

the control of industry participants.³² Thus, stable or rising prices that result either from increasing costs or cost reductions that fail to materialize simply do not indicate a non-competitive market.

III. BUNDLING OF CUSTOMER PREMISES EQUIPMENT

The Commission's anti-bundling rule, which it now is proposing to abandon, has served the interests of telecommunications competition well over the past fifteen years.³³ MCI has long fought to preserve that rule against

³² Interexchange service providers remain reliant on monopoly service providers to furnish essential access for the origination and termination of calls made over their networks. These costs constitute almost one-half of all those incurred to provide service, and industry efforts over the years in regulatory arenas to bring access charges to cost have been largely unsuccessful. Indeed, the most profitable segment of the business of these monopoly service providers today is the exchange access services that they furnish to interexchange carriers.

³³ The anti-bundling rule is codified in Section 64.702(e) of the Commission's rules, as followed: "...[T]he carrier provision of customer-premises equipment used in conjunction with the interstate telecommunications network shall be separate and distinct from provision of common carrier communications services and not offered on a tariffed basis."

For purposes of this analysis, given the background and decisions leading to the adoption of the anti-bundling rule in the first instance, MCI assumes that "Enhanced Services," which are defined in Section 64.702(a) of the Commission's rules, also are intended to be included in any repeal of the rule. See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 447 (1980) (The separation of provision of CPE from regulated services "complements the regulatory scheme we are adopting for basic and enhanced services"), recon., 84 FCC 2d 50, 57 (1980) (citing order requiring detariffing of enhanced services), further recon., 88 FCC 2d 512 (1981), aff'd sum nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). Thus, any repeal would result in allowing the packaging of basic transmission services with Enhanced Services as well as CPE

challenges made to its validity and application, and the several complaints that have been filed by MCI seeking its enforcement by the Commission serve to disclose MCI's strong interest in the rule's enforcement.³⁴

The premise for abandoning the rule, which would allow for the furnishing of both transmission and equipment under common discounting or under conditions requiring consumers to purchase "packages" consisting of both offerings, is that the basic telecommunications services and equipment markets are fully competitive.³⁵ Essentially, the Commission reasons that if both these markets are effectively competitive, no harm will come from bundling activities.³⁶

or, for that matter, any other product or service that the carrier chooses to include in a bundle.

³⁴ MCI has a four-year old-plus formal complaint pending, which could (and should) have been decided long ago in order to lend essential guidance to the industry in connection with the rule's application. (See MCI Telecommunications Corp. v. American Telephone & Telegraph Co., Complaint No. E-92-05.) The failure of the Commission to resolve this complaint action on a timely basis predictably resulted not only in the AT&T program being allowed to run its course unhindered, but also in the use by AT&T of the same objectionable marketing practice in other contexts as well. (See MCI Telecommunications Corp. v. AT&T Corp., Complaint No. E-95-25.) This Commission inability to deal with complaints concerning questionable marketplace undertakings by carriers does not bode well for the future, if the Commission adopts mandatory detariffing. At least using the tariffing process, there is available to consumers and competitors an alternative approach to challenging carrier marketing practices that are reflected in filed tariffs.

³⁵ See NPRM at para. 86.

³⁶ The Commission is careful to indicate that what had been an "all-carrier rule," *i.e.*, the rule applied to all common carriers whether they were classified and regulated as "dominant" or "non-dominant," would apply prospectively only to dominant carriers.

Indeed, the Commission suggests, bundling will allow "carriers to create attractive service/equipment packages for customers"³⁷ and thereby furnish to consumers what they want or need.

With some significant reservations, MCI supports the removal, on a conditional basis, of the Commission's long-standing rule against bundling. That the rule has served well is beyond any legitimate dispute, and that its removal now will advance the public interest is possible, but unclear.³⁸ Accordingly, MCI recommends that, in lieu of any

³⁷ NPRM at para. 88. There are advantages in bundling, as became clear when the Commission allowed equipment bundling in the cellular arena. Because cellular telephone handsets were expensive, allowing them to be packaged with cellular transmission -- with term plans of at least one-year -- helped to overcome consumer resistance and resulted in remarkable industry growth. Consumers perceived an affordable drop in equipment purchase price, while carriers grasped the opportunity to reduce churn by locking customers into term plans.

Another advantage arises in situations where a bundle incorporates proprietary technologies that could not be made available other than in a bundle in which the carrier owns, or has entered into affiliations with developers of, proprietary technologies.

³⁸ As Commissioner Ness noted in her statement accompanying the issuance of the NPRM: "I am not ready to conclude that the CPE unbundling rule has outlived its usefulness and should be discarded I am not aware of evidence that warrants the tentative conclusion presented in the Notice."

There are disadvantages in bundling. The true cost of CPE is hidden in a bundle, thus depriving consumers of the ability to make independent decisions based on features and price. In addition, bundling locks customers into a vendor and perhaps even a technology, thus diminishing the vitality of marketplace competition. This is especially true when the technology is proprietary to the supplier or when the total cost of the equipment is high relative to the transmission component.

repealing of the rule at this time, the Commission should suspend its application for a one-year trial period and, after one year, revisit the matter by assessing the effect of the suspension on the competitive interstate, interexchange service and CPE and related markets. Following such evaluation, the rule can either be repealed or reimposed, whichever is appropriate.

MCI's reservations -- and measured, conservative, recommended approach -- arise from a lingering belief that there still is merit in the rule. It would be a mistake to assume, presumptively, that consumers will benefit if they are allowed to purchase "packages." The practical effect in such an approach would be that consumers would need to pay for a product they did not want and, accordingly, they would be made to pay additionally for the product they really wanted. Both these results are "consumer-unfriendly," to say the least.

