

those that possess market power.²⁰ Although the Competitive Carrier proceeding continued for much of the 1980s, at no time did the Commission ever suggest that application of the No-Bundling Rule should be limited to dominant carriers. As the Commission subsequently observed, the "classification of carriers as dominant or nondominant . . . does not, without further analysis, determine whether carriers should be allowed to bundle . . . CPE and transmission services."²¹ Rather, the Commission concluded, the agency "must take into account other factors," including the effect that bundling would have on competition in the CPE market and the public interest considerations raised by bundling.²²

B. The No-Bundling Rule Has Been One of the Commission's Most Successful Policy Initiatives

The Notice entirely ignores the fact -- repeatedly recognized in prior Commission decisions -- that the CPE No-Bundling Rule has yielded substantial benefits to consumers. By prohibiting carriers from requiring transmission service customers to use carrier-provided CPE, and barring carriers from using transmission service revenues to cross-subsidize CPE, the Rule has allowed independent manufacturers to provide consumers with a wide array of innovative

²⁰ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1, 20-21 (1980).

²¹ Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, 7 FCC Rcd 4028, 4034 n.22 (1992).

²² Id.; see also H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 201 (1996) (noting that "one of the underlying themes" of the Telecommunications Act of 1996 is to get the Commission and the Department of Justice ("DOJ") "back to their proper roles The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws.").

products. As users' communications needs have increased, these manufacturers have developed equipment that creates efficient alternatives to network-based facilities and services.

The No-Bundling Rule has been one of the Commission's greatest successes. Time and again the Commission has reaffirmed its commitment to the Rule, and has recognized the substantial benefits generated by competition in the market for CPE.²³ In the 1994 NYNEX Enterprise Service proceeding, for example, the Commission observed that:

The CPE industry has exhibited growth and innovation in the fourteen years since the Commission deregulated CPE and required . . . all . . . carriers to detariff CPE and to unbundle it from their network service offerings. . . . The underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II Decisions The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks. These policies have also created new job opportunities in several related sectors of the economy.²⁴

²³ See, e.g., Verilink LBO Order, 10 FCC Rcd 8914 (denying petition to rebundle line build out functionality with regulated transmission service); NYNEX Enterprise Service Order, 9 FCC Rcd 1608 (denying petition to bundle premises-based multiplexing equipment with regulated transmission service); BellSouth Telecomm. Digital Transmission Serv. F.C.C. Tariff No. 1, Order, 7 FCC Rcd 5504 (1992) (denying petition to bundle premises-based multiplexing equipment with regulated transmission service); BellSouth's Petition for Declaratory Ruling, Memorandum Opinion and Order, 6 FCC Rcd 3336 (1991) (denying petition to bundle line build out functionality with regulated transmission service); Competition in the Interexchange Marketplace, Order, 6 FCC Rcd 5880 (1990) (rejecting proposal to allow AT&T to bundle CPE with regulated transmission service); AT&T Communications Revisions to Tariff F.C.C. Nos. 1 and 2, Order, 4 FCC Rcd 4984 (1989) (rejecting tariff revision seeking to bundle multiplexing equipment with regulated transmission service).

²⁴ NYNEX Enterprise Service Order, 9 FCC Rcd at 1608.

The Verilink LBO Order, issued only last year, reiterated the Commission's continued support for the No-Bundling Rule.²⁵

The Commission is not alone in recognizing the substantial benefits that have flowed to consumers as a result of the competitive provision of CPE. Indeed, congressional leaders,²⁶ the National Telecommunications and Information Administration,²⁷ as well as industry analysts²⁸ have recognized that a robust CPE market is the best way to guarantee diversity, innovation, quality, and affordability.

²⁵ See Verilink LBO Order, 10 FCC Rcd at 8921 (observing that the Commission's pro-competitive policies have led to improvements in CPE quality, lowered prices, enhanced performance of users' data networks, and created additional U.S. jobs).

²⁶ In a 1994 hearing before the House Subcommittee on Telecommunications and Finance, for example, Representative Edward Markey noted that "[u]nbundling of [customer premises] equipment . . . [has] allowed for a flowering of manufacturing of telephone equipment for the home and the business. It separated product from service and fostered consumer choice and competition." Oversight Hearings on Interactive Video Systems: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 103d Cong., 2d Sess. (Feb. 1, 1994).

²⁷ See National Telecommunications and Information Administration, The NTIA Infrastructure Report: Telecommunications in the Age of Information at 205 n.707 (1991) (specifically recommending that the "FCC maintain its rule that bars common carriers from bundling CPE with their [regulated] service offerings"); NTIA Inquiry on Universal Service and Open Access Issues, 59 Fed. Reg. 48,112, 48,113-14 (1994) (noting that the competitive provision of CPE has provided consumers with greater choice, more useful equipment, and a decline in CPE cost of 50 percent when measured in real terms).

²⁸ "The rough rule of thumb in . . . [the CPE] markets is half the price -- or double the functionality -- every two to five years." P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II 1993 Report on Competition in the Telephone Industry § 6.60 (1992). This improvement in productivity far exceeds that found in the market for transport services.

