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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended	)	CC Docket No. 96-149

PETITION FOR RECONSIDERATION AND CLARIFICATION OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc., by its attorneys, hereby submits this, its petition for reconsideration of the Commission's *Clarification Order* in the above-referenced proceeding.[1/] The Commission should reconsider those aspects of the *Clarification Order* that do not account for the differences between commercial mobile radio services ("CMRS") and other services, and should clarify the effect of certain determinations on wireless providers.

On May 26, 1998, Vanguard submitted its initial petition for reconsideration of the rules governing customary proprietary network information ("CPNI") adopted in the *Second Report*

[1/] *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Order,* CC Docket No. 96-115, DA 98-971 (Comm. Carr. Bur.), rel. May 21, 1998 (the *"Clarification Order"*). The *Clarification Order* clarified certain aspects of the *Second Report and Order* in this proceeding. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket Nos. 96-115 and 96-149, FCC 98-27, rel. Feb. 26, 1998 (the *"Second Report and Order"*).

and Order (the "Initial Petition").[2] In the Initial Petition, Vanguard established that the Commission must reconsider certain of the rules established in the *Second Report and Order*. The Initial Petition also described certain concerns relating to the *Clarification Order*. Specifically, Vanguard explained that:

> While the *Clarification Order* attempts to address some [equipment-related] issues by concluding that it is permissible to market customer equipment on the basis of equipment-specific information obtained by a provider at the time of the initial sale to the customer, that conclusion simply does not solve the problem. First, cellular providers use *current* CPNI to determine what customers will benefit most from converting to digital service. The customer's initial calling plan often will not be same as the current calling plan, and plainly is unrelated to the actual level of use. Indeed, many of the customers most likely to benefit from a digital upgrade will be customers who initially chose a calling plan with low or moderate expected usage, but subsequently have switched to higher usage plans without changing handsets. For that matter, if a customer has switched from one cellular provider to another, the customer may have continued to use his old handset, so the exception described in the *Clarification Order* will not apply. Thus, the *Clarification Order* addresses the problems created by the current rules in only a relatively small fraction of the situations in which they will apply. It is still necessary, therefore, for the Commission to modify its current rules to permit the use of CMRS CPNI to market customer equipment to existing CMRS customers.
>
> Finally, the analysis described above for customer equipment also applies to many enhanced services, such as voice mail, that are provided in conjunction with CMRS. Voice mail, in particular, historically has been marketed as part of the basic package offered to CMRS customers and is integrated into many CMRS providers' services. This is particularly the case with digital services, which in many cases offer only unified packages of "CMRS" and "information services" that customers do not necessarily distinguish. Thus, it also

[2] A copy of the Initial Petition is attached as Exhibit 1 and hereby is incorporated by reference.

is important to permit use of CPNI to market information services to CMRS customers.[3]

Because the period to seek reconsideration of the *Clarification Order* had not begun when petitions for reconsideration of the *Second Report and Order* were due, Vanguard was unable to seek reconsideration of both orders on a consolidated basis.[4] By this submission, Vanguard formally reiterates its position that the *Clarification Order* is inadequate to remedy the flaws in the Order; thus, Vanguard seeks reconsideration of the *Clarification Order* for the reasons discussed in the Initial Petition.

For all these reasons, the Commission should reconsider the *Clarification Order* and modify its rules in accordance with this petition.

Respectfully submitted,

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July 22, 1998

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[3] Vanguard Initial Petition at 11-13 (footnotes omitted).

[4] *See* 47 C.F.R. § 1.429(d) (petitions for reconsideration may be filed only within a 30-day period following public notice of a rulemaking order).

EXHIBIT 1

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May 26, 1998

SUMMARY

The rules adopted in the *Order* do not properly account for the differences between CMRS providers and other providers of telecommunications services. The Commission should reconsider the application of the rules governing the relationship between service and customer equipment and carrier efforts to win back customers. The Commission also should clarify how the rules apply to customer loyalty programs, how providers may obtain customer consent and how the rules affect the relationship between CMRS providers and their agents.

