommunications services" and that the definition specifically includes subscriber numbers, databases and information sufficient for billing and collection. Accordingly, the Court held that such features as operator services and directory assistance are UNEs because "[t]he commercial offering of phone services ... implicates the use of operator services and directory assistance."[64]

Similarly, CPNI and other customer-specific information are part of a "database" including "subscriber numbers" that is maintained and accessed "through the use of software and hardware that is used in the commercial offering of telecommunication services to the public." The offering of phone service "implicates the use of" CPNI as much as other OSS functions.[65] In fact, US West mentions that CPNI can be made available through ILECs' OSSs.[66] Since OSSs constitute UNEs under the Eighth Circuit's decision, so must CPNI.

Finally, that a requesting carrier would not have placed a service order for a customer at the point when it seeks the

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[63] 47 U.S.C. § 153(29).

[64] Iowa Utilities Bd., 120 F.3d at 809.

[65] Id.

[66] US West Opp. at 9.

customer's CPNI for marketing should be no barrier to UNE status. OSS, for example, is a UNE that is not triggered by a service order for a new customer. Competitive carriers have a right to access the pre-ordering OSS functions as a UNE on a generic basis prior to the placing of any customer service orders. All OSS has to be available prior to the signing up of any customers, so that competing carriers know that they can properly provision, maintain and repair their customers' service before they begin. Similarly, carriers have the right to buy unbundled switching as a UNE as a unit of capacity on a switch in expectation of future customers. A customer's CPNI must also be available prior to the signing up of the customer.

II. THE ILECs FAIL TO ADDRESS MCI's ARGUMENTS AS TO THE NEED FOR CPNI TO INITIATE SERVICE

A. The ILEC Oppositions

In its Petition, MCI argued, on both textual and policy grounds, that the Commission should reconsider its decision that Section 222(d)(1) applies only to carriers already possessing CPNI. MCI explained the vital need for CPNI and other customer information in order to submit complete service orders, especially resale service orders to ILECs, in conformance with customer expectations and argued that resellers and other competitive carriers therefore should have access to the CPNI in the ILECs' possession, without customer approval, in order to install and bill for service. In the alternative, MCI requested that Section 222(c)(1) be interpreted to allow a carrier to

disclose CPNI to another without customer approval to enable the latter to initiate service. Under this approach, such disclosure would be treated as part of the disclosing carrier's "provision of the ... service" being handed off to the other carrier under Section 222(c)(1).

Whether or not the Commission interprets Sections 222(c)(1) or (d)(1) in the manner MCI advocates, MCI also argued that the nondiscrimination requirements of Sections 272(c)(1), 201(b) and 202(a) should be applied to require that where a BOC or other ILEC uses CPNI, or discloses CPNI to its affiliate, without the customer's approval, in order to initiate service, it must provide CPNI to any other requesting carrier also needing it to initiate service. Such request and the CPNI should be transmitted electronically in order to ensure a real time, nondiscriminatory response to requests. MCI also repeated its request, in the context of initiating service, as to the status of CPNI as a UNE under Section 251(c).

Various ILECs object to some or all of these arguments. US West argues that to allow or require a carrier to disclose CPNI to another without customer approval for the initiation of service would violate customers' expectations of privacy. US West adds that the disclosing carrier should be able to rely on the other carrier's representation that it had the customer's approval to access and use the CPNI and to change carriers. US West and SBC note that even assuming that Section 222(d)(1) were to be interpreted in the manner MCI requests, the incumbent

carrier would only be permitted, not required, to disclose CPNI to the requesting carrier.[67]

US West also challenges MCI's argument that customers expect their chosen carrier to have all of the information necessary to initiate service and that the carrier's lack of such information would be disquieting and offputting to consumers. US West asserts that the same could be said for the entire "express approval" CPNI regime that the Commission has established and that if any relaxation were warranted, such relaxation would be most appropriate with respect to the existing carrier-customer relationship, not the new one.[68]

SBC expresses doubt that a carrier could really want CPNI only for initiating service and warns that "MCI's proposal may have unintended consequences that would result in unanticipated transfers of CPNI to third parties for marketing purposes, and not merely to commence service to one who has made a buy decision."[69] Ameritech expresses similar doubts and warns of the dangers of "data mining" by unscrupulous carriers.[70] SBC also dismisses the need for the relief MCI seeks on the grounds that the Order already addresses the application of Sections 201(b), 251(c)(3) and 251(c)(4) to the use of CPNI to initiate service.[71]

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[67] US West Opp. at 10-12; SBC Comments at 17.