Within the industry, moreover, widespread support exists for the No-Bundling Rule. In the 1991 Interexchange Competition proceeding, end-users,²⁹ equipment manufacturers,³⁰ and government agencies³¹ all expressed opposition to the Commission's proposal to allow AT&T to bundle CPE with its transmission service offerings. Indeed, with the exception of AT&T, there was virtually no support for the proposal.

C. The Notice Neither Provides a Reasoned Justification for Allowing Bundling Nor Attempts to Assess the Costs of This Ill-Conceived Proposal

In light of the numerous public interest benefits provided by the CPE No-Bundling Rule, the Commission must provide a compelling justification if the Rule is to be eliminated. The Notice offers none. It merely recites that the interexchange market is now "substantially

²⁹ See, e.g., Comments of the Ad Hoc Telecommunications Users Committee, CC Docket No. 90-132, at 63 (filed July 3, 1990) ("The market will work best if consumers continue to have the greatest number of options, and . . . providers of transmission services and CPE [provide] those components separately."); Comments of the California Bankers Clearing House Association, the New York Clearing House Association and VISA U.S.A., Inc., CC Docket No. 90-132, at 15 (filed July 3, 1990) (opposing removal of structural and non-structural protections against conduct by AT&T).

³⁰ See, e.g., Letter to Alfred C. Sikes, Chairman, Federal Communications Commission, from Edward J. Silberhorn, Associate General Counsel, Mitel, Inc., CC Docket No. 90-132 (filed June 14, 1990) ("The proposed FCC [Bundling] Rule would . . . destroy the competitive gains of the last ten (10) years."); Letter to Donna Searcy, Secretary, Federal Communications Commission, from David L. Johnson, President, Penril DataComm, CC Docket No. 90-132 (filed June 11, 1990) ("We find the concept of bundling unregulated CPE with regulated transmission service to be particularly offensive.").

³¹ See Comments of the Chief Counsel for Advocacy of the U.S. Small Business Administration, CC Docket No. 90-132, at 26 (filed July 3, 1990) ("The ultimate result [of bundling] will not be greater competition but fewer alternatives for the vast number of large and small businesses that currently benefit from competition in services and CPE.").

competitive" and the CPE market is "fully competitive." As demonstrated below, however, despite the increasing competitiveness of the interexchange market, elimination of the No-Bundling Rule would give interexchange carriers the ability to dictate their customers' equipment choice.³² Moreover, the fact that, as a result of the No-Bundling Rule, the CPE market is now fully competitive is a reason to retain the Rule, not to dismantle it.

Nor does the Notice identify any problem that justifies lifting the ban on bundling in the interexchange market. Rather, the Notice does nothing more than baldly assert that, if the Rule were eliminated, interexchange carriers could offer "service/equipment packages for customers."³³ This, of course, is no justification. The No-Bundling Rule does not bar a carrier from offering "service/equipment packages."³⁴ Indeed, such "one-stop-shopping" is common industry practice. Rather, the Rule merely requires that a carrier that offers such packages must separately price the service and equipment components, and must provide its customers with the option of purchasing each component on a stand-alone basis.

The Notice also fails to consider the significant adverse consequences that would occur if the Commission were to allow CPE bundling in the interexchange market. These consequences are addressed in Section II.

³² See infra § III.

³³ Notice at ¶ 88.

³⁴ As a result of the elimination of the Computer II CPE structural separation requirements, Furnishing of Customer Premises Equipment and Enhanced Services by American Tel. & Tel. Co., Order, 102 F.C.C.2d 655 (1985), modified in part on recon., 104 F.C.C.2d 739 (1986), all interexchange carriers are permitted to provide both transmission service and CPE using common personnel and facilities.

II. ALLOWING INTEREXCHANGE CARRIERS TO BUNDLE CUSTOMER PREMISES EQUIPMENT WOULD BE UNLAWFUL AND WOULD HARM THE PUBLIC INTEREST

Although the bundling proposal contained in the Notice is grounded on an antitrust analysis, the Commission has requested comment "on the effect that the proposed amendment of Section 64.702(e) would have on our other policies and rules."³⁵ As demonstrated below, adoption of the proposal would violate the non-discrimination provisions contained in Section 202 of the Communications Act. The proposal, moreover, would adversely affect numerous congressional and Commission policies designed to protect the public interest. In particular, CPE rebundling would:

- reduce consumer choice by eliminating the independent CPE manufacturing sector;
- thwart congressional policy favoring CPE unbundling, while frustrating the Administration's National Information Infrastructure Initiative's goal of promoting broad interconnection of diverse networks;
- create serious administrative problems by blurring the boundary between regulated transmission service and non-regulated CPE; and
- violate binding U.S. international obligations -- under the GATS Telecommunications Annex, NAFTA, and the NGBT "standstill" agreement -- and impede U.S. trade policy.

A. CPE Bundling Violates Section 202 of the Communications Act

Under the rebundling approach proposed in the Notice, an interexchange carrier could engage in three types of currently prohibited conduct. As demonstrated below, each of

³⁵ Notice at ¶ 90.

these practices would violate Section 202 of the Communications Act.³⁶ The Commission, therefore, lacks the legal authority to authorize such conduct.