The new CPNI rules will have particularly stark effects on small and mid-sized independent CMRS providers such as Vanguard. Not only do these smaller providers have to bear the burdens of complying with requirements that never have been applied to them before, but they also are unable to reap the benefits available to large, integrated providers of telecommunications services. One-size-fits-all regulation has the potential to eliminate the consumer benefits that result from the vigorous competition that smaller providers help create.

Indeed, the *Order* does not address the differences between CMRS and other services. Section 222(c)(1) requires a service-specific analysis of the use of CPNI, which would have different results for other services than for CMRS. In addition, existing obligations, such as number portability and E-911 implementation, will impose significant costs on CMRS providers. Because most CMRS providers were not previously subject to CPNI requirements, the costs of CPNI compliance will add to those existing costs.

In light of these concerns, the Commission should reconsider the aspects of the rules that prohibit CMRS providers from using CPNI, without customer permission, to market customer equipment. CMRS equipment is integral to the service and typically has been

marketed concurrently with the underlying service. Failure to modify this rule also could damage efforts to convert analog cellular customers to digital service. The same analysis applies to information services marketed in connection with CMRS.

Next, the Commission should reconsider the "win back" rule. As currently defined, the win back rule creates a significant comparative disadvantage for CMRS providers seeking to regain lost customers. This means that consumers do not obtain the full benefits of competition. Moreover, the win back rule is not required by the statute.

The Commission also should clarify certain aspects of the *Order*. First, the rules should permit CMRS providers to use CPNI in connection with customer loyalty programs, which reward customers for usage of a provider's services. These programs primarily are intended to market the underlying service, which is permitted under the rules.

Second, the Commission should clarify the nature of the consent required from customers for use of CPNI. In particular, the Commission should permit carriers to obtain consent at the time that the customer first obtains service, and should allow reasonable disclosure of the customer's CPNI rights on the customer contract.

Finally, the Commission should clarify that CMRS providers are not responsible for the ways in which agents use customer information. Because agents are not telecommunications carriers, they are not subject to the CPNI rules. In addition, CMRS providers have little control over how their agents use this information, especially because agents may sell the services of multiple CMRS providers.

TABLE OF CONTENTS

Page

SUMMARY i

I. Introduction 2

II. The Commission Should Have Engaged in Individualized Analysis of Each Service Category Subject to the CPNI Requirements 3

A. Section 222 Requires Individualized Analysis of the Use of CPNI in Connection with Discrete Service Categories 4

B. The Rules Adopted in the *Order* Impose Significant Hardships on CMRS Providers in Light of the Other Obligations that Have Been Imposed on Them 7

III. The Rules Should Be Modified to Account for the Unique Relationship Between CMRS Service and Equipment 9

IV. The Rules Must Be Modified or Clarified to Permit Reasonable Customer Retention Activities 12

A. The "Win Back" Rule Unnecessarily Restrains Competitors and Reduces the Benefits of Competition to Consumers 13

B. The Commission Should Clarify that CMRS Providers May Use CPNI in Connection with Customer Loyalty Programs 15

V. The Commission Should Clarify the Nature of the Consent Required for Use of CPNI 17

VI. The Commission Should Clarify the Extent to Which CMRS Providers Are Liable for the Actions of Their Agents 18

VII. Conclusion 20

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[1] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket Nos. 96-115 and 96-149, FCC 98-27, rel. Feb. 26, 1998 (the "*Order*"). The Commission has adopted certain clarifications of the rules adopted in the *Order*. *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Order,* CC Docket No. 96-115, DA 98-971 (Comm. Carr. Bur.), rel. May 21, 1998 (the "*Clarification Order*"). Although this petition describes certain elements of the *Clarification Order,* it seeks reconsideration only of the *Order.*

clarification is particularly important because the *Order* imposes new requirements on CMRS providers that had not previously been subject to *any* FCC regulation of their use of customer proprietary network information ("CPNI").

