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Hon. Reed Hundt
Chairman
Federal Communications Commission
1919 M Street N.W. -- Room 814
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

RE: Opposition to the Commission's CPE Bundling Proposal, CC Docket No. 96-61

Dear Chairman Hundt:

The Commission will soon consider the Interexchange Market Order. In the Notice, the Commission proposed to eliminate its long-standing requirement that interexchange carriers separate the provision of regulated transmission service from the provision of unregulated customer premises equipment ("CPE"). Last week, a coalition -- consisting of the Independent Data Communications Manufacturers Association, the Information Technology Association of America, the Consumer Electronics Retailers Coalition, the National Retail Federation, and America's Carriers Telecommunication Association -- wrote to urge you to reject this proposal, and to defer consideration of the status of the CPE No-Bundling Rule until the biennial regulatory review mandated by the Telecommunications Act, which will occur in 1998.

The coalition's letter observed that "the record in support of 'rebundling' CPE into the network is remarkably thin." Indeed, only a handful of commenters supported the proposal. Although a larger number of commenters advocated a partial relaxation of the CPE No-Bundling Rule, most of these comments consisted of little more than a few sentences. In contrast, the parties that oppose modification or elimination of the Commission's pro-competitive CPE No-Bundling Rule have provided detailed, well-reasoned comments in support of their position.

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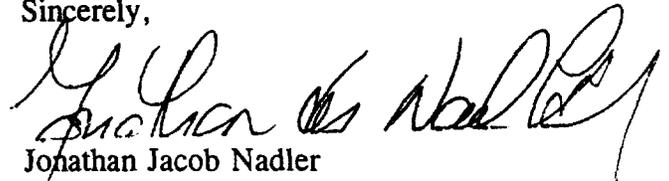
Chairman Reed Hundt
October 21, 1996
Page Two

As the Commission prepares to decide this important issue, the Independent Data Communications Manufacturers Association ("IDCMA") believes that it is essential to recognize the breadth of the opposition to the Commission's rebundling proposal. In order to assist the Commission, IDCMA is filing the following Compendium of Oppositions to the Elimination of the CPE No-Bundling Rule. This compendium includes comments and letters filed by:

- Independent CPE manufacturers
- Enhanced services providers
- Consumer electronics retailers
- Value added resellers
- Large business users
- Consumers
- State public utilities commissions
- Small to medium-sized interexchange carriers

We hope that this will assist the Commission. Please do not hesitate to contact us if we can provide any additional information.

Sincerely,



Jonathan Jacob Nadler

Counsel
Independent Data Communications
Manufacturers Association

Attachment

cc: John Nakahata
William Caton

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Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street N.W. -- Room 844
Washington, D.C.

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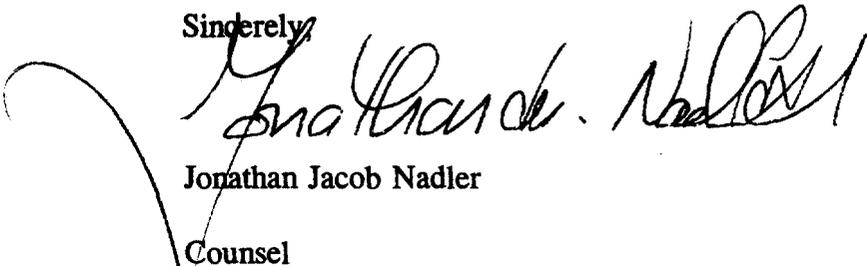
Commissioner Rachelle Chong
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Counsel
Independent Data Communications
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Commissioner Susan Ness
Federal Communications Commission
1919 M Street N.W. -- Room 832
Washington, D.C.

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RE: Opposition to the Commission's CPE Bundling Proposal, CC Docket No. 96-61

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Jonathan Jacob Nadler

Counsel

Independent Data Communications
Manufacturers Association

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cc: James L. Casserly
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Commissioner James H. Quello
Federal Communications Commission
1919 M Street N.W. -- Room 802
Washington, D.C.