Section 202 makes it unlawful for "any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service . . . to any particular person [or] class of persons."³⁷ This requirement is among the very few provisions of the Communications Act that the Commission may not forebear from enforcing.³⁸ If the Commission adopts the rebundling proposal, an interexchange carrier could choose to make transmission service available only to customers that agreed to obtain carrier-provided CPE. This plainly would constitute unlawful "discrimination" in the provision of transmission "service" against a "class of persons" consisting of customers that chose to provide their own CPE.³⁹

The rebundling proposal also would allow interexchange carriers to provide transmission service at a lower price to customers that agreed to use carrier-provided CPE. Under established precedent, if a carrier charges different prices for identical transmission service, the burden shifts to the carrier to demonstrate that the price discrimination is not unjust

³⁶ See 47 U.S.C. § 202(a).

³⁷ Id.

³⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128, 104th Cong., 2d Sess. (1996) (to be codified at 47 U.S.C. § 160(a)) (forbearance provision is applicable only if a statutory provision is "not necessary to ensure that charges, practices, classifications, or regulations by, for, or in connection with . . . telecommunications service . . . are not unjustly or unreasonably discriminatory.").

³⁹ This action also would violate the carrier's duty, under Section 201 of the Communications Act, to "furnish . . . communication service upon reasonable request therefor." 47 U.S.C. § 201(a).

or unreasonable.⁴⁰ A carrier's desire to favor customers that accept carrier-provided equipment plainly does not provide a lawful basis under the Communications Act to engage in price discrimination.

If the Commission adopts the rebundling proposal set forth in the Notice, interexchange carriers also would be permitted to provide deep discounts on customer premises equipment to customers that agree to buy the carrier's transmission service. Here, again, the Commission lacks statutory authority to authorize such conduct. The Commission has stated that, consistent with Section 202, "a carrier may not . . . price terminal equipment with the intent of providing extra benefits or inducements for regulated service customers."⁴¹ This statutory prohibition, the Commission has further explained, is violated "[w]here a carrier directly ties an offer of free or reduced cost terminal equipment to exclusive use of its

⁴⁰ See MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1980). The courts have recognized only a handful of permissible reasons for price discrimination -- such as the need to meet a bona fide offer from a competing transmission service provider, see American Tel. & Tel. Co. v. FCC, 449 F.2d 439, 448 (2d Cir. 1971), or to "preserve . . . [the] financial viability" of a class of customers, see National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984).

⁴¹ See ITT World Communications, Inc. v. TRT Telecommunications Corp., ENF-82-4, 51 Rad. Reg.2d (P&F) 1386, 1390-91 (Com. Car. Bur. 1982).

transmission service."⁴² Because the Commission's rebundling proposal would authorize conduct that would violate the Communications Act, it must be rejected.

B. Allowing Interexchange Carriers to Bundle CPE Would Deprive Consumers of the Benefits That Only a Strong Independent Manufacturing Sector Can Provide

The No-Bundling Rule benefits users by ensuring that every customer has the freedom to select the CPE that best meets his or her needs. Consumer choice, however, is meaningful only because of the existence of a strong, truly independent manufacturing sector. The Commission should reject the rebundling proposal contained in the Notice, because it threatens the continued survival of this critical market sector.

1. The role of independent manufacturers

Historically, independent manufacturers have worked directly with end-users to develop cost-effective, innovative products specially designed to meet end-users' widely varied communications needs. As a result, "to a large extent, the technological revolution in terminal equipment has occurred independent of common carrier transmission services. Non-regulated

⁴² Id. A more recent Commission decision suggests that discounts on non-regulated services are permissible if the "major purpose" of the discount is to promote the non-regulated service or good, rather than to "stimul[ate] the demand for regulated services" and the carrier receives "the full tariffed rate" for its regulated transmission service. BankAmerica Corporation v. AT&T, 8 FCC Rcd 8782, 8785 (Com. Car. Bur. 1992). A CPE discount provided exclusively to customers of a carrier's transmission service fails to satisfy either prong. Such a discount plainly is intended to stimulate demand for regulated transmission service. Moreover, if the Commission chooses to detariff interexchange service, it will no longer be possible to ensure that, despite the discount, the carrier is receiving the "full tariffed rate" for its regulated offering.

equipment vendors have been instrumental in applying computer technology to CPE, and have been the primary leaders in innovation in this area."⁴³

Equipment developed by independent manufacturers also has been an important source of "intermodal" competition. Such equipment often reduces or eliminates the need for end-users to purchase network-based facilities or services. For example, a business that needs to transmit voice and data communications among multiple offices can choose to assemble a private network -- consisting of dedicated lines and premises-based equipment that derives, interconnects, and manages the necessary communications -- rather than relying on the carrier-provided public network. Unlike independent manufacturers, carriers have little, if any, incentive to offer consumers equipment that will decrease demand for network-based facilities and services. To the contrary, because carriers need to recoup often-substantial investments in their networks, they have a strong incentive to limit customers' ability to use such equipment. As a result, carriers often have sought to restrict attachment of CPE or, if that is not feasible, to insist that customers use carrier-provided CPE.