I. Introduction

Vanguard is a mid-sized provider of wireless services, including both cellular and paging. Vanguard has more than 675,000 CMRS customers, most of them concentrated in a "Supersystem" in central and eastern Pennsylvania. Vanguard, like all other independent CMRS providers, was not subject to any CPNI rules prior to the *Order*. Thus, Vanguard has no systems in place to respond to the new requirements described in the *Order*.

The *Order,* issued more than two years after the passage of the Telecommunications Act of 1996, adopted a series of new requirements for CPNI in light of Section 222 of the Communications Act. The underlying theory of the *Order* is that all services should be treated the same for purposes of determining what steps are necessary to protect CPNI and in evaluating customer expectations regarding the use of CPNI. At the same time, the *Order* divides the telecommunications marketplace into four segments: (1) local exchange services; (2) interexchange services; (3) CMRS; and (4) offerings that are not telecommunications services, such as customer premises equipment ("CPE") and information services. The net effect of the *Order* is to forbid the use of CPNI obtained in connection with any of the first three categories of service to market any other category unless the provider has customer permission.

As shown in more detail below, this strict categorization is inconsistent with the requirements of Section 222. Equally important, it fails to take into account the nature of CMRS, in which customer equipment is an integral part not only of the service but of the marketing for the service. At the same time, the *Order* unduly narrows the scope of the customer relationship in ways that will prevent providers from competing to retain their customers.

The Commission also should clarify certain aspects of the *Order*. In particular, the Commission should clarify that providers may use CPNI in connection with customer loyalty programs; should clarify that providers are permitted to obtain consent as part of the initial customer agreement; and should ensure that CMRS providers are not held liable for the use of customer information by independent agents. These clarifications are necessary to avoid significant uncertainty as CMRS providers implement the CPNI rules.

II. The Commission Should Have Engaged in Individualized Analysis of Each Service Category Subject to the CPNI Requirements.

While the *Order* adopts three categories of telecommunications service, it applies the same rules to each category.[2] Section 222, however, is not a one-size-fits-all provision. Rather, it requires individualized analysis of the nature of the use of customer information for each category of service. Moreover, the adoption of uniform rules imposes an unreasonable burden on CMRS providers, especially independent CMRS providers that have not previously

[2] Order at ¶¶ 22-26 ; 47 C.F.R. § 64.2005.

been subject to CPNI requirements. Consequently the Commission must revisit the rules to adapt those rules to requirements of CMRS.

A. Section 222 Requires Individualized Analysis of the Use of CPNI in Connection with Discrete Service Categories.

The Commission's first step always must be to analyze the specific terms of the statute. That analysis shows that Section 222 does not permit the Commission to adopt the same requirements for all services.

Section 222(c)(1) permits a provider to use CPNI without customer permission

> in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.[3]

This language plainly requires the Commission to recognize that different services will have different needs; indeed, different services will have different CPNI.[4] Moreover, Section 222(c)(1)(B) specifically recognizes that there are additional "services necessary to, or used in, the provision of" a particular telecommunications service. The only way to give this provision meaning, as required by basic principles of statutory construction, is to conclude that it refers to non-telecommunications services. Otherwise, Section 222(c)(1)(B) would be unnecessary.

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[3] 47 U.S.C. § 222(c)(1).

[4] Cellular service, for instance, relies on the transmission of data indicating whether a customer is on her home system or is roaming. This information would be meaningless in the context of landline service.

In fact, this provision refers specifically to directory publishing, which is not a telecommunications service.

The consequence of this reading of Section 222(c)(1) is that the Commission is required to make specific determinations regarding the CPNI used in connection with different services. These determinations can be made by service category, much as the Commission divided telecommunications into local exchange, interexchange and CMRS, but they must be made.

The *Order* adopts some of this analysis but fails to recognize the consequences of its conclusions. The *Order* determines that it is permissible to use CPNI to market services within a service category, but nevertheless applies the same requirements to each category.[5] The *Clarification Order* continues to assume that all services should be subject to identical requirements, even as it attempts to accommodate the concurrent sale of service and customer equipment by CMRS providers.[6]

There simply is no requirement that the Commission adopt this "one-size-fits-all" approach. As shown above, it is inconsistent with the statute. At the same time, the Commission often has distinguished among various classes of providers when it was appropriate to do so. The Commission treats dominant and non-dominant carriers differently

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[5] *Order* at ¶¶ 35, 70.