RE: Opposition to the Commission's CPE Bundling Proposal, CC Docket No. 96-61

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Commissioner James H. Quello

October 21, 1996

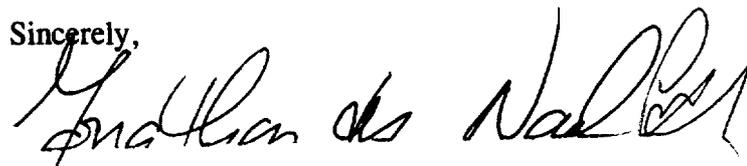
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Jonathan Jacob Nadler

Counsel
Independent Data Communications
Manufacturers Association

Attachment

cc: Lauren J. Belvin
William Caton

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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OCT 21 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of

**Policy and Rules Concerning the
Interstate, Interexchange Marketplace**

**Implementation of Section 254(g) of the
Communications Act of 1934, as amended**

CC Docket No. 96-61

**COMPENDIUM OF OPPOSITIONS
TO THE ELIMINATION OF
THE CPE NO-BUNDLING RULE**

Filed By:

**The Independent Data Communications
Manufacturers Association**

October 21, 1996

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

In the Matter of

Policy and Rules Concerning the
Interstate, Interexchange Marketplace

Implementation of Section 254(g) of the
Communications Act of 1934, as amended

CC Docket No. 96-61

**Comments of the
Independent Data Communications Manufacturers Association**

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Counsel for the
Independent Data Communications
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April 25, 1996

SUMMARY

The Independent Data Communications Manufacturers Association is strongly opposed to the Commission's proposal to allow interexchange carriers to bundle customer premises equipment ("CPE"). The Commission seeks to justify this proposal on the grounds that, as a matter of antitrust law, interexchange carriers lack the ability to harm competition in the CPE market. The Commission's CPE No-Bundling Rule, however, is intended to do more than prevent carriers from violating the federal antitrust laws; it seeks to serve the public interest by allowing consumers to use the premises equipment that best meets their needs -- regardless of whether it is provided by a carrier or an independent manufacturer. Rather than promoting competition, elimination of the Commission's highly successful No-Bundling Rule would impair competition while harming the public interest.

Public Interest Considerations

The Independent Manufacturing Sector. Adoption of the Commission's rebundling proposal would threaten the survival of a truly independent manufacturing sector. Independent manufacturers have been the primary source of cost-effective, innovative products that are specifically designed to meet the varied needs end-users. Such equipment often provides a competitive alternative to network-based services and facilities.

If the Commission were to adopt the rebundling proposal, interexchange carriers would be able to require transmission service customers to use carrier-provided CPE. Carriers also would be able to use transmission service revenue to offer CPE at cross-subsidized, deeply discounted prices. These practices would threaten the viability of many independent

manufacturers. Those manufacturers that survived, moreover, would shift their orientation from the end-user market and, instead, would act primarily as vendors for the carriers.

The Telecommunications Act. The Commission's rebundling proposal also is inconsistent with the Telecommunications Act of 1996. Section 304 of the Act not only preserves the Commission's No-Bundling Rule, it directs the Commission to extend the existing unbundling regime to multichannel video programming systems. The Commission's proposal to retreat from its long-standing unbubdling policy reflects a disturbing disregard for the clear and controlling policy choices made by the Congress.

CPE Reregulation. Adoption of the rebundling proposal would allow inter-exchange carriers to provide CPE as part of their regulated transmission service offerings. As a result -- for the first time in nearly twenty years -- CPE would be subject to the regulatory requirements, contained in Title II of the Communications Act, governing common carrier offerings. Such CPE "reregulation" plainly is inconsistent with congressional directives and Commission policy. CPE reregulation also would complicate administration of the Commission's Part 68 registration program and its network disclosure rules by blurring the boundary between regulated transmission service and CPE.