2. Effect of the Commission's proposal

If the Commission were to adopt the rebundling proposal contained in the Notice, interexchange carriers would be able to require transmission service customers to use carrier-provided CPE. This practice would foreclose independent manufacturers from a significant portion of the end-user market. Such a foreclosure might not necessarily rise to the level of an

⁴³ Computer II Final Decision, 77 F.C.C.2d at 440. For example, while Western Electric was asserting that it would never be technically feasible to develop a telephone modem that could operate at a rate greater than 2,400 bits per second, independent manufacturers were developing modems that could operate at three times that speed. Today, the widely available V.34 modem operates at 28,800 bits per second. Cable modems, moreover, promise to offer throughput rates of up to 40 million bits per second.

antitrust violation. However, it plainly would threaten the viability of many independent manufacturers.

Adoption of the Commission's proposal also would allow interexchange carriers to offer deeply discounted (or "free") CPE to induce consumers to commit to a package that includes a long-term transmission service contract.⁴⁴ As Peter Huber has pointed out, "account control" is so important that carriers may offer CPE at below market prices simply to establish a point of contact for the more profitable transmission service. "For AT&T," Huber has observed:

it may well prove profitable to sell PBXs at a loss. . . AT&T has long believed that control of local switching is essential to maintaining customer contact in order to sell . . . long-distance service. AT&T's revenues from long-distance sales completely dwarf its PBX sales (by more than a factor of twenty). Once an AT&T PBX is installed on a customer's premises, the AT&T salesperson will have repeated occasion to peddle AT&T's far more lucrative long-distance service too. Up to a point, AT&T can discount and lose money on PBXs much like cellular companies do with mobile phones; the profit is in the razor blades, not the razor.⁴⁵

⁴⁴ Carriers could do so by imposing proportionately small increases in recurring charges for transmission services, using the revenue generated thereby to cross-subsidize CPE prices. Contrary to the Commission's assumptions, the fact that the agency has classified all interexchange carriers as non-dominant does not mean that they are incapable of any cross-subsidization. "Market power exists in degrees." Phillip E. Areeda, IIA Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 501 (1994). Even if interexchange carriers are not able to profitably price transmission service at a level that is substantially above cost, they do have the ability to effect the fairly small price increases necessary to generate the revenues needed to offer CPE at deeply discounted prices.

⁴⁵ P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II 1993 Report on Competition in the Telephone Industry § 6.61 (1992).

AT&T, of course, plans to divest its manufacturing operations. However, a carrier's ability and incentive to use CPE to obtain account control exists even in situations in which the carrier does not manufacture the bundled equipment. Indeed, AT&T frequently has sought to bundle its service with equipment manufactured by other vendors.⁴⁶ This practice may not necessarily violate the federal antitrust laws. Nonetheless, it places independent CPE manufacturers -- who lack the ability to use basic service revenue to cross-subsidize CPE offerings -- at an insurmountable competitive disadvantage.

If the Commission were to adopt a rebundling policy, one theory suggests that independent manufacturers would "team up" with interexchange carriers to provide service/CPE packages. Such an outcome, however, would deprive consumers of the benefit of a truly independent manufacturing sector. As an initial matter, the major carriers would seek to partner with a small number of CPE vendors. Inevitably, many manufacturers would be without carrier alliances and, as a result, would exit the market. Those that remained, moreover, would be dependent on their carrier-patrons, rather than end-user customers. As a result, they would be

⁴⁶ For example, AT&T has bundled vendor-manufactured routers with its InterSpan Frame Relay Service. See Independent Data Communications Manufacturers Association, Petition for a Declaratory Ruling That AT&T's InterSpan Frame Relay Service is a Basic Service That Must Be Offered Under Tariff, at 26-27 (filed Nov. 28, 1994). AT&T also has sought to offer a bundled package of 800 service and non-AT&T-manufactured computer devices. See Petition for Limited Waiver of the Customer Premises Equipment Unbundling and Detariffing Requirements of the Second Computer Inquiry, DA 93-1036 (filed Aug. 6, 1993). The carrier ultimately withdrew the petition.

The same pattern can be observed in the local exchange market. Pursuant to the terms of the Modification of Final Judgment, the Bell Operating Companies ("BOCs") were prohibited from manufacturing customer premises equipment. See United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 191 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). Despite this restriction, the BOCs repeatedly sought to bundle CPE with their basic service offerings. See supra n.22.

unlikely to have the incentive or ability to develop equipment that competes "intermodally" against network-based facilities or services.