[6] The *Clarification Order* holds that it is permissible to jointly market CMRS and customer equipment on the basis of information obtained about the equipment purchased by the customer. *Clarification Order* at ¶ 4. This determination does not, however, address the issues associated with identifying customers most likely to benefit from upgrading to digital service. *See infra* Part III.

in many respects, and has done so for years, even though the underlying statutory principles governing both are identical.[7] Similarly, the Commission's original price cap orders adopted differing regulatory regimes for different groups of dominant local exchange carriers, based on their individual characteristics.[8] More recently, the Commission adopted different governing principles for providing universal service support to rural carriers and to non-rural carriers with high cost areas, even though Section 254 did not provide any direct authority for such a differentiation, because the Commission determined that it was appropriate to provide a transition period for the rural carriers.[9] In contrast to the provisions of the Communications Act that governed those proceedings, Section 222(c)(1) provides a plain basis for treating different services according to their specific requirements.

Indeed, adapting the CPNI rules to the specific practices and requirements of particular services is consistent with Congressional intent as well. As the Commission recognized in the *Order,* Congress did not intend to handicap service providers' efforts to continue to sell the services they already sell; rather Congress sought to avoid abuse of CPNI as providers moved into new markets:

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[7] *Compare* 47 C.F.R. § 61.58(c) (dominant carrier tariff notice requirements) *with* 47 C.F.R. § 61.58(b) (nondominant carrier notice requirements).

[8] *See* Policy and Rules Concerning Rates for Dominant Carriers, *Report & Order and Second Further Notice of Proposed Rulemaking,* 4 FCC Rcd 2873, 2931 n.197 (1989) (requiring some incumbent LECs, but not all, to participate in price caps).

[9] *See* Federal-State Joint Board on Universal Service, *Report & Order,* 12 FCC Rcd 8776, 8934 (1997).

> [I]n Section 222 Congress intended neither to allow carriers unlimited use of CPNI for marketing purposes as they moved into new services avenues opened through the 1996 Act, nor to restrict carrier use of CPNI for marketing purposes altogether. Specifically, although the general purpose of the 1996 Act was to expand markets available to both new and established carriers, the legislative history makes clear that Congress specifically intended section 222 to ensure that customers retained control over CPNI in the face of the powerful carrier incentives to use CPNI to gain a foothold in new markets.[10]

This description of the Congressional intent is consistent with the statutory language, and requires the Commission to adopt CPNI rules that recognize the differences between CMRS and other services.

B. The Rules Adopted in the *Order* Impose Significant Hardships on CMRS Providers in Light of the Other Obligations that Have Been Imposed on Them.

Reconsideration is important in the case of CMRS because the rules adopted in the *Order* impose significant hardships on CMRS providers. The costs of attempting to comply with the new CPNI requirements are particularly significant because so many other obligations that have been imposed on CMRS providers in the last few years.

CMRS providers are subject to a host of significant obligations over the next few years. The Commission's rules, for instance, require CMRS providers to implement enhanced 911 services, including providing location information, that previously had been entirely unavailable in CMRS networks, and to provide service provider local number portability. CMRS providers also are subject to new universal service obligations that have added

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[10] *Order* at ¶ 37.

significantly to their costs. Many cellular providers, including Vanguard, are in the process of significantly increasing their digital capacity, which requires time-consuming and sometimes technically challenging changes to their operations. At the same time, CMRS providers are confronting the need to ensure that their computer systems will continue to operate after January 1, 2000.

Complying with the current CPNI rules only adds to these burdens. The current rules require many changes to the underlying recordkeeping and customer service databases operated by CMRS providers. These changes will be made more difficult because CMRS providers generally were not required to comply with the Commission's previous CPNI rules, so the current customer service systems do not accommodate, for instance, a "flag" indicating that use of CPNI is or is not permissible.[11] The complexity of compliance is increased because many of the underlying systems used by CMRS providers must be changed not only to address the CPNI rules, but also to ensure Year 2000 compliance, provide number portability or to meet other requirements that will come into effect in the next 18 months. As a consequence, the burdens of complying with the Commission's CPNI rules are much more significant for CMRS providers than for providers in other service categories.