International Trade. Allowing CPE bundling in the interexchange market also would violate the binding obligations imposed by the GATS Telecommunications Annex and the North American Free Trade Agreement. While these agreements commit the United States to allow users to attach terminal equipment to carrier networks, the Commission's proposal would permit an interexchange carrier to refuse to provide service to a user that declined to use carrier-provided terminal equipment.

Antitrust Considerations

The Commission has based its proposal to allow interexchange carriers to bundle CPE solely on antitrust grounds. Yet, the Notice fails to recognize that the unique relationship between the interexchange service and CPE markets allows interexchange carriers to "force" their customers to purchase carrier-provided CPE. As a result, if the No-Bundling Rule is eliminated, interexchange carriers would be authorized to impose "tying" agreements that would constitute a per se violation of the federal antitrust laws. The Commission's rebundling proposal also would extend to the now-competitive CPE market the oligopoly conditions that exist in the interexchange service market.

Alternate Proposal

The Commission's alternate proposal -- which would allow interexchange carriers to offer bundled interexchange service/CPE packages, provided that they continue to offer interexchange service on an unbundled, nondiscriminatory basis -- also should be rejected. If this proposal were adopted, interexchange carriers would be likely to offer bundled service/CPE packages at the same price as the stand-alone transmission service. Once customers obtained transmission service from the carrier, they almost certainly would accept the "free" CPE from the carrier, even if it was not the equipment that best met their needs.

Three Year Deferral

Even if the Commission disagrees with IDCMA's analysis, it should defer consideration of its rebundling proposal for at least three years. This will allow the Commission to assess the costs and benefits of any alteration in the No-Bundling Rule in light of the substantial changes that are likely to occur in the coming years.

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

In the Matter of

Policy and Rules Concerning the
Interstate, Interexchange Marketplace

Implementation of Section 254(g) of the
Communications Act of 1934, as amended

CC Docket No. 96-61

**Comments of the
Independent Data Communications Manufacturers Association**

The Commission initiated this proceeding to consider whether the public interest would be served by revising the regulatory regime governing the interstate, interexchange services market.¹ The Independent Data Communications Manufacturers Association ("IDCMA") supports the Commission's effort to adapt its regulations, to the extent appropriate, in light of changing market conditions. As part of this process, however, the Commission has proposed to eliminate the long-standing prohibition against interexchange carriers bundling customer premises equipment ("CPE") with their transmission services.² IDCMA is strongly opposed to this proposal.

¹ See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket No. 96-61, at ¶ 4 (rel. Mar. 25, 1996) ("Notice").

² See id. at ¶¶ 84-91.

The CPE No-Bundling Rule,³ which was adopted during the Second Computer Inquiry, has been one of the Commission's most successful policy initiatives. The Rule has allowed consumers to obtain the premises equipment that best meets their needs, whether provided by a carrier or an independent manufacturer. IDCMA recognizes that, in the 16 years since the Rule was adopted, there have been important changes in both the CPE and interexchange markets. These changes, however, do not alter the Commission's finding -- reiterated only last year -- that "the underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II decisions."⁴

Rather than advancing the Commission's pro-competitive policies, permitting interexchange carriers ("IXCs") to bundle CPE would turn back the clock to the 1960s, when the carrier provided premises equipment as part of its regulated transmission service offering, and consumers were unable to deal directly with independent manufacturers. There can be no justification for such a result. The only appropriate action, therefore, is for the Commission to reject the "rebundling" proposal contained in the Notice.

³ 47 C.F.R. § 64.702(e).

⁴ Verilink Corporation's Petition for Rulemaking to Amend the Commission's Part 68 Rules to Authorize Regulated Carriers to Provide Certain Line Build Out Functionality as a Part of Regulated Network Equipment on Customer Premises, 10 FCC Rcd 8914, 8917 (Com. Car. Bur. 1995) ("Verilink LBO Order") (quoting NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 127, Memorandum Opinion and Order, 9 FCC Rcd 1608, 1608 (1994) ("NYNEX Enterprise Service Order").