[68] US West Opp. at 12.

[69] SBC Comments at 16.

[70] Ameritech Comments at 11-12.

[71] SBC Comments at 16.

SBC also defends the Commission's decision as a matter of statutory construction, stating that Section 222(d)(1) provides a grant of authority to a carrier as to its customer, not relative to a third party's customer no longer serviced by such carrier. In connection with this point, SBC focuses on the conferring of authority on a carrier to use or disclose CPNI "either directly or indirectly through its agents," which, according to SBC, emphasizes that provision's application to a carrier that already has a relationship with the customer and possesses the customer's CPNI. SBC also notes MCI's argument that Section 222(d)(2) references "other carriers," while Section 222(d)(1) does not and thus has no limitations. SBC argues just the opposite from those provisions: by using the phrase "other carriers" in subsection (d)(2) while omitting it from subsection (d)(1), Congress intended "other carriers" to be the beneficiaries of Section 222(d)(2), but not of Section 222(d)(1).[72]

Bell Atlantic, on the other hand, objects only to a requirement that incumbent carriers be required to provide CPNI that is unrelated to the installation of or billing for the service to be initiated, since the disclosure of such unrelated CPNI would be inconsistent with the customer's privacy expectations. Bell Atlantic gives the examples of local service CPNI, which, it states, is unrelated to the provision of intraLATA toll service or voice mail service, and intraLATA toll CPNI, which is unrelated to the provision of local service and

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[72] SBC Comments at 17.

thus need not be provided for the initiation of local service. Such information as call detail data would also be irrelevant to the initiation of service and thus should not have to be provided for that purpose.[73]

B. The ILECs Either Do Not Address or Fail to Undermine MCI's Arguments

The ILEC responses appear to reflect some ambivalence on this issue. On one hand, they dismiss the need for relief on this issue, as if the Commission already upheld MCI's position, while on the other hand, they resist any interpretation that would provide competitive carriers the CPNI they need to provide services already chosen by customers. Bell Atlantic is right on the mark: carriers should have the CPNI and other customer information they need to install, provide and bill for the service or services chosen by the customer, no more and no less.

Other BOCs' attacks on the bona fides of competitive carriers -- questioning whether carriers can be trusted to report accurately that they have, in fact, been selected by a customer -- do not add anything to the analysis. As MCI stated in its Petition, if it becomes necessary for the carrier requesting CPNI to demonstrate that the customer has chosen its service, it should be permitted to do so by any reasonable means, such as by audiotape recording, third party verification or other method. In any event, such verification should not hold up the electronic

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[73] Bell Atlantic Opp. at 7-8.

transmission of the CPNI. If it turns out that CPNI was provided to a carrier that, in fact, had not won the customer, indemnification provisions in intercarrier agreements can take care of any liability arising from such wrongful CPNI disclosure. What is important at this juncture is that the ILECs not be permitted to use these enforcement issues to distract the Commission's attention from the proper interpretation of Section 222 and nondiscrimination principles.

SBC's comment that there is no need for the Commission to decide the issue raised by MCI, since the Order addresses the application of the relevant provisions of law to the use of CPNI to initiate service, is belied by SBC's other arguments and the vast disparity among the BOCs on this issue. Plainly, in the absence of customer approval, SBC and some of the other ILECs are not about to turn over CPNI to MCI or any other carrier for the initiation of service. As pointed out above, US West states that MCI already has electronic access to CPNI through "many" -- not "all" -- ILEC OSSs, "when it has complied with carrier-imposed approval requirements and it has secured the requisite customer approval to access the information."[74] The point is, however, that MCI should not have to secure any approval to obtain access to CPNI for the initiation of service to a customer it has already won. Reconsideration on this issue is therefore critical.

On the merits, US West's argument that the disclosure of

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[74] US West Opp. at 9.

CPNI for the initiation of service without customer approval would violate customers' privacy expectations begs the question. Section 222(d)(1) creates an exception to the approval requirement for the use or disclosure of CPNI "to initiate, render, bill, and collect for" service. If that provision covers the disclosure of CPNI to carriers that do not already possess it, as MCI believes, then Congress has already decided that customer convenience and the need for a carrier to initiate service to a customer that has chosen that carrier override whatever privacy expectations that the customer may have as to the provision of the service that the customer has chosen.

Moreover, US West is clearly wrong about customer expectations. Where the customer has already chosen a particular service from a particular carrier, her expectation that the carrier will be able to provide the service will obviously outweigh any privacy concerns as to the information that is necessary to accomplish the customer's chosen purpose. US West asserts that the same could be said as to the entire CPNI regime established in the Order, but, as MCI has previously explained, that is clearly not the case in the typical instance assumed by US West.