The burdens of CPNI compliance are particularly great for independent CMRS providers, including Vanguard. Independent CMRS providers generally will not be able to take advantage of the benefits afforded to integrated providers of services in multiple

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[11] *See id.* at ¶ 198.

categories under the CPNI rules. Unlike incumbent LECs with CMRS affiliates or AT&T, which combines the largest long distance company with the largest wireless provider, independent CMRS providers will not have the ability to use CPNI to cross-market large installed bases. Rather, independent CMRS providers will have to meet all the obligations under the rules, with significant penalties to their ability to market their services, without obtaining any benefits at all. Consequently, it is of the utmost importance that the Commission reconsider the CPNI rules as they apply to CMRS providers.

III. The Rules Should Be Modified to Account for the Unique Relationship Between CMRS Service and Equipment.

The most significant area in which the Commission should reconsider its rules governing CMRS providers' use of CPNI is the treatment of CMRS customer equipment. CMRS equipment not only historically is marketed in conjunction with service: the two are integrally linked. As a result, the *Order's* determination that CPNI cannot be used to market equipment without customer permission should not be applied to CMRS.[12]

Unlike the landline business, in which customer equipment long has been marketed separately from service, the opposite is true for CMRS. There are many reasons for this distinction. The most obvious reason for the link between CMRS equipment and service is that many CMRS customers simply do not own the underlying equipment, so they must purchase their equipment at the time they initiate service. CMRS equipment, unlike landline

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[12] *Id.* at ¶ 71.

equipment, must be programmed to work with the customer's provider and must be registered with the network.[13] CMRS equipment also often is specific to the provider chosen by the customer – a cellular phone will not work on a PCS-band network or on Nextel's network. For these and many other reasons, CMRS equipment typically is marketed concurrently with the underlying service, not only at the time of the initial customer contact, but also throughout the life of the provider-customer relationship.

Concurrent sale of CMRS service and customer equipment is particularly important as cellular providers seek to convert their customers from analog to digital service. For obvious reasons, customers must have new equipment if they are to take digital service. It would be senseless to market digital service without concurrently marketing the necessary equipment, and Vanguard is aware of no cellular provider that does so. Moreover, typically such marketing takes the form of offering discounted customer equipment to customers who switch to digital service, and targets the customers who have the greatest usage.[14] These discounts are important because the cost of new equipment is one of the most significant hurdles to convincing customers to switch from analog to digital service. The CPNI rules, as currently

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[13] The landline network does not associate telephone numbers with CPE, but rather with locations. Wireless providers, on the other hand, cannot use location, so they must associate telephone numbers and electronic serial numbers with specific customer equipment. As a result, the common experience of unplugging a landline phone and replacing it with another phone simply does not apply to wireless.

[14] Targeting marketing for digital service in this way benefits not only high usage customers, but also low usage, analog customers. As high usage customers shift to digital service, congestion on the analog network decreases significantly, increasing the ability of the remaining analog customers to make and receive calls.

constituted, effectively deny cellular providers the ability to engage in such concurrent marketing because they forbid marketing customer equipment on the basis of such traditional indicators as the customer's service plan, minutes of use or monthly charges.[15]

Leaving this requirement in place will devastate cellular providers' efforts to shift their customers from analog to digital service. It also will create a significant competitive disadvantage because high-usage customers will be able to obtain discounts on customer equipment from other providers, but not from their current providers. This result is contrary not only to basic principles of competitive neutrality but also to the requirements of Section 222 described above.