I. **THE COMMISSION HAS PROVIDED NO BASIS TO RETREAT FROM ITS HIGHLY SUCCESSFUL, PRO-COMPETITIVE CPE POLICIES**

The Notice devotes only a few paragraphs to the Commission's radical proposal to allow interexchange carriers to bundle CPE with interexchange services.⁵ This brief analysis, however, contains numerous fundamental flaws: it misstates the reasons the Commission adopted the No-Bundling Rule, ignores the substantial benefits the Rule has provided, provides no reasoned justification for abandoning the Rule, and disregards the costs that rebundling would impose. These factors alone justify rejection of the proposal.

A. **The No-Bundling Rule is Designed to Protect Consumers' Rights to Use the CPE of Their Choice, Not Merely to Prevent Dominant Carriers from Violating the Federal Antitrust Laws**

The Notice rests on a fundamental misconception: it suggests that the sole rationale for the No-Bundling Rule is to prohibit a carrier from engaging in conduct that would constitute a violation of the federal antitrust laws. Under this view, the No-Bundling Rule is intended to do nothing more than prevent a carrier with "monopoly power" in the transmission service market from using this power to "force" customers to purchase carrier-provided CPE and, ultimately, to "monopolize" the market for CPE.⁶

Because the Commission previously has determined that the interexchange service market is "substantially competitive," and that the CPE market is "fully competitive," the Notice reasons that "it is unlikely" that interexchange carriers could engage in conduct that would

⁵ Notice at ¶¶ 84-91.

⁶ Id. at ¶ 87.

violate the antitrust laws.⁷ Therefore, the Notice concludes, there no longer is any need to prevent CPE bundling in the interexchange market.⁸ Indeed, the Notice suggests that elimination of the No-Bundling Rule in the interexchange market would "promote competition" by allowing interexchange carriers to offer "attractive service/equipment packages for customers."⁹

Contrary to the assumption that underlies the Notice, the Commission did not adopt the CPE No-Bundling Rule solely to codify the Sherman Act proscription against tying by firms with market power. Rather, the adoption of the Rule was the culmination of a generation-long effort to ensure that users have the right to use the premises equipment that best meets their needs -- regardless of whether they obtain such equipment from a carrier or an independent manufacturer.

The struggle to allow customers to use the premises equipment of their choice, free from carrier interference, began in 1948. In that year, the Hush-A-Phone Corporation filed a petition with the Commission in which it challenged AT&T's attempt to bar users from attaching a cup-shaped device, designed to enhance privacy during a call, over the mouthpiece of the customer's handset. Hush-A-Phone's effort bore fruit eight years later, when the D.C. Circuit held that AT&T's application of its "no foreign attachment" rule constituted an

⁷ Id. at ¶ 86.

⁸ Id. at ¶ 88.

⁹ Id.

unwarranted interference with the "subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."¹⁰

Consumers were required to wait an additional twelve years, until 1968, before the Commission ruled in the Carterfone case that the right to use premises equipment in a manner that is "privately beneficial without being publicly detrimental" includes the right to attach competitively provided electrical equipment to the network.¹¹ The Commission subsequently adopted the Part 68 equipment registration program, which is intended to allow users to connect registered customer-provided equipment directly to the public switched network without causing technical harm.¹²

In the Second Computer Inquiry, which began in the late 1970s, the Commission took several actions designed to further its efforts to ensure that consumers have the ability to select and use a wide choice of competitively provided customer premises equipment. As part of this effort, the Commission deregulated the provision of all CPE and adopted a stringent regulatory regime designed to prevent use of basic service revenues to cross-subsidize premises-

¹⁰ Hush-A-Phone Corp. v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956), on remand, 22 F.C.C. 112 (1957).