C. Permitting Interexchange Carriers to Bundle CPE Would be Inconsistent with the Policies Underlying the Telecommunications Act and the Administration's NII/GII Initiative

1. Unbundling

The Commission's rebundling proposal is inconsistent with the Telecommunications Act of 1996, which embodies a strong congressional commitment to CPE unbundling. Section 304 of the Act expressly preserves the Commission's No-Bundling Rule.⁴⁷ This provision further directs the Commission to extend the existing unbundling regime to multichannel video programming systems, such as cable systems and direct broadcast satellite systems.⁴⁸ Pursuant to Section 304, the Commission is to adopt rules that prevent multichannel video programming system operators from requiring a customer to purchase or lease equipment as a condition of receiving service.⁴⁹ The rules also must provide that, in any case in which a system operator seeks to provide CPE, it must offer the equipment on a "stand-alone" basis at a cost-based price. System operators are expressly forbidden from using service revenues to

⁴⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, § 304, 110 Stat. 56, 125, 104th Cong., 2d Sess. (1996) (to be codified at 47 U.S.C. § 549).

⁴⁸ See *id.*

⁴⁹ *Id.*; see also H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 181 (1996) ("[O]ne purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific proprietary converter box, interactive device or other equipment from the cable system or network operator.").

cross-subsidize CPE prices.⁵⁰ The Commission proposal to retreat from its long-standing unbundling policy reflects a disturbing disregard for the clear policy choices made by the Congress.

The Telecommunications Act also includes a provision governing the "sunset" of the multichannel video programming system no-bundling rules. In determining when the rules should expire, Congress rejected a proposal that would have linked elimination of the no-bundling requirement solely to the advent of competition in a relevant market.⁵¹ Rather, Congress determined that the no-bundling provision should remain in effect until the Commission finds that the relevant service and equipment markets are competitive and that elimination of the rule would be in the public interest.⁵² The Notice's mechanical reliance on the Commission's prior finding that no interexchange carrier is dominant stands in stark contrast to Congress' direction that the Commission must conduct a public interest analysis before permitting bundling.

2. Interconnection

The Telecommunications Act also seeks to promote interconnection of diverse networks.⁵³ Consistent with that goal, the Act requires all carriers -- including interexchange carriers -- to interconnect "with the facilities and equipment of other telecommunications

⁵⁰ See Telecommunications Act § 304 (permitting operators to provide equipment only "if the . . . charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any . . . service").

⁵¹ See H.R. 1555, 104th Cong., 1st Sess. § 203 (1995).

⁵² See Telecommunications Act § 304.

⁵³ See, e.g., Telecommunications Act § 101(a) (to be codified at 47 U.S.C. § 256(a)(2)) (establishing a congressional policy "to ensure the ability of users and information service providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.").

carriers."⁵⁴ This provision complements the No-Bundling Rule, which requires carriers to interconnect with private networks (such as those that link multiple schools, hospitals, or places of business) and value added networks (which combine data transport service with enhanced services such as protocol conversion), even if those networks choose to provide their own CPE.

Many private and value added networks serve more end-users than many independent local exchange carriers. Under the Notice's proposal, however, an interexchange carrier could refuse to interconnect with a private network or a value added network that chose to deploy competitively provided CPE, while being required to interconnect with a local exchange carrier that uses identical equipment. This anomalous result plainly would thwart Congress' effort to promote widespread interconnection of disparate networks. It also would be inconsistent with the vision that the Administration has advanced as part of its National Information Infrastructure/Global Information Infrastructure Initiative, which seeks to foster an interconnected, interoperable communications infrastructure that will facilitate the transfer of information across the country and the world.⁵⁵

D. Rebundling Would Create Significant Administrative Burdens

Adoption of the rebundling proposal would allow interexchange carriers to provide CPE as part of their regulated transmission service offering. This would result in the reregulation of the bundled CPE. Bundling also would blur the boundary between regulated

⁵⁴ Telecommunications Act § 101(a) (to be codified at 47 U.S.C. § 251(a)).

⁵⁵ See Vice President Al Gore, Address before the International Telecommunication Union (Mar. 21, 1994) ("Today. . . it is not only possible, but desirable, to have different companies running competing -- but interconnected networks . . .").

transmission service and competitively provided CPE, making application of existing rules -- such as Part 68 and the All-Carrier Rule -- far more difficult. The proposal also would create an asymmetric regulatory regime between interexchange carriers and local exchange carriers ("LECs"), requiring the Commission to resolve numerous disputes as to when a given carrier can, and cannot, bundle.

1. Re-regulation of CPE

Pursuant to the No-Bundling Rule, all customer premises equipment must be offered on a non-regulated basis, separate from the carrier's basic transmission service. If the Commission relaxes the No-Bundling Rule, however, interexchange carriers would be free to offer CPE as part of their regulated transmission service offering. Such CPE "reregulation" plainly is inconsistent with congressional directives and Commission policy.⁵⁶

CPE reregulation also would result in increased administrative burdens. Title II of the Communications Act requires that rates for regulated services be just, reasonable, and not