While the *Clarification Order* attempts to address some of these issues by concluding that it is permissible to market customer equipment on the basis of equipment-specific information obtained by a provider at the time of the initial sale to the customer, that conclusion simply does not solve the problem.[16] First, cellular providers use *current* CPNI to determine what customers will benefit most from converting to digital service. The customer's initial calling plan often will not be same as the current calling plan, and plainly is unrelated to the actual level of use. Indeed, many of the customers most likely to benefit from a digital upgrade will be customers who initially chose a calling plan with low or moderate expected

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[15] Ironically, although the rules appear to forbid selling customer equipment to new digital customers on the basis of CPNI, they would permit cellular providers to give that equipment away as an inducement to switch from analog to digital service because the cellular provider would not be "marketing" the equipment.

[16] *Clarification Order* at ¶ 4.

usage, but subsequently have switched to higher usage plans without changing handsets. For that matter, if a customer has switched from one cellular provider to another, the customer may have continued to use his old handset, so the exception described in the *Clarification Order* will not apply. Thus, the *Clarification Order* addresses the problems created by the current rules in only a relatively small fraction of the situations in which they will apply. It is still necessary, therefore, for the Commission to modify its current rules to permit the use of CMRS CPNI to market customer equipment to existing CMRS customers.

Finally, the analysis described above for customer equipment also applies to many enhanced services, such as voice mail, that are provided in conjunction with CMRS. Voice mail, in particular, historically has been marketed as part of the basic package offered to CMRS customers and is integrated into many CMRS providers' services. This is particularly the case with digital services, which in many cases offer only unified packages of "CMRS" and "information services" that customers do not necessarily distinguish.[17] Thus, it also is important to permit use of CPNI to market information services to CMRS customers.

IV. The Rules Must Be Modified or Clarified to Permit Reasonable Customer Retention Activities.

The *Order* concludes that telecommunications service providers cannot, without customer permission, use CPNI in efforts to "win back" former customers. This conclusion is

[17] For instance, Sprint PCS has included an "answering machine" service as part of its most basic service offering in the Washington, D.C. area.

not required by the statute, will handicap providers in efforts to retain their customers and will reduce the benefits that competition brings to customers.

A. The "Win Back" Rule Unnecessarily Restrains Competitors and Reduces the Benefits of Competition to Consumers.

As others have demonstrated to the Commission, the CMRS marketplace is characterized by intense and growing competition. In some of its markets, Vanguard faces competition from another cellular provider, two PCS providers and Nextel, and expects two to four new broadband CMRS competitors in the near future. In this environment, the ability to win back customers who have chosen to shift their service to a competing provider is critical to Vanguard's survival. CPNI is an important element in such win back efforts because it allows the provider to consider the former customer's likely needs when planning what services to offer. In fact, the former customer often will expect the provider to know what services she was using before she changed providers. Nevertheless, the *Order* concludes that permission from the former customer is necessary to use CPNI to determine what service plan will best meet that former customer's needs.

This rule imposes unreasonable restrictions on the customer's former provider. The rule leaves a former provider in, at best, the same position as a provider that never had a relationship with the customer. In many cases, the provider will be worse off than it would be if it never had a customer relationship in the first place. For instance, if a provider cannot use the CPNI associated with the customer, it is impossible to address specific concerns the customer had about the provider's service or the service plans previously offered by the

provider. Without that information, it is likely to be effectively impossible to win such customers back.[18]

There is no parallel to this rule in other industries. Indeed, when a Lands End customer starts purchasing clothes from J. Crew, Lands End can use its knowledge of that customer's preferences and previous purchases to offer special discounts or mailings featuring goods that are likely to appeal to that customer. There is no reason to deny this tool to telecommunications providers.

Moreover, the statute did not require the Commission to adopt this rule. Section 222(d)(1) permits the use of CPNI in connection with "initiation" of service, and efforts to win back a customer plainly are related to initiation of CMRS.[19] Similarly, the term "provision" of service, used to describe permissible circumstances for using CPNI, can include win back, which is necessary to the provision of service to the specific customer.[20]

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[18] The impact of this rule could be even more crippling if the Commission were to interpret it broadly to apply at any time after a customer announces an intention to change providers. To the extent the customer has not yet actually terminated the customer relationship, *i.e.*, the customer still is taking service from the provider, the rules should permit the provider to use CPNI in efforts to retain the customer. Otherwise there truly would be no meaningful opportunity to retain the customer once an initial decision to change providers had been made. Even if it does not reconsider the rule regarding win backs, the Commission should clarify that it does not apply until the customer actually has ceased using the provider's service.