For example, US West takes the view that its local service customers would consider services other than local service to be within the scope of their service relationship with US West. Even where a US West local service customer has chosen MCI for long distance service, US West apparently takes the view that the

customer would consider long distance services to be within the US West service relationship and thus open to marketing and CPNI use in connection with such marketing. Since the Order does not allow such CPNI use without the customer's approval, US West regards the Order as frustrating the customer's expectations.

In fact, of course, such a customer would have no expectation that US West would be examining her CPNI in connection with its potential provision of long distance service. The existing relationship between the customer and US West, at least in the customer's mind, if not US West's thinking, does not extend to long distance service. Thus, customer convenience and expectations are not greatly disturbed where US West requests approval to use its CPNI to market long distance service to the customer. When and if a customer does choose US West for its PIC, however, her expectations will be the same as for any chosen carrier.

Accordingly, US West has it backwards in suggesting that the customer approval regime should be "relaxed" in the case of the "existing carrier-customer relationship," rather than the new relationship.[75] By "existing ... relationship," US West actually means the marketing of services by an incumbent falling outside its current service relationship with the customer. Thus, US West's goal is to relax Section 222 to help incumbents expand their incumbency while making it more difficult for new competitors to gain a foothold by denying them the CPNI they need

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[75] US West Opp. at 12.

to initiate service. As MCI explained in its Petition, it is the new carrier that has won the customer that has the "existing service relationship" with the customer[76] and thus should not need approval to use his CPNI.

SBC's statutory construction arguments are not persuasive. The "directly or indirectly through its agents" language does not settle this issue, since it is not clear that such phrase would necessarily apply in every instance under Section 222(d), particularly where the carrier is "disclosing or permitting access to" CPNI in order that one of the enumerated purposes in subsections (d)(1), (d)(2) or (d)(3) can be achieved. If a carrier, for example, discloses CPNI to its agent so that the agent can bill for the carrier's services, under Section 222(d)(1), the carrier is, in fact, "using" the CPNI indirectly through its agent. "Disclosing or permitting access to" would then be superfluous language, since "using" CPNI "directly or indirectly" would cover the waterfront. If the "agents" phrase were meant to apply in every instance under Section 222(d), including every instance where CPNI is disclosed, it would have been phrased differently to allow CPNI to be disclosed "to" agents in order for them to achieve one of the enumerated purposes. Thus, given the phrasing, the "agents" clause does not necessarily apply in every instance and therefore does not stand in the way of an interpretation of Section 222(d) that allows the disclosure of CPNI to third parties to accomplish the

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[76] Order at ¶ 4.

enumerated goals.

SBC attacks MCI's point that subsection (d)(2) refers to "the carrier" and "other carriers," asserting that since subsection (d)(1) contains no such language, it was not intended to apply to "other carriers." The problem with that explanation, however, is that it only addresses the "other carriers" phrase in subsection (d)(2), not "the carrier" phrase. Under SBC's reasoning, since subsection (d)(1) also does not refer to "the carrier," it should not apply to the carrier that already has CPNI and thus should not apply to any carriers at all. The only other possibility is that, by omitting any reference either to "the carrier" that already possesses the CPNI or to "other carriers," Section 222(d)(1) was intended to apply to either situation, depending on the context. Thus, Section 222(d)(1) authorizes the disclosure of CPNI to another carrier in order for the latter to initiate service, as well as the use of CPNI to enable the carrier having the CPNI to initiate service.

Surprisingly, none of the ILECs opposes MCI's alternative argument that Section 222(c)(1) be interpreted to permit a carrier to disclose CPNI to another in order for the latter to initiate service. Such disclosure could be considered to be part of the disclosing carrier's "provision of ... service" under Section 222(c)(1)(A) and thus permitted in the absence of customer approval.

Moreover, none of the ILECs specifically challenges MCI's arguments in support of the application of nondiscrimination

principles to the use and disclosure of CPNI for the initiation of service, except perhaps as one aspect of their opposition to the application of nondiscrimination principles to CPNI generally.[77] MCI argued in its Petition that, even if the Commission does not interpret Section 222(c)(1) or (d)(1) to permit the disclosure of CPNI without customer approval for the initiation of service, it should still require that where a BOC or other ILEC uses CPNI, or discloses CPNI to its affiliate, without the customer's approval, in order to initiate service, such BOC or ILEC must provide CPNI to any other requesting carrier needing it to initiate service.