⁵⁶ Adoption of the proposal contained in the Notice also would be inconsistent with the Commission's policies governing inside wiring. These policies require that carriers unbundle inside wiring and provide it on a non-regulated basis. See Detariffing the Installation and Maintenance of Inside Wiring, Second Report and Order, 51 Fed. Reg. 8498 (rel. Mar. 12, 1986). As the Commission recently explained, "the deregulation of inside wiring, in combination with the deregulation of CPE undertaken in Computer II," was intended to create "unregulated and highly competitive markets for all telephone-related services performed on the customer side of the demarcation point." Telecommunications Services Inside Wiring, Notice of Proposed Rulemaking, CS Docket No. 95-184, at ¶ 41 (rel. Jan. 26, 1996). This policy has been so successful that the Commission is now considering whether to extend it to inside wiring used in conjunction with broadband networks, such as cable systems. See id. at ¶¶ 42-48. CPE and inside wiring are conceptually identical: they are both premises-based products that allow the end-user to connect to, and interact with, the carrier network. If interexchange carriers were allowed to bundle CPE with their regulated transmission service, it would be difficult for the Commission to preserve -- much less expand -- its highly successful, pro-competitive rules allowing customer control over inside wiring.

unreasonably discriminatory.⁵⁷ If carriers are permitted to provide CPE as part of their regulated transmission service offering, the Commission would be required -- for the first time in nearly two decades -- to ensure that CPE prices comply with the Title II pricing requirements.

IDCMA recognizes that the Commission has proposed to eliminate the tariff filing requirement in the interexchange market.⁵⁸ Even if it does so, however, the rates charged by interexchange carriers for regulated services would remain subject to the Title II pricing requirements. In the absence of tariffs, the review of carrier compliance with these requirements will be a difficult task.⁵⁹ Allowing carriers to offer CPE as part of their regulated offerings would make this task even more difficult. In order to determine the legality of a carrier's charges, the Commission presumably would have to allot a portion of the carrier's overall charge to CPE and the remainder to transmission service, and then determine whether each element is lawfully priced.

2. The regulated/non-regulated boundary

The boundary between regulated basic service and non-regulated enhanced service and CPE offerings is critical to the Commission's regulatory regime. For example, the Commission's Part 68 and network disclosure rules apply at the regulated/non-regulated border. Because this boundary is clear and well-established, the Commission's application of these rules has been relatively straightforward. The proposal contained in the Notice, however, would blur

⁵⁷ See 47 U.S.C. §§ 201(b) & 202(a).

⁵⁸ See Notice ¶¶ 27-32.

⁵⁹ Such review will be required in any case in which a customer files a complaint, pursuant to Section 208 of the Communications Act, contesting the lawfulness of a carrier's charges. See 47 U.S.C. § 208. Commission determinations in such matters would remain subject to judicial review.

the boundary by allowing carriers to combine basic service and CPE in a single package. This, in turn, would make application of the existing rules far more difficult.

Part 68. Adoption of the rebundling proposal would substantially complicate administration of the Commission's Part 68 registration program.⁶⁰ This program facilitates consumers' ability to provide their own CPE by assuring that such equipment complies with standards designed to prevent technical harm to the network. Under the Commission's rules, only equipment that directly connects to the "network" is subject to registration.

If interexchange carriers were allowed to bundle CPE into their regulated offerings, the network boundary would change. As a result, equipment that currently is not subject to registration would need to be registered. For example, if an interexchange carrier were allowed to include Channel Service Units/Data Service Units ("CSUs/DSUs") as part of the regulated network service, then premises-based routers, which interconnect the CSUs/DSUs, would become subject to registration under the Part 68 rules. If a carrier also sought to bundle the routers into its regulated offering, then local area network ("LAN") equipment, which interconnects to the routers, would have to be registered.⁶¹ Different carriers no doubt would bundle various levels of CPE into their network offerings, creating continuing uncertainty as to which equipment must be subject to Part 68 registration. The end-result would be an increase in CPE registrations and the resources that the Commission would have to devote to administration of the Part 68 program.

⁶⁰ 47 C.F.R. § 68.1 et seq.

⁶¹ AT&T has sought to offer precisely this kind of package to its packet service and frame relay customers, under the trade names "ACCUWAN" and "Extended Connectivity" service. See, e.g., AT&T ACCUWAN Service Overview ("ACCUWAN service moves the [service] boundaries . . . to the LAN interface on the customer premises.").

Network disclosure. Under the Commission's All-Carrier Rule, all facilities-based carriers must disclose relevant network interface information necessary to allow non-carrier-affiliated manufacturers to design CPE that can interoperate with the network.⁶² If carriers are permitted to offer CPE as part of their regulated network offerings, however, the network interface -- and, hence, the disclosure obligation -- would shift depending on the CPE functionality that a carrier included within its network offering. This would create numerous disputes as to the extent of the carriers' disclosure obligations.⁶³

3. The interexchange/local exchange boundary

While the Notice proposes to allow IXC's to bundle interexchange service with CPE, local exchange carriers would continue to be prohibited from bundling local exchange service with CPE. As carriers begin to enter different service markets and offer combined service packages, implementation of this asymmetric regime would create serious administrative problems.

The major interexchange carriers are poised to enter various local exchange service markets. Their goal is to offer customers an integrated service package combining both local exchange and interexchange services. If the Commission adopts the bundling proposal set

⁶² Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Reconsideration Order, 84 F.C.C.2d 50, 82-83 (1980).