[19] 47 U.S.C. § 222(d)(1).

[20] 47 U.S.C. § 222(c)(1).

Thus, the Commission was not constrained to adopt a rule prohibiting the use of CPNI in the context of win back efforts, and can revisit that rule on reconsideration.[21]

B. The Commission Should Clarify that CMRS Providers May Use CPNI in Connection with Customer Loyalty Programs.

One of the most important trends in marketing today is the development of customer loyalty programs. These programs encourage customers to continue to use a company's goods or services. The airline industry pioneered customer loyalty programs, but they now are common in many markets, including telecommunications.

CMRS providers' customer loyalty programs, by their very nature, depend on CPNI. Usage, based on minutes or dollars spent, is the basic measuring stick for these programs. Consequently, it is important for CMRS providers to be able to use CPNI if their customer loyalty programs are to be effective.

Under the rules adopted in the *Order*, certain kinds of customer loyalty programs appear to be plainly permissible. Any customer loyalty program that provides customers with free goods or services or discounts on services within the service category (such as reductions in airtime charges for cellular customers) should be permissible under the terms of the *Order*. In both cases, the only services being marketed through use of CPNI are within the same category as the service subscribed to by the customer. In the case of programs that provide

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[21] Indeed, given the Congressional intent to permit use of CPNI to market current services, as noted above, the Commission should not restrict CMRS providers from this pre-existing use of CPNI.

free goods and services, it is evident that these goods and services are not being marketed to the customer because the customer does not pay for them. Rather the provision of free goods or services is intended only to market the service that is the subject of the customer loyalty program. The same obviously is true of discounts on services in the same service category.

The same analysis can be applied to customer loyalty programs that provide discounts on goods, such as customer equipment, or services in other categories, such as information services. The primary purpose of any customer loyalty program is to reward customers for using specific services, not marketing other goods or services. In some cases, the most cost effective way to reward customers with moderate usage levels may in fact be discounts on voice mail or other non-telecommunications services they already are likely to be using.[22] When other types of customer loyalty rewards may be based on CPNI, there is no basis for preventing CMRS providers from offering additional types of awards when the purpose of the program is to market the underlying service already used by the customer. Consequently, the Commission should clarify that the rules adopted in the *Order* permit the use of CPNI generally for customer loyalty programs.

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[22] Many customer loyalty programs provide for different awards depending on levels of usage. For instance, one airline frequent flyer program recently offered members the opportunity to use accumulated miles (at levels that were insufficient for free tickets) for magazine subscriptions.

V. The Commission Should Clarify the Nature of the Consent Required for Use of CPNI.

The *Order* adopts certain requirements for telecommunications providers that wish to obtain consent for use of CPNI by their customers. These requirements include notification of the customer's rights and that the notification should be in proximity to the signature line of the consent.[23] The implementation of these requirements raises significant questions, particularly in the context of seeking consent to use CPNI in the context of initial customer agreements. The Commission should clarify the application of its rules in this context.

There are many reasons it is desirable to seek customer consent to use of CPNI in the context of the initial customer agreement. Seeking consent at the time of initial contract reduces the likelihood that records will become separated and reduces the otherwise significant costs of seeking consent. In addition, because the initial contact typically is the most extensive contact a customer will have with the provider, it provides the best opportunity for the customer to seek information about CPNI and the meaning of a decision to consent to the use of CPNI.

While the *Order* adopts certain requirements for disclosure of customer rights when a provider seeks to obtain access to CPNI, it does not provide sufficient guidance for providers that would like to ask for consent in their initial customer agreements. Vanguard agrees it is critical for customers to understand their rights and options, but extensive disclosures, by their very nature, tend to obscure the information they contain. Vanguard suggests, for that reason,

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[23] *Order* at ¶ 141.