For this reason, if bundling is allowed, it ought not to be at the expense of depriving consumers of their ability to acquire each product separately.³⁹ Moreover this

³⁹ When the Commission created an exception to Section 64.702(e) in the cellular arena, it imposed a requirement that cellular transmission and cellular equipment had to be made available separately so that consumers could make informed judgments in their purchases. No less should be required here if the anti-bundling rule is lifted, as the Commission should require offerors to make available each of the bundled products on a standalone basis. It goes without saying that consumer choice is enhanced if, notwithstanding the allowance of bundling, the Commission requires that each bundled product be made available on a standalone basis.

approach would be fully consistent with the U.S. Government's position in terms of its position in trade meetings, as well as serving the best interests of consumers, who would retain an ability to exercise choice in connection with terminal equipment interconnected to the public switched network.⁴⁰

Finally, with regard to the question on how the anticipated entry of local exchange carriers, in particular the BOCs, into the market for interstate, interexchange services, will affect this matter,⁴¹ MCI interprets the Commission's tentative conclusion or proposal here to disallow their bundling of transmission services and equipment or Enhanced Services so long as they remain regulated as "dominant." MCI fully concurs because, otherwise, the entire legal and economic rationale for allowing bundling -- the absence of market power in any affected market -- would be undermined, given BOC dominance in essential markets related to the interstate, interexchange market, namely, the exchange access market. Thus, a shift by the Commission from a prohibitory "all carrier" rule to one that would allow only non-dominant

⁴⁰ One approach that the Commission might also consider in order to preserve choice among consumers -- if it repeals its rule -- is to allow carriers to bundle equipment, but also to be prepared to require that, alternatively, they grant credits to any consumer equal to the value of any unwanted, bundled equipment so that consumers would be in a position to purchase their equipment-of-choice.

⁴¹ NPRM at para. 90.

carriers to bundle would foreclose the LECs, including the BOCs, from engaging in bundling until the Commission is able to find and conclude that they were non-dominant. The foreclosure of LECs from bundling eligibility therefore is well-founded and reasonable under the circumstances.

IV. OTHER ISSUES

The "other issues" raised by the Commission essentially involve matters pertaining to individually negotiated agreements between carriers and their customers. As the Commission correctly notes, these issues "will be largely mooted" if these agreements no longer are reduced to contract-tariffs and filed with the Commission.⁴² And, as noted above, if the Commission determines that non-dominant carriers, such as MCI, no longer need to reduce their Special Customer Arrangements to tariffs for filing with the Commission, MCI will cease doing so, satisfied that both its interests and those of affected customers will be better served.

The problems that have arisen in the contract-tariff arena largely involved controversies between AT&T and its customers. In their essence, these involve the question of whether, and under what circumstances, a carrier, operating

⁴² NPRM at para. 92. Based on first quarter 1996 filings, MCI projects that, if obliged to do so, it will file more than 2,000 of its Special Customer Arrangements during 1996.

in a tariff environment, can modify long-term commitments contractually made to its customers.⁴³

Although this is a serious and complex issue, MCI believes it would largely disappear if the Commission were to permit the detariffing of these individually negotiated agreements. This is because carriers would be bound contractually to the fruits of their negotiations and could not use the tariffing process to renege on, or otherwise modify, their commitments to those who had relied upon carrier promises in entering into the contract in the first instance.⁴⁴ In this manner, thorny problems that raise weighty equity considerations -- such as the "substantial cause doctrine," which allows a carrier to modify materially negotiated commitments by later inconsistent tariff filings -- would not arise because there could be no tariff filings to interfere with privately negotiated agreements. In effect, no "tariffs versus contracts" issues would arise because contracting would be the exclusive transactional

⁴³ This issue and several related matters were briefed extensively this past year by AT&T and MCI in In the Matter of AT&T Corp. Revisions to Contract-Tariff No. 360, Contract Tariff Transmittal No. 3076, CC Docket No. 95-146. The Commission may wish to take "judicial notice" of that record for decisional purposes herein.

⁴⁴ As noted above, the type of customers to whom contract-tariffs are appealing do not need the basic protections that tariffs provide to consumers. They are fully capable of advancing or protecting their interests through the negotiations process which, of course, simply is not the case with respect to small or medium-sized customers.

medium between the parties.⁴⁵ Thus, the contentious "substantial cause doctrine" would have no relevance or application; and commercial contract principles would prevail in all instances.

Accordingly, in view of the foregoing, the Commission should exercise its statutory authority under the new law to allow non-dominant carriers not to tariff their individually negotiated contract-tariffs.⁴⁶

⁴⁵ MCI's experiences in transacting in this manner in the years preceding court rulings that struck down "permissive detariffing" served well to show that both the concept and the approach are viable. Simply put, it was understood between MCI and its customers that, in the event of any inconsistency between the filed tariff and the contract, contract terms prevailed -- a result that is precisely the opposite of firmly established law in the tariffing environment.

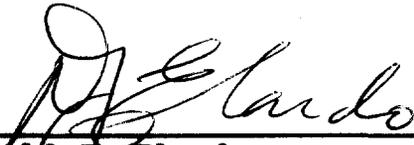
⁴⁶ This could be achieved simply by amending Section 61.55 of the Commission's Rules to add a new subsection "(e)" essentially as follows: "A nondominant carrier shall have the option of filing a contract-tariff under this section with the Commission or with the customer, in which case the contract-tariff shall prevail over the filed tariff." This would be consistent with the Commission's long-standing policy of allowing carriers to file contract-tariffs with the Commission or with the customer, in which case the contract-tariff shall prevail over the filed tariff.

CONCLUSION

The Commission should take into account the above comments in addressing and deciding the important issues raised in this proceeding.

Respectfully submitted,

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