⁶³ Allowing a carrier to shift the network interface by bundling CPE would enable the carrier to place independent manufacturers at a significant competitive disadvantage. Independent manufacturers expend significant amounts of money to design equipment to interoperate with the interface presented by the carrier's network. If a carrier can change that interface simply by bundling additional CPE, it will have unrestricted ability to render the independent manufacturer's products useless. The end-result would be the elimination of the national market for CPE, which the network disclosure rules have allowed. In its place would be a patchwork of discrete networks, each of which would require CPE designed to interoperate with its unique interface.

out in the Notice, it would have to determine whether an interexchange carrier could bundle CPE with such an offering.⁶⁴

The difficulty of determining the applicability of the No-Bundling Rule will be compounded when incumbent local exchange carriers begin to enter the interexchange market.⁶⁵ If interexchange carriers are allowed to offer packages consisting of interexchange service, local exchange service, and CPE, proponents of "regulatory parity" will argue that local exchange carriers should be allowed to do so as well.⁶⁶ The Commission will have to decide whether incumbent local exchange carriers should be subject to a more stringent bundling rule than interexchange carriers because they remain dominant in their "core" markets. If the Commission were to make such a distinction, it also would have to determine whether other service providers that lack market power -- such as competitive access providers and providers of cable telephony -- should be allowed to bundle CPE in a package that includes both interexchange and local exchange service.⁶⁷

The end result will be a never-ending series of requests to determine when a carrier can, or cannot, bundle. The process is likely to consume scarce significant administrative resources, while leading to a further erosion of the No-Bundling Rule.

⁶⁴ The Commission also will have to determine whether an interexchange carrier can offer a package that bundles CPE with interexchange and international service. This task is complicated by the fact that the Commission continues to classify AT&T as dominant in the international market, while it classifies AT&T's IXC competitors as non-dominant.

⁶⁵ See Telecommunications Act § 151(a) (to be codified at 47 U.S.C. § 271(b)).

⁶⁶ Cf. id. (to be codified at 47 U.S.C. § 271(e)(1)) (providing that an IXC may not jointly market its service with resold BOC local exchange service unless the BOC is authorized to provide in-region interLATA service).

⁶⁷ See id. at § 304 (barring cable operators from bundling CPE used in conjunction with multichannel video programming and "other services" -- such as telephony).

E. Permitting Interexchange Carriers to Bundle Would Violate U.S. International Obligations, and Would Be Inconsistent With U.S. Trade Policy

The Notice specifically requests comment on the impact that allowing CPE bundling in the interexchange market would have on the United States' international commitments.⁶⁸ As demonstrated below, allowing CPE bundling in the interexchange market would violate the binding obligations imposed by the General Agreement on Trade in Services ("GATS") Telecommunications Annex and the North American Free Trade Agreement ("NAFTA"), while undermining U.S. efforts to further open foreign equipment markets to U.S. manufacturers.

1. The GATS Telecommunication Annex

Section 5(b) of the GATS Telecommunications Annex requires signatories -- including the United States -- to ensure that common carriers allow service providers within their borders "to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply [their] services."⁶⁹ In addition, Section 5(e) of the Annex requires signatory nations to ensure that carriers impose no conditions on access to, and use of, the public telecommunications infrastructure other than those necessary to safeguard public service responsibilities, protect technical integrity, and ensure against the performance of services not yet liberalized.⁷⁰

⁶⁸ See Notice at ¶ 89.

⁶⁹ See General Agreement on Trade in Services, Telecommunications Annex, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, § 5(b) (1994) (reprinted in H.R. Doc. No. 316, 103d Congress, 2d Sess. 1617 (1994)).

⁷⁰ Id. § 5(e).

At the present time, the United States' commitment to ensure that common carriers in the United States provide these equipment interconnection rights extends to service providers that, under Commission rules, are classified as enhanced service providers ("ESPs").⁷¹ If the Commission were to allow interexchange carriers to bundle CPE, these carriers could require ESPs to attach carrier-provided CPE in order to obtain basic transmission service. Such a restriction would violate Sections 5(b) and 5(e) of the GATS Telecommunications Annex.⁷²

The Commission could allow interexchange carriers to bundle CPE, while ensuring that the United States meets its current obligation under the GATS Telecommunications Annex, by carving out an "ESP exception" to the proposed interexchange rebundling rule. Under this approach, interexchange carriers would be prohibited from requiring ESPs to accept packages of transmission service and CPE. Such a provision, however, would prove very difficult to enforce. It would require the Commission to make difficult distinctions between ESPs and other categories of users (such as private network operators) that presumably could be required to accept IXC-provided premises equipment.

Even if the administrative problems could be overcome, however, it would be anomalous to treat enhanced service providers -- who, under existing Commission rules, are just

⁷¹ U.S. Schedule of Specific Commitments, at 45 (reprinted in 30 Uruguay Round on Multilateral Trade Negotiations: Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994 25,299 (1994)).