Thus, where CPNI is necessary for a CLEC to initiate local service to a customer it has won, nondiscrimination requires that the BOC or other ILEC turn over the customer's CPNI immediately upon notification that the CLEC has won the customer, since the BOC or ILEC has been using such information to "render, bill, and collect for" local service to that customer. Accordingly, as MCI explained in its Petition, the application of nondiscrimination principles creates a mandatory obligation to disclose CPNI, without the customer's approval, to a requesting carrier to enable it to initiate service, whether or not Section 222(c)(1) or 222(d)(1) is interpreted to allow such disclosure. No one specifically challenged MCI's arguments in support of this

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[77] GTE, at 22, n. 68, opposes, in a conclusory fashion, MCI's requests as to the disclosure of CPNI to initiate service and the application of nondiscrimination principles to such situations but provides no reasoning for its position.

request, and it should be granted.[78]

No party except SBC commented on the Section 251 issue specifically in the context of initiation of service, and SBC did so only indirectly. As MCI advocated in its Petition, if a BOC or other ILEC uses CPNI to initiate, render, bill and collect for local service or discloses CPNI to an affiliate for the initiation of service without customer approval, requesting carriers should be given access to CPNI as a UNE for the same purpose and under the same conditions under Section 251(c)(3). Since no party rebutted MCI's arguments in support of this request, it should be granted. Finally, since no party opposes MCI's requests for real-time electronic transmission of CPNI, separate and apart from the issues of whether and under what conditions a carrier should have access to CPNI at all, the Commission should make it clear throughout that access to CPNI means immediate electronic access. In the case of access to CPNI to initiate service, such transmission should be immediately upon receiving notification that the requesting carrier has won a customer.

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[78] US West, at 10-11, takes great exception to MCI's arguments that, on the one hand, nondiscrimination requires that CPNI be disclosed to third parties that have obtained the customer's oral approval for such disclosure, and, on the other, that CPNI be disclosed without such approval for the initiation of service. In both cases, the constant is nondiscrimination. Where a BOC or ILEC uses CPNI for marketing with the customer's oral approval, any third party should also have access to such CPNI with the customer's approval. Where a BOC or ILEC uses CPNI without customer approval to initiate or bill for service, any third party should also have access to such CPNI without customer approval for the same purpose.

Finally, MCI also mentioned in its Petition that if the Commission does not grant reconsideration so as to require CPNI disclosure without customer approval to enable other carriers to initiate service, carriers will need customer approval to obtain CPNI from an ILEC or other incumbent to initiate service. MCI accordingly requested, in the alternative, that the Commission modify its notification requirements to make approvals more likely. As an example, MCI discussed the notification requirement that carriers not suggest to customers that approval is necessary to ensure proper service and pointed out that this requirement will have to be modified so that carriers may explain to customers that have just switched to them that approval of the carrier's access to CPNI is vitally necessary for the carrier to initiate service. Otherwise, customers will not receive adequate notice of the urgency for their new carrier to obtain their CPNI from the ILEC.

No one opposes this request. Thus, if no other relief as to the disclosure of CPNI to initiate service is granted, MCI's alternative request that the notification requirements be modified to make approval more likely should be granted. Because of the time-sensitive nature of access to CPNI for a carrier that has just been chosen by a customer, the Commission should also permit such carriers to provide a summary oral notice instead of the full notification required in the Order. When a customer switches local carriers, for example, in the course of a telemarketing call, the new carrier should be able to request the

customer's approval to obtain access to her CPNI in the possession of the ILEC by giving a one or two-sentence explanation of the need for the CPNI and the request for approval.

Unless such a shortened notification and approval procedure is allowed in this situation -- somewhat akin to the procedure that some parties have requested for customer approval on inbound telemarketing calls under Section 222(d)(3) -- it will be impossible in many cases to provide the competitive service that the customer has ordered, thereby frustrating consumers and local competition. Competitive carriers will already be at a great disadvantage in this situation if the Commission requires them to obtain approval to access CPNI to initiate service, especially in light of the fact that the ILECs may use local service CPNI to initiate long distance service under Section 222(d)(1). The competitive imbalance will be overwhelming if competitive carriers in this situation are not at least permitted to use a shortened notification and approval procedure.

Finally, if customer approval is needed for access to ILEC-held CPNI for the initiation of service, a similarly shortened notification and approval procedure should also apply to situations where it is necessary to learn what services and features are available at a given local service switch and the services and features that are being provided by the ILEC to a customer. In some cases, ILECs are refusing to provide even generic or aggregated information about the available local