¹¹ Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, recon. denied, 14 F.C.C.2d 571 (1968). Even after the right of end-users to interconnect equipment to the network was established, AT&T continued its efforts to thwart the ability of consumers to use the CPE of their choice. Ultimately, however, the Commission rejected these efforts. See, e.g., Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), First Report and Order, 56 F.C.C.2d 593, 598 (1975) ("Part 68 Order") (striking down protective connecting arrangements for non-carrier-provided CPE as "unnecessarily restrictive"); Implications of the Telephone Industry's Primary Instrument Concept, 68 F.C.C.2d 1157 (1978) (rejecting AT&T's effort to require basic telephone service customers to lease at least one carrier-provided telephone set).

¹² See Part 68 Order, 56 F.C.C.2d at 599.

based equipment.¹³ The Commission also adopted the CPE No-Bundling Rule.¹⁴ Adoption of the Rule, the Commission explained at the time, "is only another in a series of steps to isolate terminal from transmission offerings, increase consumer choice, and to open equipment markets to full and fair competition."¹⁵

The CPE No-Bundling Rule, codified at Section 64.702(e) of the Commission's rules, provides that:

[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.¹⁶

The Rule prevents carriers from engaging in conduct that limits the ability of consumers to obtain competitively provided CPE -- even if this conduct would not, in itself, constitute a violation of the federal antitrust laws. In particular, the Rule prohibits carriers from requiring their basic service customers to purchase or lease carrier-provided CPE.¹⁷ The Rule also bars carriers from offering "special discounts" on CPE available only to customers that also agree to purchase the carrier's basic transmission service. Carriers also are barred from

¹³ Amendment of § 64.702 of the Commission's Rules & Regulations, Final Decision, 77 F.C.C.2d 384, 439 (1980) (subsequent history omitted) ("Computer II Final Decision").

¹⁴ Id. at 442-47.

¹⁵ Id. at 453.

¹⁶ 47 C.F.R. § 64.702(e).

¹⁷ This restriction bars conduct that would not necessarily constitute a violation of the federal antitrust laws. The antitrust laws prohibit "tying" only when it is either undertaken by a firm with market power or when it unreasonably restrains trade. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). The No-Bundling Rule, in contrast, prohibits any offering in which a common carrier ties the provision of basic communications service to the provision of customer premises equipment.

providing discounts on their regulated transmission service to customers that buy carrier-provided CPE.¹⁸

To be sure, at the time the Commission adopted the No-Bundling Rule, the Bell System monopoly provided most of the nation's telecommunications services. The Commission, however, did not limit application of the Rule to AT&T. To the contrary, the Commission applied the Rule to all carriers -- including then-fledgling "specialized" common carriers such as MCI and non-facilities-based resellers.¹⁹

Soon after adoption of the No-Bundling Rule, the Commission released the First Competitive Carrier Order, in which it determined that certain regulations (such as the obligation to file tariffs) should be applied only to "dominant" carriers, which the Commission defined as

¹⁸ These restrictions go well beyond the prohibition, contained in the federal antitrust laws, against predatory pricing. See Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993) (requiring evidence that a firm cut prices below cost and, at a minimum, have a reasonable prospect of later recouping the lost revenues). Indeed, the Rule may prohibit some discounts that could be seen as advancing antitrust goals. See id. (absent predation, "discouraging a price cut . . . does not constitute sound antitrust policy"). The Rule does this in order to create a "diverse" market in which customers may obtain CPE from both carriers and independent manufacturers. As Chief Judge Posner explained in connection with another Commission rule, "[i]f the Commission were enforcing the antitrust laws, it would not be allowed to trade off a reduction in [price] competition against an increase in . . . 'diversity.' Since it is enforcing the . . . public interest standard instead, it is permitted, and maybe even required, to make such a trade off" Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992).

¹⁹ See Computer II Final Decision, 77 F.C.C.2d at 443 (The "provision of bundled offerings" by any carrier "presents [the] distinct potential for limiting the freedom of customers to be able to put together the service and equipment package most desired by them.").