⁷² Permitting interexchange carriers to bundle CPE also would violate the "standstill" provision of the Decision establishing the Negotiating Group on Basic Telecommunications ("NGBT"). Such an action would constitute a retreat from the liberalized regulatory regime currently governing CPE in the United States. See Decision on Negotiations on Basic Telecommunications, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, at 414 (1994) (reprinted in H.R. Doc. No. 316 at 1706).

another category of communications service customers -- differently from other customers. The legality of such a solution, moreover, might be short-lived: the United States has now offered to extend its commitments under the GATS Telecommunications Annex to all service providers.

2. NAFTA

The Commission's rebundling proposal also would violate Article 1302 of the North American Free Trade Agreement.⁷³ The United States' obligation under this provision is substantially broader than the United States' undertaking in the GATS Telecommunications Annex. Article 1302 requires the United States to ensure that "all persons" -- not just ESPs -- "are permitted to purchase or lease, and attach terminal or other equipment that interfaces with the public telecommunications transport network."⁷⁴ NAFTA also contains a provision, similar to the one in the GATS Telecommunications Annex, that requires the U.S. Government to "ensure that no condition is imposed on access to and use of public telecommunications transport networks or services" other than those necessary to "protect the technical integrity" of the network or fulfill any public service responsibilities.⁷⁵ Because the Commission's rebundling proposal would allow interexchange carriers to deny end-users the right to interconnect competitively provided CPE, it is flatly inconsistent with these binding obligations.

3. Foreign trade

Adoption of the "rebundling" proposal contained in the Notice also would undermine the U.S. Government's efforts to open foreign markets to telecommunications

⁷³ North American Free Trade Agreement, H.R. Treaty Doc. No. 159, art. 1302(2)(a) 103d Cong., 1st Sess. (1993).

⁷⁴ Id.

⁷⁵ Id. at art. 1302(6).

equipment manufactured in the United States. In recent years, foreign regulatory authorities have adopted pro-competitive measures to prevent their telecommunications organizations from discriminating against U.S. equipment manufacturers. For example, Japan,⁷⁶ Korea,⁷⁷ and the European Community⁷⁸ have pursued liberalized policies that permit users to connect foreign manufactured CPE to the public telecommunications network. Due to the rigors of the domestic CPE market, U.S. telecommunications equipment manufacturers have been well-positioned to take advantage of such export opportunities and to compete against their foreign counterparts. As a consequence, exports have increased, and high-skilled jobs have been created for U.S. workers.

If the U.S. Government were to retreat from its long-standing opposition to CPE bundling, however, it would be more difficult to continue to urge other nations to move toward a more liberalized equipment policy. Contrary to the suggestion in the Notice, the United States is unlikely to convince foreign governments that their carriers should be subject to stringent

⁷⁶ As part of the 1990 Market-Oriented Sector-Specific ("MOSS") negotiations with the United States, for example, Japan agreed to allow customers in Japan to purchase digital network channel terminating equipment ("NCTE") from U.S. manufacturers, rather than having to lease such equipment from Japanese suppliers or carriers. See Letter from the Honorable Ryohhei Murata, Japanese Ambassador to the United States, to the Honorable Carla A. Hills, U.S. Trade Representative (July 31, 1990).

⁷⁷ In 1992, Korea signed a bilateral agreement with the United States permitting users in Korea to attach any type-approved analog or digital wireline equipment to the public telecommunications network. See Letter from the Honorable Hong-Choo Hyun, Korean Ambassador to the United States, to the Honorable Carla A. Hills, U.S. Trade Representative, Attachment at 19 (Feb. 24, 1992).

⁷⁸ See Commission Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2, 237 ¶ 134 (1991).

unbundling requirements because they have market power, while U.S. interexchange carriers should be allowed to bundle because they are "subject to competition."⁷⁹

In light of the above, it is clear that adoption of the rebundling proposal contained in the Notice would be both unlawful and not in the public interest. As IDCMA demonstrates below, adoption of the proposal also would impair the pro-competitive, antitrust-based policies that the proposal purports to advance.

III. DISMANTLING THE NO-BUNDLING RULE WOULD ALLOW INTEREXCHANGE CARRIERS TO ENGAGE IN ANTI-COMPETITIVE CONDUCT

The Commission has based its proposal to allow interexchange carriers to bundle CPE solely on antitrust grounds. Yet, the Commission's analysis of the highly complex antitrust issues raised by this proposal is disturbingly cursory. Indeed, the Commission does nothing more than to recite that -- because the interexchange market is "substantially competitive" and the CPE market is "fully competitive" -- it is "unlikely" that interexchange carriers could use "monopoly power" in the transmission service market to "force" customers to purchase carrier-provided CPE and, thereby, "monopolize" competition in the CPE market.⁸⁰

The Notice's invocation of prior Commission findings regarding the level of competition in the interexchange market is not a substitute for a reasoned assessment of the ability of interexchange carriers to dictate their customers' CPE choice. There is good reason to believe that interexchange carriers have such power. The Commission's rebundling proposal

⁷⁹ Notice at ¶ 90 n.193.

⁸⁰ Id. at ¶¶ 86-88.